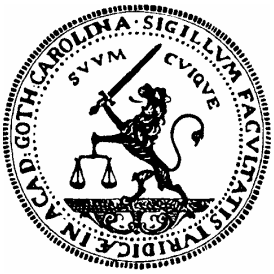


Faculty of Law

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**Master of International Human Rights Law**

Master thesis

By

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# If Right, Fight It Right
## *Ending the Beginning of War*

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Field
Use of Force, Conflict Prevention and Human Rights

Spring 2004

*To the memory of my father, S.S., a visionary who struck the keynote of this thesis by reciting Albert Einstein, 'Peace cannot be kept by force. It can only be achieved by understanding…'*

# If Right, Fight It Right:
## *Ending The Beginning of War*

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## Prefatory Remarks

The essence of this thesis is to link the prohibition of the use of force with other international means of preventing war. The central question is how to define the limit of legitimate use of force. A further issue is finding non-violent alternatives to use of force. The premise is that any threat or use of force by a State, other than in accordance with the exceptions provided for under the UN Charter is contrary to, and prohibited by, contemporary international law. The failure to control or prevent the use of force in international relations is often attributed to the lack of a firm and clear definition on the parameters of permissible use of force under the UN regime. Therefore, this thesis attempts to develop the normative threshold for justifiable use of military force as well as its judicious use in view of the new and unconventional challenges to international peace and security. The underlying theme, however, is the principle of peaceful settlement of disputes.

It is crystal clear that the prevailing international legal system proscribes recourse to war regardless the purpose or motivation for waging war. Nevertheless, the line between aggression and what may be regarded as just or unjust war is blurred. There is an obvious danger to abuse the right to self-defence. The legal vacuum for the definition of the crime of aggression under the International Criminal Court Statute leaves room for States to interpret the UN Charter provisions in accordance with their particular interests. While the just cause tradition seeks to determine the moral justification of recourse to force, this theory would be rendered questionable in the present state of international law. To cite an example, Article 5 of the 1974 Definition of Aggression, which stipulates that no consideration of whatever nature, be it political, economic, military, or otherwise, may justify an act of aggression. Thus, against this backdrop, it is debatable whether the just war tradition would exonerate an act of aggression.

The emerging consensus is that armed force should be used as a last resort if, and to the extent that, it is absolutely necessary for self-defence, where the need is instant, overwhelming, leaving no choice of means, and no moment for deliberation. However, force begets force and aggravates conflicts, embitters relations and endangers peaceful resolution of disputes. Further, use of force is often the source of the grossest human rights violations. In the light of the global movement for a culture of peace and non-violence, prevention of, or finding alternatives to, use of armed force could offer an effective protection for human rights of the defenceless non-combatants.

By and large, the conclusion of this thesis is that, current international law prohibits use of force and provides peaceful means of settling disputes. The existing legal orders should be complemented by a comprehensive regional regime that imposes an obligation on States to submit disputes for peaceful settlement and ensures substantial disarmament. Regional action could not

only lighten the burden of the Security Council but also contribute to a deeper sense of participation, consensus and democratisation in international affairs. The regime for the protection of human rights has, however, been reactive and event-driven to specific violations, yet prevention is a more effective and cheaper than having to end violations. Hence, there is need for a coherent plan of action to prevent conflicts by all policy makers, human rights and humanitarian actors along side military authorities.

Apart from this preface, the thesis has five chapters. The first, an introductory chapter, offers the present profile of the prohibition of force regime. It questions the validity of the just war theory against the ban on war in modern international law. Chapter two is devoted to identifying a threshold for legitimate self-defence on the premises of the 'absolute necessary' standard and against the backdrop of protecting fundamental human rights of non-combatants. Chapter three is a discussion of the line between the exercise of the right to self-defence and the crime of aggression. In a distinctly innovative view, it suggests that a determination of an act of aggression by the Security Council should not be a *condition sine qua non* for the exercise of jurisdiction by the International Criminal Court, but rather the scale and effects of such an atrocious act on the rights of individuals within a State.

The core of chapter four presents a picture of a culture of peace and non-violence and advocates for a coherent action plan for peace from a regional perspective. Finally, the last Chapter exposes the evolving role of military forces and the corresponding need for revision of military doctrines and trans-national law enforcement. In addition, it suggests strategies to accommodate alternatives to use of force. The thesis concludes by challenging the medieval just war theory and presenting a picture of legitimate and ethical use of force. It places the responsibility for the crime of aggression within the broader analysis of accountability for human rights atrocities. In addition it proposes non-violent means of dispute resolution while taking into account the question of proper and lawful use of defensive force by military forces.

Acknowledgments are due to my supervisor, Professor Gudmundur Alfredsson, for his inspiring art of legal persuasion punctuated with a diplomatic accent. Professors Jerzy Sztucki and Gregor Noll and Dr John Barker of the Lauterpacht Research Centre for International Law offered useful erudite insights. Improvements in content and presentation of this work emanate from the collegial advice of Olof Beckman and Christopher Cassetta, respectively. The probing questions of my opponent, Leah Hoctor enriched the discussion of the issues raised in this thesis. The author has been very sensible of, and grateful for, the immeasurable goodwill manifested by Lena Olsson and Habteab Tesfay in the library, among other people too numerous to mention, in the course of this study.

Lund, 17 May 2004

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*Resolution on the Non-Use of Force in International Relations and the Permanent Prohibition of the Use of Nuclear Weapons*, adopted by the UN General Assembly on 29 November 1972. UNGARes. 2936, 29 UN GAOR Supp. (No. 30) 5, UN Doc. A/8730 (1972).

*Statute of the International Court of Justice*, 24 October 1945.

*Vienna Declaration and Programme of Action,* UN Doc. A/conf.157/23, 12 July 1993, adopted by the World Conference on Human Rights on 25 June 1993.

*World Treaty on the Non-Use of Force in International Relations*,
Resolution 31/9 of 8 November 1976, UN GAOR, 34th Session, Supp. No. 41, *UN Doc. A/34/41* and *Corr. 1.*

# Abbreviations

All ER…….All England Reports
CSBMS…Disarmament, Arms Control and Confidence and Security Building Measures
EISAS……..…...Executive Committee on Peace and Security Information and Strategic Analysis Secretariat
ICC……. International Criminal Court
ICC Statute…….Statute of the International Criminal Court, adopted at Rome Conference on 17 July 1998
ICCPR……International Covenant on Civil and Political Rights
ICHRP……International Council on Human Rights Policy
ICISS……..International Commission on Intervention and State Sovereignty
ICJ……..International Court of Justice
ICRC……...The International Committee of the Red Cross
IHL……International Humanitarian Law of War
IHLRI……..The International Humanitarian Law Research Initiative
ILC……...The International Law Commission
IMT…….……..The International Military Tribunal
NATO…….……..North Atlantic Treaty Organization
NGO……...Non-Governmental Agencies
NPT……..Nuclear Non-Proliferation Treaty
NSA……...……Non-State Actors
OSCE……..Organization for Security and Co-operation in Europe
PCNICC……..Preparatory Commission for the International Criminal Court
UN…….United Nations Organizations
UN GAOR…….UN General Assembly Official Records
UNWCC *Law Reports*……...United Nations War Crimes Commission: *Law Reports of Trials of War Criminals*
UK……United Kingdom of Great Britain and Northern Ireland
US…….United States of America
USSR…….Union of Soviet Socialist Republic
WMD……Weapons of Mass Destruction
WWWI……The First World War
WWWII……..The Second World War

# Chapter One

## 1. Introduction: Current Norms on the Prohibition of the Use of Force- A World Without War

### 1.1. CONTEMPORARY CONTEXT OF THE PROHIBITION OF USE OF FORCE

The Charter of the United Nations (the UN Charter) in Article 2(4) prohibits 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 (UN). Article 2(4) has been described as the corner stone of peace in the Charter system.[1] This provision is customary international law and the reference to force rather than war is beneficial and thus covers situations in which violence is employed that fall short of technical requirements of the state of war.[2]

The main exception to this prohibition is under Article 51, which provides for the inherent right of self-defence against an armed attack. The combined effect of the foregoing Articles renders all use of force illegal except where it is exercised pursuant to the right of self-defence in the event of an armed attack or enforcing the Purposes of the UN Charter.[3] It would appear that the prohibition of force is not absolute, but brings forth a clear division between lawful and unlawful use of force.[4] It may be generous, although reasonable, to interpret that Article 2(4) allows the use of force that is consistent with the aims of the Charter.[5]

The precursor of this prohibition is the legal regime under the 1928 General Treaty for the Renunciation of War. The first two Provisions of this General Treaty, often referred to as the Kellogg─Briand Pact, condemned recourse to war, and encouraged pacific means for the solution of international controversies and renounced war as an instrument of national policy in relation with one another. This constituted the background to the formation of customary law in the period prior to the Charter.[6]

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[1] Brierly, *The Law of Nations,* 6th edition, Wadlock, 1963, p. 414 cited in Ian Brownlie, *Principles of International Law,* and 6th edition, Oxford, p. 699.
[2] Malcolm N. Shaw, *International Law,* 4th edition, Cambridge, 1997, p. 781.
[3] Which include the maintenance of international peace and security and the protection of human rights; *see* Ian Brownlie, *International Law and the Use of Force by States,* Oxford: Claredon Press, 1963, p. 265.
[4] Belatchew Asrat, *Prohibition of Force Under the UN Charter: A Study of Art.2 (4),* Uppsala: Iustus Förlag, 1991.
[5] Consider Use of Force in pursuit of self-determination, democracy and to stem human rights violations; *but see* Christine Gray, " The Use of Force and The International Legal Order" in Malcolm D. Evans (ed.), *International Law*, Oxford: University Press, 2003, pp. 586─620.
[6] Ian Brownlie, *Principles of Public International Law*, 6th edition, Oxford, 2003, p. 698.

The prohibition in Article 2(4) should thus be read with the fundamental obligation in Article 2(3), which requires States to settle there disputes peacefully in such a manner that international peace and security is not endangered, as well as Articles 39, 51 and 53.[7] These provisions tend to supplement the scope of the prohibition of force regime. Although the prohibition would appear to be directed at the inter-state use of force, the term "State" should not be restricted to States proper.

The reasoning being that inasmuch as the term " any State" extends the protection from illegal threat or use of force to non- Members, they are bound by the obligation of Article 2(4) despite the principle of *pacta tertii nec nocent nec prosunt.* This view is buttressed by Article 2(6) which places a duty on the UN to ensure that even States which are not UN members act in accordance with these principles so far as may be necessary for the maintenance of international peace and security.[8]

The debate as to whether the term 'force' in Article 2(4) includes not only armed force but also, for example, economic force is of less practical importance since economic coercion is now expressly prohibited in General Assembly Resolutions, such as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.[9] As regards the interpretation of 'force', the holding of the International Court of Justice (ICJ) in the *Nicaragua* case[10] is illuminating.

In this landmark case, the ICJ held that not only the laying of mines and attacks on Nicaragua ports and oil installations by US forces but also support for the *contras* engaged in forcible struggle against the government could constitute the use of force. The ICJ decided that arming and training of the *contras* involved the use of force against Nicaragua, but the mere supply of funds did not in itself amount to use of force.[11] However, recent scholarship suggests that it follows from the wording and structure of Declaration on Friendly Relations that Article 2(4) is to be interpreted as embodying a narrow meaning of force, confined to military force.[12]

The prohibition covers 'threat of force' as well as 'use of force'. In addressing the question as to the meaning of these terms, the ICJ in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, stated that a 'signaled intention to use force if certain event occur' could constitute a threat under Article 2(4) where the envisaged use of force would itself be

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[7] Bruno Simma *et al* (eds.), *The Charter of the United Nations: A Commentary*, 2nd edition Vol. 1, Oxford: University Press, 2002, p. 117.
[8] Asrat, *supra* note 3, p. 16; *see also infra* note 297 *and also* paragraph 5.1, p. 62 below.
[9] The Declaration is contained in the Annex to Resolution 2625 (XXV) of the UN General Assembly adopted without vote, 24 October 1970.
[10] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, ICJ Reports 1986*, p. 14.
[11] *Ibid.*, para. 228.
[12] Simma, *supra* note 7, p. 136.

unlawful.[13] The values that are protected include territorial integrity, political independence and the Purposes of the UN. It is debatable whether these rubrics should be interpreted restrictively, so as to permit force that would not contravene the clause, or as reinforcing the primary prohibition. Nonetheless, the weight of opinion probably suggests the latter position.[14]

This view derives credence from the conclusion of the ICJ in the *Corfu Channel* case that the essence of international relations lay in the respect by independent states of each other's territorial sovereignty. This was in response to the British claim of a right of intervention in minesweeping the channel.[15] The *travaux préparatoires* of the UN Charter is, however, sufficiently clear that the phrase " against territorial integrity or political independence of any state" was introduced precisely to provide guarantees to small States and was not intended to be restrictive in interpretation. Moreover, it seems that the term "armed attack" has a reasonably clear meaning, which necessarily rules out anticipatory self-defence.[16]

In theory the Security Council has a central role with regard to the exercise of the right to individual and collective self-defence. States are under an obligation to report their use of force in self-defence to the Security Council immediately. The right of State to self-defence is temporary until the Security Council takes the measures necessary to maintain international peace and security. In practice, however, the Security Council does not generally make pronouncements on the legality of claims to self-defence. To cite some instances, in the Iraq/Iran war (1980-8) and Ethiopa/Eritria conflict (1998-2000) although it did expressly uphold the right of Kuwait to self-defence when Iraq invaded Kuwait in 1990.[17] In the *Nicaragua* case, the ICJ held that the failure by the US to report its use of force to the Security Council was an indication that the US was not itself convinced that it was acting in self-defence.[18]

## 1.2. THE SELF-DEFENCE EXCEPTION

The exceptions to the prohibition of 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 UN, are expressly regulated by international law. By and large, force can be used in case of individual or collective self-defence in Article 51 of the UN Charter; It can be authorised

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[13] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996,* p. 226.
[14] Shaw, *supra* note 2, p. 784.
[15] *Corfu Channel, Merits, Judgment, ICJ Reports*, 1949, p. 4, p. 35.
[16] Brownlie, *supra* note 6, p. 700.
[17] *But see* S/RES/1368(2001) adopted by the Security Council at its 4370th meeting on 12th September 2001. The Security Council recognized the inherent right of individual or collective self-defence in accordance with the UN Charter and expressed readiness to combat by all means necessary threats to international peace and security caused by terrorist acts.
[18] *See* Gray, *supra* note 5, p. 606.

by the Security Council under Chapter VII of the UN Charter, Articles 42 and, according to dominant legal interpretations, force can be used by a people exercising its right to self-determination (national liberation wars).[19] However, for purposes of this discussion, attention shall particularly be drawn to the explicit individual or collective self-defence exception.

Legal views differ as to whether self-defence is a narrow right, which is available only in responsible to an armed attack or whether it allows force for the protection of nationals abroad or to prevent humanitarian catastrophes. The debate centers on interpretation of whether Article 51 is an exhaustive statement of the right to self-defence or whether here is a wider customary law of self-defence going beyond the right of response to an armed attack. Those for a wider right of self-defense argue that reference to "inherent right" in Article 51 preserves the customary law right of self-defence and that such customary law right is wider than Article 51 and allows self-defence other than against armed attack. Thus, arguing for a right of anticipatory self-defence and of protection of nationals abroad.

Those against argue that this interpretation deprives Article 51 of any purpose. As the right of self-defence is an exception to the prohibition on the use of force, it should be narrowly construed. Given this fundamental disagreement on the interpretation of the Charter, commentators suggest that State practice is crucial for an understanding of the scope of the right of self-defence.[20] In this regard, there seem to be three requirements for defensive action. These are necessity, i.e., using armed force in self-defense only as a last resort; secondly, proportionality, i.e., using only that amount of force necessary to get the attacker to desist; and thirdly, imminence, i.e., that the attack be on-going or imminent. If one of the three requirements is not present, the matter becomes one of international law enforcement.[21]

Reference to 'collective self-defence' may be regarded as the basis of comprehensive regional security systems. This formulation finds support in the *Nicaragua* case where the ICJ stressed that the right to collective self-defence was established in customary law but added that the exercise of that right depended both upon a prior declaration by the state concerned that it was the victim of an armed attack and a request by the victim state for assistance. In addition, the court emphasized that 'for one state to use force against another, on the ground that that state has committed a wrongful act

[19] Chapter VII of the UN Charter; *see also* " On the Legality of War v. The Law of Armed Conflict", The International Humanitarian Law Research Initiative, 2003, available at <www.ihlreserch.org/iraq>, visited 16 December 2004.
[20] Gray, *supra* note 5, p. 600.
[21] With regard to the final criterion, the September 11, 2001 attacks in the Unites States are only the recent of series of on-going attacks. The bombing of the SS Cole, the bombings of the US embassies in Africa, an so forth; *see* Michael N. Schmitt,*" Ethics and Military Force: The Jus in bello,"* available at <www.carnegiecouncil/org/viewMedia.php/prmTemplateID/8/prmID/98>, visited 14 February 2004.

of force against a third state, is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack'.[22]

The *Nicaragua* case[23] and the *Nuclear Weapons* Advisory Opinion[24] have reaffirmed the customary requirement that self-defence must be necessary and proportionate. It is generally regarded as limiting self-defence to action which is necessary to recover territory or repel an attack on a State's forces and which is proportionate to this end. The principle of proportionality is also central aspect of IHL and entails that the use of force must not be excessive in relation to the concrete military advantage anticipated.[25] Nonetheless, considering the collateral damage concomitant with use of force, precautionary measures should be taken on account for the use of force. This is governed by *jus in bello*.[26] This is the subject of chapter two.

The principle of protection of civilians and non-combatants lies at the core of the Geneva Conventions of 1949 and the Additional Protocols of 1977, and indeed, is fundamental to all IHL. The obligation to be bound by these principles is manifestly clear in the 1998 report by the US of its operations against 'terrorist facilities' and 'chemical weapons facility' in Afghanistan and Sudan respectively. The US stated that it acted pursuant to the right of self-defence confirmed by Article 51 of the UN Charter, submitting that " the targets struck, and the timing and method of attack used, were carefully designed to minimise the risks of collateral damage to civilians and to comply with international law, including the rules of necessity and proportionality."[27]

## 1.3. SOME QUESTIONABLE EXCEPTIONS TO USE OF FORCE

### 1.3.1. Legality of Preemptive Action or Anticipatory Self-Defence

It is controversial whether the Charter provisions definitively exclude the possibility of anticipatory or pre-emptive self-defence. The Security Council and the General Assembly did not address this doctrinal issue in the resolutions condemning Israel's anticipatory-armed attack against an Iraq nuclear reactor in 1981.[28] Customary law is thus invoked to legitimize anticipatory self-defence because the text of Article 51 is incompatible with such action. One school of thought contends that it seems not realistic to expect States to wait for an attack before responding. Another school argues

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[22] *See Nicaragua* case, *supra,* note 10, p. 110; *see also* Shaw, *supra* note 2, pp. 794─795.
[23] *Ibid.,* p. 14 para 194.
[24] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion supra* note 13 above, para. 141.
[25] Article 51 (5)(b) of the 1977 Protocol I Additional to the Geneva Conventions of 1949, (Protocol I).
[26] *See a more detailed discussion* C.A.J. Coady, *The Ethics of Armed Humanitarian Intervention,* Peaceworks No.45, United States Institute of Peace, Washington DC, 2002, p. 18 *et seq.; see also* A.J. Coates. *The Ethics of War,* Manchester University Press, 1997.
[27] Letter dated 20 August 1998; *see generally* Murphy, 93 *AJ* (1999), pp. 161─167.
[28] 1981 *UNYB* 275.

that this involves a risk of escalation in that the State may mistake the intentions of the other or react disproportionately. However, insofar as a wide conception of armed attack based on the capabilities of modern weapons is adopted, the gap between the two positions may shrink.[29]

Noteworthy is the US argument in favour of a preemptive doctrine that rests on the fact that warfare has been transformed. It claims that unconventional adversaries, prepared to wage unconventional war, can conceal their movements, weapons, and immediate intentions and conduct devastating surprise attacks.[30] Since the terrorist attacks of September 11, 2001, the US government began equating self-defence with preemption arguing that the only way to deal with the terrorist network is to take the battle to them by way of self-defence of preemptive nature.[31] However, the difficult issue is that of threshold of evidence to justify threat and the conduct of pre-emption.

It is advisable that the conduct of preemptive actions must be limited in purpose to reducing or eliminating the immediate threat. Otherwise it will reasonably be considered aggression by the targets of such actions. Those conducting preemptive strikes should also obey the *jus in bello*, specifically avoiding injury to noncombatants and avoiding disproportionate damage. For example, "in the case of the plans for the above mentioned terrorist attacks, on these criteria–and assuming intelligence warning of preparations and clear evidence of aggressive intent–a justifiable preemptive action would have been the arrest of the hijackers of the four aircraft that were to be used as weapons. But, prior to the attacks, taking the war to Afghanistan to attack al-Qaeda camps or the Taliban could not have been justified preemption."[32]

This approach was successful, and the crisis was peacefully resolved, in the Cuban missile crisis of 1962 while preventive action was seriously contemplated by the US. When the US learnt from spy-plane photographs that the USSR was secretly introducing nuclear-capable, immediate-range ballistic missiles into Cuba, missiles that could threaten a large portion of the Eastern US, president John F. Kennedy had to determine if the prudent course of action was to use US military air strikes in an effort to destroy the missile sites before they were being installed. After extensive debate on the implications of such an action, President Kennedy undertook a measured but firm approach to the crisis that utilized a US military 'quarantine' of the island of Cuba to prevent further shipments from the USSR of military

[29] Gray, *supra,* note 5, p. 601.
[30] Neta C. Crawford, " The Slippery Slope to Preventive War", available at <www.carnegiecouncil.org/viewMedia.php/prmTemplateID/0/prmID/868>, p. 1 *et seq.* visited 14 February 2004.
[31] Donald H. Rumsefeld, "Remarks at Stakeout Outside ABC TV Studio," October 28, 2001 quoted Crawford, *supra* note 30.
[32] Crawford, *supra* note 30.

supplies and material for the missiles sites, while a diplomatic solution was aggressively pursued.[33]

In practice, the conditions for legitimate pre-emption can be grouped into four. First, the party contemplating pre-emption would have a narrow conception of the "self" to be defended in circumstances of self-defence. Pre-emption is not justified to protect imperial interests or assets taken in a war of aggression. Second, there would have to be strong evidence that war was inevitable and likely in the immediate future. Immediate threats are those, which can be made manifest within days or weeks unless action is taken to thwart them.

The foregoing requires clear intelligence showing that a potential aggressor has both the capability and the intention to do harm in the near future. Capability alone is not a justification. Thirdly, pre-emption should be likely to succeed in reducing the threat. Specifically, there should be a high likelihood that the source of the military threat can be found and the damage that it was about to occasion can be greatly reduced or eliminated by a pre-emptive attack. If pre-emption is likely to fail, it should not be undertaken. Fourth, military force must be necessary if no other measures can have time to work or be likely to work. [34]

Certain quarters still argue that a preventive offensive war doctrine undermines international law and diplomacy. Preventive war short-circuits non-military means of solving problems. Article 51 of the UN Charter would lose much of its force. Preventive wars are imprudent because they bring wars that might not happen and increase resentment. Such wars are also unjust because they assume perfect knowledge of an adversary's ill intentions when such a presumption of guilt may be premature or unwarranted.

Although many states in the past rejected the legality of pre-emptive self-defence, they now seem to accept this wide right to self-defence by the US, however, in response to terrorism. It is certainly not as a general acceptance of anticipatory or pre-emptive use of force. However, this right may exist only in cases where the Security Council has asserted the right.[35] Thus pre-emption may be justified if it is undertaken due to an immediate threat, where there is no time for diplomacy to be attempted, and where the action is limited to reducing that threat.

This proposition is consistent with state practice since the *Caroline* case.[36] Following the incident in this case, the US authorities required the British government to show 'a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.' Not only were

[33] Richard F. Grimmett, " US Use of Preventive Military Force", CRS Report of Congress, Order Code RS2 1311, September 18, 2002.
[34] Crawford, *supra* note 30.
[35] Gray, *supra* note 5, p. 604.
[36] *Caroline* Case (1837), 29 BFSP 1137; 30 BFSP 195.

such conditions necessary before self-defence became legitimate, but the action taken in pursuance of it must not be unreasonable or excessive, 'since the act, justified by the necessity of self-defence must be limited by that necessity, and kept clearly within it'. [37] These principles were accepted by the British government at that time and are accepted as part of customary international law.[38]

States generally are not at ease with the concept of anticipatory self-defence, and, as indicated in the *Nicaragua* case, one possibility would be to concentrate upon the notion of armed attack so that this may be interpreted in a relatively flexible manner.[39] One suggestion is to distinguish anticipatory self-defence, where an armed attack is foreseeable, from **interceptive self-defence**, where an armed attack is imminent and avoidable so that the evidential problems and temptations of the former concept are avoided without dooming threatened states to making the choice between violating international law and suffering the actual assault.

According to this approach, self-defence is legitimate both under customary law and under Article 51 of the UN Charter where an armed attack is imminent. It would then be a question of evidence as to whether that was an accurate assessment of the situation in the light of the information available at the relevant time. This is reasonable and in line with the right to self-defence in customary law as expounded in the *Caroline* case.

Thus, in the face of a manifestly imminent armed attack, there is still a right to preventive self-defence under the customary international law, as a strictly limited exception, after all diplomatic means available under the circumstances have been exhausted under the *Caroline* case,[40] which is generally regarded as the classic illustration of the right to self-defence.[41] Although much will depend on the characterisation of the threat and the nature of the response, for this has to be proportionate.[42]

### 1.3.2. Humanitarian Intervention in Perspective

Humanitarian intervention, as defined by *Ian Brownlie,* is the threat or use of armed force by a state, belligerent community, or an international organization, with the object of protecting human rights.[43] There is still no

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[37] *For the relevant documents see* Jennings, 32 *AJ* (1938), pp. 82─99.
[38] Shaw, *supra* note 2, p. 787.
[39] *Nicaragua* v. *USA, supra* note 10, pp. 347─348
[40] *See generally the Caroline* Case, *supra* note 36, p. 314; *for a good discussion see* Peter Malanczuk, *Akehurst's Modern Introduction to International Law,* London: Routeledge, 2001, pp. 311–318.
[41] *Ibid.*
[42] Shaw, *supra* note 2, p. 790.
[43] Ian Brownlie, " Humanitarian Intervention", in John N Moore (ed.), *Law and Civil War in the Modern World,* Baltimore, Maryland: Johns Hopkins University Press, 1947, p. 217. *Compare with* the definition by Ellery C. Stowell, *Intervention in International Law*, John Byrne & Co., Washington, DC, 1921) 53: ' the reliance upon force for the justifiable purpose of protecting the inhabitants of another state from treatment which is so arbitrary

consensus on whether Article 2(4) allows the use of force for humanitarian intervention Article 2(7) of the UN Charter provides that nothing in the Charter authorizes UN organs to intervene in matters, which are essentially within the domestic jurisdiction of States. The rule against intervention in internal affairs encourages states to solve their own problems and prevent them from spilling over into a threat to international peace. This dilemma is obvious in the Security Council debates and the pleadings in the *Legality of Use of Force* case espoused by former Republic of Yugoslavia (FRY) before the ICJ against 10 State Parties of the North Atlantic Treaty Organization (NATO).[44] The case was in relation to the events that were occurring during the armed conflict between NATO and the FRY in Kosovo, being a constituent part of the FRY.

Unlike use of force to protect State's own national abroad, which also occurs on humanitarian grounds, the objective of humanitarian intervention is the protection of foreign nationals at risk.[45] It is often argued that the use of force on strictly humanitarian grounds is directed neither against the territorial integrity nor the political independence of other States. Those in support, moreover, argue that this is in conformity with the most fundamental peremptory norms of the Charter. Nevertheless, it is apparent that such an interpretation of Article 2(4) disregards the *travaux préparatoires* as well as the purpose of the provision and is, therefore, untenable.[46]

However, others have further argued that the use of military force to protect lives and property of individuals would be considered lawful as an exceptional and extraordinary measure, which must be warranted where there is serious and irreparable harm occurring to human beings, or imminent to occur.[47] The rationale for this proposition is that the nationals of a state are an extension of the state itself, a part as vital as the state territory, and that the *raison d'être* of the state is the protection of its citizens.[48] The *Pinochet* case[49]symbolizes the changing attitude towards State sovereignty and the rule of non-intervention, the twin pillars of the classical paradigm of international legal order. Thus, human rights are no longer regarded as among the matters essential within the domestic jurisdiction of a State but are the concern of international community a s

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and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice.'

[44] *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, ICJ reports 1999,* p. 124; *see also* Gray, *supra* note 5.

[45] Simma, *supra* note 7, p. 130.

[46] *Ibid.*

[47] *Generally see* the Report entitled *the Responsibility to Protect,* by the International Commission on Intervention and State Sovereignty, Department of Foreign Affairs, Canada, December 2001, p .6; *see also* Brownlie, *supra* note 3, p. 289.

[48] *Ibid.*

[49] *R.*. v. *Bow Street Metropolitan Stipendiary Magistrates Court and Others,* ex parte *Pinochet Ugarte* (No. 3) [1999] 2 ALL ER 97.

whole, while respect for the customary law rule of non-intervention is conditional upon a State ensuring the well-being of its people.[50]

In the 1993 Vienna Declaration and Programme of Action[51], the UN endorsed international protection of human rights as its legitimate concern. Since then, it is no longer legitimate to apply Article 2(7) of the UN Charter where human rights violations are considered serious and pose a threat to international peace and security. As a consequence, the Security Council is increasingly taking action to deal with large-scale violations of human rights in internal conflicts by authorizing enforcement measures such as humanitarian intervention under the powers in Chapter VII of the Charter.[52]

The United Kingdom (UK) submitted to the UN Secretary-General arguing for the development of the doctrine of humanitarian intervention and setting out a framework of principles that: "when faced with an overwhelming humanitarian catastrophe which a government has shown it is unwilling or unable to prevent or is actively promoting, the international community should intervene. Intervention in internal affairs is a sensitive issue, and so there must be convincing evidence of extreme humanitarian distress on a large scale, requiring urgent relief; it must be objectively clear that there is no practical alternative to the use of force to save lives and any use of force should be proportionate to achieving the humanitarian purpose and carried out in accordance with international law; the military action must be likely to achieve its objectives; any use of force must be collective."[53]

However, State practice seems to reject the so-called right of humanitarian intervention. Evidence for this view is drawn partly from the Ministerial Declaration by the meeting of Foreign Ministers of the Group of 77 held in New York on 24 September 1999, after the NATO action against Yugoslavia had ended stating that this has no basis in the UN Charter.[54] The International Commission on Intervention and State Sovereignty (ICISS) commissioned a study on the tension between sovereignty and humanitarian intervention.

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[50] *See* Mary Griffin, "Ending the Impunity of Perpetrators of Human Rights Atrocities: A Major Challenge for International Law in the 21st Century", International Review of the Red Cross No. 838, pp. 369–389.

[51] UN Doc. A/CONF.157/23, 12 July 1993, adopted by the World Conference on Human Rights on 25 June 1993.

[52] *But see* the proviso to Article 2(7) of the UN Charter which explicitly states that enforcement measures under Chapter VII are exceptions to the prohibition of intervention under Article 2(7); *cf. generally* the establishment by the Security Council of the International Criminal Tribunal for the Former Yugoslavia (ICTY) to punish those responsible for crimes against humanity, genocide and war crimes is a form of humanitarian intervention. The same with the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court. Other interventions are South Africa, Iraq, Haiti, Somalia, the former Yugoslavia, and East Timor.

[53] *See* (2000) 71 *BYIL* 644 *and also* Gray, *supra* note 5, p. 597.

[54] Paragraph 69 of the Declaration; *see* Brownlie, *supra* note 6, p. 712.

In its report entitled *the Responsibility to Protect,*[55] the ICISS has indicated that policy makers should focus on the responsibility to protect rather than on the right to intervene so that the rights of affected persons rather than the interests of states should determine the decision to intervene.[56] The report, which is a detailed study of state practice, indicates that the primary responsibility to protect individuals at risk falls on their own states; but where states are unable or unwilling to provide protection from serious abuses, it falls on other states to do so.

The responsibility to protect does not only include the duty to react but also the duty to prevent abuses from occurring and, after intervention, the duty to rebuild.[57] In this regard, the responsibility to protect seems to be a linking concept that bridges the divide between intervention and sovereignty.[58] It can be argued that although this report does not have a force of law and therefore do not create binding obligations, it may arguably contribute to the formulation of *opinio juris.*

The so-called 'just cause' theory provides a benchmark for determining the situation when rules protecting sovereignty yield to intervention to protect the rights of individuals at risk. The threshold for the requirement of a **just cause** determines whether violations are so severe as to warrant use of military force. Military intervention will only be justified where large numbers of people are suffering extreme abuse, and when a measured military response that is consistent with International Humanitarian Law (IHL) can be expected to halt that abuse. The problem, however, is how to determine when the level of abuse is so serious that it warrants intervention, considering the fact that claims of abuse have been exaggerated in the past in order to justify interventions.[59]

The criterion of **right intention,** demands that the primary purpose for the use of force must be to halt or avert human suffering. Right intention is better assured with multilateral operations supported by regional opinion and the victims concerned. Use of force can only be justified as a **last resort** with reasonable grounds for believing that lesser measures would not have succeeded. The principle of **proportionality** requires that the use of force for such a cause must occasion less damage than that it is attempting to prevent. Military action can only be justified if it stands **reasonable prospects** for success in halting or averting the suffering, with consequences of action not likely to be worse than the consequences of

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[55] The ICISS, Department of Foreign Affairs, Canada, *supra* note 47; *but see also* Gareth Evans and Mohamed Sahnoun, *The Responsibility to Protect*, Council on Foreign Relations Inc. Canada, 2001.
[56] *Ibid.,* p. 17.
[57] The International Council on Human Rights Policy, *Human Rights Crises: NGO Responses to Military Interventions,* Versoix, Switzerland, 2002, p. 45.
[58] Gareth Evans *et al*, *supra* note 55, p. 22.
[59] *For example*, in Kosovo, certain politicians made inflated claims of genocide in the months preceding the military intervention*; see* the ICHRP, *Human Rights Crises,* note 57 above.

inaction. Military action must not risk triggering a greater conflagration. Finally, resort to use of force needs to be under the control of a **legitimate authority**.[60]

However, it has been argued that there is no evidence of State practice or *opinio iuris* that would have led to an amendment of the Charter, by means of customary international law, in the sense of recognising humanitarian intervention as an exception to the prohibition laid down in Article 2(4); nor could the *Nicaragua* Judgment be read as endorsing such an exception. Therefore, under the Charter, forcible humanitarian intervention can no longer be considered lawful.[61] There is a broad acceptance of the universal **legal authority of the UN Security Council** in this respect, although some debate continues as to the legality of interventions not authorized by the Security Council.

This signals the need for the development of globally recognized criteria that could justify a non-UN intervention in cases where the Security Council fails or is reluctant to authorise.[62] Of course there are two other institutional solutions, one is for the General Assembly to consider the matter in an emergency special session under the "uniting for peace" procedure and the other is through regional or sub-regional organizations under Chapter VIII of the UN Charter.[63]

Humanitarian interventions coupled with the concomitant large-scale humanitarian assistance have engendered intense questioning of the effectiveness of military forces in these roles.[64] Firstly, it has been argued that international troops have been required to maintain law and order, a role for which they are not trained or suited. The argument further goes that military intervention is not tailored to prevent atrocities from recurring and that it does not cater for post conflict state-building initiatives. The other problems that grapple humanitarian interventions are that of consent of the government concerned and the use of force. In light of this, the *Brahimi Report* has recommended that each troop contributor should meet the requisite UN **training and equipment requirements** for peacekeeping operations, prior to deployment. The Report starkly states that units that do not meet the requirements must not be deployed.[65]

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[60] Gareth Evans, *supra* note 55, p. 4.
[61] Simma, *supra* note 7, p. 131.
[62] Liam Mahony, *Military Intervention and Human Rights Crises: Responses and Dilemmas for the Human Rights Movement,* Background Paper, Meeting on Military Intervention and Human Rights, prepared for the International Council on Human Rights Policy, March, 2001, available at <www.ichrp.org/115/2.pdf>, p.12 visited on 27 September 2002.
[63] Gareth Evans, *supra* note 24, p. 5.
[64] Major General Indar Rikhye (rtd), *The Politics of the United Nations Peacekeeping: Past, Present and Future,* Toronto: Canadian Peacekeeping Press, 2000 p. 87.
[65] *The Brahimi Report,* United Nations General Assembly Security Council A/55/305/2000/809, p. xi and paras. 48─64.

Whatever strategic position that humanitarian agencies take on the ethics and practical appropriateness of a military intervention, many have criticised them for their pursuit of particular military tactics and for their personal behaviour.[66] It is therefore still controversial wherever intervention takes place without the approval of the Security Council as not only to whether such interventions are appropriate and effective, but also whether they are legal.[67]

*1.3.2.1. Use of Force in Extreme Cases Only*

Most seem to agree that resort to military force should be the last option exercised only in extreme and exceptional cases. The practical difficulty lies in determining when, in fact, all non-military options have been explored in good faith and exhausted.[68] The generally expressed view is that exceptional circumstances must be cases of violence which so genuinely shock the conscience of mankind or which present such a clear and present danger to international security, that they require military intervention.[69] By and large, large-scale loss of life actual or apprehended and large scale 'ethnic cleansing' have been held to justify a military intervention. These include war crimes, situations of state collapse that expose the population to mass starvation or civil war and overwhelming natural catastrophes.[70]

While emphasizing the need for 'large scale' loss of life in order to justify military intervention, *the Responsibility to Protect* indicates that military action can be legitimate as an anticipatory measure in response to clear evidence of likely large-scale killing. Without this possibility of anticipatory action, the international community would be placed in a morally untenable position of being required to wait until genocide begins, before taking action to stop it.[71] All in all, it would appear that humanitarian intervention will remain at most in a legal penumbra-sometimes given legitimacy by the Security Council, sometimes merely tolerated by States.[72]

## 1.4. SOME REFLECTIONS ON THE JUST WAR THEORY

### 1.4.1. Anachronism of the Just War Theory

The **medieval theory** of 'just war' or *bellum iustum* deals with the justification of how and why wars are fought. The justification can be either

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[66] Hugo Slim, *Military Intervention to Protect Human Rights: The Humanitarian Agency perspective,* Background Paper, Meting on Military Intervention and Human Rights, International Council on Human Rights Policy, March, 2001 p. 12, available at <www.ichrp.org/115/1.pdf>, visited on 27 September 2002.

[67] The International Council on Human Rights Policy, *Human Rights Crises: NGO Responses to Military Interventions, supra* note 57, p. 9.

[68] *Ibid.,* p. 18.

[69] Gareth Evans, *supra* note 55, p. 33.

[70] *For a detailed discussion see ibid*., p. 34 *et seq.*

[71] *Ibid.,* p. 33.

[72] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law,* Oxford, 2001, p. 87.

theoretical or historical. The theoretical aspect is concerned with ethically justifying war and forms of warfare. The historical aspect, or the just war tradition deals with the historical body of rules or agreements existing in various wars across the ages. For instance international agreements such as the Geneva and Hague conventions are historical rules aimed at limiting certain kinds of warfare.[73]

Historically, the theory had been developed by theologians and was never a valid rule of public international law.[74] Force could be used provided it complied with the divine will. The concept embodied elements of Greek and Roman philosophy and was employed as the ultimate sanction for the maintenance of an orderly society. War was waged to punish wrongs and restore the peaceful *status quo* but no further. Aggression was unjust and the recourse to violence was strictly controlled. In the 13th century, *St Thomas Aquinas*[75] declared that it was the subjective guilt of the wrongdoer that had to be punished are rather than the objectively wrong activity. He wrote that war could be justified if waged by the sovereign authority, it was accompanied by a just cause (the punishment of wrongdoers) and it was supported by the right intentions on the part of the belligerents.

With the rise of the European nation-states, the sue of force against other states, far from strengthening order, posed serious challenges to it and threatened to undermine it. Thus the emphasis in legal doctrine moved form the application of force to suppress wrongdoers to a concern to maintain order by peaceful means. Such that in the 16 century, *Vitoria* [76]emphasized that not every kind and degree of wrong can suffice for commencing war, while *Suarez*[77] noted that states were obliged to call the attention of the opposing side to the existence of a just cause and request reparation before action was taken. *Grotius*[78], writing in the 17th century, attempted to redefine the just war in terms of self-defence, the protection of property and the punishment for wrongs suffered by the citizens of the particular state.

Gradually, positivism and the advent of definitive establishment of European balance of power system after the Peace of Westphalia, 1648, facilitated the disappearance of the concept of the just war from international law as such.[79] States were sovereign and equal, and therefore no one state could presume to judge whether another's cause was just or not. States were bound to honour agreements and respect the independence and integrity of other countries, and had to try and resolve differences by

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[73] Alex Moseley, "Just War", The Internet Encyclopedia of Philosophy, available at <www.utm.edu/research/iep/j/justwar.htm>, visited on 13 February 2004.
[74] Simma, note 7, pp. 114─115
[75] *Summa Theologica,* II, p. ii, 40, cited in Shaw, *supra* note 2, p. 778.
[76] *De Indis et de Jure Beli Relectiones,* ss.20–23, pp. 29 and 60, cited in Shaw, *supra* note 2, p. 778.
[77] *Ibid*.
[78] *Ibid.*
[79] *Generally see* Shaw, *supra* note 2, p. 779, Brownlie, *supra* note 6, p. 14 *et seq.*; *see also* L. gross, "The Peace of Westphalia, 1648─1948" 42 AJIL, 1948, p. 20.

peaceful means. Where war commenced, the fact that the cause was just or not became irrelevant in any legal way to the international community. As a consequence, the basic issue revolved around whether in fact a state of war existed.[80]

WWI marked the end of the balance of power system and raised a new the question of unjust war and resulted into the creation of the League of Nations to oversee international order. The Covenant of the League declared that members should submit disputes to lead to a rupture to arbitration or judicial settlement or inquiry by the Council of the League. In no circumstances were members to resort to war until the expiry of three months after the arbitral award or judicial decision or report by the Council. The logic was to provide a cooling-off period for passion to subside and reflected the view that such a delay might well have broken the seemingly irreversible chain of the tragedy that linked the assassinations of the Austrian Archduke in Sarajevo leading to the outbreak of the WWII.[81]

The League system did not prohibit war or the use of force, but did set up a procedure designed to restrict it to tolerable levels. An attempt to close this gap led to the total prohibition of war in international law in the Kellogg–Briand Pact.[82] However, this does not mean that the use of force in all circumstances is illegal. Reservations to the treaty by some states made it apparent that the right to resort to force in self-defence was still a recognized principle in international law.[83] In view of the fact that this treaty has never been terminated and in the light of its wide acceptance, it is clear that prohibition of the resort to war is now a valid principle of general customary international law.

In terms of ethics, just war theory offers a series of principles that aim to retain a plausible moral framework for war. From the just war tradition, theorists distinguish between the rules that govern the resort to war (*jus ad bellum*) or more accurately, *jus contra bellum*[84], from those that govern the conduct of war (*jus in bello*). The two are by no means mutually exclusive, but they offer a set of moral guidelines for waging war that are neither unrestricted nor too restrictive.[85]

The principles of *jus ad bellum*, as noted above, include: having a just cause, being declared by a proper authority, possessing right intention, having a reasonable chance of success, and the end being proportional to the means used. Whilst this provides just war theory with the advantage of flexibility, the lack of a strict ethical framework means that the principles

[80] Brownlie, *supra* note 6, pp. 26─28.
[81] Shaw, *supra* note 2, p. 78.
[82] *Generally see ibid*.
[83] *Ibid*., p. 781.
[84] Hilaire McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare*, 2nd edition, England, 1998, p. 1.
[85] Moseley, *supra* note 73.

themselves are open to broad interpretations. The rules of *jus in bello* fall under the two broad principles of discrimination and proportionality. The principle of discrimination concerns legitimacy of targets in war, whilst the principle of proportionality regulates the appropriateness of force. A third principle can be added to the traditional two, namely the principle of responsibility, which demands an examination of where responsibility lies in war.[86]

In this sense, the theory bridges theoretical and applied ethics, since it demands an adherence, or at least a consideration of meta-ethical conditions and models, as well as prompting concern for the practicalities of war. [87] Although the just war theory retains persuasive and pervasive logic, yet **it is no longer possible to set up the legal relationship of war in contemporary international society**. It is therefore reasonable to conclude that this medieval theory of just war is misleading in terms of the use of force regime of the Charter. It should also be noted that that the just war theory may easily be abused as a licence for easy and destructive resort to war.[88]

### 1.4.2. A Note On the Just War v. the Laws of War

IHL was first developed at a time when international law regarded the use of force as a legitimate means of engaging in international relations. States had the right, under *jus ad bellum*, to use military force against other states. There was no logical problem for international law to prescribe them the *jus in bello* that regulated the conduct of hostilities. Under modern international law, the use of force among States is clearly forbidden by a peremptory rule of international law.[89] Thus, today the *jus ad bellum* has changed into *jus contra bellum.*[90] Exceptions of this prohibition are admitted in a case of individual and collective self-defence, Security Council enforcement measures, and arguably to enforce the right of peoples to self-determination (national liberation wars). Logically, at least one side of an international armed conflict is therefore violating international law by the sole fact of using force, however respectful of IHL.[91]

Illegal use of force does not necessarily imply a violation of the laws of armed conflict nor does it amount to a 'war crime'. **Use of force can be illegal but still abide by the rules of IHL**, as IHL focuses on the conduct

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[86] *Ibid.*
[87] *Ibid.*
[88] *Generally see* Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations,* 2nd edition, New York: Basic Books, 1992.
[89] Expressed in Article 2(4) of the UN Charter; *see a discussion of the exceptions to the rule in* " On the Legality of War v. The Law of Armed Conflict," The International Humanitarian Law Research Initiative, 2003, available at <www.ihlresearch.org/iraq>, visited 16 December 2004.
[90] Marco Sassòli *et al, How Does Law Protect In War?* International Committee of the Red Cross, Geneva, 1999, p. 84.
[91] *Ibid.,* p. 85.

of the belligerents once they are engaged in hostilities. IHL must regulate and contribute to the containment of violence and the preservation of fundamental standards of humanity in the midst of conflicts. For practical, policy, and humanitarian reasons, IHL has to be the same for both belligerents. It should be applied 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.[92]

Practically, compliance with IHL would otherwise be difficult to obtain because, as between the belligerents, it is usually controversial which belligerent is lawfully resorting to force. From a humanitarian perspective, the victims of the conflict on both sides need an equal guarantee of protection. IHL has therefore to be respected independently of any argument of *jus ad bellum*. In particular, just war theories concern only *jus ad bellum* and cannot justify exceptions or limitations to IHL obligations, regardless of the 'just' or 'evil' character of the belligerents. IHL applies whenever there is a *de facto* armed conflict, where the use of military force is generating protection needs. Although different rules of IHL may apply in non-international armed conflicts, the basic principle remains: IHL applies independently from any political or legal justifications for using force.[93]

### 1.4.3. *Jus Contra Bellum* Not *Ad Bellum*: Problems of Terminology

It is worthy of note that the notion of "armed conflict" has since 1949 replaced the traditional notion of "war". According to the Commentary to the First Geneva Conventions of 1949,[94] the substitution of this much more general expression "armed conflict" for the word "war" was deliberate. The term "war" is open to diverse definitions. As outlined earlier, pursuant to the just war tradition, a State can always pretend, when it commits a hostile act against another State, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression "armed conflict" makes such arguments anachronistic.

Any controversy leading to resort to force is undoubtedly an armed conflict, even if one of the Parties denies the existence of a State of war.[95] Supporting this approach, the International Law Commission suggested that, war having been outlawed, the term "laws of war" ought to be discarded.[96] Similarly, the current debate on terrorism alludes to the question as to

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[92] *See* the Preamble to Protocol I.

[93] The International Humanitarian Law Research Initiative (IHLRI), *supra* note 19.

[94] *See* Pictet, J.S., *Commentary of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* Geneva, International Committee of the Red Cross, 1952, p. 32.

[95] *Cf.* Sassòli, *supra* note 90, p. 88.

[96] *See Yearbook of the International Law Commission,* New York, UN, 1949, p. 281; *cf.* that 'war is a fact recognized, and with regard to many points regulated, but not established, by International Law'. Sir Hersch Lauterpacht, *L. Oppenheim's International Law* cited in Yoram Dinstein, *War, Aggression and Self-Defence,* 2nd edition, Cambridge, 1995, p. 71.

whether the 'war against terrorism' is a 'war' in the legal sense. It would appear that confusion has been created by the use of the term 'war' to qualify the totality of activities that would be better described as a 'fight against terrorism' given the fact that terrorism, like drug-trafficking, is a criminal phenomenon.

It is evident that most of the activities being undertaken to prevent or suppress terrorist acts do not amount to, or involve, armed conflict.[97] It can confidently be concluded that the just war tradition has no place in modern day international relations. Therefore continued reference to the term 'war' not only revives it but also enables the just war theory to regulate international order from the grave. Probably, the terms 'war' or 'law of war' should be understood not as a legal concept in the old technical-legal meaning, but rather as a factual notion of recourse to armed force. This is because the authors of the new formula hoped to have done away once and for all with the possibility for States to place such a narrow construction on the single word 'war', and to have replaced it with a factual, objectively ascertainable notion.[98]

## 1.5. POTENTIAL GAPS OR UNCERTAINTIES IN THE PROHIBITION OF FORCE IN THE UN CHARTER

The prohibition of force in contemporary international law is burdened with uncertainties resulting from the ambiguous wording of the relevant provisions of the UN Charter, as well as their unclear relations with each other. Most evidently, Article 2(4) does not define the scope of the prohibited force. Additionally, Article 51 does not provide for the threshold of justifiable as well as justicious use of force. This legal vacuum leaves room for States to interpret the Charter provisions in accordance with their particular interests.[99] States are clearly anxious to avoid condemnation for their use of force and they generally use the language of international law to explain and justify their action, not as a sole justification but as one of a variety of arguments.[100] Thus, there is an obvious danger to abuse the right to self-defence by unlawful use of military force.

Another problem concerns the fact that the prohibition of force is not linked to other international legal means of preventing war. Prohibition of the use of force draws its significance from being the most direct effort to prevent war.[101] However, there is neither comprehensive obligation to submit disputes to peaceful settlement nor an obligation of substantial disarmament.[102] It should be remembered that the Peace Conferences at The

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[97] *International Humanitarian Law and Challenges of Contemporary Armed Conflicts,* Report by the International Committee of the Red Cross, Geneva, 2003.
[98] Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War,* International Committee of the Red Cross, Geneva, 1996, p. 39.
[99] Simma, *supra* note 7, p. 135.
[100] Gray, *supra* note 5, p. 589.
[101] Simma, *supra* note 7, p. 114.
[102] *Ibid.*

Hague in 1899 and 1907 failed to agree on a system of compulsory arbitration as a means of settling disputes that threaten peace.[103] In contrast, however, the Covenant of the League of Nations 1919, in Article 12(1), Members of the League agreed that if there should arise between them any dispute likely to lead to a rapture, they will submit the matter to arbitration or judicial settlement or inquiry by the Council.[104]

From an ethical standpoint, the exclusion of anticipatory self-defence is not definitive under the Charter. Hence, there is a great temptation to step over the line from pre-emptive self-defence to preventive war, because that line is vague and the stress of living under the threat of war is great. This uncertainty arguably accommodates the applicability of the just war theory where States have a wide room to justify their use of force. Further, the exterior principles of necessity and proportionality provide striking evidence to the wide gulf separating the right to self-defence under the UN Charter and the rules governing the use of armed force under IHL. If the prohibition of use of force were linked to prevention mechanisms, the stress of threat of use of force would probably be assuaged by preventive measures in the form of arms control, disarmament, negotiations, confidence-building measures, and the development of international law.[105]

In the eyes of human rights and humanitarian practitioner, Article 51 seems not to provide precautionary guidelines for legitimate self-defence. The fact that use of force involves deliberate killing and maiming of human beings and great destruction of their property and humanitarian crises means that resort to it demands the discharge of a heavy burden of justification; This requires proof that it is absolutely necessary in the given circumstances. Further, due to the atrocities concomitant with use of force, the mode of justifying use of force need to include considerations of proportionality.[106] There is a potential gap between the exercise of the right to self-defence and the triggering of the application of the IHL as well as the declaration of state of emergency as outlined in Article 4 of the International Covenant on Civil and Political Rights (ICCPR).

Invariably, use of force is often the source of the grossest human rights violations. It triggers and exacerbates violations. It logically follows, therefore, that prevention or finding alternatives to use of armed force may

[103] Although the Conferences adopted the conventions defining the laws and customs of warfare and declarations forbidding certain practices, including the bombardment of undefended towns, the use of poisonous gases and soft-nosed bullets; *see* Fact Sheet No. 13, International Humanitarian Law and Human Rights, available at <http://193.194.138.190/html/menu6/2/fs13.htm>, p. 3, visited 9 May 2004; *but see* John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law,* Oxford, 2000, p. 31–39, relating to the Permanent Court of Arbitration.

[104] *For an in-depth discussion see* Malanczuk, *supra* note 40, p. 308 *et seq.*.

[105] Crawford, *supra* note 30.

[106] *See* Coady, *supra* note 26, p. 18.

be the most profound protection of all for human rights.[107] Prevention of war and peaceful resolution of disputes constitute the heart of the UN Charter and is the hallmark of international relations. However, Article 51 does not also provide a procedure or strategic options for prevention of escalating violence or appropriate response. The procedure envisaged here is analogous to the one for reprisals as laid down in the *Naulilaa* dispute, which required that before reprisals could be undertaken, there had to be sufficient justification in the form of a previous act contrary to international law. If that was established, reprisals had to be preceded by an unsatisfied demand for reparation and accompanied by a sense of proportion between the offence and the reprisal. [108]

It is easy to note that the UN Charter regime does not provide protection to individuals from the use of force within the State territory against *inter alia* intruding persons or aircraft.[109] Article 2(4) of the Charter prohibits the threat or use of force in international relations, not in domestic situations. There is no rule against rebellion in international law and it is dealt with by the internal jurisdiction of the state. Thus, the UN Charter does not fetter or delimit the use of force against individuals by states and other power holders. The original intent behind that arrangement in the Charter was that control over the use of force would lie with the UN Security Council, which would have a standing army at its disposal to enable it to take enforcement action against aggression in order to restore international peace and security. This ambitious plan has not been realized. The original UN Charter scheme has since been modified through practice,[110] allowing for political considerations as opposed to law, to determine the use of force. The resultant legal vacuum poses a threat to international law, and to human rights in particular.

Yet, reading the UN Charter today 'we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them'.[111] Consequently, the doctrine of humanitarian intervention recognizes as lawful the use of force by states to prevent or curtail maltreatment by a state of own nationals when the conduct is brutal and large- scale as to shock the conscience of other nations.[112] However, the UN Charter does not address the crucial question as to how to determine the deterioration or tolerance threshold after which a situation ceases to be a matter essentially within the domestic jurisdiction of a State. Hence, it

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[107] Brian J. Foley, *Avoiding War: Using International Law to Compel a Problem- solving Approach,* in *Terrorism and Human Rights After September 11*,Cairo Institute for Human Rights Studies, Cairo, Egypt, p. 109.
[108] 2 RIAA, p. 1011 (1928); 4 ILR, p. 526.
[109] *See* Simma, *supra* note 7, p. 123.
[110] Gray, *supra* note 5, p. 607.
[111] Kofi Annan, "*Two Concepts of Sovereignty*", in *The Economist,* 18 September 1999 as quoted in Gareth Evans, *The Responsibility to Protect,* Research Bibliography, Background, Supplementary Volume, *supra* note 55.
[112] *See* Towelle, S.C., *Intervention in International Law 53* (1921); L. Sohn & T. Buergenthal, *International Human Protection of Human Rights* (1973), p. 137.

becomes even more intolerable to see grave violations of human rights within a State and to see other States being barred by public international law from intervening.[113]

## 1.6. AN EVALUATION: NEED FOR MORE LAW, LESS POLITICS

In sum, the current *jus contra bellum* as founded upon Articles 2(3) and 2(4) and Chapter VII of the Charter, clearly provides that war, and indeed armed conflict, are not a lawful condition of international relations as distinct from a defensive use of force in response to aggression or under the direction of the Security Council.[114] It is against this backdrop that the just war theory lacks legal validity insofar as it takes into account other factors other than legal considerations to resort to use of force. This view certainly accords with the jurisprudence of the *jus cogens* principle of non-use of force that is the very cornerstone of the maintenance of international peace. The point is that **force begets force and aggravates conflicts** embitters relations and endangers peaceful resolution of disputes.[115]

However, the line dividing aggression and humanitarian intervention by external armed forces is not clearly delineated. Similarly, the limit of legitimate self-defence is not defined. The international legal order governing peace and security under the Charter is, therefore, somewhat flawed. This is exacerbated by the fact that there is no universally accepted definition for the crime of aggression to be prosecuted by the International Criminal Court (ICC).[116] As it will be discussed in chapter three, the punishment of the crime of aggression, in accordance with the prohibition of use of force under the UN Charter, would necessitate a clear definition of the crime and, consequently, the establishment of rules which would provide for the case where armed force was used in a criminal manner.

The preambular theme of the Charter is to save succeeding generations from the scourge of war. War is emphatically prohibited by the UN Charter in international relations. International law, if correctly applied, is one of the strongest tools that the international community has at its disposal in the effort to maintain international peace and security and prevent wars. The law is not lacking but rather the **political will** to apply it correctly is required. The succeeding generations have no other protection from arbitrariness and abuse except implementation of the law. As pointed out above, the prohibition of force regime under the UN Charter does not address the important question of parameters of permissible means to use force. It is this important, albeit complicated, issue that the chapter that follow intends to address.

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[113] Simma, *supra* note 7, p. 132.
[114] McCoubrey, *supra* note 84, p. 58.
[115] *See* the Opinion of Judge Nagenda SINGH in the *Nicaragua* case, *supra* note 10.
[116] *See generally* Kriangsak Kittichaisaree, *International Criminal Law*, Oxford, 2002, p. 209.

# Chapter Two

## 2. The Tension Between the Use of Force and Fundamental Guarantees of Individuals

### 2.1. THE *RAISON D'ÊTRE* FOR PROTECTION OF CIVILIANS: INDIVIDUALS AND THE RIGHT TO PEACE

In 1976, the UN Commission on Human Rights pointed out that "everyone has the rights to live in conditions of international peace and security and fully to enjoy economic, social and cultural rights and civil and political rights.[117] The Commission added that unqualified respect for and the promotion of human rights and fundamental freedoms require the existence of international peace and security. It therefore recommended that all states should make an effort to create the most favourable conditions for the maintenance of international peace and security "through respect for and the promotion of human rights and fundamental freedoms, including the right to life, liberty and security of person."[118]

All persons have the right to live in peace so that they can fully develop all their capacities, physical, intellectual, moral and spiritual, without being the target of any kind of violence. To this end it is the duty of the state to maintain law and order. This should be conducted under strict restraint on the use of force in accordance with standards established by the international community, including IHL. Every individual and group is entitled to protection against all forms of state violence, including violence perpetrated by its police and military forces.[119]

The above notwithstanding, in the past fifty years, more than 250 conflicts have erupted around the world; more than 86 million civilians, mostly women and children, have died; and over 170 million people were stripped of their rights, their property and their dignity. Yet one of the greatest contributions to the protection of the rights of victims of conflict was to spell out the norms that should govern armed conflict. The tragedy faced today is, to an extent, because the norms were written on the assumption that armed conflict would take place between well-trained and well-disciplined armies. Unfortunately, many combatants, particularly insurgents today are young and lack the basic rudiments of education, and the international community can do little to educate them.[120]

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[117] UN Commission on Human Rights Res..5(XXXII), 60 UN ESCOR Supp. (No.3), p. 62, UN Doc. E/5768[E/CN.4/1213] (1976).
[118] *Ibid*.
[119] *See for example* the Asian Human Rights Committee–Asian Charter, paras. 4.1–4.2, <www.ahrchk.net/Charter/mainfile.php/eng_Charter/61>, visited on 14 February 2004; *see also* Article 23 of the African Charter on Human and Peoples' Rights.
[120] Kishore Mahbubani (Singapore), quoted in UN Security Council SC/6937, p. 15.

Therefore, the international community is faced with an urgent need to control and outlaw indiscriminate forms of warfare that maim and kill innocent civilians. It should also enforce the global arms control agreements and treaties and check cross-border trafficking in arms. There should be an effective mechanism to guarantee and monitor that the warring factions are complying with IHL in this respect. More importantly, there should be a comprehensive framework for conflict prevention. Measures to ensure the observance of law in prospect, rather than penalisation of violations are important in preventing violations. It is easy to conclude that to secure the effective application of the law is far more beneficial than to punish war criminals after unnecessary suffering and atrocities have been inflicted.

## 2.2. THE DUTY TO TAKE APPROPRIATE STEPS TO PROTECT LIFE

There is undoubtedly an enhanced risk that life will be endangered or lost in the use of military force. Hence the need to take appropriate action to avoid loss of life both as regards any use of force and the risk to those not taking part in the hostilities. This entails a duty of care to distinguish between a legitimate and illegitimate target and to accurately assess proportionality in order to protect life. The requirement that force be used when absolutely necessary is a very substantial constraint on the circumstances in which it can be undertaken.

It is clear that the 'absolutely necessary' standard required by international humanitarian[121] law must control both the planning and the execution of an operation. In respect of the former, there is need to ensure that there is adequate evaluation of the intelligence on which use of force is to be based, as well as of the different options to be pursued (with full account being taken of the need to minimise risk to those who might be caught up in the operation), and that those carrying out the operation are suitably briefed about the situation and any weaknesses in the information being relied upon.[122] Further, it is of utmost importance that those deployed for the operation be as well trained and equipped as possible for it, with particular attention being paid to the danger of indiscriminate loss of life that might be posed through the use of particular weapons.[123]

The jurisprudence of the European Court of Human Rights[124] reveal that there should be no authorisation for a use of force in circumstances

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[121] The only legitimate object that States should endeavour to accomplish during armed conflict it to weaken military forces of the enemy; *see generally* St. Peters Declaration, 1868.

[122] *See McCann and Others* v. *United Kingdom,* European Court of Human Rights, Judgment of 27 September 1995; *see* note 124 below.

[123] *Andronicou and Constantinou* v. *Cyprus,* European Court of Human Rights, Judgment of 9 October 1997; *see* note 124 below.

[124] *See* Jeremy McBride, *Study by on the Principles Governing the Application of the European Convention on Human Rights during Armed Conflict and Internal Disturbances and Tensions,* Committee of Experts for the Development of Human Rights (DH-DV), Strasbourg, 19 September 2003, p. 5 *et seq*. This may be seen as a manifestation of regional State practice generally accepted as law in Europe.

forbidden by IHL standards, in particular, the use of substantial force against areas occupied by civilians will only be exceptionally justified, or for the employment of weapons that are proscribed under international obligations applicable to the State concerned.

In the conduct of an operation itself, the principle of necessity should often require those against whom force can legitimately be used to be given first an opportunity to surrender or negotiate but this could not be expected where this would itself endanger life. [125] However, it will be essential to train those authorised to use force regarding how to make a proper assessment as to whether its use in particular circumstances is justified or whether non-lethal alternatives should first be employed, as well as to appreciate the need to observe the principle of proportionality and to seek to minimise the loss of life wherever the use of force is justified.[126]

One commentator has indicated that because of technological capabilities, advanced militaries will see their humanitarian law mission planning focus shift from proportionality issues to those surrounding their duty of care. Proportionality becomes increasing easier to achieve due to the ability to conduct surgical attacks.[127] The key question will be whether or not the attacker exhausted the resources available to avoid collateral damage. The underlying principle of the duty of care is not necessarily fairness, but rather than the desire to protect civilians and civilian objects, which is the underlying essence of IHL.

## 2.3. THE DOCTRINE OF MILITARY NECESSITY AND THE RIGHT TO LIFE

It is clear that international law does recognize a principle of necessity. *Vattel* noted that 'since a nation is obliged to preserve itself, it has a right to every thing necessary for its preservation, for the Law of Nature gives a right to every thing, without which one could fulfil one's obligation'. This right, as understood by *Vattel*, extended to the means employed in warfare that it gives a right of doing against the enemy whatever is necessary for weakening him; or disabling him from making any farther resistance. At the same time, however, he recognized that this rule of necessity was not unlimited in its reach. In particular, 'the right of necessity, as arising from natural law, was constrained by natural law, so that it could permit nothing odious, unlawful, or exploded by the law of nature'.[128]

This principle was incorporated into the 1907 Hague Regulations, which specifically states that: the right of belligerents to adopt means of injuring

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[125] *Ogur* v. *Turkey,* European Court of Human Rights, Judgment of 20 May 1999 cited in McBride, *supra* note 124.
[126] McBride, *supra* note 124, p. 6.
[127] Schmitt, *supra* note 21.
[128] Emmerich de Vattel, *The Law of Nations or Principles of Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns (1754)*, Luke White (ed.), Dublin, 1792, p. 532.

the enemy is not unlimited.[129] An argument can be made that the rule against deliberate attacks on civilians and civilian targets is so well established in law that it cannot be ignored based on a justification of necessity. Indeed, since the distinction between combatants, who can be attacked, and non-combatants, who are immune from attack, is so fundamental to the law of armed conflict, it is difficult even to postulate what would remain of *jus in bello* if this distinction was vitiated.[130]

The consideration of all of the facts and circumstances surrounding the above events does not, however, establish a sufficient record of derogation, such as to vitiate or undermine this principle. Although somewhat battered, non-combatant immunity remains a core *jus in bello* principle. In any case, the doctrine of necessity is also limited by the nature of the necessity itself. in that the lawful end gives a true right only to those means which are necessary for obtaining such end. *Vattel* explained that:

> "[W] hatever exceeds this is censured by the law of nature, is faulty, and will be condemned at the tribunal of conscience. Hence it is that the right to such or such acts of hostility varies according to their circumstances. What is just and perfectly innocent in a war, in one particular situation, is not always so in another. Right goes hand in hand with necessity, and the exigency of the case; but never exceeds it."[131]

Applying these general principles to the conflict between the principle of military necessity and the right to life, the anticipation of a particular military advantage cannot justify the use of force in excess of that necessary to vindicate that situation. Attacks on civilians cannot find justification, which would not support such methods necessary to merely attain some additional military advantage. Thus, overall, there is no exception to IHL, and particularly the injunctions against deliberate attacks on civilians and civilian targets, for the benefit of particular belligerents or any other cause. Even under the relaxed requirements of Protocol I, a group that targets civilians as a regular tactic not only violates the laws and customs of war, but also loses its right to lawful combatant status.

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[129] *See* Article 22, Hague Regulations (Convention No. IV) Respecting the Laws and Customs of War on Land, 1899.

[130] However, this rule of non–combatant immunity has not always been strictly followed in practice. For example, during WW II, both Axis Powers and Allies engaged in aerial bombing campaigns intended to terrorize the civilian population apart from counter–industrial targeting. The rule barring deliberate attacks on civilians also came under considerable stress during the Cold War as a result of the doctrine of Mutually Assured Destruction (MAD) that was premised on the assumption that the civilian population of opposing Cold War blocs constituted legitimate targets. *For a comprehensive historical discussion see* Charles Webster and Noble Frankland, *Official History of the Second World War-The Strategic Air Offensive Against Germany,* London: HMSO, 1961 cited in David B. Rivkin *et al,* " A Legal Analysis of the Attacks on Civilians and Infliction of Collateral Damage in the Middle East Conflict" available at< www.fed-soc.org/Lawswar/Collateraldamage/Whitepaper.pg.pdf> visited 12 February 2004.

[131] Vattel, *supra* note 128, p. 518.

## 2.4. CIVILIAN CASUALTIES AND THE ISSUE OF COLLATERAL DAMAGE

The use of force is, of course, governed by IHL and includes the injunction against deliberate attacks on civilians and civilian targets. This rule remains essentially unaltered today. It was applied with full force and effect during the war crimes trials convened after WWII, which constitute some of the most important evidence of customary international law in this area. As held in *United States* v. *Ohlendorf, et al,* there still is no parallelism between an act of legitimate warfare, namely the bombing of a city, with a concomitant loss of civilian life, an avoidable corollary of battle, and the premeditated killing of all members of certain categories of the civilian population in occupied territory.[132] Thus, today, the relevant legal issue is not whether 'collateral damage' is permissible under the laws of war, [133] but the extent to which any particular use of military force complies with the principles of distinction and proportionality.

### 2.4.1. The Principle of Distinction

The principle of distinction effectively restates the general rule that civilians cannot be deliberately targeted, and requires that military and civilian objects be distinguished during the process of target selection.[134] It is, however, in the application of this rule that difficulties arise. As the International Committee of the Red Cross (ICRC) Commentary on Geneva Protocol I notes, most civilian objects can become useful objects to the armed forces.[135] Here, the key question to consider is what the particular facility is being used for at the time an attack is contemplated.

In armed conflict, distinction plays out in two separate ways. The first is the prohibition on the use of indiscriminate weapons, whereas the second involves the indiscriminate use of weapons that are capable of distinction. Analyst posit that as some countries develop high-tech, highly impressive militaries, and others lag behind, the latter have no chance of meeting the former's superior forces on an equal basis. One would think that if you cannot viably face an opponent on the field of battle, one has to find another

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[132] Justice Michael Musmanno, (the *Einsatzgruppen* case) Military Tribunal II, Nuremberg, Germany, 8 April 1948.

[133] For, unfortunately, it is; *see for instance* Protocol I, Article 51(5)(b) referring to attack, which may cause 'excessive' damage among civilian population. More precisely, Article 57(2) (a) (iii) providing an obligation to take feasible precautions 'with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects'.

[134] Military targets have been defined as combatants, and those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. *See for example* Article 52 of Protocol I and also Department of the Army, *the Law of Land Warfare,* FM 27–10 (18 July 1956), Change No. 1. 40 (15 July 1976)(the *US Field Manual.)*

[135] International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,* 618 (1987).

way to fight or give up the fight.[136] This massive gap between capabilities is an incentive for ignoring the principle of discrimination. In international armed conflicts combatants are entitled to use force against opposing combatants and military objectives. Rebel groups, by contrast, are criminals in the eyes of the State and are in violation of its domestic criminal code. To label them 'combatants' might appear to legitimize their activities.

Instead, in the law of non-international armed conflict the objective is to highlight the special protection enjoyed by those not participating in the hostilities. In other words, violence against non–combatants deserves to be prohibited in both domestic and international law. To resolve this quandary, the term 'fighters' has been suggested to determine who is and is not participating in the fighting. A fighter is a member of the armed forces of a party to the conflict or one otherwise taking part directly in the hostilities. The definition would include, for instance, someone who is attacking an opponent, conducting sabotage, delivering ammunition, or serving as a spotter for artillery.[137]

### 2.4.2. The Principle of Proportionality

In addition to the principle of distinction, the principle of proportionality provides that, even when selecting proper military objectives to attack, consideration must be given to the likely effects on the civilian population. In brief, even a legitimate military objective may not be attacked if the likely damage to civilians, or civilian objects, would be disproportionate to the military advantage to be achieved.

The underpinning guideline is that loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained. Therefore, those who plan or decide upon an attack must take all reasonable steps to ensure not only that the objectives are identified as military objectives but also that these objectives may be attacked without probable loss of life and damage to property disproportionate to the military advantage anticipated.[138] Put starkly, force should be used sparingly and with heightened care.
It should be noted that proportionality is an inherently subjective determination, and, by its very nature, the calculation changes depending on the importance of the military advantage involved.[139] The State practice has been to use force to achieve not only immediate tactical military advantages, but also strategic and psychological advantages over their enemies. The overarching goal of such attacks is to undermine not only the enemy's capability to continue the war, but also his will to continue the

[136] *Cf.* the terrorists attacks, for instance against the backdrop of the US military technology advancement.
[137] *See* Schmitt, *supra* note 21.
[138] The *US Field Manual, supra* note 133 above, Change No.1, p. 41.
[139] By way of an example, although the destruction of a tactically insignificant enemy might not justify any risk to civilians in the area, the destruction of an important installation might well justify a very great risk to the surrounding civilian population.

war.[140] It may therefore be difficult to calculate the extent of force proportional to given circumstances in advance.

The answers to the questions regarding the principle of proportionality and collateral damage are not simple. It may be necessary to resolve them on a case-by-case basis. The answers may also differ depending on the background and values of the decision-maker. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to non-combatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases.[141] Given this discrepancy, it essential to adopt a standard doctrine that takes into account the protection of the human rights of non–combatants from arbitrary judgment.

### 2.4.3. The Duty to Choose Status and the Obligation to Cancel Attack

Protocol I, in Articles 51 and 57, requires an attacker to do everything feasible to verify that a target is legitimate.[142] It also requires using methods and means of attack, such as smart weapons if available and militarily sensible, which minimize incidental injury to civilians and collateral damage to civilian property. In particular, Article 57(2)(b) of Protocol I demands that **an attack must be cancelled** if an attacker realizes that it is not legitimate or that the resulting collateral damage or incidental injury will be disproportionate. In addition, although only to the extent militarily and practically feasible, **civilians must be warned of an impending attack**.[143]

It is important to note that, once a civilian object is occupied by combatants, or otherwise converted to some military use, it loses its civilian character and protected status, and becomes a lawful military target, which may be attacked and destroyed.[144] To the extent that the principles of discrimination and proportionality apply in such circumstances, it is only with respect to individuals and objects remaining in the area that have not been converted to some military use. A point of interest is that 'civilians' who actively assist in the fighting, committing acts of war, which by their nature or

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[140] Jeanne M. Meyer, " Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine" *51 A.F.L. Rev.* 143, 164 (2001).
[141] Final Report to the Prosecutor of the Committee Established to Review NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 50 UN Doc. PR/P.I.S./ 510-E (2000) (Released June 13, 2000) cited in David B. Rivkin *et al, supra,* p.14.
[142] Article 51 generally prohibits indiscriminate and disproportional attacks and requires effective advance warning to civilian population of an impending attack failing which an attach should be cancelled. Article 57 provides precautionary measures to spare the civilian population.
[143] *Cf.* the precautionary measures under Articles 57 and 58 of Protocol 1.
[144] As noted in the International Committee of the Red Cross Commentary to Protocol I, *supra,* p. 621.

purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces, become combatants and legitimate targets.[145]

It is, in fact, one of the primary functions of IHL **to force individuals to choose between one status or another**. As explained in the British Military Manual in force during the World Wars: It is one of the purposes of the laws of war to ensure that an individual must definitely choose to belong to one class or the other, and shall not be permitted to enjoy the privileges of both; in particular, that an individual shall not be allowed to kill or wound members of the army of the opposed nation and subsequently, if captured, or in danger of life, to pretend to be a peaceful citizen. As a matter of principle, this rule means that individual civilians who take up arms, becoming belligerents or combatants, lose their civilian status and become legitimate targets of attack. If such individuals have violated the laws and customs of war in that capacity, they are subject to prosecution and punishment for these acts.[146]

## 2.5. THE GAP BETWEEN THE RIGHT TO SELF-DEFENCE AND THE APPLICATION OF INTERNATIONAL HUMANITARIAN LAW (IHL)

It would appear that there exists a normative lacuna between the prohibition of force regime in the UN Charter and the triggering of humanitarian law. This lacuna is exposed by the intersection of the exercise of the right of self–defence and the demands of IHL. Most of the discussion about the ethical and legal implications of armed conflict focus on *jus in bello* issues relating to legal and ethical conduct once a party has already resorted to use of force. Whereas little or no effort is put on the *jus ad* or (more accurately) *contra bellum*, to determine the legality or morality of resort to force. Art. 1 common to the four Geneva Conventions confirms the autonomy of *jus in bello* in relation to *jus contra bellum.* As it may therefore be noted, IHL applies whether the use of force is legal or illegal.

The previous chapter has illustrated that international law outlaws war such that war seems illegal. The Kellogg–Briand Pact proscribed war, and the UN Charter further reinforced this rule by stating that the use of force can only be authorized for self–defense or under the auspices of the Security Council for maintaining peace and security. Nevertheless, the issue of legality or illegality of use of force is of less importance, especially given that in either way, use of military force usually occasions incidental loss of civilian lives. A gap therefore lies in the determination of the limit of use of defensive that is permitted by the UN Charter. The gap is germane to the

[145] *See* Articles 51, Protocol I which provides that civilians shall enjoy the protection of the provision unless and for such time as they take a direct part in hostilities.
[146] *See Manual of Military Law 1929,* Amendment (No.12) (1936), Ch. XIV, p. 17 (the *British Military Manual*).

duty of care by those who make decisions to resort to force as well as the fighters[147], to respect and protect the fundamental human rights of civilians.

The just was theory eschews to consider alternatives to use of force at this point. However, this lacuna can effectively be addressed by evaluating the normative weight of human rights and international law before recourse to use of military force. All human rights for all should be protected and respected at all times. The cardinal rule is that war is prohibited in international law. The guiding principle of international relations is that of peaceful settlement of disputes.

While identifying the root causes of conflicts does not automatically provide the clue to resolve them, it may nevertheless, prevent conflicts from escalating. Although there are no set patterns applicable to every conflict, by aiming to understand and unveil the incentives for waging war, their disincentives for compromise and the structural features of the conflict, third party mediators can develop specific strategies for initiating negotiations.[148] Making war a difficult and unattractive option can deter recourse to force. It is therefore important that the international community implement the procedural safeguards for prohibiting use of force.[149]

## 2.6. CHALLENGES TO THE PROTECTION OF CIVILIANS BY IHL

Rules for distinguishing between civilians and soldiers during armed conflict have been around since the medieval period, but the debate surrounding civilian deaths in contemporary violence suggest that, while legal principles exist that govern the conduct of hostilities, the moral and ethical debate is far from over.[150] The 1949 Geneva Conventions governs how individuals should be treated in wartime. These laws focus on the principle of discrimination, or the ability to discriminate between civilians and non-civilians when it comes to use of force. After the determination, a number of principles can be applied to evaluate how civilians should be treated, all of which can be found in the relevant legal documents.[151] But

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[147] A fighter is a member of the armed forces of a party to the conflict or one otherwise taking part directly in hostilities. The definition would include for, instance, someone who is attacking an opponent, conducting sabotage, delivering ammunition or serving as a spotter for artillery. The term has been adopted by the Institute of International Humanitarian Law to resolve the quandary encountered in determining who is and is not a civilian where rebel groups are involved. *Compare* Schmitt, *supra* note 21.

[148] Bjørn Møller, *Conflict Prevention and Peace-Building in Africa* in *Conflict Prevention and Peace-Building in Africa*, Report from the Maputo Conference 28–29 June 2001, Danish Ministry of Foreign Affairs, Danida, p. 67.

[149] *For a good discussion see* Charles King, *Ending Civil Wars*, Oxford University Press, 1997, p. 73.

[150] *Cf. when* the US military mistakenly strafed a wedding party in Afghanistan and in the Gaza strip; *also* when the Israeli Air Force dropped a one– ton bomb in a civilian neighbourhood and killed its intended target but also 9 children. The incidences are cited in Schimitt, *supra* 21.

[151] *See* Article 48 of Protocol I, which dictates that the Parties to a conflict shall at all times distinguish between civilian population and combatants and between civilian objects and military objects and direct their operations only against military objects; *see also* Article 51

while the legal principles appear clear, the problem, as in all law, is their interpretation and relevance for different types of conflicts. The challenges would fall into three broad areas.[152]

### 2.6.1. The 'Just Cause' Makes the Rules Difficult to Follow

There may well exist a theoretical tension at the heart of the just war tradition. The greater the justice of one's cause, the more rules one can violate for the sake of the cause, although some rules are always inviolable. The same argument can be put in terms of outcomes: the greater the injustice likely to result from one's defeat, the more rules one can violate in order to avoid defeat. This is a moral dilemma that weakens the just war tradition. It is clearly reflected in responses to the accusations that military forces have killed innocent civilians where authorities have argued that their cause makes the rules difficult to follow. While they seek to obey them, they will occasionally invoke the justness of their cause as a justification for overriding the rules governing who can be killed in combat.[153]

### 2.6.2. The Shift to Give More Rights to Those Resisting Occupation.

The Geneva Conventions recognizes the *levée en masse,* a phenomenon that has made distinguishing combatants from non-combatants to be more difficult. The situation is complicated if an entire society is engaged in a war against an oppressor, where it is almost impossible to define some as warriors and some as civilians. It is even more difficult if the whole society support a cause, where the occupiers would arguably be allowed to undertake reprisal actions that punish a whole society. The recent attacks on civilians in the Israel–Palestine situation render this point credible.[154]

### 2.6.3. New Developments in Weapons Technology

In the past 10 years, technology has led to the creation of smart weapons that allows military commanders to better pinpoint targets. Ironically, this development, which should lead militaries better wage war directly against

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of Protocol 1, which requires that civilian population as well as individual civilians should not be objects of attacks. Further, Article 52 of Protocol I makes a prohibition that civilian objects shall not be objects of attacks.

[152] Walzer, *supra* note 88, p. 229 *et seq.*

[153] *Ibid.*

[154] In the Israel case, while not all Palestinians have been engaged in suicide bombings, apparently many support these tactics. The Israelis are now proposing to punish family members of the suicide bombers, a further challenge to the principles governing those under occupation.

other military targets, has led to military commanders targeting civilian areas because they believe they can avoid civilian casualties. In fact, however, this lessening of the threshold of what areas can be targeted has created the unfortunate outcome of militaries using weapons in situations that are highly populated by civilians.[155]

## 2.7. FROM THE JUST CAUSE TO LEGITIMATE SELF-DEFENCE THRESHOLD-AN AGENDA FOR LEGITIMATE USE OF FORCE

The foregoing poses challenges for using the just cause threshold in evaluations of military operations. If one's understanding of the rules is limited to the just war theory, then these developments, and accompanying challenges, suggest that applying the just war tradition is not as simple as partisans of the theory would lead one to believe. Just war theory is confined to evaluating the moral justification for resort to the use of military force while not addressing the requisite training of those who use force, with particular attention to the dangers of indiscriminate loss of life that might be posed through the use of particular weapons or equipment.

Thus, there exist potential gaps in the law that need to be filled by greater attention to human rights principles to curtail the risk to, or endanger, life in the use of military force. In this regard, human rights and international law governing the treatment of civilians must be the primary tools for the evaluation of resort to military force.

## 2.8. TIGHTENING THE THRESHOLD OF LEGITIMATE SELF-DEFENCE

### 2.8.1. Obligation to Declare A State of Emergency

Use of force, whether legal or illegal has a potential of causing loss of life and damage to property of individuals. In human rights terms, the belief that humanity is a value in itself found expression in treaties protecting individuals from arbitrariness, abuse and persecution by authorities. In humanitarian terms, it found expression in treaties, which limit the use of force in times of armed conflict. While different in circumstances of application, the common aim of the two regimes is to protect the life, health and dignity of individuals from arbitrary exercise of power over them.[156]

During wartime or public emergency, however, the enjoyment of certain human rights may be restricted under certain circumstances. Article 4 of the International Covenant on Civil and Political Rights (ICCPR) allows States

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[155] *See* Tony Lang, " Civilians and War: Dilemmas in Law and Morality" available at <www.carnegiecouncil.org/viewMedia.php/prmTemplateID/8/prmID/95>, visited 12 February 2004.

[156] Jakob Kellenberger, President of the ICRC in a Statement on the 58th Annual Session of the United National Commission on Human Rights, Geneva, 26 March 2002 available at <www.icrc.org/Web/eng/sit>, visited on 17 February 2003.

to take measures temporarily derogating from some of their obligations under the Covenant in these situations. Despite this provision, it would appear that most, if not all, governments that have been involved in armed conflicts have never officially proclaimed any state of emergency. However, the need of safeguarding human rights even during use of military force has been fully recognized in Common Article 3 to the four Geneva Conventions.

First and foremost, before resorting to use of force, it is imperative that there should be an official declaration of a state of emergency for legitimate derogation of the rights of individuals at risk. There is need to respect the legality requirement for any restriction; any restriction must be applied in a manner that is both non-arbitrary and non-discriminatory; the restrictions must respect the principle of proportionality and should not lead to any rights or freedoms being entirely extinguished and finally, there are certain rights and freedoms which are non-derogable. These principles need to be at the forefront before any resort to use of force.

Despite being well established, they are often lost sight in practice. It is essential to put in place measures to governing conflicts and disturbances before such situations arise and thereby reduce the risk of ill-conceived responses to them.[157] It is reasonable to argue that non–compliance with the obligation to declare a state of emergency is not only a breach of Article 4 of the ICCPR, but contravenes the legitimate use of force envisaged in Article 51 of he UN Charter and eschews opportunity for peaceful settlement in case of a dispute. The merit of this argument is derived from the preamble of the UN Charter, which sets out the determination to save the succeeding generations from the scourges of war.

### 2.8.2. The Duty to Appoint a Protecting Power

It is the duty of the fighters from the beginning of a conflict to secure the supervision and implementation of IHL by appointment of a protecting power and by permitting the activities of a protecting power it has accepted after designation by the enemy. The protecting power, whose duty is to safeguard the interests of the Parties to the conflict, is usually a State appointed by a party to an armed conflict and the specific duties of the protecting power are laid down in the Geneva Conventions and Protocols, which include general supervisory duties.[158] If a protecting power is not appointed, the International Committee of the Red Cross (ICRC) can offer its service and act as a substitute for a protecting power.

#### *2.8.2.1. An Occupying Power's Duty to Provide Security*

[157] *But see* McBride *supra* note 124, pp. 3–4.
[158] *For specific duties, see, e.g.* Article 16, Geneva Conventions I; Article 12 Geneva Convention III, Article 14 Geneva Convention IV and for general duties, see Article 8 Geneva Convention I–III and Article 9, Geneva Convention IV.

An occupying power has a duty to restore and ensure public order and safety in the territory under its authority. Under customary international law, this duty begins once a stable regime of occupation has been established, but under the Geneva Conventions, the duty attaches as soon as the occupying force has any relation with the civilians of that territory.[159]

#### *2.8.2.2. Transparency and Assessment of Civilian Loss as a Consequence of Use of Military Force*

A degree of transparency of military operations is essential for demonstrating and enabling public understanding of compliance with IHL. With regard to improving transparency and accountability under IHL, Human Rights Watch has recommended that all fighters should facilitate access to military information, personnel and battlefield by journalists and international monitors; all fighters should respect the legal status of journalists as civilians and prisoners of war and that all fighters should act swiftly to facilitate internal and external investigation of alleged war crimes and serious violations of IHL.[160]

### 2.8.3. Requisite Training and Equipment

Before being deployed military forces must be trained to observe principles of proportionality and discrimination in the use of force and provide them with proper equipment to meet these needs. Training should focus on the duty to take all feasible steps, including choosing the means of attack, that will minimize injury to civilians and civilian objects. Military forces should be trained to defuse tense non-combat situations without resorting to lethal force. Lethal force should be used only when necessary to meet an imminent threat to life and only in proportion to the actual danger presented in conformity with international humanitarian standards.

Military forces that are deployed should be able to evaluate precautionary measures to produce the least harm to civilians consistent with achieving a military objective. With proper intelligence, and assuming no technical failure or human error, precision-guided equipment as opposed to indiscriminate bombs, can significantly enhance the ability to discriminate between combatants and civilians. Other precautions may also mitigate civilian damage, such as choosing a time of attack when fewer civilians will be in the vicinity, or providing effective warnings.[161]

### 2.8.4. Justifiable and Judicious Use of Force

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[159] This is a principle of customary international law and a treaty obligation; *see* Article 43, Hague Convention (IV) of 1907.

[160] Human Rights Watch, " International Humanitarian Law Issues In A Potential War In Iraq", Human Rights Brief Paper, February 20, 2003, pp.10–11, available at <www.hrw.org/backgroundder/arms/iraq0202003.htm>, visited on 12 March 2003.

[161] *See ibid*, p. 7.

Fighters must positively identify and correctly evaluate the nature of a target before engaging with lethal force. Use of particular weapons is only effective when it is used in conjunction with reliable intelligence. If such positive identification is not possible, the target should not be attacked. Commanders should scrutinize targets more closely than has been the case before authorizing an attack.[162] This entails determining the limits on the justifiable and lawful use of force. Judicious use of force need not only be legitimate and proportionate, but also ethically applied where it is absolutely necessary.[163]

It is advisable that military forces, in law enforcement situations, only use reasonable means for law enforcement. In particular, when facing civilian demonstrations or protests, military forces should abide by the standards set forth in the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the U.N. Code of Conduct for Law Enforcement Officials,[164] and be provided with the equipment and training necessary for this purpose. Responsible States or groups should provide compensation to victims of unlawful use of force by its armed personnel where this has caused death, disablement, or destruction of property.[165]

## 2.9. CONCLUSION: PARAMETERS OF PERMISSIBLE USE OF FORCE

It is obvious to concur that use of force should not demolish the global normative system painfully built over the past decades and centuries.[166] Military power is potentially a destabilizing factor. The UN Charter requires that force should only be used in self-defence or other legitimate action and in a clearly justified manner. Otherwise use of force destabilizes the system by inciting fear and insecurity, and thus undermining the global community's confidence in peaceful cooperation. The rules that govern the legitimate use of force encompass a number of international agreements, with the UN Charter at the centre.

International law has an enormous ability to shape state-to-state relations. It condemns recourse to war for the solution of international controversies and renounces war as an instrument of national policy. There can be no war under the system laid down in the Charter, save in response to an aggression. A compelling argument can, therefore, be made that the just war tradition bends or breaks the prohibition of use of force in the Charter.

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[162] *Ibid.*

[163] See General Henry Shelton, " The New Moral Climate for the Use Of Force" available at <www.carnegiecouncil.org/viewMedia.php/prmTemplateID/0/prmID/96>, visited 18 December 2003.

[164] Adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders in 1990 and the UN General Assembly in a Resolution of 1979, respectively.

[165] *See* Mc Bride *supra* note 124, p. 6.

[166] *Consider* the Preamble of the Charter of the United Nations.

This argument is augmented by the fact that the Kellogg–Briand Pact, explicitly proscribed war. The architects of the Charter could not have intended non-legal considerations to govern the use of force in given circumstances or justify an act of aggression. This would amount to waging war through the back door. As this chapter has shown, the just war theory further poses a threat to the respect of IHL.

The UN Charter contains no provision governing the use of force by belligerents. Yet, IHL, while not prohibiting the use of force, spells out a balance between military necessity and the demands of humanity. It requires combatants to maintain a degree of humanity on the battlefield to avoid harming non-combatants, and imposes limitations on means and methods of warfare. Despite all the efforts that have been made to put peaceful negotiation on a permanent basis in the place of resort to use of force, the toll of human suffering, death and destruction, which wars inevitably bring, continues to grow.

In the final analysis, there must be a degree of convergence between the prohibition of use of force and IHL. In practice, however, there seems to be a divergence in the operation of the two regimes unless there was a principle of international law that indicated how they should be reconciled. This principle should provide a threshold of legitimate use of force that is permitted by the Charter. The principle should not only embody human rights and humanitarian law considerations but also the obligation for settlement of disputes exclusively by peaceful means.[167]Prevention of recourse to use of force is, and must remain, the foremost purpose of international cooperation. Therefore, there is need for fighters and civilians alike to realize that the basic issue is one of respecting fundamental human rights.[168]. If such individuals have violated international law, they are subject to prosecution and punishment for these acts. It is against the backdrop of prevention of illegal use of force that the next chapter focuses on.

# Chapter Three

## 3. Apprehension of Aggression: A Human Rights Approach for Individual Responsibility for the Crime of Aggression

### 3.1. HISTORICAL BACKGROUND: THE UNIQUE NATURE OF INDIVIDUALS RESPONSIBLE FOR THE CRIME OF AGGRESSION

#### 3.1.1. The Charter of the Nuremberg Tribunal and Individual Responsibility

[167] The obligation is not just to give peaceful methods a try, but to persevere for as long as necessary, whilst at the same time avoiding action which could make things worse. In other words, if a dispute cannot be settled, States must at least manage it and keep things under control; *see* Evans, *supra* note 5, p. 531.

[168] The Office of the High Commissioner for Human Rights, Fact Sheet No. 13, International Humanitarian Law and Human Rights, pp. 10–11.

Aggression was first regarded as an international crime involving criminal responsibility by Article 6(a) of the International Military Tribunal Charter of 18 August 1945 (The Nuremberg Charter). This Article placed individual responsibility for acts constituting crime against peace, namely, planning, preparation, initiation or waging of war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing. Wars of aggression were only one of the subcategories of the broad spectrum of crimes against peace. Not just any individual would be criminally responsible for the offence of aggression but only policy makers.

In terms of Article 6 of the Nuremberg Charter, the individuals subject to prosecution for aggression fall into a special category consisting of leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan. According to the Nuremberg Tribunal aggression is the 'supreme international crime'.[169] The Tribunal established that if and as long as a member of the armed forces does not participate in the preparation, planning, initiating, or waging of aggressive war on a policy level, the person's war activities do not fall under the definition of crimes against peace.

The logic for the above principle being that, it is not the person's rank or status, but the persons power to shape or influence the policy of his or her State, which is the relevant issue for determining one's criminality under the charge of crimes against peace. The Tribunal based this reasoning on the principle that international law condemns those who, due to their actual power to shape and influence the policy of their nation, prepare for, or lead their country into, an aggressive war. Whether an individual can be classified as being on a policy level is a question of fact to be proven on a case-by-case basis.[170]

### 3.1.2. The Abeyance occasioned by UN General Assembly Resolution 3314(XXIX)

Although the UN General Assembly unanimously adopted Resolution 95(1) on 11 December 1946 by which it affirmed the principles of international law recognized by the Charter and subsequent judgments of the Nuremberg Tribunal, there was no follow-up to the definitions of crime against humanity and its application in subsequent years, whilst other crimes, for instance genocide and torture, were spelt out in various conventions. For

[169] *Trial of the Major War Criminals,* Proceedings of the International Military Tribunal, Nuremberg, pt 22(H.M. Stationery Office, 1950) (*Nuremberg Proceedings),* 421; (1947) 41 *AJIL* 186.
[170] *Trial of Wilhem von Leeb and others,* (1953) 15 *Ann. Dig.* p. 376, pp. 381–382 and also *Alfred Krupp von Bohlen and Others,* UNWCC *Law Reports,* xv, p. 145–146.

political reasons, the definition of aggression remained in abeyance until the UN General Assembly adopted a definition in Resolution 3314(XXIX) of 14 December 1974, albeit deliberately incomplete. Article 4 of the Definition of Aggression provided that the definition was not exhaustive and left to the Security Council a broad area of discretion, by stating that the Security Council was free to characterize other acts as aggression under the Charter. The resolution did not specify that aggression could entail both State and individual liability.[171]

### 3.1.3. Individual Responsibility in view of the International Law Commission

In 1996 the International Law Commission (ILC) attempted to define aggression in the Draft Code of Crimes Against Peace and Security of Mankind. Article 16 of the Draft Code provides that 'An individual who, as a leader or organiser, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a state, shall be responsible for a crime of aggression.[172] These individuals include the members of a Government, persons occupying the high-level posts in the military, the diplomatic corps, political parties, and industry.[173]

In this context, the determination of aggression by a State is a *sine qua non* condition for the attribution of individual responsibility for the crime of aggression. The ILC required that before the International Criminal Court (ICC) could deal with the crime of aggression, there must be a prior determination by the Security Council that a State has committed the act of aggression that is the subject of the complaint. The role of the ICC would then be that of determining the legal question of whether an individual person from the State in question has committed the crime of aggression.

## 3.2. SNAPSHOT OF STATE PRACTICE GERMANE TO AGGRESSION

Although there have been instances where States have engaged in acts of aggression, there has been no national let alone international trials for the alleged crimes of aggression since the Nuremberg Tribunal in 1946.[174] However, State practice as drawn from the views expressed by States within the framework of the UN on the adoption of the definition, as well as the authoritative pronouncement by the ICJ, seem to suggest that customary

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[171] *See* Article 5 (2) of the Definition in the UN General Assembly Resolution 3314 (XXIX) of 14 December 1974.

[172] Report of the International Law Commission, UN GAOR, 51st Session, Supp. No.10, UN Doc. A/51/10(1996), pp. 84–85.

[173] 1996 *Yearbook of the International Law Commission, Part Two*, p. 42, cited in Kittichaisaree, *supra* note 116, p. 224.

[174] *See for example* the UN Security Council Resolution 573 of 4 October 1985 condemning Israeli attacks on PLO targets, and Resolution 577 of 6 December 1985, on South Africa's attacks on Angola.

rules have evolved indicating that some instances of aggression may be regarded as criminalized.[175]

The most apparent is the 1990 Iraq invasion of Kuwait, which was a clear breach of the prohibition of use of force under Article 2(4) of the UN Charter. Therefore, if this opinion is correct, that invasion would constitute an international crime of aggression. This view is primarily based of the fact that the invasion was against the territorial integrity of Kuwait, contrary to the provision of Article 2(4) of the UN Charter. This opinion is further fortified by the fact that the invasion was not self-defence envisaged in Article 51 of the Charter. However, the UN Charter does not provide for criminal prosecution of those who have committed aggression. The Security Council resolutions tend to condemn the States responsible for acts of aggression and not individuals.

### 3.3. INDIVIDUAL RESPONSIBILITY FOR AGGRESSION UNDER THE ICC STATUTE

The ICC Statute shall exercise jurisdiction over the crime of aggression pursuant to Article5 (1) (d) once a provision defining it is adopted through an amendment of the Statute. In the negotiations leading to the adoption in 1998 of the ICC Statute, no agreement was reached on the definition of aggression. Nevertheless, States agreed on Article 5(2) whereby the ICC shall exercise jurisdiction over the crime of aggression only if and when an amendment to the Statute is adopted in accordance with Articles 121 and 123 with the view to both defining the crime and setting out the conditions under which the Court may exercise its jurisdiction. Such a provision shall be consistent with the relevant provisions of the UN Charter.

Under the ICC Statute, the crime of aggression has no definition, nor enumerated list of acts constituting aggression, and even further, no indication of constituent elements of the crime are outlined. It is generally conceived that the reason for the exclusion is that the offence is too politically charged to be defined in sufficiently clear and exhaustive criminal provisions and consequently entrusted to international independent judicial bodies for adjudication.[176] It would, however, appear that there is a considerable consensus for the principle of individual responsibility where the crime is committed by political or military leaders of a State.[177]

### 3.4. AN EVALUATION OF THE CONDITIONS FOR THE EXERCISE OF JURISDICTION BY THE ICC

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[175] Antonio Cassese, *International Criminal Law*, Oxford, 2003, p. 113.

[176] *For detailed legislative history see* H. von Hebel and D. Robinson, "Crimes within the Jurisdiction of the Court", in Roy .S. Lee (ed.) *The International Criminal Court: The Making of the Rome Statute—Issues, Negotiations, Results,* Kluwer Law International, 1999,pp. 79–126; *see also* Cassese, *supra* note 175, p. 110; *but compare* Kittichaisaree, *supra* note 116 p. 206.

[177] *Generally see PCNICC/1999/WGCA/RT.1of* 9 Dec.1999, p. 4; *see also* Kittichaisaree, *supra* note 116, p. 225.

It is safe to assert that presently the crime of aggression does not fall under the jurisdiction of any international criminal tribunal or court. The proposals submitted to the Preparatory Commission for the International Criminal Court (PCNICC)[178] and views expressed by delegations reveal three possible conditions form the exercise of jurisdiction by the ICC that are evaluated below.

The first requires the Security Council to determine pursuant to Article 39 of the UN Charter, within a specific time-frame, whether or not an act of aggression has been committed by a State whose national is concerned before referring the situation to the ICC Prosecutor in terms of Article 13 (b) of the ICC Statute. In case of failure by the Security Council to make a decision, the ICC may proceed or request the General Assembly for a recommendation or to seek an Advisory Opinion of the ICJ within a specific time-frame. In case of such recommendation or request, the ICC may only proceed if the victim State Party before it has been declared as such by the ICJ.[179]

The second suggests that the ICC shall exercise its jurisdiction over the crime of aggression subject to the determination by the Security Council under Article 39 of the UN Charter that an act of aggression has been committed. If the Security Council does not make a determination, within twelve months in case of a request from ICC, has not adopted a resolution under Chapter VII of the UN Charter requesting the ICC to defer investigations or prosecutions pursuant to Article 16 of the ICC statute, the ICC shall proceed with the case in question.[180]

The third provides that a complaint of or directly related to an act of aggression may not be brought before the ICC unless the Security Council has left determined that a State has committed aggression.[181] In this context, commentators argue that this approach is not in consonant with the primary role of the Security Council in the maintenance of international peace and security and that it may also immunize nationals of the Permanent members of the Security Council. However, they agree that it augurs well with the dynamics of the use of force regime, as the Security Council would realistically determine which use of force is or is not aggression.[182]

It seems that in the foregoing approaches, the Security Council's determination of aggression by a State is a condition precedent for the

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[178] *See* consolidated text of proposals on the Crime of Aggression, *Doc.PCNICC/1999/WGCA/ART/RT.1* of 9 December 1999.
[179] Proposal of Bosnia- Herzegovina, Portugal, Australia, New Zealand, and Romania, submitted to the 7th Session of the PCNICC in February/March 2003; *see* Kittichaisaree, *supra* note 116, p. 218.
[180] *See Doc. A/CONF.183/C.1/IL. 39* of 2 July 1998, p. 3.
[181] Report of the ILC to the General Assembly on the Work of its 46th Sessions, UN GAOR, Supp. No.10 (A/49/10) (1994), pp. 43–161.
[182] Kittichaisaree, *supra* note 116, p. 219.

attribution of individual responsibility for the crime of aggression. It is the view of the present author that this form of determination of responsibility is not entirely in line with the current trend of international law. First, it is open for debate whether or not the approaches may invoke challenges from the defence based on the principle of *nullum crimen sine lege* entrenched in Article 22 of the Statute of the ICC.

Further, for the ICC to wait for the determination by the Security Council of whether an act of aggression has been committed, would amount to delegating the Security Council to decide the crime itself. In the absence of legal criteria binding on the Security Council, it would appear that the determination of an act of aggression takes into account non-legal factors when the law on the exception to the prohibition of use of force in the Charter is very clear. Although such determination of the Security Council would be binding on Member States of the UN by virtue of Article 25 of the Charter, the decision is only a political act and it is impossible to see how it could have legal effects beyond those laid down in the Charter.[183]

Second, it does not take into account the emergence of non-State armed groups who are capable of engaging odious aggression jus as much as States. Thirdly, it focuses more on the intercourse of States and not the rights of individuals. Fourth, if the ICC has jurisdiction over natural persons, the primary step ought to have been determining the acts of individuals and not necessarily States. Finally, the first and second approaches seem to be in conflict with Article 13 of the ICC Statute which provides that the Security Council may refer a situation to the Prosecutor and not otherwise.

The provision of Article 13 serves two important purposes. It relieves the Security Council of the need to establish *ad hoc* tribunals and it provides the Prosecutor with a basis for initiating investigations and preserving evidence. Since the referral of a situation by the Security Council is based on Chapter VII of the UN Charter, the exercise of jurisdiction by ICC is binding and legally enforceable on all States. This will particularly be pertinent in securing jurisdiction over situations which otherwise would not fall within the competence of the court. It should be borne in mind that Article16 would suffice in situations where the Security Council deems it fit that its activities should take precedence over the criminal jurisdiction of the ICC.[184]

The above argumentation draws inspiration from the classic pronouncement of the Nuremberg Tribunal that crimes against international law are committed by individuals, not by abstract entities, and only by punishing

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[183] *See* Francois Bugnion, " Just Wars, War of Aggression and International Humanitarian Law" available at <www.icrc.org/web/siteeng0.nsf/htmlall/5FLCt4>>, visited 21 April 2004.

[184] *See* Lee, *supra* note 176, pp. 35–36.

individuals who commit such crimes can the provisions of International Law be enforced.[185] Thus, criminal responsibility should be derived from the obvious consequences of the act of individuals who commit the crime. Further, this reasoning lends credence from the *Nicaragua* case where the ICJ in addressing the element of aggression, determined whether aggression occurred or not by examining the gravity of the offence, particularly the scale and effects of an operation.[186]

If the above assessment is correct, it follows that the ICC needs to consider the scale and effects of the act of individual aggressors. The logical consequence would therefore be considering the effects of an act of aggression on the human rights of the victims within the victimised State. It should be noted that the adoption of new standards of conduct for states in the protection and advancement of international human rights has gradually led to a shift from a culture of sovereign impunity to a culture of national and international accountability and recognition that concepts of security must include people as well as states.[187]

At the 1993 Second World Conference on Human Rights, the UN endorsed that international protection of human rights as its legitimate concern. It appears that in modern international law, what counts is the sovereignty of the people and not of the metaphysical abstraction called the State.[188] The rationale for this proposition is that the nationals of a State are an extension of the State itself, a part as vital as the state territory, and that the *raison d'être* of the state is the protection of its citizens.[189] This view is in line with the intention of the drafters of UN Charter who set out in the preamble that The aim of saving succeeding generations from the scourge of war.

It would therefore be reasonable to conclude that the basis for attribution of criminal responsibility for the crime of aggression should be its effects on the violations of the human rights of the victims. This propositions is fortified by the holding of the *Nicaragua* case, which states that it is the victim of an armed attack that must form and declare the view that it has been so attacked.[190] However, it is important to distinguish that the victim in that case was the State of Nicaragua whereas in the present formulation it is the individuals within the State. Going by this formula, apprehension or suppression of the crime of aggression will thus be governed by human rights rules as opposed to politics. In this sense, the just war theory appears to accommodate arbitrary factors to justify an act of aggression.

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[185] Judgment of the International Military Tribunal, in *The Trial of German War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany,* Part 22, London, 1950, p. 447.
[186] *See Nicaragua* v. *US*, *supra* note10, p. 195.
[187] *See* Gareth Evans, *supra* note 55, p. 20.
[188] *Michael Reisman*, challenging a criticism of the legality of UN resolution authorizing military intervention in Haiti that it might violate its sovereignty; *see* Michael Reisman, " Haiti and the Validity of International Action" (1995) 833 AJIL 89.
[189] *Ibid.*
[190] *See generally Nicaragua* v. *US* case, *supra* note 10.

Concomitantly, the actual perpetrators of aggression would hide behind the façade of the State.

## 3.5. THE SUBJECTIVE AND OBJECTIVE ELEMENTS OF THE CRIME OF AGGRESSION

Notwithstanding that the definition of the crime of aggression and the conditions of the exercise of jurisdiction by ICC have not been settled, it is possible to formulate the objective and subjective elements of the crime of aggression based on the contemporary international jurisprudence.

### 3.5.1. The Subjective or Mental Element (*Mens Rea*)

The Definition of Aggression does not go beyond the *actus reus*. However, a crime against pace is not completed unless the *actus reus* is accompanied by *mens rea,* termed as *animus aggressionis*. The requisite subjective elements of the crime of aggression are criminal intent (*dolus)* plus knowledge. The prosecution has the burden to prove that the perpetrator intended to participate in an act of aggression and was aware of the scope, significance, and consequences of the action taken, or recklessness on the part of the perpetrator to knowingly take the risk of bringing about the consequences of the action in question.[191] There should be knowledge and criminal intent for criminal liability for the crime of aggression to arise. Thus, courts require that it must be shown that the accused were parties to the plan or conspiracy, or, knowing of the plan**,** furthered its purpose and objective by participating in the preparation for aggressive war.[192]

Others suggest that aggression requires a special intent, for instance, to achieve territorial or economic gains or to interfere with the internal affairs of the victim State. According to this school, the crime of aggression is committed if the UN Charter is breached with an illegal aim, that is, special intention aforementioned. However, critics argue that current international law proscribes engaging in aggression whatever the purpose or motivation of the aggressor. The argument further goes that to require a special intent would presuppose that aggression only constitutes an international crime when a State unlawfully uses military force against another in pursuit of a special goal.[193]

The former view would be debatable in the light of Article 5 of the 1974 Definition of Aggression which stipulates that no consideration of whatever nature, be it political, economic, military, or otherwise, may justify an act of aggression. It would, thus, be questionable whether the just war tradition would exonerate an act of aggression. However, a reasonable balance between these two views may be struck by the splitting of a unitary notion

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[191] Cassese, *supra* note 175, p. 115.
[192] *See Krauch and* Others (*IG Farben* trial), US Military Tribunal Sitting at Nuremberg, Judgment of 29 July 1948, in TWC, VIII, 1081–1210,and p. 1108.
[193] *For an in-depth analysis see* Cassese *supra* note 175, pp.115–116.

of aggression into two separate concepts. One valid for wrongful acts of States where no special intent would be required, for the prohibition of force in breach of Article 2(4) of the Charter, the other for criminal offence by individual aggressors where the requisite subjective element would include special intent.[194]

### 3.5.2. The Objective or Material Element (*Actus Reus*)

The UN Charter prohibits any recourse to force in international relations, with the exception of the collective enforcement action provided for in Chapter VII and the right of individual or collective self-defence reserved in Article 51. Broadly speaking, the use of force not envisaged in this text and the corresponding customary rule, amounts to aggression. The 1974 Definition of Aggression would be regarded to have codified these instances of aggression as confirmed by the ICJ in the *Nicaragua* case.

In this groundbreaking case, the ICJ considered the elements of aggression in Article 3(g) of the Definition. The ICJ stated that aggression includes the case where a State sends or is substantially involved in sending into another State armed bands with the task of engaging in armed acts against the latter State of such gravity that they would normally be seen as aggression because of its scale and effects.[195] Simply put, those guilty of this offence must have actual knowledge that an aggressive war is being intended and that if launched it will be an aggressive war.[196]

Under the Nuremberg Tribunal, crimes against peace were committed by the 'planning, preparing, initiating, or waging' (what will be prosecuted by the ICC as) the crime of aggression, or 'participating in a common plan or conspiracy to accomplish the same'.[197] The ICC Statute has a comprehensive regime of modes of participation. Article 25 provides a broad approach to the occasions on which an individual can be held criminally responsible for participating in the commission of an offence, ensuring that those involved in the planning, preparation, or execution of serious violations of IHL, in other words, all those who contribute to the commission of the violation are individually responsible.[198] Conspiracy however is not included. Generally, Article 28 of the ICC Statute provides for responsibility of military commanders.

## 3.6. AN ATTEMPT TO FILL THE LACUNA

### 3.6.1. Aggression under the UN Charter

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[194] *Ibid.*
[195] *Nicaragua* v. *US, supra* note 10, p. 195.
[196] *Wilhelm von Leeb and Others,* US Military Tribunal at Nuremberg, 28 Oct.1948 (1953) 15 *Ann. Dig.* p. 376, p. 381.
[197] *See* Kittichaisaree, *supra* note 116, p. 220.
[198] Antonio Cassese, "International Criminal Law" in Malcolm N. Evans, *International Law,* Oxford, 2003, pp. 721–756, p. 736.

The UN's first and foremost Purpose, as enumerated in Article 1 of the UN Charter, is to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or breaches of the peace and to bring about peace by peaceful means. In this connection, Article 2(4) prohibits the threat or use of force in international intercourse with the only permissible exception in Article 51, which allows individual or collective self-defence against an armed attack (*aggression armée*).

The term aggression is deliberately left undefined in the Charter because it was feared that the progress of modern warfare would render futile the definition of all cases of aggression and as such the list of aggression would be incomplete, thereby allowing aggressors loopholes and distort the definition to their advantage.[199] As such, the UN Charter in Article 39, gives the Security Council mandate to determine the existence of any threat to the peace, breach of the peace, or act of aggression and take appropriate action.

It would be fallacious to hold the view that, since no general agreement has been reached in international law on an exhaustive definition of aggression, perpetrators of this crime may not be prosecuted and punished.[200] Although the UN Charter does not provide for criminal prosecution of those who have committed aggression, this gap would have to be filled by an independent court to avoid impunity for the crime of aggression from international judicial scrutiny.[201] An aggression is deemed to be an unlawful act, the international law crime *par excellence.*[202]

The complimentarity regime is one of the cornerstones on which the ICC is built, pursuant to the tenth preambular paragraph of the ICC Statute. Under the existing international law, national courts have jurisdiction over crimes committed within their territories, irrespective of who perpetrated the crime. Therefore, it is fair to conclude that the most effective and viable system to bring perpetrators of serious crimes to justice is one that must be based on national procedures complemented by the ICC.

This system would reinforce the primary obligation of States to prevent and prosecute international crimes, an obligation which exists for all States under treaty and customary law. The ICC would, therefore, fill the gap where States could not or failed to comply with those obligations.[203] Considering that the ICC shall be complementary to national criminal jurisdictions, which are already operational, national courts may exercise their territorial jurisdiction over individual aggressors in the meantime. The

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[199] Security Council Enforcement Arrangements, *UN Security Council Doc.881, III/3/46, 12 UN C.I.O. Doc.505 (1945);* quoted in Kittichaisaree, *supra* note 116, p. 211.
[200] Cassese, *supra* note 175, p. 113.
[201] Opinion of Benjamin B. Ferencz, former prosecutor at the Nuremberg Trials, quoted in Kittichaisaree, *supra* note 116, p. 208.
[202] *Cf.* Bugnion, *supra* note 183, p. 11.
[203] John T. Holmes, "The Principle of Complimentarity" in Lee, *supra* note 176, pp. 41–78, p. 73.

underlying concern is that the commission of the crime of aggression should be determined from the consequences of the act of the perpetrators on the rights of the individuals within the State that has been attacked.

### 3.6.2. Addressing the Grey Zones: The Role of Customary Law

There is still no consensus on the possible new forms of aggression, namely, the initiation of armed attack against another State by new means or methods of warfare in form of pre-emptive strikes, or widespread terrorist attacks by non-State armed groups.[204] Probably, the most effective response to atrocities is to resort to the various available mechanisms, each most suited to a specific condition, effectively to stem out gross human rights violations. It is certain that the current status of international law posits that private persons, groups and in particular corporations have human rights responsibilities.

Recent jurisprudence of national courts reveals that criminal law can be an effective tool for the prevention and deterrence of human rights.[205] Proponents of this theory suggest that States should not only initiate criminal proceedings on the basis of the principles of territorial and personal jurisdiction, but also, in the interest of the universality of human rights, on the basis of universal jurisdiction. Rather than cover up international criminals, States are encouraged to pursue an open and transparent policy of bringing all perpetrators of serious human rights to justice in order to complement the ICC.

Commentators suggests that universal criminal jurisdiction for gross violations of human rights should also lead States to establish universal civil jurisdiction over corresponding torts.[206] By the same token, they have proposed for the adoption of international rules requiring States to offer a forum to victims of IHL and Human Rights violations for tort claims and also to establish universal jurisdiction over such claims. It is clear that such forum and jurisdiction would be particularly useful against these new non-state actors, as they do not benefit, like States, from immunity against civil claims before foreign courts.[207] In these circumstances, given these new aggravating challenges, there is need to enforce the prohibition of force on various fronts of criminal justice in order to effectively respond to the multifarious aspects of international criminality.

## 3.7. PROSECUTING THE CRIME OF AGGRESSION

### 3.7.1. Defining the Crime of Aggression

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[204] Cassese, *supra* note 175, p. 115.
[205] *Consider for example* the *Pinochet* case [1999] 2 WLR 827; ILR 119.
[206] Marco Sassóli, "Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian Law and International Human Rights Law", University of Quebec in Montreal, Canada, *paper presented at the Armed Groups Conference,* Vancouver, Canada, 13–15 November 2003, p. 20.
[207] *Ibid.*

War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from war crimes in that it contains within itself the accumulated evil of the whole.[208] The Kellogg–Briand Pact established the illegality of war as an instrument of national policy.

Therefore, the *Nuremberg* Judgement inferred that 'those who plan and wage such a war, in its inevitable and terrible consequences, are committing a crime in doing so'.[209] Of course, the Tribunal conceded that the Pact had neither expressly promulgated that war is a crime nor set up courts to try offenders.[210] The *Nuremberg* Judgement was innovative when it ingested the criminality of war into general international law.[211] As a consequence, war of aggression currently constitutes a crime against peace. Not just a crime, but the supreme crime under international law.[212]

### *3.7.1.1. Definition of Aggression*

It cannot be denied that responsibility for international crimes, as distinct from responsibility for ordinary breaches of international law, entails the punishment of individuals. The criminality of war of aggression means the accountability of human beings, and not merely of abstract entities.[213] The General Assembly consensus Definition of Aggression adopted in 1974, relates to aggression in a generic way. Article 5 (2) of the text prescribes that 'war of aggression is a crime against international peace'. Article 5 (2) differentiates between 'aggression' that gives rise to international responsibility and 'war of aggression' that is a crime against international peace.[214] Thus, the framers of the Definition thereby signalled clearly that not every act of aggression constitutes a crime against peace but only war of

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[208] This well-known dictum is based on a passage from Lord Wright, " War Crimes under International Law", 62 *L.Q.R.*(1946) 40, p.47

[209] *Nuremberg* Judgment, *supra* note 185, p. 220.

[210] *Ibid.;* but this is also true of the Hague Convention (No. IV of 1907) Respecting the Laws and Customs of War on Land which prohibits certain practices in warfare such as the maltreatment of prisoners of war, the employment of poisoned weapons, and the proper use of flags of truce. The forbidden acts have been viewed as war crimes notwithstanding the fact that the Convention does not designate them as criminal and does not introduce penal sanctions; *see* Yoram Dinstein, *War, Aggression and Self-Defence,* 2nd edition, Cambridge, 1995, p. 119.

[211] *See* G.A. Finch, "The Nuremberg Trial and International Law", 41 *A.J.I.L.* (1948) 20, pp. 33–34 cited in Dinstein, note 210 above, p.121 footnote 26.

[212] *See generally* The Declaration on Friendly Relations, note 9 above; *see also* Dinstein, *supra* note 210, p. 121.

[213] Dinstein, *supra* note 210, p. 125.

[214] *See* G. Gilbert, "The Criminal Responsibility of States", 39 *I.C.Q.* (1990) 345, p. 360 cited in Dinstein, *supra* note 210, p. 125.

aggression does. An act of aggression may trigger war. However, this is not a foregone conclusion, since aggression may also take the form of an act short of war. When an aggressive act short of war is committed, although a violation of international law occurs, no crime against peace is perpetrated.[215]

The General Assembly's Definition of Aggression is the most recent and the most widely, albeit not universally accepted. By and large, it is difficult to provide a definition serviceable for all purposes. Still, in the context of the present study, 'aggression' will have the meaning of the general formulation in Article 1 of the Definition that:

> Aggression is 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, as set out in this Definition.

In an explanatory note, the drafters of the definition commented that the term 'State' includes non- UN Members, embraces a group of States and is used without prejudice to questions of recognition. The obvious divergence of the wording of Article 1 of the Definition from Article 2(4) is that the threat of force *per se* does not qualify as aggression, since actual use of armed force is absolutely required[216] True, as pointed above, the holding in the *Nicaragua* case proposes that traditional forms of aggression are prohibited by customary international law.

The Resolution, to which the Definition of Aggression is annexed, makes it plain that the primary intention of the General Assembly was to recommend the text as a guide to the Security Council when the latter is called upon to determine the existence of an act of aggression within its mandate under Article 39 of the Charter. As discussed earlier, aggression may appear in a different light when inspected by the Security Council for political purposes and when a judicial enquiry is made into criminal liability.

This said, it is reasonable to conceive that the ICC cannot possibly gloss over the theme of aggression that is the gravamen of the charge reason being that unless a war is aggressive in nature, no crime has been committed. By contrast, under Chapter VII of the Charter, the mandate of the Security Council is identical regarding aggression, breach of the peace or any threat to the peace. It is not imperative for the Council to determine specifically that aggression has been perpetrated. Irrespective of the exact classification, so long as they can be categorized as either aggression or as breach of, or threat to, the peace, the Council is authorised to put in effect the same measures of collective security.[217]

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[215] *Ibid.*
[216] *Ibid.,* p. 127.
[217] *Ibid.* p. 126.

Article 2 of the Definition stipulates that the first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression, but the Security Council may determine otherwise in the light of circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity. This leaves a broad margin of interpretation that may involve the intent and purposes of the acting State. Nonetheless, in view of the demise of the just war tradition coupled with Article 5 of the Definition, the proviso in Article 2 would rightly be seen as a *de minimis* clause that clarifies, for instance, that a few stray bullets across a boundary cannot be invoked as an act of aggression.[218]

Article 5(1) of the Definition posits that no consideration of whatever nature, whether political, economical, military or otherwise, may serve as a justification for aggression. This provision stresses that the motive does not count and is in line with the argumentation against the just war theory in this thesis. Thus, even a good motive does not prevent an act from being illegal. Article 3 of the Definition contains an enumeration of specific acts of aggression. It seems that Article 3 was not intended to exhibit the entire spectrum of aggression. According to Article 4 of the Definition, the acts enumerated in Article 3 do not exhaust the definition of that term, and the Security Council may determine what other acts are tantamount to aggression.

*3.7.1.2. Splitting the Notion of Aggression*

As a matter of fact, after 30 years of existence, the Definition of Aggression has had no visible impact on the deliberations of the Security Council.[219] If the Council would ignore past precedents and devise novel conceptions of aggression, it is unlikely that criminal responsibility would ensue, since the principle *nullum crimen sine lege* is now enshrined in the ICC Statute, in Article 22. Over and above, Article 15(1) of the ICCPR prescribes that no one shall be held guilty of any criminal offence on account or omission which did not constitute a criminal offence, under national or international law at the time when it was committed.[220]

As stated above, no agreement was reached in the negotiations leading to the adoption in 1998 of the ICC Statute. It would seem that the main bone of contention was about the role to be reserved by the Security Council. Particularly, whether its determination were to be binding upon the ICC; whether it could stop the ICC from prosecuting alleged cases of aggression; or whether the ICC would be free to make its own findings, whatever the

[218] *See* B. Boms, "The Definition of Aggression", 154 *R.C.A.D.I.* (1977) 299, p. 346 cited in Dinstein, *supra* note 210, p. 129.
[219] Although in many instances States have engaged in acts of aggression, and in a few cases the Security Council has determined that such acts were committed by States; *see* Cassese, *supra* note 175, p. 112.
[220] *Cf. also* Article 10 of the 1991 Draft Code of the Crimes against the peace and Security of Mankind.

deliberations of the Security Council.[221] In order to avoid these dilemmas, it seems reasonable to split the unitary notion of aggression into two separate concepts, one valid for wrongful acts of States in breach of Article 2 (4), the other valid for individuals' criminal offence under Article 5 of the ICC Statute. Rudimentary considerations due process require that individuals should be held responsible by a court of law, and not by a political body such as the Security Council.

*3.7.1.3. Issues of Jurisdiction over the Crime of Aggression*

The rationale for the prosecution of the crimes against peace by the ICC is self-evident. Trials of other international crimes, principally war crimes and crimes against humanity have a lot of merit even when conducted before domestic courts. But the nature of crimes against peace is such that no domestic proceedings can conceivably dispel doubts regarding the impartiality of the judges. As a matter of law, jurisdiction over the crimes against peace is universal. Yet, as a matter of fact, only enemy (or former enemy) States, rather than neutrals, are likely to convict and sentence offenders charged with these crimes. Any panel of judges composed exclusively of enemy (or former enemy nationals will be suspected of irrepressible bias.

Avoidance of actual trials against the perpetrators of crimes against peace is due to political constraints and other pragmatic considerations.[222] There is no indication that States regard as anachronistic the concept that war of aggression constitutes a crime under international law. On the contrary, support for this concept has been manifested consistently in international for a. A significant testimony is afforded by a string of uncontested UN General Assembly Resolutions, complemented by studies undertaken by the International Law Commission.[223] The capstone, however, is the stipulation of the crime in Article 5 of the ICC Statute. *A fortiori* the crime of aggression is subject to universal jurisdiction in terms of Article 5(1).[224]

*3.7.1.4. Application of the General Rules of State Responsibility*

Any breach of an obligation incumbent upon a State under international law, regardless of the subject matter of the obligation, entails international responsibility.[225] In conformity with this general, therefore, international responsibility is generated by recourse to inter-State force in violation of the UN Charter and customary international law. Thus, when an aggressive war is embarked upon, international responsibility may take the form of penal sanctions imposed on certain individuals who acted as organs of the aggressor State. However, without diminishing from such individual

[221] Cassese, *supra* note 175, p. 112.
[222] Dinstein, *supra* note 210, p. 123.
[223] *Ibid.*
[224] *But see* Article 12 and 13 of the ICC Statute.
[225] *See* Report of the International Law Commission, 28th Session, [1976] II (2) *I.L.C. Yearbook* 1, p. 96.

liability, international responsibility- whether for an aggressive war or for any other unlawful use of inter-State force -means, first and foremost, State responsibility.[226]

In the 1970 *Barcelona Traction* case, the ICJ held that the obligations derived from the outlawing of acts of aggression are obligations *erga omnes*, which arise towards the international community as whole for all States have a legal interest in the protection of the rights involved.[227] In the exceptional circumstances of *erga omnes* obligations, international law protects the interests not merely of a specific State or group of States, but of all the States in the world. Each State is vested with rights corresponding to *erga omnes* obligations, thus obtaining a *jus standi* in the matter.[228]

Logically, the consequence is that when a war of aggression is that war of aggression is let loose, every State (not just the immediate victim) may invoke the international responsibility of the aggressor. Thus, the third State gets into a claimant position and may react accordingly. In 1995 the International Law Commission recognized that when an internationally wrongful act constitutes an international crime, all other States other States are to be considered individually as 'injured' parties.[229]

## 3.8. HALTING HOSTILITIES: ENFORCING THE PROHIBITION OF USE FORCE ON VARIOUS FRONTS

It is doubtful whether an exhaustive definition of aggression that satisfies the principle of legality required in international law could ever be agreed upon. It seems, however, that the proposition of splitting the notion of aggression into two separate concepts has merit. If one is valid for wrongful acts of States pursuant to the breach of Article 2(4) of the UN Charter and the other as a criminal offence for individuals, then the principles that the ICJ shall have jurisdiction over States and ICC over natural persons according to Articles 35 and 25 of their respective Statues, will be upheld.

All in all, as it has been noted above, the international legal order governing peace and security under the Charter seems to be somewhat flawed. By way of example, there is still no general and binding agreement of the definition of aggression. When the international community has to define the crime of aggression to be prosecuted by the ICC, there is no consensus on how to

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[226] Dinstein, *supra*, note 210, pp. 106–107.
[227] *Case Concerning the Barcelona Traction, Light and Power Company, Limited,* [1970] *I.C.J. Rep.* 3, p. 32.
[228] *See* Y. Dinstein, " The Erga Omnes Applicability of Human Rights", 30 *Ar. V.* (1992), pp. 18–19 cited in Dinstein, *supra* note p. 112.
[229] Article 5(3) of the Report of the International Law Commission, 37th Session, [1985] II (2) *I.L.C. yearbook* 1, p. 25.

proceed.[230] This legal vacuum leaves room for States to interpret the Charter provisions in accordance with their particular interests.[231] States are clearly anxious to avoid condemnation for their use of force and they generally use the language of international law to explain and justify their action, not as a sole justification but as one of a variety of arguments.[232] Thus, there is an obvious danger to abuse the right to self-defence through unlawful use of military force. It may be difficult to discern a crime of aggression and decipher the culprits as they usually hide behind the shield of the State.

It logically follows from the foregoing analysis that in the absence of a centralized and mandatory judicial procedure allowing the determination of aggression in each case on the basis of clear legal criteria and in such a way as to be binding equally on all belligerents. This would lead to inconsistency and arbitrariness on the part of the Security Council in responding to incidents of threats of use or use of force. There is no definition of aggression in the Kellogg–Briand Pact or in the UN Charter. More over Resolution 3314(XXIX) of the Definition of Aggression is far from constituting a genuine definition. It has virtually nothing to say about the contemporary and indirect forms of aggression, such as subversion, terrorist attacks, foreign intervention in civil wars, occupation with the acquiescence of a puppet state and so forth. Further, by making an exception for wars of national liberation, Resolution 3314 takes into consideration an essentially subjective element, namely grounds for recourse to arms. This seems to be incompatible with a proper definition, since any definition capable of legal effect must be based on objective and verifiable elements. Finally, this resolution is not binding on the Security Council.[233]

In the final assessment, it would be inconceivable for the determination of aggression by a State to be a *sine qua non* condition for the attribution of individual responsibility for the crime of aggression, if crimes are committed, not by States, but individuals against individuals. The ICJ observed in the *Nicaragua* case that when States violated customary law on the use of force they did not assert the right to do so; they tried to characterize their use of force as justifiable under the exceptions permitted by law.[234] As further noted in the *Pinochet* case and the 1993 Vienna Declaration and Programme of Action in chapter one, the direction that modern international law is taking is that towards the protection of the rights of individuals. It would thus be reasonable to base the prosecution of, and jurisdiction over, the crime of aggression on the effects of such an atrocious act on the rights of individuals.

For the sake of objectivity in the determination of such an assertion, there is need to define limits of legitimate use of force. Secondly, to draw definitive

[230] Kittichaisaree, *supra* note 116, p. 209.
[231] Simma , *supra* note 7, p. 135.
[232] Gray, *supra* note 5, pp. 588–589.
[233] *For a good discussion see* Bugnion, *supra* note 183, pp. 11–18.
[234] *Ibid.*

procedure for the exercise of the right to self-defence that takes into account the peaceful means of settlement of disputes as well as the rights of individuals. It would be prudent therefore to attribute responsibility on the basis of the individuals act for gross violations of human rights of the victims. As a parallel measure, there is an urgent need to support the work of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations in drafting a World Treaty on the Non-Use of Force in International Relations.[235] This initiative, whether soft law or binding treaty, should codify the norms applicable to non-use of force, clearly determine the legality or illegality of nuclear weapons and provide practical measures to limit and reduce armaments.

A further task is to bridge the gap between the prohibition of force regime and the other international legal means of preventing war and to establish a link between the principle of prohibition of force and the disarmament regime. Lastly but by no means the least, the need to improve the effectiveness and efficiency of the role of the Security Council under Article 39. This is the central focus of the proceeding chapters.

[235] General Assembly Resolution 31/9 of 8 November 1976, UN GAOR, 34th Session, Supp. No.41, *UN Doc. A/34/41* and *Corr. 1.*

# Chapter Four

## 4. Cultivating a Culture for Peace

### 4.1 PREVENTION OF USE OF FORCE AND PRESERVATION OF HUMANITY

A decade after the end of the Cold War, the international community expected a New World Order that would bring stability and peace. Contrary to these hopes, threats to peace have accumulated. Regional crises have multiplied and armed conflicts proliferated. The development of ballistic missiles and weapons of mass destruction continues. With the rise in terrorist attacks,[236]threats of use or use of lethal force have become a reality. It threatens directly the lives of individuals, territorial integrity and sovereignty of States. Thus, in today's unstable situation, the first purpose of international co-operation is, and should remain, the prevention of armed conflicts and the maintenance of international peace and security. The second is to preserve humanity in all circumstances, even during conflicts, which is the primary intention of IHL.[237]

### 4.2. THE NEED FOR THE WORLD TREATY ON THE NON-USE OF FORCE IN INTERNATIONAL RELATIONS.

As discussed in chapter one, the abstract nature of the essential concepts of international peace and security as set out in the Charter, such as 'territorial integrity or political independence', leaves doubt as to whether 'indirect aggressions like humanitarian intervention is prohibited by the Charter. It is also questionable when a State can legitimately exercise the right of self-defence and whether a State can pre-empt an 'armed attack' against it through anticipatory self-defence. The failure to control or prevent the use of force in international law is often attributed to the lack of a firm and clear definition on the limit of permissible use of force under the UN regime.[238]

The UN General Assembly, by Resolution 2330 (XXII) of 18 December 1967, set up a Special Committee on the Question of Defining Aggression. This culminated in the adoption by consensus of Resolution 3314 of 14 December 1974 on the Definition of Aggression whose objective is to deter potential aggressors by providing authoritatively the parameters of how far a

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[236] *For example* in Kenya, Tanzania, United States of America, Karachi in Pakistan and Bali in Indonesia.

[237] The normal state of human relations between communities and within a single community is peace. IHL does not contradict this role, but confirms it; this is borne out by the Preamble to Additional Protocol 1 of 1977; *see* Michel Venthey, " International Humanitarian Law and the Restoration and Maintenance of Peace" available at <www.iss.co.za/Pubs/ASR/7No5/InternationalHumanitarian.html> visited on 15 February 2003.

[238] Kittichaisaree, *supra* note 116, pp. 212─213.

State can act without encroaching upon the international norm against the use of force or unfriendly relations with other States.[239]

### 4.2.1. Paralysis of the Security Council

Article 2 of the Definition empowers the Security Council to decide whether the first use of armed forces is an act of aggression. It also introduces a distinction between low-intensity conflicts and the other types of conflicts, with the former not qualifying as aggression.[240] While Article 3 of the Definition illustratively lists, in a non-exhaustive manner, the incidents which qualify as acts of aggression, Article 4 gives the Security Council the discretion to decide whether other acts may constitute aggression under the provisions of the Charter.

As provided in Article 5 of the Definition, no consideration of whatever nature, be it political, economic, military, or otherwise, may justify aggression. However, a finding of aggression can only be made when there is consensus among the permanent Members of the Security Council. Such determinations by the Security Council are rare owing to the existence of conflict of interests among the Permanent Five.[241]

In the wake of this paralysis of the Security Council, the General Assembly set up a parallel measure given that the UN General Assembly resolutions have no legally binding force. This is the establishment of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations to draft a World Treaty on the Non-Use of Force in International Relations.[242]

However, the Special Committee has not been successful in drafting the Treaty because the interplay between international law and international politics makes this impossible.[243] The lack of success is caused, among other things, by the problem of prohibiting the use of nuclear weapons and

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[239] Article 1 of the Definition provides that: 'Aggression is 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, as set out in this Definition…'

[240] Article 2 states that: ' the first use of armed forces by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.'

[241] *Cf* the finding of South Africa's aggression against Angola in the late 1970s, drawing from the 1974 Definition in contrast with the case of the Gulf War of 1990─1991, where the Security Council never branded any State an 'aggressor'.

[242] Resolution 31/9 of 8 November 1976, UN GAOR, 34th Session, Supp.No.41 (*UN Doc. A/34/41)* and *Corr. 1*.

[243] *See* Report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations, UN GAOR, 38th Session, Supp. No. 41 (UN Doc *A/38/41).*

the adoption of practical measures to limit and reduce armaments.[244] Besides it has been observed that such a Treaty would create a parallel regime in an instrument having neither the solemnity nor the universality of the UN Charter, thereby creating instability and confusion on the norms applicable to non-use of force.[245]

### 4.3. IHL AND THE RESTORATION AND MAINTENANCE OF INTERNATIONAL PEACE

IHL is an important component in maintaining peace and its very nature shatters the dangerous illusion of unlimited force[246] or total war; creates areas of peace in the midst of conflict; imposes the principle of a common humanity and calls for dialogue. [247] IHL is therefore, increasingly becoming part of global thinking on security issues at the national, regional and international levels. The inclusion of IHL complements the current concept of human security that the implementation of IHL should form part of a culture of conflict prevention for the 21st century.

Thus, in Article 6 of Perpetual Peace, *Kant* indicates that no State at war with another must allow itself hostilities of a kind, which would make reciprocal confidence impossible during future peace.[248] IHL may be expressed through the provision of bilateral agreements that can be concluded before hostilities begin (cartels), during hostilities (truces and instruments of surrender), or at the end of a conflict (ceasefires and peace treaties). Or it may be formed through multilateral agreements, frequently concluded in reaction to a bloody conflict.[249]

Thus, the fundamental rules of IHL are closely linked to the survival of human beings, not only individuals but entire populations and extend to maintaining a minimum of confidence between adversaries.[250] By its very nature, IHL is certainly not a substitute for peace but rather maintains the necessary conditions for a return of peace even during a conflict.

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[244] *Ibid.*, paras.18─20; *see* an in-depth analysis by Timothy McCormack, *infra* note 260.
[245] *Ibid.*, para. 33; *see also* Kittichaisaree, *supra* note 116, p. 215.
[246] *See* the Saint Petersberg Declaration of 1868 *as well as* Art.22 of the Hague Regulations of 1907 which stipulates that the rights of belligerents to adopt means of injuring the enemy is not unlimited, which is stressed in Art. 35(1) Protocol I.
[247] Venthey, *supra* note 237.
[248] Quoted in *ibid.*
[249] The Battle of Solferino (1859) was the impetus of the First Convention in 1864; the naval battle of Tsushima (1905) between the Japanese and Russian fleets prompted adjustment of the Convention on War at Sea in 1907; WWI brought about the two 1929 Conventions; WWII led to the four 1949 Conventions, the Vietnam War preceded the two 1977 Additional Protocols. Regional conflicts prompted the drafting of the UN instruments on human rights, disarmament, the prohibition of terrorism and mercenaries, protection of the environment, the prohibition of terrorism and mercenaries, protection of the environment and protection of the rights of children.
[250] In other words, the prohibition of perfidy.

Therefore, it is imperative for the sake of peace that IHL is respected under all circumstances. In modern situations, when faced with so-called 'collapsed states', 'post-modern wars' and anarchic conflicts, the states' party to the 1949 Geneva Conventions should reaffirm their collective responsibility to respect and to ensure respect for this Convention in all circumstances.[251] However, the question arises whether these measures should be limited to diplomatic démarches and the adoption of resolutions, or extended to the use of sanctions and peace enforcement operations in order to stop genocide and arrest war criminals. In part, this may be answered by looking at when humanitarian law is brought into a conflict or potential conflict situation.

Sometimes, the introduction of IHL in a conflict is deferred when individual countries, or the international community at large, choose to perpetuate the illusion of peace by refusing to recognise the state of conflict, and ignoring or concealing victims. Actions such as these may jeopardise the application of the law and, indeed, the restoration of peace, as delays of this nature allow conflicts to progress beyond the stage at which international law can help to resolve the conflict. As the number of victims grows and methods and means of warfare degenerate on both sides, it becomes extremely difficult to revert to the legal path. The pacifying value of humanitarian restrictions thus emerges late in the day, accompanied by the bitterness caused by too many violations.[252]

IHL lies at the heart of peace, focusing as much on maintaining peace as on restoring it. Breaches of humanitarian law aggravate and prolong conflicts while application of the law mitigates and shortens conflicts. The role of IHL in maintaining peace is clear from the fact that many conflicts, both internal and international, have been sparked by serious violations of IHL. Furthermore, breaches of IHL have accounted for the spreading of conflicts. For example, refugees may bring to neighbouring or more distant countries the violence to which they were subjected. Breaches of humanitarian law leave lasting and often serious after-effects, which hinder the return to civil and international peace, as has been witnessed during the American Civil War, on the Eastern Front in WWII, between Japanese and Chinese, and in the Middle East.[253]

The commitments arising out of the Geneva Conventions are of a binding and absolute nature. Under those commitments, each State unilaterally undertakes, *vis-à-vis* all other States, without any reciprocal return, to respect in all circumstances the rules and principles they have recognised as vital. These do not involve an interchange of benefits but constitute a

[251] *See* Common Art. 1 to the four Geneva Conventions of 1949; *for further references see* Venthey, *supra* note 237.
[252] The revolting policy of ethnic cleansing is a confirmation of grave breaches of IHL, the very embodiment of hatred and rejection.
[253] Quoted in Venthey, *supra* note 237; *see* note 30 of the Article.

fundamental charter that proclaims to the international community the essential guarantees to which every human being is entitled.[254]

The role of IHL in restoring peace is twofold. It opens the possibility of dialogue, thus averting degradation by excessive violence both between international adversaries and among one's own population. It also aims to solve humanitarian problems: refugees, prisoners, disappeared and those missing in action that can become serious political issues, and can hamper the establishment of long-term peace.[255] Humanitarian instruments in force form part of international law and are interlinked with the system of international security, whether for arms control or for peaceful settlement of conflicts. As a matter of practical fact, IHL should be highlighted in the general context of the development of co-operative relations at the political and economic levels.

### 4.4. ADDRESSING THE *NON LIQUET* ON LEGALITY OR ILLEGALITY OF NUCLEAR WEAPONS

IHL prohibits the use of certain weapons and restricts the use of others. Before introducing new weapons, States must consider whether their use would be contrary to international law.[256] It is regretted that with the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion of the ICJ,[257] no greater clarity about the legality or illegality of the use of nuclear weapons has been obtained. However the positive aspects are that the Court declared by a majority that any use of nuclear weapons is subject to the principles of customary international law applicable in armed conflicts, and the reminder to nuclear States of the obligation to negotiate and reach agreement on a comprehensive ban on nuclear weapons.[258]

As noted earlier, international law has traditionally distinguished between *jus contra bellum* and *jus in bello*. Any legitimate exercise of force must be consistent with both sets of principles. The Opinion of the ICJ, however, seems to confuse the *jus contra bellum* with the *jus in bello,* since the majority of the Court declared a *non liquet,* a determination that the possibility of a legitimate use of nuclear weapons in an extreme circumstance of self-defence, in which the very survival of a State would be at stake, could not be ruled out.[259] The fact that the majority qualified its ruling on the illegality of the threat or use of nuclear weapons by referring to an 'extreme circumstance of self-defence' rather than arguing, for

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[254] *See the International Committee's Action in the Middle East,* International Review of the Red Cross, December 1973, p. 641
[255] Venthey, *supra* note 237.
[256] *Cf.* Article 35 of Protocol I.
[257] *Legality of the Threat or Use of Nuclear Weapons, supra* note 11, p. 226.
[258] *Ibid.,* paras. 105(2) D and F.
[259] *Ibid.,* para. 105(2) E.

example, that such threat or use may not necessary be inconsistent with the *jus in bello* was both 'a surprise and a disappointment'.[260]

In its reasoning, the majority of the Court overlooked the normative significance of the Nuclear Non-Proliferation Treaty (NPT) as regards the use of nuclear weapons and also failed to perform the anticipated judicial function of applying the general principles of IHL to the use of nuclear weapons. The Court concluded that there was no comprehensive and universal prohibition on the threat or use of nuclear weapons in conventional international law as opposed to weapons of mass destruction (WMD) that have been declared illegal by specific instruments.[261]

With due respect, the Court does not mention that at least 183 States were parties to the NPT at that time,[262] 178 of which had already undertaken to respect a comprehensive prohibition on the production, acquisition, stockpiling, testing and use of nuclear weapons. Hence the *non liquet* is a discriminatory one in that it only applies to five nuclear-weapon States party to the NPT, who are coincidentally the Permanent Members of the Security Council, and to those who have refused to join the NPT regime. For other States, the law on nuclear weapons is abundantly clear that the threat or use of nuclear weapons is illegal since treaty law specifically and explicitly prohibits it.[263]

In this case, it would be accurate to state that the compromise reached in the NPT was for non-nuclear weapon States Parties to forego the right to develop, acquire, stockpile, test and use nuclear weapons in exchange for access to nuclear technology for peaceful purposes[264] and for the obligation of the nuclear-weapon States to negotiate in good faith for the elimination of their nuclear-weapon stockpiles.[265] The fact that the latter have not taken this obligation seriously has been a constant source of frustration for the former and of tension between the two.[266]

The preamble and the entire text of the NPT shows that its purpose is to prevent the horizontal spread of nuclear weapons and to achieve their

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[260] Timothy L.H. McCormack, "A *Non Liquet* on Nuclear Weapons─The ICJ avoids the Application of General Principles of International Humanitarian Law", *1997 International Review of the Red Cross No. 316,* pp. 76─91 available at <www.icrc.org/Web/eng/siteeng0.nsf/iwpList159/5CCE850DE4C9980C1256B>,visited on 24 February 2003.

[261] Para. 57 where the Court contrasted the existence of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, of 10 April 1972 (Biological Weapons Convention) and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, of 13 January 1993 (Chemical Weapons Convention).

[262] As at 30 September 1996.

[263] McCormack, *supra* note 260.

[264] Articles. II, IV and V of the Nuclear Non-Proliferation Treaty.

[265] Article VI of the Nuclear Non- Proliferation Treaty.

[266] McCormack, *supra* note 260.

eventual elimination. Therefore, the vertical proliferation among the nuclear –weapon State would be a clear disregard of the objects and purpose of the NPT, as well as some of its specific obligations.[267] The ICJ found unanimously that there was an international legal obligation to pursue and conclude negotiation leading to comprehensive nuclear disarmament under 'strict and effective international control'[268] Unfortunately, the implication of its *non liquet* as to the legality of the threat or use of nuclear weapons is that only a specific treaty requiring complete nuclear disarmament will remove the uncertainty.

### 4.4.1. Creation of a Proactive Disarmament Regime

Article 35 of Protocol I further prohibits employing weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. In addition, the Article prohibits the employment of methods and means of warfare, which are intended or may be expected, to cause widespread, long-term and severe damage to the natural environment. It further prohibits use of weapons that are indiscriminate, because they cannot be directed against a particular military objective. A range of prohibited weapons include anti-personnel exploding or incendiary as well as exploding bullets, poison, chemical and biological weapons, non-detectable fragments and anti-personnel landmines.

Strikingly, the use in international armed conflict of modern weapons which are contrary to the two basic principles prohibiting those weapons which cause superfluous injury or unnecessary suffering, or are inherently indiscriminate, is not banned *per se,* and therefore, does not amount to a crime under the ICC Statute. The ban will only take effect, and its possible breach amount to a crime, if an amendment to this end is made to the Statute pursuant to Articles 121 and 123.[269] It appears that once integrated into arsenals, a weapon is not lightly discarded on the mere assertion that it causes unnecessary suffering. It is therefore important to forestall the introduction of means or methods of warfare that might have that effect.[270]

Addressing this problem, Article 36 of Protocol I provides that in the study, development, acquisition or adoption of a new weapon, means or method of warfare, each state party to the Protocol is required to determine whether its employment would, in some or all circumstances, be prohibited by applicable rules of international law. However, in practice the effects of new means or methods of warfare in actual battle conditions often are insufficiently known and for obvious reasons cannot be experimentally tested.

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[267] *Ibid.*
[268] *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, *supra* note 13, para.105 (2) F.
[269] Cassese, *supra* note 175 p. 60.
[270] Kalshoven *et al, supra* note 98, p. 155 *et seq.*

Yet the obligation in Article 36 makes a useful contribution to the goal of prohibiting excessively injurious means and methods of warfare.[271] Experience shows that even the new non-lethal weapons are problematic. They make it conceivable to use weapons in situations where military forces are intermingled with civilians. In the past, combat forces may have hesitated to use force in such circumstances and, for instance, pulled back. With non-lethal weapons, the proportionality calculation shifts dramatically.[272]

*4.4.1.1. Deterrence of the Development of Dubious Weapons*

It would appear that the international law of disarmament regarding specific weapons is in a perpetual state of reaction, seeking to catch up with advances in weapons technology. Although the agreement on the prohibition of laser and blinding weapons, negotiated in response of the development of new technology but before deployment of that technology as a war weapon, was an unprecedented success, yet the negotiations of the international community were only a response to the technological developments and did not pre-empt them.[273] The international community has agreed, and continues, to express its commitment to general humanitarian principles. In this spirit, rather than reacting to technology and new expressions of inhumanity, the international community should create a proactive stance to pre-empt all dubious weapons.

One possible suggestion for a proactive disarmament stance would be attributing responsibility for war crimes to weapons experts. For instance, in the context of *jus in bello,* it may readily be seen that the primary function of IHL is not to punish war criminals, but to protect victims of armed conflicts by preventing war crimes from being committed.[274] If this assessment is correct, it follows that those who develop particular weapons should bear criminal responsibility if a link is established between the contribution of the weapon to the support or fulfilment of the war effort which results into indiscriminate killing of protected persons.

The *mens rea* can be inferred from the particular circumstances to determine whether the weapon expert could foresee death as a consequence of his or her acts or omissions or the taking of an excessive risk that shows recklessness.[275] To secure a conviction on this provision, the Rome Statute only requires that the perpetrator must have killed, or caused death to, one or more persons.[276] It logically follows that weapons experts who aid or abet to this end would also be held liable.

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[271] *Ibid.*
[272] *For a detailed discussion see* Schmitt, *supra* note 21.
[273] McCormack, *supra* note 260.
[274] McCoubrey, *supra* note 84 above, p. 279.
[275] Kittichaisaree, *supra* note 116, p. 143.
[276] *Ibid.*

## 4.5. THE DECLARATION AND PROGRAMME OF ACTION ON A CULTURE OF PEACE

The form of use of force has changed over the past century and has indeed become universally intolerable. For use of force now endangers the very existence of the planet. The victims of war have also changed. No longer are the vast majority of the casualties the combatants themselves. Instead, it is now the civilians who suffer most, particularly children, women, the elderly and infirm.[277] In the wake of these circumstances the UN General Assembly has taken initiatives for a culture of peace and adopted a Declaration and Programme of Action on a Culture of Peace[278] by consensus. The Declaration and Programme of Action was adopted following the adoption of Resolution 52/15 of 20 November 1997, proclaiming the year 2000 the "International Year for the Culture of Peace", and Resolution 53/25 of 10 November 1998, proclaiming the period 2001-2010 as the "International Decade for a Culture of Peace and Non-Violence for the Children of the World."

The Declaration recognizes that peace is not only the absence of conflict, but requires a positive, dynamic participatory process where dialogue is encouraged and conflicts are solved in a spirit of mutual understanding and cooperation. Moreover, it was adopted with the aim that Governments, international organizations and civil society may be guided in their activity by its provisions to promote and strengthen a culture of peace in the new millennium. It recognizes that the fuller development of a culture of peace is integrally linked to, *inter alia,* full realization of the right of all peoples, including those living under colonial or other forms of alien domination or foreign occupation, to self-determination enshrined in the Charter and embodied in the international covenants on human rights.

The Programme of Action, on the other hand, calls for various actions to promote international peace and security, including emphasizing the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in all parts of the world. This marks a new stage where instead of focusing exclusively on rebuilding societies after they have been torn apart by violence, the emphasis is placed on preventing violence by fostering a culture where conflicts are transformed into cooperation before they can degenerate into war and destruction.[279]

Although this Declaration might constitute evidence of state practice and state understanding of the normative framework of a culture of peace and non-violence, it is not binding but merely recommendatory on Member States.[280] Hence it cannot be enforced against a Member State that does not

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[277] Frederico Mayor, "Towards a New Culture of Peace and Non-Violence," available at <www.xs4all.nl/-conflic1/pbp/intros/a6_towar.htm>, visited on 16 February 2004.
[278] General Assembly Resolution A/RES/53/243B, 6 October 1999.
[279] Mayor, *supra* note 277.
[280] *But see* the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, where the ICJ noted that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence

comply. It is purely rests on individual States to commit themselves in nurturing peace and complying with the text of the Declaration.

## 4.6. SUMMARY: TOWARDS A PRAGMATIC CULTURE OF PEACE AND NON VIOLENCE

### 4.6.1. Circumventing the Paralysis of the Security Council

The ICJ has highlighted one important point in the rules of international law regulating the use of force in the present international legal system that lacks a supranational enforcement authority or legislative body. The Court observed in the *Nicaragua* case that when States violated customary law on the use of force they did not assert the right to do so but they tried to characterize their use of force as justifiable under the exceptions permitted by the law.[281] It is apparent from this practice that there must be a neutral body to determine whether such an assertion is legally correct, and if it is not, what action is to be taken.[282]

To this end, Article 39 of the UN Charter entrusts this role to the Security Council. The problem however, is that the Security Council has not been able to respond with consistency and objectivity to incidents of international armed conflicts. According to one study, of the 112 inter-State situations of use of force during the years 1945─1991, most of them were not punished or even officially determined by the international community to be unlawful apart from only 'rhetorical criticism' and disapproval were expressed.[283]

Even after the implosion of the Cold War, Permanent Members of the Security Council often have diverging views on how to solve problems germane to use of force.[284] While the Security Council has the primary responsibility of maintaining peace and security under Article 24 of the Charter, one of the possible alternatives to get round the problem of paralysis or prolonged hesitation[285] occasioned by the Security Council is by circumventing the Council's authority through regional or sub-regional arrangements under Chapter VII of the Charter, of course subject to their

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important for establishing the existence of a rule or the emergence of an *opinion juris; supra* note 13, pp.809–826. It should also be noted that certain organs of the General Assembly are binding upon the organs and member states of the UN; *see for example* Article 17 of the UN Charter.

[281] *Nicaragua* v. *US*, *supra* note 10, p. 98.

[282] Kittichaisaree, *supra* note 116, p. 217.

[283] A.M. Weisburd, *Use of Force: The Practice of States Since World War II* (Pennsylvania State University Press, 1996), pp. 11, 226, pp. 312─313.

[284] They often differ on how to solve the problem of internal conflicts caused by ethnic and religious differences that replace international conflicts based on political ideological differences during the Cold War. This was manifest in the episode of NATO's 'humanitarian intervention' in the Kosovo crisis in 1999. China and Russia would not have permitted the UN Security Council to authorize the intervention, leaving the other three Permanent Members to pursue this option without the Council's prior authorization.

[285] For instance, result of the Rwandan genocide and the reluctance to support reform of the mandate in Bosnia.

seeking subsequent authorization from the Security Council. It is on this basis that the present work proposes the establishment of regional peace councils to nurture a culture of peace and consolidate and foster the Programme of Action on a Culture of Peace at regional level.

*4.6.1.1. A Case for Regional Peace Councils: Complementing the Security Council*

Since long-term conflict prevention demands multidimensional initiatives that go beyond short-term military action,[286] it is suggested that these Peace Councils should be comprised of *inter alia* human rights and humanitarian agencies, institutions for peace research and strategic studies for purposes of developing coherent action plans in conflict prevention techniques in the fields of arms control, disarmament, negotiations, confidence-building measures, and the developments of international law relating to peace and conflict management.

However, others argue that ignoring the Security Council is undermining the international legal order in which human rights is grounded and that this leaves a vacuum of accountability and authority.[287] For instance the case of ECOWAS in Liberia where Liberian civil society activists pointed out that despite a broad recognition that something had to be done to address the Liberian security needs, the lack of any legitimate process of accountability for addressing abuses and crimes carried out by humanitarian intervention forces themselves was a serious problem.[288]

It should indeed be borne in mind that Article 53 of the UN Charter dictates that regional arrangements cannot take an enforcement action without the authorization of the Security Council. Such arrangements are expected to make every effort to achieve pacific settlement of dispute. Here, the idea of the proposed regional peace councils is not to find alternatives to the Security Council, as a source of authority, but rather to complement as well as make the Council effective.[289]

The UN and other international actors can strengthen the capacity of weak regional organizations. The UN's collaboration at regional level is also important in mitigating the influence of dominant states in the sub-regional organisations. It seem that regional collaboration is an appropriate

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[286] Dan Kuwali, "Defending the Defenceless", Danish Institute of Human Rights, Copenhagen, 2002, available at <www.humanrights.dk/departments/Research/RPPshort/Pubs/>, visited on 14 February 2004.

[287] The International Council on Human Rights Policy, *Human Rights Crises: NGO Responses to Military Interventions, supra* note 57, p. 17.

[288] *See generally* Mahony, *supra* note 62.

[289] The Security Council should take into account in all its deliberations that if it fails to discharge its responsibility in conscience shocking- situations crying out for action concerned states may not rule out other means to meet the gravity and urgency of the situation and that the stature and credibility of the UN may suffer thereby; *see* the ICISS, *supra* note 47, p. xiii.

framework for handling many interlocking crisis because regions usually comprise countries with shared background and often have an inherent propensity to be involved in each other's affairs.[290] They are better placed than the UN for early prevention of conflicts.

Its proximity to the conflict areas with a keen understanding of the local context makes it more attentive to impending violence and more effective in mediation in the early stages of conflicts.[291] Avoiding the disintegration of a neighbour, given the refugee outflows and the concomitant general regional security destabilization, can be a compelling motive.[292] Thus, the major responsibility and burden to prevent conflicts is on the neighbours of those involved in conflicts, who presumably, have the most interest in the conflict. If the neighbours are incapable of response, then it becomes a more regional and ultimately global issue. In this regard, there might be need for international scrutiny to prevent the dangers of ulterior motives.

[290] Bjørn Møller, *supra* note 148, p. 77.
[291] Ong, K. (Rapporteur), *IPA Training Seminar Report on Peacemaking and Peacekeeping,* Hotel Thayer, West Point, 8─11 May, 2000, USA, p. 7.
[292] Gareth Evans, *supra* note 55, pp. 6─7.

# Chapter Five

## 5. If You Want Peace, Prepare for Peace!

### 5.1. ARTICLE 2(3) OF THE UN CHARTER: PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES

The principle of peaceful settlement of disputes occupies a pivotal position within the international legal order whose hallmark is the prohibition of recourse to force. Today, this principle has attained a legal position which, independently of its being entrenched in the Charter, is binding on every State as a customary rule. This view derives credence from the *Nicaragua* judgment where the ICJ explicitly stated that the principle of peaceful settlement of disputes has also the status of customary law.[293]

The provision of Article 2(3) has been elaborated by the Friendly Relations Declaration[294], which provides in paragraph 2 that States shall seek early and just settlement of their international disputes. The Manila Declaration on the Peaceful Settlement of International Disputes [295] has supplemented this formula by adding the phrase 'in good faith and in a spirit of cooperation'. This, however, requires understanding of States that peaceful methods of conflict resolution would promote their own best interest.

The literal meaning of Article 2(3) also covers disputes with subjects of international law other than States. Standard practice has been for Security Council or General Assembly to call upon the States concerned to seek a peaceful solution in negotiations with their non-state opponents.[296] In this respect, it must be taken into consideration that the principle of the peaceful settlement of disputes constitutes a corollary to the prohibition of the use of force. To the extent that the use of force is permissible, an obligation to settle a dispute peacefully cannot exist. Thus, if and to the extent that, States are subject to the duty of peaceful settlement, the same duty must also apply to non-state actors (NSA) on the other side.[297] According to this construction, States would be said to have conferred to NSAs the status of subjects of international law. Otherwise the prohibition of force would not have the desired effect, the *effet utile.*[298]

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[293] *Nicaragua* v. *US supra,* note 10, p. 14.
[294] Annex to UN General Assembly Resolution 2625 (XXV), 24 October 1970.
[295] Annex to UN General Assembly Resolution 37/10,15 November 1982.
[296] Similar appeals were recently made to the situation in Afghanistan, the Congo, Georgia and Sierra Leone; *see* Simma *supra* note 7, p. 108.
[297] It should be remembered that States are the original and primary subjects of international law ; Simma *supra* note 7 above, pp. 108─109;*cf.* that Article 2(4) itself forbids the use of force by UN Members against 'any state', viz. either a fellow Member or non-Member. *compare* Article 2(6) of the UN Charter which is a revolutionary stipulation, in that it imposes on non- Members the legal regime of Article 2(4).However, this is on the basis of customary law; *see* Dinstein, *supra* note 210, p. 92–93.
[298] *Compare* Sassòli, *supra* note 90, p. 215.

It should be noted that States are obliged to settle their disputes exclusively by peaceful means. It logically follows therefore that measures inconsistent with the prohibition of force under Article 2 (4) cannot be characterized as peaceful. The question arises as to whether countermeasures are excluded under the obligation to resolve disputes by peaceful means. Obviously, any taking of countermeasures may lead to an unfortunate spiral of further countermeasures. In this regard, there is need to consider the options under Article 60 of the Vienna Convention on the Law of Treaties, to suspend or terminate the Treaty in case of grave violation of the treaty. Alternatively, Article 48 of the ILC Articles on State Responsibility sets forth two procedural guarantees that a State taking countermeasures must fulfill. Firstly, negotiate with the potential target State. Secondly, comply with all obligations regarding dispute settlement, the precise point in time being left open when recourse to available mechanisms must be had.

## 5.2. ARTICLE 33 OF THE UN CHARTER: ALTERNATIVES TO THE USE OF FORCE

Article 33 of the Charter requires the parties to any dispute likely to endanger the maintenance of international peace and security, to first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. Article 33 constitute a detailed elaboration of Article 2(3), although it refers only to disputes 'the continuance of which is likely to endanger the maintenance of international peace and security whereas Article 2(3) refers to international disputes in general.

The discrepancy would mean that Article 33 describes disputes as a preliminary stage before seizure of the Security Council and the General Assembly whereas under Article 2(3), the institutional responsibility of the UN materializes only if international peace and security are threatened.[299] Generally, therefore, Article 33(1) can be characterized as a fundamental policy rule that divides the areas of responsibility of the parties to a dispute and of the United Nations. The primary responsibility rests with the parties, which means that the competence of the Security Council and the General Assembly is subsidiary.[300]

Thus, the parties to a conflict are explicitly enjoined to deploy active efforts with a view to settling the dispute existing between them. As a result, it becomes clear that the obligation of peaceful settlement is not subsumed by the prohibition of the use of force, but is autonomous and posses a specific substance of its own. The Security Council can make an appeal to the parties to a dispute in accordance with Article 33(2). In this respect, Article 35 grants far –reaching opportunities to the parties, which, pursuant to

[299] Simma *supra* note 7, p. 534.
[300] *Ibid.*

Article 37 are even under an obligation to refer their conflict to the Security Council.[301]

Although the catalogue of Article 33(1) lists nearly all mechanisms of dispute settlement that are known in international practice, it has deliberately left open-ended 'other peaceful means'. Parties are consequently free to combine different types or to modify them in such a way as may seem most appropriate for the solution of a pending dispute.[302] The figure below describes the spectrum of peaceful means of settlement of disputes in contrast with use of force. It shows the degree of mutual participation by the parties to a conflict in search for solutions to the problems underlying their conflict.[303]

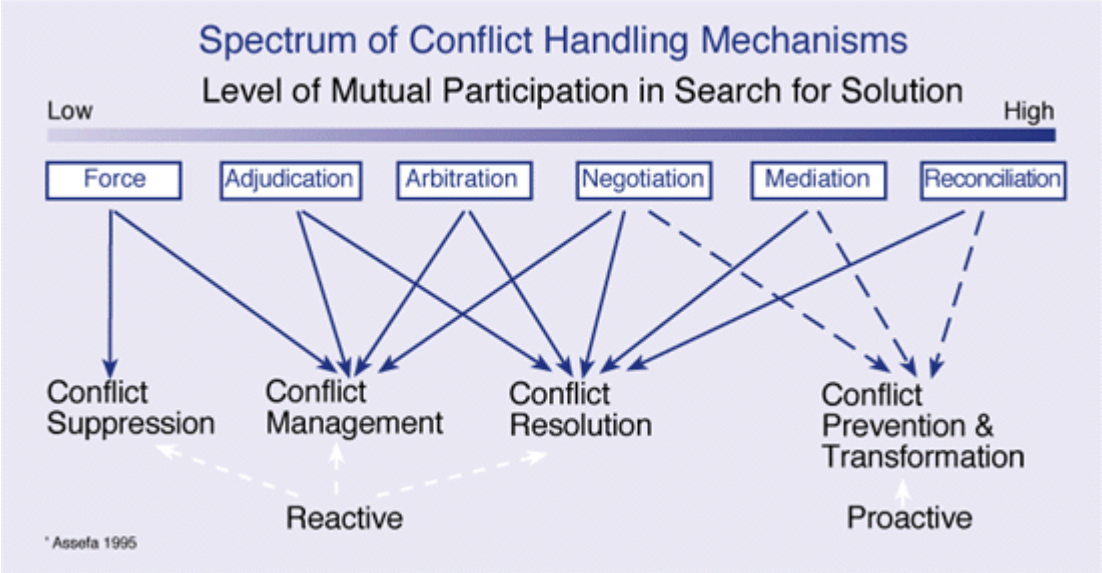


*Figure 1*

As it can be noted from the diagram, the mutual participation decreases from right to left. The use of force by one of the parties to impose a solution would be an example of a mechanism that would be placed at this end of the spectrum. Next is adjudication where the decision is made by a third party, and backed by force. However, the mutual participation of the parties in the choice of the solution is comparatively higher here than in the first. In the adjudication process, at least the parties have an opportunity to present their cases.

Then follows arbitration in which the participation of the parties is even higher since both adversaries can choose the decision maker, and whether the outcome will be binding or not. Further right, there is negotiation, which requires the parties themselves to formulate the issues, and find a

[301] Simma *supra* note 7, p. 592.
[302] *Ibid.*
[303] Adopted from Hizkias Assefa, " The meaning of Reconciliation" available at <www.xs4all.nl/~conflic1/pbp/part1/2_reconc.htm>, visited on 12 February 2004.

satisfactory solution. Then comes mediation where the third party's role is to minimize obstacles to the negotiation process. Towards the far right of the spectrum there is reconciliation where both parties must equally participate intensively in the resolution process.[304]

The conflict handling mechanisms illustrated in the above spectrum can be categorized into three groups, namely: conflict management, conflict resolution, and conflict prevention. Conflict management generally tends to focus more on mitigating or controlling the destructive consequences that emanate from a given conflict than on finding solutions to the underlying issues causing it. On the other hand, conflict resolution aims at going beyond mitigation of consequences and attempt to resolve the substantive root-causes of the conflict so that the conflict comes to an end. While conflict management and resolution are reactive, they come into motion once conflict has surfaced, conflict prevention, on the other hand, tries to anticipate the destructive aspects of the conflict before they arise and attempts to take positive measures to prevent them from occurring.

Most of the mechanisms identified on the left hand of the spectrum are conflict management approaches. The use of military force for deterrence or in peacekeeping is a typical conflict management strategy. From the standpoint of pragmatism, long-term conflict prevention demands multidimensional initiatives that go beyond short-term military action. As such, the long-term effort to remove the proximate causes of armed conflicts must be supplemented by short and medium-term initiatives to make and keep peace.

This demands addressing underlying problems of poverty, poor governance and the denial of human rights. It further demands for initiatives to make recourse to use of force an unattractive alternative. These problems should be tackled together because they cannot be separated.[305] Hence the need for an integrated approach in which peace, the rule of law and respect for human rights are part of an overall development strategy. On this basis, those deployed to use force, the military forces, would be required to cope with this evolving culture of peace and non-violence.

## 5.3. ARTICLE 52 OF THE CHARTER: REGIONAL ARRANGEMENTS

Article 52 of the UN Charter, provides and regulates the relationship between regional arrangements or agencies for the settlement of local disputes and the UN. According to Article 52(1) such regional arrangements are justified insofar as they and their activities are consistent with the Purposes and Principles of the UN. More importantly, Article 52(2) demands that the contracting parties to regional arrangements should make very effort to achieve the pacific settlement of disputes through such

[304] *Ibid*

[305] Dr Leonardo Santos Simão, in the *Report from the Maputo Conference, supra* note 148, p. 16.

regional arrangements or agencies before referring them to the Security Council. To this end, the Security Council is obliged under Article 52(3) to promote forms of regional dispute settlement.

Drafting history of the UN Charter suggests that the utilization of local solidarity and co-operation to strengthen the world security system was the purpose of the integration of regional organizations into the UN.[306] It should be noted that depending on the institutional density, the form of regional arrangements may range from a treaty to a fully-fledged international organization. As regional arrangements under Article 52(1) must have been created for dealing with matters relating to the maintenance of international peace and security, a question arises as to the exact delimitation between autonomous regional political security arrangements or agencies and collective self-defence alliances. An obvious formal distinction that the former have their legal basis in Chapter VIII, Article 52 and the latter in Chapter VII, Article 51, of the UN Charter.[307]

The underlining consideration is that political regional organizations concern themselves primarily with collective security within a region whereas regional self-defence organizations deal with the union of their members for purposes of external defence. Nonetheless, a recent monograph is blurring the distinction between the two systems.[308] In a nutshell, this theory suggests that 'regional' does not necessarily imply geographic link insofar as effective contribution to maintaining or restoring peace is concerned. It also questions the distinction on regional organisations in view of institutions having a hybrid character.

The monograph posits, moreover, that although there is an explicit reference in Article 33(1), it is not necessary that a regional organization disposes of a mechanism of peaceful settlement of its own. Further, basing on the broad understanding of 'regional arrangements under Chapter VIII, endorses the inclusion of organizations such us Organization for Security and Cooperation in Europe (OSCE) which are not based on a legally binding treaty, but only political commitments. Finally, it declares that regional organizations do not necessarily have to consist of sovereign States since even federal units of a federation or other international organizations may become members of a regional organization or arrangement.[309] The present thesis, therefore, supports this formulation and advances a concept of regional arrangements in form of regional peace councils of the above calibre.

Of course Article 52(2) and (3) limit the jurisdiction of the regional arrangements or agencies to the 'pacific settlement of disputes. According

[306] Krezdorn, F.J., *Les Nations Unies et les Accords Régionaux, 1954*, p. 46, cited in Simma, *supra* note, p. 52 footnote 28.
[307] *For a detailed discussion of the subject see* Simma, *supra note*, pp. 807─853.
[308] Walter, C., *Vereinte Nationa und Regionalorganisationen,* 1995 quoted in Simma, *supra,* p. 828, footnote 132.
[309] *Ibid.*

to a reference to Article 33, peaceful means of dispute settlement are understood to include negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their choice. It is easy to notice that the combined effect of these two essential provisions accords regional institutions a comprehensive right of initiative.

It is on the basis of this very right of initiative that this thesis proposes the establishment of regional peace councils with capacity for information gathering and analysis with the purpose of providing strategic options for preventive action punctuated with informed and appropriate response.[310] Central to their role will be forecasting the potential for the escalation of conflict in order to develop contingency plans for victim prevention. It should be noted that a few human rights crises emerge without warning. In most cases, they develop gradually and their progress can be monitored. For this reason, preventive measures deserve more attention both from Non-Governmental Organisations (NGO) as well as governments.[311]

The UN is in unique position to gather and disseminate information about potential conflicts from primary and secondary sources at all levels of the global hierarchy. Despite this, by virtue of having been established on the principle of State sovereignty and non-interference in the internal affairs of Member States, the UN is limited in its ability to maintain public information regarding the level of risk or instability that any of its Members may be facing.[312] The proposed Information and Strategic Analysis Secretariat (EISAS) would have a vital role in coordinating early warning mechanisms with regional institutions of this nature for preventive initiatives to reduce tension and avert conflicts.[313]

Thus, having constructed early warning mechanisms, a corresponding early response system has to be developed. Closer co-operation and co-ordination of the activities of various parties could improve early responses.[314] The effectiveness of regional organisations depends on the development of national frameworks for conflict prevention. To this end, human rights and humanitarian NGOs within the regional framework should encourage and support governments to review all international instruments and agreements with relevance to peace and security and reform national legislation to be in accord with the regional arrangements.

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[310] *See* Kumar Rupesinghe, *Civil Wars, Civil Peace: An Introduction to Conflict Resolution*, International Alert, 1998, USA, p. 59.
[311] The International Council on Human Rights Policy, *Human Rights Crises: NGO Responses to Military Interventions*, *supra* note 57, p. 35.
[312] *For example*, the Algeria and Indonesian governments have been, without doubt, unwilling to allow the UN to publicise its assessment of their domestic situation.; *in this context see* Rupesinghe *supra* note 310, p.68.
[313] *The Brahimi Report, supra* NOTE 65, p. xi.
[314] Rupesinghe *supra* note 310, p. 82.

In this regard, it seems reasonable to draw inspiration from the OSCE's comprehensive and co-operative approach to security that the politico-military aspects of security remain vital to the interests of participating States. In this process, disarmaments, arms control and confidence as well as security building measures (CSBMs) are important parts of the overall effort to enhance security by fostering stability, transparency and predictability in the military field. Full implementation, timely adaptation and, when required, further development of arms control agreements and CSBMs are key contributions to our political and military stability.[315] All these initiatives are directed to protecting human right of individuals at risk by saving them from the scourges of war.

## 5.4. RETHINKING MILITARY DOCTRINES: A PARADIGM SHIFT IN THE USE OF FORCE

Securing international peace and protecting human rights are the major tasks of the international community. Most human rights violations today are witnessed in the context of armed conflicts.[316] Conflicts have caused massive death and destruction, uprooting of the populations, and erosion of social capital.[317] There has been a dramatic shift in approach to the protection of human rights that military forces have been called upon to protect civilians in armed conflicts in humanitarian interventions. However, there has been too little action to configure the role of the military forces in the protection of victims of such violations.

Commentators have argued that international troops have been required to maintain law and order, a role for which they are not trained or suited. The contemporary dilemma is that; while the purpose of military intervention is ostensibly to prevent greater human suffering, killing or threat of killing is inherently wrong. By the same token, even where abuses are extremely serious, and even where military intervention may result in good, it will also result in harm because some people, including civilians may be killed.[318] Therefore, since war is often the source of the worst human rights violations of all and triggers further violations, finding alternatives to use of armed force may indubitably be the most formidable protection of all human rights for all.[319] This is also in line with the prohibition of recourse to force and the principle of peaceful settlement of disputes in the Charter regime.

Even where soldiers are only entitled to use force in self-defence, there is a fundamental problem of balancing humanity against military necessity. As a

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[315] *See* Charter for European Security.
[316] Manfred Nowak, *Introduction to the International Human Rights Regime*, The Hague: Martinus Nijhoff Publishers, 2003, p. 40.
[317] *See, in this sense,* Krishna Kumar, (ed.) *Women and Civil War: Impact, Organizations, and Action*, 2001 London: Boulder Lynne Rienner Publishers, 2001.t
[318] *See* Judith G. Gardam and Michelle J. Jarvis, *Women, Armed Conflict and International Law*, The Hague: Kluwer Law International, Netherlands, 2001, p. 20.
[319] Foley, *supra* note 107, p. 109.

soldier enjoys a military margin of appreciation in the application of force, the lawfulness of measures would depend on there being some relationship of proportionality between means and end. It is highly unlikely that the use of such force would be justified where damage is caused to the civilian population. It is difficult to weigh the incidental loss of civilian life, injury to civilians or damage to civilian objects that may be expected, *vis-à-vis* the concrete and direct military advantage anticipated. This exposes the inadequacy of the protection of defenceless civilians by the existing IHL, and demand for the implementation of peaceful means of settling disputes under Article 33 of the UN Charter.

To quote a well-known phrase by *Dag Hammarskjöld* that "peacekeeping is not a job for soldiers, but only soldiers can do it";[320] this dictum serves to remind the international community of the need for new non-military exogenous factors. The military should assume additional responsibilities and develop new patterns of non-violent action for the restoration of international peace and conflict prevention. Although soldiers alone cannot create peace, they can create space in which peace can be built. The idea is not to use front-line weapons, but to employ their organizational competence and operational skills, to advance security while promoting peace.[321]

Prevention is the single most important dimension of the responsibility to protect.[322] No matter how well planned a strategy may be, if no real action is taken to prevent the outbreak of violence, then any prevention effort would be of little use. Hence the importance of preventive strategies which are likely to be far cheaper than responding after the event through use of force, humanitarian relief assistance, post-conflict reconstruction, or prosecution of perpetrators.[323] The current global movement for a Culture of Peace and Non- Violence, therefore, requires a tremendous paradigm shift in military thinking and culture.

Consequently, this indicates that very specific rules and training are required for the military to be in keeping with re-orientation of the paradigmatic change in mission and strategy to assume additional responsibilities and develop non-violent tactics for peaceful settlement of conflicts. From a practical standpoint, it is important to note that NGOs have developed new tactics, techniques, and procedures for changing the dynamics of violence at community level. These include problem-solving

[320] *Dag Hammarskjörd*, Former UN Secretary- General, quoted in Rikhye, *supra* note 64, p. 219.
[321] Admiral Paul David Miller, Commander in Chief, US Atlantic Command, Supreme Allied Command Atlantic, *Both Swords and Ploughshares,* Cambridge, MA and Washington DC. Institute for Foreign Policy at p. 40.
[322] Gareth Evans, *supra* note 55, p. 6.
[323] *Ibid.*

workshops, hate-reduction strategies, consensus building, and communications mechanisms that help cut across communal boundaries.[324]

The emerging role for soldiers is increasingly becoming purpose oriented, effective contribution to the maintenance and restoration of peace and security, and securing a life worth living for all individuals.[325] The objective being protection of a population, not defeat a State, and restoration of law and order. This said, force protection should not become the principle objective. One author has predicted that the ultimate goal of future military doctrine is neither annihilation nor attrition but the elimination of the enemy's resistance, which may take several forms like punishment, undermining of the enemy's combat morale, neutralisation or disarming of the opposing armed forces, and eventually reconciliation.[326] In the long run, the subversion of the opposing forces will have priority over their physical elimination.

This development requires the revision of military doctrines and strategies, and corresponding restructuring of the armed forces, to enhance their defensive capabilities particularly the human rights protection role, and simultaneously limits their offensive strength.[327] It should be noted, however, that military strength alone is not sufficient to overcome the contemporary problems that threaten international peace and security such as population explosion, competition for land and scarce resources, the spread of infectious diseases such as AIDS, ethnic and religious hatred, poverty and the demand for illegal drugs. Many of these problems defy 'military solution', yet the military is often called upon to restore order once conflict breaks out.

More so, there is need to prevent potential flashpoints erupting into crisis through a coherent unified action plan starting from a regional perspective. In this sense, military forces would be deployed for conflict prevention so that the deterrent and combat functions become secondary.[328] This would require not only flexibility, both in command and control of troops, but also being multifunctional which cannot simply be improvised, but for which one has to be trained and equipped.[329] The drawback has been that discussion of non-violent tactics is usually limited to state-based diplomatic

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[324] David Last, " From Peacekeeping to Peacebuilding", the OJPCR, <www.trinctitute.org/ojper/5_1last.htm>, visited 14 May 2004;
*see* also Pamela Aall *et al.* (eds.) *Guide to IGOs, NGOs and the Military in Peace and Relief Operations,* United States Institute of Peace Press, Washington DC, pp. 219─226. Military forces possess planning and logistical capability to develop and execute swift, large-scale operations to support elections, distribute food and humanitarian relief items, build and repair infrastructure, assist with refugee relocation and other operations.

[325] *Ibid.*

[326] Gustav Däniker, *The Guardian Soldier: On the Nature and the Use of Future Armed Forces,* UNDIR, Geneva, p. 96.

[327] Roger Kibasomba and Bjørn Møller, "Europe and the Great Lakes Crisis" in *Report from the Maputo Conference, supra,* note 148, p. 111.

[328] Dãniker, *supra* note 326, p. 93.

[329] *Ibid.,* p. 102.

pressure and economic sanctions since human rights groups have a tendency towards cynicism that hinders strategic thinking and tactical experimentation.[330]

### 5.4.1. The Global Non-Violent Peace Force Model

Since the 1999 Hague Peace Conference, a new initiative is being explored, called the Global Non-violent Peace Force. It aims at training in monitoring, conflict resolution and other peacemaking skills, those willing to take personal risks without the use of violence, and ready for deployment into conflict areas, to prevent death and protect human rights. Thereby creating the space for adversaries to struggle non-violently, enter into dialogue, and seek peaceful resolution.[331] This is the model that military forces of the time should adopt. Military forces already have the required capability but they need training in non-violent conflict resolution techniques to effectively cope with their new role to protect the human rights of people at risk. This calls for a move from a culture of violence to that of durable peace.

## 5.5. PEACE BY PEACEFUL MEANS

As has already been pointed out earlier, the principle of peaceful settlement of disputes under Article 2 (3) is a cornerstone of the edifice whose main pillar is constituted by the prohibition of the use of force in Article 2 (4). The UN Charter, in Chapter VI, draws a number of institutional consequences from the obligation incumbent upon member States in terms of Article 2 (3) to settle disputes by peaceful means. In this context, it mandates the Security Council to support the parties to a dispute in their peace initiatives through appropriate measures, the mandate also extends to the General Assembly pursuant to Article 35. In Addition, Article 36 (3) provides that, as a general rule, legal disputes should be referred to the ICJ.

It appears that the framers of the Charter considered it self-evident that compliance with the principles laid down in Article 2 would not be expected by virtue of the existence of those substantive norms alone. By involving the Security Council, which according to Article 24 (1), bears the main responsibility for the maintenance of international peace and security, as well as the General Assembly, they intended to create avenues suitable in every instance of crisis threatening the very existence of a State, after all opportunities for remedial action in the bilateral relationship between the parties concerned had been exhausted.[332]

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[330] Mahony, *supra* note 62, p. 19; as an aside to this, peacekeeping as a military activity and the understanding of conflict resolution as an academic problem have evolved largely in isolation. It is only recently that the two have begun to be put together. *See also* Last, *supra,* note 324.

[331] *See* Mahony, *supra* note 62, p. 20; *also* David Hartsough and Mel Duncan, "*A Draft Proposal for a Global Non-Violent Peace Force",* 1 December 2000 available at <www.nonviolentpeaceforce.org>, visited 23 February 2004.

[332] Simma *supra* note 7, p. 584.

While international law, of course, primarily safeguards the legitimate interests of States, it gradually turns to the protection of human beings.[333] The 1993 Vienna Declaration and Programme of Action evinces evidence that human rights of individuals is a legitimate concern of the international community. In human rights and refugee law terms, the belief that humanity is a value in itself found expression in treaties protecting individuals from arbitrariness, abuse and persecution by governments. Whereas in IHL terms, it found expression in treaties providing protection to individuals in armed conflicts. All the three bodies of law intersect and continue to have the same aim to protect the life, health and dignity from arbitrary exercise of power over individuals.[334]

The foregoing renders considerable credence to the preamble normative framework of the Charter. Basically, the first part of the preamble contains two ideas: maintenance of peace and international security and respect for human rights. The second part, addresses the contractual element of the Charter. The reference to save succeeding generations from the scourge of war stresses the intention of the member States to suppress armed conflicts. It further refers to fundamental human rights, in particular, the dignity and worth of human persons and equal rights of men and women. As a matter of law, these provisions are equally valid and operative.

It is thus clear that maintenance of peace and security, like human rights designate a common gesture whose only end is human kind. If this common denominator is identified, it will be safe to conclude that the prohibition of use of force, promotion of peace and protection of human rights intersect, both in theory and practice; and the logical consequence is that they fall under the same realm. Despite this relationship, a serious drawback is that no political organ within the UN takes responsibility for the promotion, encouragement and implementation of the law governing armed conflicts *i.e.* IHL.

It is generally considered that the UN, which is an organisation for peace and security, should not deal with questions relating to armed conflicts.[335] However, in view of more than 250 armed conflicts that have occurred, and more than 40 on going, the argument would lose its relevancy and credibility. In a similar tone, others argue that IHL would be politicized if the UN had direct responsibility. However, progressive scholarship suggest that while this argument seems correct, it should be seen as an argument in favour, because IHL is also a political issue.[336]

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[333] *See Prosecutor* v. *Tadic* (*Tadic Jurisdiction Appeal*) para.97 IT-94-1AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.
[334] Kellenberger, *supra* note 156, pp. 240─244.
[335] The UN International Law Commission decided at its first meeting in 1949 not to include the law of war among the subjects with which it concerns itself.
[336] Göran Melander, "The Relationship between Human Rights, Humanitarian Law and Refugee Law", p. 33.

Clearly, given the magnitude of the task of the prohibition of recourse to military force and the multifarious aspects of root causes of conflicts, military professionals alone cannot find alternatives to use of force. Therefore, an appropriate step would be to establish a forum comprising multidimensional professionals to establish a regime for comprehensive obligation to submit disputes to peaceful settlement and an obligation of substantial disarmament. In spite of the apparent cynicism in the slogan, 'if you want peace, prepare for war', the surer path to a more peaceful world is to prepare for peace directly.[337]

### 5.5.1. Saving the Succeeding Generations From the Scourge of War

The preamble of the UN Charter highlights the motives of the founders of the UN in no uncertain terms. Particularly, the founders' aim was, and still remains, to save the succeeding generations from the scourge of war. To this end, the hallmark of the Charter is the prohibition of 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 UN. Although war has been outlawed in theory, it is yet to be diminished in practice. It is thus essential to take pragmatic measures to prevent and curtail recourse to force and achieve peace by peaceful means. So far, a summary of these means emerging from the present discussion can be highlighted as below.

#### *5.5.1.1. Establish a Treaty Regime for Compulsory Arbitration*

While the Covenant of the League of Nations obligated the Members of the League to submit a dispute likely to lead to rapture to arbitration or judicial settlement or inquiry by the Council,[338] the UN Charter does not provide for an equivalent comprehensive obligation to submit disputes to peaceful settlement. However, the arbitration in the *Alabama* claims (1872), along with good offices and mediation and enquiry, inspired the States represented at the Hague Peace Conference 1899 to facilitate its use as a means of settling international disputes and avoiding recourse to force.[339] The Conference eventually created the Permanent Court of Arbitration (PCA).

Insofar as the PCA, as such, has a basis as an institution for arbitration, it is the panel of persons nominated by States.[340] The 1899 and 1907 Convention deal with good offices, mediation, arbitration and International Commission of Inquiry. Nonetheless, it has often been said that it is neither permanent nor a court nor, itself, does it arbitrate.[341] Perhaps the most important exercise of the formal powers of the PCA these days is, in practice, the

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[337] Coady, *supra* note 26, p. 36.
[338] Article 12(2) of the Covenant of the League of Nations, 1919.
[339] *For background documents see* W. Evans Darby, *International Tribunals,* 4th edition, London, 1904.
[340] Article 44 of the Hague Convention on the Pacific Settlement of International Disputes, 1907. These must be persons of known competence in questions of international law.
[341] John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law-Institutions and Procedures*, Oxford, 1999, p. 35.

nomination of the judges of the ICJ.[342] As noted in chapter one, the Peace Conferences failed to agree on a system of compulsory arbitration as a means of settling disputes that threaten peace.

But, given that prohibition of the use of force draws its significance from being the most direct effort to prevent war,[343] it is essential to establish a link between the prohibition of force to the other international legal means of preventing war. It is on this footing that this thesis proposes for the restructuring of the PCA to provide for compulsory arbitration akin to the League regime. In broadest terms, this is an initiative to bring the rule of law into international relations and to replace the use of force with the routine of litigation. Noteworthy is the point that the ICJ has jurisdiction in relation to legal disputes. The PCA, on the other hand, has jurisdiction for all arbitration cases of international differences with a view to obviating recourse to force n the relations between States. [344]

*5.5.1.2. Draw Clear Limits of Legitimate Use of Force*

As it has been discussed earlier, the failure to control or prevent the use of force in international law is often attributed to the lack of a firm and clear definition on the limit of legitimate use of force under the Charter. Chapter two has exposed the complete separation between *jus contra bellum* and *jus in bello.* This gulf is confirmed in the preamble of Protocol I, which posits that IHL applies whenever there is *de facto* an armed conflict, however that conflict cab be qualified under the so-called *jus ad bellum*, and that no *jus ad bellum* arguments may be used in interpreting IHL.

It further states that the rules of IHL may not render the implementation *jus ad bellum* impossible. In other words, IHL applies whether the use of force is legal or illegal and may not render efficient self-defence impossible. However, use of force begets force, endangers the right to life and threatens peace and security. The absence of precautionary measures for the exercising the right to self –defence makes controlling and prevention of use of force difficult. Nonetheless, an attempt to bridge this gap has been initiated by the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 1994 (San Remo Manual)[345]. Section II of the San

[342] Statute of the ICJ, Article 5(1).
[343] Simma, *supra* note 7, p. 114.
[344] *See* Articles 1 and 42 of the Hague Conventions, 1907. It should be noted that the ICJ has jurisdiction in relation to legal disputes, according to Article 36(3) of the UN Charter and Article 36(2) of the Statute of the ICJ. The PCA, on the other hand, has jurisdiction for all arbitration cases of international differences with a view to obviating recourse to armed force, in terms of Articles 1 and 42 aforementioned.
[345] An international group of lawyers and naval officers under the aegis of the San Remo-based international Institute of Humanitarian Law and working in close co-operation with the ICRC, succeeded in producing, 1994, the San Remo Manual on International Law Applicable to Armed Conflicts at Sea. Although not a treaty, it is noteworthy, if only because of the effort and expertise that have gone into it and that make it a significant contribution to the development, not only of the law of naval warfare, but also international law as a whole; *see* Kalshoven *et al*, *supra* note, p. 35.

Remo Manual entitled ‘ armed conflicts and the law of self-defence’ establishes that the exercise of the right of individual or collective self-defence recognized in Article 51 of the UN Charter is subject to the conditions and limitations laid down in the Charter, and arising from general international law, including in particular the principles of necessity and proportionality.

The San Remo Manual clearly lays down that principles of necessity and proportionality apply equally to armed conflict and require that the conduct of hostilities by a State should not exceed the degree and kind of force, not otherwise prohibited by the law of armed conflict, required to repel an armed attack against it and to restore its security. It goes further to state that how far a State is justified in its military actions against the enemy will depend upon the intensity and scale of the armed attack for which the enemy is responsible and the gravity of the threat posed. However, the provision does not address the issue of derogation of rights of the non-combatants and, moreover, does not provide an opportunity for peaceful settlement of the conflict.

Filling this gap, international law requires a binding provision akin to the foregoing formulation but it should go further to highlight the obligation to declare a State of emergency with the concomitant procedural safeguards. The provision should, in addition, impose a condition *sine qua non* to submit the dispute to arbitration in order to obviate recourse to force as far as possible. The formula being advanced here is analogous to the ‘cooling off’ period in the Covenant of the League of Nations. It should only be and to the extent that recourse to force is right, when the parties may fight it the right way.

#### *5.5.1.3. Define Conclusively, Prosecute and Punish the Crime of Aggression*

The vacuum created by the lack of a legal definition of the crime of aggression has equally created debate and doubt as to whether ‘indirect aggressions’ like intervention in internal armed conflicts are prohibited by the UN Charter. It is also questionable when a State can legitimately exercise the right of self-defence and whether a State can pre-empt an ‘armed attack’ against it through the exercise of the so-called ‘anticipatory self-defence’.[346] As a result of this loophole coupled with the medieval just war notions, the use of force in various forms is still occurring in violation of the UN Charter. It should be borne in mind that renunciation of the use or threat of force as proclaimed in the Charter is an obligation that all States should respect. [347]As such, war of aggression could reasonably be described as the war crime *par excellence*.[348]

[346] Kittichaisaree, *supra* note, 116, p. 212.
[347] This prohibition was reaffirmed in the Declaration on the Strengthening of International Security, contained in the General Assembly Resolution 2734(XXV) OF 16 December 1970. It was further endorsed in the Permanent Prohibition of the Use of Nuclear Weapons,

In this respect, chapter three contended the accountability of perpetrators of human rights atrocities as a result of aggression, in accordance with the principles of the UN Charter and relevant recent developments in international law, would necessitate a clear definition of the crime of aggression and, consequently, the establishment of the rules which would provide for the case where armed force was used in a criminal manner. If this logic is correct, then this thesis suggests a theory for the exercise of jurisdiction by the ICC over the crime of aggression. Thus, criminal responsibility should be derived from the obvious consequences of the act of individuals who commit the crime. Particularly, in addressing the element of aggression to determine whether or not aggression occurred the ICC should examine the gravity of the offence, particularly the scale and effects of an operation on the rights of the victims.[349]

The basis for attribution of criminal responsibility for the crime of aggression should be its effects on the violations of the human rights of the victims. Addressing a similar issue, albeit in the context of States, the ICJ in the *Nicaragua* case stated that it is the victim of an armed attack that must form and declare the view that it has been so attacked.[350] Basing on this footing, suppression of the crime of aggression will thus be governed by human rights rules as opposed to politics. The rationale of this proposal is that in modern international law the protection of the human rights of individuals is a legitimate concern of the international community.

Put simply, the crime of aggression is committed by people against the people. To start determining whether a State has committed a crime of aggression would lead to people hiding behind the façade of the meta-physical abstraction of the State. Ending the impunity of perpetrators of human rights violations demands individual responsibility of the perpetrators. In sum, the notion, the notion of aggression should be split into two separate concepts, one valid for state responsibility under Article 2(4) of the UN Charter and the other for individual criminal responsibility under Article 5 of the ICC Statute.

#### *5.5.1.4. Create a Pro-Active Disarmament Regime*

The law of disarmament is reactive and lagging behind the advances in weapons technology. Similarly, the *non-liquet* as to the legality of the threat or use of nuclear weapons entails that only a specific treaty requiring complete nuclear disarmament will remove the uncertainty. The use of modern weapons which may cause superfluous injury or unnecessary suffering, or are inherently indiscriminate, is not banned *per se,* and

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adopted by the UN General Assembly on 29 November 1972. UNGARes.2936, 29 UN GAOR Supp. (No. 30) 5, UN Doc. A/8730 (1972).

[348] Bugnion, *supra* note 183, p. 11.

[349] *Compare the reasoning of the ICJ in the Nicaragua* v. *US*, *supra* note 10, p. 195.

[350] *See generally Nicaragua* v. *US* case, *supra* note 10.

therefore, does not amount to a crime under the ICC Statute. In order to forestall the development of dubious weapons, this thesis proposes the attribution of responsibility for war crimes to weapons manufactures. If the essence of IHL is to protect non-combatants, it follows that those who develop particular weapons should bear criminal responsibility if there is a link between the contribution of the weapon to the support or fulfilment of the war effort which results into indiscriminate killing of protected persons.

*5.5.1.5. Cultivate Non-Violent Dispute Resolution Tactics*

The ideal world envisaged by the UN Charter was one without war and to this end, the Charter encourages pacific settlement of international controversies. This implies that those deployed to use force need to acquire new non-violent conflict resolution techniques in order to achieve peace by peaceful means. Eventually, use of force would be used for war prevention so that the deterrent and combat functions become secondary. [351] It is crucial to focus on simmering conflicts and initiate effective prevention mechanisms. In line with preventive diplomacy, troops may be deployed to prevent disputes from arising between parties, to prevent existing disputes from escalating and to limit the spread of the latter when they occur.[352]

Thus the military forces should be given new tasks, substituting human protection for aggression, and utilise its virtues of good organization, courage and willingness to sacrifice. Of course use of armed force can never be humane, but its cruelty can be curtailed. By developing non-violent lines to achieve the long-term goal of abolition of war.[353] This requires a common preventive approach among partners with maximum possible coordination between the military, human rights and humanitarian organizations.

[351] Däniker, *supra* note 326, pp. 93–96 The ultimate goal of future military doctrine is nether annihilation nor attrition but the elimination of the enemy's resistance, which may take several forms like punishment, undermining of the enemy' combat morale, neutralization or disarming of the opposing armed forces, and eventually reconciliation.

[352] Boutros Boutros– Ghali, *An Agenda for Peace, Preventing diplomacy, peacemaking and peacekeeping,* Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, A7A47/277-24111(17 June 1992)

[353] For instance, analogous to the abolition of slavery and colonialism as institutions. Of course, there will still be violence around, some still organized collectively as wars, but it will not be institutionalised, internalised nor legitimate e.g. terrorism; *see* Johan Galtung, *Peace by Peaceful Means: Peace and Conflict, Development and Civilization,* International Peace Research Institute, 1996, p. 5.

## Concluding Remarks

It is abundantly clear that use of force is prohibited in international relations by the UN Charter regime. Put starkly, modern international law outlaws war. Although the medieval just war theory still retains persuasive moral logic, the framers of the Charter did not intend to set up the legal relationship of war in contemporary international society. This aside, there is also a theoretical tension between the just war tradition and the laws and customs of war, in that the greater the justice of one's cause, the more rules one can violate for the sake of the cause.

Furthermore, the just war theory is confined to evaluating the moral justification for resort to the use of military force while not addressing the protection of the rights of non-combatants caught in war situation. IHL of war, however, applies whether the use of force is legal or illegal. Nevertheless, civilian deaths in contemporary violence suggest that, while legal principles exist that govern war, the ethical debate on parameters of permissible use of force is far from over.

Contemporary Jurists generally consider as lawful the use of military force to protect lives and property of individuals as an exceptional and extraordinary measure, which must be warranted where there is serious and irreparable harm occurring to human beings, or where its occurrence is imminent.[354] A more recent study of the European Court of Human Rights jurisprudence reveals that the law recognises the potential legitimacy of use of force leading to loss of life when exercised in self –defence.[355] In this regard, the 'absolutely necessary humanitarian standard' is a very substantial constraint on the circumstances leading to recourse to lethal force. There is an absolute duty to take appropriate steps to protect life in the circumstances.

This requires adequate evaluation of intelligence on which action is to be based as well as weighing various non-violent options. It is thus of utmost importance that military forces are as well trained and equipped as possible to operate within the threshold of legitimate use of force, with particular attention being paid to the danger of indiscriminate loss of life through use of particular weapons. Probably it should be emphasised that if all non–violent means have been exhausted, defensive force should be used sparingly with extreme caution. In sum, the obligation to prevent the use of force should be linked to, and precede, the essential principles for the use of force, which include legality, necessity and proportionality.[356]

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[354] *See* Gareth Evans, *supra* note 55, p. 6; *see also* Brownlie, *supra* note 3, p. 289.
[355] *See for example,* Article 2 of the European Convention on Human Rights; *For a detailed discussion see* Mc Bride, *supra* note 124, p. 5.
[356] *For a detailed enumeration of the essential principles for the use of force see* Anthony P.V. Rogers, *Fight It Right-Model Manual on the Law of Armed Conflict for Armed Forces,* International Committee of the Red Cross, Geneva, 1999, p. 149.

However, in today's unstable situation, the prime purpose of international co-operation is, and should remain the prevention of armed conflicts and the maintenance of international peace and security. If the basic aim of prevention is to restrain recourse to use of force, then halting the outbreak of mass violence before it becomes inevitable is probably the most effective measure.[357] Preventive strategies are likely to be far cheaper than responding through use of force, humanitarian relief assistance, post-conflict reconstruction, [358] or prosecution of perpetrators. Therefore, a better approach is to develop non-violent tactics for settlement of disputes in line with the principle of peaceful settlement of disputes in the UN Charter and the Programme of Action on Peace and Non-Violence. In the light of this development, the evolving role of military forces is that of a 'guardian soldier', who while protecting militarily is also able to perform humanitarian and peace operations.[359]

This reflects the need for strategic thinking to formulate 'ethics' for using military might for altruistic purposes.[360] This indicates that very specific new guidelines and rules are required for the military to be in keeping with re-orientation of the paradigmatic change in mission and strategy. The argument made here is not to use military force *per se,* but to give the military new tasks, substituting aggression for human protection, and utilise its virtues of good organization, courage and willingness to sacrifice.

Although the slogan, "if you want peace, prepare for war" is apparently cynical, the surer path to a more peaceful world as envisaged in the Charter is to prepare for peace directly.[361] Concern for peace and human rights is not the province of military forces or human rights activists alone, it is the province too, of those whose job is to follow and carry out international law. This signals the necessity of involving all the policy makers in the formulation of a doctrine that will ensure that military forces operate within the threshold of legitimate use of force. The evolution of peacebuilding and conflict resolution tactics, techniques, and procedures sets the stage for more durable ways to manage conflict. Resolution may involve new institutions and broad social and educational changes, supported by the international community, with the belligerents' interests in mind.[362]

In order to avoid usurping the powers of the Security Council, this would require fostering peace initiatives from the regional perspective, with a coherent and unified action plan. Although the regional arrangements provided for in the UN Charter seem to be limited to intra-regional disputes, the ones envisaged in this thesis may also handle inter-regional disputes through inter-regional institutional agreements. This said, it is fair to emphasize that these peace councils are conceived to be a complement to,

[357] Rupesinghe, *supra note* 310, p. 80.
[358] Gareth Evans, *supra,* note 55, p. 7.
[359] *See* Däniker, *supra* note 326, p. 104.
[360] *Consider generally* Coady, *supra* note 26.
[361] *Ibid*., p. 36.
[362] *See generally* Last, *supra* note 324.

and not a substitute for, the Security Council. If the UN, however, does not want to become an outsider in issues germane to international peace and security, it will have to improve the effectiveness of the role played by the Security Council under Article 39 of the UN Charter.

In the absence of legal criteria for the determination of an act of aggression by the Security Council, the Council may import arbitrariness into its role under Article 39. In fact, for the Council to respond with consistency and objectivity, there is need to establish legal guidelines for regulating the use of force by States. In light of recent developments in international law, it is clear that international crimes are committed by individuals against individuals. It logically follows in consequence that by punishing individual aggressors, the crime of aggression can be apprehended. On this basis, it would be reasonable to suggest that the jurisdiction over, and the prosecution of, the crime of aggression by the ICC should derive from the scale and effects of the atrocious acts on the human rights of individuals.

Generally speaking, international peace and protecting human rights are major tasks of the international community today. The two notions are gradually considered complimentary.[363] The concept of international peace and security has been developed to the effect that it includes human rights, the rule of law and democracy. To this end, ensuring peace and security is therefore no longer the primary responsibility of the military, but rather constitutes a complex task that is brought about effectively through concerted efforts of different parts of the society.[364] Hence the proposed peace councils should constitute, *inter alia,* stakeholders drawn from human rights and humanitarian organizations as well as peace and strategic studies institutions.

The tentative agenda for the proposed peace councils would be training defence personnel in non-violent conflict resolution tactics, implement the Declaration and Programme of Action on a Culture of Peace, complete the unfinished business on the World Treaty on the Non-Use of Force in International Relations, lobby for a comprehensive nuclear disarmament and an exhaustive definition of the crime of aggression and any other business in this regard. President *Abraham Lincoln* asked: "Do I not destroy my enemies when I make them my friends?"[365] By the same token today one would ask: By training military forces in peaceful tactics of conflict resolution, could we not ending the beginning of war?

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[363] Nowak, *supra* note 316, p. 40.
[364] *Ibid*.
[365] Quoted in Martin Luther King Jr., *Strength to Love,* North Light Book, Cleveland, 1963,p.53; *see also* this quote by Martin Luther King Jr. " In the chain reactions of evil-hate begetting hate, wars producing wars-must be broken, or we shall be plunged into the dark abyss of annihilation. Far from being pious injunction of an utopian dreamer, the command to love one's enemy is an absolute necessity for our survival….''; Compare Venthey, *supra* note 237, footnote 47.

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