

PRIZELESS WARS, INVISIBLE VICTORIES: The Modern Goals of Armed Conflict

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INTRODUCTION

Wars used to be lucrative business. Wars could be waged for empire expansion as much as for empire preservation. Once triumphant, the victors could lay claim to the territory conquered and to everything within it. Legitimate defense was not only of territory but also of religious communities or even religion itself. From biblical times, through the Crusades, and into colonialism, Kings, Emperors, Popes, waged war with the purpose of converting the religion of the vanquished. Later, secular ideologies replaced religion as Napoleon set out to bring his revolution against the Old Regime to the territories he conquered.

In a horizontal self-help world, war also served as both an adjudication and enforcement mechanism through which victors claimed their rights.¹ Rulers went to war to resolve disputes over dynastic succession, territorial claims, or personal insults. One could wage war to collect an unpaid debt, retaliate against a treaty violation, restore what was unlawfully taken, or claim what was held by others. War as an instrument of justice was not limited to the settlement of claims or restitution. It was also the ultimate form of punishment for injury, one that allowed both retribution and deterrence.

With few limits on the justification for war, there were few limits on the goals of war. If the rationale for war was the pursuit of a tangible interest (such as retribution for injury, the claiming of land, proselytizing, or the repayment of debt), satisfaction could be measured in tangible goods—territory, conversion, money, throne. Victory thus entailed—and presented—real, concrete, and quantifiable benefits. Earlier on, victors could plunder the

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1. Joachim von Elbe, *The Evolution of the Concept of the Just War in International Law*, 33 AM. J. INT'L L. 665, 665–66 (1939) (explaining historical purposes of enforcing claims and punishing rebels through war).

resources of the captured land and enslave its inhabitants to recoup the costs of war and enjoy any gains remaining. Later, plunder and enslavement were replaced by more measured forms of profit, such as ransom in exchange for release of enemy prisoners of war. Negotiated peace treaties at the close of hostilities—in effect, terms of surrender—promised large transfers from the vanquished to the victors in the guise of territory, assets, or monetary reparations.

Naturally, the real causes or motivations for war were as varied as human desire, and an appeal to conventional justifications and goals could have easily served to hide their true colors. And still, expansive justifications and goals of war were not only a matter of *raison d'état*, of an unconstrained exercise of statecraft, or human lust for power. Many justifications were recognized at least in one time or another as legitimate under the prevailing moral judgments of their era; not least, under the Christian Just War Theory that for 1,500 years or so served as the ethical code on the use of force by European states.²

The Twentieth Century witnessed a dramatic transformation of the ethical—indeed, legal—justification for war and the promise of victory. The United Nations Charter, the written constitution of the international community, was negotiated towards the ideal of international peace and security. Inspired by the foundations of Just War Theory, building on the interwar Kellogg-Briand Pact of 1928, and motivated by the horrors of two World Wars, the modern *jus ad bellum* sought to restrict to the utmost the rights of states to engage in war.³ The Charter thus laid down a broad prohibition on the unilateral threat or use of force by states.⁴ It left only a narrow exception for force in self-defense, and channeled all decision-making and enforcement in the spheres of international peace and security to the overriding plenary powers of the U.N. Security Council.⁵

For the first time in history, the Charter codified explicitly what states could no longer achieve through war: while the 1928 Kellogg-Briand Pact already forbade wars as instruments of national policy and ordered that all international disputes be solved through peaceful means, the Charter also codified the principles of sovereign equality, political independence,

2. See *id.* at 667 (discussing Christian development of Roman foundations for Just War Theory).

3. U.N. Charter art. 2, ¶¶ 3–4.

4. *Id.* ¶ 4.

5. *Id.* arts. 40–41, 51.

territorial integrity, and self-determination.⁶ The terms of the Charter made it clear that no state could lawfully gain land or hold onto colonized territories through force.⁷ Wars could no longer function as means of adjudication or enforcement, be waged for collection of debt or the punishment of transgressors, or prosecuted with the goal of converting the religion or beliefs of other people.

In many ways, the Charter's *jus ad bellum* regime must be celebrated as an enlightened progressive achievement, a constitution that transformed an international Hobbesian society into a civilized one. From a process fired by the unabashed thirst for power or even the more mundane interest in the enforcement of rights, war was now to become legitimate only in the narrowest circumstances.⁸ Indeed, subsequent international jurisprudence ordered that even the narrow exception of force in self-defense as provided for in the Charter is constrained by the customary international principles of necessity and proportionality. Like individuals in the domestic system, states would now be permitted to use force only where they have no other recourse to protect themselves or another state that requests their protection against an imminent and grave peril, and even then, only to the extent necessary.⁹

If there has been any expansion of the legitimate grounds for recourse to force in our time, it has been through the ideals of humanitarian intervention and the responsibility to protect—wars for the protection of populations that are suffering at their own governments' hands. Though the legal status of interventions that do not receive the blessing of the Security Council is hotly debated, their normative appeal is very much present in contemporary law and policy.¹⁰ The appeal derives precisely from the fact that humanitarian interventions do not add to the list of self-serving, self-regarding goals; rather, they expand the notion of defense to include, beyond classical self-defense, the defense of foreign individuals and communities. As such, they further realize the principles of both the Kellogg-Briand Pact and the U.N. Charter by rejecting war as an instrument of national policy, while implicitly allowing it as an instrument of international policy.

Yet in this progressive, laudable shift something was lost—a loss not often thought of in this context. Perhaps it is because the loss is outweighed by

6. *Id.* arts. 1–2.

7. *Id.* art. 73, ¶¶ (a)–(b).

8. *See id.* arts. 34, 51.

9. *See* Daniel Bethlehem, *Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 770, 772 (2012).

10. *See, e.g.,* Ian Hurd, *Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World*, 25 ETHICS & INT'L AFF. 293, 299–306 (2011) (detailing positions in debate on legality of humanitarian intervention).

what was gained. Yet, it is still a loss worth considering, not only for the sake of attaining a more complete view of the development of international law and policy in the post-Charter era, but also for its potential practical implications for twenty-first century battlefields.

What we have lost is the ability to specify the exact goals of war, to identify a clear moment of victory when the goals of war are satisfied and the war has no further justifiable ground upon which to continue. The broad list of affirmative goals, resting on a broad list of permissible justifications, that warring parties were free to pursue in the pre-Charter era was, to modern eyes, wildly permissive; but in a sense, it was also restrictive. For once set, these asserted goals gave warring parties clear yardsticks for the purpose of the war—for what it could and should attempt to achieve. And this, in turn, indicated when the war had to end. A war for the collection of debt had to end, as a conceptual matter, once the debt was collected. A war for territory should have ended once the territory was captured. And pitched battles could, by sundown, determine who would inherit the throne.¹¹ Even punishment was bound by what retribution and deterrence could possibly allow.¹²

By restricting the permissible justifications for war and excluding all tangible benefits from the permissible goals of war, replacing both with an amorphous, however seemingly narrow interest in “defense,” those clear yardsticks have been lost. As a result, we no longer have a clear metric of success that marks the sufficiency of the force used: there is no recognizable moment in which the war has achieved its legitimate goals. Victory can no longer be measured by concrete benefits but only by the absence of concrete harms. And an absence is hard to prove. Modern wars, as a consequence, may have more morally legitimate reasons, but they are also more difficult to judge and to restrict.

My claim is conceptual, not empirical. I do not argue that past wars did in fact end when their stated goals were satisfied, nor that stated goals always correlated with stated justifications. I argue only that the conceptual framework of Just War invited, at least in some contexts, a clearer delimitation—even if highly expansive—of what wars could or should achieve in comparison with what the *jus ad bellum* invites at present.

Clearly, the conceptual challenge of drawing the contours around what is permissible as a matter of “self-defense” is not new and must have been debatable both before and during the Just War era. Yet, at least three

11. On the phenomenon of pitched battles, see generally JAMES WHITMAN, *THE VERDICT OF BATTLE: THE LAW OF VICTORY AND THE MAKING OF MODERN WAR* (2014).

12. See Francis A. Beer & Thomas F. Mayer, *Why Wars End: Some Hypotheses*, 12 *REV. INT’L STUD.* 95, 98–99 (1986) (detailing potential reasons for wars ending, such as maximum achievement of benefits).

interrelated factors make this exercise especially problematic today. First, the fact that all justifications and goals must be refracted through the prism of “self-defense” without allowing for any to be framed in different terms raises the stakes and complexity for what counts as “self-defense.” Myriad values and interests are now couched in terms of self-defense. Whether contrived or genuine, evaluating the link between these values and defense is often not a mere factual challenge, but a conceptual impossibility. Second, states today exist in a very different strategic environment than in the pre-Charter or even the immediate post-Charter era. It is an environment rife with threats, potentially existential, from both states and non-state actors. As the threat environment becomes more multifarious, the security response seems to demand, or at least tolerate, more by the way of defensive action. And third, unlike the religious or ethical prescriptions of Just War Theory, articulated by individual experts and designed to guide the European powers of the time, the U.N. Charter was a negotiated interstate constitution designed to be universal in reach and uncontestable in its instruction. A failure by the Charter to serve its pacifying goals is in this way more consequential for international law than any shortcomings of Just War Theory.

To elaborate on these three factors, let us begin with the foundational question, what does self-defense encompass today? Is it repelling an invading army’s advance, the weakening of an adversary’s military capability, or change in the adversary’s political leadership to one that is friendlier and less adversarial? Security has many tangible benefits, but it is hardly a tangible value. Is the security of any state in fact correlated with democracy, a rule of law, human rights, economic prosperity, and developed infrastructure in other states? And if it is, may these interests be pursued through the use of force as a matter of self-defense? Far from rhetorical, these questions demonstrate the fundamental challenges of delimiting the contours of permissible “self-defense” under the *jus ad bellum*. These challenges grow as we consider not only what counts as self-defense, but also the defense of others.

Any appeal to the two customary legal principles, necessity and proportionality, that are designed to further constrain the use of force, is unlikely to be helpful. These principles are notoriously amorphous and contestable themselves. They are also, by definition, relational and depend very much on the initial delimitation of the goals of the war. Both beg the questions, “necessary for what?” and “proportionate to what?” Without first agreeing on when self-defense is satisfied, neither necessity nor proportionality can tell us whether the war must end when the invading army has been repelled or only when the political, military, economic, and social conditions that generated the threat have been transformed.

Other explicit prohibitions in the Charter are instructive on what is impermissible but not on what *is* permissible. To take but one concrete example, the Charter has made it clear that no state today can seek to gain territory or subjugate a people by force for the mere desire of self-aggrandizement.¹³ Nor can a state set out to control territory in order to convert the beliefs of its inhabitants or to usurp the territory's natural resources to collect an unpaid debt.¹⁴ However, under modern international law, a state may gain actual control over territory and people in the course of defending itself or others.¹⁵ When, then, does a threat justify controlling a foreign territory and people? How much territory and which people? For how long? Under what conditions would the state have to relinquish control? How much change in the *ex ante* conditions in that territory—political, economic, social—is a legitimate aim to pursue in order to reduce or eliminate a future threat? All of these questions are debated with great zeal in the face of each and every conflict. And all serve to justify—as much as to prohibit—the continued use of force.

In the absence of a world judge to rule on these questions or an enforcer to police the answers, any analogy from what counts as legitimate self-defense in the domestic setting is bound to fail. But the problem is not merely institutional but conceptual. If all values and interests are coined in the language of self-defense, how can we—or anyone—determine if their attainment actually promotes security or what the relative benefits and harms that are expected from a military action or inaction look like?

The definitional vagueness of self-defense becomes even more problematic in our contemporary security environment. For many states today, the fear of attack by other states has been compounded by new, farther-reaching, and more rapid and devastating means of war. Political, economic, technological, and sociological developments have contributed to the rise and proliferation of non-state actors with the ability (and willingness) to deliver significant blows even to the most powerful countries. Mere individuals now have the capacity to wreak havoc on nations close and far, more than at any other time in history. Weak structures of governance and instability around the globe contribute to the threat posed by non-state actors just as globalization and technology put a greater number of potential targets at risk. Whether real or imagined, threat is ubiquitous, more encompassing, and more nebulous—requiring strategic defense that is equally as flexible and all-encompassing.

13 See U.N. Charter art. 2, ¶ 4.

14 See *id.* art. 1, ¶ 3.

15 See *id.* art. 51.

Unsurprisingly, the Charter's focus on attacks already executed by one state against another has come under growing pressure by those fearing the threat of a disastrous attack as well as those concerned about non-state actors as potential sources of threat. At the same time, the textual narrowness of the Charter's terms also seemed at odds with the concern about the welfare of populations living under oppression by their own governments. None of these interests can be easily reconciled with the sparse instruction of the Charter, yet all seem to fall legitimately within states' interest in self-defense or the defense of others. And so, self-defense, whether through widening the text of the Charter, relying on teleological interpretation of the Charter as a whole, or developing customary law that is external to the Charter itself, must tolerate at least some of these interests some of the time. And that means further stretching what self-defense means and how it can or should be delimited.

Add these definitional problems to the fact that the Charter, at least in aspiration, was to serve as a form of a social contract through which states would relinquish their unilateral power to resort to war in exchange for a collective system that would ensure their security. It was not, or not only, an ethical commitment. It was a negotiated constitution, unlimited by geography, religion, or form of political government, that meant to ensure peaceful coexistence. But states today are not free from threats. And the Security Council has too often proven itself unable or unwilling (or both) to play its envisioned role as the arbiter and enforcer of international peace and security. The failure of the universal legal codex to deliver on either side of this bargain may have worse consequences today than when Just War Theory presumed to offer the ethical codex for rulers of the time. We—institutions, leaders, citizens—expect to have, but in practice have little, criteria by which to evaluate wars and by which to hold the prosecutors of war accountable.

Wars can, in the wake of much suffering, be wise or unwise, profitable or wasteful, and bring about good or bad outcomes. But none of this matters under the lens of international law, where self-defense is the only legitimate paradigm through which all use of force must be articulated, evaluated, and justified. Has this paradigm actually altered state action or has it simply forced a rhetorical shift that has translated all other values into the language of threats and defenses? If it has succeeded, even to a limited degree, in altering perceptions, motivations, or even actions, has it actually restricted war or even provided a workable test by which to evaluate conduct-in-war? Surely, the incidence of interstate wars has declined substantially in the post-Charter era and there is no reason to think that international law played no role in this development. But interstate wars are far from an extinct species. Transnational violence against nonstate actors is prevalent. And intrastate

wars, which neither the Just War Theory nor the U.N. Charter sought to regulate, continue to elude legal evaluation just as their protagonists continue to appeal to the interstate principles codified under the Charter sovereignty, non-intervention, territorial integrity, and self-determination. According to some scholars, the incidence of war has not declined—only war's ability to bring about territorial changes.¹⁶ And the sacrosanctity of borders under the Charter may itself have contributed to the rise in intrastate conflict.¹⁷

Since my study is conceptual in nature, just as I avoid making empirical claims with regard to states' conduct under the Just War Theory era, I do not attempt to evaluate the effects of the *jus ad bellum* regime on the incidence or types of contemporary wars. What I hope to show is that the conceptual weakness of the regime is itself problematic. One could, of course, be skeptical of the idea that international law could ever play a significant role in checking states' strategic behavior. Yet, even for those of us who believe in the power of international law to guide states and serve as an arbiter of right and wrong, the current articulation of the *jus ad bellum* falls short.

Because I am interested in the international legal framework, I write from the perspective of liberal democracies which are committed to the rule of law, including the international rule of law, and which are under the expectation—if not the obligation—to justify their actions. At the very least, statements to domestic constituencies often expose these states' understanding of their international obligations, allowing us to observe the shortcomings of the conceptual framework.

My focus is the *jus ad bellum*; for manageability's sake, I leave out the discussion of the *jus in bello*, which itself has evolved throughout the ages and with greater force in the twentieth century to limit the means and methods of war. I also largely leave out the *jus post bellum*, which has gained increased attention in recent decades, and which seeks to further assign post-war obligations for reconstruction and assistance to the victims of war. As I will argue, the *jus post bellum* is now very much intertwined with the *jus ad bellum*, forcing liberal democracies to articulate their war goals not only with self-interest in mind, but with the interests of others, too.

I begin with a rudimentary historical account of the evolution of the justifications and goals of wars throughout past centuries. I do not study the causes or reasons for war: those are and have always been multifaceted, ranging from political interests, through economic calculations, to sheer

16. See generally Mark W. Zacher, *The Territorial Integrity Norm: International Boundaries and the Use of Force*, 55 INT'L ORG. 215 (2001) (tracing changes in the attitudes and practices of states toward use of force in the alteration of interstate boundaries).

17. See BOAZ ATZILI, GOOD FENCES: BORDER FIXITY AND INTERNATIONAL CONFLICT 163–94 (2011).

megalomania. I study the permissible grounds for war as a matter of the prevailing norms of the time. I follow the evolution of the normative path, detailing the developing image of the ideal world. In this spirit, I focus on the evolutionary efforts of Christian Just War Theory from the fourth century onwards to constrict the causes and conditions for war. I trace the positivist turn of the eighteenth and nineteenth centuries, and the pre-Charter efforts to regulate war in the twentieth century.

I then move on to the Charter's *jus ad bellum* regime and the relevant jurisprudence expounding on it. I proceed to sketch the prolific debates over each and every aspect of the Charter's constricted rules and demonstrate the many indeterminacies inherent in them. These, I argue, are further proof of the difficulty—if not impossibility—of agreeing on what “self-defense” today means or encompasses.

In the last section, I turn to the goals of contemporary armed conflicts and show that the impossibility of defining today's war goals in a concrete and agreed upon manner is a fundamental conceptual problem. Regime change, democratization, nation-building, gender equality, even the elimination of each and every member of an adversary group have all been cited as defensive goals of recent wars. Though debates over wars tend to focus on whether they are lawful under the *jus ad bellum* regime, I show that the difficulties in determining and evaluating the goals of war are largely independent of this question; they persist even where the initial resort to force is clearly legal.

The justifications and goals of war may have always been indeterminate, at least to some extent. But unlike before, as international lawyers, we are confined today to the question whether these justifications and goals contribute to defense in a necessary and proportionate manner. That question, I argue, is unanswerable.

I. THE HISTORICAL EVOLUTION OF THE GOALS OF WAR

A. *Just War Theory*

Although the outlawing of wars of aggression was a twentieth-century development, some regulation of the right to resort to war existed in many recorded ancient, classical, and pre-modern societies. Among all these traditions, it was the Christian Just War Tradition (JWT) that dominated Western legal thought from the fourth century onwards that is at the basis—

at least in spirit—of the modern international law of *jus ad bellum*.¹⁸ It is therefore with JWT that I begin tracing the historical evolution of legitimate goals of war from self-interest and the interests of justice to a much narrower set of goals in the service of peace.

Naturally, there was a marked difference between what the norms were understood to be and how states behaved in practice; there were always more unjust wars than just wars. My interest is not so much in what states (or sovereigns) actually did, but in what the normative regime within which they had operated allowed them to do. For all the shortcomings of a rudimentary historical sketch, it does offer a useful intellectual and historical benchmark for assessing our current *jus ad bellum* regime and what it can and cannot offer us.

JWT, as we shall see, has changed over the ages. Its development was not linear; rather, it fluctuated through different eras with changing political, strategic, normative, and legal landscapes. Nor was there a contemporaneous consensus among scholars at any particular time on the ethical grounds for war. For this reason, my account is more thematic than strictly chronological.

At the foundation of all JWT lies St. Augustine's fifth century prescription that war was only just if it were conducted in the ultimate pursuit of peace. Earning his place as the most influential among the early Christian writers on the just cause of war,¹⁹ Augustine held that war was a sin if it was waged with "[t]he desire for harming, the cruelty of revenge, the restless and implacable mind, the savageness of revolting, the lust for dominating, and similar things."²⁰ However, "[o]ften, so that such things might also be justly punished, certain wars that must be waged against the violence of those resisting are commanded by God or some other legitimate ruler and are undertaken by the good."²¹ Augustine's consideration of war was theological rather than legal. His account of war was meant to reconcile the strategic

18. For a discussion on overlaps between Christian and Muslim conceptions of Just War, including those of Averroes, see Mohamed Abdel Dayem & Fatima Ayub, *In the Path of Allah: Evolving Interpretations of Jihad and Its Modern Challenges*, 7 UCLA J. ISLAMIC & NEAR E.L. 67, 89–90 (2009); see also HILMI M. ZAWATI, IS JIHAD A JUST WAR? WAR, PEACE AND HUMAN RIGHTS UNDER ISLAMIC AND PUBLIC INTERNATIONAL LAW 107 (2001) (“The classical sources of Islamic legal theory maintain that all kinds of warfare are outlawed except the jihād, which is an exceptional war waged by Muslims to defend the freedom of religious belief for all humanity, and constitutes a deterrent against aggression, injustice and corruption.”).

19. See JOHN MARK MATTOX, ST. AUGUSTINE AND THE THEORY OF JUST WAR 1–4 (2006).

20. AUGUSTINE, AGAINST FAUSTUS THE MANICHEAN (c. 400 CE), reprinted in THE ETHICS OF WAR: CLASSIC AND CONTEMPORARY READINGS 73, 73 (Gregory M. Reichberg et al. eds., 2006) [hereinafter THE ETHICS OF WAR].

21. *Id.*

necessities of the Roman Empire with the early Christians' embrace of pacifism. For this reason, he cautioned against violence motivated by *libido dominandi*, or naked self-interest.²² Rather, to set the warrior's conscience at peace, Augustine reasoned that war, like the loving act of a father punishing his son, was "correcting with a certain benevolent severity" the transgressor's injury to himself and others.²³

Successive generations of both Catholic and Protestant Just War theorists added layers of constraints on the resort to force, including conditions of right intention, last resort, declaration of war, legitimate authority, probability of success, and proportionality.²⁴ The concept of Just Cause itself underwent revisions, limiting, over time, justifications based on religious affiliations or cultural superiority.²⁵ These added constraints notwithstanding, war still remained an instrument of statecraft and justice.

Like the various ethical traditions before it, Just War doctrine has always recognized war as a legitimate practice of defense against an aggressor and as a forbidden exercise of hate or lust. But what counted as a valid exercise of defense was far more expansive than in the present day. Augustine's demand that war would be waged only if it promoted peace did not forbid taking territory from others.²⁶ The right of conquest, for instance, awarded territory to the military victor, partially because victory espoused divine endorsement and partially because prevailing militarily connoted the ability to guarantee peace and tranquility in the captured land.²⁷

Empire expansion was no less a legitimate goal than empire preservation, nor was a distinction between the two obvious. Both Hugo Grotius and Alberico Gentili, two of the towering figures of JWT, were impressed by Thucydides' realpolitik account of the destruction of Melos in the fourth century B.C., as necessary to protect the Athenian empire, lest others would follow the Melians' defiance and rebel against the empire.²⁸ As late as the

22. AUGUSTINE, *CONCERNING THE CITY OF GOD AGAINST THE PAGANS* 277 (Henry Bettenson trans., Penguin Books 1972) (426 CE) (translated as "lust for domination").

23. Augustine, Letter CXXXVI from Augustine to Bishop Augustin, in *1 NICENE AND POST-NICENE FATHERS* 472, 485 (Philip Schaff ed., 2007).

24. See, e.g., MATTOX, *supra* note 19, at 79.

25. See *id.* at 78.

26. *Id.*

27. See SHARON KORMAN, *THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE* 11 (1996) (explaining medieval view of war as appeal to God's authority and victory as divinely ordained).

28. See HUGO GROTIUS, *DE JURE BELLICAC PACIS (ON THE LAW OF WAR AND PEACE)* (1625), reprinted in *THE ETHICS OF WAR*, *supra* note 20, at 387, 387; see also Peter J. Ahrensdorf, *Thucydides' Realistic Critique of Realism*, 30 *POLITY* 231, 242-45 (1997) (examining

seventeenth century, John Selden went even further in allowing the capture of territory by force, arguing that waging war for territorial aggrandizement was compatible with the basic law of nature, and that any restrictions on such wars can only develop as the result of agreement between people to respect each other's territory.²⁹

Material interests in territory and resources were often complemented or legitimized by religious motivations. In biblical times, war for the land of Canaan and against the seven idol nations was the fulfillment of a divine edict from God himself, not a blinded power grab.³⁰ Though more fantastic than practical in its teaching, the biblical endorsement of deist-inspired wars was hugely influential on future Christian theologians and their view of war. In this spirit, in the fourth century, Saint Ambrose cautioned that war was never just if waged for self-interest, lust, or worldly ambition, and must never be driven by wicked intention or a hateful heart.³¹ Still, drawing on the Old Testament, he concluded that war could legitimately be waged against foreigners, and would be justified if aimed at taking possession of territory promised by God.³² Though Augustine preferred peaceful proselytizing, he too, accepted the use of violence against heretics so as to force them back into the church if they did not come back willingly.³³

Early JWT thus laid the ethical foundations for, several centuries later, justifying the Crusades based on defense and spread of faith. The crusaders also found support among their own contemporary ethicists. Writing in the thirteenth century, William of Rennes argued that “those who raise arms for the sake of obedience, justice, and zeal for the faith are praiseworthy.”³⁴

Colonialism, too, received the ethical blessings of Just War theorists, at least in its earlier days. In the fifteenth century, Christine de Pizan, the only influential woman among the pre-modern Just War theorists, enumerated the

philosophical differences between the Melians, who hold that the gods favor the just side in war, and Athenians, who believe they and Melians are equals in justice, both protecting self-interest).

29. See generally Mónica Brito Vieira, *Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden's Debate on Dominion over the Seas*, 64 J. HIST. IDEAS 361 (2003) (examining arguments for and against nations' rights to dominion over seas).

30. *Deuteronomy* 20:15.

31. AMBROSE, ON THE DUTIES OF CLERGY (c. 391 CE) (“There is nothing that goes against nature as much as doing violence to another person for the sake of one's own advantage.”), reprinted in THE ETHICS OF WAR, *supra* note 20, at 68, 68.

32. *Id.* at 69.

33. THE ETHICS OF WAR, *supra* note 20, at 85.

34. RAYMOND OF PEÑAFORT & WILLIAM OF RENNES, THE CONDITIONS OF JUST WAR, SELF-DEFENSE, AND THEIR LEGAL CONSEQUENCES UNDER PENITENTIAL JURISDICTION, reprinted in THE ETHICS OF WAR, *supra* note 20, at 134, 135.

most common just causes for war, which included maintaining of law and order, recovery of what was stolen or damaged, avenging wrongs committed by others, and protection of the Church.³⁵ In addition, she claimed that conquering and taking foreign, non-Christian land, was just as an expression of the legitimate will of the conquering sovereign, even if not as a matter of law.³⁶

A more critical view of colonialism was offered a century later by Spaniard Francisco Vitoria, perhaps the most influential theological writer after Thomas Aquinas. Vitoria, a Roman Catholic, launched the Salamanca scholastic school.³⁷ By the 1530s, when Vitoria offered his version of JWT, war for the enlargement of empire or the personal glory of the prince was no longer considered just, and Vitoria reiterated these limitations.³⁸ Yet, his greatest fame as a Just War theorist sprang from limits he advocated around Spanish colonial practices. The Spaniard invaders adopted the procedure of “Requerimiento,” which entailed announcing to the American Indians, prior to commencing hostilities, the universal authority of the Pope, which had been delegated to the Spanish monarchs, to colonize and evangelize the Americas.³⁹ The Indians, like the Melians in Thucydides’s account almost two millennia earlier, were given the choice either to willingly accept the sovereignty of the Spanish monarchs, or be compelled to do so by force.⁴⁰ Vitoria denied the legitimacy of the “Requerimiento” and rejected the idea that differences of religion could be a just cause of war.⁴¹ He further rebuffed the claims that the Amerindians lacked reason or that they should be regarded as slaves by nature, instead asserting that “the aborigines undoubtedly had true dominion in both public and private matters, just like Christians, and that

35· CHRISTINE DE PIZAN, *THE BOOK OF DEEDS OF ARMS AND OF CHIVALRY* (c. 1410), reprinted in *THE ETHICS OF WAR*, *supra* note 20, at 213, 214.

36· *But see id.* (suggesting that divine law does not sanction conquering lands belonging to another, “[f]or according to God’s law it is not proper for man either to seize or to usurp anything belonging to another, or even to covet it”).

37· Martti Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, 61 U. TORONTO L.J. 1, 6–7 (2011) (describing school as effort to reconcile Thomas Aquinas’ teachings to changing society).

38· *See id.* at 8 (explaining Vitoria’s views on limits of imperial power in America and lack of rights in new territories); von Elbe, *supra* note 1, at 674 (explaining that Vitoria denounced just causes for Spanish conquests as pretexts).

39· Peter d’Errico, *Native Americans in America: A Theoretical and Historical Overview*, 14 WICAZO SA REV. 7, 17–18 (1999) (quoting text of Requerimiento to be read to native people before beginning hostilities).

40· *Id.*

41· Koskenniemi, *supra* note 37, at 28.

neither their princes nor private persons could be despoiled of their property on the ground of their not being true owners.”⁴²

Though a courageous development at the time, Vitoria’s delimitation of permissible colonialism still left his king considerable latitude for imperialism. Vitoria forbade any violent action against the Indians as well as the taking of their lands and property, unless—and therein laid the twist—the Indians had violated the Spaniards’ lawful rights.⁴³ Those rights, per Vitoria, included travel and dwelling in the New World, trade, and ownership over common goods, such as gold mined from rivers.⁴⁴ The barbarians, claimed Vitoria, are “by nature cowardly, foolish and ignorant.” If they are fearful of the Spaniards and attack them, it would be lawful for the Spaniards to defend themselves.⁴⁵

The self-defense that Vitoria allowed for was very expansive: If all other measures to secure safety from the barbarians have been exhausted, the Spaniards would be allowed to conquer the barbarian communities. If the barbarians persisted in their wickedness and strove to destroy the Spaniards, the Spaniards would be just in treating them as treacherous foes against whom all rights of war could be exercised—including plunder and enslavement.⁴⁶ In so concluding, Vitoria invoked none other than Augustine and his maxim that the aim of war is peace and security. If it is lawful to declare war, argued Vitoria, as it must be in the right circumstances, it is lawful to exercise the full rights of war in order to attain peace and security.⁴⁷

Still, Vitoria’s admonition of certain colonial practices influenced subsequent writers; a century later, Grotius—no stranger to the practices of colonialism, especially of his Dutch homeland—cautioned against wars that are pursued in desire for fame, riches, empire expansion to check against

42. FRANCISCO DE VITORIA, ON THE INDIANS LATELY DISCOVERED (1532), *reprinted in* DE INDIS ET DE IVRE BELLI RELECTIONES 115, 128 (Ernest Nys ed., The Classics of International Law ed. 1917).

43. See Koskenniemi, *supra* note 40, at 9 (explaining that force could be justified against American Indians if they sacrificed humans or interfered with religion).

44. VITORIA, *supra* note 42.

45. FRANCISCO DE VITORIA, ON THE AMERICAN INDIANS (1539), *reprinted in* VITORIA: POLITICAL WRITINGS 231, 282 (Anthony Pagden & Jeremy Lawrance eds., 1991).

46. See Elena Cirkovic, *Self-Determination and Indigenous Peoples in International Law*, 31 AM. INDIAN L. REV. 375, 382–83 (2007) (explaining Vitoria’s view that American Indians could understand universal norms, which protected their interests but allowed Spanish to conquer them for violating those norms).

47. FRANCISCO DE VITORIA, ON THE LAW OF WAR (1539) (endorsing violent means to secure peace and security, such as pulling down fortresses), *reprinted in* VITORIA: POLITICAL WRITINGS, *supra* note 45, at 293, 305.

another empire's expansion, or with the intention to rule others on the pretext that it is for their own good.⁴⁸

Beyond defense, material, and theological interests, the legitimacy of war under JWT also rested on the idea that war could be a legitimate expression of justice. Wars concluded contests among potential heirs to the throne and allocated titles in disputed territory. They provided a mechanism for exacting the payment of a debt or the restitution of property unlawfully taken. For Gratian, writing in the twelfth century, the judicial model of war forbade war for revenge, but allowed war to regain what had been stolen.⁴⁹ Alexander of Hales stated that a just cause "is the restoration of the good, the suppression of the wicked, and peace for all."⁵⁰ And William of Rennes emphasized the anarchic nature of the international system in endorsing war as an alternative dispute resolution process: "[W]hen a king has a [just] cause of war against the emperor, or vice versa . . . neither one nor the other is obliged to seek justice by judicial means, since neither of them has a superior."⁵¹ In the seventeenth century, Johannes Althusius added denial of peaceful passage through territory, contumacy, and violation of international agreements to the familiar list of justifications for war.⁵² For the faithful, divine intervention ensured that justice was done and that the unjustly aggrieved party prevailed in battle. For the secular, in the absence of transnational institutional framework, war was merely a legitimate mechanism for upholding rights and redressing wrongs.

The justice model of war also included a punitive aspect, permitting retribution for past offences and deterrence against future ones. Indeed, Augustine's view of war as "a loving act of punishment" against a transgressing sovereign influenced all successive Just War theorists until the modern era.⁵³ In the sixteenth century, for instance, Cajetan (Thomas de Vio) noted that war was permissible not only in self-defense, "but also to exact

48. GROTIUS, *supra* note 28, at 410–11.

49. GRATIAN, WAR AND COERCION IN THE DECRETUM (c. 1150), *reprinted in* THE ETHICS OF WAR, *supra* note 20, at 104, 116.

50. ALEXANDER OF HALES, VIRTUOUS DISPOSITIONS IN WARFARE (n.d.), *reprinted in* THE ETHICS OF WAR, *supra* note 20, at 156, 159.

51. RAYMOND OF PEÑAFORT & WILLIAM OF RENNES, *supra* note 34, at 131, 137.

52. See JAMES TURNER JOHNSON, SOVEREIGNTY: MORAL AND HISTORICAL PERSPECTIVES 74 (2014) (explaining that Althusius's exceptions to prohibitions on use of force create potential for individual force).

53. See AUGUSTINE, *supra* note 22, at 593.

revenge for injuries to itself or its members.”⁵⁴ In equating war with a criminal proceeding, he noted: “That [war] is a criminal matter is clear from the fact that it leads to the killing and enslavement of persons and the destruction of goods.”⁵⁵ Following the Reformation, the punitive theory of war persisted among Protestants and Catholics alike. Calvin asserted that “kings and people must sometimes take up arms to execute such public vengeance,” and that wars were lawful to “punish evil deeds.”⁵⁶ Luther, too, asked rhetorically, “What else is war but the punishment of wrong and evil?”⁵⁷

In the late sixteenth and into the seventeenth century, Just War theory took a more secular turn. Gentili, Grotius, and Samuel von Pufendorf were the notable moral voices of their generation, laying the foundations for modern international law. For all the nuances in their teachings, all turned to natural law, rather than the judgment of a priest or church, to elucidate the just causes for war.⁵⁸ And natural law left self-defense, restitution of something unlawfully taken—including the failure to repay a debt—and punishment for injury to the sovereign or his nationals as the only legitimate causes for war.

There was some disagreement among the Just War theorists about whether the legitimacy of war as a punitive measure depended on the subjective guilt of the punished sovereign. In justifying war as punishment for injury, Grotius, for instance, suggested a very broad definition of injury to include not only harm suffered by the war-waging state, but also transgressions that “grossly violate the law of nature or of nations in regard to any person whatsoever.”⁵⁹ As examples of such transgressions, Grotius named “those who act with impiety towards their ancestors,” “those who feed on human flesh,” and “those who practise piracy.”⁶⁰ In the mid-eighteenth century, conversely, Christian von Wolff followed St. Thomas Aquinas demanding subjective guilt on the part of the offending sovereign.⁶¹ He thus forbade punitive wars against a nation that offended God and only allowed punitive wars where

54. CAJETAN, COMMENTARY TO SUMMA THEOLOGIAE (1540), *reprinted in* THE ETHICS OF WAR, *supra* note 20, at 241, 242.

55. *Id.* at 247.

56. JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION (1536), *reprinted in* THE ETHICS OF WAR, *supra* note 20, at 276, 276.

57. MARTIN LUTHER, WHETHER SOLDIERS, TOO, CAN BE SAVED (1526), *reprinted in* THE ETHICS OF WAR, *supra* note 20, at 268, 269.

58. See Arthur Nussbaum, *Just War: A Legal Concept?*, 42 MICH. L. REV. 453, 464–69 (1943).

59. GROTIUS, *supra* note 28, at 407.

60. *Id.*

61. THOMAS AQUINAS, SUMMA THEOLOGIAE (c. 1265–1274), *reprinted in* THE ETHICS OF WAR, *supra* note 20, at 171, 177.

there had been irreparable injury and satisfaction could not be obtained in any other way.

Punitive wars under the Just War tradition were undoubtedly an international political inevitability; but they were also sanctioned by the ethical codes of their time as the ultimate measure of both justice and peace, necessary to safeguard the rights of individual sovereigns as well as to preserve the stability of the international system. For Francisco Suarez, “the only reason for [war] is that an act of punitive justice is indispensable to mankind, and that no more fitting means for it is forthcoming within the limits of nature and human action.”⁶² With the turn to a secular conception of Just War, religious sensibilities gave way to concerns about the honor and dignity of injured sovereigns. War may be waged to avenge an injury received, argued Gentili, “because he who fails to avenge one injury provokes another. And to remedy loss is beneficial. Kings and kingdoms stand by names and reputation. Their good name must be protected.”⁶³ Grotius, likewise, believed that war as a means of imposing justice was essential for the international system, serving the good of the offender, the good of the enforcer, and the good of men at large, “by the protection afforded by the fear of punishment,”⁶⁴ (i.e., deterrence).

Importantly, just punishment had its limits. There were important restrictions on what measures could be used during the war and even greater limits on punishment after the war. Like the decision to go to war, the determination of what constituted a just post-conflict punishment was also an adjudicative process, with the punishing victor expected to act as an impartial judge, not as a vengeful party. Such “impartial” punishment, however, allowed not only for the reversal of the injury (including recovery of what was unlawfully taken), but also for recovery of the expenses of war (often, a considerable amount) as well as some measure of punitive reparations for purposes of future individual or general deterrence.⁶⁵

62. Alexis Blane & Benedict Kingsbury, *Punishment and the Ius Post Bellum*, in *THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS: ALBERICO GENTILI AND THE JUSTICE OF EMPIRE* 241, 243–44 (Benedict Kingsbury & Benjamin Straumann eds., 2010) (quoting FRANCISCO SUAREZ, *DE TRIPLICI VIRTUE* (1621), reprinted in *FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT* 723, 737–38 (Oliver O’Donovan & Joan Lockwood O’Donovan eds., 1999)).

63. THOMAS ALFRED WALKER, *A HISTORY OF THE LAW OF NATIONS* 256 (1899).

64. *Id.* at 305.

65. Blane & Kingsbury, *supra* note 62, at 260–63; Stephen C. Neff, *Conflict Termination and Peace-Making in the Law of Nations*, in *JUS POST BELLUM: TOWARDS A LAW OF TRANSITION FROM CONFLICT TO PEACE* 77, 80–81 (Carsten Stahn & Jann K. Kleffner eds., 2008).

Beyond what was taken in the war, negotiated peace treaties at the close of hostilities redrew maps, enthroned and dethroned rulers, and included large sums in reparations. The tangible gains served not only as the *ex post* outcome of the war, the realization of its goals, but also as the *ex ante* justification for it. If one went to war over the right to succeed the ruler, the war was justified if one could then actually succeed. If one lost, the loss comprised of both the throne and the just cause. Moreover, if there was no decisive outcome and competition between successors continued, the war did not perform its adjudicative function and thus risked being unjust to begin with.⁶⁶

As long as the causes, motivations and goals of the victors remained within the permissible bounds, the spoils of war—whether unilaterally taken or handed over by a treaty—were legitimate gains of just conduct, no less legitimate than a fine imposed or judgment rendered by a judge at the end of a trial. And whether one preferred a criminal law model or a civil law model, war's role in dispute resolution and enforcement remained an acceptable, however regrettable, feature of interstate relationships until the twentieth century.

B. *The Decline of Just War Theory and the Rise of Positivism*

The late eighteenth and nineteenth centuries witnessed a transformation of the international system, and with it, of international legal thought. The two centuries following the Peace of Westphalia saw the principalities and small states of 1648 unified into larger nation states, and national rulers superseded dynastic ruling families.⁶⁷ The limited wars of the eighteenth century gave way to ideological total wars, and small professional armies, motivated mainly by monetary gain, yielded to Napoleon's Grand Armée marching on nationalist zeal. The international system became an anarchic amalgamation of equally sovereign states, which could not be subjected to any external constraint in the form of divine order or natural justice. Just War Theory fell into desuetude.

Against the backdrop of the Napoleonic Wars, with much of the world colonized, and inspired by the writings of Prussian strategist Carl von Clausewitz, conventional accounts of the century conceived of war as a phenomenon to be explained, not justified.⁶⁸ Law and morality were replaced—almost officially—with *Kriegsraison* (the necessities of war).

66. On war as a judicial mechanism, see generally WHITMAN, *supra* note 11.

67. For a wonderful historical account of the wars in that period, see MICHAEL HOWARD, *THE INVENTION OF PEACE: REFLECTIONS ON WAR AND INTERNATIONAL ORDER* 16–31 (2000).

68. See 4 *INTERNATIONAL MILITARY AND DEFENSE ENCYCLOPEDIA*, at 1860–64 (Trevor N. Dupuy ed., 1993).

Through war, empires rose and fell, territories exchanged hands multiple times, and the tangible benefits that victors accrued were matched only by the hardships that were met by the vanquished.

It was not that states did not invoke legal, moral or pragmatic justifications when waging wars, nor that the question of the right to resort to force was left entirely unaddressed by scholars of the period.⁶⁹ In fact, one of the most influential statements on *jus ad bellum*, including on the principles of self-defense, necessity, and proportionality, arose out of the 1837 *Caroline* incident (to which I return later), involving British Canada and the United States.

For the most part, however, the legal status of war under various circumstances was the result of a positivist, inductive study of state practice, more than an engagement with its normative underpinnings. Wars were a phenomenon to be explained more than morally judged. And the most distinctive explanation of the era was captured by Clausewitz, who described wars as a “true political instrument, a continuation of political intercourse, carried on with other means.”⁷⁰

C. Preludes to the U.N. Charter

On May 18, 1899, Russian Tsar Nicholas II’s birthday, and on his initiative, the First Hague Peace Conference officially opened.⁷¹ It culminated, in part, with a Treaty on the Pacific Settlement of International

69. When justifications for war were offered, they sometimes took the form of quasi-judicial or policing operation. For instance, against the background of the British-French-German aggression against Venezuela, Theodore Roosevelt stated in his 1904 Annual Message to Congress:

All that this country desires is to see the neighboring countries stable, orderly, and prosperous. Any country whose people conduct themselves well can count upon our hearty friendship. . . . *Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and . . . may force the United States . . . to the exercise of an international police power.*

President Theodore Roosevelt, Annual Message to Congress (Dec. 6, 1904) (transcript available at <http://www.latinamericanstudies.org/us-relations/roosevelt-corollary.htm>).

70. CARL VON CLAUSEWITZ, ON WAR 87 (Michael Howard & Peter Paret eds. & trans., Princeton Univ. Press 1976) (1832).

71. FREDERICK W. HOLLS, THE PEACE CONFERENCE AT THE HAGUE AND ITS BEARINGS ON INTERNATIONAL LAW AND POLICY 36 (1900).

Disputes, which stated in Article 1 that “[w]ith a view to obviating, as far as possible, recourse to force in the relations between States, the Signatory Powers agree to use their best efforts to insure the pacific settlement of international differences.”⁷² For that purpose, the signatory powers agreed to form the Permanent Court of Arbitration.⁷³ Though the powers also agreed, in other related instruments from both the 1899⁷⁴ and 1907 Hague Conventions,⁷⁵ to limit certain technologies of warfare and ban certain practices of war, there was no further agreement on the conditions upon which one could—or could not—resort to war.

World War I was a transformative event demonstrating the perils of Clausewitz’s vision of total wars and the extension of politics into battle. With tens of millions dead and much of Europe destroyed, the international community sought to regulate war once more; it was here that the focus of war began turning from the implementation of justice to the preservation of peace. This renewed interest in the legal regulation of wars was expressed in two instruments, both part of the post-war Treaty of Versailles. One was the coercive victors’ justice embodied by the so-called “War Guilt Clauses,”⁷⁶ which ordered Germany to pay reparations to the victorious Allies “as a consequence of the war imposed upon them by the aggression of Germany and her allies.”⁷⁷ This was the debut of the term “aggression” in positive international law.

The other instrument under the Treaty of Versailles was a blueprint for a first attempt at an international institution with the power to regulate, and, hopefully, prevent wars—the League of Nations. The framers of the League of Nations envisioned their project as the guardian of world peace, as the Westphalian principles of respect for territorial integrity and non-interference in internal affairs were incorporated into the League’s 1919 founding Covenant. International disputes were to be resolved through arbitration, judicial settlement, or inquiry by the League’s Council. League members agreed that “[a]ny war or threat of war . . . is hereby declared a matter of

72. Convention for the Pacific Settlement of International Disputes art. 1, July 29, 1899, 32 Stat. 1779.

73. *Id.* art. 20.

74. Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803.

75. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.

76. Treaty of Peace with Germany arts. 231–47, June 28, 1919, 2 Bevens 43 [hereinafter Treaty of Versailles].

77. *Id.* art. 231.

concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations.”⁷⁸ The right to engage in war was not, however, abolished; it was simply subjected to a procedural mechanism of consultation,⁷⁹ which, so it was hoped, could avert the war.⁸⁰ In this spirit, the 1931 General Convention to Improve the Means of Preventing War granted the Council of the League of Nations the power to order preventive means to avert war.⁸¹

A more ambitious effort to regulate war took place outside the confines of the League of Nations Charter. The Kellogg-Briand Pact of 1928 condemned “recourse to war for the solution of international controversies” and renounced its use “as an instrument of national policy.”⁸² However, it did not outlaw all uses of force, nor did it explicitly prohibit violence in self-defense. Seventeen years later, the Nuremberg Tribunal cited the Pact as the legal basis for indicting German leaders for their role in World War II, thereby attempting to rebut the defendants’ claims that “crimes against the peace”—the Tribunal’s primary focus—was nothing more than victors’ retroactive justice.

Diplomats in subsequent years worked to make the Pact more comprehensive. In particular, they sought to broaden the terms of the Pact to cover unilateral armed reprisals, previously recognized as legitimate means of avenging wrongs without waging a full-fledged war. They also sought to limit the permissible scope of self-defense. In 1933, the League of Nations convened a Preliminary Study Conference on Collective Security to address preventive measures to avert the threat of war.⁸³ The Austrian delegation to the Study Conference suggested it would be “[a] tremendous step forward”

78. *Id.* art. 11.

79. *See id.* art. 12.

80. In 1931, League members also signed a General Convention to Improve the Means of Preventing War, which empowered the League Council, in the face of a threat of war, to “fix lines which must not be passed by [the potential belligerents’] land, naval or air forces.” *See* General Convention to Improve the Means of Preventing War art. 3, ¶ 1, Sept. 26, 1931, League of Nations Doc. C.658(1).M.269(1).1931.IX.

81. *Id.* art. 1.

82. General Treaty between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy art. 1, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

83. MAURICE BOURQUIN, LEAGUE OF NATIONS, A SHORT RECORD OF PRELIMINARY STUDY CONFERENCE ON “COLLECTIVE SECURITY” HELD IN PARIS ON MAY 24–26, 1934, at 9 (Int’l Inst. of Intellectual Co-operation ed., 1934). As it was broadly conceived, prevention included “the peaceful alteration of the status quo in order to remove the causes of international disputes by rectifying economic and political inequalities and injustices between nations.” *Id.* at 24.

if “all acts committed in self-defence were prohibited, with the exception of acts of self-defence in cases of emergency in the technical sense of the expression, that is, for the purpose of repelling an attack on national territory.”⁸⁴ Even more restrictively, a French delegate at a subsequent League of Nations conference insisted that “it is of paramount importance that peace be maintained, whatever may be the wrongs endured by the State which has been attacked.”⁸⁵ The adopted 1933 Convention on Aggression provided:

Accordingly, the aggressor in an international conflict shall, subject to the agreements in force between the parties to the dispute, be considered to be that State which is the first to commit any of the following actions⁸⁶

For all their good intentions, however, the interwar efforts at abolishing the unilateral use of force and preventing wars more generally failed to thwart the 1931 Japanese takeover of Manchuria, the 1935 Italian offensive on Abyssinia, the German encroachment on Czechoslovakia in 1938, or its invasion of Poland several months later, an act which heralded the worst war in human history.⁸⁷

D. The U.N. Charter and the Modern Jus ad Bellum

At the close of the Second World War, peace and security from war became the paramount interest of the new international order. The Allies set out to establish a reformed model of the failed League of Nations, one that

84. *Id.* at 41.

85. INT’L INST. OF INTELLECTUAL CO-OPERATION, COLLECTIVE SECURITY: A RECORD OF THE SEVENTH AND EIGHTH INTERNATIONAL STUDIES CONFERENCES, PARIS 1934–LONDON 1935, at 298 (Maurice Bourquin ed., 1936) (remarks of A. Camille Jordan). Jordan then added: “Thus the Conventions of London condemn the forcible methods hitherto frequently employed as sanctions for the repression of infractions of international law. What the signatories wished to obtain was, in the words of M. Politis, ‘that the idea of peace be recognised as having a sort of priority’” *Id.*

86. London Convention for the Definition of Aggression art. 2, July 3, 1933, 147 L.N.T.S. 67, 71–72, <https://treaties.un.org/doc/Publication/UNTS/LON/Volume%20147/v147.pdf>.

87. These efforts did, however, lay the foundation for the subsequent indictment and conviction of Nazi and Japanese officials for crimes against the peace in the Nuremberg and Tokyo Tribunals, respectively. *See generally* TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG (1947); *see also* Annex “B” *Relevant Treaties, Conventions, Agreements, and Assurances upon Which the Charges were Based*, IMTFE JUDGMENT, <http://www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-B.html> (last visited June 25, 2017).

would guard against a recurrence of a world-war catastrophe. The United Nations Charter, concluded in 1945, stated as its first and foremost goal “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.”⁸⁸ To this end, the signatories sought “to unite [their] strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest.”⁸⁹

The regulation of the use of force under the U.N. Charter was in many ways a continuation of the prewar efforts toward collective security. This time, however, it provided a clearer prescription of obligations and prohibitions and offered an institutional framework to maintain them. A handful of succinct provisions replaced the longstanding and elaborate Just War Theory, at least as a matter of international law.

Article 2(3) of the Charter laid out the obligation to resolve disputes among member states peacefully, and article 2(4) prohibited any threat or use of force against the territorial integrity or political independence of any state. The Charter thus clarified that no state can forcefully take territory from another state. Furthermore, in a rare consensus, international lawyers agree that the words “territorial integrity” or “political independence” do not limit the scope of the prohibition and that *any* use of force, regardless of its aims or motivations, is *prima facie* proscribed under article 2(4).

The Charter then provided two exceptions to the broad prohibition in article 2(4). The first is the use of force in individual or collective self-defense by states in response to an armed attack, under article 51 of the Charter:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁹⁰

88. U.N. Charter pmb.; *see also* Albrecht Randelzhofer, *Article 51*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 788, 792 (Bruno Simma et al. eds., 2d ed. 2002) (claiming the Charter intended “to restrict as far as possible the use of force by the individual State”).

89. U.N. Charter pmb.

90. U.N. Charter art. 51.

Under this exception, the use of force could only be defensive, with the sole aim of preventing further violence.

Even when a state is justified in using force under article 51, the ICJ further stipulated that such use of force must be “necessary and proportionate,” as a matter of customary international law.⁹¹ These requirements “[limit] a response to what is needed to reply to an attack.”⁹²

The second exception to the prohibition on use of force is the Charter’s main effort to subordinate all military action to the authority of the Security Council (UNSC). The Charter’s innovation was thus to recognize the inevitability of war, with the hope that the collective security design would deter and preempt the unilateral use of force. Delegates to the Dumbarton Oaks and San Francisco conferences were explicit about the possible need to use force to prevent worse force: “We now see that measures of conciliation and appeasement are not enough, that war has to be prevented at all costs, even at the cost of war itself, if necessary.”⁹³

Under Chapter VII of the Charter, the UNSC was entrusted with “[determining] the existence of any threat to the peace, breach of the peace, or act of aggression and . . . mak[ing] recommendations, or decid[ing] what measures shall be taken . . . to maintain or restore international peace and security.”⁹⁴ The terms “a threat to the peace,” a “breach of the peace,” or “an act of aggression” were nowhere defined or elaborated in the Charter. In fact, the inclusion of the term “act of aggression” was hotly debated.⁹⁵ Suggestions to define the term were rejected as impractical, likely under-inclusive and open to manipulation by would-be aggressors. Opponents further held that

91. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 41 (July 8).

92. *Id.* at 361, ¶ 5 (dissenting opinion by Higgins, J.); see also Michael Schmitt, *Counter-Terrorism and the Use of Force in International Law*, 79 INT’L L. STUD. 7, 27–28 (2002).

93. Field Marshal Jan Christian Smuts, Prime Minister & Chairman of S. Afr., Address Before the Sixth Plenary Session of the United Nations Conference on International Organization (May 1, 1945), in 1 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, 1945, at 423 (1945) [hereinafter UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION]. The continuation of the quote reads: “The Covenant did not undertake to prevent war at all costs but merely to create measures of delay and attempts at arbitration and negotiation and conciliation and finally to invoke economic sanctions to frighten off the aggressors. The Dumbarton Oaks Charter, on the other hand, realistically recognizes that war must be prevented at the start, and that no half measures to that end will suffice.” *Id.*

94. U.N. Charter art. 39.

95. Under Soviet pressure, it was ultimately inserted, even though the U.S. considered the phrase “breach of the peace” broad enough to cover aggression. PAGE WILSON, AGGRESSION, CRIME AND INTERNATIONAL SECURITY: MORAL, POLITICAL AND LEGAL DIMENSIONS OF INTERNATIONAL RELATIONS 73 (2009).

the determination of whether aggression has occurred and how it should best be dealt with should be left for the UNSC as the need arose.⁹⁶

The UNSC was thus given maximum flexibility to determine when and how it was necessary to address a particular situation. Among the measures it was empowered to authorize were non-military sanctions,⁹⁷ and if those failed, “demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”⁹⁸

Delegates also emphasized the Charter’s Chapter VII vision of U.N. armed forces and their hoped-for deterrence effects:

If called upon to do so by the Security Council, the entire force will march against a State convicted of aggression, in accordance with the provisions for enforcement as laid down for the Security Council [T]he certainty of defeat will most probably discourage any aggressor from starting a fight.⁹⁹

That idea of a U.N. military never came to pass, though member states contribute forces to peacekeeping operations that are welcomed by the states in which they operate. Peace enforcement missions—those conducted without the blessing of the target states, such as the war in Iraq in 1991—have all been undertaken by coalitions of states, operating under Chapter VII resolutions, rather than by a U.N. force.

In 1974, the U.N. General Assembly undertook the task of elaborating on what constitutes an act of aggression that would justify an intervention by the Security Council.¹⁰⁰ That definition, however, was never invoked or referenced by the UNSC in any subsequent determination,¹⁰¹ although it was adopted more than three decades later as an amendment to the ICC Rome Statute that would potentially endow the Court with jurisdiction to try individuals charged with the crime of aggression.

96. LELAND GOODRICH, EDVARD HAMBRO & ANNE SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 263–64 (2d ed. 1969).

97. U.N. Charter art. 41.

98. U.N. Charter art. 42.

99. Joseph Paul-Boncour, Acting Chairman of the French Delegation, Address Before the Closing Session of the United Nations Conference on International Organization (June 26, 1945), *in* UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, *supra* note 93, at 699–700.

100. G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/29/3314, at 142 (Dec. 14, 1974).

101. *See* ELIZABETH WILMSHURST, DEFINITION OF AGGRESSION 3 (2008), http://legal.un.org/avl/pdf/ha/da/da_e.pdf (“Paragraph 4 of resolution 3314 (XXIX) drew the attention of the Security Council to the Definition and recommended that the Council ‘should, as appropriate, take account of that Definition as guidance in determining, in accordance with the Charter, the existence of an act of aggression.’ The Definition has rarely if ever been used for that purpose.”).

Contemporary *jus ad bellum* thus drew much inspiration from Just War Theory in requiring some elements of just cause, last resort (through necessity), proportionality, and perhaps even legitimate authority (a state government under the right circumstances or the Security Council). Some other elements of JWT were largely foregone. Right intention, for instance, is not an objective requirement of the *jus ad bellum*, and as long as there is a justified self-defensive action, the true intention of the defender is not further investigated, at least as a formal matter. Similarly, the law does not require that a defender faces a reasonable chance of success. Some scholars believe that the prospect of success factors into the proportionality assessment so that a war that stands no chance of succeeding can hardly be proportionate. Yet, as a matter of law, facing aggression, a victim state can make any effort, however desperate, to defend itself.

And still, as the next section shows, notwithstanding the inspiration of JWT, the effort to constrain the grounds for war under the terms of the Charter has left much to interpret, adapt, contest, and challenge, leaving the boundaries of just causes and goals largely indeterminate.

II. THE MODERN *JUS AD BELLUM*—SETTLED AND UNSETTLED QUESTIONS

The general prohibition on the use or threat of force and the exception allowing force in self-defense are both recognized as *jus cogens*—those international law principles that bind all nations and cannot be changed or contracted around. Still, almost every aspect of the Charter’s rules on the use of force, and especially on the use of force in self-defense in article 51, is hotly debated in international law and policy. It is worthwhile to sketch some of these debates, not for the purpose of resolving or taking sides in them, but merely to show how the terms “force,” “armed attack,” “self-defense,” “necessity,” “proportionality,” “aggression,” or “threats to international peace and security”—all meant to constrain the use of force and limit the permissible goals of war—have generated, or at least allowed for, great indeterminacies in the justifications and goals of war. The debates this paper will focus on are:

- A. Armed Attack and Armed Reprisals
- B. The Meaning of Self-Defense
- C. Necessity and Proportionality
- D. Armed Attack—By Whom and Against Whom
- E. Anticipatory Self-Defense
- F. Humanitarian Intervention
- G. Intervention for Democracy

A. Armed Attack and Armed Reprisals

As earlier noted, there is a general consensus that the prohibition on the “threat or use of force,” as laid out in article 2(4), is very broad, and includes any military attack regardless of its motivations or purpose.¹⁰² Article 51, which provides the exception for the unilateral use of force in self-defense, employs the term “armed attack” rather than “force.” What is the relationship between the prohibition on “the use force” and the demand of an “armed attack” to justify it?

Under international jurisprudence, an “armed attack” demands a higher threshold of force than that which is forbidden under article 2(4). In other words, any use of force between states violates article 2(4), but if the force used is not sufficiently threatening—or, in the words of the ICJ, does not meet the “scale and effect” of an armed attack, as opposed to a “mere frontier incident”—the victim state must seek other avenues for redress, including an appeal to the UNSC, before employing retaliatory force.¹⁰³ Similarly, the international commission established to settle claims arising from the Ethiopia-Eritrea war proceeded on the assumption that “[l]ocalized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the Charter.”¹⁰⁴

The United States disputes the claim that there is a gap between the general prohibition on the use of force and the self-defense exception in article 51, and asserts, instead, that any use of military force gives rise to a retaliatory military action. The only constraints on such action are to be drawn from the customary requirements of necessity and proportionality. This view was also expressed by the British experts who authored the *Chatham House Principles of International Law on Use of Force in Self-Defence*.¹⁰⁵

If armed attack is to be distinguished from mere frontier incidents, another question arises as to whether several isolated frontier incidents can cumulatively form an “armed attack.” The ICJ has lent some support for the

102. A similar consensus seems to surround the idea that “force” in the article’s sense is only military in nature, as opposed to political, economic, or other nonmilitary kinds.

103. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 195 (June 27).

104. *Jus ad Bellum—Ethiopia’s Claims (Eri. v. Eth.)*, 26 R.I.A.A. 457, 465 (Eri.-Eth. Cl. Comm’n 2005).

105. Elizabeth Wilmshurst, *Principles of International Law on the Use of Force by States in Self-Defence* 6 (Chatham House, Working Paper No. 05/01, 2005), <https://www.chathamhouse.org/publications/papers/view/108106> (“An armed attack means any use of armed force, and does not need to cross some threshold of intensity.”).

accumulative theory in a couple of passing references in two judgments, but it is far from a settled doctrine.¹⁰⁶

The debate over the gap theory implicates the status of armed reprisals in contemporary *jus ad bellum*. Armed reprisals, which used to be a prevalent state practice, are essentially tit-for-tat military attacks. A ban on reprisals would sit well with a charter that is designed primarily to eliminate interstate clashes and allow only the narrowest possible exceptions. In this spirit, UNSC Resolution 188 of 1964 explicitly condemned reprisals as “incompatible with the purposes and principle of the United Nations,”¹⁰⁷ and in 1970, the U.N. General Assembly adopted its Declaration on Friendly Relations,¹⁰⁸ noting that “States have a duty to refrain from acts of reprisal involving the use of force.”¹⁰⁹ To the extent that a meaningful distinction could be drawn between reprisal and self-defense, particularly given that both kinds of actions are typically taken *after* an attack is suffered, the difference has been commonly framed in terms of the actions’ purposes; the former is retributive, whereas the latter is preventive.¹¹⁰ The logic of banning retribution through reprisals was summed up by Professor Albrecht Randelzhofer: “[I]t cannot be overlooked that, being caught in the ‘dilemma

106. *Oil Platforms (Iran v. U.S.)*, Order, 2003 I.C.J. Rep. 160 (Nov. 6) (“Even taken cumulatively . . . these incidents do not seem to the Court to constitute an armed attack on the United States . . .”). In its judgment in *Armed Activities on the Territory of the Congo (Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, 223, ¶¶ 146–47 (Dec. 19), the Court stated that “even if this series of deplorable attacks could be regarded as cumulative in character” they could not be attributed to the DRC and therefore did not give license to Uganda to exercise its right to self-defense against that state. *Id.* Israel is a strong advocate of the accumulative theory. See David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, 24 EUR. J. INT’L L. 235, 244 (2013) (“The accumulation of events theory has not gained general acceptance in the international community. There are, however, signs that with the growing awareness that transnational terrorist attacks present states with a serious problem, it is not as widely rejected as it was in the past.”).

107. S.C. Res. 188, ¶ 1 (Apr. 9, 1964). The Resolution was adopted when Yemen submitted a complaint to the Security Council over a British air attack on Yemeni territory on March 28, 1964.

108. G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, U.N. Doc. A/8082, at 122 (Oct. 24, 1970).

109. *Id.*

110. Robert Tucker, *Reprisals and Self-Defense: The Customary Law*, 66 AM. J. INT’L L. 586, 589 (1972); see also Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT’L L. 1, 3 (1972); Randelzhofer, *supra* note 88, at 805 (“[L]awful self-defence is restricted to the repulse of an armed attack and must not entail retaliatory or punitive actions. The means and extent of the defence must not be disproportionate to the gravity of the attack; in particular, the means employed for the defence have to be strictly necessary for repelling the attack.”).

between security and justice,' the UN Charter deliberately gives preference to the former."¹¹¹

Nevertheless, the Charter's very narrow construction of when force could be used,¹¹² coupled with the general ineffectiveness of the U.N. collective security system, has not stopped states from engaging in armed reprisals.¹¹³ Indeed political speeches addressed to the domestic population often used the language of retribution and punishment when justifying such actions. For example, in 1986 the United States struck targets in Libya in Operation *El-Dorado Canyon*. The strikes followed a Libyan-backed terrorist attack on La Belle discotheque in West Berlin, which resulted in two fatalities and hundreds of injuries, many of whom were American military personnel. In justifying the strikes, President Reagan laid out the evidence that linked the terrorists to Libyan leader, Colonel Muammar Qaddafi.¹¹⁴ The evidence, he claimed, was "direct . . . precise . . . [and] irrefutable."¹¹⁵ He spoke of the advance warnings that were given to Qaddafi, promising to hold the latter's regime accountable for any terrorist attack launched against American citizens—warnings which Qaddafi did not heed. Reagan also charged that Qaddafi's actions required putting him "outside the company of civilized men."¹¹⁶ However, conscious of the mixed audience he was addressing—the American voters and the international community—the punitive rhetoric was nonetheless carefully accompanied by a reference to article 51 of the Charter and the right of self-defense against terrorism.¹¹⁷

Bruno Simma himself, sitting as an ICJ judge in a case involving American and Iranian skirmishes in the Persian Gulf, found that reprisals should be recognized as legitimate even in the Charter era, provided they meet strict requirements of necessity and proportionality.¹¹⁸ Writing so in a

111. Randelzhofer, *supra* note 88, at 792.

112. Further limiting the right to use force was the high threshold placed by the International Court of Justice to what would amount to an "armed attack" that would justify the use of defensive force. *See id.* at 792–93 ("[A] State is bound to endure acts of force that do not reach the intensity of an armed attack, thus remaining devoid of any effective protection until the [Security Council] has taken remedial measures [I]t cannot be overlooked that, being caught in the 'dilemma between security and justice,' the UN Charter deliberately gives preference to the former.").

113. *See* Tucker, *supra* note 110, at 595 ("A narrow interpretation of self-defense . . . must generate considerable, and, in the end, irresistible, pressures to effect some kind of rehabilitation of armed reprisals.").

114. President Ronald Reagan, Address to the Nation on the United States Air Strike Against Libya (Apr. 14, 1986).

115. *Id.*

116. *Id.*

117. *Id.* ("Self-defense is not only our right, it is our duty. It is the purpose behind the mission undertaken tonight, a mission fully consistent with Article 51 of the United Nations Charter.").

118. *See* Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 160, 331–34 (Nov. 6) (separate opinion by Simma, J.).

separate opinion, not adopted by the majority of the ICJ, Simma's opinion cannot be considered a decisive statement of international law. But no less interesting than the existence of the debate itself is to note that a retributive paradigm of a tit-for-tat actually has clearer bounds than an open-ended preventive paradigm of defense against future hostilities.

B. The Meaning of Self-Defense

On July 12, 2006, militants from the Lebanese Hezbollah armed group launched rockets (and mortar rounds) at Israeli border towns and villages as a diversion for an attack on two IDF Humvees patrolling on the Israeli side of the border fence. Three Israeli soldiers were killed at the scene. Two more were abducted and taken by Hezbollah to Lebanon (only later it became known that the two were already dead when abducted). Five more were killed inside Lebanon, as they attempted unsuccessfully to rescue their friends. The entire Hezbollah attack was over within a few hours. The armed group then announced that it demands the release of Lebanese prisoners held in Israel in exchange for the release of the abducted soldiers. Israel rejected the demand, and instead launched a counter-offensive. A month of fierce fighting ensued, the IDF invaded Lebanon, Israelis were under daily rocket barrages, and significant numbers of casualties and damage were suffered on both sides of the border.¹¹⁹

The 2006 war sparked heated debates over the question whether the Israeli counteroffensive was proportionate to the Hezbollah threat.¹²⁰ Let us bracket this question for now, and begin with a more basic question: Was Israel justified in engaging in *any* counteroffensive?

The rationale of article 51 was to allow a state that is under attack to take immediate steps to defend itself until such time that the collective security system, in the guise of the Security Council, could intervene. The most obvious need for immediate defensive action is to halt or repel an ongoing attack. In the face of an invading army or ongoing bombardments, the need to exercise self-defense is clear. But what happens when a state suffers an

119 For more on this incident, see generally HUMAN RIGHTS WATCH, CIVILIANS UNDER ASSAULT: HEZBOLLAH'S ROCKET ATTACKS ON ISRAEL IN THE 2006 WAR 3, 115–17 (2007), <https://www.hrw.org/reports/2007/iopt0807/iopt0807web.pdf>; HUMAN RIGHTS WATCH, FATAL STRIKES: ISRAEL'S INDISCRIMINATE ATTACKS AGAINST CIVILIANS IN LEBANON 14–17 (2006), <https://www.hrw.org/reports/2006/lebanon0806/lebanon0806web.pdf>.

120. Lionel Beehner, *Israel and the Doctrine of Proportionality*, COUNCIL ON FOREIGN REL. (July 13, 2006), <https://www.cfr.org/background/israel-and-doctrine-proportionality>.

armed attack that is limited in time and space and seems to have ended, at least for now?

Let us assume that the Hezbollah attack did meet the “scale and effect” test and should thus be considered an armed attack for purposes of article 51 (though one might claim this is a “mere frontier incident[.]”)¹²¹ Once Hezbollah fighters held their fire, did not exhibit an intention to continue their attacks in the immediate future, and instead posed their demands for the release of prisoners—did Israel have a right to engage in military strikes against the armed group?

Under the JWT doctrine that viewed war as an act of punishment, the answer would clearly be “yes” (ignoring, for the moment, the relationship between Hezbollah and Lebanon, which is a complicated one) as the act of punishment would serve as retribution for the completed attack as well as some measure of future deterrence, and would only be just if it kept within those bounds. If successful, Israel could then extract payments from its enemy, whether directly or indirectly, to recuperate the costs of the damages from the initial attack as well as of those of meting punishment through war.

The U.N. Charter, conversely, sought to do away with any concept of punishment, and instead focused on prevention of threats to peace and security.¹²² Any use of force that followed a completed attack would have to be justified as a defense against the threat of further attack, rather than as punishment for what already transpired.¹²³ But how far can such a defense extend?

C. Necessity and Proportionality

On the night of February 26, 1991 (and then again, on March 2) U.S. airplanes struck an Iraqi convoy on Highway 80, leading from Kuwait City to Basra. The strikes resulted in the deaths of hundreds of retreating Iraqi soldiers:

[R]eporters who arrived on the scene “recorded the *carnage* that stretched along that road for miles, producing gut-wrenching images of charred bodies in the blackened hulks of bombed-out vehicles. Trucks, personnel carriers and hundreds of civilian

121. Kretzmer, *supra* note 106, at 243.

122. *Mandates and the Legal Basis for Peacekeeping*, UNITED NATIONS PEACEKEEPING, <http://www.un.org/en/peacekeeping/operations/pkmandates.shtml> (last visited July 15, 2017).

123. James A. Green & Francis Grimal, *The Threat of Force as an Action in Self-Defense Under International Law*, 44 VAND. J. TRANSNAT'L L. 285, 301 (2011).

vehicles lay strewn along the road,” a road they later dubbed “the Highway of Death.”¹²⁴

Military officers were reported to be “sickened by what they saw,” though others rejoiced at the opportunity to weaken the Iraqi forces and hasten the end of the American-led war.¹²⁵

It is easy enough to talk about the first Iraq war as a perfectly justified exercise of military power. It was prompted by a blatant invasion of one country by another. It was authorized by the Security Council. And it was supported by nearly all U.N. members, many of which also participated in the military coalition.¹²⁶

But justified as the cause was, what would have been the permissible goal of the Iraqi war? Driving Iraqi forces out of Kuwait? Weakening Iraqi military capabilities for future purposes? Changing the Iraqi regime to affect future policies? Was the “Highway of Death” a necessary and proportionate action?

As the prominent international law scholar, Ian Brownlie, once observed, the condition of necessity is “consistently referred to . . . but rarely, if ever, analysed in relation to the Charter scheme on self-defence.”¹²⁷ The very same can be said about proportionality. Though a consensus among international lawyers accepts that necessity and proportionality act as constraints on any permissible use of force, that consensus quickly dissolves once these terms are given more substance through definition or application.¹²⁸

Scholars generally agree that necessity includes the idea that there are no alternative means of redressing the situation and peaceful avenues have been tried in good faith, but to no avail.¹²⁹ This understanding of necessity harks back to the Just War Theory’s requirement of last resort.

124. Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 115, 116 (2010) (emphasis added) (quoting John Barry, *The Day We Stopped the War*, NEWSWEEK (Jan. 19, 1992, 7:00 PM), <http://www.newsweek.com/day-we-stopped-war-197642>).

125. *Id.* (quoting Barry, *supra* note 124).

126. For more information on the Gulf War, see generally, *Persian Gulf War*, HISTORY.COM, <http://www.history.com/topics/persian-gulf-war>. (last visited June 25, 2017).

127. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 429 (1963).

128. For a comprehensive and insightful analysis of the different theories underpinning interpretations of “self-defense,” “necessity” and “proportionality,” see Kretzmer, *supra* note 106.

129. See YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 202, 231 (3d ed. 2005); NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 81 (2010); TOM RUYLS, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 95 (2010) [hereinafter RUYLS, EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE]; cf. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620,

Yet beyond this baseline requirement, which is often satisfied,¹³⁰ necessity analysis becomes more complicated as it is understood to include two additional possible questions. The first focuses on whether the use of force itself was necessary; the second focuses on whether the specific measures taken, or the full scope of the use of force, were necessary. Debates around the first question return us to the “gap theory” dilemma and to whether an attack must meet a certain threshold of severity in order to justify an armed response altogether.

Debates around the second question arise from the need to delineate the permissible goals of war, or, in other words, to answer the question, necessary for what? Repelling an armed invasion is an easy case;¹³¹ thwarting an ongoing attack is similarly straightforward. Harder cases on which scholars disagree include the deterrence of future attacks, the general weakening of enemy forces, or even regime change.¹³²

And just as the application of the principle of necessity requires us to agree on a permissible goal of war, so too does proportionality require us to agree on what harms—or threats—can be legitimately prevented through the use of force. Necessity and proportionality are thus in effect intertwined and are frequently considered jointly.¹³³ And though proportionality often takes a more central place in debates around the use of force, it is no more clearly defined than necessity.

For a minority of scholars, if the initial attack is severe enough, self-defense allows the victim to seek the “total defeat” of the aggressor, including counter invasion and complete destruction of the other side’s military.¹³⁴ A more common understanding of proportionality, however, demands a closer correlation between the force used and the original threat. Repelling a particular threat might thus mean limits on the types of weapons used, the geographical area of response, and the target of the retaliatory (or

1635–37 (1984) (not requiring that a state first exhaust all peaceful means, but noting that the actions still must be reasonable).

130. See OLIVIER CORTEN, *THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW* 481 (Christopher Sutcliffe trans., 2012); RUYS, *EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE*, *supra* note 129, at 97–98.

131. See RUYS, *EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE*, *supra* note 129, at 98; see also DINSTEIN, *supra* note 129, at 231.

132. Green & Grimal, *supra* note 123, at 324.

133. See CORTEN, *supra* note 130, at 488–98; see also Schachter, *supra* note 129, at 1637.

134. See DINSTEIN, *supra* note 129, at 234. See generally D.N. Kolesnik, *The Development of the Right to Self-Defence*, in *THE NON-USE OF FORCE IN INTERNATIONAL LAW* 153 (W.E. Butler ed., 1989).

preemptory) action.¹³⁵ In some formulations of proportionality, the victim's response is measured against the events leading up to its response, meaning the actual attacks the victim has suffered;¹³⁶ in others, the response is measured up against the future threats that the aggressor poses.¹³⁷

And so, we find that even in the clearer cases of a justified self-defense action, we cannot agree on the permissible goal of the war, and existing rules do not help much in delimiting their boundaries. Could the coalition declare victory after Iraq withdrew from Kuwait? And did the war actually end then? Recall that in 2003, some American commentators argued that the May invasion was simply a continuation of the 1991 war and thus did not require a new Security Council authorization. This was far from a universally accepted position, but one that did gain some traction among international lawyers.¹³⁸

D. Armed Attack—By Whom?

The attacks of September 11, 2001 revived a longstanding debate over the instruction of article 51 where the perpetrators of an armed attack are non-state actors.¹³⁹ Recall, article 51 merely says “if an armed attack occurs” without assigning the attack to any particular actor, state or non-state. International lawyers agree at the extreme ends of the question: an armed attack by a non-state armed group that operates on behalf of a state is considered an armed attack by that state itself.¹⁴⁰ An attack that is launched by a private individual, operating on her own initiative, cannot be an “armed

135. AVRA CONSTANTINO, THE RIGHT OF SELF-DEFENCE UNDER CUSTOMARY INTERNATIONAL LAW AND ARTICLE 51 OF THE UNITED NATIONS CHARTER 162, 170–71 (2000). I mention “preemption” here only in the functional sense as a matter of both *jus ad bellum* (in the narrowest category that might be acceptable to a significant number of international lawyers) and *jus in bello*, without engaging the debate over the legality of preemptive strikes.

136. Kretzmer, *supra* note 106, at 237 (citing ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM 165–66 (1993)); Randelzhofer, *supra* note 88, at 805.

137. Kretzmer, *supra* note 106, at 270.

138. On this view and its criticisms, see generally Andru E. Wall, *Was the 2003 Invasion of Iraq Legal?*, 86 INT'L L. STUD. 69 (2010).

139. Jonathan Somer, *Acts of Non-State Armed Groups and the Law Governing Armed Conflict*, AM. SOC'Y INT'L L. (Aug. 24, 2006), <https://www.asil.org/insights/volume/10/issue/21/acts-non-state-armed-groups-and-law-governing-armed-conflict>.

140. *Id.*

attack” in the language of article 51.¹⁴¹ A debate surrounds the mid-spectrum of organized paramilitary groups that do not operate under the clear direction of a national government but enjoy varying levels of freedom of action within a state’s territory: Can such groups launch “armed attacks” for purposes of article 51? And how can the victim state respond?

With the rise of transnational terrorism, some scholars have advocated a more lenient test of attribution, under which states could be held accountable for a wider range of nongovernmental actions in their territory.¹⁴² In the context of cyberspace, there has even been proposal to hold states “strictly liable” for the harms caused by any attack that emanates from their territory.¹⁴³ None of these proposals have been officially adopted in any international instrument or ruling.

Without attribution, there is a wide agreement that no military action may be taken against the foreign state itself (meaning, government forces, objects, etc.). But what about a military action that is directed against the threatening non-state actor within the foreign state’s territory?

If the foreign state’s government consents to such military action, the military intervention is lawful and does not require further action by the Security Council (although for political reasons, in some cases, the foreign powers seek such resolutions, as was the case in the French operation in Mali against Islamist rebels in that country).

Foreign military intervention stands on shakier grounds where the territorial state does not grant explicit consent to the operation. The United States, Russia, Israel, and Turkey have long held that a state that falls victim to a terrorist attack may take military action to combat future attacks in another state’s territory, provided that the territorial state is “unable or unwilling” to prevent the threat itself.¹⁴⁴ A recent study shows that thirteen countries have now either explicitly or implicitly endorsed the doctrine of “unable or unwilling” in their military operations, many in the context of engaging in military attacks on the Islamic State of Iraq and Syria (ISIS) in Syria in recent years.¹⁴⁵ At least ten other countries have seemed to rely on it,

141. RUYTS, *EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE*, *supra* note 129, at 371.

142. For a comprehensive doctrinal and policy analysis of this view, see TAL BECKER, *TERRORISM AND THE STATE: RETHINKING THE RULES OF STATE RESPONSIBILITY* (2006).

143. Levi Grosswald, *Cyber Attribution Matters Under Article 51 of the U.N. Charter*, 36 *BROOK. J. INT’L L.* 1151, 1152–53 (2011).

144. Elena Chachko & Ashley Deeks, *Who is on Board with “Unwilling or Unable”?*, *LAWFARE* (Oct. 10, 2016, 1:55 PM), <https://www.lawfareblog.com/who-board-unwilling-or-unable>.

145. *Id.*

though these countries have not provided any legal justification for their actions.¹⁴⁶

Notwithstanding this growing state practice, a broad coalition of states, the ICJ, and numerous international lawyers reject the “unable or unwilling” doctrine, claiming instead that unless the attacks of the non-state actor can be attributed to a state (and demanding a very high degree of control by the state over the non-state actor to establish such attribution), any use of force by the victim state outside its own territory will be a violation of article 2(4). Opponents of the doctrine argue that it has no legal basis as a matter of positive law.¹⁴⁷ Moreover, they argue, from a normative perspective, the international community’s interest in peace demands an expansive reading of the prohibition on the use of force and a minimalist reading of the article 51 exception.¹⁴⁸

Supporters of the “unable or unwilling doctrine” justify the doctrine on multiple grounds. Some argue that the doctrine has deep roots in the international law of neutrality in times of war.¹⁴⁹ Others claim that attacking

146. *Id.* Deeks has offered a comprehensive study of the legal pedigree of the “unable or unwilling” doctrine in Ashley Deeks, “Unwilling or Unable”: *Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT’L L. 483 (2012).

147. See Constantine Antonopoulos, *Force by Armed Groups as Armed Attack and the Broadening of Self-Defence*, 55 NETH. INT’L L. REV. 159, 169–71 (2008); Christine Gray, *President Obama’s 2010 United States National Security Strategy and International Law on the Use of Force*, 10 CHINESE J. INT’L L. 35, 46 (2011) (“Despite the claims of some commentators, the use of force against non-State actors in response to past terrorist attacks or to prevent future attacks is far from being clearly established as lawful self-defense, even when the territorial State is unable or unwilling to act against the terrorists.”); Dire Tladi, *The Nonconsenting Innocent State: The Problem with Bethlehem’s Principle 12*, 107 AM. J. INT’L L. 570, 576 (2013) (“[‘Unwilling or unable’] is based on an erroneous assessment of customary international law and state practice and on an acontextual interpretation of Article 51.”); see also Eric Posner, *Obama’s Drone Dilemma*, SLATE (Oct. 8, 2012, 3:32 AM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2012/10/obama_s_drone_war_is_probably_illegal_will_it_stop_.html (arguing that the “unwilling or unable” test violates the U.N. Charter and its use “whittle[s] away at whatever part of the law on United Nations use of force blocks U.S. goals”).

148. Mary Ellen O’Connell, *Dangerous Departures*, 107 AM. J. INT’L L. 380, 383 (2013) (arguing that there is no authority for “the assertion that states may resort to force against states ‘unable or unwilling’ to control terrorism on their territory,” nor has any state ever accepted such a test). Over a decade earlier, however, O’Connell did write that when a state is attacked by non-state actors, “defense may be taken to the territory of the failed or impotent state.” Mary Ellen O’Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 901 (2002).

149. See Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT’L HUMANITARIAN L. 3, 22–23 (2010) (“[The ‘unable or unwilling’ test], notably, is consonant in important respects with the law of

a non-state actor when the host state is unwilling or unable to take action is a permissible exercise of article 51 and its guarantee of a state's right to self-defense.¹⁵⁰ A variation on this view holds that the "unwilling or unable" test can be located in the necessity requirement of the law of self-defense, which has been read into article 51.¹⁵¹ A minority view rejects the notion that article 51 can be read to include attacks against non-state actors emanating from another state, but argues that the limited, temporary use of force against a non-state actor is not actually prohibited by article 2(4) to begin with.¹⁵²

Both camps find support for their claims in legal argumentation, individual opinions of ICJ judges, and strategic assessments. As things currently stand, the tide seems to be rising on the side of the supporters; though even they concede, the exact terms and conditions upon which a state can be deemed "unable or unwilling" to tackle a terrorist threat and upon which a victim state has a right to use military force are far from clear or established.¹⁵³

neutrality."); Eveylon Corrie Westbrook Mack, *Remotely Piloted Aircrafts (RPAs) in Targeted Killing Operations: The United States is No Lone Wolf*, 26 FLA. J. INT'L L. 447, 474–75 (2014).

150. Deeks, *supra* note 146, at 496–503; *see also* DINSTEIN, *supra* note 129, at 244–47; Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 250 (2010) (arguing that the U.S. has a right under article 51 to use drones in Pakistan, without consent and in self-defense, to target Al Qaeda and Taliban fighters).

151. *See* LUBELL, *supra* note 129, at 67 (noting that "the requirement of necessity dictates the need to first establish that the territorial state itself is unwilling or unable to put an end to the armed attacks"); Raphaël van Steenberghe, *Self-Defence in Response to Attacks by Non-State Actors in Light of Recent State Practice: A Step Forward?*, 23 LEIDEN J. INT'L L. 183, 202 (2010) (arguing that a state "is only required to prove the existence of a link between the non-state actors and the 'harbouring' state, consisting in at least the inability or unwillingness of the latter to stop the activities of the former, and that such requirement does not stem from the responsibility rules but from the condition of necessity of the law of self-defence"); Kimberley N. Trapp, *Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors*, 56 INT'L & COMP. L.Q. 141, 147 (2007); Gareth D. Williams, *Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the "Unwilling or Unable" Test*, 36 U. NEW SOUTH WALES L.J. 619, 620 (2013) ("Simply put, if a host state is willing and able to counter the non-state actor within its territory, then the use of force by the victim state will not be necessary.").

152. Ivan Shearer, *A Revival of the Just War Theory?*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 1, 9, 15 (Michael N. Schmitt & Jelena Pejic eds., 2007); Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L.J. 145, 166 (2000) ("The argument is simply that the use of limited, temporary, [sic] force to eliminate a terrorist threat does not violate the territorial integrity or political independence of the state in which the terrorists are being harbored, and is otherwise consistent with the United Nations Charter.").

153. Deeks, *supra* note 146, at 503–04; Monica Hakimi, *Defensive Play Against Non-State Actors: The State of Play*, 91 INT'L L. STUD. 1, 2–4 (2015) (arguing that there is a legal

E. The Temporal Requirement: Anticipatory Self-defense

The exact scope of article 51 of the U.N. Charter has long been debated in the context of the right of states to respond with military force to the threat of armed attack from another state, but before having actually suffered one.¹⁵⁴ The wording of article 51 suggests that an actual armed attack must occur before a state can respond in self-defense, and indeed, a minority among international lawyers adopt a strict textual reading of the Charter that precludes any preemptive use of force, even if defensive in purpose. Nevertheless, a broad consensus holds that where a threat is sufficiently grave and imminent, customary international law does allow a state to use proportionate and necessary force to fend off an imminent danger.¹⁵⁵ This understanding harks back to the doctrine first formulated by Daniel Webster who was Secretary of State during the *Caroline* incident of 1837. The *Caroline* was an American ship, used to smuggle arms and supplies to Canadian rebels. While moored on the American side of the Niagara Falls, it was boarded by British forces who proceeded to arrest some of the sailors, set the ship on fire, and send her adrift down the falls. In his seminal letter of protest to the British governor of Canada, Secretary of State Daniel Webster posited that anticipatory military action was legitimate where the necessity of self-defense was “instant, overwhelming, leaving no choice of means, and no moment of deliberation.”¹⁵⁶

No consensus, however, surrounds a more expanded understanding of preemptive wars in response to a non-imminent threat. Some classical Just

justification for defensive force against non-state actors, but because the current legal test is so vague and not completely accepted, there has been “a sizeable gap between the norms that are widely articulated as law and the ones that reflect the operational practice”).

154. See, e.g., DINSTEIN, *supra* note 129, at 165–69, 182–87. See generally MICHAEL DOYLE, STRIKING FIRST: PREEMPTION AND PREVENTION IN INTERNATIONAL CONFLICT (Stephen Macedo ed., 2008).

155. U.N. High-Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, ¶ 188, U.N. Doc. A/59/565 (Dec. 2, 2004) (“[A] threatened State, according to long established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it, and the action is proportionate.”); see also DOYLE, *supra* note 154, at 3.

156. See Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT’L L. 493, 497 (1990); see also *id.* at 494–96 (discussing the *Caroline* incident); John Bassett Moore, *Destruction of the ‘Caroline,’* in 2 DIGEST OF INTERNATIONAL LAW 409, 412 (1906). For the view that the Webster formulation survived the Charter, see THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 107 (2002). Cf. CHRISTINE D. GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 112, 130 (2004) (claiming that even anticipatory self-defense is of “doubtful status”).

War writers recognized the validity of preemptive use of force. Gentili, for instance, held that as the preservation of the state should be a primary concern, sovereigns were entitled to use force to deter threats even before they had fully materialized: “[n]o one ought to wait to be struck, unless he is a fool.”¹⁵⁷ Grotius forwarded a yet more expanded view of preventive action, holding that war might be justified not only as punishment for past wrong but also preemptively, “to prevent some future Mischief.”¹⁵⁸ Others advocated greater caution. Emerich de Vattel, for instance, reiterated the requirement of war as a last resort, and further elucidated the conditions for war against a threatening sovereign.¹⁵⁹ If a prince is “clearly entertaining designs of oppression and conquest,” he claimed, then force may be used to prevent him from doing so.¹⁶⁰ At the same time, aggrandizement of another state (presumably, one that does not threaten a particular state) does not give just cause to launch a war against it,¹⁶¹ even though other sanctions (such as revoking commercial privileges) can be used. Pufendorf was even more skeptical. He held that if a neighboring state had injured other states, there was no justification for a preemptive attack on the neighboring state, unless there was clear evidence that the aggressive state possessed a “Real Design” to attack.¹⁶²

Under the auspices of the League of Nations, there was some effort to prohibit not only the threat of use of force, but also preparatory acts such as arms procurement.¹⁶³ This effort never materialized, either under the League or under its successor organization. In fact, as the Charter sought to replace

157. 2 H. GROTIUS, *OF THE RIGHTS OF WAR AND PEACE IN THREE VOLUMES* 506 (1715) *see also* RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* 18 (1999) (discussing Grotius’s views).

158. GROTIUS, *supra* note 157, at 506.

159. Béla Kapossy & Richard Watmore, *Introduction* to EMER DE VATTEL, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY*, at xix (Béla Kapossy & Richard Watmore eds., 2008).

160. 2 EMERICH DE VATTEL, *THE JUST CAUSES OF WAR* (1758), *reprinted in* *THE THEORY OF INTERNATIONAL RELATIONS: SELECTED TEXTS FROM GENTILI TO TREITSCHKE* 113, 120 (M.G. Forsyth et al. eds., 2008).

161. EMER DE VATTEL, *WAR IN DUE FORM* (1758), *reprinted in* *THE ETHICS OF WAR*, *supra* note 20, at 510.

162. TUCK, *supra* note 157, at 161.

163. BOURQUIN, *supra* note 83, at 330–31 (remarks of Professor René Cassin) (“The question is what the Council . . . can do regarding a State which, without committing an aggression, should perform repeated acts in violation of international engagements, notably of a collective engagement concerning armaments. It will be necessary to provide special sanctions for this offence.”).

the unilateral use of force with the collective action of the Security Council, preemptive force by individual states against anything but the most imminent and grave threat became legally dubious.¹⁶⁴

Yet, equally transformative, at least as a strategic matter, were the advent of weapons of mass destruction and the proliferation of non-state actors with the capacity and willingness to strike from great distances. The terrorist attack on the United States on September 11th, 2001 led the United States to hold that in a world of non-state actors and unconventional weapons, military strikes were insufficient effectively to defuse the new threat to national security. Moreover, as the threat was no longer an organized armed invasion into another territory, but remotely-delivered attacks or clandestinely-infiltrated attackers, a potential victim state could not wait until the threat had actually materialized or was even very imminent. Instead, proactive action that blurred the lines between defense and aggression had to be pursued.

Taking the idea of preemptive strikes farther away from Webster's formulation, the doctrine was nonetheless supported by a number of contemporary scholars, some even calling for international recognition of "a duty to prevent."¹⁶⁵

Despite the habitual association of this expansive reading of the right to engage in anticipatory self-defense with President Bush, who became, on account of it, the focus of harsh criticism from around the globe, American presidents before Bush, as well as leaders of other countries have long advocated similar views.¹⁶⁶ At the NATO summit in Prague in November 2002, NATO adopted Military Committee (MC) 472, *NATO's Military Concept for Defence Against Terrorism*, a document that implicitly supported the option of preemptive strikes against terrorist threats.¹⁶⁷ Even the European

164. See G.A. Res. 60/1, at 21–22 (Sept. 16, 2005).

165. See generally Matthew C. Waxman, *The Use of Force Against States that Might Have Weapons of Mass Destruction*, 31 MICH. J. INT'L. L. 1, 3 (2009) (arguing that pre-emptive force "is justified when a reasonable state would conclude a WMD threat is sufficiently likely and severe that forceful measures are necessary"); Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, FOREIGN AFF., Jan.–Feb. 2004, at 136, 136–37 (arguing in favor of states' duty to prevent security and humanitarian disasters, even if at the expense of others' sovereign integrity).

166. Robert J. Delahunty, *Symposium on Reexamining the Law of War: Paper Charter: Self-Defense and the Failure of the United Nations Collective Security System*, 56 CATH. U. L. REV. 871, 876 (2007) and references therein; see also ALAN DERSHOWITZ, PREEMPTION: A KNIFE THAT CUTS BOTH WAYS (2006).

167. The document stated that "NATO's actions should . . . work on the assumption that it is preferable to deter terrorist attacks or to prevent their occurrence rather than deal with their consequences" *NATO's Military Concept for Defence Against Terrorism*, NORTH ATLANTIC

Council's Security Strategy report asserted that, "we should be ready to act before a crisis occurs. Conflict prevention and threat prevention cannot start too early."¹⁶⁸ And in a section of the document titled, "Policy Implications for Europe," it added:

[We need to be m]ore active in pursuing our strategic objectives. This applies to the full spectrum of instruments for crisis management and conflict prevention at our disposal, including political, diplomatic, military and civilian, trade and development activities. . . . We need to develop a strategic culture that fosters early, rapid, and when necessary, robust intervention.¹⁶⁹

The U.N. High-Level Panel on Threats, Challenges, and Change, on the other hand, recognized the legitimacy of a preemptive action under the *Caroline* conditions, finding that "a threatened State, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate."¹⁷⁰ Still, it warned against any preventive action against more remote threats: "if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to."¹⁷¹ The rationale, explained the Panel, is that "in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention . . . is simply too great for the legality of unilateral preventive action"¹⁷²

F. Humanitarian Intervention

For some classical Just War theorists, from Seneca to Grotius and Gentili, a sovereign was just in waging war not only in the face of an injury that he or his subjects suffered, but also for injuries inflicted by another sovereign against his own subjects. In Gentili's poignant words, "the subjects of others do not seem to me to be outside of that of kinship of nature and the society

TREATY ORG., <http://www.fransamaltingvongeousau.com/documents/dl2/h3/2.3.25.pdf> (last updated Apr. 14, 2005).

168. EUR. COUNCIL, A SECURE EUROPE IN A BETTER WORLD: EUROPEAN SECURITY STRATEGY 7 (2003), <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>.

169. *Id.* at 11.

170. U.N. High-Level Panel, *supra* note 155, at 54 (emphasis omitted).

171. *Id.* at 55.

172. *Id.*

formed by the whole world.”¹⁷³ Both he and Grotius cited with agreement Seneca’s claim from the first century that “[i]f a man does not attack my country, but yet is a heavy burden to his own, and although separated from my people he afflicts his own, such debasement of mind nevertheless cuts him off from us.”¹⁷⁴

The legal right to punish offenses committed towards others was once a functional and moral imperative. It was necessary to preserve order in a society lacking any higher authority other than God. Gentili introduced the concept of accountability by the sovereign, which was essential “unless we wish to make sovereigns exempt from the law and bound by no statutes and no precedents”¹⁷⁵ It was also a moral, natural right of sovereigns to punish an offender for “sins against human nature.”¹⁷⁶ Grotius also believed that in practice, this form of punishment would likely be more moderate, as the punisher acts as a disinterested arbiter of a legal dispute rather than as an immediately affected and partial party.¹⁷⁷ Vattel, too, believed that war on behalf of the oppressed and those unjustly attacked was not only permissible but also praiseworthy.¹⁷⁸

Even for those who had a more constricted view of war as punishment, there was some room for war in the aid of the oppressed. Pufendorf rejected Grotius’ view, and held that men could only retaliate with force against those who had injured them, not for general breaches of the laws of nature.¹⁷⁹ Still, he agreed that intervention in support of the subjects of a foreign ruler might be permissible when the subjects request support and are suffering “insupportable Tyranny and Cruelties” that entitles the subjects to take up arms against their own government.¹⁸⁰ Interestingly, he added that once in the course of retaliation, a man (or sovereign) could use any violence necessary to force the compensation of the aggressor.¹⁸¹ Wolff, writing almost a century

173. Theodor Meron, *Common Rights of Mankind in Gentili, Grotius and Suarez*, 85 AM. J. INT’L L. 110, 115 (1991) (quoting 2 ALBERICO GENTILI, DE IURE BELLI LIBRI TRES 74 (J.C. Rolfe trans., Clarendon Press 1933) (1589)).

174. 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 506 (Francis W. Kelsey trans., Clarendon Press 1925) (1625).

175. Meron, *supra* note 173, at 115.

176. Blane & Kingsbury, *supra* note 62, at 252.

177. *Id.* at 255.

178. VATTEL, *supra* note 159, at 346.

179. TUCK, *supra* note 157, at 158–59.

180. *Id.* at 161.

181. *Id.* at 158.

later, went further than Pufendorf and objected to the entire notion of intervention on behalf of foreign subjects, even if oppressed or tyrannized.¹⁸²

Assertions of a right to intervene on behalf of oppressed citizens faced increased challenges as the norms of sovereign equality and non-intervention gained traction during the eighteenth and nineteenth centuries. With the rise of positivism, the decline of natural law, and the replacement of ruling dynasties with national leaders, the normative status of humanitarian interventions grew more contested, sparking debates among scholars and policymakers over its juridical basis and practical application.¹⁸³

Similar debates continued into the early twentieth century, with critics opposing the newly-introduced term, “humanitarian interventions,” either on the jurisprudential ground that no right for such interventions existed or on the pragmatic grounds of its questionable utility. Notwithstanding many gradations, to support a right of humanitarian intervention most writers demanded a nexus between the rights violated and an internal conflict that constituted a general danger to others outside the state.

Debates over the legitimacy and desirability of humanitarian interventions as well as the emphasis on prevention persisted into the U.N. Charter era, following much the same lines as earlier versions. Teleological arguments that point at the Charter’s guarantee of human rights and freedoms were countered by the Charter’s promise of sovereign equality and non-intervention in the internal affairs of any member state. Opponents of humanitarian interventions could now rely, alongside any moral or pragmatic arguments, on the plain language of article 51, which—unless stretched, turned, and pulled—does not seem to allow for any armed intervention without a Security Council authorization.

The debates over humanitarian intervention came to a head in the aftermath of NATO’s military operation against the Former Republic of Yugoslavia in the 1999 Kosovo war. “Operation Allied Force” was designed to force Serbian forces to withdraw from Kosovo and protect Kosovars from what was claimed at the time to be a genocide carried out by Slobodan Milosevic and his Serb armed forces.¹⁸⁴ NATO’s operation was never

182. *Id.* at 189–90.

183. For a discussion of the emergence of the terminology of “humanitarian intervention” and similar concepts in the nineteenth century, see SIMON CHESTERMAN, *JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* 23–26 (2001), which argues that military interventions in the late nineteenth and early twentieth centuries, although sometimes portrayed as early forms of humanitarian interventions, were nothing of the like.

184. *The Kosovo Air Campaign (Archived): Operation Allied Force*, NORTH ATLANTIC TREATY ORG. (Apr. 7, 2016), http://www.nato.int/cps/bu/natohq/topics_49602.htm.

authorized by the Security Council, nor was such an authorization sought given the expectation that Russia, and perhaps China, would veto it. After seventeen days of air strikes, an agreement was reached by which Milosevic withdrew his forces and the United Nations set up an Interim Administration Mission in Kosovo.¹⁸⁵

In the legal and political turmoil that followed the Kosovo intervention, the Canadian government heeded the call by U.N. Secretary General Kofi Annan to explore the status and conditions of humanitarian interventions, and established an international commission to study the matter.¹⁸⁶ The International Committee on State Sovereignty and Responsibility issued its report, finding that the Kosovo operation was “illegal but legitimate.”¹⁸⁷ It further suggested a reconceptualization of the idea of “humanitarian interventions” as a fulfillment of the “responsibility to protect.”¹⁸⁸ That responsibility, the commission found, lies first and foremost with every sovereign state with regard to its own citizens.¹⁸⁹ If, however, a state fails to prevent genocide, ethnic cleansing, war crimes, or crimes against humanity on a large scale—the international community should intervene. The best intervention is one that is sanctioned by the Security Council. Still, the Commission notes, if the Security Council is deadlocked, a coalition of states (rather than individual states) may be justified in taking action even without the Security Council’s blessing.¹⁹⁰

The ICSSR report initially received Secretary General’s Annan’s blessing, but the General Assembly later rejected it when invited to review the matter. In a rare unity among North and South, the developed and developing countries, small states and great powers, the General Assembly demanded that any military intervention for the protection of citizens from their own government be authorized by the Security Council or else amount to unlawful aggression. The Security Council thereafter authorized one such intervention—into Libya—in 2011, but did not authorize one in a number of other plausible cases, including the war in Syria.

The degree to which the General Assembly’s resolution has been accepted by all states as prohibiting all exercises of humanitarian intervention

185. *15 Years On: Looking Back at NATO’s “Humanitarian” Bombing of Yugoslavia*, RT NEWS (Mar. 24, 2014), <https://www.rt.com/news/yugoslavia-kosovo-nato-bombing-705/>.

186. INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 81 (2001).

187. INDEP. INT’L COMM’N ON KOSOVO, THE KOSOVO REPORT 4 (2000).

188. *Id.* at 137.

189. *Id.*

190. *Id.* at 193.

without Security Council endorsement is debatable. The United Kingdom, for instance, has stated that in rare and extreme cases, it believes that the Charter, read as a whole, should be interpreted as allowing military interventions for humanitarian purposes.¹⁹¹ And very recently, the United States struck a Syrian air force base in retaliation for the Syrian government's chemical attack on the town of Idlib, justifying it on the basis of "national security."¹⁹² International law commentators generally agreed that the attack on Syria was hard to reconcile with the U.N. Charter unless one adopted a humanitarian intervention exception as an expansion—or addition—to article 51.¹⁹³

Moreover, even if the General Assembly's resolution did settle the legal status of humanitarian interventions under contemporary *jus ad bellum*, it is worth noting that as a political and strategic matter states have continued to invoke the humanitarian needs of local populations as a justification—even if not the sole justifications—for their military operations. The plight of the Afghan population, especially of women and girls, under the Taliban regime was a recurrent theme in U.S. administration officials' justification of the invasion of Afghanistan in October 2001.¹⁹⁴ Saddam Hussein's chemical attacks on the Kurdish minority and systematic abuse of human and civil rights were frequently invoked in American rhetoric surrounding the invasion of Iraq in 2003.¹⁹⁵ Such humanitarian arguments may well have been directed at garnering greater domestic and international support for the wars much more than providing the legal basis for them. Yet, as I shall argue later on,

191. Jack Goldsmith, *UK Legal Position on Humanitarian Intervention in Syria*, LAWFARE (Aug. 29, 2013), <https://www.lawfareblog.com/uk-legal-position-humanitarian-intervention-syria>.

192. Michael R. Gordon, Helene Cooper & Michael D. Shear, *Dozens of U.S. Missiles Hit Air Base in Syria*, N.Y. TIMES (Apr. 6, 2017), https://www.nytimes.com/2017/04/06/world/middleeast/us-said-to-weigh-military-responses-to-syrian-chemical-attack.html?_r=0.

193. John Bellinger, *What Was the Legal Basis for the U.S. Air Strikes Against Syria?*, LAWFARE (Apr. 6, 2017), <https://www.lawfareblog.com/what-was-legal-basis-us-air-strikes-against-syria>; Ryan Goodman, *Humanitarian Military Options for Syrian Chemical Weapons Attack: "Illegal but Not Unprecedented,"* JUST SECURITY (Apr. 6, 2017), <https://www.justsecurity.org/39658/humanitarian-military-options-syrian-chemical-weapons-attack-illegal-unprecedented/>. *But cf.* Harold Hongju Koh, *Not Illegal: But Now the Hard Part Begins*, JUST SECURITY (Apr. 7, 2017), <https://www.justsecurity.org/39695/illegal-hard-part-begins/>.

194. *Women in Afghanistan: The Back Story*, AMNESTY INT'L (Oct. 25, 2013), <https://www.amnesty.org.uk/womens-rights-afghanistan-history>.

195. Edward Wong, *Saddam Charged with Genocide of Kurds*, N.Y. TIMES (Apr. 5, 2006), <http://www.nytimes.com/2006/04/05/world/05iht-saddam.html>.

humanitarian concerns also became the stated goals of both wars, serving what the United States believed to be its own strategic interests.

In 2014, the United States launched airstrikes against ISIS in Iraq, following the armed group's attacks on the Yazidi minority there.¹⁹⁶ With Iraq giving its consent to the strikes, the appeal to humanitarian intervention as a legal justification was not necessary.¹⁹⁷ Still the plight of the Yazidi people was very much emphasized as President Obama explained his actions to both domestic and international—receptive—audiences.¹⁹⁸

G. Intervention for Democracy

In 1991, a military junta in Haiti overthrew the elected President Jean-Bertrand Aristide in a military coup d'état.¹⁹⁹ Three years later, the United States, in Operation Uphold Democracy, worked successfully to secure a Security Council authorization to use force in order to restore the elected president to power.²⁰⁰ With U.S. navy, air force, and coast guard forces surrounding the island and ready for action, the military regime agreed to withdraw and allow Aristide to resume his office.²⁰¹

Without a Security Council resolution, the status of Operation Uphold Democracy would have been legally dubious. Throughout the Cold War, both sides of the Iron Curtain argued that they had a right to intervene militarily in case the government of any of their satellite nations was overthrown, but there was hardly any international legal consensus that such intervention would be lawful.

Still, the political pull of “intervention for democracy” has grown even stronger after the collapse of the Soviet Union and has featured prominently in arguments in support of the invasions of both Afghanistan and Iraq. Recall that the American attitude following the 9/11 attacks advocated a proactive stance against terrorists and the rogue states that support them.²⁰² The proactive action could not, so the U.S. doctrine held, be limited to foiling

196. *US Begins Air Strikes Against ISIS Targets in Iraq, Pentagon Says*, GUARDIAN (Aug. 8, 2014), <https://www.theguardian.com/world/2014/aug/08/us-begins-air-strikes-iraq-isis>.

197. *Id.*

198. *Id.*

199. WALTER E. KRETCHIK ET AL., *INVASION, INTERVENTION, “INTERVASION”: A CONCISE HISTORY OF THE U.S. ARMY IN OPERATION UPHOLD DEMOCRACY* 210 (1998).

200. *Id.* at 213.

201. *Id.* at 214–17.

202. THE WHITE HOUSE, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* 7 (2002), <http://nssarchive.us/NSSR/2002.pdf> [BUSH, NATIONAL SECURITY STRATEGY].

individual attacks and disabling individual attackers.²⁰³ Rather, the conditions that allowed for attacks and attackers to threaten the United States had to be changed, including by a comprehensive overhaul of the domestic structures of territorial states.²⁰⁴ Just like the arguments drawn from the idea of humanitarian intervention, the promise of bringing democracy to the Middle East became a stated justification—moral and political, if not legal—and a strategic goal of the U.S.-led coalition.

III. THE GOALS OF WAR—PAST AND PRESENT

In September 2016, Donald Trump commented on what he had believed the Iraq War deficiencies were: “We go in, we spent three trillion dollars. We lose thousands and thousands of lives, and then look what happens is we get nothing. You know, it used to be to the victor belong the spoils,” Trump said on NBC’s “Today Show.” “There was no victor there, believe me. There was no victory. But I always said, ‘Take the oil.’”²⁰⁵

Trump’s statements were quickly met by wide-ranging and vociferous criticisms, not least from international lawyers. “What he’s talking about is theft, pure and simple,” concluded professor Robert Goldman, a teacher of the laws of war at American University. “It would have been unlawful for the U.S. to take Iraq’s oil resources to benefit the United States during the occupation, and it would be even more clearly unlawful to try to take Iraqi oil now that Iraq has returned to full sovereignty,” observed John B. Bellinger III, the chief legal adviser to the State Department and the National Security Council under President George W. Bush.²⁰⁶ Nor did it help when Sean Spicer, the White House Press Secretary, clarified the president’s position as “[w]e’re going into a country for a cause. He wants to be sure America is getting something out of it for the commitment and sacrifice it is making.”²⁰⁷ Harvard Law School Professor Jack Goldsmith, who headed the Office of Legal Counsel under President Bush, said “basically what Trump has in mind—pillaging during occupation—is prohibited.”²⁰⁸

203. *Id.*

204. *Id.* at 6–7.

205. Robin Wright, *Donald Trump, Pirate-In-Chief*, NEW YORKER (Jan. 30, 2017), <http://www.newyorker.com/news/news-desk/donald-trump-pirate-in-chief>.

206. *Id.*

207. *Id.*

208. *Id.*

There can be no doubt that as a matter of international law, the United States could not have gone to war with the purpose of getting its hands on Iraqi oil. This much has been true not only under the modern *jus ad bellum*, but also under Just War Theory since its earliest articulations; a mere economic interest in the enemy's property could not have amounted to a just cause. With a just cause for a war, however, Just War Theory would have tolerated the confiscation of a vanquished party's resources as a way of securing appropriate reparations for either the injury that gave rise to the just cause or for the expenses of the war. Today, securing future reparations cannot be a legitimate goal of war under any reading of the U.N. Charter.²⁰⁹ In fact, when the Security Council established the U.N. Claims Commission to process claims arising out of Iraq's unlawful invasion and occupation of Kuwait (Iraqi payments were secured largely through oil proceeds), this was done with Iraq's own consent after the war was over. In this sense, the modern *jus ad bellum* has constrained what victory in war can entail for the victors, at least so far as any unilateral force is concerned.²¹⁰ And as a positive corollary, this constraint has also affected the incentives of going to war in the first place. "What happens is we get nothing" may be an effective warning against nonessential military adventures.

But the *jus ad bellum* and its reliance on the concept of defense against threats still leaves a wide margin of discretion in justifying the war and in determining and pursuing one's goals. Or in other words, in imagining what victory can and should achieve. Let us go back to Iraq. The U.S. administration went to great pains to justify the war on the basis of a combination of arguments, ranging from Iraq's violation of the post-Gulf War ceasefire agreements, through its supposed program of weapons of mass destruction (WMDs) and its connections to international terrorism, all the way to the Iraqi regime's systematic abuses of its own citizens' human rights. Each of these arguments was hotly debated among Americans and international actors alike. It would be fair to say that today, at least, there is a broad agreement that the United States did not have a legitimate ground under article 51 to invade Iraq.

This near-consensus was undoubtedly bolstered by the ultimate absence of an Iraqi program of WMDs. Moreover, even at the time that the allegations were made, most commentators (including inside the Administration)

209. As occupier of Iraq, the United States could have utilized Iraqi oil revenues to finance the occupation itself, but not for any independent purposes. *See* Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516; Hague Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.

210. Whether or not the Security Council could have ordered the seizing of oil wells as a way to ensure future compensation even during the war is an open question that I leave aside here.

doubted very much that any connection existed between Iraq and the 9/11 perpetrators.

Let us, for present purposes and for the sake of argument, assume that neither of these facts was true. What if Iraq did pursue WMDs and what if it did support international terrorism, including terrorism directed at the United States? In that case, what would it have meant for the United States to exercise its right of self-defense under article 51 (assuming there had not been a Security Council mandate to use force)? Could the U.S. have gone to war under the paradigms of anticipatory self-defense, support for terrorism, humanitarian intervention or even intervention for democracy?

Moreover, even if an article 51 justification could be found, what would have been the legitimate goals that the United States and its allies could have pursued and that upon their attainment the war had to end? Unlike the question of whether the United States had a lawful cause or not, it would be difficult to find a majority of lawyers agreeing on the question of what were the legitimate goals of the war; nor is it an easy question for any single international lawyer to answer. For policymakers, too, confident that the justification was there, defining the desired goals for the war has proven complex at the war's initiation and increasingly elusive as the war progressed.

For the Bush Administration, the combination of rogue states, WMDs, and non-state actors meant that self-defense now required change, rather than restoration of some *status quo*. While the Iraqi invasion of Kuwait could be reversed and Saddam Hussein's regime could be spared, combating the new threats could not allow for the existing domestic territorial structures to endure; change was needed. This change, in turn, required an articulation of victory that went well beyond military terms. Indeed, the first National Strategy issued under President Bush included political, economic, and social goals no less than military ones.²¹¹ The spread of democracy, human rights, and economic development were added to reactive and anticipatory military strikes alike as measures of national defense.

This was the message President Bush sent to American and Iraqi audiences. In a national address to the nation in the lead-up to the war, the president said the following to the Iraqi people:

If we must begin a military campaign, it will be directed against the lawless men who rule your country and not against you. As our coalition takes away their power, we will deliver the food and medicine you need. We will tear down the apparatus of terror and we will help you to build a new Iraq that is prosperous and free. In

211. NAT'L SEC. COUNCIL, NATIONAL STRATEGY FOR VICTORY IN IRAQ 3-4, 17-23 (2005) [hereinafter NATIONAL STRATEGY FOR VICTORY IN IRAQ].

a free Iraq, there will be no more wars of aggression against your neighbors, no more poison factories, no more executions of dissidents, no more torture chambers and rape rooms. The tyrant will soon be gone. The day of your liberation is near.²¹²

In November 2005, the National Security Council (NSC) published its National Strategy for Victory in Iraq document. The strategy quoted the president's pledge to bring democracy, the rule of law, and human rights to the country, and then defined victory in three stages:

- **Short term**, Iraq is making steady progress in fighting terrorists, meeting political milestones, building democratic institutions, and standing up security forces.
- **Medium term**, Iraq is in the lead defeating terrorists and providing its own security, with a fully constitutional government in place, and on its way to achieving its economic potential.
- **Longer term**, Iraq is peaceful, united, stable, and secure, well integrated into the international community, and a full partner in the global war on terrorism.²¹³

The NSC report further indicated that the path to victory requires changes in the security, political, and economic conditions in Iraq, and that “[p]rogress in each . . . reinforces progress in the other.”²¹⁴

The intertwining of the military, political, and economic spheres as components of what victory means in Iraq was not only an American vision. In a letter from then-Prime Minister Tony Blair to President Bush three days after the invasion (letters that were made public by the subsequent Chilcot Report on the United Kingdom's role in the Iraq war), Blair stated:

Your insight, which no-one has articulated better or more clearly is that post 9/11 our security is best guaranteed not just through traditional military and intelligence means, but by our values. More freedom in the world means more security So our fundamental goal is to spread our values of freedom, democracy, tolerance and the rule of law.²¹⁵

212. President George W. Bush, Televised Address to the Nation (CNN television broadcast Mar. 17, 2003).

213. NATIONAL STRATEGY FOR VICTORY IN IRAQ, *supra* note 211, at 1.

214. *Id.* at 2.

215. Letter from Tony Blair, Prime Minister, U.K., to George W. Bush, President, U.S. (Mar. 26, 2003), <http://www.telegraph.co.uk/news/2016/07/06/chilcot-inquiry-tony-blair-george-bush-letters/>.

By the time Barack Obama was campaigning for president, he articulated a much more modest goal for military operations in Iraq: “Victory in Iraq will not take place in a surrender ceremony . . . true success will take place when we leave Iraq to a government that is taking responsibility for its people.”²¹⁶

And yet, “a government taking responsibility for its own people” remained a vague and open-ended goal. As late as 2009, the Center for Strategic and International Studies (CSIS), an influential Washington, D.C.-based think tank, set out to define the objectives in Iraq as:

[E]ffective governance, economic security and development, and . . . something approaching a rule of law . . . find[ing] a workable approach to revitalizing Iraq’s petroleum sector . . . and creating the patterns of investment that can both develop the country and help unify it. It is a struggle to find security in dealing with neighbors like Iran, Syria, and Turkey, and to create a strategic partnership between Iraq and the United States that serves both countries without compromising Iraqi sovereignty.²¹⁷

Unattainable goals may never be just. Even under Just War Theory, the demand for a prospect of success suggested as much, although there was some debate among the different writers about it. Cajetan, for instance, ruled that war was only just if the prince could be almost certain of his victory; otherwise, he would be spilling lives and resources in vein.²¹⁸ Francisco Suarez, the last of the scholastics of the sixteenth century, thought that this level of certainty is both unattainable and impractical, and that a kind of balance must be struck between the necessity of the war and the prospects of success.²¹⁹

Contemporary writers have also considered the demand of plausible success as a moral requirement for a just war. Michael Walzer, for instance, limits the legitimate goals of war to those that can be reached while still remaining within the bounds of the necessity and proportionality requirements.²²⁰

Yet, while helpful as a conceptual moral boundary, these limitations do not exhaust the problem. For one thing, it is not at all clear that the requirement of success has endured into the Charter era as a matter of

216. President Barack Obama, Remarks in Washington, DC (July 15, 2008) (transcript available at <http://www.presidency.ucsb.edu/ws/index.php?pid=77643>).

217. Anthony H. Cordesman, *Iraq: Security and the Challenges of Lasting “Victory,”* CENT. FOR STRATEGIC & INT’L STUD. (Oct. 26, 2009), <http://csis.org/publication/iraq-security-and-challenges-lasting-victory>.

218. See *supra* note 54 and accompanying text.

219. See *supra* note 62 and accompanying text.

220. See generally MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (1977).

international law (as opposed to morality or ethics). It might be read into the principles of necessity and proportionality, as Walzer's moral argument suggests; but it might also be the case that once there is a just cause for the exercise of unilateral self-defense, a state is within its rights to defend itself militarily even if stands only a very small chance of succeeding.

For another, the requirement of success does not answer the question of what can or cannot comprise "self-defense." In other words, can civilian-political-economic-social goals ever be legitimate components of what effective defense against threats entails today? Unless the answer is a resounding "no," how can we ever be sure which of these goals was attainable and at what cost? And at what point must the "good enough" or "as good as it can get" determine the end of the war?

If distinguishing the question of the permissible goals of the Iraq war from its dubious justifications for that war feels like too contrived an exercise, let us shift our focus to the war in Afghanistan. Here, a substantial number of international lawyers—though by no means a consensus—would agree that the 9/11 attacks and the apparent collusion between Al Qaeda and the Taliban government both before and after the attacks gave the United States a just cause for invading Afghanistan. What were the legitimate goals of that war? Here, too, decision-makers and interested observers grappled with offering metrics of success.

With the Taliban government rejecting the American ultimatum and refusing to surrender the Al Qaeda leadership and shut down all Al Qaeda training camps, President Bush articulated a policy that equated those who harbor terrorists to terrorists themselves. He asserted that a friendly regime in Kabul was necessary for the U.S. to destroy the Al Qaeda network in Afghanistan. Once the Taliban regime was overthrown, the Administration and its international partners, with support from the United Nations, turned to nation building, with the goal of establishing a strong, central, democratic government.

The Obama Administration seemed to have focused on narrower military or paramilitary gains, though the elements of nation building remained part of its strategy, too. In various articulations, the Administration offered a mix of quantitative benchmarks (e.g., "[l]evel of militant-initiated violence," "[p]ercent of population living in districts/areas under insurgent control," and "Afghanistan's economic stability and development with emphasis on agriculture") and qualitative assessments ("[a]bility of the [Afghan National Security Forces] to assume lead security responsibility," "[p]ublic

perceptions of security,” and “[s]tatus of relations between Afghanistan and Pakistan”).²²¹

The 2010 National Security Strategy (NSS) offered still less ambitious goals than a prior NSS,²²² dropping economic development, and limiting the strategy objectives to more narrowly-tailored security components: “deny[ing] al-Qa’ida safe haven, deny[ing] the Taliban the ability to overthrow the government, and strengthen[ing] the capacity of Afghanistan’s security forces and government so that they can take lead responsibility for Afghanistan’s future.”²²³

The question of how one would measure these qualitative benchmarks remained unclear, nor was this narrower tailoring accepted generally as a convincing measure of success. For many outside observers, for instance, civilian aspects of war-making—including human rights, gender equality, economic development, rule of law, a stable political system, and modern infrastructure—remained part and parcel of what the objectives of the ongoing campaign must be. Thus, the American Security Project, a public policy and research group in Washington D.C., enumerated “agricultural production” and “childhood literacy” among its nine metrics for assessing whether the United States was winning the war.²²⁴

The enmeshing of the political, military, social, and economic spheres was not a twenty-first century response to Islamic extremism or threats of weapons of mass destruction. The 1999, the North Atlantic Treaty Organization (NATO) countries launched Operation Allied Force designed to protect Kosovars from Serbia’s violent oppression. NATO’s operation sought “[to support] the political aims of the international community . . . a peaceful, multi-ethnic and democratic Kosovo where all of its people can live in security and enjoy universal human rights and freedoms on an equal

221. Blake Hounshell, *Evaluating Progress in Afghanistan-Pakistan*, FOREIGN POL’Y (Sept. 16, 2009), http://www.foreignpolicy.com/articles/2009/09/16/evaluating_progress_in_afghanistan_pakistan?print=yes&hidecomments=yes&page=full.

222. See generally BUSH, NATIONAL SECURITY STRATEGY, *supra* note 202, at 7.

223. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 20 (2010), <http://nssarchive.us/NSSR/2010.pdf>.

224. JOSHUA FOUST, MEASURING SUCCESS: ARE WE WINNING? OVER 10 YEARS IN AFGHANISTAN 8 (2012), <http://www.americansecurityproject.org/ASP%20Reports/Ref%200059%20-%20Measuring%20Success%20-%20Are%20We%20Winning%20-%2010%20Years%20in%20Afghanistan%20-May%202012.pdf>.

basis.”²²⁵ Once these goals were set, victory in Kosovo could not be limited to restoring a *status quo* of lawful behavior by Milosevic’s government towards an autonomous Kosovo; it predictably led to toppling Milosevic (in elections that followed his indictment at the International Criminal Tribunal for the Former Yugoslavia) and to a change in the political status of Kosovo. In fact, the independent International Commission on Intervention and State Sovereignty determined in 2001 that any humanitarian intervention must not only prevent or react, but also follow through and rebuild, including “promoting good governance and sustainable development.”²²⁶

Even leaving aside the non-military aspects of victory, what military success looks like is far from clear today. A particularly thorny challenge has been to define victory and set the goals for the war on terrorism. Immediately after 9/11, President Bush declared, “[o]ur war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.”²²⁷ The statement was undoubtedly hyperbole, and U.S. policies never aimed to defeat every terrorist group in the world. And yet, the presidential declaration clearly presupposed a view that it would be just to keep fighting until American risk from international terrorism approached zero.

If one were looking for a more detailed statement of goals, one could perhaps find them in the White House’s stated policy on the end of the armed conflict with Al Qaeda and Associated Forces: “At a certain point, the United States will degrade and dismantle the operational capacity and supporting networks of terrorist organizations like al-Qa’ida to such an extent that they will have been effectively destroyed and will no longer be able to attempt or launch a strategic attack against the United States.”²²⁸

None of these statements suggested that the U.S. strategy is multifaceted (though it may have been), and the focus was clearly on the narrowest military goals of military strikes. These narrowest terms, however, still allow the United States to claim that its war on Al Qaeda is ongoing.

225. Press Release, N. Atl. Treaty Org., Statement on Kosovo Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Washington, D.C. (Apr. 23, 1999), www.nato.int/cps/en/natolive/official_texts_27441.htm?selectedLocale=en.

226. INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 186, at 39.

227. President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>).

228. THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 11–12 (2016).

Here, too, one could argue that the difficulty in defining the goals of the war on terrorism is further proof that justification for the war is lacking; or, that “war” itself is a misguided and illegal paradigm for the fight against modern terrorist networks. But this is not only an American challenge, nor is it limited to Al Qaeda or associated forces. By now, a number of powerful countries have reported to the Security Council their use of force against ISIS in Syria, justifying their actions on the basis of article 51 and claiming self-defense.²²⁹ None has offered a clear statement about what it hopes to achieve through these strikes, and consequently, about when and how that self-defense interest will be satisfied.

The paradigm of self-defense has proven too elusive and malleable even for wars that have received the official blessing of the Security Council, thus eliminating any controversy over their *ad bellum* legality. On December 20, 2012, the Security Council unanimously adopted Resolution 2085, authorizing the deployment of an African-led international support mission (empowered to use military force) to combat Islamic insurgency in Mali.²³⁰ In aid of the mission, and on Mali’s president’s request, France dedicated considerable forces to Operation Serval.²³¹ On January 15, 2013, President Francois Hollande announced that France would only end its Mali operation when the country became stable. He further pledged to drive Islamist extremists from the country and establish democracy. Three days later, he declared that France had one goal, “To ensure that . . . Mali is safe, has legitimate authorities, an electoral process and there are no more terrorists threatening its territory.”²³² By January 21, French Defense Minister Jean-Yves Le Drian set the bar even higher, envisioning “total reconquest” of the country, leaving no pockets of resistance.²³³

The French goals in Mali are a particularly poignant case in point, as whatever one thinks about the true American interests in the wars in

229. See, e.g., Ashley Deeks, *The UK’s Article 51 Letter on Use of Force in Syria*, LAWFARE (Dec. 12, 2014), <https://www.lawfareblog.com/uks-article-51-letter-use-force-syria>.

230. S.C. Res. 2085 (Dec. 20, 2012).

231. See generally Sergei Boeke & Bart Schuurman, *Operation ‘Serval’: A Strategic Analysis of the French Intervention in Mali, 2013–2014*, 38 J. STRATEGIC STUD. 801 (2015).

232. See France to ‘Gradually Deploy’ 2,500 Troops to Mali Following All-Night Bombing Mission, FOX NEWS (Jan. 15, 2013), <http://www.foxnews.com/world/2013/01/15/france-executes-all-night-bombing-mission-in-bid-to-take-mali-town-from-islamic.html>.

233. For more on the French goals in Mali, see generally Freya Petersen, *France Aiming for ‘Total Reconquest’ of Mali, French Foreign Minister Says*, PRI (Jan. 21, 2013, 1:34 AM), <https://www.pri.org/stories/2013-01-21/france-aiming-total-reconquest-mali-french-foreign-minister-says>.

Afghanistan and Iraq or the broader international community's focus on ISIS, the French interests in Mali were more remote.²³⁴ Once invited by the Malian government, France did not have to show an article 51 justification, and in any case, was bolstered by the blessing of the Security Council for a military intervention in the country. Even on those terms, however, defining victory has proven a tricky exercise for the French authorities.

We could return to the debates over anticipatory self-defense, the use of force against non-state armed groups, the legitimacy of humanitarian interventions, and more. And still, imagining what it would take to satisfy the interests of defense in each of these theaters—even given a valid argument on the basis of article 51—remains an impossible task today. Nor does it help to invoke the principles of necessity and proportionality, as without a baseline agreement on what the war is designed to achieve, necessity and proportionality have nothing to hang on. We could argue about an over-reach here, or unrealistic expectations there. We could debate the wisdom or the effectiveness of different strategies in different theaters. The point still stands: It is much easier to say that the United States cannot fight for oil than to say what the United States *can* fight for. As we have separated victory from any tangible gain, and demanded that it only prevent losses, victory has become elusive, less lucrative, and more difficult to judge.

234. France did hold Mali as a colony for some eighty years and Mali is part of la Françafrique, the former French lands in Africa in which France had retained significant power even after independence.