OKLAHOMA CITY UNIVERSITY
LAW REVIEW

VOLUME 42 NUMBER 3

ARTICLES

EXAMINING THE LEGITIMACY AND REASONABLENESS OF THE USE OF FORCE: FROM JUST WAR DOCTRINE TO THE UNWILLING-OR-UNABLE TEST

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ABSTRACT

Amid global armed conflicts between nonstate actors (NSA) and victim states, this paper is an attempt to explore the available legal framework to determine the legitimacy and reasonableness of the responsive use of force by victim states by examining in detail legal and philosophical questions: What constitutes just cause to pursue the use of force during an armed conflict? Does a conflict with an NSA constitute an armed attack for the purposes of the international legal system? This paper discusses the understandings of distinguished philosophers, examining developments in international law that regulate and restrain the use of force during armed conflict. Further, this paper touches upon the just war doctrine and describes the development of humanitarian law, the inherent right of self-defense, and self-defense restrictions under customary international law with the principles of necessity and proportionality. The second half of this paper explores the capacity of

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weak or failing states' conflicts to spill over into other regions of the world; it subsequently provides a framework to better enable victim states to respond to threats posed by NSAs from within the territories of host states or weak or failing states by assessing the willingness and abilities of those states to placate the conflicts, thus establishing the legitimacy and reasonableness of a victim state's use of force in response to armed attacks by NSAs.

I. INTRODUCTION

To support the mechanism for mediating and placating global armed conflicts, there are limits in international law on the conditions in which a state can resort to the use of force.[1] Simply put, these limitations (*jus ad bellum*) are the legal structure that governs an entity's right to use force in general. In essence, *jus ad bellum* seeks to establish when force can be used and who can use this force against whom. The right to use force is not extended to all; in the modern nation-state system, states hold a monopoly over the legitimate use of force. In international relations, contemporary guidelines are based on the United Nations Charter (UN Charter), which prohibits the use of force outside exceptional circumstances, including self-defense.[2]

Throughout history, the right to resort to the use of force has undergone several phases, from an unbridled right to the use of force in the nineteenth century to the prohibition on the use of force in the twentieth century.[3] Although a more detailed discussion of the evolution of the right to use force will follow, for the purposes of comprehending regulations that govern it, we must understand the UN Charter and its

1. IAN HENDERSON, THE CONTEMPORARY LAW OF TARGETING 3 (2009).
2. U.N. Charter art. 2, ¶ 4.
3. BELINDA HELMKE, UNDER ATTACK: CHALLENGES TO THE RULES GOVERNING THE INTERNATIONAL USE OF FORCE 96, 99 (2016).

restrictions on the use of force. Prior to the establishment of the United Nations' system, several attempts had been made to limit states' recourse to use force, including the Covenant of the League of Nations (1919) and the Kellogg–Briand Pact (1928).[4] The UN Charter came in the aftermath of the devastation caused by the two World Wars and was promulgated at a time when states were beginning to realize the disastrous consequences of an unlimited right to use force.

Article 2(4) of the UN Charter outlaws both the use of force and the threat of the use of force in international relations. Article 2(4) reads, "All 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."[5] This Article places restrictions on member states using force or threatening to use force against any state.

Article 51 of the UN Charter is the only exception to the Article 2(4) limitation on the use of force, in the form of self-defense. Article 51 reads,

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[6]

Article 51 allows member states to use force during an armed attack as an inherent right to self-defense.

Additionally, Articles 39 and 42 give the Security Council certain powers and responsibilities against aggressor states in violation of Article 2(4) of the UN Charter. In this regard, Article 39 reads, "The Security Council shall determine the existence of any threat to the peace,

4. TOM STREISSGUTH & LORA FRIEDENTHAL, KEY CONCEPTS IN AMERICAN HISTORY: ISOLATIONISM 40, 43–44 (Jennifer L. Weber ed., 2010).

5. U.N. Charter art. 2, ¶ 4.

6. *Id.* art. 51.

breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[7] Article 42 reads,

> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.[8]

Here, the United Nations Security Council is tasked with the duty of preserving the peace and security of the international community, to which end it has powers under Chapter VII.[9]

The UN's collective security system is hinged on this Chapter. In 1950, the Security Council allowed allied forces to assist South Korea against aggression by North Korea, thus utilizing its mandate to decide whether an armed attack could be launched.[10] Similarly, the Security Council can also identify an imminent threat to international peace and act preemptively to restore order; in this regard, the International Court of Justice (ICJ) rules on the legality of a threat of force issued by a state, or the act of force committed by a state toward another state.[11] However, short of the use of force, the Security Council can employ a variety of means to restore international security, including embargoes, as highlighted in Articles 41 and 42.[12] As a consequence of these provisions, the use of force by member states in the twenty-first century is severely limited, especially when compared to the unrestrained use of force that states enjoyed in previous times.

This paper explores the legal framework available to a state to use force in certain given situations. Accordingly, Section II of this paper

7. *Id.* art. 39.
8. *Id.* art. 42.
9. *Id.* art. 39.
10. MAX HILAIRE, WAGING PEACE: THE UNITED NATIONS SECURITY COUNCIL AND TRANSNATIONAL ARMED CONFLICTS 154 (2015).
11. *See* DAVID SCHWEIGMAN, THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UN CHARTER 1–4 (2001).
12. U.N. Charter arts. 41–42.

will define just cause to pursue the use of force against any state; within this section, prerequisites to establish just cause for such a use of force will be explored. These prerequisites $\frac{1}{m}$ rightful authority to declare war, war as a last resort to mediate conflict, formal declaration, prospects of success, and the right intention to use force $\frac{1}{m}$ will be briefly discussed in four subsections.

Section III of this paper will then explore the just war doctrine, setting out the historical evolution of the doctrine and the evolution of the humanitarian international law. In this section, the contribution, development, and theoretical understandings of such renowned philosophers as Marcus Tullius Cicero, St. Augustine, St. Thomas Aquinas, Francisco de Victoria, Hugo Grotius, and Emer de Vattel will be comprehensively assessed.

After this in Section IV of this paper, self-defense as an inherent right—and its essential restrictions in customary international law, such as the principles of necessity and proportionality—will be discussed in depth. Self-defense as an anticipatory right, along with the individual and collective rights to use force in self-defense in an armed conflict, will be succinctly touched upon within the subsections of this section. Thereafter, to understand the threat posed toward victim states by NSAs, Section V will explore the capacity of weak or failing states' troubles, conflicts, and destabilizations to spill over to neighboring regions or distant lands.

Subsequently, the last section of this paper will examine a framework of guidelines on the use of force against NSAs in a host state. This will start by examining the details of the host state's responsibilities to protect its own citizens and maintain its territory by restraining threats from permeating its porous borders as a prerequisite to enjoying the privileges of sovereignty. The paper will then explore the limits of Ashley Deeks's unwilling-or-unable test and its utility for a victim state better assessing the willingness and capability of the state hosting the terrorist group or NSA, to pacify the conflict. This assessment is necessary to evaluate the legitimacy and reasonableness of the retaliatory use of force against that hostile state within the legal framework of international law.

II. JUST CAUSE

The principle of just cause mandates that a reasonable and ethically sound reason be given before entering into war. The principle specifies

the ends for which war can be pursued and the point at which war has to be suspended—that is, when the cause is met.[13]

There are six principles that govern a state's right to resort to the use force, which are legitimate authority, just cause, last resort, formal declaration, reasonable hope of success, and right intention.[14] For a specific use of force to be justified, all of these conditions must be met.[15]

Although, historically, states could invoke a variety of reasons as "just and reasonable" causes for them to go to war, today aggression or the threat of aggression is seen as the sole just cause for a state to resort to the use of force.[16] It must therefore be shown that an aggression made it imperative for the attacked state to respond with the use of force.[17] Protecting an ally against aggression is also traditionally viewed as a just cause to pursue war.[18] There may be multiple just causes that propel a state, or states, to use force. In contemporary practice, it is vital for a state to prove that its cause is just to attract international support, as exemplified by the 1989 US invasion of Panama, which was named "Operation 'Just Cause.'"[19]

A. Legitimate Authority

The tenet of "lawful or legitimate authority" requires the decision to declare war to be made by a legitimate sovereign power—in today's world, that power is called a nation-state.[20] The principle of legitimate authority maintains that a rightful and lawful entity can impartially declare war or evaluate whether war is just.[21] James Turner Johnson contends that this principle is imperative for a war to be deemed just since only a competent authority can make decisions pertaining to war.[22]

13. M.D. VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 370–71 (1829).

14. CHARLES A. JONES, MORE THAN JUST WAR 81 (2013).

15. *Id.*

16. *See* CHRISTOPHER J. EBERLE, JUSTICE AND THE JUST WAR TRADITION 100 (2016).

17. *Id.* at 99–100.

18. Adam L. Silverman, *Just War, Jihad, and Terrorism: A Comparison of Western and Islamic Norms for the Use of Political Violence*, *in* THE NEW ERA OF TERRORISM 149, 151 (Gus Martin ed., 2004).

19. DAVID FISHER, MORALITY OF WAR 64–66 (2017).

20. CÉCILE FABRE, COSMOPOLITAN WAR 142 (2012).

21. *Id.* at 141–42.

22. *See* James Turner Johnson, *Historical Tradition and Moral Judgment: The Case of Just War Tradition*, 64 J. RELIGION 299, 308–09 (1984).

This prerequisite has its roots in medieval Europe where local lords held standing armies and could thus declare war at will: The lawful authority of the state disabled them from invoking war at will and instead made them reliant on rulers' judgments.[23]

B. Last Resort

The use of force as a last resort means that states must search for nonlethal means of obtaining their goals and attempt to resolve conflicts through peaceful means.[24] When these alternate peaceful means have been attempted for a reasonable amount of time and have failed to meet the state's objectives, then resorting to force becomes permissible.[25] The idea of last resort hinges on a moral distinction between violence and nonviolence, with nonviolence occupying a moral high ground and thus being preferable over violence.[26] Similarly, the human and monetary costs of violence are higher than nonviolent means, such as bilateral diplomatic talks, and thus nonviolence must be the first consideration.[27]

When all other means have been exhausted, war becomes a necessity and is thus permissible, but otherwise, it is unnecessary since alternatives exist.[28] There are of course practical impediments that make it difficult to ascertain exactly whether the resort to use of force is indeed the last resort. For instance, there may be ambivalence in determining what constitutes a "judicious" amount of time devoted to peaceful means or whether all other options have indeed been exhausted.[29]

C. Formal Declaration and Reasonable Hope of Success

The just cause doctrine requires war to be accompanied by a formal declaration,[30] although state practice may not always conform to this principle today. With regard to the hope of success, the costs of war,

23. *See id.* at 307–09.
24. JOHN W. LANGO, THE ETHICS OF ARMED CONFLICT 139 (2014).
25. *See id.* at 146.
26. *See id.* at 140–46.
27. *See id.* at 141, 146.
28. *See* KIMBERLY A. HUDSON, JUSTICE, INTERVENTION, AND FORCE IN INTERNATIONAL RELATIONS 94 (2009).
29. RICHARD SHAPCOTT, INTERNATIONAL ETHICS 1928–29 (2010).
30. J. DARYL CHARLES & TIMOTHY J. DEMY, WAR, PEACE, AND CHRISTIANITY 100 (2010).

including the cost of human life and monetary costs, are so high that the decision to declare war must be made only if it is likely that the desired objective will be achieved as a consequence of this war. It is disproportionate to endanger the lives of so many people and take huge financial risks if there are limited chances of the war resulting in one's success.[31]

D. Right Intention

The right intention to go to war is to restore peace while using only the minimum force necessary to resolve a conflict.[32] Simply put, if the just cause is to put an end to aggression, then the right intention must be to achieve this end and not to seek war for monetary or other benefits.[33] The right intention therefore seeks to limit the extent of war to achieve only the proposed goal. This is important to remember at the commencement of hostilities, since there is a tendency for ulterior motives (such as the opportunity to make profits) to become much more attractive once war has begun. The right intention provision thus keeps decision-makers and those participating in war focused on their goal. Holding the right intention enables states to protect human rights and creates an environment that fosters lasting and stable peace.[34] However, state practice may not always uphold this principle, and historically states have often committed excesses during war that might have helped them secure other benefits but did not directly serve to further their cause.[35]

III. JUST WAR

A. Historical Evolution of the Just War Doctrine

The just war doctrine is in many ways a precursor to Article 2(4) and

31. *See* Kevin Macnish, *Persons, Personhood, and Proportionality: Building on a Just War Approach to Intelligence Ethics*, *in* ETHICS AND THE FUTURE OF SPYING 95, 96 (Jai Galliott & Warren Reid eds., 2016).

32. David Little, *Introduction* to DAVID SMOCK, RELIGIOUS PERSPECTIVES ON WARS, at xxc, xxix (rev. ed. 2002).

33. *Id.*

34. JILL OIPHANT, OCR RELIGIOUS ETHICS FOR AS AND A2, at 143 (Jon Mayled ed., 2d ed. 2008).

35. FISHER, *supra* note 19, at 72.

the modern-day prohibition of the use of force.[36] The historical evolutions of *jus ad bellum* and *jus in bello*, although inextricably linked, are not identical. *Jus ad bellum* is the assessment of the legality of commencing the use of force—or the justification of war—and *jus in bello* rules are the oldest body of rules governing warfare.[37] *Jus ad bellum* rules go as far back as ancient Greece, where chopping down an olive tree was akin to war crime,[38] and were aimed at reducing human suffering during the conduct of war.

Almost all religious traditions value minimizing violence and the extent of force. We begin to see allusions to the limitation of war in the biblical Old Testament, where God prohibits the Israelites from destroying fruit trees since the fruit could be eaten.[39] Additionally, in ancient Chinese and Indian traditions, some measures of humanitarianism were ordained even when dealing with one's enemy in war. Indian tradition prohibited the use of poisoned weapons, and noncombatants, including prisoners of war, had to be protected from harm's way.[40] Similarly, Confucianism was one of the earliest religions to claim that peace, not war, was the normal state of being.[41] The city-states of ancient Greece viewed sacred sites such as temples "inviolable, and mercy was to be shown to prisoners."[42] Likewise, describing a person who seeks the bloodshed and violence of an unrestrained, mismanaged war, Homer's *Iliad* reads, "[l]ost to the clan, lost to the hearth, lost to the old ways."[43]

Muslim caliph Abu Bakr ordered his troops to be honest in their

36. *See* YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 92 (Cambridge Univ. Press 5th ed. 2012) (1988).

37. Johnson, *supra* note 22, at 301–02.

38. JOHN M. DILLON, MORALITY AND CUSTOM IN ANCIENT GREECE 164 (Ind. Univ. Press 2004) (2004).

39. FREDERICK RUSSELL, THE JUST WAR IN THE MIDDLE AGES 284 (1975).

40. *See* V.S. Mani, *International Humanitarian Law: An Indo-Asian Perspective*, 83 INT'L REV. RED CROSS 59, 63–65 (2001).

41. *Introduction to Confucian Thought*, COLUM. UNIV., http://afe.easia.columbia.edu/special/china_1000bce_confucius_intro.htm [https://perma.cc/T23Z-JHTJ]; *see also* XINZHONG YAO, AN INTRODUCTION TO CONFUCIANISM 187 (2000).

42. GERHARD WERLE & FLORIAN JESSBERGER, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 393 (3d ed. 2014) (2005).

43. LORRIE GOLDENSOHN, DISMANTLING GLORY 40 (2003) (quoting HOMER, THE ILIAD bk. 9, at 251, 253 (Robert Fagles trans., Penguin Books 1990) (n.d.)).

dealings with enemies.[44] The Islamic scripture, the Quran, restricts the use of illegal force, making it punishable through eternity. This is true for other sources of Islamic law too and was implemented fully in the earlier centuries of Islam, when fighting was a last resort for spreading Islam only after all other options had been exhausted.[45] Sharia law governs and restrains the use of force by Muslims against non-Muslims in self-defense or while promoting Islam.[46]

And so war-making decisions were regulated by rules, and the rules had to be adhered to if the war was to be viewed as a legitimate endeavor. In this sense, the Islamic conception of a "just war" is very similar to the early Christian doctrine, with reasonable cause and just demeanor during war being elements of both.[47] A strong proclivity toward pacifism marked the first three centuries of Christianity, with the Church claiming that war was never moral; however, as Christianity spread to Rome this pacifism was replaced by an acceptance that war was inevitable.[48]

Analogously, *bellum justum* (or "just war") is a construct of the early Roman era, when war-making required that special priests certify the war as just to the senate.[49] If any other state wronged the Roman state, a just war could be declared, and since Roman law did not establish a distinct *jus in bello*, conduct within war could not be constrained.[50]

B. Just War Doctrine

The just war doctrine—which has been the predominant principle in international regulations of conflict—establishes whether a war was just. The determination depends on the key factors: (1) just cause (*justa causa*), (2) lawful authority (*auctoritas publica*), and (3) right intention

44. L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 20 (1993).

45. *See* JOHN KELSEY, ISLAM AND WAR: A STUDY IN COMPARATIVE ETHICS 36 (1993). For additional readings on last resort, see Bassim Tibi, *War and Peace in Islam*, *in* ISLAMIC POLITICAL ETHICS 175, 178 (Sohail H. Hashmi ed., 2002) and MOHAMMAD JAFAR AMIR MAHALLATI, ETHICS OF WAR AND PEACE IN IRAN AND SHI'I ISLAM 57 (2016).

46. ABDULLAHI AHMAD AN-NA'IM, MUSLIMS & GLOBAL JUSTICE 56 (2011).

47. ONDER BAKIRCIOGLU, ISLAM & WARFARE: CONTEXT & COMPATIBILITY WITH INTERNATIONAL LAW 47 (2014).

48. *Id.* at 47–48.

49. Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of* Jus ad Bellum *and* Jus in Bello *in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 57 (2009).

50. *Id.*

(*recta intentio*).[51] Here just cause means that a war is fought in self-defense or in retaliation against injuries inflicted by an enemy, whereas lawful authority implies that the decision to go to war must be taken by a legitimate sovereign power. The right intention ensured a war's sole purpose was to correct the wrongdoing committed by the enemy and not to commit unwarranted atrocities.[52] In this sense, the just war doctrine policed armed action during a war, although it was not explicitly laid out as such in the *jus in bello* rules. The principal goals of a just war are to avenge wrongdoing and restore peace.[53]

The early developments in the just war doctrine regulated what could be a just cause to go to war, but the guidelines and protocols against conduct during a war were downright nonexistent; for example, atrocities against civilians were not proscribed.[54] The just war doctrine established that, although war may be undesirable, it is not always the worst of evils since in some contexts a greater evil may occur, and war can thus be used to put an end to it. Furthermore, this doctrine seeks to limit the use of force during conflicts, so that recourse to war is minimal. It means that war can only be pursued as a last or necessary resort to placate conflicts, and in the end, justice prevails and corrects the wrongs done.[55] In this manner, peace and security are maintained. In medieval Christian just war tradition, God called His people to go to war for the purposes of religious propagation; this was not only permitted but encouraged.[56]

1. Marcus Tullius Cicero

Marcus Tullius Cicero based his views on Aristotle's, seeing the state as a natural "wider self" that must be protected from danger.[57] He

51. ROBERT KOLB & RICHARD HYDE, AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS 21–22 (2008).

52. Howard M. Hensel, *Theocentric Natural Law and Just War Doctrine*, *in* THE LEGITIMATE USE OF MILITARY FORCE 5, 12–14 (Howard M. Hensel ed., 2008).

53. *See* Gregory M. Reichberg, *Jus ad Bellum*, *in* WAR: ESSAYS IN POLITICAL PHILOSOPHY 11, 14 (Larry May ed., 2008).

54. Sloane, *supra* note 49, at 57.

55. Andrew Liaropoulos, *War and Ethics in Cyberspace: Cyber-Conflict and Just War Theory*, *in* PROCEEDINGS OF THE 9TH EUROPEAN CONFERENCE ON INFORMATION WARFARE AND SECURITY 177, 178 (Josef Demergis ed., 2010).

56. Michael J. Broyde, *Fighting the War and the Peace: Battlefield Ethics, Peace Talks, Treaties, and Pacifism in the Jewish Tradition*, *in* WAR AND ITS DISCONTENTS: PACIFISM AND QUIETISM IN THE ABRAHAMIC TRADITIONS 1, 24 (J. Patout Burns ed., 1996).

57. KINGA TIBORI SZABÓ, ANTICIPATORY ACTION IN SELF-DEFENCE 34 (2011).

was a proponent of the idea that warfare was legitimate if undertaken in defense or as a punishment.[58] He believed that one should use force only after peaceful dialogues have failed.[59] This demonstrates his preference of pacific means of resolution over the use of force. However, he conceded that since the prosperity of the state had to be ensured, war could also be initiated for "supremacy" or "glory."[60] Cicero further argued that for a war to be just not only must its aim be to restore peace but it must also be fought with restraint.[61] Other just war theorists, including St. Augustine, echoed many of these ideas later.

2. St. Augustine

Even when St. Augustine of Hippo spoke of limits to acceptable warfare, enmeshing just war theory in Christian theology, this discussion was framed in terms of *jus ad bellum*.[62] He reconciled earlier Christian pacifism with the Roman *bellum justum* by arguing that Christians might resort to force to end conflicts.[63] Influenced by Cicero, Augustine viewed warfare as legitimate when it was undertaken pursuant to divine command, self-defense, punishment, or the defense of others.[64] Of the four permissible grounds, he spoke most highly of war that was initiated for the defense of others, as this was a virtuous and altruistic concern.[65] In Augustine's conception of a just war, states could wage war to remedy future wrongdoings and spread Christianity.[66] He believed that war and slavery originated from man's commission of sin, and thus, they were forms of punishment for past wrongdoers.[67] He further believed that it

58. Andrea Keller, *Cicero: Just War in Classical Antiquity*, *in* FROM JUST WAR TO MODERN PEACE ETHICS 9, 24 (Heinz-Gerhard Justenhoven & William A. Barbieri, Jr. eds., 2012).

59. *See* CRAIG M. WHITE, IRAQ: THE MORAL RECKONING 7 (2010).

60. TERENCE J. MARTIN, TRUTH AND IRONY: PHILOSOPHICAL MEDITATIONS ON ERASMUS 109–10 (2015).

61. *Id.* at 110–11.

62. Robert J. Delahunty & John Yoo, *From Just War to False Peace*, 13 CHI. J. INT'L L. 1, 10–11, 14 (2012).

63. Mary Ellen O'Connell, *The Prohibition of the Use of Force*, *in* RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW 89, 91–92 (Nigel D. White & Christian Henderson eds., 2013).

64. SZABÓ, *supra* note 57, at 36.

65. *See id.*

66. JOHN YOO, POINT OF ATTACK: PREVENTATIVE WAR, INTERNATIONAL LAW, AND GLOBAL WELFARE 50–51 (2014).

67. *See id.*

was the government's duty to maintain peace and punish wrongdoers and that it could do so by using force if required—in fact, not doing so was a sin.[68]

3. St. Thomas Aquinas

Similarly, medieval scholar St. Thomas Aquinas also condemned reckless slaughter.[69] Without framing his argument in categorical *jus ad bellum* terms, Aquinas drew on Augustine's work to claim that war could be just under certain circumstances, reiterating the principles of just cause, formal authority, and right intention.[70] In his seminal work *Summa Theologica*, he sought to explore whether waging a war is ever permissible, concluding that war is not forbidden in Christian teachings but must be fought for a just cause.[71] His exploration of biblical texts led him to infer the same conclusions as St. Augustine $\frac{1}{m}$ that people who are targets of force deserve such fate owing to their past sins.[72] His qualifications for just war theory are the same as Cicero's and Augustine's; however, Aquinas expounded on the contention that war must be initiated by legitimate authority, which rests with the sovereign but can also be exercised by a judge.[73]

4. Post-Aquinas Just War Doctrine

Thinkers who followed Aquinas built on his scholarship to establish certain guidelines regarding the justifiability of war, including the ability to respond to breaches of territorial sovereignty and violations of diplomatic immunity.

The institution of papacy and the Holy Roman Emperor made the just war doctrine a practical tool for regulating warfare in the medieval era.[74] Because the power of the Church was absolute during the Middle Ages, it was possible to prohibit the use of weapons detested by God. Once the modern states ceased to recognize the authority of religious

68. *See id.* at 51.
69. Sloane, *supra* note 49, at 58.
70. ROBIN GILL, A TEXTBOOK OF CHRISTIAN ETHICS 269 (4th ed. 2014).
71. *See* 3 ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. 2, sec. 2, at 1353–54 (Fathers of the English Dominican Province trans., Cosimo 2007) (1912).
72. *See id.*
73. JOSEPH CAPIZZI, POLITICS, JUSTICE, AND WAR 82–83 (2015).
74. DAVID K. CHAN, BEYOND JUST WAR 12–13 (2012).

institutions, the downfall of the just war doctrine became inevitable. *Jus ad bellum* and *jus in bello* were more closely linked in the times of the just war doctrine, where the *ad bellum* justification for war affected the *in bello* actions of war.[75]

The emergence of a separate *jus in bello* discourse can partially be attributed to the secular medieval institution of chivalry, which regulated the actions of knights. The laws of chivalry were customary regulations of gallant demeanor and regulated by the "Courts of Chivalry."[76] And yet, these codes too were linked to the *ad bellum* justification for war, applying only to Christian knights and allowing civil authority to decide upon rights for others.[77] The chivalric code distinguished between innocents and combatants by establishing that all those who did not carry arms were innocent.[78] It was this differentiation that influenced later scholars such as Grotius in their conceptions of noncombatants. Incorporating regulations inspired by the requirements of chivalry, England managed to codify the Articles of War, forbidding its military to engage in the excesses of war.[79]

5. Francisco de Vitoria

Francisco de Vitoria, whose work influenced later thinkers such as Grotius, categorized *jus ad bellum* and *jus in bello* as two separate components of the dualistic axiom that now dictates the law of war.[80] Vitoria propagated a natural law argument to not wage war to promote religion and that humans must hold the right intention when engaging in violence.[81] It is possible for a belligerent to believe in the justness of his or her cause even when it is not a just cause because all states believe that their cause to go to war is just, but not all states waging war can actually be fighting a just war. For this reason, Vitoria emphasized the significance of *jus in bello* rules, which are meant to limit the excesses of

75. Sloane, *supra* note 49, at 58.
76. GREEN, s*upra* note 44, at 21.
77. Sloane, *supra* note 49, at 58–59.
78. *See* ROBERT W. MCELROY, MORALITY AND AMERICAN FOREIGN POLICY 150 (1992).
79. Gary D. Solis, *Courts Martial*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 283, 283 (Antonio Cassese et al. ed., 2009).
80. Hensel, *supra* note 52, at 11; Sloane, *supra* note 49, at 59.
81. Norman Solomon, *The Ethics of War: Judaism*, *in* THE ETHICS OF WAR 108, 109 (Richard Sorabji & David Rodin eds., 2006).

war. He added two more rules to Aquinas's right authority framework to justify nondefensive wars: (1) last resort and (2) bounds of righteousness.[82] These meant that war could only be declared once all other means of establishing peace had been exhausted and that it should be fought only within the bounds of righteousness without causing excessive harm. He saw pre-emptive self-defence as an unacceptable excess of power that could be exploited in that one state could easily invoke a threat and engage in a war even when no such threat actually existed.[83] Expressing his views on proportionality, Vitoria wrote that when a war is commenced, it should not be prosecuted in a way that destroys everything or is not bound by any prohibitions of atrocities,[84] but war should be fought in such a way that it is only waged to right wrongs, through necessary measures, for the sake of justice.[85] He was thus critical of the Spanish conquest of the New World for violating the principle of just war and causing incommensurate harm.[86] With Vitoria's writings, the emphasis of a just war doctrine shifted from a rhetoric grounded in religious belief, applicable only to Christians, to a discourse that was based on moral beliefs and extended to all of humanity.[87]

6. Hugo Grotius

It was Hugo Grotius who secularized the discourse by discussing both *ad bellum* and *in bello*, arguing from a natural law position that all combatants should be bound by certain regulations to ease the suffering that war often afflicted on combatants and noncombatants alike.[88] During his lifetime, Grotius endured thirty years of conflict, which shaped his views on war; during these years, both Catholics and Protestants believed that they were fighting for a just cause, thus problematizing the idea that

82. ONDER BAKIRCIOGLU, SELF-DEFENCE IN INTERNATIONAL AND CRIMINAL LAW 86 (2011).

83. *Id.* at 124.

84. JAMES BROWN SCOTT, THE SPANISH ORIGIN OF INTERNATIONAL LAW 241 (4th prtg. 2008).

85. *Id.*

86. CHARLES & DEMY, *supra* note 30, at 33.

87. *Id.* at 32.

88. Steve Viner, *The Moral Foundations of the jus ad bellum/jus in bello distinction*, *in* ROUTLEDGE HANDBOOK OF ETHICS AND WAR 49, 52 (Fritz Allhoff, Nicholas G. Evans & Adam Henschke eds., 2013); *see also* WASEEM AHMAD QURESHI, JUST WAR THEORY AND EMERGING CHALLENGES IN AN AGE OF TERRORISM 41–42 (2017).

good intentions make a war legitimate.[89] Grotius therefore emphasized the need for proving a cause is just in accordance with an objective law.[90] He believed that the mightiness of law was to prevent injury and correct wrongdoings and that war would begin once such mightiness of law had ended.[91] In *De Jure Belli ac Pacis* he writes that before a war can be "called just[,] . . . it is not enough that it be made between Sovereigns, but it must be undertaken by public Declaration, and so that one of the Parties declare[s] it to the other."[92]

Despite the recognition that war was a fact of life, Grotius warned against rushing to war even when the cause was just—the ruler must weigh the advantages and costs of war before making the final decision.[93] Regarding the protection of noncombatants, he wrote that during any armed conflict, the war should be conducted so that no noncombatant is hurt or affected.[94] He also alluded to the requirement of proportionality, emphasizing that war should only be undertaken if the resulting good is likely to outweigh the expected human cost.[95] His influential work altered the mainstream foundation of international law from being based on the individual to being grounded objectively in the law of nations.[96]

7. Emer de Vattel

Swiss philosopher Emer de Vattel developed even more specificity in *jus in bello* by distinguishing between the enemy and people who do

89. *See* Ib Martin Jarvad, *Mathematical Thinking and International Law*, *in* MATHEMATICS AND WAR 367, 387–89 (Bernhelm Booß-Bavnbek & Jens Høyrup eds., 2003).

90. See RENÉE JEFFERY, HUGO GROTIUS IN INTERNATIONAL THOUGHT 39 (2006).

91. *See id.* at 39–40.

92. GREEN, *supra* note 44, at 1 (quoting HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE bk. 9, ch. 3, § 5, at 552–53 (J. Barbeyrac ed., London, W. Innys et al. 1738) (1625)).

93. CORNELIU BJOLA, LEGITIMISING THE USE OF FORCE IN INTERNATIONAL POLITICS 30–32 (2009).

94. RICHARD SHELLY HARTIGAN, THE FORGOTTEN VICTIM 99–100 (1982); Tyler Rauert, *Early Modern Perspectives on Western Just War Thought*, *in* THE PRISM OF JUST WAR 87, 94 (Howard M. Hensel ed., 2010).

95. HARTIGAN, *supra* note 94, at 99.

96. *Cf.* PETER PAVEL REMEC, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIUS AND VATTEL 239–241 (1960); *see also* WASEEM AHMAD QURESHI, *supra* note 88, at 41–42 (2017).

not carry arms (even though they belong to the enemy's territory).[97] He noted that any injury caused by a war that was not necessary or meant to contribute to victory is reprimandable and violates the ethics of justice or natural law; he wrote further on the conduct that must be exhibited during war.[98] However, his view on self-defense is inflexible: He argued that a country's inherent right to self-defense is not only a right but also a revered and holy duty in accordance with providing peace and security to a state's people.[99]

8. Succession of the Just War Doctrine

The just war tradition collectively highlights key principles that must be adhered to for a war to be considered just, including legitimate authority, just cause, last resort, formal declaration, reasonable hope of success, and right intention.[100] The concept of last resort is intrinsically linked to necessity; war becomes a necessity only when it is the last resort. Only then can force be used to mitigate a danger.

With the Peace of Westphalia and a new body of law governing international strife, *jus ad bellum* decreased in relevance, as all parties would claim that their use of force was for a just cause, and with no international arbiter, all claims would be equally legitimate.[101] Grotius's ideas, including his views on the use of arbitration, had a significant influence on the treaties that comprised the Peace of Westphalia.[102] The just war doctrine effectively declined, and international humanitarian law would completely replace it in a few centuries. The authority of the Church in medieval Europe meant that *bellum justum* could be enforced objectively, but the legal landscape had changed so much that whether a war was justified was subject to each sovereign's personal interpretation of an act of war.[103] While previously a central authority judged whether

97. JUDITH GARDAM, NECESSITY, PROPORTIONALITY, AND THE USE OF FORCE BY STATES 37–38 (2004).

98. *Id.*

99. EMER DE VATTEL, THE LAW OF NATIONS 304 (Béla Kapossy & Richard Whatmore eds., 2008).

100. *See* JONES, *supra* note 14, at 79.

101. STEVEN P. LEE, ETHICS AND WAR 58–60 (2012).

102. Mary Ellen O'Connell & Lenore VanderZee, *The History of International Adjudication*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 40, 42–43 (Cesare P.R. Romano, Karen J. Alter & Yuval Shany eds., 2014).

103. MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER 131–36 (1994).

an act of force was just, this judgment was now left to the aggressors' own discretion.[104] As a result, war evolved into a conflict between two or more sovereign states with primarily political motivation, and the prior theological and philosophical concepts of just war or unjust war have dissipated with time.[105] Thus the Peace of Westphalia ushered in a new doctrinal era where every state is sovereign and hence the equal of other states, and as a result, no nation or country is above any other country or nation in authority.[106] With the growth of positivist thought in the nineteenth century, the just war theory based on divine and natural law became anachronistic, and the focus shifted to scientific rationality. Vattel and others helped change law from being above the states to being dictated by states.[107]

C. Development of International Humanitarian Law

Just war theory dealt predominantly with *jus ad bellum* and only dispensed *jus in bello* tangentially; therefore, it came to be modified and, as international humanitarian law emerged, the focus of scholarly interest almost exclusively shifted to *jus in bello*. Wars could no longer be understood as just or unjust, but the atrocities of war could be categorized as acceptable or unacceptable. In 1856, the world saw its first interstate agreement to curtail the excesses of war, drawn up at the end of the Crimean War.[108] This was in some sense the precursor to the Geneva Conventions, the first of which was signed eight years later and aimed at the protection of wounded soldiers.[109] The First Geneva Convention in 1864 laid the groundwork for future conventions in 1906, 1929, 1949, and 1977.[110] There were now explicit rules governing wartime actions, regardless of who was fighting or why the war was being fought: The emphasis had shifted fully from *jus ad bellum* to *jus in*

104. *Id.*

105. Leslie C. Green, *The Law of War in Historical Perspective*, *in* 72 INTERNATIONAL LAW STUDIES: THE LAW OF MILITARY OPERATIONS 39, 52 (Michael N. Schmitt ed., 1998).

106. Mary Ellen O'Connell, *Peace and War*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 272, 277 (Bardo Fassbender & Anne Peters eds., 2012).

107. *Id.* at 278.

108. MICHAEL HAAS, INTERNATIONAL HUMAN RIGHTS 147 (2008); *see also* A GLOBAL CHRONOLOGY OF CONFLICT 1220 (Spencer C. Tucker ed., 2010).

109. PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 344 (7th rev. ed. 1997); BOB REINALDA, ROUTLEDGE HISTORY OF INTERNATIONAL ORGANIZATIONS 55 (2009).

110. MALANCZUK, *supra* note 109, at 344; *see also* REINALDA, *supra* note 109, at 55.

bello. To a large degree, international humanitarian law is based upon these Conventions, which govern and regulate the legal framework restraining the use of force and provide guidelines for the protection of noncombatants and the general civilian population during armed conflicts or wars.[111]

While the Geneva Conventions focused on the treatment of those incapacitated or effected in some other manner by warfare, the Hague Conventions prescribed the means and methods of actual armed strife.[112] In 1899, the First Hague Convention was adopted by twenty-six countries meeting at the behest of the Russian Czar and was later followed by another declaration in 1907.[113] These declarations dealt with the specifics of *jus in bello*, prohibiting the use of certain projectiles and other armaments. The Hague Conventions are the first codified examples of such protocols for the use and conduct of force during armed conflicts,[114] and they are largely accepted by other states as a binding and agreed-upon tool. To assure compliance, Article 3 of the Second Hague Convention stated that compensation would have to be paid if a belligerent should violate the stipulations of the regulations.[115] The two World Wars were regulated by the Hague Conventions and the war crimes tribunals, each basing their judgments around these sanctions.[116] However, it is noteworthy that these laws dealt with collectives, such as state armies, and not with individuals who committed excesses during a war.

International law in the nineteenth century managed to separate *ad bellum* and *in bello*—becoming largely indifferent to the justifications of war. During the Twentieth Century, war was a prominent feature of European statehood; however, the weapons used in warfare could often only do minimal damage and wars were only fought on frontiers, usually affecting few noncombatants.[117] With the Industrial Revolution and the

111. MALANCZUK, *supra* note 109, at 344.

112. ELIZABETH CHADWICK, SELF-DETERMINATION, TERRORISM, AND THE INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT 69 (1996).

113. DOUGLAS ROCHE, BREAD NOT BOMBS 58 (1999).

114. GREEN, *supra* note 44, at 32.

115. Convention Respecting the Laws and Customs of War on Land (Fourth Hague Convention), art. 3, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.

116. KLAUS BACHMANN & ALEKSANDAR FATIĆ, THE UN INTERNATIONAL CRIMINAL TRIBUNALS 1 (2015); Alexander Schwarz, *War Crimes*, *in* THE LAW OF ARMED CONFLICT AND THE USE OF FORCE: THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1302, 1304 (Frauke Lachenmann & Rüdiger Wolfrum eds., 2017).

117. *See* ERIC HOBSBAWM, ON EMPIRE 16–19 (2008).

advent of nuclear technology, the newfound potency of armaments required some regulation of their use since wars could now be potentially limitless. Aerial warfare meant that civilians could often become the object of attack or collateral damage. The distinction between civilian and combatant became more pertinent than ever before, and international humanitarian law had to accommodate this distinction.[118]

After the end of the First World War, the sheer scale of the war and its accompanying casualties had changed the way states viewed war, with statesmen now looking to prevent intense warfare. The most significant development of the era in this regard was the codification of a 1928 treaty that repudiated war in general.[119] The treaty, known more commonly as the Kellogg–Briand Pact or the Pact of Paris, was steered by the efforts of US Secretary of State Frank B. Kellogg and French Foreign Minister Aristide Briand.[120] The treaty sought to repudiate and renounce war in totality by condemning any kind of use of force against any state, and further noted that all party states should disavow the use-of-force as a protocol in their foreign policies to resolve any regional or nonregional state conflicts.[121] Briand had written to the United States in 1927 to agree to "outlaw war."[122] Kellogg advocated that this proposition should be extended to all powerful states, to ensure that war is never employed as an instrument of national policy again.[123] In August 1928, fifteen states signed the pact with great enthusiasm, with some expecting that this would be the end to war in the world.[124] Signatories were determined to resolve conflicts through means other than war,[125] stating that all conflicts should only be resolved by peaceful means, such as

118. *See* JUDITH GAIL GARDAM, NON-COMBATANT IMMUNITY AS A NORM OF INTERNATIONAL HUMANITARIAN LAW 7–8 (1993).

119. MURRAY COLIN ALDER, THE INHERENT RIGHT TO SELF-DEFENSE IN INTERNATIONAL LAW 55 (2013).

120. GARY D. SOLIS, THE LAW OF ARMED CONFLICT 83 (2d ed. 2016).

121. STANMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 52 (1996).

122. E.E. REYNOLDS & N.H. BRASHER, BRITAIN IN THE TWENTIETH CENTURY 135 (1966).

123. *See* DAVID SWANSON, WHEN THE WORLD OUTLAWED WAR 125 (2011); REYNOLDS & BRASHER, *supra* note 122, AT 135–36.

124. Randall Lesaffer, *Too Much History: From War as Sanction to the Sanctioning of War*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 35, 52 (Marc Weller ed., 2015).

125. *Id.*, *see also* WASEEM AHMAD QURESHI, THE USE OF FORCE IN INTERNATIONAL LAW 49 § 2.4 (2017).

diplomatic dialogues between conflicting states, and that recourse to a conflict had to be peaceful and nonviolent as a prerequisite of this pact.[126] The framework provided by the treaty for dispute resolution included the establishment of a conciliation commission and an arbitration tribunal. To ensure compliance, the International Law Association adopted the Budapest Articles of Interpretation in 1934,[127] under which a belligerent in violation of the pact would be liable to pay compensation for damage caused. The pact was radical for its time since it was the first treaty of its kind to outlaw the hegemonic tenets to resort to war, which in fact had the potential to disturb the global geopolitical balance of powers.[128] Although the pact had made aggressive warfare a crime, it could not prevent the outbreak of the Second World War.[129]

The regulatory doctrines that determined the justness of declaring war by any authority, developed rules and regulatory guidelines to be followed during the course of a war so as not to infringe the rights of general noncombatant civilians. The UN Charter established a new principle for the use of force or the resort to war by prohibiting the use of force under any circumstances (Article 2(4)) except self-defense (Article 51(2)).[130] Article 2(4) restricts aggression, meaning serious violations of peace and all other uses of force.[131] The scope of the Article can be inferred from the negotiations in San Francisco, where a US delegate claimed that the intention of the text was to prohibit the use of force in the widest sense, such that it would be an absolute proscription for states to use force.[132] Article 51 allows for self-defense in the case of an armed attack, until such time as the Security Council reacts or when peace is restored, at which point the right to self-defense ceases to remain with the state attacked.[133]

126. Nikolaï Konstantinovitch Tarassov, *Introduction to Peaceful Settlement of Disputes*, *in* INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 501, 502 (Mohammed Bedjaoui ed., 1991).

127. ALEXANDROV, *supra* note 121, at 64.

128. SZABÓ, *supra* note 57, at 90.

129. STUART HULL MACINTYRE, LEGAL EFFECTS OF WORLD WAR II ON TREATIES OF THE UNITED STATES 80–82 (1958).

130. U.N. Charter arts. 2, ¶ 4 & 51; *see also* WASEEM AHMAD QURESHI, THE USE OF FORCE IN ISLAM 19–24 (2017).

131. U.N. Charter art. 2, ¶ 4; *see also* QURESHI, *supra* note 130 at 19–24.

132. SIMON CHESTERMAN, JUST WAR OR JUST PEACE? 49 (2001).

133. Jutta Brunnée, *The Security Council and Self-defence: Which Way to Global Security?*, in THE SECURITY COUNCIL AND THE USE OF FORCE 107, 128 (Niels Blokker & Nico Schrijver eds., 2005); Nilufer Oral, *Law of the Sea, Naval Blockades and Freedom*

IV. SELF-DEFENSE

Self-defense has been viewed as a legitimate justification for the invocation of war in both ancient and medieval times. However, with the emergence of modern international law, war came to be viewed as an appropriate partisan instrument, shifting the emphasis from the right to self-defense to the right to wage war.[134] When an entity breaches international law by attacking a sovereign state, the latter may engage in self-defense to protect its citizens and re-establish law and order within its territory. As a consequence of the 1837 *Caroline* case, limits to self-defense emerged such that necessity is now a requirement for self-defense.[135] Armed action for self-defense is thus only permissible when no alternative methods can be used to achieve the intended goal. The necessity limitation is melded with the principle of proportionality, which mandates that self-defense should be restricted to necessity; that is, it is the only available recourse to placate a conflict after all nonviolent means to resolve a conflict have been exhausted.[136] Proportionality is therefore dependent upon the necessity principle, for one can only take actions that will allow it to meet the necessary goal, and no excesses can be made during such a course.[137]

A. Self-defense Evolution

From the seventeenth century onwards, realistic thinking came to overshadow natural law in Europe, and the religious just war doctrine was abandoned in favor of a more positivist approach to self-defense. These realist ideas both fed into and derived from the context that they existed in, such as the Peace of Westphalia, which altered the map of

of Navigation in the Aftermath of Gaza Flotilla Incident of 31 May 2010, *in* LAW OF THE SEA, FROM GROTIUS TO THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA 356, 367 (Lilian del Castillo ed., 2015).

134. D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 157–58 (1958).

135. James G. Apple, *Origin of Definition of "Necessity" in the International Law of Self Defense—the Caroline Affair*, INT'L JUDICIAL MONITOR (2012), http://www.judicialmonitor.org/archive_spring2012/historic.html [https://perma.cc/8CJ9-ZRZG].

136. *See* MICHAEL NEWTON & LARRY MAY, PROPORTIONALITY IN INTERNATIONAL LAW 147 (2014).

137. JONATHAN CROWE & KYLIE WESTON-SCHEUBER, PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 56–57 (2013).

Europe.[138] The Peace of Westphalia rested on the principle that the state (ruler) was sovereign, and war was an unqualified, outright privilege that can only be enjoyed by a state sovereign. Under the *raison d'état* (reason of state), state survival became the primary consideration, thus making self-defense an unconditional, inherent right.[139]

The Hobbesian conception of the state of nature as one of war meant that the right to wage war was simply an extension of self-preservation.[140] For Hobbes, the best way to defeat an enemy was through waging a preventive war: The enemy would be occupied with protecting itself and thus could not plan an invasive attack.[141] Conversely, military theorist Carl von Clausewitz viewed war as a meticulous partisan tool, which was a means of reaching one's political objectives; it was thus not an exception to the normal state of being;[142] self-defense became the primary pursuit of states as opposed to peace. For these reasons, the principle of self-preservation occupied a privileged position in international affairs which deemed self-defense to be the absolute and holy duty of a state.[143] Self-defense interventions were closely tied to self-preservation goals and thus came to be viewed as presumptively legitimate.[144] This conception—which recognized self-defense beyond the territories as an inherent right—had borrowed self-defense from medieval natural law and modified self-defense to make it more inclusive of the interstate conflicts that were unfolding at the time.[145] Scholars and strategists alike considered armed interventions for self-defense favorably on humanitarian footings.[146]

With advances in international humanitarian law during the nineteenth century, the limitless right to self-defense came under restrictions.[147] After the *Caroline* case, US Secretary of State Daniel

138. *See* Sohail H. Hashmi & James Turner Johnson, *Introduction* to JUST WARS, HOLY WARS, AND JIHADS 3, 18 (Sohail H. Hashmi ed., 2012).

139. *See* FRIEDRICH MEINECKE, MACHIAVELLISM 135 (Douglas Scott trans., Transaction Publishers 1998) (1957).

140. *See* PRESTON KING, THE IDEOLOGY OF ORDER 314 (2d ed. Frank Cass Publishers 1999) (1974).

141. *See* DARIO BATTISTELLA, THE RETURN OF THE STATE OF WAR 70 (ECPR Press 2008) (2006).

142. MIKE BOURNE, UNDERSTANDING SECURITY 137–38 (2014).

143. SZABÓ, *supra* note 57, at 69–71.

144. *Id.* at 70–71.

145. *See id.*

146. *Id.* at 73.

147. *Id.*

Webster stated,

> A just right of self-defence attaches always to nations as well as to individuals, and is equally necessary for the preservation of both. But the extent of this right is a question to be judged of by the circumstances of each particular case, and . . . nothing less than a clear and absolute necessity can afford ground for justification.[148]

He understood necessity to be a situation where there were no alternatives, and the reaction had to be immediate.[149]

From the second half of the nineteenth century, war began to be viewed as a last resort, instead of a supreme right.[150] In the past, states could conduct armed attacks in self-defense even if no plausible threat existed; however, as a last resort, action could only be undertaken if all other alternatives to eliminate a threat had been exhausted.[151] Self-preservation began to be condemned by scholars as a dangerous idea. This coincided with the emergence of international bodies such as the Hague Conventions of 1889 and 1907, which sought an end to the arms race that states had been engaged in during the self-preservation era.[152] The turn of the century saw the birth of the Hague Conventions and the League of Nations, both of which altered the normative framework surrounding the rights to war that had existed under the law in the preceding centuries.[153]

B. Limitations on Self-defense

Self-defense came to face further restrictions in the twentieth century with the promulgation of the Hague Convention of 1907 and later the 1928 Kellogg–Briand Pact.[154] Under the latter, self-defense is only

148. *Id.* (quoting Letter from Daniel Webster, U.S. Sec'y of State, to Henry Fox, British Minister in Wash. (Apr. 24, 1841), *reprinted in* 29 BRITISH AND FOREIGN STATE PAPERS, 1840-1841, at 1132–33 (1857)).

149. *Id.*

150. JACKSON NYAMUYA MAOGOTO, BATTLING TERRORISM 21 (2005).

151. *Id.*

152. *See* PETER JACKSON, BEYOND THE BALANCE OF POWER 63 (2013); OLIVER P. RICHMOND, THE TRANSFORMATION OF PEACE 34 (2005).

153. DINSTEIN, *supra* note 36, at 79–82.

154. *See* KIRSTEN SELLARS, 'CRIMES AGAINST PEACE' AND INTERNATIONAL LAW 166–67 (2013).

allowed to counter aggression.[155] Although the pact itself makes no mention of self-defense, it was featured prominently in the negotiations leading up to the pact. Kellogg believed that an explicit reference to self-defense was unnecessary given that the right to self-defense was an inherent right contained in each treaty; however, the state undertaking an act of self-defense must have a reasonable cause if it wants the world to condone its action.[156]

International attitudes about war were being reshaped prior to World War I, demonstrating the need for a new moral code and legal interpretation of war now that war had become exponentially more potent.[157] Pacifist views began to gain ground as many realized the destructive capacity of modern warfare and the potential of war in the balance-of-power system.[158] The means now had to be devised to prohibit, or at least limit, warfare.[159]

The Covenant of the League of Nations, adopted at the Paris Peace Conference in 1919, sought to make member states adhere to rules that prevented them from engaging in war at will.[160] The covenant's expectation that member states would come to one another's aid when faced with external aggression implied that states can use force for self-defense; however, there were no explicit references to self-defense.[161] However, permission to use self-defense only exists when there is an actual instance of external aggression taking place. Real-world practice, such as the Japanese invasion of Manchuria, defied the covenant and its intentions[162] and ultimately led to its demise.[163] The flaws in the covenant became glaringly obvious as states invoked self-defense as a means to justify their invasions, even when their supposed self-defensive use of force lacked the natural law essence of self-defense.[164] Japan, for

155. *See id.*

156. *See* DINSTEIN, *supra* note 36, at 192; ALDER, *supra* note 119, at 56.

157. *See* VOLKER R. BERGHAHN, EUROPE IN THE ERA OF TWO WORLD WARS 26 (Princeton Univ. Press 2006) (2002).

158. *Id.*

159. *Id.*

160. ATHANASIA SPILIOPOULOU ÅKERMARK, JUSTIFICATIONS OF MINORITY PROTECTION IN INTERNATIONAL LAW 101–02 (Kluwer Law Int'l 1997) (1996).

161. *See* DINSTEIN, *supra* note 36, at 82.

162. DAVID F. BURG, EYEWITNESS HISTORY: THE GREAT DEPRESSION 83 (updated ed. 2005); *see also* JOSEPH PRESTON BARATTA, THE POLITICS OF WORLD FEDERATION 41–42 (2004).

163. NIKOLAS STÜRCHLER, THE THREAT OF FORCE IN INTERNATIONAL LAW 12 (2007).

164. SZABÓ, *supra* note 57, at 92.

example, claimed its invasion of Manchuria was self-defense, not for its own rights and interests, and that acquisition of territory was not its goal.[165] However, in so doing, Japan used force without the actual existence of a threat or an immediate retaliatory attack—which could be considered aggression of any sort—disregarding the illegality of its actions.[166]

The normative structure that was emerging toward the start of the twentieth century sought to prohibit war by at least establishing that states did not have an absolute right to war except in cases of self-defense. It was thus that self-defense gained a unique place in the discourse surrounding warfare in the twentieth century, as it is the only exception that allows for war, and yet it is itself restricted in many ways.

C. Self-defense Under Article 51

The United Nations serves to maintain peace and prevent armed warfare among states and mediate in situations of conflict. Article 2(4) of the UN Charter prohibits any use of force and states, "All 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."[167] The UN Charter restrains the use of force by any state under any circumstances; it also prohibits states from even threatening to use force against other states. However, the UN Charter provides only one exceptional circumstance where a state can resort to use force: Under the inherent right of self-defense, a state can use force to safeguard its territories against any aggression for the maintenance of peace and security. This regulation is enshrined in Article 51 of the UN Charter:

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

165. ALEXANDROV, *supra* note 121, at 68.
166. *Id.* at 68–75.
167. U.N. Charter art. 2, ¶ 4.

> and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[168]

The UN Charter is the most important document dealing with self-defense, not only because of its prominence in regulating international affairs but also its explicit reference to the inherent right to self-defense. Article 51 is read by some as an unambiguous or unequivocal emphasis to guarantee and codify the inherent right to self-defense; however, it places limits on self-defense by allowing self-defense only if an armed attack has already occurred,[169] with war being renounced as a legitimate tool of state or foreign interest procurement strategy. Under these interpretations, the threat of an armed attack cannot be construed as a legitimate trigger for the use of force against another.[170] However, expansive interpretations emphasize the context and purpose of Article 51 to argue that preemptive action is self-defense.[171] Those who endorse these contentions argue that Article 51 only refers to one aspect of customary international law on self-defense and does not cover facets of it; consequently, the right to self-defense can also be invoked in response to a threat of armed attack.[172] Proponents of this view claim that Article 51 was not part of the original draft and was only added upon reconsideration, indicating that it was not intended to overrule customary international law but to codify it.[173] It has to be conceded that during the initial preparations of the Charter, there seemed to be no intention displayed by the states to alter the customary law on self-defense; however, there is no material provenance of indication that such self-defense in a preemptive recourse against a threat to use force is permissible under the UN Charter.[174]

In actuality, preventive action to deal with potential threats can only be undertaken at the behest of the Security Council, thereby making the

168. *Id.* art. 51.
169. SZABÓ, *supra* note 57, at 109.
170. Mary Manjikian, *Special Problems I: The Question of Preemption*, *in* THE ASHGATE RESEARCH COMPANION TO MILITARY ETHICS 59, 60–63 (James Turner Johnson & Eric D. Patterson eds., 2015).
171. *Id.*
172. *See* SZABÓ, *supra* note 57, at 109–11.
173. *See* JACKSON MAOGOTO, TECHNOLOGY AND THE LAW ON USE OF FORCE 11–12 (2015); BJOLA, *supra* note 93, at 48.
174. BJOLA, *supra* note 93, at 48.

Charter system the arbiter,[175] as opposed to states, which previously could deem for themselves what comprised self-defense. It thereby managed to prohibit unilateral preventive or preemptive war in self-defense since an actual aggression or armed attack needs to be established to engage in the use of force in self-defense, and even then, such actions or use of force in self-defense has to be well within the proportionate measurements against retaliatory aggression; it also has to be a necessary measure and a last resort to resolve a conflict.[176]

Now that war was condemned, and ceased to be understood as the natural state in international politics, self-defense gained prominence as the only grounds on which armed action could be undertaken. Subject to the caveat that whether self-defense applies is subject to interpretation, Article 51 is unequivocal in that the self-defense is justifiable as a response only to an actual attack, not a perceived threat.[177]

The mere use of force is not adequate for an event to be viewed as an armed attack; the gravity requirement was set by the ICJ in the 1986 *Nicaragua* case. The Court ruled that self-defense could only be launched against aggression of adequate "scale and effects."[178] The ICJ ruled that "it [is] necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms."[179] Thus, whether or not a state construes an action as an armed attack is irrelevant; for self-defense to be permissible it must only be in retaliation to an aggression that violates the sovereignty of a victim state within the confines of international law.[180] Consequently, an act of aggression that contravenes Article 2(4) and fulfills the gravity requirement can be responded to with self-defense that is both necessary and proportional to the initial undertaking.[181] However, the ICJ did claim that the Article 51 deals only with a specific aspect of the right to self-defense, and thus, other aspects could be regulated through customary

175. EDMUND JAN OSMAŃCZYK, 3 ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL AGREEMENTS 1838 (Anthony Margo ed., 3d ed. 2003).

176. SZABÓ, *supra* note 57, at 113.

177. MAOGOTO, *supra* note 173, at 11–12.

178. TOM RUYS, 'ARMED ATTACK' AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 140 (2010).

179. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 191 (June 27).

180. *See* LANDMARK CASES IN PUBLIC INTERNATIONAL LAW 256 (Eric Heinze & Malgosia Fitzmaurice eds., 1998).

181. Jutta Brunnée, *The Meaning of Armed Conflict and the* Jus ad Bellum, *in* WHAT IS WAR? 31, 37 (Mary Ellen O'Connell ed., 2012).

international law.[182] Critics of the gravity stipulation believe that such a restraint unfairly limits the right to self-defense and that necessity and proportionality should be the only two considerations when engaging in an act of self-defense.[183]

In accordance with Article 51, the application of this right of self-defense must be reported to the Security Council by the member state claiming that right.[184] While there is uncertainty as to whether this phrase indicates a mandatory instruction or simply a direction for the member states, the ICJ judgment provided some clarity in the *Nicaragua* case. The Court ruled that the fact that there were no reports prepared by the state that was invoking right to self-defense demonstrates unmistakably that the state itself was unsure of the legality of its use of force in self-defense.[185] A state that thus acts in self-defense must report its action to the Security Council for its justification to hold greater validity. However, in practice the Security Council has never adjudicated the legality of a claim to self-defense.[186]

Another question in the debate surrounding self-defense is whether nonarmed action can be taken in self-defense, for example Israel's construction of a wall or security barrier, which it claims is consistent with its right to self-defense under Article 51.[187]

D. Necessity and Proportionality in Self-defense

The idea that necessity and proportionality comprise the core of self-defense attacks is derived from the *Caroline* and *Nicaragua* cases, which are widely cited even today. Although not explicitly in the UN Charter, necessity and proportionality are part of customary international law and thus have figured prominently in cases ranging from the *Nicaragua* case, which concerns the legitimacy or lawfulness of the threat or use of

182. *See* Claus Kreß, *The International Court of Justice and the 'Principle of Non-Use of Force,' in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 561, 582 (Marc Weller ed., 2015). *See generally* Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 161 (Nov. 6).

183. *See* Iran v. U.S., 1986 I.C.J. at 324, ¶¶ 13—14 (separate opinion by Simma, J.).

184. U.N. Charter art. 51.

185. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 235 (June 27); DINSTEIN, *supra* note 36, at 239–40.

186. *See* ALEXANDROV, *supra* note 121, at 146–47.

187. RUYS, *supra* note 178, at 473.

nuclear weapons with regard to the principle of proportionality,[188] to the *Caroline* case, which established the principle of necessity.[189]

The principles of necessity and proportionality exist as two distinct, though overlapping, rules. If the use of force is not necessary, then it is implicit that it is not proportionate, and if the use of force is disproportionately large, it is implicit that such use of force is not necessary.[190]

E. Self-defense as a Provisional Right

A state's right to self-defense is understood as a temporary right: The inherent right exists only until the Security Council has taken measures necessary to uphold global harmony by maintaining the peace and security of the region.[191] Therefore the right ceases to exist (in that particular context) once the Security Council has undertaken the requisite measures to alter the circumstances.[192] The act of self-defense, once reported to the Security Council, is to be dealt with by the council itself so that the victim can be relieved of its defending duties. The council decides whether the inherent right of self-defense has ceased to exist, but often in the past, the indication by the Security Council that the right is no longer exercisable has led to confusion.[193] Argentina's invasion of the British-owned Falklands Islands is a case that illustrates this confusion.[194] Following the 1982 occupation, the Security Council declared a breach of peace and issued a resolution that called for Argentina to cease the use of force and withdraw its forces.[195] The United Kingdom claimed that this resolution was not an adequate measure to restore peace and therefore it still had the right to engage in the use of force for self-defense, as Argentina continued to remain in occupation of the territory after the resolution.[196]

188. Nabil Mokaya Orina, *A Critique of the International Legal Regime Applicable to Terrorism*, 2 STRATHMORE L.J. 21, 28 (2016).
189. *Id.* at 27–28.
190. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 125 (Malcolm Evans & Phoebe Okowa eds., 3d ed. 2008).
191. ALEXANDROV, *supra* note 121, at 265–66.
192. RICHARD J. REGON, JUST WAR 27 (1996).
193. *See* ALEXANDROV, *supra* note 121, at 265–67.
194. GRAY, *supra* note 190, at 125.
195. G. POPE ATKINS, ENCYCLOPEDIA OF THE INTER-AMERICAN SYSTEM 27 (1997).
196. *See id.*

F. Anticipatory Self-defense

These controversies complicate the idea of anticipatory self-defense, which is the use of force by a sovereign authority in the face of a perceived threat of attack by another. It means predicting a future attack by an enemy and taking measures in advance, which may involve going on the offensive, to deal with this future attack.[197] Proponents of anticipatory self-defense possess a wider view of necessity in self-defense than their opponents do. Among the proponents of preventive self-defense, there are differences between those who argue that this threat needs to be imminent and those who feel that even a latent threat can be just cause for self-defense action.[198] The semantics of these two scenarios vary too—while dealing with an imminent threat is preemptive action, foreseeing a latent threat is either preventive or anticipatory self-defense. Israel's 1981 raid of Iraq's nuclear reactor, which was deemed a "threat to Israel's survival" by then Prime Minister Begin, was a preventive attack.[199] Furthermore, Iran's acquisition of a nuclear reactor, coupled with the existing hostility between the two countries, led Israel to reach the conclusion that Iraq's reactor becoming operational would be a huge threat that had to be dealt with beforehand.[200] A major complication regarding preventive self-defense is the position of preemptive self-defense within this doctrine. Some scholars rely on the fact that Article 51 makes explicit reference to armed attack and not a more vague term such as aggression or hostility to claim that self-defense can only be exercised if an armed attack is the threat.[201] Therefore, other threats may be dealt with in other ways, but not through the use of force in self-defense.

Anticipatory self-defense is further complicated by the fact that many of the threats that a state faces today come from nonstate actors (NSAs) (whose exact actions often cannot be predicted) rather than other states. The Security Council's resolution following 9/11 established that a grave terrorist attack could be read as an armed attack that could then

197. Noam Lubell, *The Problem of Imminence in an Uncertain World*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 697, 702–03 (Marc Weller ed., 2015).

198. *See id.* at 704.

199. Hensel, *supra* note 52, at 103.

200. Robert M. Brown, *Tammuz I Reactor*, *in* 4 THE ENCYCLOPEDIA OF MIDDLE EAST WARS 1220, 1220 (Spencer C. Tucker ed., 2010).

201. DINSTEIN, *supra* note 36, at 198.

be responded to by military operations.[202] In this context, force could also be employed against those states harboring the terrorist threat, thereby legitimizing the subsequent US invasion of Afghanistan.[203] The September 2001 attack on US soil by Al-Qaeda triggered the former's right to self-defense, and thus the use of force by the United States in retaliation was justifiable as an act of self-defense under the UN Charter.[204] The Bush Doctrine, which made preemption the focal point of US policy post-9/11, draws no difference between terrorist groups and the rogue states where these groups seek refuge (such as the Taliban-led Afghanistan).[205] Rogue states may help terrorist groups acquire nuclear weapons too, which is why then US Vice President Dick Cheney felt that such states should be dealt with before such a situation had already occurred, even if this meant acting without any evidence.[206]

The state under threat can take action if it finds proof of a future attack, even if the specifics of the attack are unknown. Article 51 therefore leaves room for undertaking self-defense against NSAs such as terrorist groups based in another country if the NSA has attacked a state's territory, embassies, or nationals residing abroad.[207] Consequently, the state under attack can launch a counterattack on the NSA wherever it is based. Consent from the state where the NSA resides is not a condition of such an act of self-defense, a case in point being the use of US drones to eliminate the Taliban, or the exercise to kill Osama bin Laden in Pakistan.[208]

202. Karl Zemanek, *Armed Attack*, *in* 2 THE LAW OF ARMED CONFLICT AND THE USE OF FORCE: THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 26, 29 (Frauke Lachenmann & Rüdiger Wolfrum eds., 2017).

203. *See* Emily Crawford, *Armed Conflict, International*, *in* 2 THE LAW OF ARMED CONFLICT AND THE USE OF FORCE: THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 44, 53–54 (Frauke Lachenmann & Rüdiger Wolfrum eds., 2017).

204. Nigel White, *Terrorism, Security, and International Law*, *in* INTERNATIONAL LAW, SECURITY AND ETHICS 9, 26–27 (Aidan Hehir, Natasha Kuhrt & Andrew Mumford eds., 2011).

205. JOSHUA S. GOLDSTEIN & JON C. PEVEHOUSE, INTERNATIONAL RELATIONS 80 (8th ed. 2008); Leanne Piggott, *The "Bush Doctrine" and the Use of Force in International Law*, *in* THE IMPACT OF 9/11 AND THE NEW LEGAL LANDSCAPE 241, 259 (Matthew J. Morgan ed., 2009).

206. THÉRÈSE DELPECH, NUCLEAR DETERRENCE IN THE 21ST CENTURY 27 (2012).

207. HELEN DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 153 (2005).

208. *See* Craig Martin, *Going Medieval: Targeted Killing, Self-defense and the* Jus ad Bellum *Regime*, *in* TARGETED KILLINGS 223, 239 (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012).

In anticipatory self-defense, too, necessity and proportionality have to be adhered to, so armed action can only be taken once all other measures have been exhausted.[209] Similarly, the extent of armed action should not exceed the actual threat that exists, and only those actions that are necessary for the annihilation of the threat should be taken. That said, the invocation of the inherent right to use force in self-defense does not cease to exist until the threat or conflict is contained by the measures taken by the Security Council, so violence is subjugated by maintaining the peace and security of the region.[210]

To some degree, as a consequence of the debate in scholarship surrounding anticipatory self-defense and the extent to which an armed attack can be predicted in real-life practice, it is based on individual contexts more than reflective of international global practice.[211] There is dispute as to whether Article 51 of the UN Charter should be understood as constrained by, and building on, previous customary law or if it is to be viewed as new set of guidelines to be understood fully in its own right. According to legal scholar Anthony Clark Arend, the text of the Charter and the use of the phrase *inherent right* do allow for differing interpretations regarding the legality of anticipatory self-defense.[212]

G. Article 51 and Chapter VII of the UN Charter

Chapter VII deems it the duty of the Security Council to identify what constitutes an armed conflict or threat to peace, and thereunder ascertain measures to placate such a conflict or prevent violations of restraints on the use of force.[213]

Article 41 of the UN Charter reads as follows:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United

209. Alex Conte, *The War on Terror: Self-defence or Aggression?*, *in* THE CHALLENGE OF CONFLICT: INTERNATIONAL LAW RESPONDS 393, 404 (Ustinia Dolgopol & Judith Gardam eds., 2006); *see also* GARDAM, *supra* note 97, at 179.

210. MYRA WILLIAMSON, TERRORISM, WAR, AND INTERNATIONAL LAW 111 (2009).

211. ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW & THE USE OF FORCE 72–73 (1993).

212. *Id.* (citing U.N. Charter art. 51).

213. VERA GOWLLAND-DEBBAS, COLLECTIVE RESPONSES TO ILLEGAL ACTS IN INTERNATIONAL LAW 367 (1990).

> Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.[214]

One of the measures undertaken by the Security Council under this provision could be an arms embargo; however, the argument that an arms embargo violates a state's right to self-defense and is thus in contradiction with Article 51 holds merit too.[215] If an arms embargo is not a valid tool that the council can employ to obtain compliance, then its powers are greatly limited regardless of the existence of Article 41. An arms embargo was placed on Rwanda in 1994 as a response to surging violence against citizens: The Rwandan government claimed that this was a violation of its right to self-defense,[216] and the Security Council ruled that the embargo be lifted from the government.[217] This judgment set murky precedent for states in the future, which could frame an argument against arms embargoes along similar lines, such as the one in Sierra Leone in 1997.[218]

H. Individual and Collective Self-defense

Collective self-defense is the sum of individual rights to self-defense in a scenario where threats to a state's security are linked to those of another.[219] States may abuse the right to collective self-defense, and as a means of deterring them from doing so, collective self-defense is regulated through certain guidelines. Like individual self-defense, collective self-defense too must follow the prerequisite of an armed attack and cannot be exercised in any other circumstances.[220] And the country or nation that invokes the right to self-defense, and thereunder uses force to defend such a right, is to be declared and termed the victim state (the victim state is the state against whom the armed attack or the

214. U.N. Charter art. 41.
215. GRAY, *supra* note 190, at 127.
216. *Id.*
217. *See* Nicholas Tsagourias, *Necessity and the Use of Force: A Special Regime*, *in* 41 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 11, 18 (I.F. Dekker & E. Hey eds., 2010).
218. *See* DINSTEIN, *supra* note 36, at 301–02.
219. *See* ALDER, *supra* note 119, at 126.
220. RUYS, *supra* note 178, at 86.

aggression has been propelled) if collective self-defense is to be undertaken.[221] It can only be exercised at the request of the victim state and may not be left to the discretion of other states.[222]

In congruence with right to individual or collective anticipatory self-defense, it is pertinent to analyze failed or weak or failing states that pose such threats and therefore devising the detection and investigation of actual or imminent threat, are necessary. So to develop an understanding of the nature and perception of such threats (and their purveyors), scrutinizing weak or failing states is appropriate.

V. WEAK OR FAILING STATES

Over the last decades, aggression, wars, and armed-conflict spillovers from weak or failing states (WFS) have become a peril to the global community's peace and security. Francis Fukuyama and former US Secretary of State Condoleezza Rice share the view that countries with weak governance pose a threat to the global community by pouring radicals, armaments, and other hazards into the international community.[223] Through acts of terrorism, the world has seen a drastic change of perceptions; paradoxically now WFSs pose a greater threat to peace and security than aggressive states.[224] In this regard, the White House stated, "America is now threatened less by conquering states than [it is] by failing ones."[225] This understanding of the threat to global peace is not determined by the sole threat of terrorism, but it is also coupled with the far-reaching effects of the infringement of basic human rights, such as the rights to life, self-determination, and free speech; accordingly, it creates the devastating effects of environmental

221. ANTONIO TANCA, FOREIGN ARMED INTERVENTION IN INTERNAL CONFLICT 89 (1993).

222. Christopher Greenwood, *Self-defence*, *in* 2 THE LAW OF ARMED CONFLICT AND THE USE OF FORCE: THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1129, 1136 (Frauke Lachenmann & Rüdiger Wolfrum eds., 2017); DINSTEIN, *supra* note 36, at 294.

223. Stewart Patrick, *Weak States and Global Threats: Fact or Fiction?*, 29 WASH. Q., no. 2, at 27, 27.

224. Joseph B. Coelho, Building Stable and Effective States Through International Governance 66–67 (Oct. 2008) (unpublished Ph.D. dissertation, Northeastern University) (on file with Oklahoma City University Law Review).

225. Robert C. Orr, *The United States as Nation Builder: Facing the Challenge of Post-Conflict Reconstruction*, *in* WINNING THE PEACE 3, 3 (Robert C. Orr ed., 2004).

deprivation, domestic and regional security flux, and refugee crises.[226]

Stewart Patrick has compiled excerpts in this context to better portray the United States' stance on WFSs during the Bush era:

> "The attacks of September 11, 2001, reminded us that weak states can threaten our security as much as strong ones, by providing breeding grounds for extremism and havens for criminals, drug traffickers, and terrorists. Such lawlessness abroad can bring devastation here at home."
> – Richard Hoass, State Department Director, 2003[227]
> "When development and governance fail in a country, the consequences engulf entire regions and leap across the world. Terrorism, political violence, civil wars, organized crime, drug trafficking, infectious diseases, environmental crises, refugee flows and mass migrations cascade across the borders of weak states more destructively than ever before."
> – USAID 2003[228]

The Pentagon is keen to fortify the borders of WFSs from within against terrorist organizations and groups so that foreign states and distant lands can stay clear of the troubles of terrorist acts and spillovers of WFSs.[229] The CIA has collected data and estimated that there may be forty more WFSs.[230] Think tanks and the US State Department are developing strategies to moderate such states and prevent them from spreading their viruses of violence and criminality into the healthier world.[231] The United Kingdom and the United Nations are following that

226. *See* Robert I. Rotberg, *State Failure and States Poised to Fail: South Asia and Developing Nations*, *in* SOUTH ASIA'S WEAK STATES 31, 31–33 (T.V. Paul ed., 2010).

227. Stewart Patrick, *Weak States and Global Threats: Assessing Evidence of "Spillovers"* 3 tbl.1 (Ctr. for Glob. Dev., Working Paper No. 73, 2006), https://www.cgdev.org/files/5539_file_WP_73.pdf [https://perma.cc/29QK-H6KE]; STEWART PATRICK, WEAK LINKS 4 (2011).

228. DAVID WILLIAMS, INTERNATIONAL DEVELOPMENT AND GLOBAL POLITICS 3 (2012).

229. THOMAS K. LIVINGSTON, CONG. RESEARCH SERV., R41817, BUILDING THE CAPACITY OF PARTNER STATES THROUGH SECURITY FORCE ASSISTANCE 9–10 (2011); *see also* Roger E. Kanet, *American Strategy for Global Order*, *in* FROM SUPERPOWER TO BESIEGED GLOBAL POWER 238, 241 (Edward A. Kolodziej & Roger E. Kanet eds., 2008).

230. Josep M. Colomer, *Institutional Design*, *in* THE SAGE HANDBOOK OF COMPARATIVE POLITICS 246, 248 (Todd Landman & Neil Robinson eds., 2009).

231. Stewart Patrick, *"Failed" States and Global Security: Empirical Questions and*

lead by developing programs and strategies to fight the spillovers of WFSs, which include refugee crises or terrorist activities. Similarly, the World Bank is focusing on identifying countries with low GDPs so that future spillovers can be foreseen and controlled.[232] Former US Congressman Lee Hamilton noted the same problem and remarked that the security of this world can be best accomplished by securing the frailest parts of this world.[233]

Only a handful of scholars have connected the dots and established the nexus between WFSs spillovers and regional volatility, such as terrorist activities and refugee crises. Academics are mostly more concerned with the newly developed ideas of changing the economic and security situations in the regions with terrorist organizations and threats to security and peace of the world. So appropriate consideration should be given to the understanding that WFSs are the breeding grounds for terrorism.[234]

A. What Are Weak or Failing States?

The characterization of any state as a WFS is dependent on its readiness and capacity to deliver certain statehood practices; for instance, rightful political representation, corporeal safety, financial sanctuary, and communal well-being.[235] While most third world countries lack one or more of these characterizations of a healthy state, such states possess legal sovereignty but lack sovereignty in practice;[236] they cannot placate internal conflicts or maintain the territorial borders of their country.

Policy Dilemmas, *in* NORTH AND SOUTH IN THE WORLD POLITICAL ECONOMY 227, 232 (Rafael Reuveny & William R. Thompson eds., 2008).

232. *See* Tobias Debiel, *Fragile States and Developments Policy*, *in* DISCUSSING CONFLICT IN ETHIOPIA 264, 267 (Wolbert G.C. Smidt & Kinfe Abraham eds., 2007); Patrick, *supra* note 231, at 233.

233. PATRICK, *supra* note 227, at 6.

234. *Id.* at 6–7; PARDIS MAHDAVI, FROM TRAFFICKING TO TERROR 27 (2014).

235. LIANA SUN WYLER, CONG. RESEARCH SERV., RL34253, WEAK AND FAILING STATES: EVOLVING SECURITY THREATS AND U.S. POLICY 23 (2007); NATASHA UNDERHILL, COUNTERING GLOBAL TERRORISM AND INSURGENCY 24 (2014); PATRICK, *supra* note 227, at 6.

236. *See* Georg Sørensen, *Globalization and the Nation-State*, *in* COMPARATIVE POLITICS 407, 419 (Daniele Caramani ed., 3d ed. 2014); Maria Salazar & Roger R. Stough, *Sovereignty and Economic Development with Some Examples from the Atlantic Community*, *in* THE END OF SOVEREIGNTY? 287, 292 (David J. Eaton ed., 2006); JAYANTANUJA BANDYOPADHYAYA, A GENERAL THEORY OF FOREIGN POLICY 38 (2004).

Consequently, they cannot ensure security and peace against internal or external coercions and terror. In the political sphere, such countries cannot ensure legitimate authority and cannot render transparent elections or effectual management. In the legal and judicial sphere, such states cannot protect the basic human rights or liberties of their citizens. Furthermore, they cannot apprehend leaders for corruption or atrocities they have committed. In the economic sphere, these states lack efficient fiscal policies, foreign investments, breeding grounds for entrepreneurship, an impartial trade system, technologies, and capabilities to consume or manage natural resources. And lastly, in the social sphere, these countries cannot provide basic necessities to the general population; they lack the infrastructure of education, health care facilities, and roads.

However, not all WFSs are distinguishable. For instance, a few states (for example, Senegal) are located at the upper boundary of WFSs, where states are performing relatively well in some areas while lacking strength in others; hence, they have not failed completely but are struggling between constituting a WFS and not, and are fragile enough to collapse in the future; as a result, they are within the definition of failing states.[237] On the other hand, some states (for example, Somalia) are located at the lower end of the WFS continuum, where state infrastructure and statehood have completely collapsed; thus, such states are considered to be failed and weak states.[238]

All states can be subcategorized in the following four groupings with regard to their stability:

> A. Strong states, which are willing and able to respond to stabilize their respective countries.
> B. Weak states, which are willing but not able to stabilize their respective countries.
> C. Hesitant states, which do not have the means but are willing to stabilize their respective countries.
> D. Failed states, which are neither willing nor able to stabilize

237. ARIE M. KACOWICZ, ZONES OF PEACE IN THE THIRD WORLD 167 (1998); JOEL S. MIGDAL, STRONG SOCIETIES AND WEAK STATES 29 (1988).

238. Robert I. Rotberg, *The Challenge of Weak, Failing, and Collapsed States*, *in* LEASHING THE DOGS OF WAR 83, 84 (Chester A. Crocker, Fen Osler Hampson & Pamela Aall eds., 2007).

their respective countries.[239]

World Bank statistics have shown that impoverished states are fifteen times more likely to be involved in civil wars than developed states are.[240] However, the specific number of WFSs is debatable, as the World Bank, the United States, and the United Kingdom have varying methods of defining weak states. To understand the situation, the World Bank, in its *LICUS: Low Income Countries Under Stress* list, has counted thirty WFSs.[241] The US Commission Center for Global Development has outlined at least fifty-five such states. The United Kingdom's Department for International Development has proposed that there are at least forty-five WFSs, with a total population of at least 900 million.[242] These calculations have been made by weighing certain state characteristics, such as capability to govern, economic well-being, peace endurance aptitude, and social security.

In this regard, the World Bank has developed data on the disabilities of WFSs, "Governance Matters."[243] Countries in these lists have faced incessant spells of armed conflicts and political upheavals; they are classified as the lowest states in terms of providing peace and security to their respective general populations. Such states are breeding grounds for drug trafficking and terrorism.[244]

B. Spillovers of Weak or Failing States

The current understanding of scholars such as Stewart Patrick and Edward Newman is that WFSs are spilling over their internal conflicts and threats (in the form of terrorist activities) into foreign lands and thus

239. See PATRICK, *supra* note 227, at 19 and TIFFIANY O. HOWARD, THE TRAGEDY OF FAILURE 50–52 (2010) for examples of how WFSs have been categorized.

240. *See* CHARLES J. KEGLEY, JR., WORLD POLITICS 380–81 (12th ed. 2009).

241. David Carment, Yiagadeesen Samy & Stewart Prest, *State Fragility and Implications for Aid Allocation*, *in* DEALING WITH FAILED STATES 69, 72 n.6 (Harvey Starr ed., 2009).

242. Memorandum by the Dep't for Int'l Dev. on Allocation of Resources to the Int'l Dev. Comm. 10, http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/international-development-committee/dfids-allocation-of-resources/written/28276.pdf [https://perma.cc/MM8J-3J4M].

243. Susan E. Rice, *Poverty and State Weakness*, *in* CONFRONTING POVERTY 23, 41 n.34 (Susan E. Rice, Corinne Graff & Carlos Pascual eds., 2010) (emphasis omitted).

244. *See* MAHDAVI, *supra* note 234, at 24; PATRICK, *supra* note 227, at 4.

inciting breaches of global security and peace.[245] There are two contentions in this arguments: one is that NSAs and WFSs are posing a threat to the global community's peace, security, and environment through terrorist activities and pollution; the other is that WFSs are breeding grounds for terrorism and environmental degradation.[246]

Successive US administrations and the National Security Strategy have maintained and adopted this definitional approach as part of preemptive measures to counter threats of terrorism and environmental degradation against the United States and the global community.[247] However, advocates of the other view maintain that this theoretical expansion of using force against sovereign states is not based on the existence of actual armed conflict as required by the UN Charter, and if there is no actual threat against any human being, the use of force is an aggression, rather than an action of self-defense.[248] In response, WFS advocates maintain that every human being is affected by the spillovers of these WFSs in the form of the actual dispersion of terrorist activities, causing everyone to be concerned about their security as there is no guarantee of security, and further in the form of global environmental degradation and climate change.[249]

Advocates of the other view further maintain that the WFSs do not pose a real threat to the United States or its allies because such states, from distant lands, cannot in fact affect US national security.[250] Walter

245. *See* PATRICK, *supra* note 227, at 18; Edward Newman, *Failed States and International Order: Constructing a Post-Westphalian World*, 30 CONTEMP. SECURITY POL'Y 421, 429 (2009).

246. Dele Olowu & Paulos Chanie, *Introduction* to STATE FRAGILITY AND STATE BUILDING IN AFRICA 1, 1 (Dele Olowu & Paulos Chanie eds., 2016); HM TREASURY, 2004 SPENDING REVIEW 77 (2004); Shahrbanou Tadjbakhsh, *Failed Narco-state or a Human Security Failure? Ethical and Methodological Ruptures with a Traditional Read of the Afghan Quagmire*, *in* FACING GLOBAL ENVIRONMENTAL CHANGE 1227, 1229 (Hans Günter Brauch et al. eds., 2009).

247. *See* J. Brian Atwood, *The Link Between Poverty and Violent Conflict*, *in* STICKS & STONES 33, 35 (Padraig O'Malley, Paul L. Atwood & Patricia Peterson eds., 2006); Jason D. Ellis, *The Best Defense: Counterproliferation and U.S. National Security*, *in* RESHAPING ROGUE STATES 50, 51 (Alexander T.J. Lennon & Camille Eiss eds., 2004); CQ PRESS, THE POWERS OF THE PRESIDENCY 215 (4th ed. 2013); DAVID CARMENT, STEWART PREST & YIAGADEESEN SAMY, SECURITY, DEVELOPMENT, AND THE FRAGILE STATE 62 (2010).

248. *See* PATRICK, *supra* note 227, at 16–17.

249. PAUL J. SMITH, THE TERRORISM AHEAD 187 (2008); R. SCHUBERT ET AL., CLIMATE CHANGE AS A SECURITY RISK 93 (2008).

250. *See* Haroon A. Khan, *Failed States and the Lack of Good Governance: A Causal*

Laqueur in the same context noted that "[i]n the 49 countries currently designated by the United Nations as the least developed hardly any terrorist activity occurs," and maintained that any assumption that WFSs are breeding grounds for terrorism are flawed and baseless accusations.[251] Supporters of this side reiterate that, even as a response to terrorist activity, the use of force as anticipatory self-defense, without the actual existence of armed conflict, is against international law.[252] However, spillovers from WFSs cannot be calculated or anticipated. For instance, the planning and execution of 9/11 was based in the distant lands of Afghanistan.[253] Further, spillovers of WFSs affect regional security where natural resources, such as oil wells, are being occupied by organized terrorist organizations, which has been the situation in Iraq and Syria.[254] For instance, the whole of the Levant region in the Middle East is affected by the terrorism that has spilled over from WFSs.[255] This is likely owing to the fact that WFSs have porous or weak borders, unsteady governance, and a lack of funds or skills. These porous borders help NSAs or crime syndicates traffic people, drugs, weapons, and other illegal commodities as illegal trade.[256]

WFSs are utopias for the commercial activities of drug lords, organized crime syndicates, and NSAs, and thus finance terrorism.[257] Organized crime syndicates are more attracted to WFSs for a number of reasons; for instance, porous borders, no law enforcement, and abundant corruption provide enough space for criminals to function alongside governments, with or without their involvement, because contracts are

Explanation, *in* IN SEARCH OF BETTER GOVERNANCE IN SOUTH ASIA AND BEYOND 73, 73 (Ishtiaq Jamil, Steinar Askvik & Tek Nath Dhakal eds., 2013).

251. Patrick, *supra* note 231, at 238–39 (quoting WALTER LAQUEUR, NO END TO WAR 11 (2003)).

252. AREND & BECK, *supra* note 211, at 72–73; CHRISTOPHER C. JOYNER, INTERNATIONAL LAW IN THE 21ST CENTURY 169 (2005); SHIRLEY V. SCOTT, ANTHONY JOHN BILLINGSLEY & CHRISTOPHER MICHAELSEN, INTERNATIONAL LAW AND THE USE OF FORCE 136 (2010).

253. ALBERT L. MASLAR, JR., AREN'T YOU SORRY YOU ASKED . . . FOR MY OPINION 29 (2006).

254. Luay Al-Khatteeb & Eline Gordts, *How ISIS Uses Oil to Fund Terror*, BROOKINGS (Sept. 27, 2014), https://www.brookings.edu/on-the-record/how-isis-uses-oil-to-fund-terror/ [https://perma.cc/6BJV-QPC7].

255. *See* EDWARD MICKOLUS, TERRORISM, 2013–2015, at 222–23 (2016).

256. *See* MAARTEN GEHEM ET AL., BALANCING ON THE BRINK: VULNERABILITY OF STATES IN THE MIDDLE EAST AND NORTH AFRICA 22 (2014); WAYNE MICHAEL HALL & GARY CITRENBAUM, INTELLIGENCE COLLECTION 22 (2012).

257. SIMONA ŢUŢUIANU, TOWARDS GLOBAL JUSTICE 73 (2013).

unenforceable, and government enforcement agencies are involved in illicit activates for personal gain.[258] This corruption functions as a tool of criminal protection and economic gain for crime syndicates, providing room for terrorism to prosper.[259] Such breeding is at optimum pace during internal state conflicts in the form of civil wars or intrastate conflicts, where the state is more occupied with national security and peace maintenance issues.[260] However, crime syndicates tend to cherry-pick countries with higher returns and lower risks, and avoid countries with lower returns and higher risks, which "explains why South Africa and Nigeria have become magnets for transnational organized crime and Niger has not."[261]

However, it is pertinent to note that crime syndicates and terrorism are not limited to money laundering and drugs; the major sponsoring sectors for terrorism and crime differ from state to state depending on their specific alignments with sophisticated practices. There is a wide variety of such illicit activities, including prostitution;[262] misconduct against the environment, such as deforestation; weapons trafficking across the borders of states; the smuggling of diamonds and precious gemstones between countries;[263] illegal imports, including stolen and non-custom-paid vehicles; intelligence surveillance against states; counterfeit currency trades; commercial scams; and many other illicit activities.

Comprehensively, drug money, money laundering, and terrorism funding are intermingled with regard to the symbiotic relationship between organized crime and terrorism, where such illicit commodities are the main sponsors of terrorism. It is estimated that the illegal drugs sector is worth US$320 billion to US$500 billion annually and that money laundering is worth two percent of global economy;[264] currencies

258. *See* RICHARD SANDBROOK, REINVENTING THE LEFT IN THE GLOBAL SOUTH 93 (2014).

259. *Id.*

260. *See* HOWARD ABADINSKY, ORGANIZED CRIME 181 (10th ed. 2013).

261. Patrick, *supra* note 231, at 241; *see also* Tony Hawkins, *Industrialisation in Africa*, *in* AFRICA 30 YEARS ON, at 130, 148 (Douglas Rimmer ed., 1991).

262. LARRY A. BURCHFIELD, RADIATION SAFETY 33 (2009).

263. Lee A. Groat, *Preface* to 37 THE GEOLOGY OF GEM DEPOSITS, at xi, xi (Lee A. Groat ed., 2007); JOHN ROLLINS, LIANA SUN WYLER & SETH ROSEN, CONG. RESEARCH SERV., R41004, INTERNATIONAL TERRORISM AND TRANSNATIONAL CRIME: SECURITY THREATS, U.S. POLICY, AND CONSIDERATIONS FOR CONGRESS 37 (2010).

264. ROBERT MANDEL, DARK LOGIC 103–04 (2011).

worth up to US$3 trillion are laundered annually.[265] Money laundering is routed mainly through WFSs because WFSs usually lack a transparent and sophisticated banking structure that can monitor or track illegal activities. This is why criminals and money launderers target WFSs for such illegitimate activities.

WFSs are incubators for drug manufacturing and trafficking; for instance, 90% of all heroin in the world, which is smuggled around the globe via WFS routes, is developed and grown in Afghanistan.[266] Similarly, Mexico is a major producer and supplier of methamphetamine.[267] Likewise, Colombia, Bolivia, and Peru are the world's biggest manufacturers and suppliers of cocaine.[268] All of these countries are WFSs with porous borders that smuggle and supply illegal drugs to Europe and the United States. Analogously, it is also estimated that WFSs traffic hundreds of thousands of human beings between states each year for the purposes of forced hard labor—including child labor—and forced prostitution.[269]

Aside from drugs and money laundering, WFSs are exporters of violence, destabilization, and terrorism. WFSs' borders have become more porous with time after internal conflicts, and as a consequence, they export violence and destabilize neighboring regions. This takes place when the authorities are targeting perpetrators, criminals, and terrorists (PCT).[270] These PCTs use porous borders as safe havens to

265. PAUL KNOX, JOHN AGNEW & LINDA MCCARTHY, THE GEOGRAPHY OF THE WORLD ECONOMY 175 (5th ed. 2008).

266. SHIXIN IVY ZHANG, CHINESE WAR CORRESPONDENTS 147 (2016).

267. *See Fighting Meth in America's Heartland: Assessing Federal, State, and Local Efforts: Hearing Before the S. Comm. on Criminal Justice, Drug Policy, and Human Resources*, 109th Cong. 14 (2005) (statement of Timothy J. Ogden, Assoc. Special Agent in Charge, Drug Enforcement Agency).

268. ROBERT R. ALMONTE, EVOLUTION OF NARCOTIC INVESTIGATIONS 12 (2005); Nick Miroff, *Colombia is Again the World's Top Coca Producer. Here's Why That's a Blow to the U.S.*, WASH. POST (Nov. 10, 2015), https://www.washingtonpost.com/world/the_americas/in-a-blow-to-us-policy-colombia-is-again-the-worlds-top-producer-of-coca/2015/11/10/316d2f66-7bf0-11e5-bfb6-65300a5ff562_story.html?utm_term=.590e8701a2b2 [https://perma.cc/4CF9-FRBY].

269. PATRICK, *supra* note 227, at 20; UNITED NATIONS OFFICE ON DRUGS AND CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 2016, at 10 (2016), https://www.unodc.org/documents/data-and-analysis/glotip/2016_Global_Report_on_Trafficking_in_Persons.pdf [https://perma.cc/A3KS-BKZ2].

270. Fiona B. Adamson, *Crossing Borders: International Migration and National Security*, *in* GLOBAL POLITICS IN A CHANGING WORLD 393, 398 (Richard W. Mansbach &

escape capture. Furthermore, as a result of domestic economic disability and political volatility, civilians—and PCTs—better known as refugees in the modern world, migrate in the hope of improving their living conditions.[271] As a result, all regions that neighbor WFSs are affected by the influx of PCTs and refugees.[272] This overspilling effect of refugees and PCTs collapses the region's economic well-being, and consequently, all neighboring areas are badly affected, such that one WFS will develop more WFSs because neighboring states do not have the mechanisms to stop spillovers from weak states.[273] For instance, the whole Levant is affected by spillovers from Iraq, such that Syria has become the new battlefield against terrorism.[274]

The contagious madness of WFSs has mainly developed because of the international community's prevalent malpractice of arming rebellions. When authorities such as international organizations and domestic political regimes take sides between armed groups, terrorism gains momentum and strength. For instance, the Assad regime and NATO forces back different armed groups in the conflict zones of Syria, and there are other instances of revolutions backed by international organizations, such as the NATO-backed revolution against Gaddafi in 2011;[275] as a result, the whole country, and its economy and civilians, are

Edward Rhodes eds., 4th ed. 2009); *see also* Bertram I. Spector, *Negotiations to Avert Transboundary Environmental Security Conflicts*, *in* RESPONDING TO ENVIRONMENTAL CONFLICTS 31, 31 (Eileen Petzold-Bradley, Alexander Carius & Arpád Vincze eds., 2001).

271. KEN MENKHAUS, SOMALIA: STATE COLLAPSE AND THE THREAT OF TERRORISM 50 (Tim Huxley ed., 2004); *see also* Francesca Declich, *Can Boundaries Not Border on One Another? The Zigula (Somali Bantu) Between Somalia & Tanzania*, *in* BORDERS & BORDERLANDS AS RESOURCES IN THE HORN OF AFRICA 169, 174–75 (Dereje Feyissa & Markus Virgil Hoehne eds., 2010).

272. MENKHAUS, *supra* note 271, at 50; RICHARD L. MILLETT, COLOMBIA'S CONFLICTS: THE SPILLOVER EFFECTS OF A WIDER WAR 2 (2002).

273. *See* BOAZ ATZILI, GOOD FENCES, BAD NEIGHBORS 204–05 (2012); Mónica Serrano & Paul Kenny, *Colombia and the Andean Crisis*, *in* MAKING STATES WORK 102, 118 (Simon Chesterman, Michael Ignatieff & Ramesh Thakur eds., 2005).

274. RILEY M. TOWNSEND, THE EUROPEAN MIGRANT CRISIS 69 (2015); SVEN BISCOP, PEACE WITHOUT MONEY, WAR WITHOUT AMERICANS 54 (Routledge 2016) (2015); SHANTA DEVARAJAN & LILI MOTTAGHI, WORLD BANK MIDDLE EAST AND NORTH AFRICA REGION, MENA QUARTERLY ECONOMIC BRIEF: THE ECONOMIC EFFECTS OF WAR 9 (2016).

275. Efraim Inbar, *Introduction* to THE ARAB SPRING, DEMOCRACY AND SECURITY 1, 6, 8 (Efraim Inbar ed., 2013); RYAN C. MANESS & BRANDON VALERIANO, RUSSIA'S COERCIVE DIPLOMACY 58 (2015); *see also* Philippa Winkler, *Introduction* to CONFRONTING THE INTERNATIONAL PATRIARCHY 1, 4 (Philippa Winkler ed., 2013).

hugely affected, largely because if the rebellions are not armed in the first place, PCTs will not be able to take any material hold on the WFS. It is because such authorities back PCTs financially and materially that they are able to prosper and breed in any given state.[276]

In addition to the aforementioned illicit activities, WFSs are found to be the exporters and incubators of plagues and ailments.[277] It is noted that all of the fatal and contagious breakouts of calamitous diseases and viruses in the world, such as HIV/AIDS, Ebola, West Nile encephalitis, and the Zika virus, and the recurrence of pathogens such as tuberculosis, cholera, and malaria, are a result of a lack of health care systems, policies, and management in WFSs.[278] Such diseases then spread in distant parts of the world through the incubators of pathogens, that is, WFSs.[279] In today's extensively interconnected world, millions of people cross interstate borders each day, and billions of tons of freight move between borders annually. Therefore, breakouts of diseases in the form of spillovers from WFSs are inevitable and very expensive to contain.[280]

These spillovers of diseases are essentially triggered by absent or insufficient health care systems, health research programs, precautionary practices, and response aptitude in WFSs.[281] Health care experts have noted that WFSs are incapable of investigating, analyzing, and constraining the breakout of deadly diseases. Furthermore, domestic conflicts, corruption, civil wars, international wars, and political instability are also factors that contribute to the negligent health care systems in WFSs.[282]

The Armed Forces Medical Intelligence Center has categorized all countries in the world into five categories based on their ability to respond to epidemics and manage health care.[283] The lowest two

276. *See* JEREMY FARRALL & HILARY CHARLESWORTH, STRENGTHENING THE RULE OF LAW THROUGH THE UNITED NATIONS SECURITY COUNCIL: POLICY PROPOSALS 7 (2016); BRIAN GLYN WILLIAMS, COUNTER JIHAD 271 (2017); ANDREI LANKOV, THE REAL NORTH KOREA 229 (2013); JEREMY M. WEINSTEIN, INSIDE REBELLION 37, 61, 95, 163 (Margaret Levi et al. eds., 2007).

277. See PATRICK, *supra* note 227, at 25, 43.

278. See *infra* notes 283–91 and accompanying text.

279. *See* PATRICK, *supra* note 227, at 25, 43.

280. *See id.*

281. *See* ULYSSES PANISSET, INTERNATIONAL HEALTH STATECRAFT 36–37 (2000).

282. *Cf.* Peter Eigen, *Corruption and Health Care: Need for New Solutions*, *in* GLOBAL HEALTH LEADERSHIP AND MANAGEMENT 93, 96 (William H. Foege et al. eds., 2005).

283. PATRICK, *supra* note 231, at 243.

categories—which mostly include countries from South Asia and Africa—are responsible for the most fatal and devastating disease breakouts in the world, such as tuberculosis, measles, hepatitis B, and HIV/AIDS.[284] For example, sub-Saharan Africa encompasses 10% of the world total population but suffers from almost 90% of all malaria cases and 75% of all HIV/AIDS cases in the world.[285]

Comparably, different pathogens and viruses were identified to have emerged from other WFSs; for instance, the infamous West Nile virus was first detected in Uganda in 1937.[286] Zika virus was first seen in 1947 in Uganda; then, it spread toward Tanzania in 1948, and in 1954 it reached Nigeria and later broke out in Cape Verde in 2015.[287] Similarly, Ebola was first diagnosed in what is now the South Sudan and the Democratic Republic Congo (simultaneously, in 1976)[288] before breaking out in Guinea in 2013–2014,[289] and lastly, dengue fever reemerged and broke out in Uruguay in 2016.[290] Furthermore, polio—which is nearly exterminated worldwide—has been flourishing in Indonesia, Yemen, Saudi Arabia, and various states of Africa because Nigeria was unsuccessful in containing its eruption.[291]

This shows that WFSs are the petri dishes and incubators for plagues, drugs, corruption, smuggling, and most notably violence. These plagues and illicit activities are not contained within the boundaries of WFSs, owing to the lack of health care or law enforcement infrastructure

284. *See id.* at 242–43.

285. *Id.* at 243.

286. *West Nile Virus*, WORLD HEALTH ORG. (Jul. 2011), http://www.who.int/mediacentre/factsheets/fs354/en/ [https://perma.cc/ZN8K-9T8U].

287. *The History of Zika Virus*, WORLD HEALTH ORG. (n.d.), http://www.who.int/emergencies/zika-virus/timeline/en/ [https://perma.cc/N868-KYNF] ("First identified in Uganda in 1947 in monkeys, Zika was later identified in humans in 1952"); *Zika Virus*, WORLD HEALTH ORG., http://www.who.int/mediacentre/factsheets/zika/en/ [https://perma.cc/N868-KYNF].

288. *Ebola Virus Disease*, WORLD HEALTH ORG., http://www.who.int/mediacentre/factsheets/fs103/en/ [https://perma.cc/J6DA-JV89].

289. *Origins of 2014 Ebola Epidemic*, WORLD HEALTH ORG. (Jan. 2015), http://who.int/csr/disease/ebola/one-year-report/virus-origin/en/ [https://perma.cc/2A66-LBYY].

290. *Dengue Fever—Uruguay*, WORLD HEALTH ORG. (Mar. 10, 2016), http://www.who.int/csr/don/10-march-2016-dengue-uruguay/en/ [https://perma.cc/J6DA-JV89].

291. *Resurgence of Wild Poliovirus Type 1 Transmission and Consequences of Importation—21 Countries,* 2002–2005, MMWR WEEKLY (Feb. 17, 2006), https://www.cdc.gov/mmwr/PDF/wk/mm5506.pdf [https://perma.cc/8N2A-AN39].

and prevalent corrupt practices. As a result, states near and far are affected by spillovers of such activities.[292] The states that host the perpetrators of such illegal activities are termed "host states," and the countries that are affected by diseases and terrorism from the host states are generally known as "victim states." Victim states seek to use force against terrorism and perpetrators as promised by the inherent right of self-defense.[293] However, few states are willing to intercede in violence breeding on the victim states' grounds, and others are unwilling to work in harmony with the international community, owing to the prevalent corrupt practices and opaque political systems.[294] To counter such unwillingness, there has to be a framework to determine the victim states' and the international community's right to self-defense.

VI. UNWILLING OR UNABLE HOST STATES

Article 51 of the UN Charter guarantees the inherent right of individual and collective self-defense to a member state in an armed attack.[295] This only applies to state-versus-state conflicts, where a victim state can use proportional force by invoking the right to self-defense against an aggressor state during an armed conflict.[296] However, in recent times, the contentious debate over the right to self-defense has moved from state-versus-state armed conflicts to state-versus-NSA armed conflict; NSAs include insurgent groups, terrorist organizations, rebels, and unofficial combatants or armed groups, and act from the territories of the host state.[297] (The host state is the state from which NSAs conduct their armed attacks on victim states, or where NSAs are taking refuge; for instance, terrorist organizations like Al-Qaeda operate from

292. *See* PATRICK, *supra* note 227, at 43; Newman, *supra* note 245, at 431.

293. SOLIS, *supra* note 120, at 173; Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, *in* 13 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3, 23 (Michael N. Schmitt, Louise Arimatsu & T. McCormack eds., 2011).

294. Jonathan Wolff, *The Content of the Human Right to Health*, *in* PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 491, 499–500 (Rowan Cruft, S. Matthew Liao & Massimo Renzo eds., 2015).

295. U.N. Charter art. 51.

296. *See* KENNETH WATKIN, FIGHTING AT THE LEGAL BOUNDARIES 339–40 (2016).

297. *See* DINSTEIN, *supra* note 36, at 227–28; *see also* Geert-Jan Alexander Knoops, *The Transposition of Inter-state Self-defense and Use of Force onto Operational Mandates for Peace Support Operations*, *in* LAW ENFORCEMENT WITHIN THE FRAMEWORK OF PEACE SUPPORT OPERATIONS 3, 13 (Roberta Arnold ed., 2008).

Afghanistan, which is the host state.) This shift of assertions transpired mainly because terrorists, who are NSAs, have been using force against victim states (victim states are states that NSAs have attacked or used force on; for example, in the Paris terrorist attacks, France is the victim state); therefore, victim states seek justification to use force against such NSAs, who are taking refuge in the territories of a host state.[298] As a result, victim states target and use force against NSAs and the host state.[299]

For instance, in 2011, US forces performed an exercise in Pakistan's territory to kill Osama bin Laden and justified that use of force by contending that the host state was either unwilling or unable to fight the terrorists.[300] Accordingly, to ensure the legality of such use of force against NSAs without the consent of the host state, the concepts of the "responsibility to protect" and Ashley Deeks's unwilling-or-unable test are imperative.

A. Responsibility to Protect

In recent times, scholars, organizations, and states have developed the principle that in customary international practices where a host state or any state is unable to end the misery of its citizens, unwilling to cooperate with the international community, or itself the executor of atrocities against its people, it is the responsibility of the international community to intercede for the victims as a humanitarian effort.[301] For instance, the endorsement to use force and humanitarian intervention by the Security Council and NATO in the cases of Kosovo, Sierra Leone, and Liberia were justified by the responsibility-to-protect principle (R2P).[302] However, whether there is an obligation to acquire the authorization of the Security Council in the application of R2P with collective and individual intervention, as permission or obligation, is

298. *See* Christian J. Tams, *The Necessity and Proportionality of Anti-terrorist Self-defence*, *in* COUNTER-TERRORISM STRATEGIES IN A FRAGMENTED INTERNATIONAL LEGAL ORDER 373, 407 (Larissa van den Herik & Nico Schrijver eds., 2013).

299. *See* Georg Witschel, *International Law and the War on Terrorism*, *in* 1 COEXISTENCE, COOPERATION, AND SOLIDARITY 1341, 1349 (Holger P. Hestermeyer et al. eds., 2012).

300. *See* HERALDO MUÑOZ, GETTING AWAY WITH MURDER 208 (2014).

301. NOËLE CROSSLEY, EVALUATING THE RESPONSIBILITY TO PROTECT 29 (2016).

302. Ademola Abass, *Calibrating the Conceptual Contours of Article 4(h)*, *in* AFRICA AND THE RESPONSIBILITY TO PROTECT 38, 43 (Dan Kuwali & Frans Viljoen eds., 2014).

under scrutiny.[303] Interestingly, the global community is placing an embargo on individual states' interventions and is substantiating the collective intervention by endorsing the formation of the R2P principle.[304] Further, the R2P norms represent two categories. The first is the obligation of the international community to intervene as a humanitarian effort; the second is the consent-based intervention. Both are applicable where the state has failed to protect its general population.[305] Consent-based R2P—where intervention follows the international legal system—has lately been preferred over non-consent-based R2P.[306] In 2004, the High-Level Panel on Threats, Challenges and Change, to further the cause of global peace and security, endorsed the emergence of the R2P and maintained that humanitarian effort in the form of R2P is necessary and should be granted only with Security Council permission as a collective effort of the international community.[307]

B. Sovereignty as Responsibility

For decades, the UN has failed to stop humanitarian crises such as the genocides in the lands of Kosovo, Sudan, and Rwanda.[308] This is mainly because any one of the powerful five permanent members of the Security Council can veto action and cause deadlock, preventing

303. *See* CRISTINA GABRIELA BADESCU, HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT 63 (2011); ANDREAS KRIEG, COMMERCIALIZING COSMOPOLITAN SECURITY 74 (2016).

304. DAN KUWALI, RESPONSIBILITY TO PROTECT 90 (2011).

305. *See* Nicholas J. Wheeler & Tim Dunne, *Operationalising Protective Intervention: Alternative Models of Authorisation*, *in* THE ROUTLEDGE HANDBOOK OF THE RESPONSIBILITY TO PROTECT 87, 89 (W. Andy Knight & Frazer Egerton eds., 2012).

306. *See* Nicole Deller, *Challenges and Controversies*, *in* THE RESPONSIBILITY TO PROTECT: THE PROMISE OF STOPPING MASS ATROCITIES IN OUR TIME 62, 71 (Jared Genser & Irwin Cotler eds., 2012); Edward C. Luck, *The Responsibility to Protect: The Journey*, *in* RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE 39, 42–43 (Julia Hoffmann & André Nollkaemper eds., 2012).

307. *See* KUWALI, *supra* note 304, at 91.

308. Karen A. Mingst & Margaret P. Karns, *The United Nations and Conflict Management: Relevant or Irrelevant?*, *in* LEASHING THE DOGS OF WAR 497, 511 (Chester A. Crocker, Fen Osler Hampson & Pamela Aall eds., 2007); ROBERT J. JACKSON, GLOBAL POLITICS IN THE 21ST CENTURY 175 (2013); Bruno Stagno Ugarte & Jared Genser, *Evolution of the Security Council's Engagement on Human Rights*, *in* THE UNITED NATIONS SECURITY COUNCIL IN THE AGE OF HUMAN RIGHTS 3, 27 (Jared Genser & Bruno Stagno Ugarte eds., 2014).

collective humanitarian efforts and intervention pursuant to the R2P in international law.[309] So, many countries have intervened for humanitarian purposes without acquiring Security Council permission as a norm of customary international law.[310]

Similar to the embargo against the use of force, there has been a conceptual disagreement between the ideas of "sovereign states" and "state responsibilities."[311] Scholars have argued that to enjoy the privileges of sovereignty, a state must fulfill its responsibility to its population as set out in the Universal Declaration of Human Rights.[312] Accordingly, the state has an obligation to protect its citizens against infringements of fundamental human rights and war crimes and genocides.[313] Consequently, international guidelines are in continual tension where human rights protection regulations pose strict requirements for states to be responsible regarding the protection of their citizens, and the UN Charter imposes a restriction on the use of force against any state without the consent of the Security Council.[314]

Scholars throughout the world have argued on each side of this contestation: those valuing human rights writing in favor of humanitarian intervention without the consent of the Security Council[315] and those valuing sovereignty writing against such intervention as being against state sovereignty.[316]

C. Armed Conflict with Nonstate Actors

As explained in previous sections, the UN Charter restrains and

309. *See* Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, *in* HUMANITARIAN INTERVENTION 232, 264–65 (J.L. Holzgrefe & Robert O. Keohane eds., 2003); MATTHEW C. WAXMAN, COUNCIL ON FOREIGN RELATIONS, COUNCIL SPECIAL REPORT NO. 49, INTERVENTION TO STOP GENOCIDE AND MASS ATROCITIES 23 (2009).

310. *See* ALAN J. KUPERMAN, THE LIMITS OF HUMANITARIAN INTERVENTION 4 (2001); Stromseth, *supra* note 309, at 255.

311. ROBERT JACKSON, SOVEREIGNTY 128–29, 132, 134 (2007).

312. *See* HANNES PELTONEN, INTERNATIONAL RESPONSIBILITY AND GRAVE HUMANITARIAN CRISES 79–80 (2013).

313. *See id.* at 79.

314. U.N. Charter arts. 2, ¶ 4, 39 & 41–42.

315. *See* Kok-Chor Tan, *The Duty to Protect*, *in* HUMANITARIAN INTERVENTION 84, 92 (Terry Nardin & Melissa S. Williams eds., 2006).

316. *See* Fernando R. Tesón, *The Moral Basis of Armed Humanitarian Intervention Revisited*, *in* THE ETHICS OF ARMED HUMANITARIAN INTERVENTION 61, 70–71 (Don E. Scheid ed., 2014).

prohibits the use of force, with the sole exception of the right to self-defense, where a substantial use of force against a victim state has been used, establishing an actual armed conflict.[317] Scholars have debated over the decades whether armed attacks from NSAs constitute armed conflicts[318] and whether this resort to force in self-defense or to preemptive measures is aligned with the inherent right to self-defense principles in customary international law.[319] Therefore, the unwilling-or-unable test provides a legal framework for the use of force against NSAs taking refuge in the host states' territories. Because the UN Charter was written in the context of state-versus-state conflicts, it arguably does not address armed conflicts between a state and NSAs. Scholars contend that any armed attack on a victim state can constitute an armed conflict and hence establishes a justification to use force against the host state or NSAs under the right to self-defense.[320] However, it is maintained that such a use of force in self-defense must follow the principle of necessity; that is, such resort to force must be the last available resort to reconcile an armed conflict.[321] So the contention for the use of force has further drifted toward new emerging guidelines under the unwilling-or-unable test, where all norms, specific situations, and customary international laws are considered to come upon a neutral agreement for using force in human rights crises and armed attacks by NSAs.

D. Unwilling-or-Unable Test

Ashley Deeks composed the unwilling-or-unable test in an attempt to produce an unbiased mechanism to resolve the legality of the use of force

317. U.N. Charter arts. 2, ¶ 4 & 51.

318. DINSTEIN, *supra* note 36, at 225–27; *see also* John C. Dehn, *Whither International Marital Law?: Human Rights as Sword and Shield in Ineffectively Governed Territory*, *in* THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS 315, 320 (Jens David Ohlin ed., 2016).

319. JOYNER, *supra* note 252, at 170–71; *see also* Giovanni Distefano, *Use of Force*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 545, 561 (Andrew Clapham & Paola Gaeta eds., 2014).

320. *See* DINSTEIN, *supra* note 36, at 225–27; Dehn, *supra* note 318, at 320.

321. Başak Çali, *From Bangladesh to Responsibility to Protect: The Legality and Implementation Criteria for Humanitarian Intervention*, *in* THE DELIVERY OF HUMAN RIGHTS 228, 235 (Geoff Gilbert, Françoise Hampson & Clara Sandoval eds., 2011); David Kretzmer, *Use of Lethal Force Against Suspected Terrorists*, *in* COUNTER-TERRORISM 618, 623–24 (Ana María Salinas de Frías, Katja L.H. Samuel & Nigel D. White eds., 2012).

against NSAs acting within the host states' territories to attack victim states. The test sets out that if the host state is willing and able to curb terrorist attacks within its territories by itself, or with the help of the international community, then the test will work as an incentive for host states to provide a legal mechanism to fight NSAs. However, if the host state is either unable or unwilling to curtail NSA activities, the test will support the victim in its armed conflict with the NSAs.[322]

This test is a neutral mechanism for evaluating whether the commencement of use of force is legitimate; for instance, this test—without prejudice to either the host state or the victim state—provides a no-fault distinction between misconduct and allowed practices within the norms and regulations of international law while taking into consideration the sovereignty of the host state, the legality of self-defense right of the victim states, the occurrence of armed conflict, and mediation to resolve conflicts and promote peace.[323] To encompass all of the aforementioned factors in the equation, the test comprises certain guidelines, which are set out below.

1. Consent of the Host State

The first step of applying the unwilling-or-unable test to the use of force by NSAs from within the territories of a host state is for the victim state to seek the permission of the host state to use force against the NSAs in the territory of the host state.[324] If the host state agrees to the use of force, then the further guidelines in the unwilling-or-unable test become redundant and the issue is resolved by the agreement to use force.[325] For example, over the last decade, the United States has been using drone strikes against NSAs with the consent of Yemeni authorities.[326] However, if the host states refuses to give its consent to

322. Ashley S. Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-defense*, 52 VA. J. INT'L LAW 483, 483 (2012).

323. *Id.* at 506.

324. Waseem Ahmad Qureshi, *The Use of Force Against Perpetrators of International Terrorism*, 16 SANTA CLARA J. INT'L L. 1, 23 (2018), *see also* Deeks, *supra* note 322, at 519.

325. Stephen Mathias, *The Use of Force: The General Prohibition and Its Exceptions in Modern International Law and Practice*, *in* 8 A NEW INTERNATIONAL LEGAL ORDER 73, 81 (Chia-Jui Cheng ed., 2016); *see also* Qureshi, *supra* note 324, at 23.

326. David Cortright & Rachel Fairhurst, *Assessing the Debate on Drone Warfare*, *in* DRONES AND THE FUTURE OF ARMED CONFLICT 1, 15 (David Cortright, Rachel Fairhurst & Kristen Wall eds., 2015); *see also* MARKO MILANOVIC, EXTRATERRITORIAL

use firepower against NSAs inside its territories, then the victim state should invite the host state to conduct combined military actions against NSAs;[327] for instance, the United States seeks the consent of the Yemeni like authorities to conduct drone attacks on its territories on a case-by-case basis, which permits the use of force in the territories of the host state against NSAs.[328] This is continually balanced with the international legal framework to use force, which honors the sovereignty of the host states.

2. Threat or Risk Assessment

It is vital for a victim state to assess the threats and risks incurred or posed by the NS better assess the ability of the host state to curb such threats. For example, if the attacks or threats posed by the NSAs are sophisticated, then it is less likely that the host state will be able to detect or curb such terrorism.[329] Likewise, the larger the threat in the host state—in terms of numbers and technological sophistication of the NSAs—the more likely it is that the host state will be incapable of containing its spillovers or future threats against victim states.[330]

3. Assigning a Time Limit to Assess the Willingness of the Host State

The victim state should give a fixed duration of time to the host state as a procedural guideline, so that the host state can itself curb the threats of the NSAs toward the victim state.[331] When the victim state is alleging that NSAs have been using the territory of the host state to injure the victim state, it is vital for the countries to share intelligence to establish evidence that the NSAs pose a threat to the victim state.[332]

However, where the states have clandestine correspondence with the terrorist organizations, such sharing of information is counterproductive;

APPLICATION OF HUMAN RIGHTS TREATIES 2 (2011).

327. Mathias, *supra* note 325, at 81, 84; Deeks, *supra* note 322, at 525.

328. William C. Banks, *Regulating Drones: Are Targeted Killings by Drones Outside Traditional Battlefields Legal?*, *in* DRONE WARS 129, 145 (Peter L. Bergen & Daniel Rothenberg eds., 2015); *see also* LINDSEY CAMERON & VINCENT CHETAIL, PRIVATIZING WAR 15 (2013).

329. Deeks, *supra* note 322, at 518–21.

330. *Id.*

331. *Id.* at 520–22, 525.

332. *Id.* at 520–23.

for instance, the United States did not inform the Pakistani authorities of the exercise to kill Osama bin Laden because informing Pakistani authorities could have threatened the exercise. As a result, Pakistan registered severe discontent and disapproval since such an act violated its sovereignty.[333] Providing a time limit to the host state is therefore an indispensable guideline to be followed—which allows time to prove either that the host state is efficaciously responding against the NSAs or that it is unwilling to curtail illicit activities.[334]

4. Assessing the Host States' Ability to Curb Threats

In this step it is essential for the victim state to assess the capabilities of the host state to resolve the situation because it is very possible that the host state is willing to curb the threat but is materially unable to contain the NSAs' activities, owing to a lack of military capacity or the existence of prevalent ungoverned territories within the host state.[335] Therefore, the victim state should primarily assess whether the territories of the host state are under the control of the host state or not. If the host state is unable to control its territories and there is no law enforcement in the region, then the NSAs are likely ruling the area.[336] (Information on ungoverned spaces is largely available, so there will not be any technical issue for this substep.)[337] For instance, Turkey recently used its army in self-defense in certain regions of Iraq[338] on the basis that Iraqi authorities had no control or governance over that area.[339] Fortuitously, the international community did not criticize these actions, as they were conducted in areas that were not governed or controlled by any state, and so, in that case, the violation of state sovereignty was not in question.[340]

333. *See* Linda Fecteau, *U.S. and Pakistan Officials on Death of Osama bin Laden*, *in* HISTORIC DOCUMENTS OF 2011, at 231, 234 (Heather Kerrigan ed., 2013).

334. Deeks, *supra* note 322, at 521–22.

335. *See* WATKIN, *supra* note 296, at 389.

336. Deeks, *supra* note 322, at 527–29.

337. *See* JOANNE M. FISH, SAMUEL J. MCCRAW & CHRISTOPHER J. REDDISH, FIGHTING IN THE GRAY ZONE: A STRATEGY TO CLOSE THE PREEMPTION GAP 14–16 (2004).

338. *See Mosul Offensive: Turkish and Kurdish Forces Launch Attacks on IS*, BBC NEWS (Oct. 23, 2016), http://www.bbc.com/news/world-middle-east-37744702 [https://perma.cc/2Y8N-4EMK].

339. *See Turkish Troops in Iraq Repel IS Attack*, BBC NEWS (Jan. 8, 2016), http://www.bbc.com/news/world-middle-east-35262727 [https://perma.cc/UP48-DTHC].

340. *See* Dehn, *supra* note 318, at 352–53; WALI ASLAM, THE UNITED STATES AND GREAT POWER RESPONSIBILITY IN INTERNATIONAL SOCIETY 85 (2013).

Nevertheless, it is important to assess the host state's military capacity to better assess the ability of the state to end NSA attacks.[341]

The victim state should then consider the combat capacity of the host state to assess its capacity to placate threats, because it is plausible that a state is *willing* to limit the terror presented by NSA in its territory but is *unable* to curtail such undertakings, owing to a lack of military competence and facilities.[342] This was seen in the intervention in Syria, where Syrian authorities lacked the essential capabilities to respond during or after the situation.[343] Nonetheless, the victim state must also assess the improvements or development in the military capabilities of the host state, because with experience and time the host state may be better able to respond to such situations.[344] For example, Pakistan has lately been showing positive signs in responsive arrangements against terrorism, and thousands of NSAs have been stopped, and many have been killed in the military actions as part of Operation Zarb-e-Azb.[345]

Therefore, by assessing the host states' strategy, a victim state can sensibly conclude whether a host state is able to curtail NSA threats on its own or whether military action in self-defense is vital to stop imminent future threats.[346]

5. Decision to Undertake Military Action

In order to decide whether to use force in self-defense against NSAs in the territory of the host state or not to take any action, a victim state must consider the previous interactions with the host state.[347] For example, a victim state should evaluate whether the host state has previously been cooperative during conflicts or whether the host state has been posing a threat to the national security of the victim state for too

341. *See* Tams, *supra* note 298, at 405–06.

342. *Id.* at 408.

343. Kinga Tibori-Szabó, *The 'Unwilling or Unable' Test and the Law of Self-defence*, *in* FUNDAMENTAL RIGHTS IN INTERNATIONAL AND EUROPEAN LAW 73, 93 (Christophe Paulussen et al. eds., 2016).

344. *Id.* at 91.

345. *Those Challenging Writ of State to Be Crushed: Nisar*, SAMAA TV (Sept. 10, 2015), https://www.samaa.tv/pakistan/2015/09/Those-Challenging-Writ-Of-State-To-Be-Crushed-Nisar/ [https://perma.cc/FT9J-ZJJJ]; *Operation Zarb-e-Azb: Two Year of Success*, NATION (Sept. 6, 2016), https://nation.com.pk/06-Sep-2016/operation-zarb-e-azb-two-years-of-success [https://perma.cc/V58X-GQYU].

346. *See* Tibori-Szabó, *supra* note 343, at 90–92.

347. Deeks, *supra* note 322, at 529–33.

long. Is the host state an ally of the victim state? This would allow a victim state to better judge whether conducting military actions against NSAs would be reasonable and legitimate.[348]

VII. CONCLUSION

There are six principles that govern a state's right to use force. These include legitimate authority, just cause, last resort, formal declaration, reasonable hope of success, and right intention. For a specific instance of the use of force to be just, all of these principles must be met.[349] However, today aggression or the threat of aggression is seen as just cause for a state to resort to the use force;[350] furthermore, protecting an ally in the face of an aggression is also viewed as just cause to pursue war.[351]

The tenet of lawful authority holds that the decision to declare war must be made by a legitimate sovereign power—in today's world, nation-states. It is also essential that the use of force is the last available recourse, taken only after exhausting all available nonviolent means to resolve a conflict; additionally, war must be accompanied by a formal declaration. Furthermore, the goal of war should be to restore peace. Simply put, if the just cause is to put an end to aggression, then the right intention must be to achieve this end, not to fight for monetary or other benefits.[352]

Almost all religious traditions place value on minimizing recourse to violence and the use of force, since the sole purpose of war is to correct wrongdoing committed by the enemy, not to commit unwarranted atrocities. In this sense, the just war doctrine polices armed action during war. Thus, the principal goal of a just war is to avenge wrongdoing and restore peace.[353]

In this regard, philosophers and progressive thinkers have developed principles for the use of force. Cicero declared that warfare is legitimate

348. *Id.*
349. *See* JONES, *supra* note 14, at 80–81.
350. ROBERT L. HOLMES, ON WAR AND MORALITY 159–62 (1989).
351. Adam Silverman, *Just War, Jihad, and Terrorism*, *in* THE NEW ERA OF TERRORISM 149, 150 (Gus Martin ed., 2004).
352. *See* Little, *supra* note 32, at xxix.
353. *See* Nigel Biggar, *The Ethics of Forgiveness and the Doctrine of Just War: A Religious View of Righting Atrocious Wrongs*, *in* THE RELIGIOUS IN RESPONSES TO MASS ATROCITY 105, 115 (Thomas Brudholm & Thomas Cushman eds., 2009).

if it is undertaken in defense or as punishment.[354] Similarly, St. Augustine viewed warfare as legitimate when it was undertaken either in self-defense, as punishment, or in the defense of others.[355] Similarly, St. Thomas Aquinas believed that wars must be fought for a just cause,[356] and Francisco de Vitoria argued that war should be the last resort to resolve conflict.[357]

Consequently, to safeguard the rights of civilians and noncombatants, international humanitarian law was developed. Wars could no longer be understood as just or unjust, but the atrocities exhibited in war could be categorized as acceptable or unacceptable. With the Industrial Revolution and the advent of nuclear technology, the newfound potency of arms required some regulation of their use since wars could potentially be limitless.

The use of force under the inherent right of self-defense under customary international law, such as in the renowned *Caroline* case, must be necessary, such that it is the only available recourse to resolve a conflict.[358] Furthermore, the use of force was further restrained by developing sophisticated principles such as proportionality, where use of force during an armed conflict should be proportionate to avoid unnecessary destruction and violence, which was established in the landmark *Nicaragua* case.[359]

Nevertheless, there must be an actual or imminent use of force (also known as armed attack) or the threat of the use of force against a victim state before the victim state can invoke the inherent right to self-defense. A threat of force or an armed attack can be devised by NSAs from within the territories of host states.[360] This is because WFSs are known to spill their internal armed conflicts over into neighboring regions or distant lands, owing to their porous territories, a lack of infrastructure, corrupt practices, instable politics and governance, and no law enforcement.[361]

As such, so as not to violate the sovereignty of a host state, a framework, Ashley Deeks' unwilling or unable test, should be followed to assess the legitimacy or reasonableness of the use of force against

354. BAKIRCIOGLU, *supra* note 47, at 47.
355. SZABÓ, *supra* note 57, at 36.
356. GILL, *supra* note 70, at 269.
357. NEWTON & MAY, *supra* note 136, at 62–63.
358. Orina, *supra* note 188, at 27–28.
359. *Id.*
360. DINSTEIN, *supra* note 36, at 225.
361. *See* Patrick, *supra* note 223, at 27–28.

NSAs acting from within the sovereign borders of a host state. First, the victim state must seek the consent of the host state to curtail the threats NSAs pose toward the victim state. Thereafter, the victim state must assess the willingness and capability of the host state's military to respond to such conflicts and the host state's governance and territorial integrity in the areas where NSAs rule or conduct their illicit activities. Then, the victim state must analyze prior interactions with the host state or the ruling political party of the host state in congruence with the ability of law enforcement to stop further harm to the victim state and thus resolve conflicts.[362] By following these guidelines, the legitimacy and reasonableness of the use of force by the victim state in the territory of the host state can be assessed within the legal framework of international law.

362. *See* Deeks, *supra* note 322, at 529–33.