

# Essay

## International Law and the Use of Force: A Plea for Realism

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### I. INTRODUCTION

Since the adoption of the U.N. Charter in 1945, there has been almost continuous debate regarding the provisions governing the international use of force. On the one hand, the U.N. Charter Chapter on “Principles” prohibits “the threat or use of force against the territorial integrity or political independence of any state.”<sup>1</sup> On the other hand, the Chapter on “Action with respect to threats to the peace, breaches of the peace, and acts of aggression” affirms “the inherent right of individual or collective self-defence if an armed attack occurs.”<sup>2</sup> Arguments have persisted because of the centrality of these provisions to the maintenance of even minimum international order.

Two schools of thought have predominated.<sup>3</sup> They are exemplified by the commentary on the United Nations Charter, edited by International Court of Justice (ICJ) Judge Bruno Simma,<sup>4</sup> by a number of opinions of the ICJ since 1986,<sup>5</sup> and by the 2004 Report of the U.N. Secretary-General’s High-level Panel on Threats, Challenges and Change.<sup>6</sup> Despite the extensive literature on this subject since 1945, no consensus exists.<sup>7</sup>

The following Essay surveys anew familiar issues in the international law governing the use of force. It concludes that adherence to the

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1. U.N. Charter art. 2, para. 4.

2. *Id.* art. 51. On versions in other authoritative languages, see 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 803 n.140 (Bruno Simma et al. eds., 2d ed. 2002) [hereinafter U.N. CHARTER COMMENTARY].

3. J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 416-20 (Humphrey Waldock ed., 6th ed. 1963). The Brezhnev Doctrine and Soviet attitudes toward international law ceased to have policy relevance after 1989. See Nicholas Rostow, *Law and the Use of Force by States: The Brezhnev Doctrine*, 7 YALE J. WORLD PUB. ORD. 209 (1981).

4. U.N. CHARTER COMMENTARY, *supra* note 2. The sumptuous binding conveys an impression of authoritativeness.

5. Legal Consequences of a Wall in Occupied Palestinian Territory, 2004 I.C.J. 136 (July 9); Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

6. Report of the High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (Dec. 2, 2004).

7. BRIERLY, *supra* note 3; see also CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 95 (2d ed. 2004); Christine Gray, *The Charter Limitations on the Use of Force*, in THE UNITED NATIONS SECURITY COUNCIL AND WAR 86-98 (Vaughan Lowe et al. eds., 2008).

requirements of economy of coercion—the principles of necessity and proportionality—holds out the best hope that those using force in self-defense will follow the laws of war while achieving their lawful objectives against those who engage in asymmetrical warfare<sup>8</sup> without regard to such laws.

## II. THE DEPARTURE FROM REALISM

The Simma commentary on the U.N. Charter provides a starting point. It sums up the argument as follows:

The UN Charter did not intend to exclude self-defence entirely, but restricted its scope considerably. A comparison of the different wording of the two provisions [Arts. 2(4) and 51] illustrates that, remaining uncertainties apart, ‘armed attack’ is a much narrower notion than ‘threat or use of force’. If Art. 51 is thus read in connection with Art. 2(4), the stunning conclusion is to be reached that any State affected by another States’s unlawful use of force not reaching the threshold of an ‘armed attack’, is bound, if not exactly to endure the violation, then at least to respond only by means falling short of the use or threat of force, which are thus often totally ineffective. This at first sight unacceptable result is undoubtedly intended by the Charter, since the unilateral use of force is meant to be excluded as far as possible. Until an armed attack occurs, States are expected to renounce forcible self-defence. Because of the pre-eminent position of the SC [Security Council] within the Charter system of collective security, the affected State can in that situation merely call upon the SC to qualify the violations of Art. 2(4) as constituting a breach of the peace and to decide on measures pursuant to Arts. 41 or 42. Only if and when the prohibited use of force rises to an armed attack can the State concerned resort to forcible measures for its defence.<sup>9</sup>

Further, a state may not use force to end another state’s unlawful behavior.<sup>10</sup>

Simma’s perspective resonates in international legal institutions. In the last twenty years, the ICJ, for example, has developed a body of jurisprudence consistent with the Simma view that has drawn severe, reasoned criticism<sup>11</sup>

8. See generally Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 11 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007).

9. U.N. CHARTER COMMENTARY, *supra* note 2, at 790 (citations omitted). Thomas Franck argues that state practice has made Article 51 more flexible than the drafters intended. THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 49-51 (2002); see also Antonio Cassese, *Article 51*, in JEAN-PIERRE COT & ALAIN PELLET, LA CHARTE DES NATIONS UNIES: COMMENTAIRE ARTICLE PAR ARTICLE, 1329, 1358-59 (3d ed. 2004).

10. U.N. CHARTER COMMENTARY, *supra* note 2, at 794. Some suggest that contemporary international law bars one State from aiding another to suppress a rebellion. As a result, today, in the event that we had to live again through the Spanish Civil War, we could expect to hear arguments that assistance to the government of Spain would be unlawful. See Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT’L L. 189, 251-52 (1985). Under the theory advanced in the Commentary, one may well wonder if the U.S. attack on Afghanistan in 2001 should have been viewed as legitimate absent such endorsement. After all, the “armed attack” took the form of crashing civilian airliners into buildings.

11. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 1 (Dec. 19); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9); Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6); Advisory Opinions: Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27). All of these opinions are the subject of much commentary. For a few examples, see Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT’L L. 715, 720-22, 730-32 (2008); Michla Pomerance, *The ICJ’s Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial*, 99 AM. J. INT’L L. 26, 36 (2005); W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-defense*, 100 AM. J. INT’L L.

and led some governments, including the United States, to avoid the Court and other international tribunals wherever possible. Among the difficulties with this body of jurisprudence is the suggestion that there is some legally discernible quantum of force that constitutes an armed attack and some legally principled way to distinguish between armed attacks and attacks, whether armed or not, that do not constitute “armed attacks” within the meaning of Article 51. As a former Legal Adviser to the U.S. State Department put it, defining an armed attack in terms of its gravity

would encourage States to engage in a series of small-scale military attacks, in the hope that they could do so without being subject to defensive responses. Moreover, if States were required to wait until attacks reached a high level of gravity before responding with force, their eventual response would likely be much greater, making it more difficult to prevent disputes from escalating into full-scale military conflicts.<sup>12</sup>

The Simma view states that the law requires the defender to absorb a first strike. This proposition is unrealistic and, in the wake of the events leading to World War II—Manchuria, Abyssinia, Rhineland, Spain, Austria, Czechoslovakia, and Pearl Harbor—was known to be so in 1945. The interpretation also is at odds with the notion, as Justice Jackson put it, that law is not a “suicide pact.”<sup>13</sup> It attempts to fix a definition of permissible self-defense in a changing context<sup>14</sup> and appears to see the defender as more dangerous than the attacker.

Second, the commentary’s analysis of Article 51 is incomplete, ignoring the text and structure of the U.N. Charter. Article 51 uses the term “inherent”<sup>15</sup> to describe the right of self-defense. Earlier writers stressed the importance of this wording as meaning that the right predated the Charter and that the Charter reaffirmed the existing legal contours of that right.<sup>16</sup> Thus, Sir

525, 533-37 (2006); Nicholas Rostow, *Wall of Reason: Alan Dershowitz v. The International Court of Justice*, 71 ALB. L. REV. 953, 972-84 (2008); 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, 80-93 (2008).

12. William H. Taft IV, *Self-defense and the Oil Platforms Decision*, 29 YALE J. INT’L L. 295, 300-01 (2004).

13. *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

14. Or, as was written at the beginning of the U.N. Charter age:

The Charter, like every written Constitution, will be a living instrument. It will be applied daily; and every application of the Charter, every use of an Article, implies an interpretation; on each occasion a decision is involved which may change the existing law and start a new constitutional development. . . . No state can reasonably be expected meekly to accept an interpretation of the Charter which it considers completely wrong, however large the majority in favour of such an interpretation may be. . . . This remark does not apply to an interpretation given by the International Court of Justice or other bodies which may be authorized to give a binding interpretation.

Pollux, *The Interpretation of the Charter*, 23 BRIT. Y.B. INT’L L. 54, 54-57 & n.2 (1946) (emphasis added). This is not to say that a “living” document means whatever one wants it to mean.

15. See *supra* text accompanying note 2.

16. See, e.g., LELAND M. GOODRICH, EDVARD HAMBRO & ANNE PATRICIA SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 345 (3d ed. 1969); MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 232-41 (1961); C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 1952-II RECUEIL DES COURS 451. Reisman also ignores the significance of the word “inherent” as indicating a recognition that the right existed prior to the Charter and is not impaired by it. Reisman & Armstrong,

Humphrey Waldock argued that the Charter did not further restrict the customary

general right of self-protection against a forcible threat to a State's legal rights. . . . Article 51 also has to be read in the light of the fact that it is part of Chapter VII. It is concerned with defence to grave breaches of the peace which are appropriately referred to as armed attack. It would be a misreading of the whole intention of Article 51 to interpret it by mere implication as forbidding forcible self-defence in resistance to an illegal use of force not constituting an "armed attack."<sup>17</sup>

Neither was Waldock impressed by assertions that Article 51 circumscribed the customary right of self-defense articulated in connection with the 1837 *Caroline* case involving British action on American soil against supporters of rebellion in Canada:<sup>18</sup> the government claiming an exception to the general rule against a first strike, even in self-defense, and on another state's territory must present facts that "show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."<sup>19</sup> Waldock's reformulation of the *Caroline* doctrine corresponded to the emerging technological context defined by nuclear weapons and intercontinental ballistic missiles:

legitimate self-defence has three main requirements:

- (1) An actual infringement or threat of infringement of the rights of the defending State[;]
- (2) A failure or inability on the part of the other State to use its own legal powers to stop or prevent the infringement; and
- (3) Acts of self-defence strictly confined to the object of stopping or preventing the infringement and reasonably proportionate to what is required for achieving this object.<sup>20</sup>

Waldock concluded that one should understand that the law of self-defense needs to reinforce the mechanisms of peace, not create advantages as a matter of law for aggressors.<sup>21</sup>

The world lacks a central police power or reliable U.N. Security Council. Accordingly, how does one ensure that those who exercise policing responsibilities, whether or not blessed by the U.N. Security Council, do so responsibly and in support of an international law of minimum world order? The answer propounded by previous generations was the balance of power.<sup>22</sup>

*supra* note 11, at 532. Yoram Dinstein argues both that the Charter does not allow for the use of force in self-defense in the absence of an armed attack and that

[t]here is no need to wait for the bombs to fall—or, for that matter, for fire to open—if it is morally certain that the armed attack is under way (however incipient the stage of the attack is). The victim State can lawfully (under Article 51) intercept the armed attack with a view to blunting its edge.

YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 183, 187 (4th ed. 2005).

17. Waldock, *supra* note 16, at 496-97.

18. See generally R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938).

19. Letter from Daniel Webster, U.S. Sec'y of State, to Lord Ashburton, British Special Minister (July 27, 1842), available at [http://avalon.law.yale.edu/19th\\_century/br-1842d.asp](http://avalon.law.yale.edu/19th_century/br-1842d.asp).

20. Waldock, *supra* note 16, at 463-64.

21. *Id.*

22. Martin Wight, *The Balance of Power*, in *DIPLOMATIC INVESTIGATIONS: ESSAYS IN THE THEORY OF INTERNATIONAL POLITICS* 149 (Herbert Butterfield & Martin Wight eds., 1966); see also HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* 101-25 (1977);

Today, under the hydraulic pressure of nuclear and other indiscriminate and highly lethal weapons, the goal remains an international community governed by a rule of law sensitive to technological realities and encouraging minimum order,<sup>23</sup> and the answer lies in the twin cores of the customary international law governing the use of force, necessity, and proportionality.

### III. THE HIGH-LEVEL PANEL

In 2004, the United Nations published the report of the Secretary-General's High-level Panel on Threats, Challenges and Change: *A More Secure World: Our Shared Responsibility*.<sup>24</sup> U.N. Secretary-General Kofi Annan had called for the study in his first comprehensive comment on the 2003 U.S.-U.K. invasion of Iraq.<sup>25</sup>

Where we disagree, it seems, is on how to respond to these threats [e.g., terrorism and weapons of mass destruction]. . . . Article 51 of the Charter prescribes that all States, if attacked, retain the inherent right of self-defence. . . . Now, some say this understanding is no longer tenable, since an armed attack with weapons of mass destruction could be launched at any time, without warning, or by a clandestine group. Rather than wait for that to happen, they argue, States have the right and obligation to use force pre-emptively, even on the territory of other States, and even while the weapons systems that might be used to attack them are still being developed. According to this argument, States are not obliged to wait until there is agreement in the Security Council. . . . My concern is that, if it were to be adopted, it would set precedents that resulted [sic] in a proliferation of the unilateral and lawless use of force, with or without justification.<sup>26</sup>

Against this background, the High-level Panel's Report, adopted by consensus,<sup>27</sup> addressed (among other things) the law governing the use of force that should apply to contemporary threats.

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LUDWIG DEHIO, *THE PRECARIOUS BALANCE* (1962); EDWARD VOSE GULICK, *EUROPE'S CLASSICAL BALANCE OF POWER* (1955); F.H. HINSLEY, *POWER AND THE PURSUIT OF PEACE* (1963).

23. But see Cassese, *supra* note 9, at 1336, which treats this view as presumptively misguided and necessarily "méta-juridique." Other authors

soulignent justement que a) il n'est pas vrai que la norme coutumière en question prévoyait la légitime défense préventive [but that is precisely what it did do]; b) l'article 51 a de toute façon effacé tout le droit préexistant, sans laisser aucun espace à la légitime défense contemplée par le droit coutumier si ce n'est dans les limites où elle est explicitement autorisée par la Charte de l'ONU.

*Id.* The problem with this point of view is that it is wrong as a matter of history, including the history of international relations under the U.N. Charter, and of common sense.

24. See Report of the High-level Panel on Threats, *supra* note 6.

25. Statement of the Secretary-General, U.N. GAOR, 58th Sess., 7th plen. mtg. at 2-4, U.N. Doc. A/58/PV.7 (Sept. 23, 2003). On September 16, 2004, Kofi Annan said that the 2003 invasion was illegal under the U.N. Charter. *Iraq War Was Illegal, Says Annan*, BBC NEWS, Sept. 16, 2004, [http://news.bbc.co.uk/2/hi/middle\\_east/3661134.stm](http://news.bbc.co.uk/2/hi/middle_east/3661134.stm). But see Nicholas Rostow, *Determining the Lawfulness of the 2003 Campaign Against Iraq*, 34 ISR. Y.B. HUM. RTS. 15 (2004); William Howard Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557 (2003).

26. Statement of the Secretary-General, *supra* note 25, at 3. The Secretary-General's speech merits its own *explication de texte* as an example of selective understanding of the history of international relations in the U.N. Charter era.

27. The fact of consensus is as remarkable as what the document said. Panel members included persons with such diverse perspectives as Gareth Evans (former Australian Foreign Minister and proponent of the Responsibility to Protect), Amr Moussa (former Egyptian Foreign Minister and Secretary-General of the Arab League), Yevgeny Primakov (former Russian Prime Minister), and Brent Scowcroft (National Security Adviser to President Ford and President George H.W. Bush).

The Panel unanimously agreed that the older interpretation of self-defense under the U.N. Charter was correct:

[A] threatened State, according to long established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate. The problem arises where the threat in question is not imminent but still claimed to be real: for example the acquisition, with allegedly hostile intent, of nuclear weapons-making capability.<sup>28</sup>

The Panel concluded that Article 51—the law of self-defense—ought neither to be rewritten nor reinterpreted. It then took up the issue of preemption.<sup>29</sup> It wrote that in the first instance a state should make the case for preventive military action

to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment—and to visit again the military option. For those impatient with such a response, the answer must be that, in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all.<sup>30</sup>

The Panel reaffirmed a status quo.

The Panel thus affirmed that the law of self-defense incorporated anticipatory self-defense, provided the threat was imminent.<sup>31</sup> It also set forth a procedural response to the challenge posed by the events of September 11, 2001. If a state perceives a threat of the sort made real on September 11, it should go to the Security Council for action before taking measures of self-help. In short, a state in such a situation should exhaust its administrative remedies before taking action. The Report would side with anticipatory military action if a state believed it necessary to intercept an attack.

28. Report of the High-level Panel on Threats, *supra* note 6, ¶ 188. The quotation of Article 51 of the U.N. Charter in this paragraph omits the significant word “necessary” after “measures.” The situation created by Iran’s nuclear program exemplifies the problem. Israel perceives an Iranian nuclear weapons capability as a *per se* threat to Israel’s existence because of Iran’s hostility to Israel’s existence and its support of entities such as Hizbollah and Hamas that are committed to the destruction of Israel. There is much talk at this time of Israel undertaking military action against Iran at least to slow down Iran’s progress toward creating a nuclear weapons arsenal. At the same time, the United States has made clear that any nuclear attack on its allies or friends will be met with a maximum U.S. response—a euphemism for the use of nuclear weapons. See Stephen Hadley, Nat’l Sec. Adviser, Remarks to the Center for International Security and Cooperation (Feb. 8, 2008), <http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080211-6.html> (“As many of you know, the United States has made clear for many years that it reserves the right to respond with overwhelming force to the use of weapons of mass destruction against the United States, our people, our forces and our friends and allies.”).

29. The U.S. National Security Strategy of September 2002 had highlighted “pre-emption” as an issue. See THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), available at <http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf>.

30. Report of the High-level Panel on Threats, *supra* note 6, ¶¶ 190-91.

31. *Contra* Reisman & Armstrong, *supra* note 11, at 532.

Apart from advocating a process, the High-level Panel recognized that, at the end of the day, states would do what they believe is necessary.<sup>32</sup> The Panel endorsed above all the principle of necessity that has been at the heart of the law governing the use of force.<sup>33</sup> It also endorsed a contextual view of necessity—reasonableness given the circumstances, including the procedural circumstances, and the belief about the threat to be addressed. As Messrs. McDougal and Feliciano noted more than forty years ago, this approach is the “most comprehensive and fundamental test of all law, reasonableness in particular context.”<sup>34</sup> What is reasonable and who decides?<sup>35</sup> Enter the multiplicity of commentators, observers, and decisionmakers in the international community.

#### IV. NECESSITY AND PROPORTIONALITY: THE ANSWER TO THE CONUNDRUM<sup>36</sup>

The principles of necessity and proportionality, informed by reasonableness under the circumstances, offer a solution to the difficulties posed by the present international context and the intellectual knots it offers. They lie at the core of the international law governing the use of force.<sup>37</sup> This idea is hardly original yet seems more obscure than necessary.<sup>38</sup> For example, Israel’s war in 2006 with Hizbollah or invasion of the Gaza Strip in 2008-2009 generated commentary on the question of “proportionality”—were Israel’s actions in both cases proportional?<sup>39</sup> In a similar vein, NATO’s Kosovo campaign, which inflicted casualties without absorbing them, provoked similar questions.<sup>40</sup> One may not like the goal of making one’s

32. Report of the High-level Panel on Threats, *supra* note 6, ¶ 196; DINSTEIN, *supra* note 16, at 187.

33. MCDUGAL & FELICIANO, *supra* note 16, at 217-18; Sloane, *supra* note 11, at 52 & nn.27-28.

34. MCDUGAL & FELICIANO, *supra* note 16, at 218.

35. In 1995, New York University Law School held a symposium on this subject, including Nicholas Rostow, “*Who Decides*” and *World Public Order*, 27 N.Y.U. J. INT’L L. & POL. 577 (1995).

36. As this Essay was being written, Thomas M. Franck published *On Proportionality of Countermeasures in International Law*, which properly emphasizes the importance of subsequent review. See Franck, *supra* note 11, at 762-67. Article 51 of the U.N. Charter makes much the same point in asserting that the Security Council may end the period in which the right of self-defense exists by taking “measures necessary to maintain international peace and security.” This phrase ought to impose an effectiveness test, but may not do so. The phrase does not receive much notice in the standard commentaries. See U.N. CHARTER COMMENTARY, *supra* note 2, at 789-806; GOODRICH ET AL., *supra* note 16, at 342-53.

37. See generally DINSTEIN, *supra* note 16, at 208-11, 219-51.

38. See, e.g., Thomas Hurka, *Proportionality and Necessity*, in *WAR: ESSAYS IN POLITICAL PHILOSOPHY* 124 (Larry May ed., 2008) (discussing proportionality and necessity in the context of “just war theory”).

39. Franck, *supra* note 11, at 732-34; Sloane, *supra* note 11, at 96-100.

40. See generally the following debate in the *American Journal of International Law*: Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT’L L. 834 (1999); Christine M. Chinkin, *Kosovo: A “Good” or “Bad” War?*, 93 AM. J. INT’L L. 841 (1999); Richard A. Falk, *Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT’L L. 847 (1999); Thomas M. Franck, *Lessons of Kosovo*, 93 AM. J. INT’L L. 857 (1999); Louis Henkin, *Kosovo and the Law of “Humanitarian Intervention,”* 93 AM. J. INT’L L. 824 (1999); W. Michael Reisman, *Kosovo’s Antinomies*, 93 AM. J. INT’L L. 860 (1999); and Ruth Wedgwood, *NATO’s Campaign in Yugoslavia*, 93 AM. J. INT’L L. 828 (1999). See also Sloane, *supra* note 11, at 96.

enemy pay a higher human cost of unlawful attack than the defender, but that feeling does not make the action unlawful. Enemy tactics, such as using human shields, may raise the risk of civilian casualties. That fact does not make the lawful use of force in pursuit of lawful goals, including the destruction of military targets, unlawful. Objectivity is hardly attainable in this area. If one accepts the proposition that Hizbollah in Lebanon and Hamas in Gaza share a goal of destroying Israel, one may reach one conclusion. If one leaves those policy contexts aside and examines just what determined Israel to use force in Lebanon and in Gaza—the *casus belli*—one may reach a different conclusion. And, if one regards facilities with military and civilian uses (dual use) as unlawful as military targets one may reach one conclusion about war crimes just as one might reach another depending on one's outlook.<sup>41</sup>

The discussion involves an older and a newer view. The newer view (which in fact is a revival of the much older concern with just war<sup>42</sup>) worries about proportionality in the context of whether the military action is just, the perpetrators/victims are innocent, and whether the goals are "good."<sup>43</sup> The real legal issue, however, is different and less subjective: it has to do with whether or not an action is reasonably necessary to put an end to the delict giving rise to the right to use force in the first place. In this context, the goal is "economy in coercion."<sup>44</sup> That, together with the distinction between military and nonmilitary targets,<sup>45</sup> encompasses legally permissible military action or other forms of coercion and allows for technological differences among competing forces.

## V. CONCLUSION

The structure of international society and international relations has changed little in centuries. Since World War II and the adoption of the U.N. Charter, we have lived, as we did before, in a global system of independent states.<sup>46</sup> Its structure represents worldwide values. In the eighteenth century, Montesquieu wrote that the law, in its most fundamental meaning, embodies

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41. See Charles J. Dunlap, *Targeting Hearts and Minds: National Will and Other Legitimate Military Objectives of Modern War*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES, *supra* note 8, at 117, 117 (discussing the Crossed Swords monument in downtown Baghdad as a target); W. Hays Parks, *Asymmetries and the Identification of Legitimate Military Objectives*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES, *supra* note 8, at 65, 112-16; see also Franck, *supra* note 11, at 733; Ruth R. Wisse, *Now, About That "Proportionality"*, COMMENT., Mar. 2009, at 27. This point is not made to excuse violations of the chief principle in the laws of war, discrimination between military and civilian personnel and targets. See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 27-33 (2004) (discussing the basic distinction in international law of armed conflict).

42. See, e.g., WILLIAM V. O'BRIEN, *THE CONDUCT OF JUST AND LIMITED WAR* (1981); MICHAEL WALZER, *JUST AND UNJUST WARS* (1977).

43. Hurka, *supra* note 38; see also Sloane, *supra* note 11; Public Ethics Radio, Transcript of Episode 7, Jeff McMahan on Proportionality (Jan. 25, 2008), [http://www.cceia.org/resources/transcripts/0109.html/\\_res/id=sa\\_File1/PER\\_Episode\\_7\\_Transcript.pdf](http://www.cceia.org/resources/transcripts/0109.html/_res/id=sa_File1/PER_Episode_7_Transcript.pdf).

44. McDUGAL & FELICIANO, *supra* note 16, at 218.

45. See DINSTEIN, *supra* note 41.

46. See BULL, *supra* note 22, at 38-40.

the nature of things.<sup>47</sup> This insight is worth recalling in the international context because we do not have a world polity with a monopoly of force and the ability to enforce a rule of law on a global basis.<sup>48</sup> The latter task is left to the states that comprise the international system. In times of stress, whether threatened by states or nonstates, they will look to their ability to defend themselves even if all they can do is call for aid. That is a reality the law, to be the law, must respect.

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47. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 1 (Anne M. Cohler, Basia C. Miller & Harold S. Stone eds. & trans., Cambridge Univ. Press 1989) (1748) (“Laws, taken in the broadest meaning, are the necessary relations deriving from the nature of things.”).

48. In the international community, there also is no one authoritative source of international law. See Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 *YALE J. INT’L L.* 393, 410-13 (2007); W. Michael Reisman, *The View from the New Haven School of International Law*, 86 *AM. SOC’Y INT’L L. PROC.* 118 (1992).