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Is War Ever Justifiable? A  
Comparative Survey\*

RODA MUSHKAT\*\*

Legal scholars and philosophers alike have long been preoccupied with the question of whether war is ever justifiable. This question is also of considerable practical importance since the attitudes towards it influence the proclivity of actors in the international arena to resort to force in pursuit of their objectives. However, despite its academic and practical relevance, the question of whether war is ever justifiable has not been examined in a comprehensive fashion in recent years. The aim of the present article is to partially rectify this deficiency by offering a survey of the main approaches, both historical and contemporary (with an emphasis on the latter), that have been adopted by those who have justified recourse to force in international relations or challenged its legitimacy.

I. ANALYTICAL SUMMARY OF THE HISTORICAL MATERIAL

Historically, the question of whether war is ever justifiable has spawned a multitude of views. This diversity of opinion notwithstanding, three basic attitudes can be discerned with regard to justifiability of waging war, namely, the maximalist, minimalist and compromise positions. The maximalists subscribe to the view that

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war is *always* justified, morally or legally, on both sides, which is equivalent to saying that a resort to force requires no justification. The minimalists, on the other hand, contend that war is *never* justified, on either side, or that it can have no justification. The compromise position falls between the previous two in holding that war is *sometimes* justified, on one side or the other and conceivably, though improbably, on both sides. In other words, it presupposes that war at the same time requires and can have justification.

Because of the influence of religious factors, particularly those rooted in the Judaeo-Christian tradition, the minimalist position preceded the development of its maximalist counterpart. Initial expressions of the former can be traced to the "early church era"<sup>1</sup> although it was evident in one form or another throughout the history of social thought. Minimalist views, while never enjoying widespread support, gained occasional currency, such as in the sixteenth century with the emergence of Evangelical Anabaptism<sup>2</sup> and in the eighteenth century amongst political philosophers.<sup>3</sup>

The minimalist position was almost invariably qualified. Early church "pacifists" made no claim for integral acceptance of nonviolence by those who had not chosen the calling of Christianity.<sup>4</sup>

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1. The "early church era" is broadly defined as the period from the death of Jesus in 29 A.D. until the year 313, when Emperor Constantine the Great declared his conversion to the Christian faith. For a portrayal of the "early church" era as pacifistic, see Kunz, *Bellum Justum and Bellum Legale*, 45 AM. J. INT'L L. 528, 530 (1951).

2. The largest movement of pacifists in that period rejected all participation in warfare on scriptural and theological grounds and viewed just war doctrines as part of the corruption of the world. See R. BAINTON, *CHRISTIAN ATTITUDES TOWARD WAR AND PEACE: A HISTORICAL SURVEY AND CRITICAL RE-EVALUATION* 153-57 (1960).

3. Prominent minimalists of the period included Rousseau (who produced a treatise on *Perpetual Peace* in 1756), Montesquieu, Voltaire, Bentham and Kant. Kant, for example, believed that "humanity was bound to move towards peace because the sense of moral principle is always advancing in man and rendering more culpable those who violate it." Kant regarded war as the greatest evil besetting human societies and in one passage he went so far as to describe war as the source of all evils and of all moral corruption. I. KANT, *KANT'S POLITICAL WRITINGS* 183 (H. Reiss ed. 1970). For a historical analysis of the antiwar feelings in that period as grounded in ideas of "balance and restraint" and the sense of "human responsibility," see J. NEF, *WESTERN CIVILIZATION SINCE THE RENAISSANCE: PEACE, WAR, INDUSTRY AND THE ARTS* 332 (1963); J. NEF, *WAR AND HUMAN PROGRESS* 209 (1950). In the latter book, the author also highlights the influence of pacific economic doctrines which found receptive audiences in that period of growing commercial unity between nations. *Id.* at 266.

4. See S. BAILEY, *PROHIBITIONS AND RESTRAINTS IN WAR* 2 (1972) for references and citations from church fathers. Origen, for example, in *Contra Celsum* (written in 248 A.D. in answer to an earlier critique of Christianity by the pagan philosopher, Celsus, Origen's work is referred to in P. BROCK, *PACIFISM IN EUROPE TO 1914* at 11 (1972)) clearly allowed for a conditional justification of war on a sub-Christian level. Early church pacifism was also af-

Others, like the chiliastic Taborite priests, while preaching peace in 1418-1419, "called for a sword to extirpate the godless when it appeared that this would not happen without the intervention of human hands."<sup>5</sup> The Mennoists in the sixteenth century would not bear arms, but accepted a variety of alternatives in lieu of serving with weapons even though these were in some way connected with the waging of war.<sup>6</sup> They thus confined their rejection of war to the individual practice of conscientious objection rather than opting for a total denunciation of war. During the American Civil War, other pacifists distinguished between international war and varieties of civil war, regarding the latter not as war *stricto sensu* but as police action.<sup>7</sup> Furthermore, until the coming of modern Biblical criticism, Christian pacifists, including the Quakers,<sup>8</sup> considered all wars which had occurred before Christ to be approved by God as had the wars recounted in the Old Testament. They considered Christ's replacement of the law of revenge by a new and more loving dispensation to be the advent of pacifism.

Pacifist doctrines never became a potent intellectual force, and their societal influence remained limited. Even during periods in which there was relatively greater receptivity to their ideas, exponents of minimalist principles remained a distinct minority and had to contend with rival schools of thought. This was certainly the case in the sixteenth and eighteenth centuries which saw the rise of prominent maximalists such as Ayala,<sup>9</sup> Machiavelli,<sup>10</sup> Bynkershoek<sup>11</sup> and Vat-

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fectured by the military needs of specific geographical areas. As Bainton remarked, "Pacifism best flourished within the interior of *Pax Romana* (especially in the Hellenistic East) and was less prevalent in the frontier districts menaced by barbarians." R. BAINTON, *supra* note 2, at 69.

5. P. BROCK, *supra* note 4, at 473.

6. *Id.* at 477.

7. See generally P. BROCK, *PACIFISM IN THE UNITED STATES: FROM THE COLONIAL ERA TO THE FIRST WORLD WAR* (1968).

8. See P. BROCK, *supra* note 4, at 472.

9. See, e.g., Ayala's statement that "the right to make war is a prerogative of princes who have no superiors." B. AYALA, *DE JURE ET OFFICIIS BELLICIS ET DISCIPLINA MILITARI LIBRI III*, in *CLASSICS OF INTERNATIONAL LAW* 22 (J. Bate trans. 1912).

10. Machiavelli was an articulate representative of the political philosophy of his period (sixteenth century) when war was conceived as an indispensable tool of statecraft. "When it is a question of the safety of the country no account should be taken of what is just or unjust, merciful or cruel, laudable or shameful, but without regard to anything else, that course is to be unswervingly pursued which will save the life and maintain the liberty of the [fatherland]." N. MACHIAVELLI, *THE PRINCE* (1537), quoted in R. BAINTON, *supra* note 2, at 125.

11. Bynkershoek perceived war as a mere condition, "a contest of independent persons carried on by force or fraud for the sake of asserting their rights." C. BYNKERSHOEK, *QUAES-*

tel<sup>12</sup> as well as the development of just war thinking represented by Suarez,<sup>13</sup> Gentili,<sup>14</sup> Grotius<sup>15</sup> and others.

At the same time, genuine adherence to the view that resort to war is always acceptable was equally rare. This applies even to periods such as the eighteenth and nineteenth centuries when the international legal system formally endorsed an unqualified right to resort to war based on the sovereign position of states.<sup>16</sup> In fact, statesmen did

TIONUM JURIS PUBLICI LIBRI DUO, in CLASSICS OF INTERNATIONAL LAW 15 (T. Frank trans. 1930).

12. According to Vattel, the legality of war under the "voluntary Law of Nations" did not depend on the justice of the cause but rather on the "presence of the elements constituting a regular war." E. VATTEL, *LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE: APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS*, in CLASSICS OF INTERNATIONAL LAW 305 (C. Fenwick trans. 1916). The nineteenth century writers Phillimore and Wheaton expressed the respective views that war was the "exercise of the international right of action to which, from the nature of the thing and the absence of any common superior tribunal, nations are compelled to have recourse to in order to assert and vindicate their rights," R. PHILLIMORE, *COMMENTARIES UPON INTERNATIONAL LAW* 77 (3d ed. 1879), and that "[e]very state has . . . the right to resort to force, as the only means for redress for injuries inflicted upon it by others." H. WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 309 (1936). The nineteenth century also saw the development of a "military doctrine" according to which war was a positive, generating power, a process of national growth, in fact an indispensable factor in the assertion of the inherent right of nations to development. See Moltke, *A Letter to Professor Blutnitschli, Acknowledging Receipt of the Manual of the Law of War*, 13 *REVUE DE DROIT INTERNATIONAL* 80 (1881).

13. This Jesuit theologian (who theorized about law), while conceding the existence of some evil traits in war, stressed the greater evils that would result without war. Moreover, Suarez believed that an act of "vindictive justice" was indispensable to mankind given the deficiency of other peacekeeping methods. See F. SUAREZ, *DE TRIPLICI VIRTUTE THEOLOGICA, FIDE, SPE, ET CHARITATE*, in CLASSICS OF INTERNATIONAL LAW, SELECTIONS FROM THREE WORKS OF FRANCISCO SUAREZ, S.J. 821 (G. Williams, A. Brown & J. Waldron trans. 1944).

14. As stated by Gentili, "[W]ars are just even though so many things which come from them are evil, because their final aim is good, after the rebels have been forced to submit to reason." A. GENTILI, *DE JURE BELLI LIBRI TRES*, in CLASSICS OF INTERNATIONAL LAW 28 (J. Rolfe trans. 1933).

15. In fact, Grotius' analysis of "whether war is ever justifiable" was a systematic attempt to refute the pacifist tradition within Christianity. Thus he asserted that Christ's teachings could not support a pacifistic stand in that "if it had been the purpose of Christ [to absolutely do away with capital punishment], beyond doubt with the most direct and explicit words he would have laid down the rules that no one should pass a sentence of death, and that no one should bear arms." H. GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES*, in CLASSICS OF INTERNATIONAL LAW 66 (F. Kelsey trans. 1925). Similarly, Grotius pointed out, a review of past "practice" of the majority of Christians would serve to uphold the contention that Christians seemed to have no greater scruples about waging war than adherents of any other faith. *Id.* at 20. War was perceived by Grotius as a judicial and punitive procedure for the redress of wrongs suffered and for the vindication of rights. *Id.* at 171.

16. Note, for example, Vattel's proviso that "[w]hen a sovereign, or a Nation, is deliberating upon the steps he must take to fulfill his duty, he must never lose sight of the necessary

not rely on sovereignty to exempt them from the necessity to justify engagement in war. Rather they regularly claimed justification for their recourse to war, even though the law stipulated that this was unnecessary, and thus indirectly acknowledged the need for justification.<sup>17</sup>

By distinguishing between law and practice, proponents of the maximalist position may have wished to overcome the institutional deficiencies inherent in just war doctrines while at the same time wishing to retain a measure of restraint upon the waging of war. Given the lack of consensus on the meaning of justice, the unavailability of a judge who could be relied upon to evaluate the position of competing states with strict impartiality, and no probability that the proud rulers of sovereign states would defer to such a judge if one were available, it was not surprising that at the theoretical level just war doctrines gave way to a maximalist position. As Vattel put it, "Since . . . Nations are equal and independent and can not set themselves up as judges over one another, it follows that in all cases open to doubt the war carried on by both parties must be regarded as equally lawful" (and, by extension, equally subject to the restraining force of the laws of war).<sup>18</sup>

The early modern statesmen of the European system appeared also to believe that they had to choose between *jus ad bellum* and *jus in bello* or between restricting the right to go to war and limiting the manner of fighting.<sup>19</sup> As suggested by Howard, states have never readily accepted the paradoxical demand "[t]o submit to restraints

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law, which is always binding in conscience," E. VATTEL, *supra* note 12, at 305 (emphasis in original), since, after all, "[w]hoever knows what war really is, whoever will reflect upon its terrible effects and disastrous consequences, will readily agree that it should not be undertaken without the most urgent reasons for doing so. Humanity revolts against a sovereign who, without necessity or without pressing reasons, wastes the blood of his most faithful subjects and exposes his people to the calamities of war, when he could have kept them in the enjoyment of an honorable and salutary peace." *Id.* at 243. Similarly, Lorimer asserted that war was a means and never an end in itself, one argument being that "we cannot lawfully fight for fighting's sake because fighting, in this sense, is a wasteful expenditure of force and law is an ideal economics." J. LORIMER, *THE INSTITUTES OF THE LAW OF NATIONS* 19 (1884).

17. According to Parry, "no state has even resorted to war without fervent protestation of the justice of its cause as surely would not have been the case had the right of war ever been absolute." Parry, *The Function of Law in the International Community*, in *MANUAL OF INTERNATIONAL LAW* 27-28 (M. Sorensen ed. 1968). In practice, war was always accompanied by an appeal to legal or moral rights which had in some ways been injured. See Farer, *Law and War*, in 3 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 26 (C. Black & R. Falk eds. 1971).

18. E. VATTEL, *supra* note 12, at 247.

19. See W. HALL, *A TREATISE ON INTERNATIONAL LAW* 62 (7th ed. 1917).

which prejudiced ones [sic] chances of victory when fighting a righteous cause, to accept the concept of *jus in bello* when one had an unquestionable *jus ad bellum*.”<sup>20</sup> They opted, therefore, for regulation and humanization of interstate violence rather than prohibition.

Thus viewed, the maximalist position did not develop out of fascination with the institution of war nor out of moral commitment to it, but was prompted by the belief that regulation is the most viable instrument for moderating the effects of war. It can be said, therefore, that the maximalists have expressed preference for an extreme posture on the grounds of its compatibility with the realities of international politics of the day.

While absolute versions of minimalist and maximalist positions have rarely been evidenced by historical material, a compromise stand on the justifiability of war is more easily established. To reiterate, such a stand, which is generally designated as the just war doctrine, corresponds to the view that engagement in war may be justifiable, and must be justified.

This doctrine, although present in Ancient Greek<sup>21</sup> and Roman thought,<sup>22</sup> is essentially a product of Christian theology and of the changing circumstances of the church under the Roman Empire.<sup>23</sup> Its emergence in a more defined manner can clearly be traced to the acceptance, in the fourth century, of Christianity as the established religion of the Empire which brought to an end the profession of pacifist sentiments in the church. The question of whether a Christian could participate in a war without committing sin was initially answered by St. Augustine<sup>24</sup> who then took his place at the head of a

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20. RESTRAINTS ON WAR 5 (M. Howard ed. 1979).

21. While renouncing war as a desirable state policy, ancient Greek thinkers were prepared to accept its necessity under certain circumstances. War could be justified but only if peace was its objective: “We make war so that we can live in peace.” 10 ARISTOTLE, NICOMACHEAN ETHICS 10 (1909).

22. The Romans also conceived war as an integral part of the natural order of mankind but recourse to arms had to be justified nonetheless. Indeed, the question of sufficiency or insufficiency of motives for war had occupied the works of several Roman historians. See von Elbe, *The Evolution of the Concept of the Just War in International Law*, 33 AM. J. INT’L L. 665, 666 (1939). Cicero’s writings, for example, reflected the Plato-Aristotle formula of “war for the sake of peace” when expounding that “[t]he only excuse for going to war is that we may live in peace unarmed.” CICERO, DE OFFICIIS 37-39 (W. Miller trans. 1921).

23. The alliance of Church and Empire was marked by Constantine’s acceptance of Christianity.

24. St. Augustine asserted that Christians were not compelled by the Gospel precepts to abstain from the use of force or from killing if they were acting in a public capacity. See C. CADOUX, *THE EARLY CHRISTIAN ATTITUDE TO WAR* 49-66 (1919). Wars were regarded by St. Augustine as: inevitable (as long as men and their societies were “moved by avarice, greed

long line of theologians, natural law philosophers, and international lawyers including: Aquinas, Victoria, Luther, Grotius and Pufendorf. All these thinkers shared the recognition of the need for, and the feasibility of, the justification of war and set forth criteria according to which the justness of resort to war should be determined.<sup>25</sup>

Comprising notions of the permissibility of war — one ought to resist, to overthrow or to punish perpetrators of injustice; to seek revenge or even reparation for injury; and to promote and establish justice — dominated medieval thinking on war. The just war doctrine obviously flourished when the Catholic Church had a generally acceptable claim to preside over its application. As observed by McDougal and Feliciano, the Western world at that time “exhibited a basic unity characterized, in its fundamental aspect, by one widely and deeply shared body of spiritual perspectives, a centralized ecclesiastical organization that transcended political boundaries, and a common overriding respect for the supreme ecclesiastical authority, the Papacy.”<sup>26</sup> Such conception of the Papacy’s authority as a source independent of and higher than human volition enhanced just war theories which assumed the existence of a body competent to pass judgment on the justness of a belligerent’s cause.

The doctrine had, however, languished following the profound changes in the conditions of the medieval world which seriously affected the viability of *bellum justum*. In particular, the Reformation, with its disintegrating impact on the unity and authority of the church as well as the consolidation of the effective power of territorial polities, meant that there was no longer a supernational organ commonly acknowledged as competent to pass judgment on the legitimacy of the cause asserted by a sovereign prince who resorted to violence.

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and lust for power, the permanent drives of sinful men’), ST. AUGUSTINE, *DE CIVITATE DEI* 13 (M. Dods trans. 1948), necessary (in order to prevent worse evils such as anarchy and open flouting of the rules of human society), see H. DEANE, *THE POLITICAL AND SOCIAL IDEAS OF ST. AUGUSTINE* 161 (1963), justifiable, under certain circumstances, and even holy and sanctioned by god in some cases (when fought against heretics and schismatics). *Id.* at 194-202.

25. See T. AQUINAS, *SUMMA THEOLOGICA* (trans. 1919); F. VICTORIA, *DE INDIS ET DE IVRE BELLI RELICTIONES*, in *CLASSICS OF INTERNATIONAL LAW* 166-67 (J. Bate trans. 1917); M. LUTHER, *WHETHER SOLDIERS, TOO, CAN BE SAVED* (1526), cited in S. BAILEY, *PROHIBITIONS AND RESTRAINTS IN WAR* 17 (1972); H. GROTIUS, *supra* note 15, at 171; S. PUFENDORF, *DE OFFICIO HOMINIS ET CIVIS JUXTA LEGEM NATURALEM LIBRI DUO*, in *CLASSICS OF INTERNATIONAL LAW* 138 (F. Moore trans. 1927).

26. McDougal & Feliciano, *Legal Regulation of Resort to International Coercion: Aggression and Self-Defense in Policy Perspective*, 68 *YALE L.J.* 1057, 1066 (1959).



As indicated above, this decentralized and unorganized character of the world arena was reflected in modified maximalist notions of justification of war during the eighteenth and nineteenth centuries. In the absence of central authority and the prevalence of strong nationalistic movements, sovereign claims to the right to wage war gained prominence and were accorded legitimacy.

The just war doctrine (or a compromise position) came to the fore again in a somewhat altered version in the aftermath of, and the reaction to, World War I.<sup>27</sup> The establishment of the League of Nations provided the international structure and procedure necessary to give effect to a revived and revised just war idea. With the League as church, the Secretary General as Pope and the doctrine of collective security as the theological creed of the twentieth century, multi-state system, secular replacements had been provided for the ecclesiastical accoutrements of the medieval just war doctrine.

Support for the reinstatement of the just war notion in positive international law can also be found in other important international documents including the Kellogg-Briand Act<sup>28</sup> and the Charter of the International Military Tribunal.<sup>29</sup> Eminent theorists such as Kelsen, Oppenheim and Tucker have firmly placed these instruments in the traditions of the just war doctrine<sup>30</sup> although other writers, notably Kunz, argue that the old *bellum justum* theory can in no way be considered a part of modern positive international law. Invoking a distinction between *bellum legale* and *bellum justum*, Kunz has contended that there was no basis for the opinion that the discrimination between wars made by the Pact of Paris (and for that matter by the Covenant and the U.N. Charter) ought to be viewed as entailing a distinction in classical terms between just and unjust wars since the illegality of resort to war in these treaties was not a function of the

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27. See LEAGUE OF NATIONS COVENANT, reprinted in 1 INTERNATIONAL LEGISLATION 1 (M. Hudson ed. 1931) (Part 1 of the Treaty of Peace signed at Versailles, June 28, 1919). The Covenant seemed to establish that resort to war was forbidden under certain, but not all, circumstances. In most serious disputes, war was placed in the position of last resort after peaceful means had failed.

28. Treaty for the Renunciation of War, reprinted in 4 INTERNATIONAL LEGISLATION 2522 (M. Hudson ed. 1931) (the Treaty for the Renunciation of War is also known as the "Pact of Paris"). While renouncing wars of aggression, the Treaty clearly permitted wars in self-defense and as an instrument of collective action to restrain an aggressor. The Treaty also did not abolish resort to war between signatories of the Pact and non-signatories, nor did it prohibit resort to war against a country which had violated its provisions.

29. *Charter of the International Military Tribunal*, 39 AM. J. INT'L L. 258 (1945).

30. H. KELSEN, GENERAL THEORY OF LAW AND STATE 333 (1945); see also Tucker, *The Interpretation of War Under Present International Law*, 4 INT'L L.Q. 11, 23 (1951).

intrinsic injustice of the cause of war but a breach of a formal, procedural requirement.<sup>31</sup> It appears, however, that Kunz has taken a somewhat narrow view in concerning himself with the specific content of the peacekeeping provisions of the above instruments rather than considering the broad concept of the attempt to limit war.

At the same time, modern conceptions of just war, while basically propounding the same principle of justification of war, differ from traditional theories both in terms of target and scope. With respect to target, it is arguable that earlier just war concepts, which had been influenced by the church, were concerned less with the ruler than with his individual subjects, who had the need for advice as to how to reconcile their religious obligations with their civic commitments. The twentieth century formulation, by contrast, aims at deterring *states* from embarking upon unjust military retaliation. As to scope, it can be said that twentieth century revisionists are more restrictive with respect to the substance of just causes for war while their predecessors recognized many more justifications for resort to force.<sup>32</sup>

The neo-just war doctrine that emerged following the First World War went on to assume a more defined framework with the promulgation of the U.N. Charter in 1945. The Charter appears to have firmly established the principle that fighting can be justified but only in resistance to unjustified fighting. While sharply curtailing the traditional list of injuries that should be regarded as permitting the just warrior to go into action, the new version of just war nonetheless specifically identifies the injustice of recourse to nondefensive war, that is, to war *for* rather than war *against*.

## II. ANALYSIS OF THE CONTEMPORARY LEGAL POSITION

The path which the Charter of the U.N. has attempted to follow has been laden with ambiguities caused and exacerbated by the lack of definition of fundamental terms. For example, while the Charter reflects the traditional desire to outlaw war when it speaks of saving "succeeding generations from the scourge of war," it also condones wars of self-defense, those "in the common interest," and wars which are "necessary to maintain or restore international peace and secur-

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31. Kunz, *supra* note 1, at 532.

32. A fuller discussion of this point of difference is found in the author's doctoral thesis.

ity.”<sup>33</sup> Again the world community, succumbing to the natural inclination to choose sides, appears to have rejected the polar maximalist and minimalist perspectives in favor of the compromise position that recourse to war is sometimes justified, thus requiring an effort to sort out the just and unjust causes.

*A. The Prohibition on the Use of Force: Article 2(4)  
of the United Nations Charter*

Specifically, the Charter proscribes the use of force which includes both the comprehensive and highly intensive uses commonly associated with war and the less comprehensive and relatively milder actions often described as “measures short of war,”<sup>34</sup> against “the territorial integrity or political independence of any state.”<sup>35</sup> Such a prohibition was further supplemented by the “Nürnberg Principles” of 1945 — which authorized the imposition of sanctions on individual persons judicially considered to be responsible for the “planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances”<sup>36</sup> — and subsequently reiterated in charters of regional governmental organizations.<sup>37</sup>

Indeed, the rule of the Charter proscribing the use of force in international relations has been interpreted and restated with some consistency over the years since 1945. Most notably, the General Assembly in 1970, in its Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, “solemnly proclaimed” that “[s]tates shall refrain in their international relations

33. U.N. CHARTER art. 51. Article 51 explicitly recognizes a Member State's inherent right of individual or collective self-defense. See *infra* text accompanying notes 46-48.

34. See Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 455, 489 (1952).

35. U.N. CHARTER art. 2, para. 4. Article 2(4) states in its entirety that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” *Id.*

36. Report of the International Law Commission to the General Assembly, [1950] 2 Y.B. INT'L L. COMM'N 376, U.N. Doc. A/1316 (Principle VI of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal); see also Draft Code of Offences Against the Peace and Security of Mankind Adopted by the International Law Commission, 9 U.N. GAOR Supp. (No. 9) at 11-12, U.N. Doc. A/2693 (1954).

37. See generally citations to treaties collected in McDougal & Feliciano, *International Coercion and World Public Order: The General Principles of the Law of War*, 67 YALE L.J. 771, 802 n.100 (1958); McDougal & Feliciano, *supra* note 26, at 1060 n.12.

from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.”<sup>38</sup> The Assembly reasserted this principle in Resolution 2936 (XXVII) on the Non-Use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons when it “solemnly declar[ed] on behalf of the State Members of the Organization the renunciation of the use or threat of force in all its forms and manifestations in international relations, in accordance with the Charter of the United Nations.”<sup>39</sup> On that occasion the General Assembly also recalled prior Resolution 2160 (XXI) which reaffirmed the principle that armed attack by one state against another or the use of force in any other form contrary to the Charter of the U.N. constituted a violation of international law giving rise to international responsibility.<sup>40</sup> Such use of force was later defined as aggression in the 1974 Definition of Aggression adopted by the General Assembly<sup>41</sup> and its prohibition was further restated in the Final Act of the Conference on Security and Cooperation in Europe.<sup>42</sup> A more recent confirmation of the principle of non-use of force in international relations found expression in General Assembly Resolution 32/150 of December 19, 1977, which set up a Special Committee with a view to drafting a world treaty on non-use of force in international relations.<sup>43</sup>

### *B. The “Exceptions” to the General Prohibition on Force*

In none of the above international instruments, however, is a total ban on the use of force advocated. A sphere of permissible coercion is invariably preserved, and with it the need to provide justifications and distinguish between just and unjust wars. Indeed, according to the creative team of McDougal and Feliciano, “[t]he world community’s prescriptions about coercion, like other world prescriptions, march and must march in pairs of complementary opposites. An absolute interdiction of all coercion is scarcely conceivable, or if conceivable, is hardly within the limits of the achievable.”<sup>44</sup>

38. 25 U.N. GAOR Supp. (No. 28) at 122, U.N. Doc. A/8082 (1970).

39. 27 U.N. GAOR Supp. (No. 30) at 5, U.N. Doc. A/8730 (1972).

40. 21 U.N. GAOR Supp. (No. 16) at 4, U.N. Doc. A/6316 (1966).

41. G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31), U.N. Doc. A/9890 (1974).

42. Signed on August 1, 1975, reprinted in 14 INT’L LEGAL MATERIALS 1292 (1975).

43. See Report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force In International Relations, 34 U.N. GAOR Supp. (No. 41), U.N. Doc. A/34/41 (1979).

44. McDougal & Feliciano, *supra* note 26, at 1062.

Consequently, several forms of justifiable recourse to war are identified and discussed below.

### 1. Low-level coercion

There is a "relatively low-level coercion which is 'normal' and perhaps ineradicable in the ordinary value processes taking place across state boundaries and which includes all coercion not accelerated to the levels of intensity and magnitude that signal impermissible coercion."<sup>45</sup> This category presumably embraces the inherent right of states to use force internationally in ways which do not violate article 2(4), that is, in circumstances which do not threaten or impair the territorial integrity or political independence of another state.

### 2. Use of force in self-defense and with article 51 of the United Nations Charter

There is the "coercion of relatively great scope<sup>[46]</sup> and intensity . . . that is exercised in necessary response to and defense against impermissible coercion by others."<sup>47</sup> This inherent right to resort to force in response to unauthorized coercion is explicitly recognized in article 51 of the U.N. Charter and pertains both to force exercised by the target state individually or by a collectivity of states. In fact, as pointed out by Kelsen,<sup>48</sup> not even the most highly centralized and effectively organized municipal systems attempt to prohibit private coercion absolutely; some provisions for self-defense in residual, exceptional cases always remain. *A fortiori* in the existing decentralized world arena in which the general community of states still lacks effective capacity to protect itself, it would seem impractical to aim at elimination of permissible self-defense thereby achieving a truly complete prohibition of force.

### 3. Defense measures which do not comply with requirements under article 51

It appears reasonable to support the view that advocates an inter-

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45. *Id.* at 1123-24. This exception may possibly be read into the definition of force in article 2(4) which prohibits the use of force "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" and could be construed as implying large-scale force. U.N. CHARTER art. 2, para. 4.

46. The scope of permissible action in self-defense is examined in the author's doctoral thesis.

47. McDougal & Feliciano, *supra* note 26, at 1121-22.

48. See H. KELSEN, COLLECTIVE SECURITY UNDER INTERNATIONAL LAW 27 (1957).

mediate status of permissible coercion between self-defense on the one hand and aggression on the other and refuses to automatically classify as aggression all situations falling short of the limits of self-defense as perceived under article 51.<sup>49</sup> Arguably, adoption of a different interpretation would result in the absurd placement of cases that fail to conform strictly to the specific words of article 51 in the same category as hard core aggression. Thus, for instance, it would not accord with our sense of justice to equate the behavior of a state which employed force with the explicit objective of expansion and acquisition of territory with that of a state which protected itself without any aggressive intention but did not uphold the standard of proportionality as required under article 51. It is, therefore, reasonable to assume that there are such cases outside the purview of article 51 — such as where the attack is aimed at aircrafts or ships which are not territory; where the aggression relates to instances of defense by United Nations Emergency Forces which are not a state; where a state believed in good faith that an armed attack occurred though objectively no such attack took place; or where the defending state failed to immediately report to the Security Council as required under the article<sup>50</sup> — which may nonetheless constitute actions in self-defense and can thus be viewed as additional forms of permissible coercion.<sup>51</sup>

4. Force employed consistently with the purposes of the United Nations and not directed against “territorial integrity or political independence”

Another approach which attempts to extend the legal justification for recourse to force beyond the narrowly defined action of self-defense under article 51 centers on the qualification to which the prohibitions of article 2(4) are subject. Such an approach has found expression in the work of Stone who has argued, with some conviction, that what article 2(4) prohibits is not use of force as such, but its use against the “territorial integrity or political independence of any state” or “in any other manner inconsistent with the purposes of the United Nations.”<sup>52</sup> These purposes may properly extend beyond article 1, which delineates the purposes of the United Nations to include, *inter alia*, the prevention of the scourges of war and maintenance of

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49. See Z. Tamir, *Extra-Legal Self-Defense in International Law* (Unpublished Ph.D. dissertation, Hebrew University of Jerusalem, 1970).

50. *Id.* (a detailed discussion of similar cases).

51. J. STONE, *AGGRESSION AND WORLD ORDER* 43 (1958).

52. *Id.*

fundamental human rights, conditions assuring justice, respect for the obligations arising from treaties, and general international law.<sup>53</sup>

Furthermore, the purposes expressed in article 1 embrace not only collective measures against threats to peace, breaches of the peace and acts of aggression, but also the adjustment or settlement of disputes in accord with fundamental principles of international law and justice.<sup>54</sup> It is possible to argue that a threat or use of force employed consistently with these purposes, and not directed against the "territorial integrity or political independence of any state," may be commendable rather than necessarily forbidden by the Charter. It is also conceivable that situations may arise in which attempts to settle disputes by peaceful means can be so delayed, and prospects of success so remote, that a minimal regard for law and justice in interstate relations might require the use of force in due time to vindicate these standards, and avoid even more catastrophic resort to force at a later date. It is Stone's conclusion that "there is, at any rate, no clear legal warrant for reading the Charter and the *travaux preparatoires*, as is sometimes done, as if Article 2(4) excluded all resort to force except in self defense or under the authority of the United Nations, thus excluding these other possibilities."<sup>55</sup>

A similar construction of article 2(4) was adopted by the United Kingdom Representative to the U.N., Sir Eric Beckett, in the *Corfu Channel Case*.<sup>56</sup> In defending the British mine-sweeping operation in Albanian territorial waters, Sir Beckett stated: "Our action . . . threatened neither the territorial integrity nor the political independence of Albania. Albania suffered thereby neither territorial loss nor any part of its political independence."<sup>57</sup> An equivalent position was taken by the United Kingdom in the debates of the Sixth Committee with respect to the Principles of International Law Concerning Friendly Relations and Co-operation Among States.<sup>58</sup> The conten-

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53. *Id.*

54. *Id.*

55. *Id.*

56. 2 *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (merits); 1 *Corfu Channel* (U.K. v. Alb.), 1948 I.C.J. 15 (preliminary objections).

57. 1949 I.C.J. Pleadings 295-96. Sir Pierson Dixon's statement in the First Emergency Session of the General Assembly concerning the 1956 Suez intervention is illuminating: "Our action is in no way aimed at the sovereignty of Egypt, and still less at its territorial integrity. It is not of our choice that the police action which we have been obliged to take is occurring on Egyptian territory." 10 U.N. GAOR (561st plen. mtg.) para. 102, U.N. Doc. A/PV.561 (1956).

58. 18 U.N. GAOR C.6 (805th mtg.) para. 7, U.N. Doc. A/C.6/SR.805 (1963).

tion that the Charter proscribed the threat or use of force in interstate relations only when directed at the territorial integrity or political independence of another state was also reiterated by other state representatives.<sup>59</sup> In fact, the reaction of the international community to certain incidents of state practice suggests perhaps that forceful measures which do not threaten a state's independence enjoy high levels of tolerance and may indicate a shared belief that force used in the interests of justice and international law is legally justifiable.<sup>60</sup>

##### 5. Collective defense for reasons other than external aggression

Employing the same line of reasoning as adopted above in relation to individual self-defense, it is forcefully contended that a narrowly defined category of collective self-defense is insufficient to accommodate all cases of such a nature, particularly where a state asserts both vital interests and a moral right to assist a people in a civil war but is unable to point out any external indirect aggression or intervention sufficient to justify collective self-defense.<sup>61</sup> Most characteristic in this respect is the contention made by a few national representatives in United Nations debates on Principles of International Law Concerning Friendly Relations and Co-operation Between States that the rendering of armed assistance to colonial peoples engaged in

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59. See, e.g., Canada, 25 U.N. GAOR Special Committee on the Question of Defining Aggression (56th mtg.) at 25, U.N. Doc. A/AC.134/SR.56 (1970); Italy, 25 U.N. GAOR Special Committee on the Question of Defining Aggression (69th mtg.) at 38, U.N. Doc. A/AC.134/SR.69 (1970); Report of the Special Committee on the Question of Defining Aggression, 25 U.N. GAOR Supp. (No. 19) para. 86, U.N. Doc. A/8019 (1970).

60. Note, for example, the Congo operation (1961), India's intervention in Bangladesh (1971) and Tanzania's invasion of Uganda (1979). Lillich has noted that "neither the Stanleyville rescue operation nor any other claimed humanitarian intervention has been condemned by the United Nations as violation of Article 2(4), in marked contrast to its repeated condemnation of claims to use forcible self help by way of reprisals." Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 229, 244 (J. Moore ed. 1974) [hereinafter Lillich, *A Reply to Ian Brownlie*]; see also Conference of the Procedural Aspects of International Law Institute, Charlottesville Humanitarian Intervention and the United Nations, reprinted in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* 3, 64, 107-08, 114 (R. Lillich ed. 1973). With regard to the Indian intervention, see the observation that "[d]espite the violation of Articles 2(4) and 2(7) of the Charter by India, it was not even blamed or censured by the UN, which in fact seemed reconciled to India's recourse to military force against Pakistan." Islam, *The Use of Force in International Relations: The Indian Invasion of East Pakistan*, 2 *LAWASIA* 171, 192 (1983). The United Nations' inaction in the case of Tanzania is noted in 25 *KEESING'S CONTEMPORARY ARCHIVES* 29670 (June 22, 1979). This point will be further examined in the context of "humanitarian intervention" discussed in the text accompanying notes 87-102 *supra*.

61. See W. O'BRIEN, *THE CONDUCT OF JUST AND LIMITED WAR* 337 (1981).



a struggle for independence was a laudable activity excepted from the proscriptions of article 2(4) as a particular modality of collective self-defense permissible under the Charter.<sup>62</sup>

## 6. Regional action

Another factor which has a bearing on the use of force in collective self-defense is the emergence of regional spheres of dominance and the frequent exercise by regional organizations of the right to resort to military means in order to protect regional interests. Ostensibly, the Charter provisions for regional actions allow regional organizations extensive powers in derogation of article 2(4) and even greater powers are assumed by them in practice. Regional organizations have come to interpret articles 52 and 53 as giving primacy to the bloc in settling disputes among its own members.<sup>63</sup> Indeed, both the United States and the Soviet Union have asserted the right to establish regions of superpower dominance to which article 2(4) of the Charter does not apply.<sup>64</sup> Within these proclaimed spheres, the collective organization is in fact plaintiff, judge and executioner.<sup>65</sup>

Although it may not be normatively justified,<sup>66</sup> such a trend has been explicated in terms of the ineffectiveness of the United Nations as well as the change in the distribution of international power from

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62. See Turkey, 20 U.N. GAOR C.6 (892d mtg.) para. 31, U.N. Doc. A/C.6/SR.892 (1965); Syria, 22 U.N. GAOR C.6 (1094th mtg.) para. 28, U.N. Doc. A/C.6/SR.1094 (1968); Kenya, *id.* at para. 33; Kuwait, *id.* at para. 38.

63. Article 52 legitimizes the "existence of regional arrangements or agencies for dealing with . . . matters relating to the maintenance of international peace and security." U.N. CHARTER art. 52, para. 1. Moreover, article 52 encourages these bloc agencies to "make every effort to achieve pacific settlement of local disputes through such regional arrangements or . . . agencies before referring them to the Security Council." U.N. CHARTER art. 52, para. 2.

Article 53 authorizes, *inter alia*, enforcement action by regional arrangement or agencies against former enemy states of any signatory from the Second World War. U.N. CHARTER art. 53, paras. 1 & 2.

64. The "Johnson Doctrine" expresses the American view of the rule of force in bloc situations, namely, that a bloc leader has the right to use force on behalf of the bloc in intrabloc situations. See N.Y. Times, May 29, 1965, at 2, col. 2 (speech by President Johnson). Similarly the "Brezhnev Doctrine" introduced the concept of limited sovereignty of nations within a bloc and asserted the right of a bloc leader to intervene even to the point of using force where the situation threatened to remove the target nation from the orbit of the bloc. See *Sovereignty and International Duties of Socialist Countries*, Pravda, Sept. 25, 1968, reprinted in 7 INT'L LEGAL MATERIALS 1323 (1968).

65. For an interesting discussion of the derogation of the validity of article 2(4) in intrabloc situations, see Franck, *Who Killed Art. 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809, 822 (1970).

66. See Bravender-Coyle, *The Brezhnev Doctrine in International Law*, 3 LAWASIA 114-125 (1984).

the balance of power system, which prevailed until the beginning of World War I, to the loose bipolar international system that developed after World War II. It is suggested that the conditions which required limited objectives under the balance of power system no longer prevail and the norm of non-interference in the internal affairs of other nations is largely inoperative. Rather, "[i]nterdependence within the bloc gives positive motivation for intervention, and concentration of capabilities within the two leading bloc powers appears to make their role as intervenors inevitable."<sup>67</sup>

Furthermore, according to Schwarzenberger, a bloc law of intervention is justified as a system-serving element of peacekeeping operations.<sup>68</sup> In his view, as long as the nuclear stalemate lasts, each side by keeping its own bloc house in order "makes its own indispensable contribution to the maintenance of world peace."<sup>69</sup>

#### 7. Enforcement measures by the United Nations

More explicit grounds for permissive coercion are provided in the U.N. Charter in relation to the exercise of force in the form of police action within the framework of the collective security system created by the United Nations, that is, the implementation of enforcement measures duly undertaken by the Organization. Accordingly, under chapter VII of the Charter, the Security Council<sup>70</sup> is empowered to order or authorize military action in respect of a threat to the peace, breaches of the peace and acts of aggression. Coercive action is also available pursuant to a decision of a regional organization for the maintenance of peace and security in a particular region, subject to the conditions laid down in chapter VIII of the Charter.

Thus, in providing for the possibility of enforcement action needed to maintain or restore international peace and security, the U.N. Charter itself implies that the use of force is not an unmitigated evil. Rather, the Charter seems to be consistent with the history of mankind's approach to warfare: the evil is deplored, but circumstances are foreseen in which the evil of warfare is apparently judged to be a lesser evil.

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67. Oglesby, *The Use of Force in Bloc Situations*, 2 GA. J. INT'L & COMP. L. 77, 87 (1972).

68. Schwarzenberger, *Hegemonial Intervention*, 13 Y.B. WORLD AFF. 236 (1959).

69. *Id.* at 261.

70. But note that the General Assembly under the Uniting for Peace Resolution provided that in case the Security Council failed to fulfill its primary responsibility, the execution of this responsibility was to be reserved to itself.

## 8. Action against former enemy states

Another recognized exception to the principle of non-use of force in international relations pertains to action against former enemy states. This exception is embodied in article 107 of the Charter which stipulates that "[n]othing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action."<sup>71</sup> It is reasonable, of course, to argue that this provision only intended to cover the immediate post-war period and is now obsolete. This view gains some weight from the fact that article 107 was included under a chapter entitled "transitional security arrangements." Such an interpretation, however, is less valid with respect to article 53 which reinforces the above provision in the context of regional organizations.<sup>72</sup>

### C. Intervention

A contemporary analysis of the justifiability of the use of force in international law must also take cognizance of what may be regarded as the modern version of war, namely intervention. Conceived vaguely by Vattel,<sup>73</sup> the concept of intervention matured into permanent usage by the time de Martens wrote the third edition of *Precis du Droit des Gens moderne de l'Europe* in 1827<sup>74</sup> and thereafter appears

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71. U.N. CHARTER art. 107.

72. According to article 53:

[N]o enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state . . . provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on the request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

U.N. CHARTER art. 53, para. 1.

Note, however, reactions of the United States, Great Britain and France to the Soviet claim in 1968 of its right to intervene in the affairs of the Federal Republic of Germany (FRG) on the ground that the latter was posing a threat to international peace by the revival of Nazism. The United States denied such a right, asserting that the Charter provisions in question had, due to changed circumstances in Europe in which the two halves of Germany were each allied to opposing military blocs, become obsolete. *The Times*(London), Sept. 18, 1968, at 1, col. 4. For similar reasons the Soviet attitude was also strongly opposed by Great Britain and France. *Id.*, Sept. 21, 1968, at 5, col. 7.

73. See E. VATTEL, *supra* note 12, at 19.

74. See Winfield, *The History of Intervention in International Law*, 3 BRIT. Y.B. INT'L L. 130, 135 (1922-23) (discussing the history of the word "intervention").

to have provided a convenient mechanism for the use of force in the world arena. While armed intervention is not necessarily equivalent to regular war (although war often results and is always risked), the two generally share the element of compulsion and may be appraised, therefore, within a similar framework.

In fact, a just/unjust war analysis can no longer be limited to regular war but must extend into the broad category in which physical force is exercised.<sup>75</sup> This is particularly the case in view of the great proliferation of types of warfare and the continued blurring of the distinctions between insurrections, civil wars, just struggles against colonialism, wars of national liberation, guerrilla wars, sparrow wars, war by proxies, United Nations' wars to preserve the peace, international socialist wars to serve the cause of revolution, and conventional interstate wars.

### 1. The principle of nonintervention

The concept of intervention defies definition. "Of all the terms in general use in international law," states Fenwick, "none is more challenging than that of intervention. Scarcely any two writers are to be found that define this term in the same way or who classify the same situations under it."<sup>76</sup> A principle of nonintervention was nonetheless enunciated by the United Nations General Assembly. Adopted by a vote of 109 to zero, with one abstention, the General Assembly Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty<sup>77</sup> seemed to reflect current opinion of the international community when it provided that:

No State has the right to intervene, directly or indirectly, for any reason whatever in the internal or external affairs of any State. Consequently, armed intervention and all other forms of intervention or attempted threats against the personality of the State or against its political, economic and cultural elements are condemned.<sup>78</sup>

75. It is not intended, however, to include other claims of use of force which do not take the form of a military presence such as blockades of normal passage, of trade and transit or the use of mass media to launch a campaign of hatred and vilification, and so forth. See references to the "development dimension in the concept of non-use of force" in General Assembly, Report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations, 34 U.N. GAOR Supp. (No. 41), U.N. Doc. A/34/41 (1979).

76. Fenwick, *Intervention: Individual and Collective*, 39 AM. J. INT'L L. 645, 645 (1945).

77. G.A. Res. 2131, 20 U.N. GAOR Supp. (No. 14) at 11, U.N. Doc. A/6220 (1965).

78. *Id.*

This principle was later reiterated in the 1970 Declaration of Principles of International Law Concerning Friendly Relations and fortified by the addition of the provision that armed intervention and all forms of interference are in violation of international law.<sup>79</sup>

## 2. Exceptions to the principle of nonintervention

By the same token, the proscription of nonintervention has suffered erosion over the last three decades through the use of permissive doctrines justifying intervention under certain circumstances, for instance, by invitation (Hungary 1956, Czechoslovakia 1968 and Afghanistan 1979), under a treaty (secondary justification of the Soviets in the above cases) and in internal conflicts. Normatively, however, they have not been accepted without qualifications.

### a. intervention by invitation

Under normal conditions, recognized governments have a right to receive external military assistance and outside states are free to furnish such aid. However, an intervention of this type, even by invitation, will contravene article 2(4) of the Charter if the outside force imposes restrictions on the political independence of the country as a condition of its aid. Examples of impermissible restrictions attached to military assistance include the installation of a "puppet" government or denial of the peoples' right to determine who will rule them. Needless to say, the intervening power (U.S.S.R. in the examples noted above) has failed to convincingly demonstrate that its use of force has not infringed upon the right of the people of the countries invaded to determine their political system and the composition of their government.<sup>80</sup>

### b. intervention under a treaty

The same objections are likely to be raised with respect to interventions based on treaties of the kind sometimes concluded between a new state and the colonial or mandatory power which had previously controlled it. Thus, critics of the inviting regime would argue that the treaty provision for intervention and its specific invocation violated

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79. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, *reprinted in BASIC DOCUMENTS IN INTERNATIONAL LAW* 39 (I. Brownlie 2d ed. 1972).

80. See Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1644-45 (1984) (discusses the Grenada intervention of 1983).

the sovereignty of the nation and frustrated the process of self-determination and self-government. It should be noted, however, that a treaty may constitute a sufficient legal basis for coercive intervention if undertaken within the limits of collective self-defense as generally understood, namely, in the form of aid to another state in case of aggression or armed attack.

c. intervention in internal conflict

Also permitted as a form of collective self-defense is a counter-intervention in the context of civil war following an illegal intervention on one side.<sup>81</sup> However, to support with force one side and not the other in an internal conflict is to deprive the people in some measure of their right to decide the issue by themselves. It is independence of the state engaged in civil war.<sup>82</sup>

d. intervention to protect nationals abroad

At the same time, international lawyers interpreting state practice point to a large number of justifiable interventions inspired by moral considerations. A fairly broad base of support exists, for instance, to legitimize interventions to protect nationals,<sup>83</sup> although opinions differ as to the legal rationale underlying such a justification. One line of reasoning contends that the territorial integrity or political independence of a state is not impaired by an emergency action solely to rescue nationals from a danger which the territorial state cannot or will not prevent and hence should not be regarded as transgressing article 2(4) of the Charter.<sup>84</sup> A second line of reasoning believes that the numerous international instruments dealing with human rights, and the increasing involvement of the United Nations with human rights, have shifted human rights from the area of exclusive state ju-

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81. *Id.* at 1642.

82. *Id.* at 1643. The above "exception" will also be discussed from the point of view of legitimacy of authority in the author's doctoral thesis.

83. It seems that even scholars who deny the legality of such interventions in strict law are ready to accept it in practice when "cogent reasons of humanity for acting [exist]." See, e.g., I. BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 301 (1963) (footnote omitted).

84. See A. THOMAS & A. THOMAS, *THE DOMINICAN REPUBLIC CRISIS 1965* at 11-18 (1967); Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 *IOWA L. REV.* 325, 334-51 (1967) [hereinafter Lillich, *Forcible Self-Help*]; Lillich, *Intervention to Protect Human Rights*, 15 *MCGILL L.J.* 205, 210-19 (1969); Reisman, *Humanitarian Intervention to Protect the Ibos*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* 167 app. A, 176-77 (R. Lillich ed. 1973).

risdiction to that of international concern thereby rendering the non-intervention principle inapplicable to those cases.<sup>85</sup> A final school of thought asserts a right to intervene under such circumstances as a measure of self-defense in accordance with article 51 of the Charter.<sup>86</sup>

#### e. humanitarian intervention

Another legal basis for intervention provides that intervention for the protection of human rights in general is justified on humanitarian grounds within the limits of general international law.<sup>87</sup> This view, which has many supporters in the international legal community, was cogently expressed by Oppenheim. Although he accepts that "by virtue of its personal and territorial supremacy a State can treat its own nationals according to discretion,"<sup>88</sup> Oppenheim proceeds to assert that:

[T]here is a substantial body of opinion and of practice in support of the view that there are limits to that discretion and that when a State renders itself guilty of cruelties against and persecution of its nationals, in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible.<sup>89</sup>

Over a decade later, Jenks wrote:

[T]he world must recognize the need . . . for external intervention

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85. See McDougal & Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1 (1968).

86. See Waldock, *supra* note 34, at 466-67; Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 RECUEIL DES COURS 5, 172-74 (1957); D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 91-105 (1958); Fawcett, *Intervention in International Law*, 103 RECUEIL DES COURS 347-400 (1961); Fenwick, *The Dominican Republic: Intervention or Collective Self-Defense*, 60 AM. J. INT'L L. 64 (1966) (editorial comment); J. STONE, *supra* note 51, at 94-97. Thomas and Thomas go on to extend the permissibility of self-help to protect one's own nationals as part of the "inherent right of self-defence" through an "ancillary-like" rationale to cover situations in which the nationality link is missing. A. THOMAS & A. THOMAS, *supra* note 84, at 20. A wider use of article 51 is also made by Rostow who maintains that "[t]he customary international law right of humanitarian intervention in situations of chaos and massacre survives under the Charter presumably as a form of limited self-help under Article 51 to remedy catastrophic breaches of international law." Rostow, Book Review, 82 YALE L.J. 829, 848 (1972).

87. See generally Lillich, *Forcible Self-Help*, *supra* note 84, at 325; de Schutter, *Humanitarian Intervention: A United Nations Task*, 3 CAL. W. INT'L L.J. 21 (1972); H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 120-21 (1973); Fonteyne, *Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 197 app. B (R. Lillich ed. 1973).

88. 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 279 (7th ed. 1948).

89. *Id.* at 279-80.

in cases not covered by the right of self-defence as so defined [in Article 51 of the Charter] in which a world interest or the conscience of mankind is involved. The world community cannot tolerate acts of savagery on the ground that its civilised members have international relations.<sup>90</sup>

It is further argued in this respect that the failure of the international community to establish an effective collective machinery to enforce basic United Nations instruments on human rights, which on their part call for individual and collective action to implement their purposes, has left enforcement measures to states, or groups of states, acting in their own discretion.<sup>91</sup> It is only logical, the argument goes, that self-help prerogatives revive when an effective collective mechanism to protect against gross violations of human rights is unavailable.<sup>92</sup> A system of co-ordinate responsibility for the active protection of human rights is thus created whereby members may act jointly with the organization as well as singly or collectively under international common law of humane intervention.<sup>93</sup>

The views of states on the question of humanitarian intervention tend to vary. The debates on the Principles of International Law Concerning Friendly Relations and Co-operation Among States suggest the following categorization among States: 1) those rejecting humanitarian intervention for doctrinal and policy reasons,<sup>94</sup> 2) those asserting that the principle of non-intervention should not apply when action was taken to remedy situations such as denials of human rights,<sup>95</sup> and 3) those accepting the principle of non-intervention except in exceptional cases of gross violations of human rights, that is, (a) those likely to affect international peace and security,<sup>96</sup>

90. C. JENKS, *A NEW WORLD OF LAW?* 30 (1969).

91. See McDougal & Reisman, *Response*, 3 INT'L LAW. 438, 440-41 (1969); Franck & Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275, 299-302 (1973).

92. Reisman, *Nullity and Revision*, cited in Lillich, *A Reply to Ian Brownlie*, *supra* note 60, at 229, 239.

93. McDougal & Reisman, *supra* note 91, at 444.

94. Mexico, 19 U.N. GAOR Special Committee on Friendly Relations and Co-operation Among States (30th mtg.) at 4-6, U.N. Doc. A/AC.119/SR.30 (1964); Rumania, 20 U.N. GAOR C.1 (1403d mtg.) para. 23, U.N. Doc. A/C.1/SR.1403 (1965).

95. Algeria, 18 U.N. GAOR C.6 (809th mtg.) para. 26, U.N. Doc. A/C.6/SR.809 (1963); Mali, 20 U.N. GAOR C.6 (882d mtg.) para. 34, U.N. Doc. A/C.6/SR.882 (1965); Syria, 20 U.N. GAOR C.6 (884th mtg.) para. 52, U.N. Doc. A/C.6/SR.884 (1965); Senegal, 20 U.N. GAOR C.6 (889th mtg.) para. 20, U.N. Doc. A/C.6/SR.889 (1965); Turkey, 20 U.N. GAOR C.6 (892d mtg.) para. 5, U.N. Doc. A/C.6/SR.892 (1965).

96. See, e.g., United Arab Republic, 19 U.N. GAOR Special Committee on Friendly



(b) genocide,<sup>97</sup> (c) apartheid and racial discrimination,<sup>98</sup> and (d) denial of the inherent right to self-determination.<sup>99</sup>

The above debates revealed that states are generally reluctant to accept interventions directed at remedying human rights violations as an *explicit* exception to the Charter's prohibition of force; although, a certain notion of distributive justice, notably prevalent among socialist and third world countries, has led them to recognize the justifiability of intervention for the protection of human rights in specific contexts (e.g. colonial and neo-colonial).<sup>100</sup>

At the same time, the lack of formal condemnation or criticism *in principle* in the United Nations and in other international forums, in cases such as the Stanleyville operation and the Indian intervention in Bangladesh, lends support to the view that the world community by its lack of adverse reaction *in practice* condones conduct which, although a *formal* breach of positive legal norms, appears acceptable because of higher motives of a moral, political or other nature.<sup>101</sup> Indeed, according to one theory, this lack of express condemnation in specific cases would in fact confer on such actions the character of

Relations and Co-operation Among States (30th mtg.) at 20-21, U.N. Doc. A/AC.119/SR.30 (1964).

97. Bulgaria, 18 U.N. GAOR C.6 (807th mtg.) para. 27, U.N. Doc. A/C.6/SR.807 (1963); Mongolia, 18 U.N. GAOR C.6 (819th mtg.) para. 4, U.N. Doc. A/C.6/SR.819 (1963); Mali, 20 U.N. GAOR C.6 (882d mtg.) para. 34, U.N. Doc. A/C.6/SR.882 (1965); Turkey, 20 U.N. GAOR C.6 (892d mtg.) para. 31, U.N. Doc. A/C.6/SR.892 (1965); Pakistan, 20 U.N. GAOR C.1 (1404th mtg.) para. 5, U.N. Doc. A/C.1/SR.1404 (1965).

98. Bulgaria, 18 U.N. GAOR C.6 (807th mtg.) para. 27, U.N. Doc. A/C.6/SR.807 (1963); Ghana, 19 U.N. GAOR Special Committee on Friendly Relations and Co-operation Among States (29th mtg.) at 6, U.N. Doc. A/AC.119/SR.29 (1964); Central African Republic, 20 U.N. GAOR C.6 (884th mtg.) para. 25, U.N. Doc. A/C.6/SR.884 (1965); Senegal, 20 U.N. GAOR C.6 (889th mtg.) para. 20, U.N. Doc. A/C.6/SR.889 (1965); Turkey, 20 U.N. GAOR C.6 (892d mtg.) para. 31, U.N. Doc. A/C.6/SR.892 (1965).

99. Hungary, 18 U.N. GAOR C.6 (806th mtg.) para. 8, U.N. Doc. A/C.6/SR.806 (1963); Ghana, 19 U.N. GAOR Special Committee on Friendly Relations and Co-operation Among States (29th mtg.) at 6, U.N. Doc. A/AC.119/SR.29 (1964); Central African Republic, 20 U.N. GAOR C.6 (884th mtg.) para. 25, U.N. Doc. A/C.6/SR.884 (1965); Senegal, 20 U.N. GAOR C.6 (889th mtg.) para. 20, U.N. Doc. A/C.6/SR.889 (1965); Afghanistan, 22 U.N. GAOR C.6 (1000th mtg.) para. 47, U.N. Doc. A/C.6/SR.1000 (1967); Liberia, 22 U.N. GAOR C.6 (1001st mtg.) para. 2, U.N. Doc. A/C.6/SR.1001 (1967).

100. See *infra* text accompanying notes 303-49.

101. See HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 64 (R. Lillich ed. 1973) (comments by Professor Franck); *id.* at 73 (comments by Professor Frey-Wouters); *id.* at 114 (comments by Professor Friedmann); Wright, *The Legality of Intervention Under the United Nations Charter*, 51 AM. SOC'Y INT'L L. 79, 81 (1957) (proceedings of the fifty-first annual meeting).

some kind of second-tier or sub-legality.<sup>102</sup>

f. intervention for "rectification" purposes

A particular strong sense of justice is embedded in another argument justifying forcible intervention, namely the argument of rectification. Based on an analogy to general principles of the domestic law of restitution and quasi-contract, a state is said to possess a right of rectification when it is about to suffer irreparable harm as a result of a second state's failure to perform its acknowledged legal duty. Given the well established rule in municipal law that allows a person to perform the duty of another without the permission of the defaulting party when immediately necessary to satisfy the requirements of public decency, a state may be considered to be within its lawful rights when rectifying a wrongful situation by performing the legal obligation neglected by the delinquent state.<sup>103</sup>

*D. Reprisals*<sup>104</sup>

In addition to the reasons offered for the legitimization of self-help measures which are protective in nature, arguments are also advanced which contain a pronounced element of retributive justice. It is pointed out by Bowett, for instance, that Security Council practice implies recognition of the permissibility of some type of reasonable reprisals.<sup>105</sup> Others draw support for excluding certain reprisals from an interpretation of article 2(4) of the Charter, which leaves open the

102. HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 61-62, 118 (R. Lillich ed. 1973) (comments by Professor Lillich); *id.* at 68-69 (comments by Professor Falk).

103. A discussion and application of the principle to the Entebbe incident is noted in Sheehan, *The Entebbe Raid: The Principle of Self-Help in International Law as Justification for State Use of Armed Force*, 1 FLETCHER FORUM 135 (1977); see also *Control of Terrorism in International Life: Cooperation and Self-Help*, 71 AM. SOC'Y INT'L L. 17, 31 (1977) (proceedings of the seventy-first annual meeting); Rubin, *Terrorism and Social Control in International Law Perspective*, 6 OHIO N.U.L. REV. 60, 67-68 (1979). Rubin links "rectification" to the broad concept of self-defense as it evolved in United Nations practice and considers it a subcategory of the latter to the exclusion of the undefinable and unlimited concept of "national security."

104. A more in-depth examination of this issue is undertaken in the author's doctoral thesis.

105. See Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 22 (1972); see also Tucker, *Reprisals and Self-Defense: The Customary Law*, 66 AM. J. INT'L L. 586, 597 (1972). Farer attempts to analyse the "asymmetrical" response of the Security Council to the various incidents of reprisals in terms of the particular political context, but he too identifies justifiable cases of reprisals which may even have a "meliorative effect" on global interrelationships. See Farer, *Law and War*, in 3 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 21, 66, 69-76 (C. Black & R. Falk eds. 1971).

possibility that reprisal is a use of force "not inconsistent with the purposes of the UN."<sup>106</sup> A case in point is the *Corfu Channel Case*<sup>107</sup> in which, according to Waldock, the Court implied that some residual right to reprisal remained in the modern international legal order.<sup>108</sup> Yet others, in an attempt to reconcile the state of the law regarding reprisals with their common occurrence in the international arena, resort to sheer rationality in contending that if war, the ultimate weapon, was accepted as a legitimate form of self-defense it was "incomprehensible that the use of a lesser weapon [reprisals], a part rather than the whole, should be regarded as objectionable."<sup>109</sup>

A different line of argument concerning the justifiability of reprisals emphasizes their character as a protective measure of self-help distinct from retribution.<sup>110</sup> It is asserted that terrorist attacks on civilian populations represent a violation of individual and collective human rights of those individuals subjected to such violence.<sup>111</sup> Since the United Nations has been ineffective in granting protection from terrorist assaults, victim States must themselves retaliate in some way as a matter of *survival*, for "no State can be required passively to endure attacks upon its citizens."<sup>112</sup> The fact remains that armed reprisals are a frequent phenomenon of international politics<sup>113</sup> and, as observed by Friedlander, will continue to be utilized by an aggrieved party when the world community is either unwilling or unable to take effective remedial action.<sup>114</sup>

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106. See E. COLBERT, RETALIATION IN INTERNATIONAL LAW 203 (1948).

107. 2 *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (merits); 1 *Corfu Channel* (U.K. v. Alb.), 1948 I.C.J. 15 (preliminary objections).

108. Waldock, *supra* note 34, at 501.

109. Dinstein, *The Legal Issues of "Para-War" and Peace in the Middle East*, 44 ST. JOHN'S L. REV. 466, 472 (1970).

110. Such a distinction was drawn by Britain in defending its attack upon a Yemeni fortress during March 1964. See Leiser, *The Morality of Reprisals*, 85 ETHICS 159 (1975).

111. Dinstein, *Terrorism and Wars of Liberation Applied to the Arab-Israeli Conflict: An Israeli Perspective*, 3 ISRAEL Y.B. HUM. RTS. 78, 79-81 (1973).

112. M. WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 221 (1977).

113. Indeed, all major powers have had recourse to reprisals in recent years; see references to the United Kingdom in Danaba (1957), France in Sakheit (1958), United States in the Gulf of Tonkin (1964) and USSR in the Chinese border incidents (1969) by Dinstein, *A Survey of Self-Defense in International Law*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 273, 279 (M. Bassiouni & V. Nanda eds. 1973).

114. Friedlander, *Retaliation as an Anti-Terrorist Weapon: The Israeli Lebanon Incursion and International Law*, 8 ISRAEL Y.B. HUM. RTS. 63, 73 (1978).

*E. General Trends*

One thread of reasoning seems to run through all the above arguments which promote — for the sake of humanity and justice — forcible interventions or self-help actions even in the context of a general condemnation of the use of force in international relations, namely, that it is preferable to resort to coercion “rather than abandon all such resort to force to a blanket condemnation” thus leaving much state conduct unregulated.<sup>115</sup> The present tendency, amongst jurists at least, is to confirm customary principles permitting states some power of forcible initiative, provided this latitude is adequately safeguarded by well defined limiting criteria.<sup>116</sup> In the spirit of the just war tradition, attempts are constantly being made to distinguish between justifiable and unjustifiable uses of force and provide a moral framework within which states could conduct their international relations.

At the same time, the parameters of permissibility of force are not carefully delineated, particularly since they hinge to a large extent on the meaning and scope accorded to terms such as “aggression” and self-defense.<sup>117</sup> Although “aggression” has now been defined as consisting of acts involving the opening of a conflict by force of arms,<sup>118</sup> the definition is replete with elements subject to varied interpreta-

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115. This point was made, for example, by Richard Falk with regard to reprisals. See Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415, 431 n.39 (1969); see also Sornarajah, *Internal Colonialism and Humanitarian Intervention*, 11 GA. J. INT'L & COMP. L. 45, 45-77 (1981).

116. Several sets of criteria for the appraisal of humanitarian intervention have been suggested by various scholars in recent years. See, e.g., Nanda, *The U.S. Action in the 1965 Dominican Crisis: Impact on World Order* (pt. 1), 43 DENVER L. J. 441, 475 (1966); Farer, *Intervention in Civil Wars: A Modest Proposal*, 67 COLUM. L. REV. 266, 271 (1967); Lillich, *Forcible Self-Help*, supra note 84, at 347-51; Lillich, *Forcible Self-Help under International Law*, 62 NAVAL WAR C. REV. 129 (1980); Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203, 258-68 (1974).

117. It should be recalled, however, that the correlation between self-defense and aggression is not exhaustive of the range of permissible use of force.

118. See 29 U.N. GAOR Supp. (No. 19), U.N. Doc. A/AC.134/L.46 (1974), reprinted in 13 INT'L LEGAL MATERIALS 710 (1974); G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974), noted in 14 INT'L LEGAL MATERIALS 588 (1975). The enacted definition notes that “the first use of force by a State in contravention of the charter” was to be admitted only as “prima facie evidence of an act of aggression.” The Security Council may, therefore, when making its decision, be guided by “other relevant circumstances.” 13 INT'L LEGAL MATERIALS 713 (1974). And, as indicated, in the tenth paragraph of the preamble to the resolution, “the question whether an act of aggression has been committed must be considered in light of all the circumstances of each particular case.” *Id.* at 712.

tions<sup>119</sup> which, in turn, may affect the permissible limits of forcible actions. Thus, for instance, a broad conception of aggression which embraces subversive activities emanating from a neighboring country would tend to extend the scope of admissible self-defense. Similarly, acceptance of the thesis that defensive responses are legitimate even in the case of indirect aggression might open a rather wide field for the use of force in defensive actions.

Article 51 of the U.N. Charter has also been exposed to very broad interpretations, the least controversial of which is the one maintaining that under the Charter any breach of article 2(4) gives rise to a right of self-defense in accordance with article 51. Coupled, however, with a rather liberal view of the term "force" in article 2(4) as encompassing "all forms of pressure including those of a political and economic character which have the effect of threatening the territorial integrity or political independence of any state,"<sup>120</sup> the right of self-defense is substantially enlarged. Another frequent contention is that forcible measures may be legitimately taken in self-defense whenever national security is threatened; whether by specific armed attack, or any other direct or indirect aggression.<sup>121</sup> Article 51 is perceived as

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119. Indeed, it is Stone's thesis that the consensus definition of aggression contributed nothing to clarify the important issues raised by the Charter provisions on the use of force by states. The definition, he argues, either evaded these issues or gave deliberately ambiguous answers, thereby perpetuating rather than resolving pre-existing conflicts of views. See generally J. STONE, *CONFLICT THROUGH CONSENSUS: UNITED NATIONS APPROACHES TO AGGRESSION* (1977).

120. See Report of the Special Committee on Friendly Relations and Co-operation Among States, 21 U.N. GAOR Annex III (Agenda Item 87) at 22, U.N. Doc. A/6230 (1966). For a detailed analysis of the various interpretations given to the term "force" in article 2(4), see Jacewicz, *The Concept of Force in the U.N. Charter*, 9 POLISH Y.B. INT'L L. 135 (1977-78).

121. Israel, for example, claims that her entire posture is one of self-defense and that all forcible actions resorted to are taken on that basis. In 1966, before the Security Council, the Israeli representative noted that "[w]hatever we do, whatever our government decides to do, it is done in order to defend and protect our national independence and our national security" 21 U.N. SCOR (1321st mtg.) at 21, S/P.V. 1321 (1966). Again in a Security Council debate in March 1969 it was stated by the Israeli representative: "Yesterday's Israeli action was an act of self-defense . . . Israel has been in a state of self-defense since 1948. It will so remain until the Arab Governments agree to end the war waged against Israel and conclude peace." 24 U.N. SCOR (1466th mtg.) at 48, S/P.V. 1466 (1969); 24 U.N. SCOR (1468th mtg.) at 21, S/P.V. 1468 (1969). India also claims that her incursion into East Pakistan was in self-defense. Yet it was obvious that no attack against Indian territory was occurring nor was one threatened. It was India's view that her security was imperilled by the conditions existing in East Pakistan and particularly by the great influx of Bengali refugees into Indian territory which was depleting her slender food reserves. See *Mrs. Gandhi Said to Set Terms for Visits by Observer Teams*, N.Y. Times, Nov. 17, 1971, at 16, col. 7; Schanberg, *India and Pakistan: Short of War*, N.Y. Times, Nov. 18, 1971, at 2, col. 3; *No Reaction So Far*, N.Y. Times, Nov. 30, 1971, at 3, col. 5. Support from international jurists for the above contention with regard

covering the use of force to protect the citizens of a nation in a situation of distress or to remedy severe breakdowns in public order after earthquakes, riots or other disastrous circumstances such as those which surrounded the Entebbe raid.<sup>122</sup> And finally, in its most controversial form the permission to use force in self-defense has been taken to mean that when the cause of a state is just, it is entitled to use force in the exercise of its rights to self-defense.<sup>123</sup> A variety of techniques are employed to avoid the limitations of the armed attack reference in article 51. Most are based on the premise that paragraph 4 does not itself restrict the right of self-defense,<sup>124</sup> a premise commonly defended on the grounds that a momentous change in international law requires explicit language.

This multitude of interpretations and the general ambiguity of the language in the Charter is said to reflect the draftsmen's recognition that "as a matter of policy Members should be unlikely either in 1945 or 1974, to leave themselves exposed and helpless in the face of an indefinite series of grave wrongs by a blanket prohibition of forceful reaction."<sup>125</sup> Indeed, it seems that international behavior is motivated by the notion that in the absence of a society possessed of effective collective procedures for protecting the rights of its members as well as for changing conditions that have become oppressive and inequitable, any attempt to deny states some ultimate means of self-redress is bound to fail. The trend which may thus be discerned since the adoption of the Charter, is one of attempting to preserve a sphere

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to self-defense can be found, amongst others, in the writings of J. STONE, *supra* note 51, at 496-99; Waldock, *supra* note 34, at 496-99.

122. See Sheehan, *supra* note 103, at 135.

123. See Dugard, *International Terrorism and the Just War*, 12 STAN. J. INT'L STUD. 21, 23 (1977). A more detailed examination of self-defense as a "just cause" will be provided in chapter four.

124. There is a substantial reliance on the fact that the Charter's Drafting Committee I/I stated in its report that the "use of arms in legitimate self-defense remains admitted and unimpaired." Report of the Rapporteur of Committee I to Commission I as adopted by Committee I/I, Doc. 944, I/1/34(1), 6 U.N.C.I.O. Docs. 446, 459 (1945). The report was approved by Commission I. See Verbatim Minutes of fifth meeting of Commission I, Doc. 1187, I/13, 6 U.N.C.I.O. Docs. 202, 204 (1945).

125. According to Stone's incisive analysis of the 1974 Definition of Aggression, the exercise of defining aggression was in fact a "political warfare by other means" while at the same time states took care to ensure sufficient ambiguities in the text for future freedom of maneuver. As Stone observes, "[i]t is . . . as much the unpredictability of future relations, as any present Machiavellian intentions, which holds States from committing themselves in advance to simple, precise and qualified criteria of aggression, capable of instant clearcut application in crisis." J. STONE, *supra* note 119, at 12-13.

of justifiable use of force, which tends to expand or contract depending to a certain extent on its ideological basis.

In particular, the period since 1960 bears evidence of such a trend, consequently earning the label "era of traditional just war doctrine revisited."<sup>126</sup> This label, it is suggested, conveys the notion that "the world no longer seriously purports to accept the view that peace is unconditionally a higher value than justice." Rather, nations "have returned to the medieval view that it is permissible and perhaps even desirable — and, conceivably, even mandatory — to fight to promote justice, broadly conceived. Evil ought to be overturned, and good ought to be achieved, by force if necessary."<sup>127</sup> Put another way, recent historical development reaffirms that the issue of the justifiability of engagement in war hinges not on whether one has chosen to fight in pursuit of some goal, but whether the goal is a just or unjust one.

This attitude towards the use of force is reflected in the emphatic support given by the United Nations to the demands for a speedy termination of colonial regimes,<sup>128</sup> an attitude which has culminated in the acknowledgement of the legitimacy of insurgencies against such regimes.<sup>129</sup> Indeed, debates preceding the United Nations Declaration of Principles of International Law Concerning Friendly Relations did not even consider the option of a total ban of armed force from international relations. Rather, a major part of the discussions focused on issues such as whether the legal use of force included a right of nations or peoples to self-defense against colonial domination<sup>130</sup> in the exercise of their right to self-determination,<sup>131</sup> or what constitute the limits of legally permissible interventions by states in matters

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126. See Claude, *Just Wars: Doctrines and Institutions*, 95 POL. SCI. Q. 83, 94 (1980).

127. *Id.*

128. Declaration on the Granting of Independence to Colonial Countries and Peoples; Special Committee on Its Implementation, G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960), reviewed by 13 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 701 (1968).

129. G.A. Res. 2548, 24 U.N. GAOR Supp. (No. 30) at 5, U.N. Doc. A/7630 (1969); G.A. Res. 3070, 28 U.N. GAOR Supp. (No. 30) at 78, U.N. Doc. A/9030 (1973); G.A. Res. 3031, 27 U.N. GAOR Supp. (No. 30) at 87, U.N. Doc. A/8730 (1972). In 1973 the General Assembly reaffirmed in Resolution 3070 (XXVIII) "the legitimacy of the peoples' struggle for liberation from colonial and foreign domination and alien subjugation by all available means, including armed struggle."

130. It has been an Afro-Asian theory that colonialism is a permanent aggression that can be legitimately repelled at any time on the basis of self-defense, but it should be pointed out that neither the Declaration nor other resolutions explicitly base the *ius ad bellum* of the liberation movements on self-defense.

131. See G.A. Res. 1966, 18 U.N. GAOR Supp. (No. 15) at 70, U.N. Doc. A/5515 (1963).

within the domestic jurisdiction of another state.<sup>132</sup> The discussion concluded with the provision that "nothing in the foregoing paragraph shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful."<sup>133</sup> Specifically, the Declaration proclaimed people's right "to seek and receive support" in actions against, and resistance to, any forcible actions depriving them of their right to self-determination, freedom, and independence.<sup>134</sup> In a similar vein, later resolutions of the General Assembly confirmed the legitimacy of struggles for national liberation, to achieve self-determination, and to end racial oppression.<sup>135</sup>

Various theories have been formulated by state representatives in this context. It is argued, for instance, that wars of self-determination are permissible as a form of self-defense. This argument generally involves a wide interpretation of article 51 of the Charter and an expanded definition of what constitutes force.<sup>136</sup> Another school of thought perceives colonialism as a form of permanent or continuing aggression, thereby warranting a legitimate use of force against it in the exercise of the right to self-defense.<sup>137</sup> A third theory focuses on

132. See 21 U.N. GAOR Special Committee on Friendly Relations and Co-operation Among States (29th mtg.), U.N. Doc. A/AC.119/SR.26 (1966).

133. See source cited at *supra* note 38.

134. *Id.*

135. G.A. Res. 2131, 20 U.N. GAOR Supp. (No. 14) at 11, U.N. Doc. A/6220 (1965); G.A. Res. 2326, 22 U.N. GAOR Supp. (No. 16) at 4, U.N. Doc. A/L.541/Rev.1 and Add.1 (1967); G.A. Res. 2908, 27 U.N. GAOR Supp. (No. 30) at 2, U.N. Doc. A/L.677/Add.1 (1972); G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9446 (1974). It should be added, however, that these resolutions, while mastering commanding majorities, have consistently lacked Western support. The exception has been resolutions which condemn specific and unpopular cases such as Portugal, although even in this case the United States and United Kingdom have mostly resorted to abstaining rather than voting in favor of the resolutions. See G.A. Res. 2270, 22 U.N. GAOR Supp. (No. 16) at 47, U.N. Doc. A/6657 (1967); G.A. Res. 2395, 23 U.N. GAOR Supp. (No. 18) at 63, U.N. Doc. A/7352 (1968); G.A. Res. 2795, 26 U.N. GAOR Supp. (No. 29) at 98, U.N. Doc. A/8549 (1971); G.A. Res. 2980, 27 U.N. GAOR Supp. (No. 30) at 81, U.N. Doc. A/8959 (1972); G.A. Res. 3061, 28 U.N. GAOR Supp. (No. 30) at 3, U.N. Doc. A/L.702/Add.1-7 (1973).

136. Note the debates in the Special Committee on Friendly Relations and Co-operation Among States: Czechoslovakia, 19 U.N. GAOR (4th mtg.) at 6, U.N. Doc. A/AC.119/SR.4 (1964); Rumania, 19 U.N. GAOR (7th mtg.) at 17-18, U.N. Doc. A/AC.119/SR.7 (1964); Czechoslovakia, 19 U.N. GAOR (8th Mtg.) at 6, U.N. Doc. A/AC.119/SR.8 (1964); United Arab Republic, *id.* at 8-9; Ghana, 19 U.N. GAOR (10th Mtg.) at 14-15, U.N. Doc. A/AC.119/SR.10 (1964).

137. See *supra* note 130. This argument was raised by India at the time of its invasion of Goa, see 16 UN SCOR (987th mtg.) para. 46, U.N. Doc. A/PV.987 (1961), and supported by Ceylon, Liberia and the UAR, 16 U.N. SCOR (988th mtg.) paras. 128-29, U.N. Doc. A/PV.988 (1961). A similar argument was also put forward to Madagascar in the debates on the



the fact that since the right of self-determination is recognized, it would have as a necessary corollary a remedy in international law.<sup>138</sup> Finally, a fourth line of reasoning grounds the legitimacy of wars of national liberation in what has been termed the rule of exception.<sup>139</sup> It postulates that article 2(4) and the definition of aggression are inapplicable to wars of national liberation and that consequently, in such cases, the use of force is legitimate.<sup>140</sup>

The latter assertion was featured in the debates of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations. In the view of several delegates:

[N]othing in the treaty which would finally be drafted should call in question the legitimacy of the struggle being waged by colonial peoples to attain independence or restrict the right of peoples still subjected by colonial and racist regimes to pursue, by all means available to them, their struggle to free themselves from the yoke of aggression.<sup>141</sup>

Such views were strongly countered in the course of the relevant de-

Report of the Special Committee on the Question of Defining Aggression, 29 U.N. GAOR (1474th mtg.) para. 36, U.N. Doc. A/9619/Corr.1 (1974).

138. For the debates in the Sixth Committee on the Question of Defining Aggression, see: Mali, 25 U.N. GAOR C.6 (1207th mtg.) para. 62, U.N. Doc. A/C.6/1207 (1970); Union of Soviet Socialist Republic, 25 U.N. GAOR C.6 (1208th mtg.) para. 7, U.N. Doc. A/C.6/1208 (1970); Libya, 25 U.N. GAOR C.6 (1208th mtg.) para. 12, U.N. Doc. A/C.6/1208 (1970); Tanzania, 25 U.N. GAOR C.6 (1213th mtg.) para. 2, U.N. Doc. A/C.6/1213 (1970). Such an argument was also implicit in the drafting group's Report to the Special Committee on the Question of Defining Aggression, 28 U.N. GAOR Supp. (No. 19) at 18, U.N. Doc. A/9019 (1973).

139. This term was coined by Gorelick, *Wars of National Liberation: Jus ad Bellum*, 11 CASE W. RES. J. INT'L L. 71, 81 (1979).

140. Article 7 of the 1974 Definition of Aggression was interpreted by some countries as incorporating such a "rule of exclusion." For the relevant statements of the delegates, see: Mongolia, 29 U.N. GAOR C.6 (1474th mtg.) para. 12, U.N. Doc. A/C.6/1474 (1974); Kenya, *id.* at para. 24; Madagascar, *id.* at para. 39; China, 29 U.N. GAOR C.6 (1475th mtg.) para. 13, U.N. Doc. A/C.6/1475 (1974); Libya, 29 U.N. GAOR C.6 (1477th mtg.) para. 15, U.N. Doc. A/C.6/1477 (1974); Algeria, 29 U.N. GAOR (1479th mtg.) para. 29, U.N. Doc. A/C.6/1479 (1979); Democratic Yemen, *id.* at para. 27; Senegal, 29 U.N. GAOR C.6 (1480th mtg.) para. 17, U.N. Doc. A/C.6/1480 (1974); Burundi, 29 U.N. GAOR C.6 (1482d mtg.) para. 8, U.N. Doc. A/C.6/1482 (1974); Tunisia, *id.* at para. 26; Cameroon, 29 U.N. GAOR C.6 (1483d mtg.) para. 14, U.N. Doc. A/C.6/1483 (1974); Egypt, *id.* at para. 32; Sudan, 29 U.N. GAOR C.6 (1504th mtg.) para. 13, U.N. Doc. A/C.6/1504 (1974). Conflicting interpretations of article 7 were nonetheless given by other representatives and the cogency of the various contentions is discussed in the author's doctoral thesis.

141. 27 U.N. GAOR (2082d plen. mtg.) para. 28, U.N. Doc. A/PV.2082 (1972); Cyprus, 27 U.N. GAOR (2084th plen. mtg.) para. 74, U.N. Doc. A/PV.2084 (1972); Jordan, 27 U.N. GAOR (2084th plen. mtg.) para. 94, U.N. Doc. A/PV.2084 (1972).

bates, and further rebuttals have been provided by scholars.<sup>142</sup> But whether wars of national liberation and the like may be accepted as a legitimate use of force or not, the fact remains that the majority of the United Nations membership has, in fact, already supported the permissibility of such wars, and a modification of international legal norms may have taken place.<sup>143</sup>

Strictly speaking, the question whether war is ever justifiable under contemporary international law could legitimately prompt an uncompromising answer with a reference to the "scheme" of the U.N. Charter. Under this scheme, the use of force is prohibited except for individual and collective self-defense prior to Security Council action, or when centralized within the framework of chapter VII of the Charter. Such an answer would fail, however, to take cognizance of what Hart has termed the "internal aspect of rules," namely, the way that rules are viewed by those states subject to them.<sup>144</sup> While an observer adopting an external perspective may record the relevant Charter provisions and the numerous international resolutions confirming the illegality of the use of force, to understand the way in which these proscriptions affect the conduct of states, one needs to acknowledge the consistent claims and value preferences expressed by states in relation to the international use of force.

The overall tendency appears to be towards opting for the compromise position of the just war doctrine and attempting to set morally acceptable limits within which war could be waged rather than embracing the general proposition that all forms of international violence are equally legitimate or equally illegitimate. This compromise position of distinguishing use of prohibited force from that which is both necessary and desirable is preferable to the "[c]omplete disorder" which has "characterized the perspectives of traditional international law" as a result of the failure to forbid even the most intense and comprehensive destruction of values.<sup>145</sup>

Clearly, it has been amply demonstrated that the deeply en-

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142. A detailed discussion of the validity of the various claims is found in the author's doctoral thesis.

143. While according to orthodox legal thinking, "wars of national liberation" are internal phenomena, there often is third party involvement in such wars and even in the absence of direct involvement by international actors, they often have external ramifications. Additionally, in the analysis of war, a distinction between internal and international wars often becomes blurred and both are examined within the same overall framework. By the same token, students of war also tend to arrive at conclusions which may apply internally as well as externally.

144. See H. HART, *THE CONCEPT OF LAW* 55-60, 86-88 (1961).

145. See, e.g., McDougal & Feliciano, *supra* note 26, at 1063.

trenched ideological diversity among states is such that it precludes the possibility of seriously outlawing war altogether and that war, or at least the realistic threat of war, does, and perhaps must, remain a viable option in the pursuit of national policy. It is even arguable that "the sustained peace' [if we may so speak] between the United States and the Soviet Union," for instance, "is itself premised on the mutual tolerance of lesser wars [in which either or both may be indirectly involved]."146 One conclusion may, in any case, be drawn; namely, that it is imperative to take into consideration and accommodate the contending ideologies of the various powers of the world.

Indeed, this conclusion finds considerable support in the social science literature on the phenomenon of war. Bozeman, for example, argues in a recent article that "[i]n the multicultural environment of the twentieth century, foreign-policymakers must recognize and analyze multiple, distinct cultures as well as political systems that differ from each other significantly in their modes of rational and normative thought, their value orientations, and their dispositions in foreign affairs."<sup>147</sup>

To buttress her argument, Bozeman refers to the ideas prevailing with regard to war in non-Western societies such as sub-Saharan Africa, the Middle East, India, Southwest Asia and China. According to her, there is a marked contrast between these ideas and the established notions rooted in contemporary Western cultural perspectives. Bozeman attributes the difference between the two outlooks to the fact that in non-Western societies "peace is neither the dominant value nor the norm in foreign relations and that war, far from being perceived as immoral or abnormal, is viewed positively."<sup>148</sup>

Her careful dissection of non-Western attitudes towards war also leads Bozeman to the conclusion that these are at variance with the priorities officially set in the Charter of the U.N. and affiliated international organizations or that, contrary to what is commonly assumed, the United Nations does not reflect universally shared norms.

Bozeman's point appears to have some validity. The distinction, however, which she draws between Western and non-Western perspectives is possibly too general to be useful. Views on whether war is ever justifiable are divided along several additional lines and cannot be

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146. See Margolis, *The Concepts of War and Peace*, 6 SOC. THEORY & PRAC. 209, 214 (1960).

147. Bozeman, *War and the Clash of Ideas*, 20 ORBIS 61, 102 (1976).

148. *Id.*

effectively conceptualized in dichotomous terms. A more refined analysis would suggest at least the following categories: Western, Soviet, Chinese and Third World. Due considerations should also be given to perspectives which have their roots in established religions and which do not necessarily overlap with national policies.

### III. DIFFERENT APPROACHES TOWARDS THE LEGALITY/ JUSTNESS OF WAR

#### A. *The Western Approach*

As noted, the Western approach is the one which reflects most closely traditional international norms, although the lack of a unitary political base, the occasional divergence of interests and the proliferation of intellectual perspectives among the nations that form the "western world"<sup>149</sup> may render the identification of a coherent doctrine a rather difficult task. Notwithstanding this, there are sufficient common elements in the attitudes of the individual Western states and an attempt at a generalization is therefore appropriate.

Western states have always asserted their unqualified support for the various formal documents renouncing the use of force in international relations. Perhaps the most explicit statement of the Western position on the legality of war can be traced to the United States interpretation of the Kellogg-Briand Pact, as enunciated by Henry Stimson, then United States Secretary of State:

War between nations was renounced by the signatories of the Briand-Kellogg Treaty. This means that it has become illegal throughout practically the entire world. It is no longer to be the source and subject of rights. It is no longer to be a principle around which the duties, the conduct and the rights of nations revolve. It is an illegal thing. Hereafter when two nations engage in armed conflict either one or both of them must be wrongdoers — violators of this general treaty law. We no longer draw a circle

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149. Differences within the Western bloc have manifested themselves on numerous occasions: in 1959 when Gaullist France had partially forsaken the North Atlantic Treaty Organization (NATO), in 1973-74 when European States refused to support the United States in its aid to Israel and in its dealing with the Arab oil-producers, in 1974 when the enmity between Greece and Turkey, two NATO members, erupted in the Cyprus crisis (after which Greece, and recently Turkey, reduced their ties to NATO), and in the lack of support shown by Europeans to the United States-engineered Camp David Accords and the serious disagreement over the construction of a Soviet gas pipeline to Europe. On the multipolarization of the world's political system which rules out consideration in terms of "blocs," see Mushkat, *Grotius and the Changing Image of the Present International System and its Legal Order and Political Disorder*, 1 GROTIANA 53 (1980).

around them and treat them with the punctilios of the duelist's code. Instead we denounce them as law breakers. By the very act, we have made obsolete many legal precedents and have given the legal profession the task of reexamining many of its codes and treaties.<sup>150</sup>

This conviction motivated Western states to lend strong approval to a similar proscription of force, as promulgated in article 2(4) of the Charter.<sup>151</sup> Their declared position since has been that "whatever its grievances a state cannot justify initiating war, that whatever its interests a state should not resort to war to preserve or protect these interests."<sup>152</sup> In other words, wars as instruments of national policy are regarded as definitely unjust. At the same time, wars as instruments of international policy, that is, in self-defense or collective defense against overt aggression, waged in accordance with the Charter's requirements and subject to the collective judgment of the United Nations are generally supported by Western decision-makers. Indeed, United States officials representing their government in international bodies can be quoted as reaffirming the "commitment" of the United States "to the world of the Charter" which was said to express "both [the United States'] deepest philosophical traditions and the most realistic interpretation of [the United States'] national interest."<sup>153</sup>

However, while Western statesmen repeatedly profess commitment to the Charter, in practice their devotion to peaceful means of persuasion has not been particularly consistent, nor without limits.<sup>154</sup> Notwithstanding the general deference to international rule of law, Western states have contrived on several occasions to expand the range of permissible uses of force, utilizing for this purpose various instruments and institutional devices. The rationale for violence to

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150. Stimson, *The Pact of Paris, Three Years of Development*, 1 U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE U.S. 1932, DIPLOMATIC PAPERS 577-78 (1948).

151. Two countries, Japan and Italy, have included a renunciation of the threat of force or the use of force as a means for settling international disputes in their respective constitutions. See references by the national representatives in 35 U.N. GAOR Supp. (No. 4) paras. 225, 250, U.N. Doc. A/37/41 (1982).

152. R. TUCKER, *THE JUST WAR: A STUDY IN CONTEMPORARY AMERICAN DOCTRINE* 12 (1960).

153. 5 *THE DYNAMICS OF WORLD POWER: A DOCUMENTARY HISTORY OF UNITED STATES FOREIGN POLICY 1945-1973* at 283 (A. Schlesinger ed. 1973) (quoting an excerpt from a speech given by Ambassador Stevenson before the Security Council regarding the Cuban Missile Crisis).

154. Over 60 military interventions in foreign lands were undertaken by Britain, France and the United States since 1946. See generally Tillema & Van Wingen, *Law and Power in Military Intervention: Major States After World War II*, 26 INT'L STUD. Q. 220 (1982).

which they are inclined to resort more than any other is a wide construction of article 51, thus allowing an extensive use of force under the claim of self-defense. The Western position, as expressed in the debates of the Special Committee on the Question of Defining Aggression, hinges on the assumption that the Charter was not intended to restrict the customary right of individual and collective self-defense whose traditional, broad scope is not limited by the loose terminology used in article 51.<sup>155</sup> This contention is further supported, in their opinion, by the opening words of article 51 which states that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense.”<sup>156</sup>

In such a vein, a former Legal Adviser of the United States Department of State, Leonard Meeker, further maintains that the stipulated condition of “armed attack” preceding an action in self-defense should be interpreted not by reference to “mere form or appearance” but rather with regard to the “substance and reality of what is going on.”<sup>157</sup> Thus “defensive” measures against an act “upsetting the balance of the world”<sup>158</sup> or an attack of alien ideology and foreign inspiration<sup>159</sup> can be considered fully justifiable. Indeed, Meeker has noted that “[p]articipation in the Inter-American system, to be meaningful, must take into account the modern day reality that an attempt by a conspiratorial group inspired from the outside to seize control by force can be an assault upon the independence and integrity of a

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155. See United Kingdom, 25 U.N. GAOR Special Committee on the Question of Defining Aggression (64th mtg.) at 6, U.N. Doc. A/AC.134/SR.64 (1970); United Kingdom, 25 U.N. GAOR Special Committee on the Question of Defining Aggression (85th mtg.) at 50, U.N. Doc. A/AC.134/SR.85 (1971); See also 18 U.N. GAOR Annexes (Agenda Item 71) para. 61, U.N. Doc. A/5671 (1963); 25 U.N. GAOR Annexes (Agenda Item 87) para. 30, U.N. Doc. A/8171 (1970); Report of the Special Committee on Defining Aggression, 26 U.N. GAOR Supp. (No. 19) paras. 38, 40, U.N. Doc. A/8419 (1971). It is also interesting to note that the United Kingdom proposal to the Special Committee on the Question of Defining Aggression, which had Western support, declared lawful the use of force “in exercise of the inherent right of individual and collective self-defense” without mention of, or restriction to, article 51 of the Charter.

156. See, e.g., 24 U.N. GAOR Special Committee on the Question of Defining Aggression (38th mtg.) para. 106, U.N. Doc. A/AC.134/SR.38 (1969) (statement by the Australian Representative).

157. Meeker, *Viet-Nam and the International Law of Self-Defense*, 56 DEP'T ST. BULL. 54, 59 (1967).

158. *Repertoire of the Practice of the Security Council* 288 (Supp. 1959-68) (statement by the United States Representative regarding the Cuban Missile Crisis).

159. See generally 2 A. CHAYES, T. EHRLICH, & A. LOWENFELD, *INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE* 1179 (1968) (discussing the legal basis for the United States actions in the Dominican Republic in 1965).

state" thereby justifying an act of self-defense.<sup>160</sup>

A similarly liberal interpretation is imposed by Western statesmen on the institution of collective self-defense. A case in point is the Cuban Quarantine where the use of force by the United States was justified under the wide terms of the Rio Treaty of 1947 which provided for collective action not only in the case of armed attack, but also "if the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack . . . or by any other fact or situation that might endanger the peace of America."<sup>161</sup>

A clear indication of the flexible interpretation of collective self-defense under the Charter is expressed in the following statement made by the former Secretary of State, Dean Rusk, to the American Society of International Law:

I question whether you have to be attacked yourself before you can engage in collective self-defense. I think article 16 of the League of Nations Covenant proclaimed that an act of aggression against any member of the League is an act of war against all, and article 1 of the United Nations Charter calls for effective political action against acts of aggression against the peace. It is hard for me to see that either one of these principles of those two great documents could be doing anything else but proclaiming a general interest in resisting acts of aggression. I would suppose that any nation which is the victim of aggression has a right under international law to seek the assistance of others who are willing to assist, and that the general interest in suppressing acts of aggression and breaches of the peace is a sufficient interest to support this relationship.<sup>162</sup>

Concurrently with a liberal interpretation of military actions amounting to individual or collective self-defense under article 51 of the Charter, the Western alliance has displayed a restrictive approach

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160. *Id.* at 1181; see Chayes, *The Legal Case for U.S. Action on Cuba*, 47 DEP'T ST. BULL. 763, 765 (1962). On the other hand, a similarly permissive interpretation was not allowed by the United States in relation to the Soviet invasion of Afghanistan. In the words of United States Ambassador to the United Nations, Donald F. McHenry: "The Soviet claim that it was acting in furtherance of collective self-defense under Article 51 of the Charter is a perversion of the Charter — an insult to the intelligence of the members of this Council. Article 51 can be invoked only 'if an armed attack occurs against a Member of the United Nations.' From whence came the armed attack on Afganistan?" McHenry, 80 DEP'T ST. BULL. B, C (1980) (statement made during discussions in the U.N. regarding the Soviet invasion of Afghanistan).

161. Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 6, 62 Stat. 1681, 1701, T.I.A.S. No. 1838, 21 U.N.T.S. 77 (signed at Rio de Janeiro).

162. Frolick, *A Legal Theory of Collective Security*, 2 GA. J. INT'L & COMP. L. 125, 153 (1972) (quoting Former Secretary of State Dean Rusk).

in relation to the proscription of use of force incorporated in article 2(4) of the Charter. Discussions at the Special Committee on the Question of Defining Aggression revealed that Western states favored a literal reading of article 2(4). Accordingly, they contended that the Charter prohibited the threat or use of force in interstate relations only when directed at the territorial integrity or political independence of another state.<sup>163</sup> Consequently, as asserted by the United Kingdom Representative, "on the basis that Member States had those rights which general international law accorded, except in so far as they had surrendered them in accordance with the Charter, it was possible to envisage cases other than in exercise of the right of self-defence in which the use of force might be permissible if it did not offend against article 2, paragraph 4, of the Charter."<sup>164</sup> Furthermore, some representatives pointed to the closing words of article 2(4), thus emphasizing the need to take into consideration the correspondence between the goals of the state resorting to force and purposes of the United Nations.<sup>165</sup> Indeed, Western states consistently rejected interpretation of article 2(4) as an unqualified and absolute prohibition of the use of force.<sup>166</sup> Their approach to the definition of aggression is indicative of a perception of use of force not in strict formal terms but as a compounded phenomenon governed by various factors which need to be taken into consideration in order to establish the existence of aggression.<sup>167</sup>

Indeed, the United States' member of the Special Committee on the Question of Defining Aggression at the concluding stage of the Committee's sessions indicated that the first use of armed force by a State in contravention of the Charter was only *prima facie* evidence of an act of aggression; the Security Council might or might not in the

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163. United Kingdom, 18 U.N. GAOR C.6 (805th mtg.) para. 7, U.N. Doc. A/C.6/SR.805 (1963); *see also* sources cited *supra* note 59.

164. 18 U.N. GAOR C.6 (805th mtg.) para. 7, U.N. Doc. A/C.6/SR.805 (1963).

165. Canada, 23 U.N. GAOR Special Committee on the Question of Defining Aggression (11th mtg.) at 129, U.N. Doc. A/AC.134/SR.11 (1968); 25 U.N. GAOR Special Committee on the Question of Defining Aggression (56th mtg.) at 25-26, U.N. Doc. A/AC.134/SR.56 (1970); United States, 24 U.N. GAOR Special Committee on the Question of Defining Aggression (44th mtg.) at 156, U.N. Doc. A/AC.134/SR.44 (1969).

166. *See, e.g.*, Australia, 29 U.N. GAOR C.6 (1478th mtg.) para. 29, U.N. Doc. A/C.6/SR.1478 (1974); Austria, 27 U.N. GAOR (2085th plen. mtg.) para. 54, U.N. Doc. A/PV.2085 (1972).

167. *See, e.g.*, France, 25 U.N. GAOR Special Committee on the Question of Defining Aggression (57th mtg.) at 36, U.N. Doc. A/AC.134/SR.57 (1970); Australia, 29 U.N. GAOR C.6 (1478th mtg.) para. 29, U.N. Doc. A/C.6/SR.1478 (1974); Canada, 29 U.N. GAOR C.6 (1473d mtg.) para. 10, U.N. Doc. A/C.6/SR.1473 (1974).



particular case find that there had actually been an action of aggression. In arriving at such a decision, repeated the United States Representative, the Security Council "would be well advised to give due weight to all relevant circumstances"<sup>168</sup> and "bear in mind the purposes of the states involved."<sup>169</sup> The British delegate similarly elaborated that the first use of force could not be accepted as a "conclusive factor [of aggression], even on a *prima facie* view; other circumstances of the case, which included but were not limited to the presence or absence of aggressive intent must also be taken into account."<sup>170</sup> The United Kingdom Representative emphasized that his delegation "had been able to agree to the deletion from article 2 [of the Definition of Aggression] of the specific reference to 'purposes' on the understanding that the reference to 'other relevant circumstances' necessarily covered a reference to 'purposes.'"<sup>171</sup>

Such a contextual approach was clearly expressed by the British Ambassador to the United Nations, Sir Pierson Dixon, who explained his country's action in the Suez crisis as follows:

[I]t is . . . certainly not true to say that every armed action constitutes aggression. Every action must clearly be judged in the light of circumstances in which it has taken place and the motives which have prompted it. The action of France and the United Kingdom is not aggression. We do not seek the domination of Egypt or of any part of Egyptian territory. Our purpose is peaceful, not warlike. Our aim is to re-establish the rule of law, not to violate it; to protect, and not to destroy. What we have undertaken is a temporary police action necessitated by the turn of events in the Middle East and occasioned by the imperative need not only to protect the vital interests of my own and many other countries, but also to take immediate measures for the restoration of order.<sup>172</sup>

Other "legitimate" causes and permissive circumstances were cited throughout the practice of Western states as justifications for the

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168. 29 U.N. GAOR Supp. (No. 19) at 23, U.N. Doc. A/9619 (1974).

169. *Id.* at 24.

170. U.N. GAOR C.6 (1477th mtg.) para. 20, U.N. Doc. A/C.6/SR.1477 (1974).

171. 29 U.N. GAOR Supp. (No. 19) at 31, U.N. Doc. A/9619 (1974).

172. This statement was made in the First Emergency Special Session which occurred between the 10th and 11th Sessions of the Security Council. A similar argument was later forwarded by the French Representative who noted: "The [Government] of France . . . had taken steps which would remove the danger of hostilities and put an end to fighting. It is designed to ensure effective separation of the belligerent[s] and also to guarantee freedom through the canal." The French Representative emphasized that such a "police action" was necessary in view of the ineffectiveness of the United Nations. 11 U.N. SCOR (794th plen. mtg.) at 29, U.N. Doc. S/PV.794 (1956).

uses of force. A measure of forcible self-help was claimed, for instance, by the United Kingdom in the *Corfu Channel Case* for the "protection of UK's legal position" and in order to "remedy an international nuisance."<sup>173</sup> The United States intervention in the Dominican Republic in 1965 was justified as an action designed to prevent "the establishment of another Communist government in the Western Hemisphere."<sup>174</sup> The "protection of vital [economic] interests" was an additional reason advanced by Britain as a justification for its intervention in the Suez crisis.<sup>175</sup> A modern version of the economic rationale is incorporated in another United States doctrine of intervention, the so-called "Carter Brown Doctrine." Formulated in January 1980 to repel "outside force[s]"<sup>176</sup> in the Persian Gulf region, the doctrine justifies military intervention "whenever necessary to protect the [economic] resources of the Trilateral world"<sup>177</sup> (or, more specifically, the right to intervene on behalf of a beleaguered government of an oil-rich or strategically placed state which is being challenged by a popular revolution). Legitimate economic considerations notwithstanding, the Carter Brown Doctrine has been extended by the "Reagan Codicil" of October 1981 "from one of concern with external alignments and alliances of states in regions critical to national defense to a prerogative of active intervention and suppression of popularly demanded internal change in favor of a particular local elite."<sup>178</sup>

It is interesting to note that even when strict legal grounds for using force exist, states may be inclined to support their action with what they consider perhaps are "stronger levels" of justifications. Thus, for instance, while the United Kingdom was clearly within its legal rights of self-defense when exercising force against Argentina

173. 1950 I.C.J. Pleadings 296.

174. 52 DEP'T ST. BULL. 744, 746 (1965) (statement by President Johnson on May 2, 1965).

175. 11 U.N. SCOR (749th plen. mtg.) at 3, U.N. Doc. S/PV.749 (1956); 11 U.N. SCOR (751st plen. mtg.) at 7, U.N. Doc. S/PV.751 (1956).

176. According to one commentator, "U.S. officials including Secretary of Defense Brown have tacitly admitted that 'outside' means also internal rebellion—a proposition that is confirmed by the fact that the rapid deployment force is ill-suited for meeting Soviet aggression but is well designed for putting down local rebellions." Schwenninger, *The 1980s: New Doctrines of Intervention or New Norms of Non-Intervention?*, 33 RUTGERS L. REV. 423, 423-24 (1981).

177. See Falk, *The Prospect of Intervention: Exporting Counter-Revolution*, 228 NATION 659, 662 (1979). For the text of President Carter's statement see 16 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 197 (Jan. 23, 1980).

178. Reisman, *Critical Defense Zones and International Law: The Reagan Codicil*, 76 AM. J. INT'L L. 589, 591 (1982) (editorial comments).

during the Falkland Islands crisis, references to various just and high motives permeated the relevant debates in the British Parliament. The theme running through the discussions was that of righting wrong done and doing justice. Members of Parliament were concerned to "uphold the rights of [Britain] throughout the world and the claim of [that] country to be a defender of People's freedom throughout the world, particularly those who look to [Britain] for special protection as do the people in the Falkland Islands."<sup>179</sup> Others stressed the duties to "repossess our possessions and . . . rescue our own people"<sup>180</sup> and "restore [the Falkland Islanders'] rights"<sup>181</sup> thereby remedying the grave affront suffered by the people of both the Falkland Islands and the United Kingdom. Vociferous claims were made on behalf of Britain "as a nation that subscribes to international law" to uphold "the international rule of law as declared by the Security Council."<sup>182</sup> Resort to military action was also justified as a necessary measure "to preserve principles of freedom and democracy"<sup>183</sup> and maintain "territorial integrity" and national self-respect.<sup>184</sup>

On the other hand, the lack of justification on the enemy's part was constantly emphasized by the British Parliamentarians who turned the spotlight not on whether an act of aggression had occurred, but *who* committed it, *against whom* and *for what*.<sup>185</sup> They thus were more inclined to approve of a military action directed "against a dictator who has [unprovokedly] invaded British territory to bolster his regime and divert attention from domestic disorder and brutality."<sup>186</sup>

More common, however, are the justifications offered on humanitarian grounds. Western states have consistently asserted, for instance, the right to use force to protect the lives of nationals. Thus, when justifying British action in the Suez, the Prime Minister of the United Kingdom told the British Parliament: "We do maintain, and I think I must fairly say, that there is nothing in the Tripartite Declaration or in the Charter which abrogates the right of a Government to

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179. 21 PARL. DEB., H.C. (6th ser.) 639 (Apr. 3, 1982).

180. *Id.* at 642.

181. *Id.* at 959 (Apr. 7, 1982).

182. *Id.* at 1014.

183. 22 PARL. DEB., H.C. (6th ser.) 275 (Apr. 21, 1982).

184. *Id.* at 1026 (Apr. 29, 1982).

185. *Id.* at 997.

186. *Id.*

take such steps as are essential to protect the lives of their citizens and vital rights such as are here at stake."<sup>187</sup> Similar reasoning was employed by the United Kingdom Representative explaining his country's support in the Congo Operation:

The issue which faced my Government was simply this. In defiance of every provision of international law and the basic principles of humanity many hundred non-combatants . . . had been held for months as hostages . . . . All appeals . . . for their safety and release had been of no avail . . . . We clearly understood that the object of the operation was solely one of saving lives.<sup>188</sup>

A year later, Ambassador Banker defended the Dominican Republic intervention as the dispatch of forces "purely and solely for humanitarian purposes, for the protection of lives not only of the United States citizens but the lives of citizens of other countries as well."<sup>189</sup> The "need to save European lives" was referred to by France to justify its intervention in Zaire in May 1978.<sup>190</sup> Perhaps the most explicit affirmation of the right of states to use force to protect the lives of nationals is contained in United States Ambassador Scranton's statement in the Security Council on the question of the Entebbe incident:

Israel's action in rescuing the hostages necessarily involved a temporary breach of the territorial integrity of Uganda. Normally such a breach would be impermissible under the Charter of the United Nations. However, there is a well established right to use limited force for the protection of one's own nationals from an imminent threat of injury or death in a situation where the state in whose territory they are located either is unwilling or unable to protect them. The right flowing from the right of self-defense is limited to such use of force as is necessary and appropriate to protect threatened nationals from injury.<sup>191</sup>

And in a memorandum issued by the United States Office of Legal Adviser that year, it was confirmed that "the legitimacy of foreign state intervention in . . . situations of civil disorder for the rescue of the lives of nationals as well as nonnationals where the legitimate government is incapable of rendering the required protection is also up-

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187. Lauterpacht, *The Contemporary Practice of the United Kingdom in the Field of International Law—Survey and Comment III*, 6 INT'L & COMP. L.Q. 301, 326 (1957) (quoting the British Prime Minister's address of October 30, 1956).

188. 19 U.N. SCOR (1175th plen. mtg.) para. 13, U.N. Doc. S/PV.1175 (1964).

189. 52 DEP'T ST. BULL. 834 (1965).

190. *Le Monde*, May 23, 1978, at 1, col. 1.

191. 31 U.N. SCOR (1941st plen. mtg.) at 31, U.N. Doc. S/PV.1941 (1976).

held by traditional international law under the separate doctrine of humanitarian intervention."<sup>192</sup> Furthermore, according to the British Ambassador, states may have a duty to exercise the right to use force for the protection of their nationals, since "states exist for the protection of their peoples."<sup>193</sup>

Besides a most liberal interpretation of the exceptions from the principle of non-use of force in international relations, Western states tend to employ another technique to license the use of force in situations other than those contemplated when the Charter of the U.N. was drafted, namely, that of resorting to satellite regional organizations for the purpose of legitimizing unilateral uses of armed force initiated without such approval. For example, following the Dominican Republic intervention, President Johnson noted that because the United States was a member of the Organization of American States (OAS), it had assumed a common responsibility for dealing with Communist infiltration into the Western Hemisphere. The United States acted unilaterally because of time pressures, but later invited troops from other OAS nations to join in the action.<sup>194</sup>

Closely connected to the above claim is the extremely restrictive interpretation imposed by Western authorities on circumstances in which approval of the Security Council is required under article 53 as to enforcement action taken by regional agencies. The official United States position, for instance, has been that no prior approval of the Security Council is necessary to legitimize an enforcement action by regional organizations; rather it was sufficient that the Security Council had not disapproved the action.<sup>195</sup> Indeed, according to Legal Adviser Meeker, both the U.N. and OAS are "mutually reinforcing" and "[t]here should be no doctrinaire assumption that the United Nations and its Security Council are the exclusive guardians of world peace."<sup>196</sup> An attempt, however, by the United Kingdom (with the support of other Western countries) to introduce into the Principles of International Law Concerning Friendly Relations and Co-operation Among States a clause declaring the use of force lawful when under-

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192. E. McDOWELL, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, 1976 at 7 (1977) (citing the applicable memorandum issued by the United States Office of Legal Adviser).

193. 31 U.N. SCOR (1940th plen. mtg.) para. 107, U.N. Doc. S/PV.1940 (1976).

194. N.Y. Times, May 29, 1965, at 2, col. 2.

195. See *Legal Basis for Quarantine in Cuba*, reprinted in A. CHAYES, THE CUBA MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW 146 (1974).

196. Meeker, *The Dominican Situation in the Perspective of International Law*, 53 DEP'T ST. BULL. 60 (1965).

taken by a "regional agency acting in accordance with the Charter" was unsuccessful.<sup>197</sup>

Another aspect related to the Western attempts to preserve a certain freedom of action with regard to the interstate use of force is their limited view of the scope of the principle of non-intervention. Observations were made, for instance, during the discussions on the Principles of International Law Concerning Friendly Relations Among States that in an interdependent world it was inevitable and even desirable that states be concerned with, and try to influence, the actions and policies of other states. Explaining their position, Western delegates emphasized that the objective of international law was not to prevent intervention, but rather to ensure its compatibility with other principles of international law such as sovereign equality of states and self-determination of their peoples. Indeed, it was further suggested that too rigid a formulation of the rules on non-intervention might lead to serious contractions when one came to study the principles of equal rights and self-determination.<sup>198</sup>

The reluctance of the Western states to commit themselves to overly narrow concepts of self-defense and collective measures licensed under the Charter is not coupled, however, with an equally elastic attitude towards wars of national liberation.<sup>199</sup> Indeed, the opposition mounted by the Western alliance to the legitimization of forcible actions against colonial regimes was strong both in terms of its expression and the underlying consensus.

Western representatives insisted that "the Charter made no exception in proscribing the use of force in international relations (Article 2, paragraph 4), so as to permit States to use arms against other States in support of what might be called colonial conflicts."<sup>200</sup> In fact, they argued, no legal system could possibly grant a right of rebellion as this would destroy the legal system itself.<sup>201</sup>

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197. 19 U.N. GAOR Special Committee on Friendly Relations and Co-operation Among States (8th mtg.) para. 5, U.N. Doc. A/AC.119/L.8 (1964).

198. See, e.g., United Kingdom, 19 U.N. GAOR Special Committee on Friendly Relations and Co-operation Among States (26th mtg.) at 6, U.N. Doc. A/AC.119/SR.26 (1964); United States, 19 U.N. GAOR Special Committee on Friendly Relations and Co-operation Among States (29th mtg.) at 10, U.N. Doc. A/AC.119/SR.29 (1964); Netherlands, 19 U.N. GAOR Special Committee on Friendly Relations and Co-operation Among States (30th mtg.) at 15, U.N. Doc. A/AC.119/SR.30 (1964).

199. Australia, 23 U.N. GAOR Special Committee on the Question of Defining Aggression (8th mtg.) at 83, U.N. Doc. A/AC.134/SR.8 (1968).

200. *Id.*

201. 24 U.N. GAOR Supp. (No. 19) para. 168, U.N. Doc. A/7619 (1969).

Similarly, Western states could not accept claims justifying wars of national liberation based on the right of self-defense which, they considered, was only applicable in international relations whereas relations between a colonizing power and the colonized people were not international in scope. They also emphasized that self-defense could only be invoked against armed force while ideological or economic coercion did not fall within the realm of article 51.<sup>202</sup> Furthermore, it was pointed out by Western delegates that expressly mentioning a right of self-defense against colonial domination would encourage a nation to employ force, contrary to the principles of the United Nations, with the effect of greatly increasing tension and endangering international peace and security.<sup>203</sup>

In the course of discussions on the Question of Defining Aggression, Western representatives were adamant that "in the field of interstate relations it would not be possible to accept . . . that an act, which would under all other circumstances be defined as aggression, would not be considered aggression, if it was committed in the context of self-determination."<sup>204</sup> Western objections to excepting self-determination struggles from being characterized as aggression under article 3 manifested themselves strongly in relation to the interpretation of article 7 of the Consensus Definition.<sup>205</sup>

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202. United Kingdom, 23 U.N. GAOR Special Committee on the Question of Defining Aggression (11th mtg.) at 125, U.N. Doc. A/AC.134/SR.11 (1968); France, 23 U.N. GAOR Special Committee on the Question of Defining Aggression (17th mtg.) at 163, U.N. Doc. A/AC.134/SR.17 (1968).

203. Sweden, 19 U.N. GAOR, Special Committee on Friendly Relations and Co-operation Among States (10th mtg.) at 9, U.N. Doc. A/AC.119/SR.10 (1964); United States, 19 U.N. GAOR Special Committee on Friendly Relations and Co-operation Among States (15th mtg.) at 15, 19, U.N. Doc. A/AC.119/SR.15 (1964); United Kingdom, 19 U.N. GAOR Special Committee on Friendly Relations and Co-operation Among States (16th mtg.) at 14, U.N. Doc. A/AC.119/SR.16 (1964).

204. Australia, 26 U.N. GAOR Special Committee on the Question of Defining Aggression (84th mtg.) at 32, U.N. Doc. A/AC.134/SR.84 (1971); *see also* United Kingdom, 23 U.N. GAOR Special Committee on the Question of Defining Aggression (11th mtg.) at 125, U.N. Doc. A/AC.134/SR.11 (1968); United Kingdom, 25 U.N. GAOR Special Committee on the Question of Defining Aggression (73d mtg.) at 94, U.N. Doc. A/AC.134/SR.73 (1970); 25 U.N. GAOR Annexes (Agenda Item 87) para. 35, U.N. Doc. A/8171 (1970).

205. Article 7 states that

Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance

Basically, it was argued that no interpretation could be accepted which contradicted the provisions of the U.N. Charter concerning use of force. Thus, according to the Italian delegate, neither article 7, nor the Preamble could legitimize actions disrupting the territorial integrity of states complying with the Charter.<sup>206</sup> The Dutch Representative warned "against interpreting the affirmation of the right of peoples concerned to receive support as legitimization of armed support" since the Charter allowed no such exception. "Peoples which did not enjoy democratic government deserved support," he continued, "but not . . . armed support."<sup>207</sup> Similarly, the Canadian position was that "struggles of peoples means struggle by peaceful means . . . Article 7 could not be interpreted to license the use of force or to condone assault contrary to the Charter on the territorial integrity or dismemberment of any state by violent means."<sup>208</sup> And the Belgian Representative restated his Government's view that the "use of violence as a means of settling . . . conflicts . . . was inadmissible" and article 7 could not sanction resort to force beyond the limits set by the Charter.<sup>209</sup>

Additional arguments offered by the United States delegate in this connection referred to the inconsistency with the immediately preceding article 6, which rules out any construction enlarging the scope of lawful force under the Charter, and of any interpretation legitimizing acts of force which would otherwise be illegal under the Charter.<sup>210</sup> The Portuguese Representative also pointed out a possible contradiction with article 5(1) of the Definition which stipulates that "no consideration of whatever nature, whether political, economic, military or otherwise, may serve as justification of aggression." He further argued that article 7 could not be read as derogating from article 3(g) and excluding the use of armed bands in struggles for self-determination from the definition of aggression. If, as against article 3 as a whole, article 7 was given the meaning claimed by way of derogation from it of paragraph (g) which sanctions armed force for self-determination, this would also involve similar derogations from all

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with the principles of the Charter and in conformity with the above-mentioned Declaration.

69 AM. J. INT'L L. 480, 483 (1975) (reprinting the U.N. Definition of Aggression, Resolution 334 (xxix)).

206. 29 U.N. GAOR C.6 (1472d mtg.) para. 22, U.N. Doc. A/C.6/SR.1472 (1974).

207. 29 U.N. GAOR C.6 (1473d mtg.) para. 5, U.N. Doc. A/C.6/SR.1473 (1974).

208. *Id.* at para. 15.

209. 29 U.N. GAOR C.6 (1476th mtg.) para. 11, U.N. Doc. A/C.6/SR.1476 (1974).

210. 29 U.N. GAOR C.6 (1480th mtg.) paras. 72-73, U.N. Doc. A/C.6/SR.1480 (1974).



the other stigmatized acts. Such an interpretation, asserted the Portuguese delegate, would produce the absurd result of legalizing "for the solution of certain disputes, those very means which the definition defined as constituting illicit aggression."<sup>211</sup>

Other representatives questioned the very relevance of article 7 in a Definition of Aggression. As contended by the British delegate, a definition of aggression was concerned with acts of one state against another state. For this reason, he insisted that the reference to self-determination struggles in article 7 was not directly relevant to the Definition, so the clause achieved no more than the preservation of the legitimacy of struggles by means other than the use of force.<sup>212</sup> This, in essence, was also the position of the French Representative who maintained that article 7 was "alien to the text" since it did not relate to "aggression as defined in article 1, i.e., between sovereign states."<sup>213</sup>

The Western approach can thus be described as one which seeks pragmatic compromise and wishes to minimize disruptive change in the international system. Western states extend formal support to the principle of non-use of force but their adherence to it by no means verges on the dogmatic. They are willing to permit the use of force within the framework of the existing international norms liberally interpreted, particularly if the use of force is geared towards the preservation of the present international *status quo*.

### B. *The Soviet Approach*

Summarizing the Soviet view of war,<sup>214</sup> Vigor states that the underlying assumption is that war is essentially evil. It is also inevitable, however, as long as class societies exist.<sup>215</sup> Until such time when a truly classless Communist society is established over the whole of our

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211. 29 U.N. GAOR C.6 (1478th mtg.) para. 22, U.N. Doc. A/C.6/SR.1480 (1974). Similar arguments were expressed by the Federal Republic of Germany, *id.* at para. 15, and Spain, 29 U.N. GAOR C.6 (1472d mtg.) para. 29, U.N. Doc. A/C.6/SR.1472 (1974).

212. 29 U.N. GAOR C.6 (1477th mtg.) paras. 9-10, U.N. Doc. A/C.6/SR.1477 (1974).

213. 29 U.N. GAOR Supp. (No. 19) at 22, U.N. Doc. A/9619 (1974); *see also* United States, *id.* at 24.

214. P. VIGOR, *THE SOVIET VIEW OF WAR, PEACE, NEUTRALITY* 155-222 (1975).

215. It should be noted that the Leninist theory of the inevitability of war between Capitalism and Communism has been modified to suit the change in circumstances (no longer is it economically advantageous for the Capitalists to engage in a war against Communism given the Communists' military strength). The basic Marxist doctrine, however, remains that wars are inevitable as long as Capitalism persists; though wars may not manifest themselves as struggles between Communism and Capitalism, they arise as conflicts between Capitalism and anyone else. *See id.* at 23-25.

planet, war may be a necessary tool to promote the revolutionary cause. In other words, to use war to further the cause of Communism is, from the Marxist point of view, to do a little evil in order that much good may result.

By the same token, Marxism has traditionally condemned pacifism for being both theoretically unsound and dangerous because it does not distinguish between just and unjust wars (pacifists oppose *all* wars).<sup>216</sup> It was maintained by Marx, Engels, Lenin and their disciples that since pacifists fail to see war as a product of social contradictions, they are equally blind to its role in furthering social causes.<sup>217</sup> This point has been expounded by Lider with some lucidity. Total ban, he observes:

puts confusion into the minds of men by diverting their attention from the true cause of injustice and inequality; it thereby hinders the oppressed people from becoming conscious of their true situation; it furthermore deprives them of an essential instrument for their liberation; and it often lulls them into passivity with the worst sort of reactionary utopianism.<sup>218</sup>

Pacifism has, therefore, been attacked as one of the most dangerous enemies of forces aimed at national and social transformation.

Not all wars, however, are equally justifiable under the Marxist doctrine. Wars are classified as either just or unjust and the Soviet Union claims to support the former and oppose the latter:<sup>219</sup>

Unjust, predatory wars waged by the reactionary exploiting circles hamper and check the progress of human society, by increasing the exploitation of the oppressed classes and nations, while defending all which is old, obsolete and reactionary and smothering all which is new, developing and revolutionary . . . . Contrary to this, just liberatory wars . . . are progressive and revolutionary, because they destroy old, harmful and reactionary institutions which hinder the free progress of nations, while liberating the oppressed mankind from the capitalist slavery and liberating nations from the imperialist oppression, creating conditions for independence and national development of nations and dependent countries.<sup>220</sup>

Included in the category of just wars are wars waged by the people for

216. J. LIDER, ON THE NATURE OF WAR 239 (1977).

217. *Id.*

218. *Id.*

219. *Id.* at 227 (quoting F. Khrustov).

220. *Id.*

liberation from social oppression (i.e., civil wars),<sup>221</sup> from national oppression (i.e., wars of national liberation), in defense of national independence (i.e., against foreign attack), or against imperialist aggression. Unjust wars, on the other hand, embrace wars waged by the exploiting classes in order to suppress the struggle for liberty of an exploited class or nation, or to annex other people's territory or to enslave or rob them.<sup>222</sup>

This distinction between just and unjust wars has acquired a juridical aspect in the Definition of Aggression as perceived by the Soviets. Accordingly, any aggressive war is unjust and vice versa. Similarly every just war is a defensive war against various forms of aggression. Indeed:

the Soviet Union's political thinking has long taken it as self evident that aggression is characteristic of the Western world, as deeply rooted in the nature of Capitalism; and orthodox Communist doctrine excludes the possibility that any Soviet war could be a war of aggression, since, it is argued, aggressive attitudes contradict the inner structure of the socialist society, so that the foreign policy of the Soviet Union must always be peaceful. At the same time wars of national liberation from 'Capitalist exploitation' and 'colonial oppression' are deemed just wars which cannot be designated aggressive' in the Soviet sense.<sup>223</sup>

Thus, while lending their official support to a narrowly formulated definition of aggression,<sup>224</sup> the Soviet criterion for just wars has not been abandoned. New shades may be detected, however, in the meaning of the term "just." As suggested by Lider,<sup>225</sup> in the original sense "just aims" were those which clearly furthered the interests of the working cause of nations fighting for liberation which was considered to be indirectly in the interest of the working class. Today, the

221. The Communist meaning of the term "civil war" is not synonymous with the legal significance of civil war as understood by non-Communist states. "Civil war according to the Communist doctrine, can be consistent with a civil strife between insurgents and its [sic] parent state as well as with a war between two or several states. What alone characterizes a civil war in the Communist doctrine is its cause which must consist of a class struggle." See L. KOTZSCH, *THE CONCEPT OF WAR IN CONTEMPORARY HISTORY IN INTERNATIONAL LAW* 68 (1956).

222. P. VIGOR, *supra* note 214, at 156 (quoting the latest edition of *BOLSHAYA SOVIETSKAYA ENTSIKLOPEDIA*).

223. J. STONE, *supra* note 51, at 114 n.28, 115 n.31.

224. See Litvinov Definition of Aggression of 1933; see also Report of the United Nations Secretary General on the Question of Defining Aggression, 7 U.N. GAOR Annexes (Agenda Item 54) at 34, U.N. Doc. A/2211 (1952).

225. J. LIDER, *supra* note 216, at 222.

emphasis is on promoting long-range interests of Socialism, and hence, the aims of those who work for the "cause of peace" and "independence of nations" are included in the category of "just."<sup>226</sup>

Nonetheless, in practice "just wars are those which are waged in the Soviet interest"<sup>227</sup> and for the determination of the legalities involved, the Soviets rely on their own characterization of the situation. Thus, for instance, they regarded the Korean War in 1950 as aggressive and unjust, while deeming the interventions in Hungary (1956) and Czechoslovakia (1968) as progressive from a Socialist point of view.<sup>228</sup>

The Soviet representative was, therefore, expressing the classical Soviet position when he told a Security Council debating the Czechoslovakian intervention: "I am proud of the fact that here in this Council I defend a just cause."<sup>229</sup> Expounding the nature of this cause, the Soviet Foreign Minister, Mr. Gromyko, invoked the concept of a Socialist commonwealth (which he called an inseparable entity)<sup>230</sup> to defend his country's actions before the 23rd Session of the General Assembly: "The Socialist states cannot and will not allow a situation where the vital interests of socialism are infringed upon and encroachments are made on the inviolability of the boundaries of the Socialist commonwealth."<sup>231</sup> More explicit in identifying the perceived threat to the vital interest of the Soviet community as a justified ground for forcible intervention was Secretary Brezhnev in his comments on the Soviet invasion to the Fifth Congress of the Polish Communist Party. Mr. Brezhnev insisted that Communist countries stood for "strict respect" for sovereignty, but added:

[W]hen internal and external forces that are hostile to Socialism try to turn the development of some Socialist country towards the restoration of a capitalist regime, when Socialism in that country and the Socialist community as a whole is threatened, it becomes not only a problem of the people of the country concerned, but a

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226. See, e.g., the claim made by the USSR concerning the Soviet invasion of Czechoslovakia to the effect that the military measures undertaken by them served the cause of peace and were directed towards the strengthening of peace. *Repertoire of the Practice of the Security Council* 172 (Supp. 1966-1968).

227. B. RAMUNDO, *PEACEFUL COEXISTENCE* 128 (1967).

228. *Id.*

229. 16 *KEESING'S CONTEMPORARY ARCHIVES* 22967 (Oct. 12-19, 1968).

230. The "Socialist commonwealth" seems to have been presently extended by the Soviets to include any state signing a treaty of friendship with Moscow (e.g. Afghanistan).

231. Gibson, *Contemporary Practice of the United States Relating to International Law*, 63 *AM. J. INT'L L.* 559, 569 (1969).

common problem and concern of all Socialist countries.<sup>232</sup>

In a similar vein, United States actions in Vietnam were characterized by the Soviets as "aggression which jeopardised international peace and security" while the Vietnamese operations were portrayed as an "heroic" struggle . . . for their territorial integrity and political independence" and a "major factor for ensuring peace and security."<sup>233</sup> More recently, the invasion of Afghanistan was justified as an operation "[t]o give aid to a country which request[ed] it for countering aggression [which] is not only a noble cause from the point of view of modern international morality, [but] it is also a fully legitimate one from the point of view of international law."<sup>234</sup>

While attempting to confer a semblance of legality on wars fought in defense of policy goals and objectives to which the Soviet Union is committed, the Soviets are at the same time anxious to limit the use of force by Capitalist states. Indicative of this ambivalence in the Soviet approach, is the campaign of the Soviet bloc in support of a much broader interpretation of the proscription of force that would include within the ambit of the term force, economic, political and other forms of coercion falling short of armed force. This argument is based on the proposition that nonmilitary forms of pressure, for example, the complete or partial interruption of economic relations, are often far more potent in their effects than actual armed force, and that for this reason, the Charter should be interpreted progressively or generically in light of developments in the world community since the Charter was first drafted.<sup>235</sup>

By the same token, the notion of genuine interrelationships among states, accompanied by a certain degree of inevitable mutual influence or pressure,<sup>236</sup> has been firmly resisted in Soviet circles and the prohibition against interference of any kind strongly reaffirmed. Conversely, the mission to support proletarian movements abroad and a deep conviction in the inevitability and justness of their cause

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232. 16 KEESING'S CONTEMPORARY ARCHIVES 23027 (Nov. 16-23, 1968).

233. Rybakov, *Aggression and International Law*, 8 INT'L AFF. MOSCOW 38, 39 (1980).

234. *Id.* at 46.

235. See, e.g., Czechoslovakia, 19 U.N. GAOR Special Committee on Friendly Relations and Co-operation Among States (4th mtg.) at 6, U.N. Doc. A/AC.119/SR.4 (1964); Czechoslovakia, 19 U.N. GAOR Special Committee on Friendly Relations and Co-operation Among States (8th mtg.) at 4-6, U.N. Doc. A/AC.119/SR.8 (1964); 33 U.N. GAOR Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force (10th mtg.) para. 58, U.N. Doc. A/AC.193/SR.10 (1978).

236. See Schwarzenberger, *supra* note 68, at 261.

has led the Soviet legal community to urge, officially and unofficially, that assistance to wars of national liberation or analogous situations fall outside the scope of intervention, is not unlawful, and is undertaken pursuant to other norms of international law.<sup>237</sup>

It is the Soviet thesis in this regard that colonial domination and subjugation, irrespective of its sources, constitutes an act of flagrant aggression against dependent people and, as a corollary, that the latter may use force in self-defense to preserve their national identity and achieve their independence.<sup>238</sup> The following excerpt from an article published in a leading Soviet legal journal clearly expresses this thesis:

The national-liberation war of a dependent people against the colonial power will always be a just, defensive war from the political as well as the legal standpoint, independently of who initiated the military action. The whole thing is that in the given instance the fact of initiation of a national-liberation war by a dependent colonial country has no significance for the determination of the aggressor, since the state of dependency and disenfranchisement of the colonial peoples is the result of an imperialist aggression committed earlier, expressing itself in the annexation of these territories. This means that the national-liberation war begun by a dependent, disenfranchised people will represent but a lawful act on its part in response to an act of aggression committed earlier by the imperialist state which led to the forcible enslavement of the said people and territory which it occupies. The people of a dependent or colonial country preserve the right to counter action to an imperialist aggression for the duration of the whole period of annexation of the given country or part of its territory. At any moment the oppressed people, living on the territory annexed by the imperialist state, have the right to launch a national-liberation struggle against this imperialist state. Such a struggle will be just and legitimate, since, in the first place, neither aggression nor annexation enjoy the

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237. See Butler, *Soviet Attitudes Toward Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 380, 391-92 (J. Moore ed. 1974).

238. See, e.g., statements by representatives of Soviet bloc nations in the course of debates by the Special Committee on Friendly Relations and Co-operation Among States as follows: USSR, 19 U.N. GAOR (5th mtg.), U.N. Doc. A/AC.119/SR.5 (1964); USSR, 21 U.N. GAOR (86th mtg.), U.N. Doc. A/AC.125/SR.86 (1968); Czechoslovakia, 19 U.N. GAOR (4th mtg.), U.N. Doc. A/AC.119/SR.4 (1964); Rumania, 19 U.N. GAOR (7th mtg.), U.N. Doc. A/AC.119/SR.7 (1964). Note also the statement by the GDR Representative who indicated that "[a]s colonial rule, *apartheid* and other forms of alien suppression constituted permanent aggression against the oppressed peoples, resistance against those forms of external use of force and suppression was an act of self-defense." 29 U.N. GAOR C.6 Special Committee on the Question of Defining Aggression (1476th mtg.) para. 15, U.N. Doc. A/C.6/SR.1476 (1974).

benefits of a statute of limitations, and, in the second place, international law forbids aggression and consequent annexation puts them outside the law.<sup>239</sup>

Again, in order to propound this thesis, Soviet legal theorists have contrived to adjust other theories which they also support. For one thing, they have had to broaden somewhat the scope of their basic definition of subjects of international law (otherwise very restrictively understood) as well as extend their definition of aggression, which applies only to actions lying within the realm of interstate relations, to cover military hostilities in colonies. Thus, by asserting that any struggle between a colonial power and a native independence movement amounts to a formal international war since it represents an armed collision between two distinct entities each fully acknowledged as a subject of international law in its own right, the Soviets are ultimately able to claim that such a clash should be automatically judged in the light of whether aggression has been committed.

In reality, as one commentator observes:

[T]he Soviets bother little with a detailed assessment of the circumstantial evidence in such instances, for, thanks to *a priori* reasoning, the answer is immediately forthcoming from them that such outbreaks of violence definitely represent every time a case of aggression, since one party to the contest must be pursuing a colonial policy which has provoked the fighting and the resulting colonial wars stand *ipso facto* condemned as acts of deliberate aggression.<sup>240</sup>

Wars of national liberation are further justified by the Soviets as enforcement actions pursuant to recognized norms of international law. This reasoning notes that the Charter and general international law, having endorsed the "principle of equal rights and self determination of peoples," impose a parallel legal duty on states to give effect to this principle, that is, bring an end to colonialism and ensure people self-government and independence. The peoples of the colonies, in turn, given the inalienable<sup>241</sup> and sacred<sup>242</sup> nature of their right, are

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239. Ginsburg, "Wars of National Liberation" and the Modern Law of Nations—*The Soviet Thesis*, in *THE SOVIET IMPACT ON INTERNATIONAL LAW* 66, 76-77 (H. Baade ed. 1965).

240. *Id.* at 75.

241. See use of the term in 29 U.N. GAOR C.6 (1474th mtg.) para. 12, U.N. Doc. A/C.6/SR.1474 (1974) (Mongolia); 27 U.N. GAOR (2079th plen. mtg.) para. 25, U.N. Doc. A/PV.2079 (1972) (Poland); 27 U.N. GAOR (2080th plen. mtg.) para. 8, U.N. Doc. A/PV.2080 (1972) (Czechoslovakia).

242. While addressing the General Assembly in 1960 Chairman Krushchev introduced the following formula with regard to recourse to arms of an "oppressed people": "We welcome the sacred struggle of the colonial peoples for their liberations . . . Moral, material and other

“fully entitled with arms in hand to seek liberation from the yoke of a colonial power evading a peaceful settlement of the said question and be the first to start military action against it with the object of destroying its military forces stationed in these countries.”<sup>243</sup>

In terms of just versus unjust wars, colonialism is classified as a fundamentally evil institution and an offense against basic precepts of international law, so that there is a certain inherent justice in its eradication, even by force. By contrast, the principle of self-determination of peoples is inherently progressive<sup>244</sup> and its realization represents a condition of universal peace.<sup>245</sup> Use of force is, therefore, justifiable to obliterate this unspeakable evil, to reinstate justice and to reestablish violated rights.<sup>246</sup>

Soviet duplicity concerning the proscription of use of force is revealed again when a distinction is drawn with respect to the self-determination exception between dissident movements and people fighting colonial oppression. Force used against the former, the Soviets argue, qualifies as a legitimate police action and falls consequently within the definition of self-defense.<sup>247</sup>

The Soviet approach to the right of self-defense also reflects the ambivalence of an effort to restrict the use of the right by Capitalist states, while expanding it to accommodate the interest of the Soviet Union. The basic Soviet position is that the right to use force in self-defense has been limited by article 51 of the U.N. Charter, so that recourse to self-defense must be compatible with the requirements of the article. Put another way, the Soviets seek to restrict the opportunities for invoking the right of self-defense to situations expressly envisaged by article 51, that is, cases where an armed attack has occurred, to the exclusion of every other act such as provocation or any anticipatory self-defense.

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assistance must be given so that the sacred and just struggle of the peoples for their independence can be brought to its conclusion.” 15 U.N. GAOR (869th plen. mtg.) para. 223, U.N. Doc. A/PV.869 (1960).

243. Ginsburg, *supra* note 239, at 144.

244. B. RAMUNDO, *supra* note 227, at 144.

245. This thesis is extrapolated by Soviet jurists from the language of article 1(2) of the Charter. See Ginsburg, *supra* note 239, at 83.

246. See Report of the Special Committee on Enhancing the Principle of Non-Use of Force, 34 U.N. GAOR Supp. (No. 41) at 39, U.N. Doc. A/34/41 (1979) (statement of USSR Representative introducing article IV of the Draft World Treaty on Non-Use of Force in International Relations).

247. See, e.g., 29 U.N. GAOR C.6 (1472d mtg.) para. 4, U.N. Doc. A/C.6/SR.2058 (1974).



Article 51, they argue, provides objective criteria, as distinct from the subjective standard of national interest reflected in the practice of Western states.<sup>248</sup> As elaborated by a Soviet jurist:

[Under] the U.N. Charter . . . the right to self-defense lawfully arises "if an armed attack occurs" against a state. Acceptance of [the Western] . . . concept would furnish legal opportunities for misuse of armed force in selfish interests in cases when acts of nationalism, demands for the abrogation of fettering treaties, the social system and many other circumstances are arbitrarily fitted into concept of aggression "or threat of aggression."<sup>249</sup>

Apart from the specific language of article 51, further limitations on the right of self-defense hinge, according to the Soviet conception, on the United Nations general system for the maintenance of peace and security. Thus:

The U.N. Charter contemplates a centralized system for the application of sanctions for the purpose of protecting the security and rights of states . . . . Under these conditions, resort to the right of self-defense is exceptional rather than the general rule. It is an extraordinary and auxiliary measure because the principal measures to protect peace and international security are entrusted to the Organization, which for this purpose operates through the Security Council.<sup>250</sup>

A restrictive view of the right of self-defense is also linked to the concept of peaceful coexistence. Under Soviet theory, article 51 cannot be interpreted or understood as superseding or weakening other principles of peaceful coexistence such as self-determination, abstention from the threat or use of force, collective measures for the maintenance of peace and security, or the unanimity of the permanent members of the Security Council.<sup>251</sup>

At the same time, peaceful coexistence must defer to proletarian internationalism and solidarity with the oppressed peoples' struggle for national liberation. Indeed, according to one Soviet commentator,

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248. One may question, however, the objectivity claimed for the "armed attack" formulation. Ramundo notes that "[t]he objectivity intended is 'socialist objectivity,' i.e., a formulation which, like similar formulations in the Soviet lexicon, (e.g., 'socialist realism,' 'socialist democracy,' and 'socialist internationalism') invites characterizations in the Soviet interest." B. RAMUNDO, *supra* note 227, at 130.

249. *Id.* at 129-30 (quoting Molodstov, *Mirnoe Uregulirovanie Territorial' nykh sporov i Voprosov o Granitsakh* [Peaceful Settlement of Territorial Disputes and Border Questions], SOVETSKII EZHEGODNIK 82 (1963)).

250. *Id.* at 130 (footnote omitted).

251. *Id.*

support of wars of national liberation is in fact an affirmation of the concept of peaceful coexistence "since the issue at stake is respect for one of the basic principles of peaceful coexistence — the right of all peoples to order their own life as they see fit, to be the master in their own house."<sup>252</sup> Thus, the Soviets have laid the basis for expanding self-defense, in their own interest, to include the use of force to resist or punish violations of the law of peaceful coexistence which is said to be embodied in the Charter.<sup>253</sup>

Soviet policy objectives are also served by their insistence on another principle of peaceful coexistence, namely unanimity among the permanent members of the Security Council, which ensures the availability of the Soviet veto to exercise a measure of control over the use of force in international relations. Thus, the Soviet view emphasizes the primary responsibility of the Security Council under the Charter for the maintenance of international peace and security and restates that application of enforcement measures should be decided upon and undertaken solely by the Security Council.<sup>254</sup> Similarly, any decision by a regional organization to use coercive measures or force against a member of the United Nations without the authorization of the Security Council would be a breach of the Charter and illegal.<sup>255</sup>

Unlike its Western component, therefore, the Soviet approach to the use of force in international relations has far more doctrinal undertones. Notwithstanding this, the Soviet approach lacks the coherence of the Western approach and contains built-in contradictions which are difficult to reconcile at the practical level. Perhaps even more than Western states, the Soviet Union promotes a view of war which reflects its narrow interests and ideological imperatives.

### *C. The Chinese Approach*

While the Soviet Union is the most powerful Communist nation and still exerts tight control over most of its allies, some leftist govern-

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252. Ponomaryov, *Some Problems of the Revolutionary Movement*, 5 WORLD MARXIST REV. 8, 12 (1962).

253. The use of the right of self-defense as a basis for sustaining the legality of wars of national liberation is discussed earlier in this article.

254. See, e.g., Rumania, 19 U.N. GAOR Special Committee on Friendly Relations and Co-operation Among States (7th mtg.) at 18, U.N. Doc. A/AC.119/SR.7 (1964); Rumania, 19 U.N. GAOR Special Committee on Friendly Relations and Co-operation Among States (16th mtg.) at 6, U.N. Doc. A/AC.119/SR.16 (1974); USSR, 19 U.N. GAOR Special Committee on Friendly Relations and Co-operation Among States (14th mtg.) at 12, U.N. Doc. A/AC.119/SR.14 (1964).

255. *Id.*

ments have been pursuing an independent foreign policy and openly challenging Soviet dominance. Most notable in this respect has been China, which has emerged as a countervailing power to the Soviet Union within the Communist bloc. Because of its defiance of Soviet leadership and its enormous human resources, China is regarded as a potentially major force in international politics. Thus, China merits a separate treatment in the present context.

Several principles permeate China's ideological pronouncements on war. These precepts, which form the basis of the Chinese attitude towards the justifiability of war, focus upon the inevitability of war, "bourgeois pacifism" and the distinction between just and unjust wars alongside the principles of sovereignty, non-interference and peaceful coexistence.<sup>256</sup>

The starting point for any discussion of the Chinese attitude to war is Mao's lecture on the *Problem of Strategy in China's Revolutionary War*:

War, this monster of mutual slaughter among mankind, will be finally eliminated through the progress of human society, and in no distant future too. But there is only one way of eliminating it, namely to oppose war by means of war, to oppose counter-revolutionary war by means of revolutionary war, to oppose national counter-revolutionary war by means of national revolutionary war, and to oppose counter-revolutionary class war by means of revolutionary class war. There are only two kinds of wars in history, just and unjust. We support just wars and oppose unjust wars. All counter-revolutionary wars are unjust, all revolutionary wars are just. We will put an end to man's warring era with our hands, and the war we are waging is undoubtedly part of the final war. But the war we are confronted with is also undoubtedly part of the greatest and most ruthless of all wars. The greatest and most ruthless of all unjust counter-revolutionary wars is pressing on us; and if we did not raise the banner of a just war, the majority of mankind would suffer destruction. The banner of a just war of mankind is the banner for the salvation of mankind; the banner of China's just war is the banner for the salvation of China. A war which will be waged by the overwhelming majority of mankind and of the Chinese people will undoubtedly be a just war — it will . . . form a bridge leading world history into a new era. When human society advances to the point where classes and states are eliminated, there will no longer be any wars, whether revolutionary

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256. See generally, MAO TSE-TUNG, *SELECTED WORKS OF MAO TSE-TUNG* (1955) (British edition of Mao's Works).

or counter-revolutionary, just or unjust, and that will be an era of lasting [perpetual] peace for mankind. Our study of the laws of revolutionary war starts from our will to eliminate all wars — this is the dividing line between us Communists and all exploiting classes.<sup>257</sup>

Mao thus refutes what he considers to be an unprincipled peace. To oppose war with war, in his view, is the only way to eliminate it. “War,” he says elsewhere, “can only be abolished through war — in order to get rid of the gun, we must first grasp it in our hand.”<sup>258</sup> The era of “perpetual peace” will arrive when society has reached the ideal classless status.<sup>259</sup>

Mao thus echoes the Leninist doctrine that “[w]ar is an inevitable outcome of systems of exploitation and the source of modern war is the imperialist system. Until the imperialist system and the exploiting classes come to an end, wars of one kind or another will always occur.”<sup>260</sup>

Hence war is inherent in capitalism; aggression and imperialism are synonymous in the Chinese view.<sup>261</sup> The progressive nature of the Socialist state, however, precludes it from taking an aggressive action against others.<sup>262</sup> Therefore, wars waged by Communist states against Capitalist states are by definition just wars.<sup>263</sup>

Unlike the Soviets, however, who assert the avoidability of all wars between states,<sup>264</sup> China takes the stand that local wars are inevi-

257. 1 MAO TSE-TUNG, *SELECTED WORKS OF MAO TSE-TUNG* 179 (1955) (British edition of Mao's Works).

258. 2 MAO TSE-TUNG, *supra* note 256, at 229.

259. See *supra* text accompanying note 215.

260. Steiner, *Attitudes Toward War and Disarmament*, in *LEGAL AND POLITICAL PROBLEMS OF WORLD ORDER* 547-48 (S. Mendlowitz ed. 1962) (quoting an excerpt from *Long Live Leninism* which is generally believed to be the work of Mao although published on April 16, 1960 under the auspices of the editorial department of *Red Flag*).

261. See in this connection the statement by the Chinese Representative, Ling Ch'ing, that “the contention for world hegemony was the main content of imperialist foreign policy and imperialism was the source of contemporary wars of aggression.” 28 U.N. GAOR C.6 (1442d mtg.) para. 73, U.N. Doc. A/C.6/SR.1442 (1973).

262. According to Mao, the Socialist system “determines that we the Chinese do not need war, absolutely would not start a war, and absolutely must not, should not, and could not encroach one inch on the territory of a neighboring country.” J. GITTINGS, *SURVEY OF THE SINO-SOVIET DISPUTE: A COMMENTARY AND EXTRACTS FROM THE RECENT POLEMICS 1963-1967* at 390 (1968).

263. See E. KARDELI, *SOCIALISM AND WAR: A SURVEY OF CHINESE CRITICISM OF THE POLICY OF COEXISTENCE* 9-94 (1960) (a critique of this attitude of self-infallibility). According to Kardelj, such an approach can be equated with the notion that any war which I wage is a just war. *Id.* at 91. Furthermore, it is contrary to Leninism.

264. The Soviets— who initially refused to take the Chinese position on the inevitability of

table.<sup>265</sup> It is the Chinese view that imperialists cannot be deterred from starting local wars. "Therefore, the Communist countries should feel free to ignite and/or support local wars of liberation or to respond with force to Western-initiated local wars."<sup>266</sup>

In fact, contrary to unjust wars initiated by the imperialists, just wars such as national liberation wars waged against the colonialist and revolutionary civil wars waged against the bourgeoisie in Capitalist countries are not only inevitable, but actually desirable, and should be supported by all available means.<sup>267</sup> To quote from Mao's famous dictum:

Yes, we are, we are the advocates of the omnipotence of the revolutionary war, which is not bad at all, but is good and is Marxist. With the help of guns the Russian Communists brought about socialism. We are to bring about a democratic republic. Experience in the class struggle of the era of imperialism teaches us that the working class and the toiling masses cannot defeat the armed bourgeois and landlords except by the power of the gun; in this sense we can even say the the whole world can be remoulded only with the gun.<sup>268</sup>

By the same token, "bourgeois pacifism," which opposes wars indiscriminately, is invariably rejected by the Chinese. Rather, attention is called to the specific nature of wars and the importance of distinguishing between just and unjust wars is underlined. A clear statement of the Chinese position is provided by the Chairman of the Chinese delegation in a United Nations Plenary Session on October 3, 1972:

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local wars — appear to have made a concession with respect to anticolonial wars of national liberation which they now consider unavoidable "if the imperialists try to maintain by force their sway over other peoples." At the same time, the Soviets have remained adamant as to the avoidability of local wars other than national liberation wars which, like other types of wars between states, should be avoided given the risk of their escalation into a "world thermonuclear and missile war." See Burin, *The Communist Doctrine of the Inevitability of War*, 57 AM. POL. SCI. REV. 334, 352-53 (1963) (footnote omitted).

265. See in this connection the statement made in People's Congress to the effect that "[w]ar is inevitable but the date of the outbreak may be delayed." 1114 CHINA NEWS ANALYSIS 5 (1978).

266. Burin, *supra* note 264, at 352.

267. Note the suggestion in China's Army newspaper that China's conflict with Vietnam which took place in February 1979 was "a good war for China as well as being just." The Liberation Army Daily said: "The counter-attack educated and tempered our people, consolidated their unity and enhanced their patriotism and enthusiasm for transforming China." South China Morning Post, Mar. 27, 1979, at 5, col. 4 (quoting the Liberation Army Daily).

268. See 2 MAO TSE-TUNG, *supra* note 256, at 228-29.

People condemn war and consider it a barbarous way of settling disputes among mankind. But we are soberly aware that war is inevitable so long as society is divided into classes and the exploitation of man by man still exists. There are two categories of wars, just and unjust. We support just wars and oppose unjust wars. If a socialist still wants to be a socialist, he should not oppose all wars indiscriminately. The non-use of force in international relations can only be conditional and not unconditional. The condition is to realize peaceful coexistence through mutual respect for sovereignty and territorial integrity, mutual nonaggression, noninterference in each other's internal affairs, and equality and mutual benefit. And in order to realize this it is imperative to oppose the policies of aggression and expansion of any imperialism. When imperialism, colonialism and neo-colonialism of various descriptions are still using force to enslave, commit aggression against, control and threaten a majority of the countries of the world, it is betrayal to the people of the world to advocate non-use of force in international relations indiscriminately, without regard to the conditions and in an absolute way.<sup>269</sup>

Indeed, much stress is laid by the Chinese on the Maoist distinction between just and unjust wars. They fervently contend that it is "absolutely impermissible to mention in the same breath wars of aggression and wars against aggression, which [are] different in nature."<sup>270</sup> The waging of the former is recognized as an international crime,<sup>271</sup> and entails an obligation on the part of the aggressor to indemnify its victim.<sup>272</sup>

Mao's concern with so called structural violence, that is, with the question of *who* is using violence, against *whom*, in what sociopolitical context, and for what purpose, has been perpetuated in modern Chinese doctrine.<sup>273</sup> Chinese officials have repeatedly voiced the opinion that the identification of the aggressor is more important and more necessary than the actual definition of aggression.<sup>274</sup>

They, consequently, have expressed their disappointment with the United Nations Security Council's practice of attempting to bring

269. People's Republic of China Mission to the United Nations, Press Release of Oct. 3, 1972, at 10-11.

270. 28 U.N. GAOR C.6 (1442d mtg.) para. 75, U.N. Doc. A/C.6/SR.1442 (1973).

271. See Chun-yu, *On the Indictment and Punishment of War Criminals, reprinted in PEOPLE'S CHINA AND INTERNATIONAL LAW* 1471 (J. Cohen & H. Chiu eds. 1974).

272. *Id.* at 1479 (quoting Jen Min Jih Pao).

273. See S. KIM, *CHINA, THE UNITED NATIONS AND WORLD ORDER* 65 (1979).

274. *Id.* at 460.

about a settlement while refraining from a determination of the guilty party. In a similar vein, Chinese delegates have condemned Soviet advocacy of a total prohibition of force in international relations as a reactionary doctrine.<sup>275</sup>

Consistent with such a distinction is China's unremitting support of wars of national (or people's) liberation: "We support the revolutionary wars of the oppressed nations against imperialism [and] for their own liberation and social progress because all these . . . are just wars."<sup>276</sup> Elaborating on the justness of such wars, a Chinese delegate participating in the debates on the Report of the Special Committee on the Question of Defining Aggression has reaffirmed that "[t]he oppressed peoples<sup>277</sup> had the right to use every means, up to and including armed struggle, to win their national liberation and independence and to safeguard the sovereignty of their States."<sup>278</sup> Indeed, wars of national liberation, according to an article published in Peking, are the only option available to people in underdeveloped areas who seek to achieve national independence and equality.<sup>279</sup> Therefore, China would join "justice-loving countries" and "fight shoulder to shoulder" to "promote the cause of human progress."<sup>280</sup>

Specifically, liberation wars appear to have four doctrinal requirements: (a) the antiimperialist (national) or the proletarian origin of the war (the people); (b) limitation of the war within the boundary of a single state or a colonial area, to avoid provoking outside opposing interference; (c) keeping the door open for Communist infiltration and control; and (d) condemnation of any non-Communist interference as an infringement on the people's right of national self-determination (liberation).<sup>281</sup>

Furthermore, wars of national liberation are perceived by the Chinese, according to a prominent legal scholar, as "fully consistent with modern international law" given their nature as "wars of national self-defense conducted by colonized or semi-colonized states or

275. *Id.* at 240.

276. Steiner, *supra* note 260, at 549.

277. It should be noted that China's support of wars of national liberation extends to struggles against "reactionary" regimes waged by the domestic proletariat of post colonial and noncolonial nations as well. See generally P. VAN NESS, *REVOLUTION AND CHINA'S FOREIGN POLICY* (1970).

278. 29 U.N. GAOR C.6 (1475th mtg.) para. 19, U.N. Doc. A/C.6/1475 (1974).

279. See J. HSIUNG, *LAW AND POLICY IN CHINA'S FOREIGN RELATIONS: A STUDY OF ATTITUDES AND PRACTICE* 290 (1972).

280. 29 U.N. GAOR C.6 (1475th mtg.) para. 18, U.N. Doc. A/C.6/1475 (1974).

281. J. HSIUNG, *supra* note 279, at 290.

nations to preserve their own sovereignty, independence, unity, and territorial integrity."<sup>282</sup>

Such wars are also not at variance with the principle of peaceful coexistence. This was clearly asserted in a reply letter written by the Chinese Communist Party to the Central Committee of the Communist Party of the Soviet Union:

In recent years, certain persons have been spreading the argument that a single spark from a war of national liberation or from a revolutionary people's war will lead to a world conflagration destroying the whole mankind . . . . Contrary to what these people say, the wars of national liberation and the revolutionary people's wars that have occurred since World War II have not led to a world war. The victory of these revolutionary wars has directly weakened the forces of imperialism and greatly strengthened the forces which prevent the imperialists from launching a world war and which defend world peace.<sup>283</sup>

Notwithstanding its endorsement of national liberation wars, China has purported to support only just wars of a defensive nature. Mao's statement in this respect is illuminating: "Others may come attack us but we shall not fight outside our borders. I say we will not be provoked. Even if you invite us to come out, we will not come out, but if you should come and attack us we will deal with you."<sup>284</sup>

In the view of *Red Flag*, however, defensive wars need not be confined to the territory of the invaded country. So called "defensive counter-attacks" may be "completely justified, absolutely necessary and entirely just."<sup>285</sup> Indeed, this elusive concept of defensive counter-attack as well as the elastic claim of self-defense have invariably been used by the Chinese in justifying their military operations.

Thus, for example, China's participation in the Korean War was characterized as an act of self-defense against United States aggression. In view of the geographical proximity of Korea to China, the close ties of friendship between China and Korea and the aggressive American tendencies, the Chinese authorities considered their military involvement "not only a help rendered to their neighbour but

282. See Cohen, *China and Intervention: Theory and Practice*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 348, 372 (J. Moore ed. 1974) (quoting Fu Chu).

283. 6 *PEKING REV.*, June 21, 1963, No. 25, at 14 (a Letter of the Central Committee of the Communist Party of China in reply to the letter of the Central Committee of the Communist Party of the Soviet Union of March 30, 1963).

284. S. KIM, *supra* note 273, at 68.

285. Steiner, *supra* note 260, at 548.



also an act of defense of their own homeland.”<sup>286</sup> Similarly, China’s boundary conflict with India was justified as an exercise of self-defense against preemptive Indian invasion.<sup>287</sup> Such an argument was also put forward in connection with the Sino-Soviet border clashes in 1969.<sup>288</sup>

Self-defense was also the declared reason behind China’s involvement in the Vietnam War for, given the “brotherly” relationship between the Chinese and the Vietnamese, aggression against the one constituted aggression against the other.<sup>289</sup> More recently, China invaded Vietnam in what it characterized as a “defensive counter-attack” following Vietnam’s occupation of Cambodia and other border incidents. The Chinese authorities, wanting to teach Vietnam a lesson, had no doubt that “the counter-attack we were compelled to launch against the Vietnamese aggressors was a just war.”<sup>290</sup>

Nonetheless, it should be pointed out that while China, like other states, “can tailor the facts and manipulate the rules to rationalize . . . whatever position seems to be in the immediate interest of the Chinese state,”<sup>291</sup> a study of the practice of the People’s Republic suggests that the Chinese use of force has been, indeed, of a limited and defensive character; “in most cases Peking has deployed the PLA [People’s Liberation Army] in defensive reaction against a perceived threat, usually manifested by hostile movements toward sensitive border areas.”<sup>292</sup> Generally, in fact, “[w]hen it comes to practical action, the CPR [People’s Republic of China] has actually failed to live up to its own militant rhetoric.”<sup>293</sup> Such a discrepancy is also evident in its attitude towards wars of national liberation.

Chinese officials have steadfastly pledged their support for national liberation struggles against colonial rule and imperialistic domination and, generally, against “imperialism, modern revisionism and

286. See 19 U.N. SCOR (527th mtg.) paras. 96-97, U.N. Doc. S/PV.527 (1950).

287. See 452 CHINA NEWS ANALYSIS 4 (1963).

288. See 12 PEKING REV., July 11, 1969, No. 28, at 6; *id.*, Aug. 15, 1969, No. 33, at 3.

289. See 8 PEKING REV., Feb. 12, 1965, No. 7, at 6-7 (a government statement entitled: *China is Well Prepared to Assist D.R.V. Against U.S. Aggression*).

290. South China Morning Post, Mar. 27, 1979, at 5, col. 4 (quoting the Liberation Army Daily); see also 34 U.N. SCOR Supp. (Jan.-Mar. 1979) at 100, U.N. Doc. S/13137 (1979) (letter dated March 5, 1979, from the Representative of China to the Secretary General); *China ‘Forced to Fire on Viets’*, South China Morning Post, Apr. 17, 1983, at 1, col. 1.

291. Cohen, *supra* note 282, at 377.

292. Whiting, *The Use of Force in Foreign Policy by the People’s Republic of China*, 402 ANNALS 55, 57 (1972). See generally J. HSIUNG, *supra* note 279; S. KIM, *supra* note 273.

293. J. HSIUNG, *supra* note 279, at 288.

reactionary regimes.”<sup>294</sup> They have on many occasions, whether explicitly or implicitly, endorsed revolution in specific countries and have sometimes endorsed particular revolutionary organizations.<sup>295</sup> Yet, the Chinese concept of support has been rather limited and expressed largely in moral, ideological and psychological terms. Indeed, as pointed out by one observer, none of China’s actual uses of force across her national boundaries since 1949 has fallen within the category of support for wars of national liberation.<sup>296</sup>

Nonetheless, it is possible to argue that China’s passive attitude in this respect stems from factors such as limited resources and a policy of self-reliance. As noted by Cohen, “China is a poor, vast, developing country that is beset by the political, economic, social, and administrative problems confronting all developing countries and thus has limited resources to allocate to foreign liberation struggles.”<sup>297</sup> Equally effective here has been Mao’s doctrine recognizing that “[r]evolution or people’s war in any country is the business of the masses in that country and should be carried out primarily by their own efforts; there is no other way.”<sup>298</sup> China’s role is consequently confined to providing a model for the revolutionary forces of the world, some aid, and verbal encouragement; not to facilitating a revolution for others or engaging in fighting on their behalf.

It is, thus, conceivable that had it not been for the above constraints, the Chinese would have pursued a more active policy of support *vis-à-vis* national liberation movements and would have perceived no inherent contradiction between such a policy and the Five Principles of Coexistence to which they purport to adhere.<sup>299</sup> Any possible inconsistency could, arguably, be reconciled with reference to a *dynamic* concept of peaceful coexistence which affirms the continuation of class struggle as follows:

The policy of peaceful coexistence is a policy of mobilizing the masses and launching vigorous action against the enemies of peace. Peaceful coexistence of states does not imply the renunciation of the class struggle as the revisionists claim. The coexistence of

294. *Id.* at 292 (quoting Lin Piao).

295. Cohen, *supra* note 282, at 368-69.

296. S. KIM, *supra* note 273, at 72; see also Robinson, *Peking’s Revolutionary Strategy in the Developing World: The Failure of Success*, in 386 ANNALS 64, 64-77 (1969).

297. Cohen, *supra* note 282, at 369.

298. Piao, *Long Live the Victory of People’s War*, 8 PEKING REV., Sept. 3, 1965, No. 36, at 19.

299. Respect for territorial integrity and sovereignty, nonaggression, nonintervention, mutual benefit and equality and peaceful coexistence.

states with different social systems is a form of class struggle between socialism and capitalism . . . . It implies intensification of the struggle of the working class, of all the Communist Parties, for the triumph of socialist ideas. But ideological and political disputes between states must not be settled through war.<sup>300</sup>

An argument has also been advanced that the principles of peaceful coexistence are simply inapplicable between Socialist and imperialist states. It is theorized that since the latter do not respect these principles and insist on pursuing a policy of exploitation and suppression of oppressed peoples, the Socialist states are free to, and indeed, are obligated to, come to the defense of the oppressed peoples by aiding national liberation movements.<sup>301</sup>

A more skeptical interpretation of the Chinese posture depicts the self-serving nature of the concept of peace under the Maoist peace strategy which obviates any need for reconciliation. Thus, according to a Taiwanese scholar, the idea of peaceful coexistence in Maoist thought is, in effect, only a link in a wider war policy, an instrument to win over middle-of-the-roads, a united front tactic, a vehicle of domestic reconstruction, and a means to resolve crises.<sup>302</sup> Support for wars of national liberation could easily fit within such a scheme for peaceful coexistence.

Whichever ideological polemic one chooses to subscribe to, an examination of Chinese practice reveals a certain uneasiness and sensitivity about a policy of support for both revolution and peaceful coexistence. This uneasiness is evidenced by the tendency of the Chinese authorities to resort to elaborate tactics in order to impose a more defensible framework on the various activities which may be regarded as contradicting traditionally acceptable principles of international law.<sup>303</sup> In the final analysis, however, China's primary concerns are the interests of the Chinese state rather than any abstract notions of international legal norms, and its attitudes towards the use of force continues to be strongly influenced by its strategic goals.

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300. Steiner, *supra* note 260, at 547. This was a formula adopted in a meeting of representatives of the world Communist movement in Moscow, 1960.

301. See Cohen, *supra* note 282, at 371 (reference to various series of Party documents).

302. See Kuo-Ch'iang, *A Study of the Peace Policies of Washington, Peiping and Moscow*, 8 ISSUES & STUDIES 15, 18-19 (1972).

303. Cohen, *supra* note 282, at 372, 375. Cohen refers to tactics such as secrecy concerning the scope and nature of the military and economic aid given, and the use of state discretion in deciding whether and when to recognize insurgents as the legitimate government.

*D. Third World Approach*

As stated above, Chinese views, because of that country's sheer size and potential importance, merit separate consideration. The same cannot be said of other Third World countries, since they do not enjoy as much leverage in the international arena. The Third World as a whole, on the other hand, is a factor to be reckoned with, and its collective attitudes affect international norms and events. For this reason, it is desirable to examine common elements in Third World perceptions regarding the use of force in international relations.

Given the common heritage of their colonial experiences, their military weakness, and their economic, cultural and technological underdevelopment, it is not surprising that Third World countries tend to be preoccupied with concepts such as national sovereignty, self-determination, human rights, social justice, sovereign equality and noninterference. As declared by the Representative of Madagascar in the Sixth Committee of the General Assembly, "African countries like Madagascar, which had only recently become independent, attached particularly great importance to respect for the national sovereignty, territorial integrity and independence of States, to their sovereign equality and to non-intervention in the domestic affairs."<sup>304</sup> Third World countries also lay considerable emphasis upon justice and human dignity. Indeed, as expressed by the Sri Lankan and Indian delegations, respectively, the whole purpose of the emerging new international law is to "bring about . . . international social justice,"<sup>305</sup> and to "promote a world public order embodying values of human dignity in a society dedicated to freedom and justice."<sup>306</sup>

Nonintervention is yet another concept strongly advocated by the Third World. In particular, it has been actively championed by Latin American countries, consequently earning the description of "the central axis of the inter-American system."<sup>307</sup> Stemming partly from history and partly from endemic local factors, Latin American countries have endorsed the doctrine of nonintervention since as early as 1868 when Calvo, the Argentine jurist, formulated what has come

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304. 17 U.N. GAOR C.6 (765th mtg.) para. 13, U.N. Doc. A/C.6/SR.765 (1962).

305. 18 U.N. GAOR C.6 (805th mtg.) para. 16, U.N. Doc. A/C.6/SR.805 (1963) (quoting delegate of Ceylon which today is known as Sri Lanka).

306. 1 Y.B. INT'L L. COMM'N 65 (1963).

307. See, e.g., Dihigo, *Legality of Intervention Under the Charter of the Organization of American States*, 51 AM. SOC'Y INT'L L. 91 (1957) (proceedings of the fifty-first annual meeting).

to be referred to as the Calvo Clause<sup>308</sup> in an attempt to ensure the politically weak Latin American Republics from the military or political intervention by the European powers.<sup>309</sup> A later doctrine, first enunciated by the Argentine Foreign Minister Drage in 1902, also sought to eliminate forceful intervention by one state against another on the ground of a default on public debts, leading the way to the incorporation, under the pressure of Latin American participants, of a relevant prohibition in the Hague Conference of 1907.

A prohibition against intervention, whether directly or indirectly, for any reason whatever, in the internal or external affairs of any state was consequently included in the Organization of American States Charter in Boota in 1948 which further proscribed "any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements."<sup>310</sup> The Organization of American States Charter is even more emphatic in its prohibition of the use of force in that it declares the territory of a state to be inviolable and stipulates that "it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized."<sup>311</sup>

The Latin American contribution to the theories of intervention was equally decisive during the debates on the Declaration of Principles of International Law Concerning Friendly Relations Among States. The Latin American delegates and, most notably, Mexico, embarking upon what McWhinney has described as "*avant-garde* lawmaking ventures,"<sup>312</sup> invoked an array of practices rooted in Latin American history of legally impermissible interventions by the big powers. Thus, the Mexican draft,<sup>313</sup> after reaffirming the prohibition

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308. Such a clause was at the time frequently inserted in contracts between Latin American governments and foreign companies or persons to whom concessions or other rights were granted under the contract with a view to depriving the latter of any rights to diplomatic protection as aliens. Its insertion was due to the number of occasions when, on rather flimsy pretexts, concessionaire companies or persons sought the intervention of their own governments to protect their interests without any recourse to the remedies available in local municipal courts.

309. See D. SHEA, *THE CALVO CLAUSE* 17-20, 216-17 (1955).

310. O.A.S. CHARTER art. 18.

311. *Id.* at art. 20.

312. McWhinney, *The "New" Countries and the "New" International Law: The United Nations' Special Conference on Friendly Relations and Co-operation Among States*, 60 AM. J. INT'L L. 1, 22 (1966) (emphasis in original).

313. See also the supporting address by the Mexican Representative with a useful review

of any form of interference “against the personality of the state or against its political, economic and cultural elements,” proposed a list of eight different categories of legally impermissible interventions.<sup>314</sup>

Equally insistent on the need to guard against the undermining of sovereignty and independent development of smaller countries was the Ghanaian Representative, who suggested that certain activities of states abroad, namely “propaganda, espionage, infiltration, bribery, assassination, assistance to guerrillas, preemptory diplomatic demands, and so forth,” directed against another state, as well as actions aimed at “destroying its markets, violating its laws, damaging its prestige and reputation, controlling its policy or subverting its government” constituted illegal interventions.<sup>315</sup>

The anxiety expressed by weak Third World states with regard to possible interventions by more powerful states is often demonstrated in the former’s attitude toward the concept of force. Typical in this respect is the response of the Ecuadorian Representative to the Report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-use of Force in International Relations, who expressed support for a text:

prohibiting all use of force or the threat thereof, not only in terms of military might but also in any other form of direct, indirect or covert coercion or disguised as alleged preventive action, or in terms of economic or political pressure, the subversion of the constitutional order of a country instigated from outside, intimidation and support of terrorism, the use of mercenaries and all campaigns of disinformation and hostile and degrading propaganda directed against a country and its institutions.<sup>316</sup>

Furthermore, Third World representatives were quite adamant in subsequent debates that any proscription of the use of force in inter-

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of Latin American historical practice in 18 U.N. GAOR Special Committee on Friendly Relations and Co-operation Among States (30th mtg.) at 4-13, U.N. Doc. A/AC.119/SR.30 (1964).

314. *Id.* Including “coercive measures of an economic or political nature” which permit, in the areas subject to its jurisdiction, or promote or finance anywhere, the organization or training of armed forces for purposes of incursions into other states, or the supply of arms or war materials for aiding rebellions in another state, or the organization of subversive or terrorist activities against another state; make recognition of governments or the maintenance of international relations dependent on the receipt of special advantages; impose on a state concessions to foreigners of a privileged situation exceeding the rights, means of redress and safeguards granted under the municipal law to nationals of that state. *Id.*

315. Ghana, 19 U.N. GAOR Special Committee on Friendly Relations and Co-operation Among States (29th mtg.) at 6, U.N. Doc. A/AC.119/SR.6 (1964).

316. 37 U.N. GAOR Supp. (No. 41) para. 30, U.N. Doc. A/37/41 (1982).

national relations should encompass "economic aggression" which might take the form of refusal to fulfill obligations to promote development, erection of trade barriers by wealthy countries, failure to expedite the transfer of technology, control of prices and distribution by powerful transnational forces and promotion of instability through currency fluctuations and imported inflation. Still other forms of the use of force were ideological infiltration and economic or political sabotage.<sup>317</sup>

Indeed, even the "threat of the use of force, like the use of force itself, as in the case of political pressure exercised by the dozens of armed divisions stationed by imperialist States among weaker peoples in order to prevent their self-determination, was also unacceptable."<sup>318</sup> By the same token, Third World states have restated their commitment to an absolute and unconditional prohibition of the use of force which excluded any consideration of the intention of the state initiating the force.<sup>319</sup>

Yet, the same countries which appear to be most receptive to the need to broaden the scope of legally impermissible interventions, thereby extending the concept of "force" and dismissing the intention of the initiator of force as irrelevant have also been insistent on establishing a special category of exceptions with regard to legally *permissible* interventions when the defense of a higher right is involved. Thus, it has been contended that the principle of nonintervention could not be legally invoked with respect to situations of human rights violations which were likely to affect international peace and security.<sup>320</sup>

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317. 33 U.N. GAOR Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations (9th mtg.) para. 5, U.N. Doc. A/AC.193/SR.9 (1978). Note also the statement by the Representative of Nepal who stated that "the conventional concept of force as military force or the use of armed forces was too narrow, since acts of subversion, the encouragement of hostile activity, the use of the mass media to launch campaigns of hatred and vilification, economic pressure, the obstruction of passage and of trade and transit routes, and other means adopted by one State against another were all expressions of the use of force." 34 U.N. GAOR Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations (24th mtg.) para. 6, U.N. Doc. A/AC.193/SR.24 (1979).

318. 37 U.N. GAOR Supp. (No. 41) para. 32, U.N. Doc. A/37/41 (1982).

319. *See, e.g.*, Mexico, 18 U.N. GAOR C.6 (806th mtg.) para. 17, U.N. Doc. A/C.6/SR.806 (1963); Indonesia, 18 U.N. GAOR C.6 (809th mtg.) para. 6, U.N. Doc. A/C.6/809 (1963); Ecuador, 22 U.N. GAOR C.6 (1003d mtg.) para. 53, U.N. Doc. A/C.6/SR.1003 (1967); Chile, 23 U.N. GAOR C.6 (1092d mtg.) para. 31, U.N. Doc. A/C.6/1092 (1968); Ethiopia, *id* at paras. 49, 52.

320. *See, e.g.*, United Arab Republic, 19 U.N. GAOR Special Committee on Friendly Relations and Co-operation Among States (30th mtg.) at 21, U.N. Doc. A/AC.119/SR.30 (1964).

Instances of particular import justifying intervention include genocide,<sup>321</sup> *apartheid* and racial discrimination,<sup>322</sup> denial of the inherent right of people to self-determination,<sup>323</sup> and other colonialist practices.<sup>324</sup>

There is also some evidence to suggest that, according to certain Latin American conceptions, the principle of nonintervention may give way to use of force "against any attempt of the international Communist movement, or any other totalitarian system to seize power and control the government of any of the American republics endangering the peace, solidarity and security of the Continent" given that "democracy and human rights are essential postulates of [the American] Continent and indefeasible principles of [its] community."<sup>325</sup>

Third World states appear, in any event, to display a certain double standard on issues of force and nonintervention. To facilitate the carrying out of their main external objectives, namely the elimination of colonialism and racial discrimination, they have been quite emphatic in their call for the use of force, even if it entails clear incongruity in their stated position with respect to the Charter's prohibition concerning the regulation of force in world affairs.<sup>326</sup>

321. See Mali, 20 U.N. GAOR C.6 (882d mtg.) para. 34, U.N. Doc. A/C.6/SR.882 (1965); Pakistan, 20 U.N. GAOR C.1 (1404th mtg.) para. 5, U.N. Doc. A/C.1/SR.1404 (1965).

322. See Ghana, 18 U.N. GAOR Special Committee on Friendly Relations and Co-operation Among States (29th mtg.) para. 6, U.N. Doc. A/AC.119/SR.29 (1984); Central African Republic, 20 U.N. GAOR C.6 (884th mtg.) para. 25, U.N. Doc. A/C.6/SR.884 (1965); Senegal, 20 U.N. GAOR C.6 (889th mtg.) para. 20, U.N. Doc. A/C.6/SR.889 (1965); United Republic of Tanzania, 20 U.N. GAOR C.1 (1401st mtg.) para. 5, U.N. Doc. A/C.1/SR.1401 (1965); Kenya, 20 U.N. GAOR C.1 (1402d mtg.) para. 20, U.N. Doc. A/C.1/SR.1402 (1965).

323. See Ghana, 19 U.N. GAOR Special Committee on Friendly Relations and Co-operation Among States (29th mtg.) para. 6, U.N. Doc. A/AC.119/SR.29 (1964); Central African Republic, 20 U.N. GAOR C.6 (884th mtg.) para. 25, U.N. Doc. A/C.6/SR.884 (1965); Afghanistan, 22 U.N. GAOR C.6 (1000th mtg.) para. 47, U.N. Doc. A/C.6/SR.1000 (1967); Liberia, 22 U.N. GAOR C.6 (1001st mtg.) para. 2, U.N. Doc. A/C.6/SR.1001 (1969).

324. See Ghana, 19 U.N. GAOR Special Committee on Friendly Relations and Co-operation Among States (29th mtg.) para. 6, U.N. Doc. A/AC.119/SR.29 (1964); United Republic of Tanzania, 20 U.N. GAOR C.1 (1401st mtg.) para. 5, U.N. Doc. A/C.1/SR.1401 (1965); Kenya, 20 U.N. GAOR C.1 (1402d mtg.) para. 20, U.N. Doc. A/C.1/SR.1402 (1965).

325. Dihigo, *supra* note 307, at 100. *But see* Travis, *Collective Intervention by the Organization of American States*, 51 AM. SOC'Y INT'L L. 100, 107-08 (1957) (proceedings of the fifty-first annual meeting), who suggests that there is no regional agreement on the desirability of collective intervention in the event an American government is dominated by the international Communist movement.

326. Julius Stone draws attention to a statement by the Syrian Representative who "agreed that armed force could be used, despite Article 3(g), in self-determination struggles, *even*



Doctrinally, the basic assumption underlying their stance has been that an armed conflict in dependent territories has an international character because it is fought between, on the one hand, the metropolitan government (which is part of a colonial empire of extraneous power) and, on the other hand, the armed forces of the dependent people, which is in the process of building up the structure of its own state. Some support for this proposition was said<sup>327</sup> to derive from the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations<sup>328</sup> which stipulates that

The territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing territory have exercised their right of self-determination . . . .<sup>329</sup>

More crucial, however, according to Third World jurists, has been the "recognition of self-determination as a right," the important consequence of which is "to confer an international character on armed conflicts arising from the struggle to achieve this right and against its forcible denial."<sup>330</sup>

The tendency of Third World countries to internationalize internal wars has received its ultimate expression in the 1974-1977 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which adopted the 1977 Additional Protocol I,<sup>331</sup> categorizing, in effect, the struggle of peoples against colonial, alien and racist regimes as international conflicts.

Arguments in this context have generally been based on a purported right of self-defense against colonial domination which, as

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*though he would have wanted Article 2 to provide that use of armed force was 'automatically . . . aggression, not prima facie evidence of aggression.'*" J. STONE, *supra* note 119, at 82 (emphasis in original) (footnote omitted). Stone provides additional illustrations of such internal contradictions in the statements of the Representatives of Uganda, Sudan and Ghana. *Id.*

327. See Abi-Saab, *Wars of National Liberation and the Laws of War*, 3 ANNALS INT'L STUD. 93, 100 (1972).

328. G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 124, U.N. Doc. A/8 (1970).

329. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, *reprinted in* BASIC DOCUMENTS IN INTERNATIONAL LAW 39 (I. Brownlie 2d ed. 1972).

330. Abi-Saab, *supra* note 327, at 102.

331. *Reprinted in* 16 INT'L LEGAL MATERIALS 1391-1441 (1977).

pointed out by Dugard, appeared in two guises, namely, as an action in self-defense against continuing aggression and pursuant to a right of self-determination.<sup>332</sup>

A proposal in terms of the first guise was submitted by Ghana, India and Yugoslavia during the meeting of the Special Committee on Friendly Relations in Mexico City in 1965. A similar proposition was later raised in the debates of the Committee on the Question of Defining Aggression,<sup>333</sup> and gained the support of several Afro-Asian Representatives as well as of the Socialist states.<sup>334</sup>

To prevent an overly broad interpretation of article 51 of the Charter, certain countries, however, hastened to emphasize that the maintenance of a colonial administration itself constituted an armed attack.<sup>335</sup> Yet other moderate Third World states, adhering to the *stricto sensu* school in relation to article 51, supported a "limited right of rebellion," namely, permitting colonial people the right to self-determination.<sup>336</sup>

It is, however, the second guise of the argument based on a right of self-defense which has been forcefully advocated by Afro-Asian countries.<sup>337</sup> Indeed, a joint proposal was put forward by thirteen

332. See Dugard, *The Organisation of African Unity and Colonialism: An Inquiry into the Plea of Self-Defence as a Justification for the Use of Force in the Eradication of Colonialism*, 16 INT'L & COMP. L.Q. 157 (1967).

333. The statement of the Representative of Guinea provides a categorical formulation of such a claim:

The colonial system was the most flagrant act of aggression which could be perpetrated; thus Africa, throughout much of its territory, was at present suffering acts of undoubted aggression for which the colonialist Powers were responsible. All other forms of colonisation — neo-colonialism, imperialism or economic colonialism — fell within that category of direct aggression. The same could be said of the policy of *apartheid* applied in South Africa — a most monstrous form of aggression — as also of the policy of the white minority Government of Southern Rhodesia with respect to the inhabitants of Zimbabwe.

*Id.* at 169 (emphasis in original).

334. Afghanistan, 22 U.N. GAOR C.6 (1000th mtg.) para. 47, U.N. Doc. A/C.6/SR.1000 (1967); Cuba, 23 U.N. GAOR C.6 (1091st mtg.) para. 41, U.N. Doc. A/C.6/SR.1091 (1968); Liberia, *id.* at para. 33; UAR, *id.* at para. 16; Madagascar, 29 U.N. GAOR C.6 (1474th mtg.) para. 39, U.N. Doc. A/C.6/SR.1474 (1974).

335. See, e.g., Egypt, 24 U.N. GAOR C.6 (1163d mtg.) para. 14, U.N. Doc. A/C.6/SR.1163 (1969); Togo, 25 U.N. GAOR C.6 (208th mtg.) para. 19, U.N. Doc. A/C.6/SR.208 (1970).

336. See Gorelick, *supra* note 139, at 77.

337. Latin American states, however, chose a line of reasoning based on the proposition that colonial rule was illegal and hence its destruction would not constitute a disruption of the territorial integrity of a state. See Gorelick, *supra* note 139, at 82. Dugard suggests that an argument in the first "guise" is in fact unsuitable in the African context as "none of the present independent African States can claim to be historically a victim of colonial 'continuing aggress-

Third World countries,<sup>338</sup> and incorporated into the Report of the 1966 Special Committee on Friendly Relations, to the effect that the principle of equal rights and self-determination of peoples encompasses "rights to eliminate, and to self-defense against, colonial domination — an essential element or a corollary of the principle of self-determination . . . . This inclusion of rights in the principle, is necessary and in accordance with the provisions of the Declaration on Granting Independence to Colonial Countries and Peoples and of General Assembly Resolution 2105 (XX) of 20/12/65."<sup>339</sup>

A similar proposition was made ten years later, at the International Conference on Namibia and Human Rights, as a basis for a claim by the Southwest Africa People's Organization (SWAPO) that its war of national liberation was legally justified as an action in self-defense aimed at the assertion of the right of self-determination.<sup>340</sup>

In SWAPO's view, self-determination was "a cardinal principle of international law" and, arguably, "part of the *jus cogens* of international law."<sup>341</sup> It was a legal duty imposed on states, thus creating a corresponding "right which accrues in favour of a people." By extension, if such a right is "forcibly denied them then, under article 51 of the Charter of the United Nations, they have a right to defend themselves and their territory; the more so, against an illegal occupier. A people's liberation war can be clearly identified as defensive action within the meaning of the Charter."<sup>342</sup> It also followed that other states had, under international law, "the right to provide assistance, military and otherwise, to the Namibian people in their struggle for self-determination."<sup>343</sup>

This argument also drew support from a judge's dictum in the Advisory Opinion on *Legal Consequences for States of the Continued*

sion' in the African dependent territories." Furthermore, a Goa-type argument is inapplicable since "in the case of the dependent African territories independence is envisaged and not annexation by another State as in the case of Goa." Dugard, *supra* note 332, at 170. According to Gorelick, the argument that colonialism represents permanent aggression was not used much by anticolonial states because of the difficulty involved in "providing that military conquest was a *delicta juris gentium* during a time when this method of territorial acquisition was not only legally respectable, but even morally compelling." Gorelick, *supra* note 139, at 80.

338. The thirteen countries were Algeria, Burma, Cameroon, Dahomey, Ghana, India, Kenya, Lebanon, Madagascar, Nigeria, Syria, United Arab Republic and Yugoslavia.

339. 21 U.N. GAOR Annexes (Agenda Item 87) para. 497, U.N. Doc. A/6230 (1966).

340. Dugard, *SWAPO: The Jus ad Bellum and the Jus in Bello*, 93 SOUTH AFRICAN L.J. 144 (1976).

341. *Id.* (emphasis in original).

342. *Id.* at 144-45.

343. *Id.* at 145.

*Presence of South Africa in Namibia (Southwest Africa) Notwithstanding Security Council Resolution 276* in 1970 which provided that "[i]n law, the legitimacy of the Namibia peoples' struggle cannot be in any doubt, for it follows from the right of self-defense, inherent in human nature, which is confirmed by Article 51 of the United Nations Charter."<sup>344</sup>

Third World states seem to be united on the issue of the legitimacy of the use of force by national liberation movements. There is less agreement, however, on the issue of whether self-determination extends to people beyond those under colonial domination, and in particular, of whether it extends to neocolonial struggles, like those waged by the Iranian people against the Shah. It appears that some Third World elites are opposed to its extension, presumably because it would undermine their delicate position and national sovereignty.<sup>345</sup>

At the same time, Third World states have also considered the use of force in contexts other than anticolonialism and antiracism. Falk has noted that "[t]he artificiality of inherited boundaries is an almost endless occasion for interstate violence in Asia and Africa."<sup>346</sup> Ghana, Indonesia and the United Arab Republic [Egypt], for instance, have been accused, at various times, of resorting to force to achieve national expansion.<sup>347</sup> On the other hand, there have also been instances of coercive actions for purportedly more humanitarian purposes, including India's invasion of Goa in 1961,<sup>348</sup> the Bangladesh crisis in 1971<sup>349</sup> and the intervention by Tanzania in Uganda in 1979.<sup>350</sup>

The point arising out of the preceding analysis is that, not unlike other states, certain priorities in the foreign policies of Third World governments are accorded precedence over the total renunciation of nondefensive force. Clearly, the objectives of the eradication of colonialism and the elimination of racial discrimination prevail in a

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344. Dugard, *International Terrorism and the Just War*, 12 STAN. J. INT'L STUD. 21, 24 (1977).

345. See Schwenninger, *supra* note 176, at 429.

346. Falk, *The New States and International Legal Order*, 118 RECUEIL DES COURS 1, 51 (1966).

347. *Id.* at 52.

348. See Wright, *The Goa Incident*, 56 AM. J. INT'L L. 617 (1962).

349. See Sornarajah, *Internal Colonialism and Humanitarian Intervention*, 11 GA. J. INT'L & COMP. L. 45 (1981).

350. See Burrows, *Tanzania's Intervention in Uganda: Some Legal Aspects*, 35 WORLD TODAY 306 (1979); Chatterjee, *Some Legal Problems of Support Role in International Law: Tanzania and Uganda*, 30 INT'L & COMP. L.Q. 755 (1981).

conflict with the allegiance of Third World states to the prohibition against the use of force in international relations or the principle of nonintervention.

### *E. Religious Influences*

Political ideologies and state interests are not the only factors which impinge on perceptions of whether war is ever justifiable. Another important source of influence shaping views on the subject is religious doctrine, as expressed by two of the world's major religions — Islam and Christianity. In fact, following the resurgence of religious involvement in the political arena, Islamic and Christian doctrines may have acquired greater significance in this respect than at any time since the end of the Second World War. Both militant Moslems and dedicated Christians are increasingly vocal in endeavouring to come to terms with the phenomenon of war and its ramifications.

However, it is apparent that, as in the case of the various ideologies and state interests, religions, too, contain no unequivocal answer to the dilemmas of war. Islam, in particular, is marked by a dichotomy between ideal and reality. The idea of peace is considered to be very central to Islam,<sup>351</sup> but Islamic law enjoins Moslems to maintain a state of permanent belligerence with all nonbelievers, collectively encompassed in the *dar al-harb*, the domain of war.<sup>352</sup>

In other words, theoretically at least, the *dar al-Islam* is always at war with the *dar al-harb*, until, by conquest, the latter is turned into the abode of Islam. The Moslems are, therefore, under a legal obligation to reduce non-Islamic communities to Islamic rule in order to achieve Islam's ultimate objective, namely the enforcement of God's law (the *Shari'a*) over the entire world.<sup>353</sup> The instrument by which the Islamic state is to carry out that objective is called the *jihad* (popularly known as "holy war")<sup>354</sup> and is always just, if waged

351. See Hassan, *The Idea of Peace in the Hierarchy of Islamic Values*, 4 INT'L INST. FOR PEACE, PEACE & THE SOC. SCI. 28-29 (1980).

352. Under the traditional political law of Islam (the *siyar*) the world is divided into the domain of the Muslims or the faithful, known as *dar al-Islam* and all other territories, the domain of the infidels, known as *dar al-harb*, which literally means the domain of war. See M. KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 53, 170-71 (1955).

353. See Khadduri, *Islam and the Modern Law of Nations*, 50 AM. J. INT'L L. 358 (1956).

354. It has been maintained that the application of the term *jihad* in the sense of "holy" or "religious war" is far from being exact. The *jihad* obligation, i.e., fighting in the path of God may be exercised by means other than the sword, although the "holy war" aspect is one of its most important elements. See Nawaz, *The Doctrine of Jihad in Islamic Legal Theory and Practice*, 8 INDIAN Y.B. INT'L AFF. 32 (1959).

against the infidels and the enemies of the faith.

Bozeman has, therefore, legitimately concluded that from a doctrinal point of view:

[W]ar is an integral part of the Islamic legal system; for in accordance with the doctrines of the *jihad*, which is recognized as "the peak of religion," the Islamic commonwealth must be expanding relentlessly, like a caravan continuously on the move, until it becomes coterminous with humanity, at which time war will have been transposed into universal peace.<sup>355</sup>

The peace-war contradiction embedded in Islam has been explained, at the theoretical level, in terms of the inevitable interrelationship existing between the two phenomena.<sup>356</sup> Specifically, it has been argued that the Koran, the Muslim scripture, does not understand peace to be a passive state of affairs, a mere absence of war. Thus, for instance, the kind of peace that emerges as a by-product of cold war is "not only unholy but unreal because it does not guarantee the existence of those conditions required by the actualization of human potentialities and the fulfillment of the total human being."<sup>357</sup> To be more explicit, the Islamic obligation of *jihad* is aimed at the elimination of inequities, inequalities and injustices which pervade the personal and collective lives of people in order for a real peace to prevail in accordance with the prophet Mohammed's saying that "swords are the key to paradise."<sup>358</sup>

Moslem apologists also quote the Koran in an attempt to dispel "distortions about Islam," pointing out that although realistic in its approach (accepting war as a fact of life as long as there exists in the world injustice, oppression, capricious ambitions and arbitrary claims), Islam never tolerates aggression from its own side or any other side, and it does not entertain aggressive wars or the initiation of aggressive wars. This is because Moslems are commanded by God not to begin hostilities, embark on any act of aggression, or violate any right of others.<sup>359</sup> Indeed, in the context of reality, as shaped by

355. Bozeman, *War and the Clash of Ideas*, 20 *ORBIS* 61, 81-82 (1946).

356. See Hassan, *supra* note 351, at 29. A similar argument is often put forward by Arab countries with regard to peace with Israel. It is contended that peace can be established only after the wrong is rectified and justice is done (in this case justice will be done when the rights of the Palestinian people are restored and Israel ceases to exist). That justice is a supreme value is repeatedly emphasized by Arab governments in various forms and in official resolutions. See Y. HARKABI, *ARAB ATTITUDES TO ISRAEL* 106-07 (1972).

357. Hassan, *supra* note 351, at 29.

358. *Id.*

359. See H. ABDALATI, *ISLAM IN FOCUS* 142 (1977). For a detailed discussion concerning

Moslem governments, *jihad* has often been suppressed into a state of dormant war,<sup>360</sup> many practical modifications have been introduced into the law regulating it.<sup>361</sup>

Nonetheless, it is interesting to note that although contemporary Moslem national ideologists tend to rationalize their military postures in secular terms, they often reflect more fundamental religious convictions. This is particularly evident in pronouncements directed at internal audiences, as compared to those aimed at the international community. Thus, the struggle against Israel is often described to the people as a *jihad*, with frequent allusions to the virtues of holy war and religious promises to its fighters.<sup>362</sup>

Whatever compromises have been made, however, it is generally believed in the Moslem world that war is permissible, and indeed a sacred duty, when it is fought for just causes.<sup>363</sup> These just causes have been classified into the following categories: (1) suspended, the renewal of a prior just war; that is, a *jihad* which has, for some reason, been suspended; (2) defensive, aimed at repelling enemy attacks; (3) sympathetic, providing assistance to other Moslems in matters of religion; (4) punitive, against hypocrisy, apostasy, rebellion or the breaking of a covenant by the other party; (5) idealistic, that is, the expansion of Islam and making the Word of God supreme over the world.<sup>364</sup>

In the context of the Middle East conflict, where Arab nationalism and Islamic aspirations intertwine, another cause features prominently, presumably under the fourth category, namely, the recovery of occupied lands. The justifiability of such a cause was put forward, for example, by former Egyptian President Gamal Abdel Nasser in 1968 when he asserted that "there is a fundamental obligation, a matter of life and death; the liberation of land, step by step, if need be, even if every step costs a victim. This must be clear: war — to achieve justice — is legal."<sup>365</sup> A similar statement was made by Nasser's succes-

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"misconceptions about aggressive jihad," see M. AL-GHUNAYMI, *THE MUSLIM CONCEPTION OF INTERNATIONAL LAW AND THE WESTERN APPROACH* 165-80 (1968).

360. According to Khadduri, this is analogous to a state of nonrecognition in international law. See Khadduri, *supra* note 353, at 360.

361. *Id.* at 370-72.

362. See ISLAM, FROM THE PROPHET MUHAMMAD TO THE CAPTURE OF CONSTANTINOPLE 211 (B. Lewis trans. 1976).

363. See M. KHAN, *ISLAM, ITS MEANING FOR MODERN MAN* 178 (1962).

364. See A. RIFAAT, *INTERNATIONAL AGGRESSION* 10-11 (1979).

365. INFORMATION DIVISION, MINISTRY FOR FOREIGN AFFAIRS, *BACKWARD TO WAR, FORWARD TO PEACE* 10 (1969).

sor, Anware el-Sadat, who declared in an interview broadcast in 1973 that “[w]hat has been taken by force can be regained only by force . . . . There is no solution for the problem without a battle.”<sup>366</sup> According to Sadat, article 51 encompasses this sacred duty to liberate occupied territories and restore just rights.<sup>367</sup> Such an argument has been frequently made by other Arab states as well. Thus, in the debates of the General Assembly First Committee on a proposed Treaty on the Non-Use of Force in International Relations in 1976, Iraq, Kuwait, the Libyan Arab Republic and Qatar insisted that the right to self-defense included the right to employ force for the recovery of territories occupied by force.<sup>368</sup>

Supporters of such a position rely on a rather broad reading of the U.N. Charter provision on self-defense “which considers a continued forcible occupation following an armed intervention a prolonged ‘armed attack’ under Article 51 of the Charter.”<sup>369</sup> Others maintain that Israel’s retention of the territories constitutes a continued aggression<sup>370</sup> or a permanent aggression.<sup>371</sup>

It should be added that, while this type of argument may stem generally from an ideological rejection of what is conceived of as colonialism and imperialism, the Islamic factor appears to underlie the basic hostility towards the Jewish state.<sup>372</sup> This serves to demonstrate that attitudes towards war are not only conditioned by forces which have their origin in interstate relations but also reflect residual religious influences. Such influences also manifest themselves in other parts of the world in which Christianity is the dominant religion. Christian leaders have shown a growing tendency to reassert their authority in matters pertaining to the conduct of foreign affairs and have aimed increasingly at guiding public opinion and making a tangible impact on policy choices.<sup>373</sup>

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366. See 10 UN MONTHLY CHRON. 41 (Nov. 1973).

367. U.N. GAOR (2388th plen. mtg.) at 16, U.N. Doc. A/PV.2388 (1975).

368. See 30 U.N.Y.B. 105, 107 (1976); see also 27 U.N. GAOR (2082d plen. mtg.) para. 7, U.N. Doc. A/PV.2082 (1972).

369. Shihata, *Destination Embargo of Arab Oil: Its Legality Under International Law*, 68 AM. J. INT’L L. 591, 607-08 & n.86 (1974).

370. See H. HASSOUNA, *THE LEAGUE OF ARAB STATES AND REGIONAL DISPUTES* 281 (1975).

371. Thierry, *L’accord Israélo-gyptien du 4 Septembre 1975 et les Nouvelles Responsabilités des Etats-Unis et des Nations Unies au Moyen-Orient*, 1975 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 45, 50 n.10.

372. Islamic motifs are frequently used to express Arab attachment to Palestine. See Y. HARKABI, *supra* note 356, at 134-37.

373. In the words of the United States bishops, “We believe religious leaders have a task in



Christians, however, do not speak in one voice. Three recurring Christian attitudes toward war and peace have been identified, namely pacifism, the just war and the crusade.<sup>374</sup> While the latter ethical orientation is not explicitly considered within contemporary Christian teaching, it expresses itself more indirectly. Thus, according to Potter, "[t]he currently fashionable flirtation of Protestants with theories that portray violent revolution as a justifiable recourse for the urban ghetto dweller or the oppressed of the underdeveloped nations reflects the recrudescence of crusading sentiment in a new guise."<sup>375</sup> It is also arguable that:

[M]any of the statements made by those who support the cause of revolution as it feeds and stokes "war of liberation" bear the marks of a crusade mentality: absolute certainty in the justice of the cause; the division of contending forces into good and evil; the rejection of a neutral position; the willingness to take great risks and to "make the final sacrifice;" an unwillingness to make compromises. In brief, the transformation of political action into a religious cause and holy war.<sup>376</sup>

At the same time, the pacifist perspective in the Christian tradition has been given added legitimacy as a method for evaluating modern warfare. Especially vociferous in denouncing war have been the ecumenical Churches and their protestant leaders.<sup>377</sup> Advocates of

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concert with public officials, analysts, private organizations and the media to set the limits beyond which our military policy should not move in word or action." THE CHICAGO CATHOLIC, Nov., 1982, at 7A (Special supplement discussing the second draft of a proposed pastoral letter on War, Armaments and Peace issued by the National Conference of Catholic Bishops) [hereinafter Pastoral Letter].

374. Bainton outlines the development of the three theories as follows: "The early Church was pacifist to the time of Constantine. Then, partly as a result of the close association of Church and state under this emperor and partly by reason of the threat of barbarian invasions, Christians in the fourth and fifth centuries took over from the classical world the doctrine of the just war, whose object should be to vindicate justice and restore peace . . . . The crusade arose in the high Middle Ages, a holy war fought under the auspices of the Church or of some inspired religious leader, not on behalf of justice conceived in terms of life and property, but on behalf of an ideal, the Christian faith." R. BAINTON, *supra* note 2, at 14.

375. R. POTTER, WAR AND MORAL DISCOURSE 52 (1969).

376. Finn, *Pacifism and Justifiable War*, in WAR OR PEACE? THE SEARCH FOR NEW ANSWERS 3, 12 (T. Shannon ed. 1980).

377. Although their views are not necessarily shared by a great number of their constituencies, who feel closer to opinions such as those of the Vatican. Thus, for example, the Evangelical Church in Germany holds to the position supported by international law that defense, even including reaction against an aggressive use of force already carried out, is a sufficient moral justification for war. For other similar statements of Protestant bodies and for a discussion on general religious attitudes, see Teunissen, *The Debate in the Churches on War, Peace and Disarmament*, 36 STUDIA DIPLOMATICA 435, 460-68 (1983). Among Protestant individu-

the Pacifist option draw on texts such as the encyclical of Pope John XXIII, *Pacem in Terris* (1963), the Vatican II's *Gaudium et Spes* (1965) and a series of statements by Pope Paul VI during his pontificate (1963-1978).<sup>378</sup> In particular, modern Christian pacifists have found support in a widely discussed verse in *Pacem in Terris* in which Pope John XXIII asserted: "Therefore in this age of ours, which prides itself on its atomic power, it is irrational to think that war is a proper way to obtain justice for violated rights."<sup>379</sup> Christian pacifists also rely on the Second Vatican Council's statement on war: "It is our clear duty, then, to work for the time when all war can be completely outlawed by international consent"<sup>380</sup> as well as on the Council's endorsement of a position of conscientious objection to all war as a valid Christian stance.<sup>381</sup> Finally, reference is also made to Pope Paul's address before the United Nations General Assembly on October 4, 1965, in which he declared:

There is no need for long speeches to proclaim the supreme finality of this Institution [war]. Suffice it to recall that the blood of millions of men, that countless and unheard-of sufferings, that useless massacres and fearful ruins have sealed the pact uniting you with a vow which must change the future history of the world: never again war, war never again.<sup>382</sup>

The above pronouncements have, however, been subject to diverse readings and interpretations,<sup>383</sup> leading commentators to the conclusion that, while there is a clear pacifist strain in Catholicism and whereas a certain change in that direction in the Catholic evaluation of modern war is evident, "compared to the long-developed and predominant just war position, the tradition of Catholic pacifism,

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als, most notable is Paul Ramsey whose views are more consistent with catholic thought than with pacifism of the liberal protestant variety. See generally P. RAMSEY, *THE JUST WAR: FORCE AND RESPONSIBILITY* (1968); P. RAMSEY, *WAR AND THE CHRISTIAN CONSCIENCE: HOW SHALL MODERN WAR BE CONDUCTED JUSTLY?* (1961).

378. Reprinted in J. GREMILLION, *THE GOSPEL OF PEACE AND JUSTICE: CATHOLIC SOCIAL TEACHING SINCE POPE JOHN* (1976).

379. A. FLANNERY, *VATICAN II: THE CONCILIAL AND POST-CONCILIAL DOCUMENTS* (1975).

380. See *THE DOCUMENTS OF VATICAN II* 295 (W. Abbott ed. 1966).

381. See *Declaration on Conscientious Objection and Selective Conscientious Objection*, reprinted in *IN THE NAME OF PEACE: COLLECTIVE STATEMENTS OF THE U.S. CATHOLIC BISHOPS ON WAR AND PEACE 1919-1980* 53-57 (1983) [hereinafter *IN THE NAME OF PEACE*].

382. OFFICE OF PUBLIC INFORMATION, UNITED NATIONS, *NEVER WAR AGAIN* 37 (1965).

383. See Johnson, *Toward Reconstructing the Jus ad Bellum*, 57 *MONIST* 461, 481-85 (1973).

however strong theologically, is historically thin and insubstantial."<sup>384</sup> The total content of recent Catholic teaching does not support a judgment that the Church has moved from a just war ethic to a pacifist position.<sup>385</sup>

By the same token, "today in the Catholic community, when an issue of peace or war is addressed, the non-violent tradition must be part of the discussion."<sup>386</sup> In other words, it should be recognized that there are two moral responses offered to the Catholic conscience confronted by the moral dilemma of war: the just war ethic and Christian pacifism.

At the same time, it is apparent that the view that war is justifiable under certain conditions has been and remains the dominant tradition in the Church. The development of contemporary Catholic doctrine has not, in spite of strong statements against war, been in the direction of total rejection of war in this era, but rather along lines taken in the just war tradition.

Indeed, a recurring theme in the various Catholic teachings is the right of states to legitimate defense or the recognition of "the necessity for recourse to armed defense and to collective security action in the absence of a competent authority on the international level and once peaceful means have been exhausted."<sup>387</sup> By contrast, "wars of aggression" or "wars fought without limitation" are "condemned without qualification," thus bringing to bear on policy choices the just war ethical calculus used to determine when recourse to arms is "legitimate."

Such a calculus has been employed by the Roman Catholic Church with respect to specific armed interventions. For example, in his Christmas message after the events in Hungary in 1956, Pope Pius XII declared:

There is no further room for doubt about the purposes and the

384. Finn, *supra* note 376, at 8.

385. Hehir, *The Just-War Ethic and Catholic Theology: Dynamics of Change and Continuity*, in *IN THE NAME OF PEACE*, *supra* note 381, at 15, 22.

386. Pastoral Letter, *supra* note 373, at 5A.

387. *Human Life in Our Day*, reprinted in *IN THE NAME OF PEACE* *supra* note 381, at 33, 35. The Church has traditionally recognized that under stringent conditions, engaging in war can be a form of legitimate defense. *Id.* The bishops reiterated this view in *The Gospel of Peace and the Danger of War*, reprinted in *IN THE NAME OF PEACE*, *supra* note 381, at 71, (quoting *PACEM IN TERRIS* and *GAUDIUM ET SPES*) to "affirm, as Catholic teaching traditionally has acknowledged, that some use of force in defense of the common good are legitimate." *Id.* For a similar statement see *Salt II: A Statement of Support*, reprinted in *IN THE NAME OF PEACE*, *supra* note 381, at 76.

methods that lie behind tanks when they crash resoundingly across frontiers . . . . When all the possible states of negotiation and mediation are bypassed, and when the threat is made to use atomic arms to obtain concrete demands, whether these are justified or not, it becomes clear that, in present circumstances, there may come into existence in a nation a situation in which all hope of averting war becomes vain. In this situation a war of efficacious self-defense against unjust attacks, which is undertaken with hope of success, cannot be considered illicit.<sup>388</sup>

Similarly, in applying the principles underlying the just war doctrine, United States bishops in a statement on "Peace and Vietnam" (1966) were able to conclude that "it is reasonable to argue that our presence in Vietnam is justified"<sup>389</sup> and that citizens who took part in this justified war against aggression were in fact "making a genuine contribution to the establishment of peace."<sup>390</sup>

The just war attitude adopted by the Church is further supported by moral theologians and students of ethics who contend that the just war theory provides a framework within which the two polar claims of not harming and the obligation of protecting the innocent may be acknowledged through compromise.<sup>391</sup> As elaborated by Potter, the doctrine is grounded in a strong presumption against the use of violence. This presumption is established for the Christian by the non-resistant example of Jesus and for the rational non-Christian by prudent concern for order and mutual security, which may be overcome only by the necessity of vindicating justice and protecting the innocent against unjust aggressors. Hence, force must always be restrained, because its only legitimate function is to restrain.<sup>392</sup> Murray also emphasizes that while striving to abolish war, limit its evils, and humanize its conduct, the contemporary restatement of the theory of just war reaffirms the values that both justify war and demand its limitation.<sup>393</sup> Furthermore, far from being a contradiction of the basic Christian desire for peace, it is the strongest affirmation of this will for "there is no peace without justice, law and order" and "law and order have need at times of the powerful arm of force." Indeed, "the concept of peace itself requires that peace be defended against

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388. J. MURRAY, *MORALITY AND MODERN WAR* 11 (1959).

389. *IN THE NAME OF PEACE*, *supra* note 381, at 25, 27-28.

390. *Id.* at 27.

391. *See* R. POTTER, *supra* note 375, at 61.

392. *Id.*

393. *See* Murray, *Remarks on the Moral Problem of War*, 20 *THEOLOGICAL STUDIES* 40, 56-57 (1959).

violation."<sup>394</sup>

### F. *The Nuclear Factor*

This assumption has been challenged on the grounds that the development of nuclear weapons has confounded the relationship between aims, methods and consequences. Arguments have been made that "[n]uclear war condemns itself by the fact that it would not be fought for any rational, positive war aim. The attacker, and thereupon presumably the attacked, would aim exclusively at each other's physical destruction."<sup>395</sup> The nature of the new weaponry also makes any correspondence between goals and means obsolete,<sup>396</sup> and, its inherently indiscriminate effects exclude respect for the traditional distinction between combatants and noncombatants.<sup>397</sup> It is imperative, therefore, to pose the question whether the availability of nuclear weapons has tangibly affected perceptions about the justifiability of war in the contemporary era.

The nuclear debate seems to have produced a variety of responses: to the pacifists in general, the development of nuclear technology, which provides policy-makers with the means of widespread destruction, is taken as further confirmation and reinforcement of their belief in the utter irrationality and immorality of the whole idea of war.<sup>398</sup> The onset of nuclear weapons has, however, created a particular type of pacifism, namely nuclear pacifism. This position, according to Hehir, is "grounded in just war premises (some uses of war are legitimate) but terminates in a pacifist conclusion (nuclear weapons cannot be used)."<sup>399</sup> In fact, it is by applying the just war criteria of discrimination and proportionality that contemporary nuclear strategies are condemned. It is evident that, once adopted, nuclear warfare cannot be controlled, any distinction between civilians and soldiers cannot be made, and a sense of proportion cannot be *maintained*.

The Catholic bishops of the United States appear to have adopted this position in their draft Pastoral Letter of War, Arma-

394. J. MURRAY, *supra* note 388, at 9.

395. See Fried, *First Use of Nuclear Weapons: Existing Prohibitions in International Law*, 12 BULL. PEACE PROPOSALS 21-22 (1981).

396. J. BENNETT, FOREIGN POLICY IN CHRISTIAN PERSPECTIVE 104-05 (1966).

397. See Mahoney, *The Difficulties of Defining a 'Just War' in the Nuclear Age*, The Times (London), Feb. 21, 1969, at 14, col.2.

398. See J. LIDER, *supra* note 216, at 142 n.18.

399. *Id.* at 103.

ments and Peace. They, thus, condemned "counter-population warfare" because of the "disproportionate damage which would be done to human life," and renounced the initiation of nuclear war since the "danger of escalation is so great that it is an unacceptable moral risk."<sup>400</sup>

At the same time, there are scholars who reassert a just war doctrine without, however, arriving at a pacifist position with respect to nuclear weapons.<sup>401</sup> They contend that even if a war is very destructive, it may be just if its aims are of sufficient importance and value. They also state that, while all possible means should be taken to avoid the evils of war, if some vital purpose cannot be attained without using nuclear weapons, it would not be immoral to do so. Furthermore, it is argued that the total amount of devastation and suffering may actually be reduced if what would otherwise be a prolonged war is brought to a quick termination by an act of great violence.<sup>402</sup>

Yet, other analysts have attempted to modify the traditional just war doctrine to take account of the strategies of nuclear war. Their reasoning does not lead them to advocate an absolute ban on nuclear weaponry though it does impose some rather strict moral ceilings on their use. Ramsey, for instance, maintains that nuclear war can be, in some circumstances, a moral possibility. He has identified a policy option of "counterforce nuclear targeting," in contrast to large-scale "countercity war," as allowing the use of nuclear weapons under such circumstances but only as the "upper limit."<sup>403</sup> In fact, even such targets are only conditionally permissible, since a proportionality rule would have to be applied in each case.

The concept of limited war also characterizes attitudes of political realists in the nuclear age. Their basic assumptions, formulated in the post World War II period, have remained unchanged: war is a political act and, as such, not subject to moral assessment; it is subordinated to interpretations of state interests and political purposes and may be waged in order to maintain the security of the nation and protect its way of life.<sup>404</sup> Consequently, "[f]lexible use of

400. *Id.* at 6A-7A.

401. *Id.* at 141-42.

402. Nye, *Reagan, the Bishops and the Bombs*, *The Boston Globe*, Jan. 31, 1983, at 2.

403. Ramsey, *The Case for Making "Just War" Possible*, in *NUCLEAR WEAPONS AND THE CONFLICT OF CONSCIENCE* 143 (J. Bennett, ed. 1962). "Counterforce nuclear targeting" refers to nuclear attacks on the military targets of the adversary including some economic and industrial targets which are deemed "war supporting." *Id.*

404. See M. HOWARD, *STUDIES IN WAR AND PEACE* 203 (1970).

nuclear power, if it would serve a rational policy, would be moral."<sup>405</sup>

By the same token, in terms of the effectiveness of nuclear weapons (since "to succeed in achieving some political goal presupposes that the conduct of battle can be kept under rational control"),<sup>406</sup> a certain measure of limitation is called for. The same conclusion is also reached when the question of public support is considered. Given the strong popular feelings against nuclear weapons, political leaders concerned about retaining political power would tend to refrain from resorting to such weapons. Thus, while accepting the justifiability of wars following a rational analysis, utilitarian consideration pertaining to nuclear strategies have led realists to accept the need for restraint and to support "limited wars."<sup>407</sup>

In contrast, however, to the strong American support of the concept of limited wars,<sup>408</sup> Soviet military writers have condemned all limited wars primarily because they run the risk of escalating into nuclear world wars. Moreover, they recognize that it would be "extremely difficult to explain to one's soldiers . . . that a war can be both just and limited at the same time. People do not willingly sacrifice their lives or the lives of their fellows for a cause which is of limited significance."<sup>409</sup>

Nonetheless, pragmatic considerations have inspired agreements such as the US-USSR Agreement on Prevention of Nuclear War, signed in Washington on June 22, 1973. In order to avoid the danger of a nuclear war and "[c]onscious that nuclear war would have devastating consequences for mankind"<sup>410</sup> the parties agreed "to proceed from the premise that each Party will refrain from the threat or use of force against the other Party, against the allies of the other Party and

405. Schratz, *Clausewitz, Cuba and Command*, 8 U.S. NAVAL INST. PROC. 25, 30 (1964).

406. J. LIDER, *supra* note 216, at 142.

407. See I. CLARK, *LIMITED NUCLEAR WAR: POLITICAL THEORY AND WAR CONVENTIONS* 1 (1982).

408. Proponents of limited wars include scholars such as Henry A. Kissinger [*NUCLEAR WEAPONS AND FOREIGN POLICY* (1957)], Robert Endicott Osgood [*LIMITED WARS: THE CHALLENGE TO AMERICAN STRATEGY* (1957); *LIMITED WAR REVISITED* (1979)] and Bernard Broodie [*STRATEGY IN THE MISSILE AGE* (1959); *WAR AND POLITICS* (1972)], who draw on the realist orientation in international relations formulated by theorists such as Hans A. Morgenthau [*POLITICS AMONG NATIONS* (1948)] and Kenneth W. Thompson [*POLITICAL REALISM AND THE CRISIS OF WORLD POLITICS* (1960)].

409. Jones, *Just Wars and Limited Wars: Restraints on the Use of the Soviet Armed Forces*, 28 *WORLD POL.* 44, 59 (1975).

410. Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Prevention of Nuclear War, June 22, 1973, preamble, 24 U.S.T. 1478, 1479, T.I.A.S. No. 7654.

against other countries, in circumstances which may endanger international peace and security.”<sup>411</sup> The latter qualification may, however, suggest that the parties are not expected to refrain from the threat or use of force in circumstances which would not endanger international peace and security. This and other similar formulations are relied upon by Roling in support of the view that in the nuclear era there is a “tendency to lose sight of the distinction between *jus ad bellum* and *jus in bello*.”<sup>412</sup> Indeed, it appears that one of the effects of the nuclear dilemma has been the shifting of emphasis from the question of whether war is ever justifiable to how it can be fought in a justifiable way. As pointed out by Ramsey, it is not the justice or injustice of particular regimes in conflict that determines for the “ordinary men” their responsibility in war since they cannot know about these things “clearly and certainly.” They *can*, however, know “more clearly and certainly the moral limits pertaining to the armed action a man or a nation is about to engage in.”<sup>413</sup>

#### IV. CONCLUDING NOTE

The preceding survey of the various national, ideological and religious perspectives on the justifiability of war gives rise to a number of general propositions. First, it is evident that notwithstanding the Charter’s proscription of the use of force in international relations and other United Nations initiatives to outlaw war, states still consider recourse to force justifiable under certain circumstances. Indeed, regardless of their ideological inclinations and respective national policies, the world’s powers share this attitude. These powers differ only with respect to the interests to be protected and the goals to be achieved through the use of force.

Second, it is apparent that in the hierarchy of world values the avoidance of armed conflict is of great importance without, however, assuming an absolute nature. Protection of human rights, for example, could be said to be as important a value, prompting scholars such as O’Brien to conclude that non-use of force or nonintervention is:

not an unchallengeable first rule of enlightened international behavior, and that unilateral intervention on behalf of justice and

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411. *Id.* at art. 2.

412. See Roling, *Aspects of the Ban on Force*, 24 NETHERLANDS INT’L L. REV. 242, 245 (1977).

413. P. RAMSEY, *WAR AND THE CHRISTIAN CONSCIENCE: HOW SHALL MODERN WAR BE CONDUCTED JUSTLY?* 32 (1961).



human rights is at least a conceivable moral option in a world where massive violations of human rights exist and where expectations for community action to prevent, repress, or punish them is negligible.<sup>414</sup>

Even those who advocate minimum world public order as the primary goal of the present international legal system would concede that such a goal encompasses more than the sole elimination of forceful interaction between states and demands a certain amount of justice and respect for human rights. Explicit references in the Preamble to the U.N. Charter and the Declaration of Principles of International Law Concerning Friendly Relations, as well as in article 1(3) of the Charter to the importance of maintaining international peace founded upon freedom, equality, justice and respect for fundamental human rights have lent support to the observation that states refuse to allot an absolute value to the mere avoidance of armed conflict, as such, and their conviction that certain situations justify and require a departure, at least temporarily, from nonviolent norms in order to achieve a more equitable world structure.

There is, similarly, no evidence that states have given up the objectives for which they went to war in the past. As has been noted:

People have gone to war in order to establish or maintain political independence, to acquire or secure territory, to further or safeguard their ideologies and institutions and to acquire or protect their international position and power. There is not much sign that political institutions will soon fill the role in respect to these objectives that war has played until now.<sup>415</sup>

War has continued because it appears to those who indulge in it to fulfill some functions by way of satisfaction of claims which they believe that they could not achieve without recourse to war. It follows that "unless there is an alternative to war which could perform an identical function viz. satisfaction of just claims, it is difficult to see how war could be abandoned."<sup>416</sup>

It appears that the pacifist alternative, or Ghandi's maxim that "if one takes care of the means the end will take care of itself" have not been acceptable to the community of states. While a certain "revival of interest in pacifism, and in exploration of the techniques of nonviolent resistance" may be observed in the contemporary genera-

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414. W. O'BRIEN, *U.S. MILITARY INTERVENTION: LAW AND MORALITY* 36 (1979).

415. J. HARE & C. JOYNT, *ETHICS AND INTERNATIONAL AFFAIRS* 56 (1982).

416. A. APPADORAI, *THE USE OF FORCE IN INTERNATIONAL RELATIONS* 34 (1958).

tion, a realistic conception of "power politics" seems to prevail.<sup>417</sup> Among theologians such realism is reflected in the words of Niebuhr:

The pacifists merely assert that if men loved one another all the complex and sometimes horrible, realities of the political order could be dispensed with. They do not see that their "if" begs the most basic problem of human history. It is because men are sinners that justice can be achieved only by a certain degree of coercion on the one hand, and by resistance to coercion and tyranny on the other hand.<sup>418</sup>

At the same time, the alternative envisaged by the founders of the United Nations, namely, the system of collective security and centralization of force, has never been implemented, the three assumptions underlying it failing to materialize. Thus, the Charter's system which apparently contemplated a Security Council, the organ upon which is conferred the primary responsibility for the maintenance of international peace and security, which would (a) have at its disposal nonmilitary and military machineries of compulsion to be used against recalcitrant states; (b) be endowed with a sufficiently united sense of purpose in the discharge of its primary responsibility and would be prepared to use these machineries when faced with threatened or actual breaches of international peace and security; (c) be objectively capable of determining when an unlawful breach of the peace has occurred.

Clearly the United Nations has failed to operate in the envisioned manner. The deep political cleavage existing among the permanent members of the Security Council, nourished by the veto system, has prevented the creation of an international military force placed at the disposal of the Security Council and has frustrated the projected functioning of the Council.<sup>419</sup> The divisions between the major powers, deriving from the clash of interests in terms of global strategies, have also prevented joint decisions relating to the identification<sup>420</sup> and pun-

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417. The contemporaneous resolve to abstain from war is often, however, "a practical rather than a moral creed, resting on the belief that war does not produce its intended results, rather than on the belief that it is inherently morally wrong." Bull, *Recapturing the Just War for Political Theory*, 31 *WORLD POL.* 588, 589 (1979).

418. Goodman, *What is a "Just War" Today?*, *NEWSWEEK*, June 14, 1982, at 53.

419. Internationally controlled and internationally composed military forces have been created but on an *ad hoc* basis and subject to agreements of the states concerned rather than to the compulsory power of the Security Council.

420. Thus, for example, none of the resolutions adopted by the Security Council with regard to the Korean crisis of 1950 included a determination as to who was the aggressor (only in the General Assembly Resolution 498(V) was the Central People's Government of the PRC

ishment<sup>421</sup> of aggressors with a view to organizing the universal action needed to restore the peace. The approach adopted by the Security Council in this respect has been a pragmatic one. It has focused on the prevention of the spread of violence or on bringing it to an end, rather than condemning states.<sup>422</sup>

By the same token, the Charter itself, although furnishing the theoretical framework for a system of collective security, is saddled with interpretation problems for which the solution is still elusive. Thus, questions concerning the notions of force, aggression and other related terms affect the implementation of effective collective action.

Furthermore, as observed by Claude, the Charter does not provide or promise a system for United Nations action or United Nations sponsored action to repress the "most dangerous sort of aggression," namely that launched or supported by any of the major powers. It is Claude's contention that

[t]he famous veto clause of Article 27 expresses the founding fathers' rejection of the attempt to require member states to join forces under the UN banner for resistance to great-power aggression; "the individual or collective self-defense" clause of Article 51, a permissive clause, expresses the judgment of the founding fathers as to what can and must be done under such circumstances.<sup>423</sup>

In fact, according to Claude, states have manifested a general reluctance to confer extensive legal competence and actual coercive capability upon the United Nations. As he explains:

[E]very state has to contemplate the possibility that it might, under some circumstances, *feel impelled* to take military action that would seem to it absolutely necessary for the protection of vital national interests but might not be regarded as legitimate by the political organs of the UN. States *do* contemplate this possibility;

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condemned as an aggressor). Again, in the Suez crisis the Security Council failed to adopt a resolution identifying the aggressor. Similarly, there has not been any mention in the various resolutions of the Security Council concerning the Middle East conflict since June 5, 1967 of the aggressor party, nor was article 39 resorted to in any of the resolutions. No pronouncement has been made by the Security Council as to the aggressors in the Afghanistan invasion in 1979 or in the 1980 Iraq-Iran war.

421. War criminals have been put on trial only once — after the Second World War — and this was affected through unique laws, unique procedures and unique agencies without the subsequent acts that could facilitate their institutionalization and render them permanent.

422. The Security Council approach is taken presumably because of a desire to avoid aggravating the situation by allocating blame for the aggression or by punishing those who originally threatened or committed the aggression.

423. Claude, *United Nations Use of Military Force*, in *THE UNITED NATIONS POLITICAL SYSTEM* 201, 202-03 (D. Kay ed. 1967).

consequently, they do not genuinely commit themselves without reservation to the proposition that they will never resort to force in the face of international disapproval expressed through the UN; consequently, they are not ultimately dedicated to the purpose of enabling the UN — that is, its member states — to control the unilateral resort to military action by any and all states, including themselves.<sup>424</sup>

In the light of the rejection of the pacifist alternative, on the one hand, and the failure to establish effective international enforcement machinery, on the other hand, states, as could realistically have been expected, have claimed the power to use force in circumstances which they consider just. A constructive approach would, therefore, focus on the criteria by means of which the legitimacy of a state's coercive action could be judged.

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424. *Id.* at 204 (emphasis added in part).

