

## GOING TO WAR AND GOING AHEAD WITH THE LAW

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*In most cases those who go to war have persuasive causes, either with or without justifiable causes. There are some indeed who clearly ignore justifiable causes. To these we may apply the dictum uttered by the Roman jurists, that the man is a robber who, when asked the origin of his possession, adduces none other than the fact of possession.*

—Hugo Grotius<sup>1</sup>

*I was hoodwinked.*

—Senator J. William Fulbright<sup>2</sup>

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1. 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES*, bk. II, ch. XXII, § III(i) (W. Kelsey trans., 1925) (1625).

2. John Hart Ely, *The American War in Indochina, Part I: The Troubled Constitutionality of the War They Told Us About*, 42 *STAN. L. REV.* 877, 889 (1990).

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## I. INTRODUCTION

The year 2014 marks the fiftieth anniversary of the Gulf of Tonkin incident that prompted a soaring escalation of military intervention in Vietnam, effectively launching the full-scale Vietnam War. Coincidentally, 2014 also marks the seventy-fifth anniversary of alleged incidents along the German–Polish border upon which Germany premised its massive invasion of Poland at the outbreak of World War II, and the one hundredth anniversary of the assassination in Sarajevo of Austrian Archduke Franz Ferdinand that triggered World War I.

The coincidence of these momentous anniversaries is remarkable. Each incident not only precipitated major armed conflict or vastly expanded the scope of a conflict, but thereafter emblemized the conflict itself. Each incident thereby gained a life of its own, however limited it may have been in itself. Each incident was declared to be a *casus belli*—that is, an act or circumstance that justified substantial military action. And each incident, in the light of history, appears at best to have been a convenient pretext for such action after years of premeditation, planning, and preparation for it. In other words, each incident served as a false or inadequate pretext for military action.

It is an appropriate time, then, to reexamine these three incidents and consider the efficacy of international legal constraints on declarations to justify the immediate use of force. This is not just an indulgence in legal history. The problem of questionable pretexts is very much with us today, as the United States and United Kingdom-led interventions by the “coalition of the willing” in Iraq of 2003 and Russian intervention in Georgia of 2008 attest. Unfortunately, the law defining an acceptable *casus belli* remains rudimentary today, often overshadowed by other considerations. Of these, the most important have been prolonged tensions and festering disputes that culminate almost inevitably in decisions to use force, often prompting artificial declarations of a *casus belli*.

Given the power, if not inexorability, of the historical forces that

constitute the permissive causes of armed conflict or at least help explain it, the ultimate precipitation of the conflict and the justification for it might seem rather trivial. The *casus belli* might seem incidental at best. But when international law has failed to resolve the underlying tensions or disputes, it has a critical last chance to avoid warfare's unnecessary or disproportionate suffering by demanding a legitimate if not commendable justification for the use of force. Unfortunately, the legal requirements for a legitimate *casus belli* have proven to be unsatisfactory. That is why we need to refine the criteria for adjudging the validity and hence acceptability of justifications for the immediate use of force.

What follows is a think piece that builds upon the three historical pretexts for the use of force whose major anniversaries coincide in 2014. The study highlights the inadequacy of the law for evaluating a *casus belli* declaration and argues for more detailed, uniform, and effective guidance in the law.

## II. PRETEXTS AND THEIR CONTEXTS

### A. *The Assassination in Sarajevo (1914)*

By 1914, the prolonged run up to World War I, generally coinciding with the late Victorian and Edwardian eras, was characterized by contentious alliances—the Triple Alliance (variously Germany, the Austro-Hungarian Empire, and Italy) and the Triple Entente (variously Britain, France, and Russia)—and their expanding militias.<sup>3</sup> An arms race may best define the relationship between the two pacts. On June 28 of that year, Archduke Franz Ferdinand, the heir-apparent of the Austro-Hungarian Empire, paid an official visit to Sarajevo, the capital of Bosnia–Herzegovina, which was then within his domain. It was a rash move. Failing to heed warnings, the Archduke arrogantly scheduled his visit on Vidovdan, the very day of mourning that, by memorializing the rival kingdom of Serbia's loss to

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3. Definitive histories of this run up to World War I include, *inter alia*, LUIGI ALBERTINI, *THE ORIGINS OF THE WAR OF 1914* (1952–53); RENÉ ALBRECHT CARRIÉ, *A DIPLOMATIC HISTORY OF EUROPE SINCE THE CONGRESS OF VIENNA* 207–334 (1958); CHRISTOPHER CLARK, *THE SLEEPWALKERS: HOW EUROPE WENT TO WAR IN 1914* (2013); SIDNEY BRADSHAW FAY, *THE ORIGINS OF THE WORLD WAR* (2d ed. 1930); D.F. FLEMING, *THE ORIGINS AND LEGACIES OF WORLD WAR I* (1968); I. GEISS, *JULY 1914: THE OUTBREAK OF THE FIRST WORLD WAR* (1967); MAX HASTINGS, *CATASTROPHE 1914: EUROPE GOES TO WAR* (2013); MARGARET MACMILLAN, *THE WAR THAT ENDED PEACE: THE ROAD TO 2014* (2013); and ROBERT K. MASSIE, *DREADNOUGHT: BRITAIN, GERMANY, AND THE COMING OF THE GREAT WAR* (1991).

the Turks in 1386 at the Battle of Kosovo, annually ignited South Slav resentment of foreign domination in the Balkans.<sup>4</sup> The substantial presence of ethnic Serbs in Sarajevo posed an obvious risk, as did their view that the imperial governance in Bosnia was foreign and unwanted. Security precautions were either inadequate<sup>5</sup> or confusing,<sup>6</sup> enabling nineteen-year-old Gavrilo Princip to fire two shots into the Archduke's motorcade, killing both him and his wife, the Duchess Sophie. Princip, a Bosnian, belonged to a revolutionary movement to liberate the south Slavic people from the Austro-Hungarian Empire. First and foremost, the Black Hand, a secret society in Belgrade, had orchestrated the assassination.<sup>7</sup>

It is important to note not only that the assassin was a Bosnian rather than a Serbian national, but also that the Serbian government, obviously jittery about how its neighbor would react, expressed both its condolences to Austro-Hungarian Emperor Franz Josef and its willingness to help seek out the guilty parties.<sup>8</sup> But the creaky Austro-Hungarian government, on its last legs, had another plan: to exploit the crime in order to settle scores, once and for all, with Serbia. Even after years of mounting tensions in Europe, the assassination could not itself serve as a plausible *casus belli*, but it could be leveraged for that purpose. Having received a blank check of support from Germany—on which it had come to depend diplomatically and militarily—the imperial government issued an ultimatum to Serbia that was virtually impossible for it to accept. Indeed, its ten demands had been designed to be rejected, particularly given the forty-eight hours allotted for a reply.<sup>9</sup> The ultimatum was therefore tantamount to a notice of intended military action as a more or less *fait accompli*. To be sure, circumstantial evidence suggested

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4. See ALBRECHT CARRIÉ, *supra* note 3, at 321. Ironically, Vidovdan in 1914 was to have been celebrated as a day of rejoicing after Serbian victories in the Balkan wars of 1912–13. FLEMING, *supra* note 3, at 144.

5. ALBRECHT CARRIÉ, *supra* note 3, at 321–22; 2 BRADSHAW FAY, *supra* note 3, at 136; FLEMING, *supra* note 3, at 144 (suggesting that the precautions were *deliberately* inadequate).

6. 2 BRADSHAW FAY, *supra* note 3, at 126; MASSIE, *supra* note 3, at 859.

7. 2 BRADSHAW FAY, *supra* note 3, at 114; MASSIE, *supra* note 3, at 859–60.

8. Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference*, 14 AM. J. INT'L L. 95, 99 (1920) [hereinafter *Report*].

9. ALBRECHT CARRIÉ, *supra* note 3, at 325 (stating “[t]his ultimatum had been carefully designed in the hope its demands would prove unacceptable”); *Report*, *supra* note 8, at 99–108.

the possibility of indirect Serbian complicity in the assassination plot and irresponsibility in its aftermath, and there was a general consensus that Austria was entitled to impose moderate demands on Serbia in the wake of the assassination,<sup>10</sup> but the extreme nature of the ultimatum shocked the international conscience.

On the urging of both Russia and Britain, however, Serbia agreed to the gist of the Austrian demands with the important exception of one that Serbia considered to be a fundamental violation of its constitution and laws of criminal procedure: that Austrian officials must be included in a prescribed judicial inquiry concerning the assassination plot.<sup>11</sup> Even so, the German Kaiser and his Chancellor, Theobald von Bethmann-Hollweg, agreed that Serbia had largely met Austria's demands.<sup>12</sup> Serbia went even further in an attempt to ease tensions by suggesting either arbitration or adjudication of any remaining issues.<sup>13</sup> Britain, France, and Russia urged Austria to settle such issues peacefully.<sup>14</sup> But the imperial government in Vienna was determined to declare war on Serbia; its failure to implicate the latter directly in the assassination plot was simply irrelevant. The submissive Serbian reply to the ultimatum was therefore to no avail. Instead, on July 28, 1914, Austria declared war on Serbia and opened fire on Belgrade the next day.<sup>15</sup> Technically, then, it was Serbia's failure to comply 100% with an impossible ultimatum that constituted the *casus belli* to justify the use of force. A more questionable pretext would have been hard to find. World War I was about to begin, albeit hesitatingly the first few days after the Austrian declaration of war.

The vast diplomatic literature that tracks the run up to World War I, especially during the month between the assassination of Archduke Franz Ferdinand and the outbreak of war, reveals that the assassination provided Austria—reluctantly supported by Germany—with a convenient pretext for the use of force that Austria was

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10. 1 BRADSHAW FAY, *supra* note 3, at 27; 2 BRADSHAW FAY, *supra* note 3, at 146, 166 (describing Serbia's failure to take preventive action before the assassination, to conduct an adequate investigation afterward, and to divulge what it knew about the whole matter); GEISS, *supra* note 3, at 55; MASSIE, *supra* note 3, at 860.

11. GEISS, *supra* note 3, at 55; MASSIE, *supra* note 3, at 867.

12. FLEMING, *supra* note 3, at 167.

13. *Id.*

14. 1 VINCENT GREY OF FALLODON, TWENTY-FIVE YEARS 300–01 (1925); *Report*, *supra* note 8, at 100.

15. MASSIE, *supra* note 3, at 869, 870 (noting that the shelling undermined lingering hopes for peace); *see also* FLEMING, *supra* note 3, at 153–57.

determined to exercise against Serbia. It was a weakling's reliance on a show of strength in a desperate effort to overcome its fading status as a European power. To facilitate their interventionist plan, the Austro-Hungarian and German governments engaged in an elaborate strategy of dissemblance to lull their European neighbors into a feeling of false security while the two allies made final preparations for war. This included the issuance of comforting but deliberately misleading press reports and deceptive vacations by the Kaiser as well as German and Austrian officials.<sup>16</sup> Also, the ultimatum was timed to coincide with the incapacitation of the French president and prime minister during their sea voyage home from a state visit to Russia.<sup>17</sup>

To be sure, *all* of the European powers shared responsibility for the outbreak of World War I, if only by inept diplomacy, truculent political gestures, and military maneuvers. “[I]t can indeed be said that the European leaders had lost control of their own destinies long before the shots of June 28, 1914[,] had rung out.”<sup>18</sup> Still, it is hard to escape the conclusion that as European tensions heated up to the boiling point—particularly in the immediate aftermath of the assassination in Sarajevo—Austria's actions bespoke an ineluctable determination to go to war that was lacking among members of the Triple Entente. In the end, Germany's support, however reluctant, best explains Austria's militancy.

Chancellor Otto von Bismarck had predicted long before Sarajevo that “[s]ome damned foolish thing in the Balkans” would ignite the next war.<sup>19</sup> Sure enough, a foolish—and adventitious—act

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16. FLEMING, *supra* note 3, at 153 (adding details at 154–57); MASSIE, *supra* note 3, at 863–64, 868 (noting also that the German Kaiser's leading officials urged him to “cruise amidst the natural grandeur of the Norwegian fjords” because they thought they could better manage the crisis in the absence of the excitable Kaiser).

17. 2 BRADSHAW FAY, *supra* note 3, at 243; FLEMING, *supra* note 3, at 157.

18. Robert A. Friedlander, *Who Put Out the Lamps?: Thoughts on International Law and the Coming of World War I*, 1 N. ILL. U. L. REV. 1, 10 (1980); accord 2 BRADSHAW FAY, *supra* note 3, at 547–58 (dismissing blame placed on Germany, and concluding that “[n]one of the Powers wanted a European War”).

19. BARBARA TUCHMAN, *THE GUNS OF AUGUST 91* (Dell ed., 1963). The disingenuousness of the declared *casus belli*—the Serbian failure to comply 100% with the Austrian ultimatum—is apparent when one considers that the European Powers almost inadvertently drove themselves or stumbled into a tragic war as a culmination of a decades-long game of diplomatic chicken. It was an autopilot of a war. One hundred years later:

You don't have to have a very enlarged sense of history to remember what happened last time Western Civilization sped around the corner from '13 to '14. Not so good. The year 1913 had been full of rumbling energy and matchless artistic accomplishment—Proust kicking off, the Cubists kicking back, Stravinsky kicking

of lèse majesté proved to be just the thing. But where was international law when it was needed to call into question the validity of the declared *casus belli*?

*B. Incidents Along the German–Polish Border (1939)*

By 1939 German expansionism, as an emerging hallmark of Nazi policy, was well underway.<sup>20</sup> Initially fueled by a revanchist agenda after Germany’s territorial losses following World War I, the Nazis achieved their first successes in 1935, when a League of Nations-supervised plebiscite returned the Saarland to Germany, and in 1936, when they militarily occupied the Rhineland. As the prime objective of Nazi expansionism, the recovery of so-called lost territory gave way to sheer imperialism in the name of more living space—*lebensraum*—for ethnic Germans and their culture. In 1938 the annexation—*Anschluss*—of Hitler’s native Austria, which was redesignated “Ostmark” as a province of the German Reich, led quickly to the conquest of the Sudetenland in Czechoslovakia, which Germany’s notorious Munich agreement with Britain and France had sanctioned. Next came the full occupation of Bohemia and Moravia in early 1939, and, a week later, the absorption of Lithuanian Memel into Germany’s geographically separated territory of East Prussia. A mounting pattern of Nazi imperial conquest was evident, following, as it did, Japan’s conquests of Manchuria and Italy’s conquests of Abyssinia and Albania.

What marked the beginning of World War II, however, was Germany’s invasion of Poland on September 1, 1939, leading to French and British declarations of war to fulfill their treaty obligations to Poland and feeding German aspirations for further territorial aggrandizement. The lightning speed of the German conquest in just five days—the so-called *blitzkrieg*—bespoke lengthy planning and careful preparations. This was no *blumenkrieg*—the so-called flower war in which Nazi troops had been pelted with flowers

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out—and then, within a few months, the Archduke was assassinated in Sarajevo and the troop trains were running, and pretty soon, the whole positive and optimistic and progressive culture was on its way to committing suicide. The Great War left more than ten million Europeans dead and a civilization in ruins (and presaged a still worse war to come).

Adam Gopnik, *Comment: Two Ships*, NEW YORKER, Jan. 6, 2014, at 17.

20. The classic exposition in English of German expansionism is WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH passim* (1960).

on their arrival the previous year in Austria.<sup>21</sup> It was blatant aggression. As he had always done, however, Hitler fabricated an imminent threat to Germany as a *casus belli* to justify his aggression. Even after the Munich agreement, with its weak constraints against a military takeover of Czechoslovakia, Hitler seized on a declaration by Nazi sympathizers in Slovakia of their independence from Czechoslovakia—which Hitler perhaps orchestrated—as evidence, contorted as it was, that the government in Prague was unable to exercise control over Czechoslovakian territory and hence threatened its neighbors.<sup>22</sup> Also, the acceptance in advance of Nazi conquests by intended victims became as routine as the victims themselves were intimidated.<sup>23</sup>

In the instance of Poland, Hitler had long coveted the recovery of Danzig, a traditionally German and originally Hanseatic port on the Baltic Sea. He also wanted to create a sort of easement for an autobahn and double-track railroad across the thin corridor to Danzig that offered Poland its only access to both the port and the sea, but that separated the bulk of Germany from its territory in East Prussia. The Treaty of Versailles, following World War I, had created this so-called Polish Corridor and reconstituted Danzig as a free port. The League of Nations ostensibly protected Danzig, but under Polish administration and with its own legislature, which ethnic Germans dominated. Hitler's imperialism, however, overshadowed his revanchism. He could have simply relied on the revanchist aspirations of the Danzigers as a matter of their self-determination to obtain his objectives. Indeed, Polish resistance to a populist crusade based on the principle of self-determination would have been seen as a narrowly tailored pretext for rolling Hitler's tanks into Danzig and for creating an easement through the Polish Corridor—perhaps once

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21. See WILLIAM MANCHESTER, *THE LAST LION: WINSTON SPENCER CHURCHILL ALONE, 1930–1940*, at 282 (1988).

22. *Id.* at 392; WILLIAM M. SHIRER, *THE NIGHTMARE YEARS, 1930–40*, at 381 (1984) (suggesting that it was a phony aspiration of independence concocted by Hitler and that the terms of the request from the Slovak rebels had been drafted in Berlin).

23. For example, Hitler, aided by his henchmen Hermann Göring, Joachim von Ribbentrop, and Wilhelm Keitel, threatened Emil Hácha, the weak President of Czechoslovakia and former Chief Justice of its Supreme Court, with a cataclysmic future for Czechoslovakia unless he surrendered the country immediately. The senile Hácha, under obvious duress, agreed between spells of fainting and injections by Hitler's quack physician of an unknown substance, to sign a prepared declaration to the effect that he had confidently turned to the Führer and "the protection of the German Reich" in order to restore "calm, order and peace in Central Europe." SHIRER, *supra* note 22, at 380.



again with the acquiescence of Britain and France, as in his earlier conquests. But Hitler was faced with the problem that if he did so, the limited *casus belli* would have been accomplished, thereby depriving him of an excuse to accomplish what he really wanted in the interest of *lebensraum*: to conquer all of Poland.<sup>24</sup> He unquestionably wanted more than Danzig and an easement through the Polish corridor, determined as he was to push steadily eastward in a sort of revival of the *Drang nach Osten* promoted by the earlier Hohenzollern monarchy.<sup>25</sup> Just the previous year Hitler had expressed frustration to his SS honor guard that the Munich agreements, clearly a diplomatic coup for him, nevertheless “spoiled my entry into Prague.”<sup>26</sup>

Hitler’s solution to this dilemma, given a need for some sort of *casus belli*, was to fabricate both injury to ethnic Germans in Poland and border incidents along both the Polish Corridor and the main German–Polish border to the west and, since the conquest of the Sudetenland, to the south. As early as March 1939, shortly after the German invasion of Czechoslovakia, the Nazi-controlled media began falsely pinning blame on the Poles for anti-Nazi rioting—for example, in Bydgoszcz, a largely German ethnic city in Western Poland.<sup>27</sup>

As in the run up to World War I, the German media were complicit, if not essential, in this campaign of fabricating pretexts for the conquest of Poland. The endless parade of bogus headlines included these: “Warsaw Threatens Bombardment of Danzig—Unbelievable Agitation of Polish Archmadness” and “This Playing with Fire Going Too Far—Three German Passenger Planes Shot at by the Poles—in Corridor Many German Farmhouses in Flames.”<sup>28</sup>

After Bydgoszcz, more blatant fabrications of incidents followed, all of them similar to those on the eve of the Nazi invasions of Austria and Czechoslovakia. These incidents included staged attacks on German customs and civilian posts.<sup>29</sup> On the night before the *blitzkrieg*, the notorious “Canned Goods” operation at a German radio station in the border town of Gleiwitz was staged as a final

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24. MANCHESTER, *supra* note 21, at 466.

25. SHIRER, *supra* note 22, at 418.

26. MANCHESTER, *supra* note 21, at 358.

27. *Id.* at 464.

28. *Id.* at 504; SHIRER, *supra* note 22, at 418.

29. MANCHESTER, *supra* note 21, at 405.

tipping point to justify intervention in Poland.<sup>30</sup> The Gestapo, led by a veteran—who had faked incidents in Slovakia during the run up to the Nazi conquest of Czechoslovakia—dressed up twelve or thirteen condemned criminals from concentration camps in Polish uniforms. They then were killed with fatal injections, filled with gunshot wounds, and deposited on the ground at the radio station as evidence of Polish terrorism. SS men in disguise, wearing identical Polish uniforms, were then “captured” and presented as having “led” the attack. Unfortunately for them, the SS men themselves were later liquidated to keep them from talking.

The staging of these incidents as a pretext for the invasion of Poland was, indeed, “a clumsy, vaudevillian excuse.”<sup>31</sup> For Hitler, however, it was “not a question of conquering populations but of conquering territories suitable for cultivation. . . . Expansion cannot be achieved without smashing lives, and without taking risks.”<sup>32</sup> In the interest of *lebensraum*, any *casus belli* would do.

The massive invasion occurred Friday, September 1, 1939, just one day after Operation Canned Goods, all along the western and southern borders of Poland, thereby belying any pretense that the human rights, or even simply interests, of the German-speaking population of Danzig had alone been instrumental. The British response was delayed because, as Winston Churchill quipped, the British ruling class liked “to take its weekends in the country” whereas “Hitler takes his countries in the weekends.”<sup>33</sup> At the end of the weekend, however, Britain and France declared war, and World War II exploded.

### C. *The Gulf of Tonkin Incident (1964)*

A naval incident during the protracted conflict in Vietnam<sup>34</sup>

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30. MANCHESTER, *supra* note 21, at 516, 518; SHIRER, *supra* note 22, at 448–49.

31. MANCHESTER, *supra* note 21, at 521.

32. THE TRIAL OF GERMAN MAJOR WAR CRIMINALS BY THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, GERMANY (COMMENCING 20<sup>TH</sup> NOVEMBER, 1945), SPEECHES OF THE CHIEF PROSECUTORS FOR THE UNITED STATES OF AMERICA; THE FRENCH REPUBLIC; THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND; AND THE UNION OF SOVIET SOCIALIST REPUBLICS AT THE CLOSE OF THE CASE AGAINST THE INDIVIDUAL DEFENDANTS 120 (His Majesty’s Stationery Office ed., 1946).

33. MANCHESTER, *supra* note 21, at 483.

34. Definitive works, from which this section of the study draws, are the four volumes of THE VIETNAM WAR AND INTERNATIONAL LAW (Richard A. Falk ed., 1968, 1969, 1972, & 1976). An excellent textbook source, from which this study also draws, is STEPHEN DYCUS, ARTHUR L. BERNEY, WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY

offers a third example of a questionable pretext for military action, in this case taking the form of a massive escalation of limited skirmishes. In the wake of the Viet Cong's victory in its war of independence against France, Vietnam was militarily and politically divided along a "provisional military demarcation" line between north and south. According to the Agreement on the Cessation of Hostilities in Vietnam between France and the Democratic Republic of Vietnam on July 20, 1964,<sup>35</sup> the partition was intended to be temporary. The Agreement otherwise provided (1) for a cessation of hostilities; (2) withdrawal of opposing forces to their respective sides of a dividing line to form separate "military regrouping zones"; (3) prohibitions of alliances; (4) the establishment of an International Commission for Supervision and Control in Vietnam, consisting of Canada, India, and Poland, whose purpose was to control and supervise application of the agreement; (5) a general election to establish the government of a unified Vietnam; and (6) civil administrators in each of the regrouping zones that the respective party in military control provided. An unsigned Final Declaration of the Geneva Conference endorsed the Agreements.<sup>36</sup> All parties to the conference—except the United States and the State of Vietnam based in Saigon (South Vietnam, as it became known)—accepted the Agreements. The United States, however, did pledge not to use force to disturb the two Agreements.<sup>37</sup>

Unfortunately, this framework was a failure. The International Commission was ineffective, no general election was ever held, and systematic violations of the Agreement were not redressed.<sup>38</sup> After French forces withdrew from their military regrouping zone in the south, tensions mounted and the partition hardened between the two Vietnamese governing authorities of the north and south. Despite

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LAW 269-306 (5th ed. 2011).

35. Agreement Between the Commander-in-Chief of the French Union Forces in Indo-China and the Commander-in-Chief of the People's Army of Viet-Nam on the Cessation of Hostilities in Viet-Nam, Great Britain, Misc. No. 20, Cmd. 9239, at 27 (1954), 161 BRIT. & FOR. STATE PAPERS 818 (1954).

36. Final Declaration of the Geneva Conference on the Problem of Restoring Peace in Indo-China, Great Britain, Misc. No. 20, Cmd. 9239, at 9 (1954), 161 BRIT. & FOR. STATE PAPERS 359 (1954).

37. Daniel G. Partan, *Legal Aspects of the Vietnam Conflict*, 46 B.U. L. REV. 281, 296 (1966). This article provides an excellent historical background and pertinent international law. See also John Norton Moore, *International Law and the United States Role in Viet Nam: A Reply*, 75 YALE L.J. 1051 *passim* (1967).

38. Partan, *supra* note 37, at 296.

repeated efforts to renegotiate an effective settlement, Vietnam was doomed to over twenty-five years of armed conflict.

In the name of collective self-defense, each side attracted foreign military personnel and equipment. In 1961, President Kennedy put United States boots firmly on the ground by dispatching four hundred Special Forces troops and one hundred other military advisors.<sup>39</sup> Meanwhile, a continuous infiltration of Viet Cong troops from North Vietnam into South Vietnam posed a major threat to the regime in Saigon. The fear that the fall of South Vietnam would quickly lead to Communist domination throughout Southeast Asia—the so-called “domino theory”—prompted a huge expansion of U.S. troops—from four hundred to sixteen thousand—in just two years. Successive corrupt and weak political regimes in South Vietnam<sup>40</sup> contributed to a deteriorating military situation in the South. White House tapes later revealed President Johnson’s frustration. With the South Vietnamese government on the verge of collapse, he called the war “the biggest damn mess I ever saw . . . I don’t think it’s worth fighting for, and I don’t think we can get out.”<sup>41</sup> Even so, the President seemed to repose confidence in greatly strengthened troop numbers. Apparently, it was time to bring things to a head. The Gulf of Tonkin incident in August 1964 conveniently served that purpose.

Although critical facts about the incident remain in dispute, the gist of it was this: on July 17 and 31, 1964, the U.S.S. *Maddox*, a destroyer, was conducting an intelligence mission in the Gulf of Tonkin off North Vietnam, including a search for and triggering of Hanoi’s radar transmitters and navigation aids.<sup>42</sup> The vessel was to remain beyond eight nautical miles from the coast while South Vietnamese commandos, that United States General William Westmoreland directed,<sup>43</sup> attacked two North Vietnamese islands as a reprisal measure for North Vietnamese attacks on land. On August 2, several North Vietnamese PT boats attacked the *Maddox*, which responded by sinking one of them. Aircraft from a nearby U.S. carrier damaged two of the other PT boats. The Gulf of Tonkin

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39. See DYCUS ET AL., *supra* note 34, at 271.

40. *Id.* at 271–72.

41. *Tapes Show Johnson Saw Vietnam As Pointless in 1964*, N.Y. TIMES, Feb. 15, 1997, at 12.

42. See generally Perry L. Pickert, *American Attitudes Toward International Law As Reflected in “The Pentagon Papers,”* in 4 THE VIETNAM WAR AND INTERNATIONAL LAW 81–82 (Richard A. Falk ed., 1976).

43. See DYCUS ET AL., *supra* note 34, at 273.

incident, as such, involved only reported attacks August 4 by North Vietnamese torpedo boats directed at the *Maddox* and another destroyer. Even though no damage was reported, United States aircraft responded the next day by striking two torpedo boats based in North Vietnam.<sup>44</sup>

Several facts in this general scenario merit attention. First, it appears that on July 31, both of the United States vessels were within the twelve-mile territorial waters that North Vietnam claimed. Senator Wayne Morse of Oregon therefore described the United States' naval posture as a provocation, though not a justification for North Vietnamese action nor even a provocation of the August 4 attack.<sup>45</sup> As to that, the two United States destroyers were located sixty-five miles offshore on the high seas—a possible threat to North Vietnam, even beyond its claimed territorial waters, but not even a provocation. More importantly, however, there may have been no attack at all on August 4. A National Security Agency (NSA) study released in 2005—that newly declassified signals intelligence reports supported—found no evidence of such an attack, but rather the NSA's deliberate skewing of intelligence.<sup>46</sup> Even if the North Vietnamese did launch an attack on August 4—the *sine qua non* of the “incident”—the United States counterattacked the next day on the coastal torpedo bases. That should have settled the matter under a reprisal theory of response.<sup>47</sup> Even then, the United States' response has been criticized as disproportionate insofar as it was largely disassociated from the larger war in South Vietnam.<sup>48</sup>

This lack of an association with the larger war in Vietnam is a crucial consideration insofar as the August 4 incident, even if it did occur, caused no reported damage, and yet it prompted the Johnson Administration to introduce a draft resolution in Congress the following day (August 5). The Resolution—known ever since as the Tonkin Gulf Resolution—condemned the attack and authorized the

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44. See Richard A. Falk, *International Law and the United States Role in the Viet Nam War*, 75 YALE L.J. 1122, 1144–45 (1966).

45. See Eliot D. Hawkins, *An Approach to Issues of International Law Raised by United States Actions in Vietnam*, in 1 THE VIETNAM WAR AND INTERNATIONAL LAW 163, 190 n.112 (Richard A. Falk ed., 1968).

46. See DYCUS ET AL., *supra* note 34, at 273 n.5.

47. See, e.g., Eric Pace, *Laos: Continuing Crisis*, FOREIGN AFF., Oct. 1964, at 64, 74 (“The North Vietnamese gunboat attacks on United States destroyers provided a kind of clear-cut provocation which makes possible a neatly calibrated reprisal.”).

48. See Falk, *supra* note 44, at 1145.

President to take “all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting in defense of its freedom.”<sup>49</sup> The Resolution provided for its expiration “when the President shall determine that the peace and security of the area is reasonably assured . . . except that it may be terminated earlier by concurrent resolution of the Congress.”<sup>50</sup> On August 7, Congress passed the Resolution, with only two “no” votes (Senators Ernest Gruening of Alaska and Wayne Morse of Oregon).<sup>51</sup>

To be sure, there is no evidence whatsoever that President Johnson staged the Gulf of Tonkin incident. Whatever the facts may have been on August 4, the naval back-and-forth seems to have been conducted as a series of encounters entailing reprisals or countermeasures.<sup>52</sup> Although the United States’ response may have been disproportionate, whether there was an attack or not, the incident does not seem in itself to have been a pretext for ratcheting the conflict up to a substantially higher level. Instead, the alleged incident is significant primarily in almost spontaneously generating the Gulf of Tonkin Resolution, with its expansive authorization of the president’s use of force regardless of any direct relationship with the Gulf of Tonkin incident. In other words, the “necessary steps” could extend far beyond the limits of a reprisal measure. By 1968, taking full advantage of the Resolution’s delegated power to reinforce his own constitutional power as Commander in Chief, President Johnson rapidly increased the level of United States troops in Vietnam to 550,000.<sup>53</sup> The opposition to both the Resolution and the Vietnam campaign as a whole increased exponentially.

Although much of the endless debate about the Resolution ever since its adoption has involved constitutional issues, it is cogent in

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49. Southeast Asia Resolution (Tonkin Gulf Resolution), Pub. L. No. 88-408, § 2, 78 Stat. 384 (1964). By “protocol State,” Congress evidently intended to refer to South Vietnam.

50. *Id.* § 3.

51. See DYCUS ET AL., *supra* note 34, at 274 (includes a copy of the principal provisions of the Resolution).

52. See Hawkins, *supra* note 45, at 189–91. It should be noted that the legitimacy of reprisal measures remains controversial under contemporary international law. See, e.g., Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 246 (July 8) (stating “armed reprisals in time of peace . . . are considered to be unlawful”).

53. Richard A. Falk, *Six Legal Dimensions of the United States Involvement in the Vietnam War*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 216, 246 (Richard A. Falk ed., 1969). In another account the troop build-up had reached 510,000 troops by early 1968. DYCUS ET AL., *supra* note 34, at 276.

this study for two reasons. First, it was the immediate product of an alleged attack to which the United States had fully—maybe more than fully—responded by bombing North Vietnamese coastal villages in the nature of a reprisal rather than an unanswered foreign threat or use of force. Unless the United States intended the Resolution as a punitive measure in violation of international law, it is difficult to understand its rationale as a response to the Gulf of Tonkin incident specifically. Second, the Resolution led predictably to a massive escalation, indeed recharacterization, of the Vietnam conflict. A question ever since has been: did the *casus belli* of the incident, as expressed in the Resolution, justify the escalation of the conflict, ultimately combining, as it did, “ineffectual with excessive force?”<sup>54</sup> To be sure, under international law the escalation of the conflict, indeed, the Vietnam War as a whole, was arguably supported by mutual defense obligations among members of the Southeast Asia Treaty Organization<sup>55</sup> and under Article 51 of the United Nations Charter.<sup>56</sup> But this authority has also been questioned as inadequate to justify the escalated conflict.

President Nixon agreed to repeal the Gulf of Tonkin Resolution in 1971, concluding, as had President Johnson, that his constitutional power as Commander in Chief was sufficient to take all necessary enforcement measures in the Vietnam theater of war.<sup>57</sup> Others disagreed, claiming that repeal of the Resolution either left a vacuum<sup>58</sup> or an unconstitutional war.<sup>59</sup> In any event, it is a third example in this study of military action based on a questionable *casus belli*. It is, indeed, telling that the distinguished floor manager of the Resolution, Senator William Fulbright, later confessed that he had been “hoodwinked”<sup>60</sup> and became a dedicated opponent of the

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54. Falk, *supra* note 44, at 1144.

55. Southeast Asia Collective Defense Treaty, Sept. 8, 1954 [1955] 6 U.S.T. 28, 81, T.I.A.S. No. 3170. It is interesting that the Department of the Army legal guidance that was published just two months before the Gulf of Tonkin incident identified regional arrangements, not unilateral actions, as a default in the absence of United National Collective security. See DEP'T OF THE ARMY, 1 INTERNATIONAL LAW 118–19 (June 1964).

56. See United Nations Participation Act of 1945, 22 U.S.C. § 287(a)–(e) (2008).

57. The repeal took the form of a rider to the Foreign Military Sales Act of 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055 (1971).

58. See Don Wallace, Jr., *The War-Making Powers: A Constitutional Flaw?*, 57 CORNELL L. REV. 719, 740, n.116 (1972).

59. See Edwin Brown Firmage, *Law and the Indochina War: A Retrospective View*, 1 UTAH L. REV. 1, 17 (1974).

60. See Ely, *supra* note 2, at 889. For a more circumspect version of Senator

Vietnam campaign.

### III. THE LAW: PAST, PRESENT, AND FUTURE

#### A. Introduction

Of the two broad categories that comprise the law of war—the *jus in bello* (the law governing the conduct of war) has developed impressively in recent years whereas the *jus ad bellum* (the law governing the initiation of war) has scarcely developed at all. Explanations for this disparity mostly highlight the growth and visibility of the *jus in bello*. The factors include: (1) exhaustive coverage by the global media (traditional and social) of brutality during armed conflict; (2) global consciousness-raising; (3) consequent demands by NGOs for effective constraints on unacceptable conduct by military personnel; (4) the related growth of humanitarian norms and rules; and (5) the visibility of newly established war crimes tribunals and other specialized institutions to address the brutality by prosecution or other means. To be sure, the initiation of armed conflict has also generated substantial media coverage and robust public opinion. In particular, the 2003 intervention in Iraq, led by the United States and the United Kingdom, sparked enormous controversy that continues to be

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Fulbright's about face, see *Record of '64 Senate Hearings on Tonkin Gulf Issued*, N.Y. TIMES, Nov. 24, 1966, at 4 ("I feel that I was led into the Tonkin Gulf Resolution . . . I should have been more intelligent, more far-seeing, more suspicious."). Senator Fulbright's initial enthusiasm for the Resolution appears in a famous exchange with Senator John Sherman Cooper during the congressional hearing on the draft Resolution. In it, Senator Fulbright reflected on the ambitious intent of the sponsors, as follows:

*Mr. Cooper.* . . . Does the Senator consider that in enacting this resolution we are satisfying that requirement of Article IV of the Southeast Asia Collective Defense Treaty? In other words, are we now giving the President advance authority to take whatever action he may deem necessary respecting South Vietnam and its defense, or with respect to the defense of any other country included in the treaty?

*Mr. Fulbright.* I think that is correct.

*Mr. Cooper.* Then, looking ahead, if the President decided that it was necessary to use such force as could lead into war, we will give that authority by this resolution?

*Mr. Fulbright.* That is the way I would interpret it. If a situation later developed in which we thought the approval should be withdrawn, it could be withdrawn by concurrent resolution.

110 CONG. REC. 18409-8410 (1964).



influential. Indeed, the essence of the controversy has been the focus of this study, namely the validity of a declared *casus belli*. Also, in policy-making and other professional circles the complicated question under international law of appropriate military responses to acts of terrorism, as opposed to ordinary law enforcement, has been as prominent as it has been perplexing. Both of these examples of a focus by the media and the public on the *jus ad bellum*, however, highlight the lack of a corresponding development of specific rules or even guidelines to define and better operationalize it.

### *B. The Legal Framework*

For seven decades, several provisions of the United Nations Charter have defined the legal framework governing the use of force. All of them seek to operationalize, first and foremost, the commitments of its Members, as expressed in the Charter's Preamble: "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."<sup>61</sup> Under Article 2(4), "[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." Under Article 42, however, the Security Council, acting under Article 24 and its Chapter VII powers as the United Nations organ primarily responsible for maintaining international peace and security, may itself take "such action by air, sea or land forces as may be necessary to maintain or restore international peace and security."

A threshold issue in the formative years of the United Nations arose out of the lack, even today, of an ongoing system of collective security, which the architects of the United Nations intended to be a premise of military action. Fundamentally, the failure to provide for collective security is essentially a failure of Members to fulfill their obligation under Article 43 to provide and finance armed forces for deployment under United Nations supervision whenever called upon to do so. Given the failure of collective security, did the Security Council have any power under the circumstances to apply Article 42 at all? The answer that eventuated has been "yes," in view of long-

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61. U.N. Charter pmb. (1945). Two of the four "ends" of these commitments pertain to the use of force, namely "to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institutions of methods, that armed force shall not be used, save in the common interest . . ." *Id.*

standing and universal recognition of an implied power vested in the Security Council to take action in the absence of the intended system of collective security. Article 48 offers some indirect textual authority for that by obligating members to “carry out the decisions of the Security Council for the maintenance of international peace and security . . . .” More specifically, in line with customary international law regardless of a collective security mechanism, Article 51 provides that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations [pending Security Council action].” Finally, Article 53 enables “regional arrangements” also to take “enforcement action” (meaning the use of force), but only if authorized by the Security Council.

The interpretation of these Charter provisions has been endlessly problematic and debated. Chief among the questions pertaining to this study have been these: were rules of customary international law besides Article 51 grandfathered into the framework when the Charter was opened for signature and ratification in 1945? If so, does customary international law justify unilateral humanitarian intervention to rescue a state’s nationals or even non-nationals from another state’s failure to acquit its responsibility to protect them? Can humanitarian intervention be justified in the otherwise prohibitive language of Article 2(4) simply on the basis that such intervention furthers the essential purposes of the United Nations? Must humanitarian intervention be multilateral? Under Article 2(4), is the threat or use of force acceptable if it is not directed against the territorial integrity or political independence of another state and causes only fleeting impact in that regard? Given repeated violations of Article 2(4), can it any longer be interpreted literally or has it passed into desuetude?<sup>62</sup> Does the “inherent right of self-defense” under Article 51 include the use of force in the absence of an armed attack? In other words, does Article 51 prohibit anticipatory or preemptive self-defense to avoid an imminent armed attack? Finally,

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62. Nearly forty-five years ago a famous article proclaimed the death of Article 2(4). Thomas M. Franck, *Who Killed Article 2(4)?*, 64 AM. J. INT’L L. 809 (1970). But a vigorous reply argued to the contrary. Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT’L L. 544 (1971). Moreover, the International Court of Justice has consistently applied the Article. See, e.g., *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, paras. 184–86 (June 1986) (applying Article 2(4) and other Charter provisions as customary international law). Finally, Professor Franck himself seems to have changed his mind. See Thomas Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT’L L. 839 (2001).

how do the Charter's rules apply to non-state actors in an age of terrorism?

All of these questions bear on the validity of a declared *casus belli*. And, for answers, they all suffer from a lack of detailed, explicit, and authoritative guidance. That is partly because global constraints on the use of force are of fairly recent origin.<sup>63</sup> But the other problem has been that the progressive development of the law in further defining and operationalizing the Charter's rules has been painfully slow. Still, a wealth of commonly accepted principles, norms, and insights are instructive.

### C. Guiding Principles, Norms, and Insights

#### 1. Historical Sketch

The fathers of modern international law inherited certain rules of sovereign conduct related to the use of force from classical and medieval practice. Most importantly, they inherited the “just war” concept, with its roots in the Augustinian and Thomist doctrines of the Church.<sup>64</sup> As to the *casus belli*, Thomas Aquinas argued that just war depended on a just cause. By the sixteenth and early seventeenth centuries, however, the Spanish theologian–jurists Francisco de Vitoria and Francisco Suárez were disturbed by the abuses of the doctrine. Vitoria particularly was troubled by its unjust application against the indigenous population of Spain's emerging colonial empire in South America. Their articulation of a three-fold right of self-defense to justify the use of force—to protect life and property, and to counter an unjust attack—shaped the monumental work in the seventeenth century of Hugo Grotius. His detailed rules for a law of war, all based on natural law and the concept of a just war, still have a modern ring. For example, his definition of war recognized public, *private*, and *mixed* wars. The latter two categories describe military actions that non-sovereign authorities conduct<sup>65</sup>—such as al-Qaeda

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63. “Prior to the adoption of the UN Charter, there was no clear prohibition on the use of force.” STEPHEN MCCAFFREY, DINAH SHELTON & JOHN CERONE, PUBLIC INTERNATIONAL LAW: CASES, PROBLEMS, AND TEXTS 1155 (2010).

64. For a summary of the development of the just war concept in the history of international law, see SYDNEY D. BAILEY, PROHIBITIONS AND RESTRAINTS IN WAR 1–57 (1972).

65. See P.P. REMEC, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIUS AND VATTTEL 3–6 (1960) (emphasis added), *quoted in* MCCAFFREY ET AL., *supra* note 63, at 1157.

and other terrorist groups today. Drawing as he always did on classical insights and later moral philosophy, Grotius addressed the use of pretexts for the use of force as specifically as any legal pronouncements today:

IV. Others allege causes which they claim to be justifiable, but which, when examined in the light of right reason, are found to be unjust. In such cases, as Livy says, it is clear that a decision based not on right but on violence is sought. Very many kings, says Plutarch, make use of the two terms, peace and war, as if they were coins, to obtain not what is right but what is advantageous.

Now causes which are unjust may, up to a certain point, be recognized from the foregoing discussion of just causes. What is straight is in fact a guide to what is crooked. For the sake of clearness, however, we proceed to mention the principal kinds of unjust causes.

VI. Advantage does not confer the same right as necessity.<sup>66</sup>

In the course of the nineteenth century, however, the just war concept “was scorned as sentimental rubbish, hopelessly vague in content and impossible to enforce for lack of a tribunal competent to pass judgment. War, in short, was simply a fact of life that the law must accept, however it might play out.”<sup>67</sup> By the time of World War I, a version of the just war concept made a comeback, this time drawing a line between “aggressive” and “defensive” wars.<sup>68</sup> As we have seen, the assassination of Archduke Franz Ferdinand in 1914 demonstrated the fragility of this distinction in the face of politics and

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66. GROTIUS, *supra* note 1, at §§ IV, VI.

67. TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 65 (Bantam Bk. ed., 1971). The author continues as follows: “To be sure, governments would still give reasons for resorting to war that stressed the justice of their cause, and individuals might legitimately entertain beliefs about the morality of a particular war. But none of this was of any legal significance.” *Id.*

68. *Report, supra* note 8, ch. I. It was not until 1974, however, that the United Nations General Assembly adopted a definition of aggression for application in international relations. The definition is expressed in terms of specific acts. First and foremost, “[t]he First use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression . . . .” Resolution on the Definition of Aggression, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 14, 1974) [hereinafter *Definition of Aggression*]. The definition of an act of aggression for application to individuals, particularly as a basis for prosecution in war crimes tribunals, has proven to be very difficult, however.

terminological ambiguity.

The end of World War I did introduce a new concept, however: that of individual responsibility. A Commission on Responsibility of the Authors of War, whose members were some of the victorious powers, including the United States, undertook an inquiry into individual responsibility and orchestrated the first, albeit largely unsuccessful, attempt to prosecute “authors” of aggressive warfare. The next major initiative was the rather quixotic Kellogg–Briand Pact of 1928,<sup>69</sup> which required its parties to condemn all recourse to war, to renounce it as an instrument of state policy, and to seek only pacific means to settle or solve disputes and conflicts. As such, the Pact was dead almost on its arrival just before the global depression that contributed to the rise of Hitler and the proliferation of aggression, primarily by Japan, Italy, and then Germany in the 1930s. But the Pact did help articulate and legitimate a crime against peace during the Nuremberg, Tokyo, and lesser war crimes tribunals in the aftermath of World War II. For the possible criminality of an unauthorized *casus belli*, the definition of crimes against peace specifically included *initiation* of a criminal war.<sup>70</sup> The eminent Dutch jurist, Bert Röling, who was the youngest member of the Tokyo War Crimes Tribunal, regarded aggressive war in the future as the “supreme international crime”<sup>71</sup> that comprehends all lesser crimes. That is not at all to say that declaring a false pretext to justify foreign military intervention in itself constitutes aggression, but it is an element that merits serious attention during war crimes trials. Since the post-World War II prosecutions, the criminalization of serious breaches of the *jus ad bellum*, especially grave breaches, has reemerged in the ad hoc war crimes tribunals of the last two decades, although not in the Rome Treaty that defines the jurisdiction of the

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69. Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, T.S. No 796.

70. The Nuremberg Charter, Aug. 8, 1945, 82 U.N.T.S. 279, 59 Stat. 1544, provides as follows (emphasis added):

Crimes against peace:

- (i) Planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances;
- (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i) . . . .

*Id.*

71. See B.V.A. RÖLING & ANTONIO CASSESE, THE TOKYO TRIAL AND BEYOND 99 (1993).

International Criminal Court.

2. International Custom: The Requirements of Immediacy, Necessity, and Proportionality

Even during the nineteenth-century heyday of sovereign autonomy, durable rules of custom to govern the use of force emerged. The prime example is the rule in *The Caroline*.<sup>72</sup> Accordingly, an anticipatory or preemptive use of force prior to an actual attack is justified as a self-defense measure when “the necessity of that self-defence is instant, overwhelming, and leaving no moment for deliberation.”<sup>73</sup> Coupled today with a requirement of proportionality, the *Caroline* rule is still authoritative so long as its exercise otherwise conforms to the accountability requirement in Article 51 of the United Nations Charter. Based on the requirements of immediacy, necessity, and proportionality, the rule is accepted as either an articulation of an “inherent right” which Article 51 left unaddressed or as a rule of international custom grandfathered into the Charter for case-by-case application even in the absence of an actual armed attack.

What has unfortunately complicated the legacy of the *Caroline* rule in recent years has been the misbegotten notion that the immediacy of a threat is no longer a requirement. Otherwise known as the “preventive war” or “preventive self-defense” rule, it was first articulated by President George W. Bush to provide a response to organized terrorism and the threat of weapons of mass destruction (WMDs) abroad.<sup>74</sup> As a *casus belli* for the Iraq invasion, it proved to be yet another false or inadequate pretext in the absence of an actual threat in Iraq from either terrorist groups such as al-Qaeda or WMDs. What is more, no other state fully endorsed the notion. Its legacy thus remains simply as a source of confusion with the *Caroline* rule of

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72. 2 MOORE, DIGEST OF INTERNATIONAL LAW 412 (1906) (discussing *The Caroline Case*). *The Caroline Case* took the form of correspondence in 1842 between Lord Ashburton, as the lead British Minister, and Daniel Webster, United States Secretary of State, regarding an 1837 Canadian-based intervention in the United States by Canadian insurgents in order to destroy a vessel that posed a continuing threat to them in Canada. *Id.* The intervention arguably was an exercise of anticipatory self-defense lest the vessel cause even further damage to the insurgents.

73. *Id.*

74. See NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 14–16 (2002). For a concise case study, with documents and media reporting on the intervention in Iraq, see MARY ELLEN O’CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE 49–82 (2005); see also IRAQ: GUIDE TO LAW AND POLICY 203–52 (Chibli Mallat ed., 2009).

anticipatory or preemptive use of force, with its requirements of immediacy and necessity coupled with that of proportionality.

The *Caroline* rule is just one example of a role of custom in helping define the *jus ad bellum*. The long history of just war thinking has generated other customary rules. Many of them lack criteria even as precise as those of the *Caroline* rule.

### 3. World Court Decisions

The International Court of Justice has decided several important cases involving use-of-force issues. *Nicaragua v. United States*,<sup>75</sup> in particular, addressed questions of individual and collective self-defense and confirmed that the underlying rules of the United Nations Charter enshrine international custom. The advisory opinion in the *Nuclear Weapons* case<sup>76</sup> left open the possibility of a self-defense exception to the prohibition of nuclear weapons. But, despite these and other authoritative pronouncements, the criteria for evaluating the legality of a declared *casus belli* and the consequences derived from such an evaluation are pitifully scattered, incomplete, and sometimes contradictory. In the *Oil Platforms Case*,<sup>77</sup> a separate opinion lamented as follows:

I find it regrettable that the Court has not mustered the courage of restating, and thus reconfirming, more fully fundamental principles of the law of the United Nations as well as customary international law (principles that in my view are of the nature of *jus cogens*) on the use of force, or rather the prohibition on armed force, in a context and at a time when such a reconfirmation is called for with the greatest urgency. . . . Everybody will be aware of the current crisis of the United Nations system of maintenance of peace and security, of which Articles 2(4) and 51 are cornerstones. We currently find ourselves at the outset of an extremely controversial debate on further viability of the limits on unilateral military force established by the United Nations Charter. In this debate, “supplied” with a case allowing it to do so, the Court ought to take every opportunity to secure that the voice of

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75. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

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

77. Oil Platforms Case (Iran v. U.S.), 2003 I.C.J. 161, 327–28 (Nov. 6) (Sep. Op. Judge Simma). The case concerned the issue of United States air strikes on Iranian oil platforms as a matter of anticipatory or preemptive self-defense. *Id.*

the law of the Charter rises above the current cacophony. . . . [T]he present Judgment is an exercise in inappropriate self-restraint.<sup>78</sup>

More succinctly, a recently published textbook of international law, apparently on a note of optimism, observed that:

A body of practice has begun to shape the content of the prohibition on the use of force. While uncertainties remain at the periphery, there is very little disagreement over the central cases to which the prohibition is directed. Where a use of force would be unlawful, a threat to use such force is similarly prohibited.<sup>79</sup>

That is certainly correct, but it is also discouraging to acknowledge that such a practice has only “*begun* to shape the context of the prohibition on the use of force.”<sup>80</sup>

#### 4. Going Ahead with the Law: The Future Agenda

The chief interpretive questions regarding the Charter-based legal framework governing the use of force cry out for detailed, stable, and authoritative requirements. Preliminarily, further guidance for policymakers and legal advisors would be advantageous. The pertinent literature is vast, the expertise is available, and the need for codification or restatement of principles and rules is apparent. The political challenge of doing so is also apparent. For example, United Nations Secretary-General Kofi Annan’s High-Level Panel on Threats, Challenges and Change issued a report that addressed self-defense issues and articulated interpretive principles together with the Secretary-General’s response to the report, but the General Assembly ignored the effort.<sup>81</sup> Still, the process of formulating uniform and detailed responses may be worthwhile in itself. For example, although the General Assembly’s definition of aggression has not been as effective as originally hoped, it nevertheless engaged the international community in a worthwhile project to spell out in some detail the specific actions that would be deemed to constitute

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78. *Id.*

79. MCCAFFREY ET AL., *supra* note 63, at 1183.

80. *Id.* (emphasis added).

81. *See* A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565 (2004) (confirming the requirements of imminence, necessity and proportionality to use force in self-defense); U.N. Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All, UN Doc. A/59/2005 (2005).



aggression.<sup>82</sup> Not only are the basic rules clear, but also the international collaboration in formulating those rules was worthwhile. Moreover, a common vocabulary for diplomacy is in itself valuable.

Contemporary threats of international terrorism present particularly difficult challenges to the rule of law within a framework that was established before the contemporary era of threats. Governmental initiatives to clarify policy and stabilize expectations about counterterrorist operations are essential, although they lie beyond the scope of this study.<sup>83</sup>

Several non-governmental efforts are noteworthy. These include the Chatham House Principles on the Use of Force in Self-Defense,<sup>84</sup> the Leiden Policy Recommendations on Counter-terrorism and International Law,<sup>85</sup> and Principles Relevant to the Scope of a State's Rights of Self-Defense Against an Imminent or Actual Attack by Nonstate Actors.<sup>86</sup> Daniel Bethlehem, a former principal Legal Advisor of the U.K. Foreign and Commonwealth Office, drafted the latter initiative. It elicited two sets of published responses offering critiques of the principles, notably concerning the efficacy in specific cases of the broad requirements of immediacy, necessity, and proportionality.<sup>87</sup> In addition to substantive principles, the procedures to temper and govern use-of-force claims also merit consideration.<sup>88</sup>

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82. See Definition of Aggression, *supra* note 68.

83. See, e.g., *White House Document Outlives Standards and Procedures for U.S. Use of Force in Counterterrorism Operations*, 107 AM. J. INT'L L. 943, 943-46 (2013).

84. Elizabeth Wilmshurst, *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 INT'L & COMP. L.Q. 963 (2006).

85. Nico Schrijver & Larissa Van den Herik, *Leiden Policy Recommendations on Counter-terrorism and International Law*, 57 NETH. INT'L L. REV. 531 (2010).

86. Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 770, 775 (2012).

87. See 107 AM. J. INT'L L. 378, 378-95, 563-85 (2013).

88. For example, the author suggested the following general procedure for multilateralizing humanitarian intervention:

In the absence of an effective, on-going enforcement mechanism that is equipped to respond immediately to national crises of self-determination or other crises of human rights significance, the General Assembly and the Security Council might jointly adopt a resolution on humanitarian intervention. It should preempt unilateral actions. Accordingly, member states would be authorized only under the resolution to undertake measures in other states that are deemed necessary to vindicate fundamental human rights. Such measures might include the use of force unless the target state agreed within a reasonable period of time to submit immediately to fact-finding and conciliation procedures, and in good faith to carry out any resulting recommendations or decisions. Under Articles 98 and 99 of the U.N. Charter, the Secretary-General might continue to play a central role. Rescue missions requiring an immediate response would be an exception; these would be governed primarily

Such NGO and academic initiatives as these are sorely needed, if only to spark governmental and inter-governmental commitments, which are essential to the success of such initiatives.

#### IV. CONCLUSION

Three anniversaries of either the initiation of major armed conflict—World War I and World War II—or the vast expansion of it—the Vietnam War—highlight the importance of declared justifications for the use of force. In all three instances, the justifications—the *casus belli*—were either false or inadequate. Today, the United Nations Charter, supplemented by international custom and decisions, broadly defines the law governing the initiation of war—the *jus ad bellum*—although there is a creditable argument that the appropriate term today should be a *jus contra bellum*, a law against war.<sup>89</sup> Whatever the appropriate term, the Charter's prescriptions need uniform and detailed interpretations that spell out the acceptable scope of *casus belli* declarations. The controversial invasion of Iraq in 2003 is a recent reminder of the persistence of false or inadequate pretexts.

The underlying tensions and disputes that may foretell eventual armed conflict, or inevitably lead to it, merit serious attention under international law. But a focus on permissive causes should not overshadow the legal importance of declared justifications for the immediate use of force. It is discouraging to realize how little

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by customary rules of law, such as [the requirements of] immediacy, proportionality, and necessity. Thus, humanitarian intervention by one state would only be permissible under two circumstances: first, if a target state had declined to submit a dispute to impartial review within a reasonable period of time; second if after agreeing to do so, the target state failed to comply in good faith with resulting recommendations or decisions. Humanitarian intervention would be subsumed within a process of community decision, and would be authorized only as a last resort when Article 33 procedures [requiring all Members to attempt to peacefully settle their disputes, based on several alternative methods] have failed. Effective community deliberations and collective initiatives, rather than unilateral argument and doctrinal justification of intervention, would become the hallmark of a new process of multilateral dispute resolution.

James A.R. Nafziger, *Self-Determination and Humanitarian Intervention in a Community of Power*, 20 DEN. J. INT'L L. & POL'Y 9, 38-39 (1991) (emphasis added).

89. See OLIVIER CORTEN, *THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW 2* (Christopher Sutcliff trans., 2012). On the premise of a *jus contra bellum*, the book generally rejects the concepts of humanitarian intervention and anticipatory self-defense. Although it is highly unlikely that the outright rejection of these exceptions to the use of force would be acceptable in the near future, it does underscore the failure to more precisely articulate the acceptable *casus belli*.

progress the global community has made in that regard since the time of Hugo Grotius nearly four centuries ago. The outbreak of World War I a hundred years ago, for example, demonstrated the impotence of legal constraints on the relentless force of geopolitical posturing against common sense and compromise.<sup>90</sup> Since then, history has borne out this reality.

Recent efforts to formulate precise principles and rules of humanitarian intervention or of anticipatory or preemptive self-defense against non-state actors, for example, are promising. We should encourage similar efforts to go ahead with the law for going to war by crafting effective rules to govern the validity of a declared *casus belli*. Such efforts must engage policymakers and government legal advisers in drafting the principles and rules and eventually committing their governments to them. Meanwhile, important anniversaries, even of the three dubious declarations of a *casus belli* highlighted in this study, are a good time to learn from the past, to get our bearings on the present, and to seek a better future.

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90. See Adam Gopnik, *Comment: Two Ships*, NEW YORKER, Jan. 6, 2014.

Even open societies, sailing, so to speak, on the open seas of history, are not immune to the appeal to honor and the fear of humiliation. The relentless emphasis on shame and face, on position and credibility, on the dread of being perceived as weak sounds an icy note through the rhetoric of 1914—from the moment Franz Ferdinand is shot to the moment the troops are sent to the Western Front. The prospect of being discredited, “reduced to a second-rate power,” was what drove the war forward. The German Kaiser kept saying that he would never again allow himself to be embarrassed by the British. Lloyd George, in London, felt that Britain had to go to war or it would never be “taken seriously” in the councils of Europe. Needless wars are rushed along, it seems, by an overcharge of the language of honor and credibility, when the language of common sense and compromise would be a lot more helpful.

*Id.* at 18.