COMMENTS ON WAR

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I. LAW V. JUSTICE

Many theologians, ethicists, political scientists and occasionally even international lawyers would like to revive the "just war" (*bellum justum*) doctrine in present-day international law. This doctrine was prevalent in the writings of the "fathers of international law" in the sixteenth through the eighteenth centuries. It was borrowed from the Church canonists. Although the roots of the doctrine go back to St. Augustine (early in the fifth century),[1] its principal expression is the Thomist analysis (in the thirteenth century). St. Thomas Aquinas held that a "just war" had to satisfy three cumulative conditions: (i) the authority of a prince (*auctoritas principis*); (ii) a just cause (*causa justa*); and (iii) righteous intention (*intentio recta*).[2]

Through the writings of the "fathers of international law"—Victoria (who, not coincidentally, was a Spanish Dominican monk) and others—the Thomist ideas percolated from theology into the Law of Nations. But it is important to bear in mind that, from the very beginning, the list of "just causes" was manipulated by the "fathers of international law" to fit the political needs of their respective countries. Thus, Victoria—in addressing Spain's war against the "Indians" in the New World—upheld the justice of that war on the made-to-measure excuse that the Indians had violated the Spaniards' right to travel freely, to carry out trade, and to propagate Christianity.[3]

Even in its heyday, the "just war" doctrine was mostly a convenient tool or fig-leaf, and States went to war whenever they deemed fit, using or abusing an arbitrary list of "just causes." There is no

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1. AUGUSTINE, THE CITY OF GOD AGAINST THE PAGANS 928-29 (R.W. Dyson trans., Cambridge Univ. Press 1998).

2. 2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA 1360-63 (Fathers of the English Dominican Province trans., Benziger Bros. 1947).

3. FRANCISCI DE VICTORIA, DE INDIS ET DE IVRE BELLI RELECTIONES 151-58 (Ernest Nys ed., John Pawley Bate trans., Classics of International Law 1995).

indication whatever that the "just war" doctrine affected the practice of States by limiting in a perceptible manner their freedom to go to war. No wonder that, by the nineteenth century, the international legal literature abandoned the "just war" doctrine and openly admitted that States had full discretion to "resort to war for a good reason, a bad reason or no reason at all."[4] Through bilateral non-aggression pacts, States could relinquish in individual cases their general right to go to war. But, otherwise, war could be waged whenever it was considered advantageous.

International law underwent a metamorphosis only in the twentieth century: first (in a somewhat restricted fashion) in the 1928 Kellogg-Briand Pact for Renunciation of War as an Instrument of National Policy,[5] and then—in a sweeping prohibition of the use (and even the threat) of force in international relations—in Article 2(4) of Charter of the United Nations of 1945. As proclaimed by the International Court of Justice, in 1986, in the *Nicaragua* case, this prohibition is now reflected in customary international law.[6]

There is no reason to think that the congruence of Charter and customary law on the use of force has disintegrated between 1986 and 2003. Can future customary international law part company in this regard with the law of the Charter? In theory, the answer to the question is affirmative. But one must keep in mind that the interdiction of the use of inter-State force is generally acknowledged today as *jus cogens* (a peremptory norm).[7] A revision of *jus cogens*—albeit feasible—is not easy to bring about.[8]

The overall prohibition of the use of inter-State force is subject to only two exceptions, both explicitly recognized in the Charter: (a) self-defense in response to an armed attack,[9] and (b) military action taken or authorized by the Security Council in a binding decision, following determination of the existence of a threat to the peace, a breach of the peace, or an act of aggression.[10]

The powers of the Security Council pursuant to the Charter are

4. THE LAW OF NATIONS: CASES, DOCUMENTS, AND NOTES 976 (Herbert W. Briggs ed., 2d ed. 1952).

5. General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

6. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 99-100 (June 27).

7. *See* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 94 (3d ed. 2001).

8. *See id.* at 96-98.

9. *See* U.N. CHARTER art. 51 ("Nothing in the present Charter shall impair the inherent right of . . . self-defence if an armed attack occurs against a Member . . ..").

10. *See* U.N. CHARTER arts. 39-41.

extensive, but—unless the five Permanent Members (vested with a veto power) are willing to put these powers in play—the Security Council may remain aloof (not to say paralyzed) notwithstanding a manifest need for action. If at the same time conditions for invoking the right of self-defense are unfulfilled, the net result is that—under the Charter—no inter-State force can be used lawfully, regardless of the provocation. The only option is to try to settle the dispute by peaceful means, in line with Article 2(3) of the Charter.[11] This can prove very frustrating.

Despite temptations, I completely reject the notion that the current prohibition of the use of inter-State force is subject to any additional exception not expressly incorporated in the Charter, beside self-defense and action by—or with the authority of—the Security Council. I unapologetically belong to a school of thought that interprets the text of the Charter very strictly in case of a disagreement regarding its reach or meaning. I am apprehensive of any "creative interpretation" of the Charter, unless it is supported by consistent and uniform practice.[12]

The U.N. Charter is the counterpart of a constitution in the international community. Article 103 of the Charter promulgates that, in the event of a conflict between obligations derived for U.N. Members from the Charter and their obligations under any other treaty (past or future), the Charter obligations prevails.[13] The primacy over any other stratum of legislation is the hallmark of any constitution. For my part, I strongly adhere to the view that any erosion of the authority of the Charter endangers the stability of the fragile *limes* protecting the international community against forces of chaos and barbarism.

It is wrong to believe that the U.N. Charter, in forbidding the use of force in international relations, has followed in the footsteps of the "just war" doctrine. The proscription of inter-State force amounts to a

11. U.N. CHARTER art. 2, para. 3 (requiring that "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.").

12. The leading illustration for consistent and uniform practice affecting the interpretation of the text of the Charter is the endorsement by the International Court of Justice of the long-standing consensus in the Security Council that only a negative vote cast by a Permanent Member amounts to a veto defeating a resolution, whereas an Abstention by a Permanent member, or non-participation in the vote, does not count. *See, e.g.*, Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 22 (June 21).

13. U.N. CHARTER art. 103.

veritable revolution compared to earlier international law. The U.N. Charter has wiped out the pre-existing permissive legal norms concerning recourse to inter-State force and has introduced a whole new set of legal norms based on a *jus contra bellum*. It is totally irrelevant today whether or not a war is just. The sole question is: is war legal, in accordance with the Charter?

Since the Nuremberg proceedings of 1945-1946 (which were predicated on the Kellogg-Briand Pact, rather than the Charter), it is clear that waging a war of aggression amounts to a crime against peace. This was the gist of Article 6(a) of the Charter of the International Military Tribunal set up to try the major German war criminals,[14] and the Tribunal pronounced that the criminalization of war of aggression was declaratory of customary international law.[15]

The crime of aggression is also enumerated in Article 5 of the 1998 Rome Statute of the International Criminal Court as subject to the jurisdiction of the Court, although the Court will not exercise that jurisdiction until a definition of the crime is adopted in the future.[16] While the precise scope of the crime of aggression is hotly debated (hence the delay in arriving at a definition), the concept underlying it is not in dispute.

Ever since the adoption of the U.N. Charter, there have been attempts—from various sides of the political spectrum—to revive the "just war" doctrine. However, resurrecting the "just war" doctrine at the present juncture is dangerous for two reasons: it is used to circumvent the Charter and it blurs the total distinction between the *jus ad bellum* and the *jus in bello*.

As a rule, those who are attempting to reintroduce the "just war" doctrine do so with a transparent reason. What they would like to accomplish is to legitimize war in circumstances when it is mounted in breach of the Charter (because it does not come within the framework of the two exceptions to the prohibition of the use of inter-State force approved by the Charter). In the past, this approach was characteristic of developing and Socialist countries who wished to allow foreign States to lend military support to "wars of national

14. Charter of the International Military Tribunal, Annexed to the London Agreement, August 8, 1945, art. 6(a), 59 Stat. 1546, 1547, 82 U.N.T.S. 279, 288.

15. International Military Tribunal (Nuremberg), Judgment and Sentences, *reprinted in* 41 AM. J. INT'L L. 172, 219-23 (1947).

16. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf. 183/9 (2002).

liberation" against colonial Powers.[17] Today, the context is principally that of "humanitarian intervention" undertaken by mighty developed countries (without the authority of the Security Council) in the face of atrocities and brutal disregard of human rights.[18] The fulcrum of legal debate in the last few years has been the Kosovo Air Campaign launched by NATO against the former Yugoslavia in 1999. The Air Campaign had much to commend it against the backdrop of "ethnic cleansing" and other violations of human rights taking place in Kosovo. Yet—however just the use of force was in the minds of the architects of the Air Campaign—NATO acted in breach of the Charter, inasmuch as it failed to obtain the authorization of the Security Council (and the circumstances would not sustain claims of self-defense).[19] Morally speaking, the Kosovo Air Campaign may have been an "excusable breach" of the Charter, but it was a breach nevertheless.[20]

Has the Kosovo Air Campaign introduced into present-day customary international law a new construct, transcending the Charter, of the legitimacy of a "just war" in response to gross violations of human rights? It is noteworthy that the key player, the United States, has assiduously refrained from rationalizing the Air Campaign on the ground of "humanitarian intervention," and—in stressing the *sui generis* character of the Campaign—has expressed the desire "not to overdraw the various lessons that come out of it."[21] I believe that Kosovo was the (unlawful) exception to the rule, rather than evidence of the emergence of a new rule.

There is a natural tendency on the part of proponents of the "just war" doctrine to confer a preferred status in the conduct of hostilities on the belligerent whose cause is just, as compared to its adversary. However, one of the most basic principles of modern international law is that of a total separation between the *jus ad bellum* and the *jus in bello*. The *jus in bello* applies equally to all Parties to an international armed conflict, notwithstanding their disparate standing

17. *See* DINSTEIN, *supra* note 7, at 64-66.

18. *See id.* at 66-68, 271-73.

19. *See* M. Byers & S. Chesterman, *Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law, in* HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 177, 181-84 (J.L. Holzgrefe and R.O. Keohane eds., 2003).

20. *See* Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change, in* HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS, supra note 19, at 232, 243.

21. *See* Byers & Chesterman, *supra* note 19, at 199.

pursuant to the *jus ad bellum*. There is no distinction whatever between the rights and obligations in warfare of the armed forces or civilians of the aggressor State(s), on the one hand, and those of the State(s) resorting to self-defense or participating in enforcement operations authorized by the U.N. Security Council, on the other.[22] Breaches of the *jus in bello* cannot be warranted on the ground that the enemy is responsible for commencing the hostilities in flagrant breach of the *jus ad bellum*. In the words of the Preamble to Protocol I of 1977, Additional to the Geneva Conventions for the Protection of War Victims:

> [T]he provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict . . . .[23]

Even United Nations forces, when engaged as combatants in situations of armed conflicts, are obligated to respect the principles and rules of the *jus in bello*.[24]

Absent authorization by the Security Council, the only licit use of force today by one State against another—under both the Charter and customary international law—is in self-defense against an armed attack, and this is true whether the action is taken individually (by the direct victim of an armed attack) or collectively (by third States coming to the assistance of the victim State). The indispensable condition for the exercise of the right of individual or collective self-defense under Article 51 of the Charter is that "an armed attack occurs." The requirement of such an occurrence totally undermines any theory of anticipatory or preemptive self-defense (in the sense of initiating self-defense measures in anticipation of a future armed attack, prior to its actual occurrence).[25] A State is disallowed to use force merely on the ground of assessment of the dangerous military capabilities—or even the perceived hostile intentions—of another State. An arms race or saber-rattling speeches by the leadership of a

22. *See* DINSTEIN, *supra* note 7, at 140-47.

23. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, pmbl., 1125 U.N.T.S. 3, 7.

24. *See* United Nations Secretariat, Secretary General's Bulletin, Observance by United Nations Forces of International Humanitarian Law, U.N. Doc. ST/SGB/1999/13 (1999), *available at* http://www.un.org/peace/st_sgb_1999_13.pdf.

25. *See* DINSTEIN, *supra* note 7, at 165-69.

State are not enough to entitle another State to use force. All that a State can do in anticipation of a future strike by an unfriendly country is prepare for it militarily, try to defuse the crisis, or raise the matter before the Security Council, which is the only organ empowered to take or authorize military action against a mere "threat to the peace."

Having said that, there remains the question of the point in time at which an armed attack "occurs." Article 51 does not imply that an armed attack must be fully consolidated before the right to self-defense crystallizes. Once an armed attack is beginning to occur—even when it is at a very preliminary or incipient stage—self-defense may legitimately be invoked in an "interceptive" manner.[26] By way of a common example, when the radar of an anti-aircraft battery locks on another State's warplane, the pilot need not wait until a missile is launched against him: he can strike right there and then.

A few words about the Gulf War. After the invasion of Kuwait by Iraq, in August 1990, the Security Council immediately determined, in Resolution 660, that the invasion was a breach of the peace.[27] It looked for a while as if the Security Council might take direct military action against Iraq. But this was not to be. Instead, a coalition of States, led by the United States, was voluntarily formed, with a view to responding to the Iraqi armed attack on the basis of collective self-defense. Since the exercise of individual or collective self-defense in response to an armed attack can be carried out by States unilaterally, without depending on the prior approval of the Security Council, there was no legal need for the Council to authorize the military action against Iraq. The Security Council eventually adopted Resolution 678, which did authorize the coalition "to use all necessary means" (a euphemism for the use of force) against Iraq, should the latter not fully implement previous resolutions by 15 January 1991.[28] In the final analysis, Resolution 678—while giving an enormous political boost to the coalition in the court of world public opinion—only tied the coalition's hands in legal terms. The resolution precluded the possibility that military operations would be unleashed by the coalition against Iraq from the date of its adoption (November 1990) until mid-January 1991. However, at no time did the Security Council establish a U.N. force for combat against Iraq: the use of

26. *See id.* at 171-73.

27. S.C. Res. 660, U.N. SCOR, 45th Sess., 2932d mtg. at 19, U.N. Doc. S/INF/46 (1990).

28. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg. at 27, U.N. Doc. S/INF/46 (1990).

force by the coalition (subsequent to the expiry of the deadline) was paradigmatic of collective self-defense per Article 51.[29]

II. THE WAGING OF WAR

War, as the subject of the contemporary *jus contra bellum,* is inter-State in nature. It does not have to be a World War, nor does it have to involve a whole array of States; war can be a bilateral affair. But, as a minimum, two States must be fighting each other. The prohibition of the use of force in Article 2(4) of the Charter extends exclusively to international, i.e., inter-State, relations. Of course, at the present time, most armed conflicts raging in the world are not international but internal in character (that is, they are intra-State conflicts or "civil wars"). However, while international law deals increasingly with a *jus in bello* specifically adapted to non-international armed conflicts,[30] there is no international *jus ad bellum* governing their outbreak.

It must be appreciated that drawing the line of demarcation between inter-State and intra-State armed conflicts may prove a complicated task. Some armed conflicts incorporate elements of both inter-State hostilities (between two or more belligerent States) and intra-State hostilities (between two or more clashing groups within the territory of one of the belligerent States where a civil war is raging). This is what happened in Afghanistan in 2001: the Taliban regime, having fought a long-standing civil war with the Northern Alliance, got itself embroiled in an inter-State war with an American-led Coalition as a result of providing shelter and support to the al Qaeda terrorists who had launched the notorious attack against the United States on September 11 of that year.[31]

The fact that a belligerent State is beset by enemies from both inside and outside its territory does not mean that the international and the internal armed conflicts necessarily merge. Specific hostilities may be waged exclusively between the domestic foes (e.g., between the Taliban forces and the Northern Alliance), whereas other hostilities may take place on the inter-State plane (e.g., between the Taliban forces and the Americans). As the International Court of

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29. *See* DINSTEIN, *supra* note 7, at 243-45.

30. *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

31. *See* Christopher Greenwood, *International Law and the "War Against Terrorism,"* 78 INT'L AFF. 301, 309 (2002).

Justice pronounced in the *Nicaragua* case of 1986 regarding a parallel state of affairs:

> The conflict between the *contras*' forces and those of the Government of Nicaragua is an armed conflict which is "not of an international character". [sic] The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts.[32]

There are also situations in which a clash of arms which starts with the attributes of an intra-State armed conflict develops into an inter-State war. This may happen through the military intervention of a foreign State on the side of rebels against the central Government. Another possibility is the implosion of a State which has plunged into a civil war, and has then fragmented into two or more independent States. Such implosion and fragmentation occurred in Yugoslavia in the 1990s. As the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia held in the *Tadic* case, in 1999, the participation of the Federal Republic of Yugoslavia (Serbia-Montenegro) in hostilities in Bosnia-Herzegovina—once the latter seceded from Yugoslavia and emerged as an independent State in 1992—denoted that a state of an international armed conflict existed between them.[33]

Not every instance of use force in international relations between States necessarily amounts to war. Some armed clashes between States do not reach the threshold of war and can only be classified as incidents "short of war." Indeed, it is the frequency of such incidents that has led the framers of the U.N. Charter to expand the *jus contra bellum* from war (renounced in the Kellogg-Briand Pact) to any use of inter-State force.

A state of war indicates that a more serious and protracted clash of arms is going on, compared to a mere incident "short of war." A full-fledged war may break out in two ways, one technical and the other material.

The Technical Commencement of War

The technical mode of commencing war is for a State to issue

32. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 114 (June 27).

33. *See* Prosecutor v. Tadic, 38 I.L.M. 1518, 1549 (Int'l Tribunal for the Former Yugoslavia, Appeals Chamber 1999).

either a declaration of war against another State or an ultimatum with a conditional declaration of war in case the other side does not comply. The issuance of a declaration of war or an ultimatum is required by the 1907 Hague Convention (III) Relative to the Opening of Hostilities.[34] It is well known that, in reality, declarations of war are now exceedingly rare, and, when issued, may well be issued by the victim of aggression after the outbreak of hostilities. But it is noteworthy that the U.S. went to war against the Taliban-led Afghanistan, in 2001, following a classical ultimatum.[35]

The Material Commencement of War

War can also unfold in a material way, regardless of formal statements (a declaration of war or an ultimatum). This would be the outcome of an actual recourse by a State to comprehensive force against another State. It need not be assumed that every war must be "total," but the use of force in war must be comprehensive in terms of time, space, quantity (of military units engaged), or quality (of devastation inflicted).[36]

Sometimes, while the scale and effects of an armed clash between States are substantial, both sides stick to a fiction (which does not mirror the true state of affairs and need not be accepted by third States) that a mere incident "short of war" has occurred.[37] Conversely, the issuance of a declaration war does not mean that hostilities will necessarily ensue, so that a technical state of war may remain technical.[38] Nonetheless, it is clear that since war must be waged between two or more States, figures of speech like "war on terrorism" must be taken as metaphorical. A "war on terrorism" may segue into a real war when—like in Afghanistan in 2001—one State (the United States) went to war against another (Afghanistan) owing to the support given by the latter to terrorists. But usually the "war on terrorism" is prosecuted through ordinary law enforcement measures

34. Convention Relative to the Opening of Hostilities, Oct. 18, 1907, art. 1, 36 Stat. 2259, 2271, 205 Consol. T.S. 264, 270.

35. The text of the non-negotiable American demands addressed to the Taliban regime appears in *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 237, 243-44 (2002) (edited by Sean D. Murphy).

36. On war in the material sense, see DINSTEIN, *supra* note 7, at 9-10, 32.

37. The Soviet-Japanese armed conflict of 1939, in Manchuria, is a good illustration of this phenomena. *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 389-89 (1963).

38. For the example of certain Latin American States in both World Wars, see JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT: A TREATISE ON THE DYNAMICS OF DISPUTES—AND WAR—LAW 306 (2d ed. 1959).

or even incidents "short of war," without waging an all-out war.

The interest in producing a clear-cut and precise definition of war has waned since the conclusion of the U.N. Charter and the broadening of the *jus contra bellum* to all instances of inter-State use of force. The need to define war is still evident in some branches of domestic law—for example, in the contexts of "war powers" in constitutional law or "war risks" in insurance law. But insofar as contemporary international law is concerned, the definition of war has little bearing on concrete decision-making. In any event, all inter-State armed clashes must be conducted today in conformity with the *jus in bello*, even if the occasion is an incident "short of war." Article 2 common to the 1949 Geneva Conventions for the Protection of War Victims appropriately proclaims in its first Paragraph: "[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."[39]

The question of a formal recognition of the enemy as a State or as a Government does not come into play in war, either in respect of the *jus ad bellum* or that of the *jus in bello*. The statehood of the opposing Parties, which obviously prejudges the nature of the armed conflict as an inter-State war, is determined by objective criteria set by international law.[40] The fact that one of the Parties does not recognize the other as a State is immaterial. Statehood is wholly contingent on satisfying those criteria (which do not include recognition), and failure to gain recognition does not affect the rights of the non-recognized State.[41] Evidently, one of the primary consequences of a war (like the Vietnam War) may be the loss of statehood by one of the former belligerents, that is, the disappearance of a pre-existing State.[42] But as long as a State exists (in conformity with the international legal

39. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 2, para. 1, 6 U.S.T. 3114, 3116, 75 U.N.T.S. 31, 32; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 2, para. 1, 6 U.S.T. 3217, 3220, 75 U.N.T.S. 85, 86; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, para. 1, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 136; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, para. 1, 6 U.S.T. 3516, 3518, 75 U.N.T.S. 287, 288.

40. For these criteria, see JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 36 (1979).

41. *See id.* at 74.

42. The separation of Vietnam into two States, however temporary, cannot be denied. *See id.* at 287.

criteria)—even if the war is fought in order to quash or retain that existence—a subjective non-recognition by the enemy does not affect the State's objective legal standing as a belligerent Party for purposes of the application of the *jus in bello*.

In the same vein, no formal recognition of a particular regime as the Government of an enemy State is necessary. Consequently, in the 2001 hostilities, it did not matter that the Taliban regime failed to gain recognition as the Government of Afghanistan by the international community at large (and specifically by the United States). The fact that the Taliban regime was in control of most of the territory of Afghanistan meant that—recognized or not—it was the de facto Government, and the regime's actions had to "be treated as the actions of the state of Afghanistan."[43]

Once war commences, it can go on for years and even decades with intermittent clashes. The "Hundred Years War" and the "Thirty Years War" are old examples. But it may be useful to take a look at the Arab-Israeli conflict. The latest war between Syria and Israel, which broke out in 1967, is now in its 36th year and still counting. The latest war between Jordan and Israel, which also started in 1967, ended in 1994, after 27 years; while the latest war between Egypt and Israel went on between 1967 and 1979 for "only" 12 years. The record is held by the war between Iraq and Israel that started in 1948 but went on until 2003, that is, for 55 years. The reason why the war was so long is that in 1949, unlike four other Arab countries that had invaded Israel upon its creation in 1948 (Egypt, Jordan, Syria and Lebanon), Iraq declined to conclude an Armistice Agreement with Israel terminating the war. In the course of the years since the late forties, there have been a number of serious clashes between the two countries. Suffice it to mention that large Iraqi formations fought Israeli troops at the gates of Damascus in 1973; Israel bombed the Iraqi nuclear reactor at Osirak in 1981; and Iraq launched Scud missiles against Israel in 1991. I assume that the war between Iraq and Israel will shortly be over, as a result of the occupation of Iraq by the Coalition forces, but only time will tell.

War can—and often does—end with less than final victory of one side. This is what happened, for example, in Korea. But the decision to end war with a compromise is a matter of choice or battle fatigue. As long as one of the belligerent Parties persists, war can go on to the finish. World War II is the classical template: the Allies insisted on a

43. Greenwood, *supra* note 31, at 312-13.

policy of "unconditional surrender,"[44] and pursued the war to the last bunker of the dictator in Berlin and to the total collapse of Imperial Japan. The point is of great import. During the 1991 phase of the Gulf War, allegations were made to the effect that the coalition had to stop the fighting upon the liberation of Kuwait.[45] But, in accordance with international law, there was no impediment to prolonging the hostilities all the way to Baghdad. In fact, the failure to follow through in 1991 led to Iraq's defiance of the coalition and to the full occupation of the country in 2003.

III. SUSPENSION V. TERMINATION

When war is prosecuted, it is frequently punctuated with general or local interludes in hostilities. Such interludes are now called cease-fires, but in the past were referred to as truces or armistices. A cease-fire may be formal or informal. A formal cease-fire either follows a binding decision of the Security Council or is directly agreed upon by the parties. In both instances, the cease-fire may embrace many obligations transcending the mere suspension of hostilities: e.g., fixing demarcation lines, providing for an exchange of prisoners of war, and establishing demilitarized zones. The most extreme case of a cease-fire setting terms beyond a suspension of hostilities is the Iraqi cease-fire, based on Security Council Resolution 687, which imposed on Iraq far-reaching obligations with respect to the destruction of Weapons of Mass Destruction.[46]

A suspension of hostilities must be differentiated from their termination. A cease-fire does not end war. The Gulf War is a good case in point. As mentioned, it was started by Iraq upon the invasion of Kuwait in August 1990. Hostilities between Iraq and the coalition that came to the aid of Kuwait (with the blessing of the Security Council) began in January 1991. The cease-fire became effective in April 1991, once Iraq officially announced that it accepted the provisions of Resolution 687.[47] The hostilities of 2003—like earlier rounds of hostilities between 1991 and 2003 (preeminently in 1998

44. The Allied policy of "unconditional surrender" was formally declared in the Declaration of Four Nations on General Security, Oct. 30, 1943, *in* 9 DEP'T STATE BULL. 308, 309 (1943).

45. *See* Mary Ellen O'Connell, *Enforcing the Prohibition on the Use of Force: The U.N.'s Response to Iraq's Invasion of Kuwait*, 15 S. ILL. U. L.J. 453, 479 (1991).

46. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. at 11, U.N. Doc. S/INF/47 (1991).

47. *Id.*

and 1999)—did not signify the outbreak of a new war. They were only different phases of the same Gulf War that went on from 1990 to 2003 and is not really over even at this point.

Under Article 40 of the Regulations Respecting the Laws and Customs of War, Annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907, any serious violation of a cease-fire (armistice, in the original language) gives the other Party the right to denounce it and even, in cases of urgency, to recommence hostilities immediately.[48] The modern phraseology is that of "material breach" of the agreement. Article 60 of the 1969 Vienna Convention on the Law of Treaties sets forth that a Party to a treaty (a term embracing a formal cease-fire agreement between States) may invoke its "material breach" by another Party as a ground of terminating or suspending the operation of the treaty.[49]

Security Council Resolution 1441 decided categorically—in a binding manner under Chapter VII of the Charter—that "Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687," insofar as disarmament obligations are concerned.[50] The Security Council further decided to give Iraq "a final opportunity to comply with its disarmament obligations" by giving U.N. inspectors a full account of its programs to develop weapons of mass destruction.[51] Once a "material breach" of the cease-fire agreement (rooted in Resolution 687) was conceded by the Security Council to exist, the decision whether and when to recommence military operations was vested in the other side to the armed conflict under the Hague Regulations and the Vienna Convention, to wit, the (restructured) coalition. By giving Iraq "a final opportunity," the Security Council—as it had done in Resolution 678—actually limited the freedom of action of the coalition: the coalition had to hold its fire until the U.N. inspectors reported back whether or not Iraq was complying with all its obligations. However, after several reports by the U.N. inspectors clearly concluding that Iraq had not fully met its obligations were transmitted to the Security

48. Regulations Respecting the Laws and Customs of War on Land, Annex to Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 40, 36 Stat. 2277, 2305-06, 205 Consol. T.S. 277, 295 [hereinafter Hague Regulations].

49. Vienna Convention of the Law of Treaties, May 23, 1969, art. 60, 1155 U.N.T.S. 331, 346.

50. S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg. at 3, U.N. Doc. S/RES/1441 (2002).

51. *Id.*

Council,[52] there is no doubt in my mind that the coalition regained its freedom of action and was not required to obtain another resolution from the Security Council.

In the past, an armistice was the equivalent of the present-day cease-fire. That is how an armistice is examined by Articles 36 to 41 of the Hague Regulations of 1899/1907: as an agreement to suspend military operations, i.e., a cease-fire.[53] A modern armistice must be distinguished from a cease-fire, inasmuch as a cease-fire only suspends warfare whereas an armistice can now terminate war. The best illustrations for the termination of war through an armistice are the four separate armistices of the Arab-Israeli conflict agreed upon in 1949[54] and the armistice concluded in Korea in 1953,[55] all of which prohibited any continuation of hostilities.

The new meaning of an armistice is tied to the watershed Armistice with Germany in November 1918 which virtually terminated World War I.[56] The leading example of the completely transformed role of an armistice is that of the Italian Armistice of September 1943, in World War II, which not only pulled Italy out of the Axis with Nazi Germany but turned Italy into a co-belligerent against Germany.[57] Surely, if Italy could switch sides in the war by virtue of an armistice, that armistice produced more than a suspension of hostilities.[58]

When an armistice ends war, it does so only in the negative sense (negation of war or "no more bloodshed"). But even after an armistice agreement, it is still necessary to conclude a peace treaty, just as the 1918 Armistice was a prelude to the 1919 Treaty of Peace of Versailles.[59] The purpose of a peace treaty coming in the wake of an

52. For the various reports to the Security Council of Hans Blix, the Executive Chairman of the U.N. Monitoring, Verification and Inspection Committee, in December 2002 and January-February 2003, see *Contemporary Practice of the United States Relating to International Law*, 97 AM. J. INT'L L. 419, 419-22 (2003) (edited by Sean D. Murphy).

53. Hague Regulations, *supra* note 48, arts. 36-41, 36 Stat. at 2305-06, 205 Consol. T.S. at 295.

54. General Armistice Agreement, Feb. 24, 1949, Isr.-Egypt, 42 U.N.T.S. 251; General Armistice Agreement, Mar. 23, 1949, Isr.-Leb., 42 U.N.T.S. 287; General Armistice Agreement, Apr. 3, 1949, Isr.-Jordan, 42 U.N.T.S. 303; General Armistice Agreement, July 20, 1949, Isr.-Syria, 42 U.N.T.S. 327.

55. Military Armistice in Korea and Temporary Supplementary Agreement, June 27, 1953, 4 U.S.T. 234, 1953 U.N.Y.B. 136, U.N. Sales No. 1954.1.15.

56. Conditions of an Armistice with Germany, Nov. 11, 1918 (London, His Majesty's Stationery Office 1918)

57. Armistice with Italy: Instrument of Surrender of Italy, Sept. 29, 1943, 61 Stat. 2742.

58. See also the other Armistices of World War II, cited in DINSTEIN, *supra* note 7, at 40.

59. Treaty of Peace between the United States and Germany, June 28, 1919, 42 Stat.

armistice is not to end the armed phase of the conflict (that was accomplished already in the armistice) but to end the conflict in its entirety. In other words, the peace treaty's role is to bring about peace in the positive sense by normalizing relations between the former belligerents.[60]

IV. CONCLUSION

The common denominator of all these comments on war is that we are often deceived by semantics. Justice in the setting of warfare is an enticing idea, but when presented as an alternative to law it must be recognized as a will-o'-the-wisp. The *jus contra bellum* must not blind us to the significance of the equal application in war of the *jus in bello* as a shield against barbarism. And the suspension of hostilities (a cease-fire) must not be mixed up with their termination (as in a modern armistice). War is far too serious a phenomenon to be allowed to yield to the allure of word.

1939.

60. *See* DINSTEIN, *supra* note 7, at 34.