Contemporary International Law on the Decision to Use Armed Force

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Abstract

As the natural law of nations gave way to positive international law, the just war tradition gave way to a more legalistic standard. The UN Charter prohibits any threat or use of force except in self-defense or by Security Council authorization. The Definition of Aggression (1974) attempts to clarify what it means to use force. The amended Rome Statute holds states’ leaders personally accountable for the crime of aggression. However, a plethora of new problems and unresolved old ones pose challenges to complying with the very restrictive *jus ad bellum* of today. Several extra-Charter justifications for force have been advanced in recent years, including protection of nationals, anticipatory self-defense, humanitarian intervention, anti-terrorism, and anti-criminal operations.

From Natural Law to United Nations (UN) Charter

The regulation of the right to resort to force in international law, *jus ad bellum*, is older than international law itself. The foundation of many early treatments of international law (then called *jus gentium* or the “law of nations”), e.g., by Francisco de Vitoria and Francisco Suárez, was the just war tradition in classical Western (and Christian) thought (see Chapter 1). The just war tradition was also a pillar of the groundbreaking 1625 treatise by Hugo Grotius, *The Law of War and Peace*, the first systematic codification of the law of nations (Grotius 1925). However, beginning in the sixteenth century the law of nations began moving beyond its roots in natural law and Christian law and theology, with legal treatises on war drawing more often from secular sources of law, e.g., the works of Balthasar Ayala, Alberico Gentili, and Samuel Pufendorf.

As the “law of nations” was secularized, the influence of natural law declined and gave way to positive “international law” beginning in the eighteenth century. In positive law, the interactions between nations are regulated not by a Thomist-style “dictate of moral reason” or divinely-given morality, but by rules drawn up by states themselves with the intent to be bound by them. Not wanting to limit their prerogatives to make war,¹ states simply did

¹ For brevity’s sake, the remainder of this chapter uses the terms “war” and “force” interchangeably. Strictly speaking, not all military force rises to the level of war, but war and force short of war are both fundamentally the same phenomenon.
not. This practice of states is reflected in the legal treatises of the eighteenth century. In 1758, Emer de Vattel elevated the duty of nations to promote justice among themselves. States had not only the right to resist injustice, but also to procure justice by force (Vattel 1916, ii, v, 64–9). War was the means for remediating an injury, broadly speaking, and causes for war included preventing injury as well as avenging it (Vattel 1916, iii, 26–8). The erosion of the restraint on war in natural law is reflected in the 1795 treatise of Georg Friedrich von Martens. His formula for justifiable causes of war is quite brief: “the violation of a perfect right, either committed, committing, or with which a nation is threatened in the future” (von Martens 1986, ii, viii, 3), which is very broadly permissive. In this era, the practice of states created the law that governed them.

Thus the just war tradition fell into disuse by the turn of the nineteenth century. The requirement of a just cause for war had disappeared altogether; there remained only the prerequisite that the war be “in form, or duly commenced” (Wheaton 2002, i, iv, 5–6). By the turn of the twentieth century, jus ad bellum was virtually non-existent in positive international law. Legal treatises of that period nearly unanimously acknowledged the lawfulness of acquiring territory by conquest and occupation. Title by occupation generally denoted the process by which the “civilized” nations settled in and colonized lands inhabited by “uncivilized” nations. The prevailing attitude in 1914, at the start of World War I, was that the right to make war lay entirely outside the domain of international law.2

All that changed within four years. The destructiveness of World War I instilled a popular revulsion against war generally, and that revulsion manifested itself in new restrictions on the right to resort to war in positive international law. The first restriction was in the Covenant of the League of Nations (1919), which is the first declaration by a broad community of states of an aspiration to eliminate war. War was no longer a private matter between the belligerents; it concerned the entire League (Article 11). Members had to submit their disputes to arbitration or judicial proceedings before resorting to war (Article 12); if the loser of the proceeding complied with the judgment, the winner could not resort to war (Article 13).3

The second restriction, the Kellogg-Briand Pact (1928), was broader still. Beginning as an initiative between the United States and France, the signatory states declared that “they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another” (Article 1). Fifteen states joined the Pact at its original signing and it had 70 signatories in 2012 (US Department of State 2012, 454–5). These developments paved the way for the most comprehensive restriction on war in history: the Charter of the United Nations.

The UN Charter

In the nineteenth century jus ad bellum had been extremely permissive; the UN Charter completed the swing of jus ad bellum to the opposite extreme of restrictiveness. Article 2, paragraph 4, of the Charter reads:

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2 International law continued to regulate the methods and means of war, as it had done since the time of Francisco de Vitoria.

3 If the loser did not comply with the judgment, the winner could then resort to war, but only after three months (Article 12).
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.

By joining the UN, every state declares its intent to be bound by that rule. Furthermore, the rule has entered the body of customary international law as well, resulting in all states now being bound by it whether they signed the Charter or not.

The phrase “against the territorial integrity or political independence of any state” in Article 2 of the Charter can be misleading and warrants some attention. It gives a false impression that it qualifies the general prohibition on using force. If that were true, then one state could threaten or use force against another as long as doing so did not violate the other state’s “territorial integrity or political independence.” However, the negotiating history of Article 2(4) reveals that it was intended to be strict and comprehensive. Its originally proposed text read: “All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization” (UNCIO 1945, vol. 3, 1–3). At the San Francisco conference, many states that had not attended the preparatory conference insisted that the article be strengthened. In response, an Australian proposal to add the phrase “against the territorial integrity or political independence of any member state” was adopted without opposition (UNCIO 1945, vol. 6, 342). In adding that phrase, the drafters of the Charter intended not to create exceptions to the prohibition of the use of force, but rather to reinforce its absoluteness.

The Charter permits only two exceptions to Article 2(4). The first is enforcement action by the UN Security Council, which is the 15-member body of the UN charged with maintaining peace and security. Article 42 reads:

[The Security Council] 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.

There are two procedural steps that the Council must follow first: it must find and declare the existence of a threat to the peace, breach of the peace, or act of aggression (Article 39), and it must consider that non-forcible measures to restore peace and security have been or would be ineffective (Article 42). Beyond those two provisos, its discretion is quite broad. Since the Council must rely on the armed forces of states to carry out its decisions (there are no independent UN armed forces), states acting under its authority are not bound by the restriction against using force in Article 2(4).

The other exception to Article 2(4) is self-defense. Already a part of customary international law, the right of self-defense is further codified in Article 51, which reads: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.” This exception was added to permit a state that had been attacked to take immediate protective measures without violating the Charter. The measure is akin to the fundamental law of individual self-defense in most countries: a police force cannot monitor every person all the time; so an individual being attacked must be able to defend himself until the police arrive. The same is true in international law: once the Security Council has taken measures

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4 The final wording of Article 2(4) replaced “any member or state” with “any state.” For further detail on the negotiating history, see Brownlie (1963, 266–8).
to restore international peace and security, i.e., once it has regained control of the situation, then the state's individual right of self-defense ceases.

In addition, Article 51 provides for collective defense. Collective defense is the exercise of a single state’s right of self-defense by multiple states. A quintessential illustration is the North Atlantic Treaty of 1949 (the charter document of the North Atlantic Treaty Organization, or NATO). Article 5 of the Treaty provides that:

The Parties agree that an armed attack against one or more of them ... shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them ... will assist the Party or Parties so attacked ... including the use of armed force.

In collective defense, State A may use force against State B, which has attacked State C, even if State A has not been attacked itself. However, the attack must have triggered the right of self-defense of State C specifically, and State C must request assistance. Unless both of these conditions are met, State A’s claim of collective defense is not valid (Nicaragua v. U.S. 1986, paras. 232–8).5

This is the extent of jus ad bellum in the UN Charter, and since no part of the Charter discussed here has been superseded, this highly restrictive rule remains in force. Why then does it seem to the casual observer that Article 2(4) is often honored more in its breach than in compliance? The remainder of this chapter addresses the ambiguities and challenges that plague what on its face reads as a clear prohibition against using force.

The Definition of Aggression

The first ambiguity is Article 51 itself, which reaffirms the inherent right of self-defense in customary international law. But defense against what? What is an “armed attack” precisely, and is it the same as an “agression armée” (“armed aggression”) as it is called in the French version of the UN Charter?

The UN General Assembly sought to answer that question in adopting the Definition of Aggression (1974). That document defines “aggression” as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations” (Article 1), thus linking the term back to Article 2(4). The key provision of the Definition of Aggression, Article 3, enumerates seven types of acts of a state that qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

5 However, a specific treaty commitment made in advance would likely be construed as such a request.
(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

The first use of force by a state “in contravention of the Charter,” i.e., without Security Council authorization, is presumed an act of aggression (Article 2).

The Definition of Aggression also contains two types of exceptions to the otherwise thorough prohibition just described. One is the de minimis exception: the act or consequences must be of “sufficient gravity.” This exception is meant to exclude very minor and brief skirmishes or border incursions from being characterized as “aggression.” However, the Security Council must make that determination (Article 2). The other exception concerns the rights of nations that are forcibly deprived of their self-determination, freedom, and independence (Article 7). This exception is somewhat controversial. On the one hand, the provision could on its face be construed to entitle nations seeking independence to fight for it, as well as other states to aid them, much as the Netherlands and the United States had to fight for their independence from Spain and Great Britain, respectively. But at the time and in the context in which the Definition of Aggression was adopted, the document could also be construed to permit states to provide material aid to non-state, quasi-terrorist actors seeking regime change within their own, already independent states such as South Africa and Southern Rhodesia (which later became Zimbabwe). It also was construed by some states to permit aid to Palestinian groups, many of which have engaged in terrorism against Israel.

For the above reasons, and because different states interpreted the Definition of Aggression in different and irreconcilable ways, the Definition was adopted by consensus rather than by a formal vote. The Definition left many questions unanswered, particularly as to how it would be implemented (Stone 1977). In the end, the statements made by many delegations in committee and in plenary sessions of the General Assembly suggest that the Definition garnered only lukewarm support. None of the delegations to the Special Committee on the Question of Defining Aggression were completely satisfied with the document; Canada, for example, considered the Definition “adequate, if not ideal” (Ferencz 1975, vol. 2, 590).

Julius Stone (1977, 245) suggests two hypotheses as to why the Definition was adopted at all: (1) each state hoped it could interpret the Definition according to its own political interests; and (2) the collective membership of the UN wished to avoid the embarrassment of failing what had been a 25-year-long endeavor.

Finally, it should be noted that the Definition of Aggression, however useful in describing the acts of states deemed to violate Article 2(4), is not a legally-binding document
(see Dinstein 2001, 115). Rather, like all other General Assembly resolutions, it is a political document meant to be interpreted and applied by other organs, namely the UN Security Council and the World Court. Thus the Definition of Aggression is not an instrument of international law in and of itself, but it has been used in the formation of international legal standards by other, genuinely lawmaking bodies.

The Crime of Aggression

The Definition of Aggression has grounded an additional development of *jus ad bellum*—one that is legally binding (at least for those states that agree to be bound by it). In 1998, states adopted the Rome Statute of the International Criminal Court (ICC), which created a standing criminal court to try heads of state and other high-level political leaders for certain international crimes. Initially those crimes consisted of genocide, crimes against humanity, and war crimes (*in bello* crimes), but the drafters of the Statute provided for the crime of aggression (*the ad bellum crime*) to be inserted at a later date. That crime was added to the Statute in 2010 (Rome Statute Amendment 2010).

To its proponents, this codification of the crime of aggression marks a sea-change in the domain of war law. It purports to finish the work started at Nuremberg, which was to build a legal foundation for holding the highest officials of states accountable for precipitating war (Nuremberg Charter 1945). The Rome Statute Amendment marks the first time that prosecuting “crimes against peace,” as it is phrased in the Nuremberg Charter (1945), enjoys broad support among states as an institution—and unlike the Nazis, states’ leaders now (purportedly) are on unequivocal notice that starting an unjust war is an offense for which they personally may be held criminally liable. It was hoped that by piercing the sovereign veil and exposing states’ leaders to criminal liability, states would be deterred from, and be held accountable for, launching wars of aggression (though in 2014 it is too early to tell whether that hope will be realized).

In defining the act of state that constitutes “aggression” in the ICC, the Rome Statute on its face appears to be very similar to the 1974 Definition of Aggression. Indeed, Article 8bis, paragraph 2 reproduces verbatim the seven acts enumerated in the 1974 Definition of Aggression. The once political definition of aggression has now become a formal, legal definition.

Beyond that key similarity to the Definition of Aggression, however, the *crime* of aggression is different in other ways. The most important difference is the “threshold clause” contained in Article 8bis, paragraph 1, so named because like the *de minimis* exception in the 1974 Definition of Aggression, it labels as “aggression” only the most serious (or at least, more serious) uses of force. Specifically, the crime of aggression is limited to “an act of aggression which, by its character, gravity and scale, constitutes a manifest violation” of the UN Charter (emphasis added). In one sense this threshold clause is stronger than that of the 1974 Definition of Aggression: the 1974 document only excluded from “aggression” an act of insufficient gravity, whereas the amended Rome Statute also takes into account the act’s character (i.e., the intent and objective of the actor) and scale. The act must pass through three filters to qualify as “aggression” in the Rome Statute, whereas it only had to pass through one in the 1974 Definition of Aggression. However, in another sense the threshold clause is weaker, for it does not specify how and by whom the determination is made, thus leaving the matter ultimately to the discretion of judges and prosecutors.

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6 The crime of aggression will not take effect until 2017 at the earliest (Article 15ter, paragraph 3).
In addition, the crime of aggression lacks the self-determination clause contained in the 1974 Definition of Aggression—a very political clause that likely would have been unworkable in a judicial setting such as the ICC. However, very clear cases of self-determination could potentially be excluded from prosecution as “aggression” by the threshold clause, by virtue of their character.

The Rome Statute also clearly states that the crime of aggression is a leadership crime: the crime is defined as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State” (Article 8bis(1)). Heads of state/government, ministers, and top-level military officials involved in the act of aggression are exposed to prosecution, but lower-level military and civilian officials, who have no reasonable discretion not to carry out superior orders that do not clearly violate *jus in bello*, are not to be prosecuted.

But the Court’s ability to put political leaders on trial is not unfettered. Article 15bis limits the Court’s jurisdiction—it can prosecute leaders only of those states which are parties to the Rome Statute. In 2013, only 122 states out of 195 are parties, and many great powers and most frequent users of force are non-parties, including the United States, China, Russia, India, Pakistan, Israel, Iran, and North Korea. Furthermore, the crime of aggression is a new addition to the Rome Statute, and therefore it must be ratified separately. It is possible that not all current parties will do so. Limiting the jurisdiction of the Court even further is that an act of aggression against a non-party cannot be prosecuted either (Article 15bis(5)). This provision has a ring of fairness toward the states that have elected to become parties (a non-party cannot hold a party accountable for conduct for which the non-party has refused to be accountable itself), but it does not seem to bode well for the Rome Statute’s ability to constrain the most frequent users of force.

Still, the addition of the crime of aggression to the Rome Statute is the most significant development in *jus ad bellum* since the UN Charter, in that it has greater potential than any other to actually influence states’ decisions to resort to war or not.

**Challenges to Compliance**

Unfortunately, that “greater potential” is not saying much. The UN Charter, Definition of Aggression, and Rome Statute all are designed to eliminate the “the scourge of war,” as the Charter’s preamble puts it. The greatest challenge to realizing that goal is *not* that most states actually desire to intimidate, threaten, attack, and even conquer other states free of legal impediments. Rather, the challenge is that the letter of *jus ad bellum* is vague and overly broad. Despite the world having become more peaceful overall, there still remain bad actors and otherwise law-abiding states sometimes must violate the law’s letter so as to uphold its spirit. This is especially true for wealthy democracies with enough military power to protect the greater interests of world public order. Such states, however law-abiding they intend to be, occasionally succumb to the incentives and pressures to resort to force; yet they

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8 More precisely, the Court has no jurisdiction to prosecute acts of aggression committed by the nationals or on the territory of a non-party.
9 Abram and Antonia Chayes (1995) argue that states generally want to comply with international law, and Louis Henkin (1979, 47) argues that compliance with international law is actually widespread and routine—in his words, “almost all nations observe almost all principles of international law … almost all of the time.”
do so having no permanent designs on the territorial integrity or political independence of other states. Because the Security Council is often deadlocked by the realpolitik rivalries of its permanent members, states often must take action outside the legally proper procedural channels. However, because Article 2(4) is so overly broad, and Article 51 is the only other exception to it, states find themselves forced to justify their otherwise good intentions with bad legal arguments. This practice, along with the practice of states with bad intentions to make equally bad legal arguments, once prompted Professor Thomas Franck (1970, 810) to lament the death of Article 2(4) due to states having “violated it, ignored it, run roughshod over it, and explained it away.”

The so-called “killers” of Article 2(4) are classifiable into five major categories. None of them are provided for expressly in the UN Charter, Definition of Aggression, or Rome Statute, and therefore a military venture falling into any of them constitutes an act of aggression and thus a violation of jus ad bellum, according to the strict, literal interpretation of international law.

(1) In protection of nationals, a state sends armed forces into another state to rescue its nationals being held hostage or under serious threat of harm, which the target state cannot or will not take measures to prevent. Contemporary examples include the Mayagüez incident (1975; US vs. Cambodia), the Entebbe incident (1976; Israel vs. Uganda), the unsuccessful Tehran hostage rescue attempt (1980; US vs. Iran), and a multilateral noncombatant evacuation operation in Liberia (1990). These operations were undertaken without the consent of the host state, which technically renders them acts of aggression. Despite some scholars’ opinions that the right of intervention to protect nationals has long existed in customary international law (Bowett 1958, 87–105; Dinstein 2001, 203–7), the majority have taken the position that contemporary jus ad bellum makes no exception for this type of operation (Brownlie 1963, 298–301; Gray 2008, 156–60).

(2) Anticipatory self-defense. Sometimes a state may know that an attack on it is imminent, so it preempts the attack with an attack of its own. The legal rationale for this is that Article 51 of the Charter was never intended to force a state to absorb a potentially catastrophic first blow (Waldock 1952, 498; Henkin 1979, 143). Traditionally, the legal standard for justifying anticipatory self-defense is that the attacker “show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation,” as stated in the Caroline case (Dinstein 2001, 218–19). In other words, the attacker can exercise the right of preemptive defense only when an attack on itself is imminent. At best, however, the Charter is ambiguous as to whether an armed attack triggering the right of self-defense must occur in the future (including the attacking forces being en route to commit the attack), or only in the past. If in the future, then the state that preemptively attacks first is the defender, and the state that is preemptively attacked is the actual aggressor (because its imminent attack on the defender forced the defender into action). The best known case of preemptive defense is Israel’s first strike against Egyptian forces that were mobilized on the border (1967). That strike, which inaugurated the Six-Day War, was criticized by some at the time, but history has since been somewhat kinder to it.

Another variant of anticipatory self-defense is preventive defense. In contrast to the preemptive defense just described, in which an attack is imminent, here an attack is anticipated not immediately but in the more distant future. By striking the distant-in-future aggressor

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10 The Caroline was a steamboat attacked by British Canadian forces in US waters in 1837. The case actually exemplifies the legal standard in its breach, for the US’s position was that the British attack did not meet that standard—and the UK conciliated to that position.

11 The French version of Article 51, which translates as “in the case of an armed aggression,” appears to weigh in favor of allowing a preemptive attack but unfortunately is still not clear enough to settle the question.
in the present, a state prevents a more costly and damaging war in the future. This was Israel’s justification for attacking the Iraqi nuclear reactor in 1981 (a localized strike with few casualties prevented a nuclear attack by Iraq against Israel). The United States has also cited preventive defense to justify proactive military action against terrorist organizations after 9/11 in the so-called Bush Doctrine. Preventive defense was also the centerpiece of the claimed justification by the United States for invading Iraq (2003), in which it sought to eliminate the threat of Iraqi weapons of mass destruction. The Iraq War case highlights a feature of *jus ad bellum* that is taken for granted in conventional self-defense cases: the burden of proof. The state claiming anticipatory self-defense must show that defensive action is justified by a likely armed attack on it. However, when a state attacks first in anticipation of an attack on it, it assumes the risk of being wrong. If its claim that the other state intended to attack it first is not supported by the evidence (as is widely held to be the case with Iraq), then its claim of self-defense fails and the anticipatory first attacker is the actual aggressor.  

(3) **Humanitarian intervention** is military action to stop (or prevent) gross, large-scale violations of fundamental human rights that are committed in another state. Such an operation violates the UN Charter when undertaken without Security Council authorization and without the consent of the host state (which is usually the case, since the intervention is often directed against the host state’s government). This phenomenon emerged only after the significant legal advances in international human rights and the rise in stature and public awareness of the same; and the drafters of the Charter did not foresee these developments’ consequences to *jus ad bellum*. The major post-Charter cases are: India’s invasion and liberation of East Pakistan (now Bangladesh) from West Pakistan (1971), Vietnam’s invasion of Cambodia and ouster of the Khmer Rouge regime (1978), Tanzania’s invasion of Uganda to oust Idi Amin (1979), enforcement of no-fly zones in Iraq to protect the Kurds and Shiites (1991–2003), and NATO’s bombing of Yugoslavia to stop ethnic cleansing in Kosovo (1999). In each instance, the central government had perpetrated widespread atrocities against some or all of the population and the result of military intervention was to halt those atrocities (though occasionally the attackers’ actual motives were more complex than purely humanitarian). Most of these cases exposed the intervenors to condemnation, but not all: the Kosovo intervention famously has been characterized as illegal yet legitimate.

It was in the wake of Kosovo that the notion of an international Responsibility to Protect (R2P) came into vogue. A Security Council resolution authorizing NATO to intervene was blocked by several veto-wielding permanent members (therefore it did not come up for a vote). In addition, Western states were still haunted by their failure to effectively suppress the genocide in Rwanda in 1994. A high-level commission proposed the idea that the international community has a duty to intervene to stop such abuses of state sovereignty, by force when necessary, and the idea of a “responsibility to protect” has enjoyed widespread attention and support (International Commission on Intervention and State Sovereignty (ICISS) 2001; see also *World Summit Outcome* 2005, paras. 138–9). However, neither the ICISS report nor the *World Summit Outcome* advance any suggestion that states should be permitted to intervene without the required Security Council authorization. Furthermore, nothing in either document creates any legal obligation of the Security Council (or General Assembly) to approve such an intervention. The lack of such an obligation renders R2P little more than a political and moral aspiration.

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12 This assumes that the state attacking first has no other legitimate justification for the attack. Several historical cases widely accepted as humanitarian interventions today were never characterized as such by the states undertaking them (because they believed that they needed to justify them as self-defense), e.g., the 1970s cases mentioned in the next section.
The practice of humanitarian intervention poses a quandary for *jus ad bellum*. Its supporters must argue either that the UN Charter does not apply (a virtually unsupportable claim) or that a right of humanitarian intervention has emerged in customary international law through state practice and has superseded the Charter. In turn, opponents have the strict letter of the law on their side, but when they criticize the intervenors they face the moral hazard of the atrocities continuing unchecked and their perpetrators remaining unaccountable for them.

A variant of humanitarian intervention, which I label *ideological intervention*, focuses not on people’s right to life and security and freedom from torture and imprisonment, but instead on their right to good governance. Three historical cases of *pro-democratic intervention* are the US invasions of the Dominican Republic (1965), Grenada (1983), and Panama (1989), the latter two conducted pursuant to the “Reagan Doctrine” of using military force to roll back communism. The Reagan Doctrine was a response to the earlier “Brezhnev Doctrine” of 1968, in which the USSR asserted a right of *pro-communist intervention* to protect communist governments from the threat of collapse (e.g., Hungary in 1956, Czechoslovakia in 1968). With the rise of political Islam, it is conceivable that some states may eventually assert a right of *pro-Islamic intervention* to protect or install Islamic governments. Given the nearly universal condemnation of the intervenors in the cases above, it seems unlikely that ideological intervention will earn widespread acceptance even if traditional humanitarian intervention does.

(4) *Anti-terrorism* operations suppress terrorist organizations and other hostile non-state actors. This practice does not violate the Charter when the state inside which the operation takes place consents to it. However, when the host state does not consent and the Security Council does not authorize the operation, it is often viewed as a Charter violation. This is a point of frustration for states that are frequent targets of terrorist attacks, for the states from which the attacks originate, and in which the terrorist organizations operate, often are unwilling or unable to suppress the terrorist activity (as is their duty to do). Occasionally the terrorist attack actually has been sponsored or even executed by the state itself. A few classic examples of anti-terror operations include Israel’s attacks on terrorist organizations in Southern Lebanon (1980s) and US air strikes against Libya (1986) and Sudan and Afghanistan (1998)—all of which have been criticized as violations of the Charter.

(5) *Anti-criminal* operations are undertaken to depose governments engaged in a common criminal activity. Instances are rare: the most notable is the US invasion of Panama (1989) to capture its leader, General Noriega, who was involved in drug trafficking. One could imagine military interventions to depose regimes engaged in counterfeiting, piracy, or human trafficking. These types of criminal activity do not usually constitute armed attacks against other states (thus eliminating self-defense as a justification), nor do they normally breach fundamental human rights on a large scale (thus undermining a claim of humanitarian intervention). A new, quasi-legal justification would have to be advanced in support of such operations. However, there is insufficient state practice at the moment to establish a precedent for legitimizing them in contemporary *jus ad bellum*.

**Conclusion**

Behind the deceptively simple Article 2(4), which broadly prohibits any threat or use of force against other states, hides a complex minefield of nuances, disputable exceptions, and unresolved problems. Contemporary *jus ad bellum* is fraught with disagreements rooted in the methodologies—and sometimes ideologies—of the law’s interpreters. Positive
international law is supposed to provide a level of clarity and precision that is lacking in natural law, but contemporary *jus ad bellum* seems to have done the opposite.

References


*World Summit Outcome*, 2005. UN General Assembly Resolution 60/1, UN Doc. A/RES/60/1.
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