

COLD WAR AND PEACE: A RECONCEPTUALIZATION OF ARMED AGGRESSION AND COLLECTIVE SECURITY IN CIRCUMSTANCES OF MODERN GREAT POWER WAR

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In 1945, the nuclear revolution radically transformed the strategic character of great power war. As a consequence, the first great power war of that era—the U.S.-Soviet Cold War—was characterized by proxy warfare, irregular operations, and threats of armed force. Those modes of military conflict will also almost necessarily be implicated in any future great power war. Critically, in such conflicts, the character of armed aggression is strategically distinct from traditional iterations of that phenomenon. This Comment argues that, despite those strategic shifts, however, the application of existing *jus ad bellum* norms to the realities of modern great power war often fails to comprehensively, clearly, or correctly proscribe the means by which armed aggression is actually effectuated by great powers in the modern era. That result cannot stand if international order predicated upon the rule of law is to be preserved.

Accordingly, this Comment reasons that *jus ad bellum* norms must clearly identify and effectively proscribe indirect armed aggression carried out through state or non-state proxies, armed attacks executed by means of irregular operations, and threats of force employed in preparation for aggression. States faced with those forms of armed aggression must therefore be permitted to efficaciously engage in lawful self-defense against those illegal activities. Moreover, this Comment contends that *jus ad bellum* norms must recognize any aggressive military campaign in which a great power systematically threatens the security of multiple states as a single, ongoing, and large-scale armed attack that constitutes a full-scale war of aggression. Finally, this Comment argues that when such a war is initiated, all states in the international system must be permitted, through the mechanism of collective defense, to support the victims of that campaign in a defensive war that effectively terminates the pattern of aggression in order to maintain international peace and security.

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I. INTRODUCTION

War, as a strategic phenomenon, is a conflict characterized by the systematic, large-scale employment of force and the threat of force, by means of which organized, political entities pursue their policy objectives.¹ Throughout all of recorded human history, resort to war among great powers has been a perennial feature of international relations.² For most of the modern era, wars were characterized by large-scale encounters between the regular armed forces of great

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1. See GPeter Paret, *Clausewitz*, in *MAKERS OF MODERN STRATEGY FROM MACHIAVELLI TO THE NUCLEAR AGE* 186, 199–200, 206–07 (Peter Paret ed., 1986) (explaining that the Prussian military theorist Karl von Clausewitz determined that organized, mass violence is the feature that separates war from all other human activities, but that the conduct of war is derivative of political objectives).

2. See generally PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS* (1987) (documenting geopolitical conflict between the great powers from 1500–1987).

powers.³ The dawn of the nuclear age in 1945 dramatically altered that paradigm.⁴ Modern great power war is not primarily characterized by major conventional warfare, but rather by proxy warfare, irregular operations, and the use of potential force.⁵ It is necessary to consider the implications of this development in warfare for *jus ad bellum*—the international law on the use of force.

This Comment analyzes how existing *jus ad bellum* norms regulate the strategic realities of modern great power war. In large part, that analysis is conducted with a view towards the Cold War, as it is the only modern great power war that has been both clearly initiated and concluded at the time of this writing. Based upon that analysis, this Comment evaluates whether *jus ad bellum* as it presently exists regulates the central facets of modern great power war in a manner conducive to the prevention of large-scale aggression and the maintenance of just international order. It will conclude that while the U.N. Charter system can be effectively employed towards those ends, doing so requires recognizing the right of states to effectively wage modern, defensive wars against great powers that engage in indirect, irregular, and threatened armed attacks in contravention of the international legal order.

II. THE STRATEGIC REALITIES OF MODERN GREAT POWER WAR

The emergence of nuclear arms in 1945 represented the culmination of over two and a half centuries of strategic history. Since the First Industrial Revolution, technological progress has provided states with increasingly destructive military arsenals.⁶ Coupled with the mass politics that emerged out of the French Revolution, that capability resulted in a dramatic expansion of the size and absolute strength of the military forces that great powers could employ over the nineteenth century and the first half of the twentieth.⁷ Yet the central strategic objective of the state in time of war remained the same as it had been since the dawn of modern history—the destruction of the enemy's military forces.⁸

Destruction required the state to amass superior force relative to that brought by its adversary.⁹ The use of nuclear weapons in the final days of World War II (WWII) irreversibly altered that reality.¹⁰ Strategic nuclear weapons, amassed in sufficient quantities, can obliterate a state's economic potential.¹¹ The deployment of those weapons, therefore, constituted the realization of the strategic objective of

3. See *infra* Part II for a discussion of the development of great power warfare up to 1945.

4. See *infra* Part II for a discussion of the development of great power warfare since 1945.

5. See *infra* Part II for a discussion of the development of great power warfare since 1945.

6. Martin van Creveld, *Through a Glass, Darkly: Some Reflections on the Future of War*, 53 NAVAL WAR COLL. REV. 25, 27–28 (2000).

7. *Id.*

8. SHIMON NAVEH, IN PURSUIT OF OPERATIONAL EXCELLENCE: THE EVOLUTION OF OPERATIONAL THEORY 16, 41–43 (1997) (discussing the dominance of destruction as the strategic aim of warfare during that period).

9. *Id.* at 80, 90.

10. See Creveld, *supra* note 6, at 28 (explaining that the introduction of nuclear weapons brought an end to patterns of massive, conventional great power warfare).

11. Lawrence Freedman, *Nuclear Strategists*, in MAKERS OF MODERN STRATEGY FROM MACHIAVELLI TO THE NUCLEAR AGE 735, 736–39 (Peter Paret ed., 1986).

destruction and the solution to the strategic problem of assembling a quantum of force sufficient to achieve that aim.¹² But this development in strategic affairs was a paradox. Once the state no longer possesses strategic nuclear superiority relative to an adversary, the possibility of its own destruction is unacceptably high should it decide to employ nuclear weapons against that enemy.¹³

The nuclear revolution thus catalyzed a fundamental transformation in the character of war. The existence of absolute force changed the central strategic problem in warfare—the need to assemble superior strength was replaced by the need to discipline available power to achieve political objectives.¹⁴ That new strategic imperative concerns action at the operational level of war; the zone of activity between tactics and strategy that governs military campaigns' design and conduct to achieve strategic objectives.¹⁵ Critically, sophisticated operational cognition recognizes that modern military structures are complex systems¹⁶ that are effectively invulnerable to destruction absent the application of absolute force.¹⁷ Consequently, sophisticated operations aim not to *destroy* enemy forces, but rather to *disrupt the functioning of enemy military systems*.¹⁸ The operation coordinates a series of simultaneous and successive tactical actions against enemy forces that produce operational effects—specific impacts on the enemy military system that directly and significantly contribute to its disruption.¹⁹ Effective disruption neutralizes the enemy system and its constituent elements—the enemy warfighting system is reduced to a state in which it can no longer operate as an effective military

12. *Id.* at 739 (stating that the development of the hydrogen bomb removed all limitations on the extent of destructive power that can be produced by nuclear weapons).

13. Crevel, *supra* note 6, at 28–29.

14. NAVEH, *supra* note 8, at 1–2 (quoting Henry Kissinger).

15. *Id.* at 1–2, 11–12. It should be noted that increases in the scope and complexity of modern warfare that occurred by the beginning of the nineteenth century had already resulted in the growing centrality of the operational level of warfare. *Id.* at 1, 10. However, the significance of this dimension with respect to land warfare was not recognized until the latter stages of World War I (WWI). *Id.* at 16. More importantly, the efficacious conduct of operations in all domains of warfare did not become apparent to Western strategists until the emergence of the nuclear revolution. *See id.* at 1–2 (noting that Kissinger's comments were made in 1965). By that time, strategic thought in the West was dominated by discussions concerning the implications of nuclear weapons on military strategy. Michael Carver, *Conventional Warfare in the Nuclear Age*, in *MAKERS OF MODERN STRATEGY FROM MACHIAVELLI TO THE NUCLEAR AGE* 779, 784 (Peter Paret ed., 1986). Kissinger, among others, specifically defined this problem as relating to the importance of finding specific ways to employ military power in support of policy. *Id.*

16. NAVEH, *supra* note 8, at 4–8 (discussing the application of systems theory to politico-military structures).

17. *Id.* at 16. Importantly, an overall politico-military system contains military subsystems. *See id.* at 5 (referring to the components of an overall system).

18. *Id.* at 13–16; *see also* Robert Dixon, *Clausewitz, Center of Gravity, and the Confusion of a Generation of Planners*, *SMALL WARS J.*, <https://smallwarsjournal.com/jrnl/art/clausewitz-center-of-gravity-and-the-confusion-of-a-generation-of-planners> (last visited Feb. 14, 2020) (referring to the concept of disrupting the cohesion of the enemy system).

19. *See* Gary P. Petrole, *Understanding the Operational Effect*, OMB No. 0704-0188 SCH. OF ADVANCED MIL. STUD. 17–19 (Sept. 12, 1991) (identifying the link between operational action and the operational end as the production of operational effects on the enemy force structure).

instrument.²⁰

The nuclear revolution and the increasing importance of operations in modern warfare have amplified the utility of new instruments of warfare beyond the nuclear sphere. Modern technological developments have produced an increasingly extensive range of coercive instruments.²¹ This development has provided states with the capacity to produce operational effects against enemy military systems via non-traditional means of violence.²² Thus, great powers have retained the ability to execute military operations against peer adversaries amid circumstances of nuclear stalemate.²³ Critically, different types of military capabilities possess differential utilities as warfighting instruments, thereby allowing their proponent to specifically target enemy weaknesses and vitiate enemy strengths,²⁴ especially where the employment of those capabilities is coordinated.²⁵ Military operations have therefore become more complex as a result of the growing multiplicity of coercive instruments.²⁶

This complexity has, in turn, resulted in the greater salience of calculated asymmetrical action in modern war. Asymmetry relates to the employment of the proponent's strengths against the adversary's weaknesses.²⁷ Though commonly defined narrowly to characterize the use of guerilla tactics against conventional forces,²⁸ asymmetry is inherent to the conduct of all wars.²⁹ Thus, it is not a modern phenomenon, but a reality that has more acutely entered the consciousness of strategists due to the nuclear revolution and the growing heterogeneity of military

20. NAVEH, *supra* note 8, at 16 (explaining the concept of operational shock, which is describes a consequential state of a fighting system that can no longer accomplish its objectives).

21. Jon Lindsay & Erik Gartzke, *Cybersecurity and Cross-Domain Deterrence: The Consequences of Complexity*, in NATIONAL SECURITY IN CYBERSPACE (Damien T. Van Puyvelde & Aaron Brantley eds., 2016) (forthcoming manuscript).

22. See ANDREAS KRIEG & JEAN-MARC RICKLI, SURROGATE WARFARE: THE TRANSFORMATION OF WARFARE IN THE TWENTY-FIRST CENTURY 2 (2019) (discussing the expansion of warfare as a result of the emergence of types of destructive and disruptive force that are capable of producing strategic effects absent the employment of traditional forms of physical violence); see also ANDREW MUMFORD, PROXY WARFARE 102 (2013) (describing modern forms of proxy warfare as effects-based operations).

23. Lindsay & Gartzke, *supra* note 21, at 6 (referencing the ability of the United States and the Soviet Union to engage each other militarily during the Cold War despite the existence of mutual nuclear deterrence, as a result of the multiplicity of new domains of warfare).

24. See *id.* at 15–17 (indicating the different capabilities of nuclear weapons and offensive cyber tools and noting that a cyberattack may be employed to disable the nuclear arsenal of an enemy state, thus neutralizing the enemy's strategic nuclear deterrent).

25. *Id.* at 16 (noting that the coordination of diverse military instruments promotes the efficacy of military operations).

26. See *id.* at 22 (reasoning that the sophistication of the systems regulating military conflict in the modern era have made military activity more nuanced).

27. JOHN LEWIS GADDIS, STRATEGIES OF CONTAINMENT: A CRITICAL APPRAISAL OF AMERICAN NATIONAL SECURITY POLICY DURING THE COLD WAR 60 (2005).

28. Ellen Sexton, *Asymmetrical Warfare*, ENCYC. BRITANNICA (June 27, 2014), <https://www.britannica.com/topic/asymmetrical-warfare>.

29. Lucas Milevski, *Asymmetry is Strategy, Strategy is Asymmetry*, 75 JOINT FORCE Q. 77, 77 (2014).

capabilities.³⁰ In the pre-nuclear era, asymmetry could be realized via the escalation of force to a level the enemy could not match.³¹ However, asymmetries of force between nuclear-armed powers are functionally impossible.³² Therefore, modern great powers have been confronted with the problem of how to achieve operational asymmetries against peer adversaries.³³

Amid the foregoing realities, the Soviet Bloc and the Western Allies confronted each other in the Cold War. As a consequence, the military conflict that emerged was fundamentally dissimilar from the great power wars that preceded it. Direct combat between the superpowers was highly limited.³⁴ Instead, the opposing belligerents engaged in proxy warfare, carried out irregular operations, and threatened the employment of large-scale force.³⁵ Nevertheless, as with WWI and WWII, the Cold War constituted a struggle between the impulses of aggressive, imperial expansionism and the search for just international order.

III. INDIRECT AGGRESSION

A. Proxy Warfare

Proxy warfare is a strategy in which a state indirectly engages in an armed conflict by supporting or directing another party's direct engagement in armed hostilities, while limiting its own direct involvement.³⁶ Proxy warfare allows a state to decrease the costs of its participation in an armed conflict.³⁷ A proxy may be employed where a state does not have a level of interest in a conflict justifying the

30. See Lindsay & Gartzke, *supra* note 21, at 5 (explaining that deterrence, as a strategic phenomenon, has always existed in warfare, but that it was not until the emergence of nuclear weapons that strategists were forced to conceptualize deterrence as a strategic objective separate from defense). The utility of nuclear weapons is almost exclusively defined to the mission of deterrence, and therefore strategists were compelled to consider the implications of deterrence at a conceptual level. *Id.* at 5, 16. Similarly, the emergence of new domains of warfare provides actors with a far greater variety of means with which to undertake asymmetrical action, and thus requires the conceptualization of asymmetrical action. See *id.* at 15–17, 22 (discussing the implications of new capabilities).

31. See Milevski, *supra* note 29, at 79–80 (indicating that Allied asymmetries in WWII included the ability to engage in higher levels of military production than the Axis Powers, and therefore ensure Allied control of the seas and the airspace over Axis territory); Creveld, *supra* note 6, at 27–28 (discussing the dramatic expansion of military force by both of the belligerent alliances in WWII).

32. Milevski, *supra* note 29, at 79 (noting the inability to meaningfully define asymmetries of capabilities in the Cold War).

33. See Carver, *supra* note 15, at 783–89 (documenting theoretical discussions among Western strategists on how to respond to Soviet military challenges falling below the nuclear threshold); Lindsay & Gartzke, *supra* note 21, at 6 (indicating that, during the Cold War, NATO and the USSR militarily engaged each other below the nuclear threshold as a result of emergent capabilities in new domains of warfare).

34. MICHAEL LIND, VIETNAM: THE NECESSARY WAR 4–5, 38–40 (1990).

35. *Id.*

36. Daniel Byman, *Why Engage in Proxy War? A State's Perspective*, LAWFARE (May 21, 2018, 7:00 AM), <https://www.lawfareblog.com/why-engage-proxy-war-states-perspective>.

37. *Id.*

deployment of its regular armed forces or where the costs of directly engaging in combat are perceived to be too high.³⁸ In some cases, direct intervention may not be possible.³⁹ Use of a proxy force may also provide the sponsor state with plausible deniability.⁴⁰

B. Indirect Aggression via Non-State Proxies

Under *jus ad bellum*, an illegal war is generated by armed aggression—an armed attack.⁴¹ According to U.N. General Assembly (U.N.G.A.) Resolution 3314, armed aggression includes circumstances where a state indirectly employs armed force via its sponsorship of a non-state actor.⁴² Article 3(g) provides that a state commits an act of aggression insofar as it sends “armed bands, groups, irregulars, or mercenaries” into another state, and those groups “carry out acts of armed force [against that] state” that are “of such gravity as to amount to [acts of aggression carried out directly by the armed forces of the sponsor state].”⁴³ Article 3(g) also provides that the state’s “substantial involvement” in acts of armed force carried out by non-state actors on the territory of a second state constitutes armed aggression.⁴⁴

In *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, the International Court of Justice (ICJ) determined that Article 3(g) was reflective of custom.⁴⁵ According to the Court, if the “scale and effects” of an operation carried out by non-state actors “sen[t] by a State . . . to the territory of another State” are such that the operation would have constituted an armed attack by the regular armed forces of the first state, then that operation may be classified as an armed attack.⁴⁶ Importantly, while the ICJ recognized that the dispatch of violent non-state actors to another state may constitute an armed attack by the state deploying those forces, it refused to characterize other forms of support as rising to the level of an armed attack on the part of the sponsor state.⁴⁷ Moreover, absent the

38. Yaacov Bar-Simon-Tov, *The Strategy of War by Proxy*, 19 COOPERATION & CONFLICT 263, 267 (1984).

39. *Id.*

40. Byman, *supra* note 36.

41. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 11–12 (4th ed. 2005) (explaining how an armed conflict begins and referring to the concept of an armed attack). Importantly, the concept of “armed aggression” has generally been equated with the concept of “armed attack” that gives rise to the right of self-defense. TOM RUYS, *ARMED ATTACK AND ARTICLE 51 OF THE U.N. CHARTER: CUSTOMARY LAW AND PRACTICE* 127 (2010) [hereinafter *ARMED ATTACK*]. These terms will therefore be used interchangeably in this article.

42. G.A. Res. 3314 (XXIX), annex, Definition of Aggression, art. 3(g) (Dec. 14, 1974).

43. *Id.*

44. *Id.*

45. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 195 (June 27).

46. *Id.*

47. *Id.* The majority expressly held that “the concept of ‘armed attack’ [does not] include[] . . . assistance to rebels in the form of the provision of weapons or logistical or other support.” *Id.* Instead, such assistance may constitute a mere use of force by the sponsor state, as well as an illegal intervention into the affairs of the victim state. *Id.* According to the ICJ, “organizing . . . irregular forces . . . for incursion into the territory of another state,” and “organizing, instigating, assisting,

active dispatch of non-state forces, the Court articulated an exacting threshold for attributing the actions of a non-state proxy to its sponsor, requiring the state sponsor to exercise “effective control” over the non-state force.⁴⁸

Under that standard, even where a state has “largely financed, trained, equipped, armed, and organized” a non-state force,⁴⁹ provided it with intelligence and logistical support,⁵⁰ and advised it with respect to “a number of [its] military and paramilitary operations,”⁵¹ the conduct of the non-state actor is not necessarily attributable to the state. Rather, attribution turns on whether the non-state actor was completely or only partially dependent upon its state sponsor.⁵² The state sponsor must have “directed or enforced” the illegal activities undertaken by the non-state force.⁵³ The ICJ has reaffirmed this standard,⁵⁴ despite the fact that it is unsupported by custom or treaty text.⁵⁵

Nevertheless, the ICJ’s position neither is, nor should be, the end of the matter. Judge Schwebel’s dissent in *Nicaragua* explained that the majority’s decision to limit cases of indirect aggression via non-state actors to circumstances where a state actively dispatches non-state forces, or where the state exercises effective control over the non-state actor, was contrary to established international law.⁵⁶ Considering the drafting history of Article 3(g), Judge Schwebel explained that the phrase “or their substantial involvement therein” was consciously added to embrace a more comprehensive concept of indirect aggression.⁵⁷ The inclusion of that language corresponded, functionally, to the position that the provision should encapsulate all forms of indirect aggression, including circumstances in which a state “organiz[es], support[s], or direct[s] non-state forces, acts of terrorism or civil strife, or subversive activities against another state.”⁵⁸ Judge Schwebel thus concluded that the provision

or participating in acts of civil strife or terrorist acts in another state” constitute violations of the prohibition on the use of force under customary international law. *Id.* ¶ 191. Moreover, the majority reasoned that the principle of non-intervention is breached insofar as a state organizes, assists, or finances “subversive, terrorist, or armed activities directed towards the violent overthrow of the regime of another State, or interfere[s] in civil strife in another State.” *Id.* ¶ 192.

48. *Id.* ¶ 115.

49. *Id.* ¶ 108.

50. *Id.* ¶ 242.

51. *Id.* ¶ 106.

52. *Id.* ¶¶ 109–10.

53. *Id.* ¶ 115.

54. Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT’L L. 649, 649–50 (2007).

55. *Id.* at 654.

56. Judgment, 1986 I.C.J. 14, ¶¶ 13, 155 (June 27) (dissenting opinion of Schwebel, J.). Importantly, Judge Schwebel noted that both the United States and Nicaragua were in agreement that where a state provides “significant material support . . . [to] foreign armed irregulars” who attempt to forcibly overthrow the government of a second state, that conduct “is tantamount to armed attack upon the latter state by the former state.” *Id.* ¶ 6.

57. *Id.* ¶¶ 162, 165.

58. *Id.* Judge Schwebel also noted that a separate proposal that refused to recognize indirect state aggression carried out through non-state actors as constituting an armed attack was explicitly rejected by the General Assembly.

Id. ¶¶ 163, 165. Importantly, that position was characterized as being “at odds with the [U.N.]

of “arms, munitions, other supplies, training, command and control facilities, sanctuary, and lesser forms of assistance” to a non-state actor constitutes the “substantial involvement” of a state in acts of armed force carried out by a non-state actor on the territory of a second state.⁵⁹ Therefore, insofar as the armed activities of the non-state proxy rise to a level of gravity commensurate with an armed attack carried out by regular forces, the sponsor state carries out an armed attack through its provision of such support.⁶⁰ Judge Schwebel also indicated that, under some circumstances, the provision of weapons and logistical support alone might constitute “substantial involvement.”⁶¹

Authoritative scholarship preceding *Nicaragua* lends support to Judge Schwebel’s dissent. In 1963, Ian Brownlie reasoned that “a co-ordinated and general campaign by powerful bands of irregulars, with obvious or easily proven complicity of the government of a state from which they operate, would constitute an ‘armed attack’” launched by the sponsor state.⁶² Brownlie further reasoned that a state might effectuate an armed attack by “giv[ing] aid to insurgents [located] on the territory of another state.”⁶³ And in 1956, Hans Kelsen argued that the U.N. Charter affords states the latitude to determine that a State initiates an armed attack when “a revolutionary movement which takes place in one state . . . is initiated or supported by another state.”⁶⁴

Furthermore, when assessing the issue of attribution in *Prosecutor v. Tadić*, the International Criminal Tribunal for the former Yugoslavia (ICTY) explicitly rejected the “effective control” standard.⁶⁵ The ICTY reasoned that requiring a state sponsor to exercise “effective control” over a non-state force in order for attribution to obtain is incongruous with the international law of state responsibility.⁶⁶ The *Tadić* Court accepted that an “effective control” standard must be employed to evaluate attribution when a private individual carries out specific illegal activity pursuant to state orders.⁶⁷ In such circumstances, imputing responsibility to the sponsor state requires establishing that the state specifically directed the individual to carry out a particular act.⁶⁸ However, attribution need not be analyzed under that framework when a state employs an organized, hierarchically structured group to carry out

Charter and general international law,” as the Charter does not distinguish between aggression carried out directly by a state or indirectly through non-state actors. *Id.* ¶ 164.

59. *Id.* ¶ 166.

60. *Id.*

61. *Id.* ¶ 171. Note that this interpretation would find a state directly responsible for launching an armed attack irrespective of whether the actions of the non-state actor it supports are otherwise attributable to that state. *Id.* ¶ 167.

62. IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 279 (1963).

63. *Id.* at 361.

64. John Norton Moore, *International Law and the United States Role in Viet Nam: A Reply*, 76 *YALE L. J.* 1051, 1068–69 (1967) [hereinafter *United States Role in Viet Nam*] (citing to Hans Kelsen, *Collective Security Under International Law*, 49 *INT’L L. STUD.* 88 (1956)).

65. *Prosecutor v. Tadić*, Case No. IT-94-1-I, Judgment, ¶¶ 100–03 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

66. *Id.* ¶ 116.

67. *Id.* ¶¶ 118–19.

68. *Id.*

illegal activities.⁶⁹

Entities that are thus structured—such as paramilitary units or “armed bands of irregulars or rebels”—ordinarily operate via an established chain of command, and the members of such organizations are generally expected to conform to the orders of their leadership.⁷⁰ Moreover, states normally employ such entities to carry out a *series of activities*, as opposed to discrete acts.⁷¹ Therefore, insofar as the entity as a whole is under the “overall control” of a state, the organization can be understood to operate as a sort of *de facto* state organ.⁷² Under such circumstances, the basic principle undergirding the concept of state responsibility—that states may not avoid their obligations under international law by acting through entities that formally operate beyond governmental authority—requires that all the actions of the non-state actor be attributed to the sponsoring state,⁷³ irrespective of whether each activity was “specifically imposed, requested[,] or directed by the state.”⁷⁴ “Overall control” exists where the sponsor state equips and finances a non-state force and “coordinat[es] or help[s] in the general planning of [the non-state actor’s] military activity.”⁷⁵ However, financial or military assistance alone or the provision of a territorial base are inadequate to impute responsibility for the group to the sponsor state.⁷⁶

During the Cold War, states tended to recognize indirect aggression via non-state proxies as a form of armed attack,⁷⁷ but it was unclear to what extent that state practice demonstrated custom.⁷⁸ In the early stages of that conflict, proxy warfare carried out through a non-state force was recognized as an armed attack at least where a state recruited, dispatched, directed, or controlled a non-state force.⁷⁹ Critically, state practice demonstrated that the level of direction required by states to attribute an attack by a non-state actor to its state sponsor reflected an “overall

69. *Id.* ¶ 120.

70. *Id.*

71. *Id.* ¶ 122.

72. *See id.* ¶¶ 120–21 (stating that the nature of a hierarchically-structured entity and the realities of state control means that where such a group is under the overall control of a state, it can be equated to *de jure* state organs).

73. *See id.* ¶¶ 117, 122 (explaining that a state which exercises overall control over an organized non-state force is responsible for the entire series of acts carried out by that group).

74. *Id.* ¶ 122.

75. *Id.* ¶ 131. Notably, the *Tadić* Court indicated that the facts necessary to identify overall control may vary in particular cases, and therefore the threshold for attribution in such circumstances may require less of a proven connection between a state and non-state actor in a given situation. *Id.* ¶ 117. Specifically, where those parties possess common territorial ambitions, it is more likely for overall control to be recognized. *Id.* at ¶ 140. Importantly, in at least one case, “overall control” was determined on the grounds that a “close personal, organizational, and logistical interconnection” existed between a paramilitary group and its state sponsor. *Id.* ¶ 129.

76. *Id.* ¶ 130.

77. Norman Menachem Feder, *Reading the U.N. Charter Connotatively: Toward a New Definition of Armed Attack*, 19 N.Y.U. J. INT'L L. & POL. 395, 419 (1987).

78. *Id.* at 429–30.

79. RUYSS, ARMED ATTACK, *supra* note 41, at 399.

control” rather than an “effective control” standard.⁸⁰ However, in the late 1960s, some states began to take the position that broad forms of indirect aggression via non-state proxies would constitute an armed attack.⁸¹ Nevertheless, the Cold War itself ultimately precluded the emergence of a clear customary rule.⁸² In the post-Cold War period, however, overall state practice shifted, and a more flexible standard has more clearly emerged for identifying indirect aggression carried out via non-state proxies.⁸³ Specifically, it appears that states may now view the provision of sanctuary or support to a non-state actor as sufficient to impute responsibility for an armed attack to the sponsor state.⁸⁴

Importantly, certain aspects of *jus in bello* are also implicated by the phenomenon of proxy warfare carried out through a non-state actor. Specifically, hostilities that would otherwise be characterized as a non-international armed conflict can be “internationalized” if a foreign state intervenes or exercises “overall control” over a non-state party to the conflict.⁸⁵ According to *Tadić*, foreign intervention requires the deployment of military forces.⁸⁶ However, the International Committee of the Red Cross (ICRC) has taken the position that the provision of military, logistical, and intelligence support to one of the belligerents will “internationalize” an internal conflict, although the provision of financial or political support will not.⁸⁷

If a foreign state intervenes on behalf of a non-state party to a non-internationalized armed conflict, then an international armed conflict exists between

80. Cassese, *supra* note 54, at 665–67. *But cf.* RUYSS, ARMED ATTACK, *supra* note 41, at 418–19 (stating that substantial involvement as defined by the ICJ was largely reflective of state practice at the time *Nicaragua* was decided). Importantly, *Nicaragua* indicated that a state that sponsors a non-state actor may engage in indirect aggression insofar as it is substantially involved in the conduct of that group. *Id.* at 408–09. Analytically, that conduct can be distinguished from the sponsor state’s “effective control” of the non-state actor, which under *Nicaragua* would give rise to state responsibility on the basis of attribution. *Id.* Therefore, it is reasonable to conclude that state practice supported both the overall control standard for purposes of attribution while also identifying indirect aggression via substantial involvement.

81. RUYSS, ARMED ATTACK, *supra* note 41, at 383–84. Moreover, by that time many states had come to identify that phenomenon as a threat to international peace and security. *Id.* at 382–83.

82. *Id.* at 404.

83. *Id.* at 486.

84. Greg Travalio & John Altenberg, *Terrorism, State Responsibility, and the Use of Military Force*, 4 CHI. J. INT’L L. 97, 110–11 (2003). This view is not, however, universally accepted as former reflective of state practice. RUYSS, ARMED ATTACK, *supra* note 41, at 486.

85. Prosecutor v. Tadić, Case No. IT-94-1-I, Judgment, ¶ 84 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

86. *Id.*

87. Tristan Ferraro, *The ICRC’s Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to this Type of Conflict*, 97 INT’L REV. RED CROSS 1227, 1231 (2015). The ICRC has justified this position by explaining that the former types of support may be regarded as a form of co-belligerency on the part of the intervening power. *Id.* Importantly, principles of co-belligerency may be employed to inform the geographical scope of international armed conflicts under *jus ad bellum*.

the foreign intervenor and the state party.⁸⁸ The original armed conflict continues, however, to be of non-international character.⁸⁹ Notably, where a foreign power exercises overall control over a non-state party, the original non-international armed conflict is subsumed into the resultant international armed conflict, as the activities of the non-state actor are attributable to the intervening state.⁹⁰ Finally, and most importantly, where separate foreign intervention occurs on behalf of both parties to an internal conflict, or a foreign state exercises overall control over the non-state party, an international armed conflict arises between the foreign states.⁹¹ The emergence of an international armed conflict as the result of foreign intervention is a critically important event with respect to the scope of that conflict under *jus in bello*. In an international armed conflict, the military forces of and all military objectives located within the state parties are legitimate targets, no matter how remote they are from the existing battlefield.⁹²

C. Indirect Aggression via State Proxies

In accordance with state responsibility principles, a state that “aids or assists another state in the commission of an internationally wrongful act” incurs responsibility for its provision of that support.⁹³ In order for sponsor state responsibility to arise, that state must have “knowledge of the circumstances of the . . . wrongful act” it aids or assists.⁹⁴ In some cases, this may require that the state have actual or direct awareness that the recipient of aid will utilize it illegally.⁹⁵ However, where an established pattern of cooperation, such as a military alliance, exists between the states, constructive knowledge is sufficient.⁹⁶ The sponsor state has such knowledge where it is foreseeable that its support will facilitate the commission of a wrongful act, given the prevailing circumstances.⁹⁷ Additionally, there must be a clear nexus between the aid provided and the commission of the principal wrong.⁹⁸ That requirement is satisfied insofar as the aid or assistance “contributed significantly” to the performance of the principal act.⁹⁹

As a result of these principles, where a sponsor state provides economic aid, weapons, or equipment to a client state that initiates an armed attack, the sponsor

88. *Id.* at 1245–46.

89. *Id.*

90. *Id.* at 1248–49. By contrast, foreign intervention on behalf of a state party will not, in of itself, alter the *jus in bello* status of the conflict. *Id.* at 1243.

91. *Id.* at 1247.

92. Michael N. Schmitt & Liis Vihul, *Proxy Wars in Cyberspace: The Evolving International Law of Attribution*, 1 FLETCHER SEC. REV. 53, 70 (2014) [hereinafter *Proxy Wars in Cyberspace*].

93. Int'l Law Comm'n, Rep. on the Work of its Fifty-Third Session, U.N. Doc. A/56/10, art. 16 (2001).

94. *Id.*

95. VLADYSLAV LANOVOY, *COMPLICITY AND ITS LIMITS IN THE LAW OF INTERNATIONAL RESPONSIBILITY* 105–06 (2016).

96. *Id.*

97. *Id.*

98. *Id.* at 102.

99. *Id.* at 104.

incurs responsibility for providing that support.¹⁰⁰ Illegal assistance may also take the form of logistical, technical, or intelligence support, or the provision of territorial bases.¹⁰¹ Importantly, the sponsor state incurs responsibility on the basis of its complicity in the armed attack it facilitates, but not *necessarily* for the armed attack itself.¹⁰² The sponsor state does, however, by providing such assistance, engage in an illegal use of force.¹⁰³ Nevertheless, at higher levels of sponsor state involvement in an armed attack carried out by its client state, both parties engage in armed aggression.¹⁰⁴

Where a state provides significant¹⁰⁵ or substantial military assistance to a state that executes an armed attack, the sponsor state is no longer merely complicit in, but rather becomes jointly responsible for, that armed attack.¹⁰⁶ Consequently, a state engages in armed aggression through its provision of significant or substantial operational, matériel, logistical, intelligence, or financial assistance¹⁰⁷ to a state that directly carries out an armed attack.¹⁰⁸ This is also the case when operational, matériel, logistical, intelligence, or financial support supplied to another state does not simply facilitate, but is instead necessary or essential to, an armed attack executed by that state.¹⁰⁹ Importantly, the foregoing circumstances include situations where, via its provision of such assistance, a state actually or effectively engages in joint military operations with a state that directly executes an armed attack.¹¹⁰ In addition, under primary *jus ad bellum* rules, Article 3(f) of U.N.G.A. Resolution

100. *See id.* at 141–42 (providing that a sponsor state can be responsible for the client state if it is shown to have direction and control over the client state).

101. HARRIET MOYNIHAN, CHATHAM HOUSE, AIDING AND ASSISTING: CHALLENGES IN ARMED CONFLICT AND COUNTERTERRORISM 8 (2016).

102. *See id.* at 6–7 (specifying that this concept is an ancillary responsibility).

103. *See* Michael Bothe, *The Law of Neutrality*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 549, 558 (Dieter Fleck ed., 3d ed. 2013) (explaining that support for a state that engages in armed aggression constitutes an illegal use of force); *see also* LANOVOY, *supra* note 95, at 193–94 (discussing the illegality of support for an aggressor as a breach of the prohibition on the use of force).

104. *See, e.g.*, LANOVOY, *supra* note 95, at 147–51 (explaining that at higher levels of sponsor state involvement in an armed attack directly carried out by a client state, the sponsor state is not responsible for aiding or assisting the client state execute an armed attack, but rather is jointly responsible for the armed aggression).

105. MOYNIHAN, *supra* note 101, at 8–9.

106. LANOVOY, *supra* note 95, at 147–51.

107. *See id.* (referring to the provision of combat units, military advisors, or other military personnel).

108. *See* MOYNIHAN, *supra* note 101, at 8–10 (reasoning that it is degree of assistance that determines whether a state that provides assistance to a state that directly carries out an armed attack is jointly responsible for that action). Moynihan provides—as an example of joint responsibility for armed aggression—circumstances in which a state provides another state with base facilities from where the latter launches an armed attack. *Id.*

109. LANOVOY, *supra* note 95, at 147–51. Similarly, insofar as the aid and assistance rendered by the sponsor state facilitates an armed attack the resulting harm of which is indivisible and thus cannot be individually attributed to either state, state responsibility principles indicate that both parties engage in armed aggression. *Id.*

110. *See* MOYNIHAN, *supra* note 101, at 9 (reasoning that highly integrated military operations carried out by two states results in joint responsibility for an armed attack).

3314 provides that a state engages in an armed attack insofar as it allows its territory to be used by another state to “perpetrat[e] an act of aggression.”¹¹¹

The concept of co-belligerency provides an additional basis, via the primary rules of *jus in bello*, for determining the legal status of a state that sponsors a state proxy.¹¹² Where it has already been determined under *jus ad bellum* that an armed attack has occurred, the rules of co-belligerency may serve as the basis of the *jus ad bellum* status of third states that are involved in the resultant armed conflict.¹¹³ Co-belligerency principles may thus inform the geographic scope of an armed conflict, in terms of identifying the specific legal actors against which defensive military actions may lawfully be directed against under *jus ad bellum*.¹¹⁴ Under the doctrine of co-belligerency, a belligerent party engaged in armed hostilities in association with another belligerent becomes associated with that belligerent for purposes of the armed conflict.¹¹⁵ As co-belligerents, those states collectively engage in a single armed conflict against their common enemies, and the geographic scope of that armed conflict therefore encompasses all of the territories controlled by those parties.¹¹⁶

A state becomes a belligerent—a party to an armed conflict—through formal or informal processes.¹¹⁷ In addition to formal measures, a state becomes a party to an international armed conflict when it directly participates in hostilities to a significant extent, or when it indirectly participates in hostilities by systematically or substantially providing certain forms of assistance to an existing belligerent party

111. G.A. Res. 3314 (XXIX), annex, Definition of Aggression, art. 3(f) (Dec. 14, 1974). The victim state therefore comes under armed attack from both states. See LANOVY, *supra* note 95, at 204 (providing that states have an obligation to ensure its territory is not used for unlawful conduct).

112. Though the *jus in bello* and the *jus ad bellum* are separate legal regimes, in certain circumstances the two bodies of law overlap. See, e.g., Alonso E. Illueca, *International Coalitions and Non-Militarily Contributing Member States: A Perspective from Panama's Practice and the Law of Neutrality*, 49 U. MIAMI INTER-AM. L. REV. 1, 4 (2017); Rebecca Ingber, *Untangling Belligerency from Neutrality in the Conflict with Al Qaeda*, 47 TEX. INT'L L.J. 75, 96 (2011).

113. E.g., Ingber, *supra* note 112, at 88–89, 96.

114. *Id.*

115. See Special Rapporteur, *Report on Extrajudicial, Summary or Arbitrary Executions*, ¶ 60, U.N. Doc. A/68/382 (Sept. 13, 2013) (defining co-belligerency as a concept that entails a state becoming a party to an existing international armed conflict via formal or informal processes, such as by providing assistance to or establishing common cause with an existing belligerent party) [hereinafter *Report of the Special Rapporteur*]; see also Nathalie Weizmann, *Associated Forces and Co-Belligerency*, JUST SEC. (Feb. 24, 2015), <https://www.justsecurity.org/20344/isil-aumf-forces-co-belligerency/>. The U.S. Department of Defense has defined a co-belligerent as “any [s]tate or armed force joining and directly engaged [alongside another state or armed force] in hostilities or directly supporting hostilities against a common enemy.” Manual for Military Commissions, in *Implementation of the Military Commissions Act of 2006*, 10 U.S.C. §§ 948a, et seq., Part II, Rule 103(a)(24)(C) (2007).

116. See, e.g., Jens David Ohlin, *Targeting Co-Belligerents*, in *TARGETED KILLINGS: LAW & MORALITY IN AN ASYMMETRICAL WORLD* 60, 70–71 (Claire Finkelstein, Jens David Ohlin, & Andrew Altman eds., 2012) (“Under this doctrine [of co-belligerency] states engaged in an international armed conflict are allowed to consider third-party states as co-belligerents of the enemy and thus subject to attack.”).

117. *Report of the Special Rapporteur*, *supra* note 115; Weizmann, *supra* note 115.

in violation of its core duties of neutrality.¹¹⁸ In particular, the systematic or substantial provision of military advisors¹¹⁹ or other troops, matériel, or financial assistance by an otherwise-neutral state to an existing belligerent renders the former a belligerent party to the armed conflict.¹²⁰ A state also becomes a belligerent when it allows the military forces or matériel of a principal belligerent party to transit its territory, grants territorial bases to a principal belligerent,¹²¹ allows an existing belligerent to establish lines of communications within its territory,¹²² or otherwise allows an existing belligerent party to utilize its territory in order to engage in hostilities.¹²³

Critically, moreover, when a state supplies an existing belligerent with military advisors or other troops, it *directly* and significantly participates in hostilities, even if those forces are not directly engaged in combat.¹²⁴ Similarly, when an otherwise-neutral state allows a belligerent party to utilize its territory in the course of an armed conflict, the former is understood to be directly and significantly participating in the relevant armed conflict.¹²⁵ Finally, when a state provides an existing belligerent with operational, logistical, intelligence, or other military assistance that is integrated into the military operations conducted by that existing belligerent or that otherwise objectively, actively supports the conduct of hostilities by that belligerent, those

118. See L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE, VOLUME II: WAR AND NEUTRALITY* 102–03 (Ronald F. Roxburgh ed., 3d ed. 1921) (1906) (referring to the character of different types of belligerent parties). Oppenheim refers to states that engage in a war through their provision of “help and succour only in a limited way to a principal belligerent” party at war with another state as “accessory belligerent parties.” *Id.* See also Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV L. REV. 2047, 2112–13 (2005) (stating that a state becomes a party to an existing armed conflict where it systematically participates in acts of war with an existing belligerent party or otherwise systematically violates its duties of neutrality in support of an existing belligerent); Weizmann, *supra* note 115.

119. *E.g.*, Bothe, *supra* note 103, at 562.

120. Oppenheim states that a state becomes an accessory belligerent party to a war by, among other things, “paying subsidies, sending a certain number of troops or men-of-war.” OPPENHEIM, *supra* note 119. See Bradley & Goldsmith, *supra* note 118, at 2112 (referring to participation in acts of war carried out by an existing belligerent); see also Weizmann, *supra* note 115 (explaining that a state becomes a belligerent when it systematically or substantially provides matériel, military forces, or financial assistance to an existing belligerent party).

121. See OPPENHEIM, *supra* note 119 (explaining that a state becomes an accessory belligerent where it allows the military forces of a principal belligerent party to pass through its territory). Oppenheim also indicates that a state becomes a belligerent if it “grant[s] a coaling station to the men-of-war of a principal [belligerent] party.” *Id.*

122. See Bradley & Goldsmith, *supra* note 118, at 2112 (referring to the establishment of “wartime communications channels”).

123. See JAMES UPCHER, *NEUTRALITY IN CONTEMPORARY INTERNATIONAL LAW* 56 (2020) (explaining that an otherwise-neutral state directly engages in the hostilities of an existing armed conflict when it invites an existing belligerent party to enter its territory).

124. *E.g.*, Bothe, *supra* note 103, at 562 (referring to “participation in acts of war”); see DINSTEIN, *supra* note 41, at 10 (indicating that a state’s provision of military advisors to insurgents engaged in a non-international armed conflict is a sufficient level of involvement to objectively render that state a belligerent in that armed conflict).

125. See UPCHER, *supra* note 123 (explaining that state engages in the hostilities of an existing armed conflict when it invites an existing belligerent party to that armed conflict to enter its territory).

states are effectively engaged in the collective conduct of armed hostilities.¹²⁶ Therefore, when a state provides any of the foregoing types of support to a state that is engaged in an armed conflict, the sponsor state itself becomes a belligerent party to the relevant armed conflict and thus a lawful object of attack under *jus in bello*.¹²⁷

D. Proscribing Indirect Armed Attack Under the Jus Ad Bellum

1. Non-State Proxies

The *Nicaragua* standard for identifying indirect aggression carried out via a non-state proxy fails to proscribe most forms of that mode of warfare as it has actually been carried out in the modern era. In some circumstances, proxy warfare has been carried out through the active dispatch of non-state forces to another state.¹²⁸ Additionally, a non-state proxy may be entirely dependent upon and fully controlled by its state sponsor.¹²⁹ In the vast majority of cases, however, state sponsorship of a non-state proxy involves neither the dispatch, nor the state's effective control of, a non-state force. Moreover, with respect to attribution, even where a state has organized a non-state actor for use as a proxy and exercises strategic control over its conduct, the objective of maintaining plausible deniability in modern great power war has often led the sponsor state to afford significant operational and tactical discretion to the proxy.¹³⁰ Since the effective control standard requires the state to direct the specific activities of the non-state force, it is unlikely that even those situations would result in attribution under *Nicaragua*. Moreover, in the vast majority of circumstances, the sponsor exercises only limited

126. See FERRARO, *supra* note 87, at 1230–31, 1233–34 (discussing the concept of co-belligerency in the context of foreign intervention in non-international armed conflicts). Ferraro indicates that, under the ICRC's standard, a state becomes a belligerent party to an armed conflict when it provides military, logistical, or intelligence support to another state, or engages in the joint planning or coordination of military operations with that state. *Id.* at 1230–31. A state also becomes a belligerent when it pools military resources with an existing belligerent party for the purpose of weakening or neutralizing an enemy belligerent. *Id.* at 1233–34. See also UPCHER, *supra* note 123, at 63 (reasoning that state practice suggests that indirect participation in hostilities results in an otherwise-neutral state becoming a belligerent); see DINSTEIN, *supra* note 41, at 10, 24–29 (alluding to the relationship between an otherwise-neutral state's violation of its core duties of neutrality and the objective reality of its participation in hostilities that brings about an end of its neutral status). Dinstein specifically states that the supply of military advisors constitutes participation in hostilities and notes that that act of participation is also a violation of one of the core neutral duties of a neutral state. *Id.* at 10, 10 n.29.

127. See Ohlin, *supra* note 116 (explaining that co-belligerents of an enemy belligerent may be targeted in the course of an armed conflict); see also DINSTEIN, *supra* note 41, at 19–20, 25–26 (noting that the geographic scope of an armed conflict extends throughout the territories of all belligerent parties to an armed conflict, and that lawful targets located in those geographies may be subject to attack under *jus in bello*).

128. See CHENG GUAN ANG, *THE VIETNAM WAR FROM THE OTHER SIDE* 54, 66–67 (2002) (indicating that from 1959 to 1963, North Vietnam facilitated the Viet Cong forces' infiltration into South Vietnam via the Ho Chi Minh Trail).

129. See LIND, *supra* note 34, at 230 (defining Viet Cong as an externally directed insurgency over which the North Vietnamese regime exercised absolute control).

130. See KRIEG & RICKLI, *supra* note 22, at 23–24 (noting the example of the relationship between the United States and the Cuban dissidents employed in the Bay of Pigs invasion).

strategic control over its non-state proxies, and authority over operational and tactical matters is left to the proxy force's full discretion.¹³¹ In those cases, effective control quite clearly does not exist.

Especially in circumstances where a state employs a non-state proxy over which it exercises a lesser degree of control, the sponsor state's role seldom consists of the dispatching of the non-state force into another state's territory.¹³² In fact, traditional unconventional warfare doctrine—a mode of proxy operations wherein a state sponsor deploys special forces to assist a non-state proxy force—assumes the existence of an indigenous non-state force prior to the operation's execution.¹³³ Therefore, state sponsorship of non-state proxies most often consists of the state providing military advisors, weapons and other military matériel, and financial assistance.¹³⁴ Military advisors may conduct a range of activities including engaging in operational planning, providing intelligence and logistical support, and distributing arms.¹³⁵ Additionally, a state may provide a non-state force with base areas within its own territory or otherwise allow its territory to be utilized as a strategic rear area that supports the proxy's combat operations.¹³⁶ Importantly, these are the kinds of activities that Judge Schwebel indicated should be considered “substantial involvement” in acts of armed force carried out by non-state actors under Article 3(g).¹³⁷

The standards for recognizing indirect aggression carried out via non-state actors under *Nicaragua* are therefore inadequate as means of proscribing that phenomenon. Those inadequacies suggest that a policy solution to definitively replace *Nicaragua* must both articulate a more realistic standard for attribution and define “substantial involvement” in a manner that fully captures the concept of state sponsorship of non-state actors in situations where the concept of attribution is not applicable. Regarding attribution, non-state proxy warfare's realities demonstrate that the level of strategic and operational coordination between state sponsors and their non-state proxies should determine whether the proxy is a de facto state organ.

131. *See id.* at 23–25 (discussing the trend, beginning in the 20th century, of states externalizing a greater degree of tactical, operational, and even strategic decision-making to their non-state proxies).

132. *See id.* at 25–26 (explaining that where a state sponsor employs a non-state surrogate operating with a greater degree of operational and even strategic autonomy, the sponsor state usually does not create the non-state force, but rather provides aid and assistance to a pre-existing group).

133. *See* David Kilcullen, *The Evolution of Unconventional Warfare*, 2 SCANDINAVIAN J. MIL. STUD. 61, 65 (2019) (displaying the seven-phase model of traditional unconventional warfare operations, in which the preliminary phases of unconventional operations require special forces to make contact with local resistance groups).

134. MUMFORD, *supra* note 22, at 61–66.

135. *See id.* at 62 (noting the USSR's expansion of military advisor activities during the Cold War).

136. *See* LIND, *supra* note 34, at 36 (referring to the flow of massive military aid across the Sino-Soviet frontier, from Moscow to the Chinese communists, during the second half of the Chinese Civil War between 1946–1949).

137. *See supra* Section III.B for a discussion of the “substantial involvement” standard as articulated by Judge Schwebel.

When there is a high-degree of military coordination that includes the joint planning of operations, the proxy force acts as a *substitute* for the state's regular armed forces.¹³⁸

A state generally employs a non-state actor over which it exercises firm strategic and operational control—a so-called “direct surrogate”—only in circumstances where it cannot achieve certain objectives through its *de jure* military forces. The use of a direct surrogate may be employed to secure vital interests while maintaining plausible deniability,¹³⁹ thus inhibiting escalatory pressures,¹⁴⁰ or to secure those interests while avoiding the high costs of modern conventional warfare.¹⁴¹ Additionally, a direct surrogate may act as a force-multiplier that enhances the state's ability to operate in a particular theater.¹⁴² It may, for example, serve as a substitute for conventional power-projection capabilities, or allow the state to more easily operate in unfamiliar terrain.¹⁴³

In the foregoing circumstances, attributing the conduct of the non-state proxy to the state sponsor is logical, because the non-state force is functionally being operated as a *de facto* state organ. Effectively, the proxy is acting in accordance with the sponsor states' strategic and operational direction except insofar as the sponsor provides it with operational discretion in order to create ambiguity about the state's involvement in a particular conflict.¹⁴⁴ This paradigm necessarily implicates the concept of attribution, the purpose of which is to prevent states from avoiding responsibility for actions carried out on their behalf.¹⁴⁵ Specifically, the activities associated with employing a direct surrogate correlate to the concept of overall control as articulated by the ICTY and endorsed by state practice. Therefore, the overall control standard should govern attribution in cases where a state employs a direct surrogate. However, the standard should employ additional presumptions that lower the threshold necessary to identify overall control.

Particularly, the systematic or substantial involvement of a state's military advisors, special forces, or intelligence agents with a non-state force should result in a determination of overall control.¹⁴⁶ Such personnel's sustained presence amid a

138. KRIEG & RICKLI, *supra* note 22, at 23–24.

139. *Id.*

140. Byman, *supra* note 36.

141. See Bar-Siman-Tov, *supra* note 38, at 267 (referring to the way in which both economic and political costs of war may be lessened by using a proxy).

142. KRIEG & RICKLI, *supra* note 22, at 23.

143. Byman, *supra* note 36. Proxies indigenous to a particular theater are generally more likely to be accepted as legitimate by local populations, and thus less likely to be met with hostility by those groups, than are foreign forces. *Id.* Moreover, due to their far greater familiarity with those populations, as well as with the theater's geography, local forces are better able to source intelligence, traverse the terrain effectively, and blend in among the populace. *Id.*

144. See KRIEG & RICKLI, *supra* note 22, at 24 (indicating that Russia's sponsorship of direct surrogates operating in Ukraine and Syria is structured so as to ensure Moscow's control over their strategic employment while at the same time providing Russia with the benefit of plausible deniability by affording those forces operational discretion).

145. Robert Heinsch, *Conflict Classification in Ukraine: The Return of Proxy War?*, 91 INT'L L. STUD. 323, 349 (2015).

146. Alternatively, it could result in a rebuttable presumption, which the state could have an

non-state force is important circumstantial evidence of overall control, because they are often involved in coordinating or assisting with planning military operations.¹⁴⁷ In addition, the active provision of territorial bases or safe haven to a non-state actor should result in attribution. Unlike other forms of aid and assistance not involving the coordination of military activities, the provision of bases or safe haven often occurs in circumstances where the state sponsor exercises significant strategic or operational control over non-state forces.¹⁴⁸

A state may also, however, employ a non-state proxy that exercises a significant degree of strategic autonomy—an indirect surrogate.¹⁴⁹ In those circumstances, the proxy serves not as a substitute for, but rather as a *supplement* to the state's regular armed forces.¹⁵⁰ Here, the proxy is utilized to secure non-vital interests that the state does not view as justifying the employment of its conventional forces.¹⁵¹ Throughout the Cold War, the superpowers and their principal allies concentrated the preponderance of their conventional military forces in Central Europe and Northeast Asia.¹⁵² Nevertheless, the two alliances also sought to expand and maintain their influence elsewhere.¹⁵³ The delivery of military aid and assistance to relatively strategically-autonomous non-state actors allowed the superpowers to contest peripheral theaters while maintaining the integrity of their conventional force postures in more vital regions.¹⁵⁴

This distinction implies that the use of an indirect surrogate implicates a theory of co-belligerency, as opposed to control, for analyzing the connection between the state and the non-state actor.¹⁵⁵ The non-state actor is not a de facto organ of the

opportunity to disprove via conclusive evidence that it has not dispatched such forces to operate alongside the relevant non-state force. See Thomas P. Jordan, *The Law of Armed Conflict, Unconventional Warfare, and Cyber Attacks*, 6 AM. U. NAT'L SEC. L. BRIEF 37, 56 (2016) (suggesting that where a non-state actor carries out activities from the territory of a particular state, that state should be compelled to help bring that group to justice or else face a presumption of attribution).

147. See MUMFORD, *supra* note 22, at 62 (indicating that Soviet advisors often carried out that role in the Cold War).

148. See ROBERT M. GATES, *FROM THE SHADOWS: THE ULTIMATE INSIDER'S STORY OF FIVE PRESIDENTS AND HOW THEY WON THE COLD WAR 204–06* (2006) (indicating that Eastern Bloc support, via territorial sanctuary, of Marxist-Leninist terrorist organizations, demonstrated considerable Soviet influence over those groups' operations).

149. See KRIEG & RICKLI, *supra* note 22, at 24–25 (tracking the international system's influence on the rising use of indirect surrogacy in the twentieth century).

150. *Id.*

151. Bar-Siman-Tov, *supra* note 38, at 267.

152. See LIND, *supra* note 34, at 4–5, 38–40 (indicating that Cold War's central theaters were Central Europe and Northeast Asia, where the conventional forces of the belligerents faced each other directly).

153. *Id.*; see also MUMFORD, *supra* note 22, at 100–02 (explaining that, for both superpowers, proxy wars in the Third World were of secondary concern to their contingencies for a conventional war in a major theater).

154. See KRIEG & RICKLI, *supra* note 22, at 20–21 (noting how the delivery of military aid enabled local fighting and relieved the superpowers of the need to maintain levels of deterrence across numerous countries).

155. See *supra* Section III.B for a discussion of the analytical frameworks employed by the

sponsor state, but a relatively autonomous ally. This paradigm of non-state proxy warfare, therefore, implicates Judge Schwebel's standard for "substantial involvement" in supporting an armed attack carried out by a non-state actor under Article 3(g).¹⁵⁶ In these circumstances, *jus ad bellum* should therefore hold that a state executes an armed attack when the state supplies a non-state actor with any of the kinds of assistance that, if provided to a client state engaged in an armed attack, would constitute armed aggression on the part of the sponsor state as proposed in this article.¹⁵⁷ The sponsor state should thus become a lawful target, under *jus ad bellum*, of defensive responses.

As a normative matter, the foregoing determinations with respect to recognizing indirect aggression are critical, because, irrespective of the specific form that aggression takes, it remains a threat to international order.¹⁵⁸ The U.N. Charter system was designed to protect against systematic aggression and thus must do so when it is carried out directly or indirectly.¹⁵⁹ In addition, the relatively low cost of proxy warfare, when carried out via the sponsorship of non-state forces, can induce states to engage in conflicts that they would not otherwise undertake if required to commit their regular military forces in combat operations.¹⁶⁰ The ability to conduct non-state proxy warfare thus facilitates aggression by providing states with the ability to more easily initiate armed conflicts.¹⁶¹ Finally, identifying state sponsorship of armed attacks carried out by non-state actors as indirect aggression is essential, because an insurgency's efficacy has almost invariably depended upon the extent of external support for the insurgents.¹⁶² Proscribing the conduct of aggressive, non-state proxy warfare as a form of indirect armed attack is therefore of the utmost importance to establishing and maintaining a just international order.

2. State Proxies

At the highest levels of sponsor state support for a state proxy, *jus ad bellum*

ICTY and the ICRC for determining an armed conflict's status under the LOAC, wherein both bodies distinguish a situation of co-belligerency from a situation of overall control.

156. See *supra* Section III.B for a discussion of Judge Schwebel's interpretation of "substantial involvement."

157. See *infra* Section III.D.2 for an extensive discussion of the types of assistance implicated in this concept.

158. See LIND, *supra* note 34, at 231 (explaining that there was a functional similarity, in terms of the threat posed to the victim states and the international community, between the externally directed insurgency carried out against South Vietnam and the overt invasion executed against South Korea during the Cold War); see also Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809, 812 (1970) (explaining that the concept of armed attack ultimately relates to the systematic use of force that threatens the security of other societies, and reasoning that the form that use of force takes is inconsequential).

159. See Franck, *supra* note 158 (explaining that the U.N. Charter was designed to prohibit systematic aggression).

160. KRIEG & RICKLI, *supra* note 22, at 147.

161. *Id.*

162. John Shy & Thomas W. Collier, *Revolutionary War*, in MAKERS OF MODERN STRATEGY FROM MACHIAVELLI TO THE NUCLEAR AGE 815, 858 (Peter Paret ed., 1986).

and *jus in bello* principles are almost precisely in accord as a functional matter. Where a sponsor state provides systematic or substantial operational assistance in support of an armed attack carried out by a client state—by deploying military personnel or engaging in joint military operations with its client—the two states collectively engage in armed aggression under *jus ad bellum*.¹⁶³ The sponsor state also becomes a co-belligerent of the client state under *jus in bello*.¹⁶⁴ Therefore, defensive responses may be lawfully directed against both states.¹⁶⁵ Those rules effectively proscribe armed aggression carried out by a sponsor state through the limited use of its regular military forces in support of military operations carried out primarily by the armed forces of its client state. That result is sound, because such support dramatically enhances the effectiveness of those operations, as demonstrated by Soviet and Chinese military forces' direct involvement in many of the armed conflicts that constituted part of the broader U.S.-Soviet Cold War.¹⁶⁶ Most notably, the direct participation of Soviet and Chinese military forces in the U.S.-Soviet proxy wars in Korea¹⁶⁷ and Vietnam significantly improved the operational effectiveness of North Korean and North Vietnamese units against U.S. military forces.¹⁶⁸

In addition, state responsibility rules as applied to *jus ad bellum* provide that a state engages in armed aggression by providing significant or substantial matériel, logistical, intelligence, or financial support to a client state that utilizes that support to execute an armed attack. Similarly, under related *jus in bello* rules of co-belligerency, a state becomes a party to an armed conflict by providing such

163. See *supra* Section III.B for a discussion of the *jus ad bellum* and *jus in bello* status of a state that deploys its military forces in support of another state that has carried out an armed attack.

164. *Id.*

165. *Id.*

166. See LIND, *supra* note 34, at 26–27 (describing the centrality of 3,500 Soviet military advisors to Vietnam's ability to invade Cambodia in late 1978).

167. In the Korean War, the Soviet Union carried out a large-scale covert air campaign against U.S. forces and allies that provided the preponderance of communist airpower and contested U.S. air supremacy between 1950–53. *E.g.*, AUSTIN CARSON, *SECRET WARS: COVERT CONFLICT IN INTERNATIONAL POLITICS* 1–2, 158–59 (2018). In addition, Soviet personnel advised North Korean ground forces in combat and defended Chinese territory from air attack, thus improving North Korean combat capabilities and deterring the United States from attacking targets in China. See Kathryn Weathersby, *The Soviet Role in the Korean War: The State of Historical Knowledge*, in *THE KOREAN WAR IN WORLD HISTORY* 61, 73–74, 77–78 (William Stueck ed., 2004) (documenting the escalation of Soviet involvement). In late 1950, China launched a major ground offensive that brought the Korean War to a stalemate. Bruce Riedel, *Catastrophe on the Yalu: America's Intelligence Failure in Korea*, BROOKINGS (Sept. 13, 2017), <https://www.brookings.edu/blog/order-from-chaos/2017/09/13/catastrophe-on-the-yalu-americas-intelligence-failure-in-korea/>.

168. In the Vietnam War, between 1965 and 1973, Soviet forces deployed and manned sophisticated air defense networks in North Vietnam, dramatically reducing the effectiveness and increasing the costs of U.S. strategic bombing campaigns. See COLIN S. GRAY, *WAR, PEACE, AND INTERNATIONAL RELATIONS: AN INTRODUCTION TO STRATEGIC HISTORY* 220 (2d ed. 2012) (explaining that heavy combat occurred between U.S. and Soviet forces); see also LIND, *supra* note 34, at 19–20, 89–90 (discussing the effect on U.S. air campaigns). China deployed 327,000 logistical troops to North Vietnam, freeing up North Vietnamese units to engage in combat. *Id.* at 18–20.

assistance on a systematic or substantial basis to an existing belligerent party. Further, state responsibility principles as applied to *jus ad bellum* indicate that where necessary or essential operational, matériel, logistical, intelligence, or financial support is provided to another state that carries out an armed attack, the sponsor state is responsible for indirect aggression.¹⁶⁹ This corresponds to the *jus in bello* concept that where a state provides operational, logistical, matériel, or other military assistance to an existing belligerent engaged in an armed conflict, and that support is integrated into the military operations of the existing belligerent, those states engage in the collective conduct of armed hostilities. Importantly, all of those standards are invariably reflective of the realities of modern proxy warfare.

Each form of support allows a state to effectively sponsor an armed attack and, therefore, to efficaciously engage in large-scale, systematic, armed aggression against another state without directly engaging in armed hostilities. In each case, moreover, that support either escalates or is integral to the gravity and scope of the armed attack carried out by the client state, increasing the likelihood that the attack will achieve its illegal objectives. In the course of multiple proxy wars encompassed within the larger Cold War, substantial and systematic Soviet matériel, logistical, intelligence, and financial assistance was integral to the ability of Soviet client states to effectively engage in sustained armed aggression.¹⁷⁰ In particular, substantial Soviet matériel assistance to its clients in the course of the Korean and Vietnam Wars allowed those states to directly engage U.S. forces in prolonged, high-intensity armed hostilities sustained by a war economy effectively located in Soviet territory.¹⁷¹ Critically, because the matériel base of those Soviet clients was located outside of an existing theater of active hostilities, the Soviet Union was able to engage U.S. forces in large-scale, conventional armed conflicts in which the United States could not target the enemy economic center of gravity absent a further escalation of the existing hostilities.¹⁷²

Consequently, the primary rules of *jus ad bellum* should explicitly hold that a state executes an armed attack when that state supplies a state that directly carries out an armed attack with operational, matériel, logistical, intelligence, or financial support; and that aid or assistance is substantial or significant, systematic, necessary

169. See *supra* Section III.B for a discussion of the *jus ad bellum* and *jus in bello* status of a state that provides such assistance in support of another state that has carried out an armed attack.

170. For example, in 1974, a surge of Soviet material assistance allowed North Vietnam to launch its final and decisive offensive against South Vietnam. NORMAN FRIEDMAN, *THE FIFTY-YEAR WAR* 396–97 (2000); LIND, *supra* note 34, at 24.

171. The Soviet Union supplied the vast majority of all arms, ammunition, and equipment utilized by communist forces during the Korean War. Weathersby, *supra* note 167, at 79. Throughout the Vietnam War, the North Vietnamese war effort was sustained by constant flows of significant military matériel from the Soviet Union. LIND, *supra* note 34, at 19–20, 90–91. Between 1966–1973, extensive Soviet matériel and logistical assistance provided North Vietnam with the capability to engage in high-intensity conventional warfare against the United States and South Vietnam. DOUGLAS PIKE, *VIETNAM AND THE SOVIET UNION, ANATOMY OF AN ALLIANCE* 89–93 (Routledge ed. 2019).

172. See LIND, *supra* note 34, at 29–30, 90–91 (discussing this reality in the context of the Vietnam War).

or essential to, or integrated into the military operations of that armed attack.¹⁷³ The inclusion of financial assistance is necessary because its provision may be as significant to the sustainment of state proxies as is the supply of arms and military equipment.¹⁷⁴ Therefore, under *jus ad bellum*, a state that provides any of the foregoing types of military assistance to a state that directly engages in armed aggression should become a lawful target of forcible defensive responses necessary to terminate the pattern of indirect aggression.

In addition, the primary rules of *jus ad bellum* and *jus in bello* indicate that a state executes an armed attack when it allows a client state to utilize its territory to engage in armed aggression. Co-belligerency rules suggest that this occurs when the former allows the military forces of the latter to transit, establish bases in, or establish lines of communication through its territory. Those principles also effectively correspond to the realities of proxy warfare.¹⁷⁵ In the course of several U.S.–Soviet proxy wars, Soviet client states that directly engaged in armed hostilities utilized lines of communication or bases located in third states to sustain protracted military operations carried out against U.S. or allied forces.¹⁷⁶ Importantly, those logistical arrangements permitted Soviet clients to draw on channels of supply that could not be interdicted by the United States without targeting the territory of those third states in which those lines of communication were located.¹⁷⁷ Thus, the primary rules of *jus ad bellum* should also hold that a state executes an armed attack when it allows its territory to be utilized by another state to carry out or facilitate an armed attack.¹⁷⁸

IV. THE NATURE OF ARMED ATTACK

A. *The Rise of Irregular Warfare*

Irregular operations are ubiquitous in modern warfare and include insurgency,

173. In addition, the state should also continue to be identified as a co-belligerent of its client state when it provides such support.

174. While the Soviet Union, for example, provided approximately \$21.5 billion in military matériel to its proxies from 1965 to 1978, it sent \$51 billion in financial assistance to its proxies *excluding* Cuba, North Korea, and North Vietnam from 1955 to 1980. *See* MUMFORD, *supra* note 22, at 64–65 (documenting the extent of Soviet financial support).

175. *See infra* text accompanying notes 177–79.

176. In the course of the Vietnam War, for example, significant quantities of Soviet matériel traveled overland through China until 1968. *See* LIND, *supra* note 34, at 89–92 (discussing the myriad of ways the Soviet Union got supplies and support to North Vietnam).

177. While the Soviet Union supplied North Vietnam via land lines of communication running through China, a dramatic escalation of the U.S. war effort—the targeting of Chinese territory—would have been necessary to interdict Soviet supplies to North Vietnam. *See id.* (discussing the involvement of the Soviet Union and the options the United States considered to reduce the Soviet impact). However, once China stopped the Soviet Union from using its territory, the United States was able to cut off a significant amount of supplies by interdicting the sea lines of communication between the Soviet Union and North Vietnam. *Id.*

178. This should include circumstances in which the second state’s military forces or supplies transit are based in the first state’s territory, or lines of communication for the second state are established on the first state’s territory.

terrorism, and guerilla warfare.¹⁷⁹ More broadly, irregular warfare encapsulates all operations that aim to influence—and therefore gain control over—populations through force.¹⁸⁰ Irregular warfare thus includes informational, psychological, and unconventional warfare, and other activities that employ military capabilities in order to undermine or build popular support.¹⁸¹

B. Low-Intensity Conflict

The prohibition on the use of force in the U.N. Charter applies to armed force—kinetic violence carried out via weapons of war.¹⁸² Article 2(4) is thus invariably implicated by uses of low-intensity armed force.¹⁸³ However, there is a degree of ambiguity as to whether such uses of force may constitute an armed attack.¹⁸⁴ In *Nicaragua*, when discussing whether the activities of irregular forces amounted to an armed attack, the ICJ distinguished between the use of “the most grave forms . . . [and] less grave forms” of the use of force, and indicated that only the former constitutes an armed attack.¹⁸⁵ The ICJ suggested that irregular warfare operations could be classified as an armed attack only insofar as the “scale and effects [of such operations] would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.”¹⁸⁶ However, the *Nicaragua* Court also suggested that while discrete uses of force might not individually constitute an armed attack, they might do so collectively.¹⁸⁷

Following *Nicaragua*, the ICJ again endorsed the concept of a force gap in the *Oil Platforms* case.¹⁸⁸ In *Oil Platforms*, the ICJ set out the requirement that an armed attack must be carried out with “the specific intention of harming” the state against which it is launched.¹⁸⁹ To date, the ICJ has not clarified the distinction between a

179. See ERIC V. LARSON ET AL., ASSESSING IRREGULAR WARFARE 8–9 (2008) (analyzing an early definition of irregular warfare).

180. See *id.* at 10–11 (examining the modified and generally adopted version of the definition of irregular warfare).

181. See *id.* at 11–13 (discussing the different types of irregular warfare operations).

182. See Catherine Lotrionte, *Reconsidering the Consequences for State-Sponsored Hostile Cyber Operations Under International Law*, CYBER DEF. REV. 73, 78 (2018) (discussing the adoption of Article 2(4) prohibiting the use of armed force, or its equivalent, in the U.N. Charter).

183. See *id.* at 84 (explaining that only very minor uses of force fall below the threshold of Article 2(4)).

184. See *id.* at 87 (explaining that some uses of force that implicate Article 2(4) may not implicate armed attacks as understood in Article 51 of the Charter).

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

186. *Id.* ¶ 195.

187. See *id.* ¶ 231 (discussing whether a series of Nicaraguan cross-border incursions into Costa Rica and Honduras between 1982 and 1984 could be treated as an armed attack, either individually or collectively); see also *Nicar. v. U.S.*, 1986 I.C.J. 170, ¶ 73 (dissenting opinion of Schwebel, J.) (framing the scale of attacks by Nicaragua asserted by El Salvador and Honduras).

188. See *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, ¶ 64 (Nov. 6) (reasoning that while a single missile attack in a series of similar strikes might not rise to the level of an armed attack, the entire sequence may be viewed as a single armed attack).

189. See *id.* (finding that the Iranian mine was not released with the intent to harm any U.S. vessels and so does not rise to the level of an armed attack).

use of force and an armed attack, nor has it provided any legal or policy justification for the gap theory that developed.¹⁹⁰

Subsequent scholarship has, however, justified the force gap as a de-escalatory mechanism implied in the structure of the U.N. Charter.¹⁹¹ Under this view, while Article 2(4) makes any use of armed force illegal, the victim state's right to self-defense arises only insofar as the state is faced with an intentional use of force that objectively threatens its security interests.¹⁹² The force gap, therefore, operates to inhibit escalation by limiting the ability of states to respond with defensive force to low-intensity, and potentially unintentional, uses of force.¹⁹³

In the absence of further ICJ guidance, states and scholars have attempted to identify the threshold at which use of force becomes an armed attack.¹⁹⁴ This process has required an inquiry into the "scale and effects" doctrine.¹⁹⁵ Under the doctrine, "scale" requires "considerable magnitude and intensity, . . . taking into consideration the amount of force used and duration of the attack."¹⁹⁶ "Effects" requires "substantial destruction to important elements of a [victim] state," primarily with respect to its population, territory, and economy.¹⁹⁷ However, while the language of "scale and effects" would seem to connote a relatively large-scale use of force, the threshold has primarily been interpreted as merely excluding small-scale localized uses of force from the definition of armed attack.¹⁹⁸

Closely related to the foregoing interpretation is the "accumulation of events"

190. Lotrionte, *supra* note 182, at 87. It is worth noting that the United States, taking the minority view, does not recognize a force gap and instead maintains that all uses of armed force give rise to the right of self-defense. *Id.*; see also Matthew C. Waxman, *Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)*, 36 YALE J. INT'L L. 421, 426–30 (2011) (discussing the use of force in Article 2(4) and the U.S. interpretation).

191. See CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 157 (4th ed. 2018) (arguing that if a gravity and proportionality requirement does not exist, then minor uses of force may be permitted to escalate into major conflicts).

192. See Lotrionte, *supra* note 182, at 87 (discussing a state's right to self-defense under the gap theory). *But see* José Luis Aragón Cardiel et al., *Modern Self-Defense: The Use of Force Against Non-military Threats*, 49 COLUM. HUM. RTS. L. REV. 99, 114 (2018) (referring to the separate opinion from Judge Simma in the ICJ's *Oil Platforms* case and the theory that even when a use of force does not rise to the level of an armed attack, a state may respond with military countermeasures). Countermeasures, in opposition to self-defense, are intended to bring the breaching state back into compliance with its legal obligations. See Lotrionte, *supra* note 182, at 93–94 (discussing when state countermeasures might violate the Charter).

193. See Cardiel et al., *supra* note 192, at 110, 113–15 (suggesting that the use of countermeasures under Judge Simma's conception may allow for a forcible response to limited armed attacks without leading to escalation).

194. See Lotrionte, *supra* note 182, at 87 (distinguishing the meaning of armed attack from a use of force).

195. See *id.* (analyzing the "scale and effects" test used in the *Nicaragua* case and beyond).

196. *Id.*

197. *Id.* at 87–88.

198. See David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, 24 EUR. J. INT'L L. 235, 243 (2013) (arguing that the threshold for intensity is not very high, whether or not a force gap is recognized).

doctrine.¹⁹⁹ Accepting the existence of a force gap, the “accumulation of events” doctrine holds that a “series of [low-intensity] forcible actions could “constitute an armed attack, even if each action would not do so individually.²⁰⁰ The doctrine is supported by ICJ’s suggestion that an analysis of whether an armed attack has occurred may aggregate the cumulative effects of a series of low-intensity uses of force.²⁰¹ From a policy perspective, the doctrine attempts to reconcile the policy of preventing escalation with the inherent right of states to defend themselves when irregular warfare objectively threatens their national security interests.²⁰² The doctrine recognizes that the systematic nature of a low-intensity campaign causes the entire operation to be of a scale and produce the effects associated with a traditional armed attack.²⁰³ Importantly, many states that have responded to systematic, low-intensity terrorist or insurgent attacks have often implicitly justified their defensive actions based on an “accumulation of events” theory.²⁰⁴ Ultimately, a substantial body of state practice since the end of WWII supports an interpretation of Article 51 that includes systematic, low-intensity irregular warfare campaigns under its ambit.²⁰⁵

1. Non-“Armed” and Non-Kinetic Force

Under the traditional view, Articles 2(4) and 51 refer exclusively to armed force.²⁰⁶ Other activities that may be characterized as involving a kind of “force” due to the fact that they implicate some form of coercion—such as economic sanctions or political interference—fall outside the use of force regime.²⁰⁷ However, even under the traditional interpretation, it is well-established that a large-scale

199. *See id.* at 243–44 (discussing the use of the “accumulation of events” theory).

200. *Id.* at 244.

201. *See id.* (discussing language used by the ICJ in its *Oil Platforms* decision).

202. *See* John Norton Moore, *Low-Intensity Conflict and the International Legal System*, 67 INT’L L. STUD. SERIES U.S. NAVAL WAR C. 25, 38 (1995) [hereinafter *Low-Intensity Conflict*] (reasoning that defensive responses to a series of low-intensity attacks must be clearly designed to terminate the pattern of aggression, rather than retaliate against individual attacks).

203. *See* Lotrionte, *supra* note 182, at 89 (explaining the “accumulation of event” doctrine in coordination with the “scale and effects” approach).

204. *See* RUYS, *Armed Attack*, *supra* note 41, at 168–69 (explaining specific instances of states utilizing the theory without formal U.N. adoption).

205. *See, e.g., id.* at 169–72 (detailing states’ justification of defensive actions and that while the events have been criticized, doctrine itself has generally not, the criticism has generally on the basis of necessity and proportionality); Feder, *supra* note 77, at 418–19, 427–30 (discussing the evolution of categorizing armed attacks and specific instances of state defensive actions); Christian J. Tams, *The Use of Force Against Terrorists*, 20 EUR. J. INT’L L. 359, 373, 378–81 (2009) (arguing that defensive responses by the United States and its allies to state-sponsored terrorism during the latter stages of the Cold War were not accepted, but that the response has largely changed in the past two decades).

206. *See* Tom Ruys, *The Meaning of “Force” and the Boundaries of the Jus Ad Bellum: Are “Minimal” Uses of Force Excluded from U.N. Charter Article 2(4)?*, 108 AM. J. INT’L L. 159, 163, 163 n.28 (2014) (stating that while force may not be defined in the charter, it has a generally accepted definition).

207. *See* Waxman, *supra* note 190, at 429–30 (discussing efforts, thus far unsuccessful, to include other forms of interference as “force”).

offensive operation carried out by regular military forces constitutes an armed attack even before active combat operations commence.²⁰⁸ In addition, the *Definition of Aggression* includes instances of direct aggression that do not necessarily require that any fighting occur.²⁰⁹ Russia's seizure of the Crimean Peninsula in 2014 suggests that active combat need not take place for a conventional invasion to constitute an armed attack. The Russian invasion constituted an armed attack²¹⁰ despite the fact that the invasion forces did not face any real resistance from the Ukrainian military and that the operation did not produce substantial death or destruction.²¹¹ Therefore, a military operation need not involve active combat, significant death, or physical destruction, for it to constitute a use of force and an armed attack.

In addition, the application of Articles 2(4) and 51 is not limited to the employment of traditional or conventional military instruments.²¹² In the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ was explicit that those provisions "apply to any use of force, regardless of the weapons employed."²¹³ Relatedly, the Security Council held that the terrorist attacks of September 11, 2001, gave rise to the "inherent right of individual or collective self-defense" under Article 51.²¹⁴ The Security Council thus implicitly recognized that the Al-Qaeda operations constituted an armed attack.²¹⁵ This is despite the fact that the attacks did not involve the use of "arms" strictly defined, but rather civilian technologies employed to produce death and physical destruction.²¹⁶

The foregoing precedents suggest a general acceptance by the international community of an "effects-based" approach for analyzing whether an act constitutes

208. See RUYS, *Armed Attack*, *supra* note 41, at 189 (discussing the different considerations in the event of small-scale versus large-scale operations).

209. See G.A. Res. 3314 (XXIX), annex, Definition of Aggression, art. 3(a) (Dec. 14, 1974) (stating that an invasion constitutes armed aggression, and therefore an armed attack, and does not require actual combat); see also Mary Ellen O'Connell, *The Crisis in Ukraine*, in *THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH* 855, 862 (Tom Ruys, Olivier Corten, & Alexandra Hofer eds., 2018) (noting that where the military forces of one state occupy the territory of another following an invasion, or remain on the territory following the withdrawal of consent, the Definition of Aggression indicates that the first state has committed an armed attack, and that there is no further requirement that any fighting occur).

210. O'Connell, *supra* note 209, at 862–63.

211. See CHRISTINE GRAY, *supra* note 191, at 32–33 (discussing Russia's violations of Article 2(4) and Ukraine not resisting, but instead accusing Russia of a breach).

212. See *infra* text accompanying notes 215–19.

213. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 39 (July 8).

214. See SERGEY SAYAPIN, *THE CRIME OF AGGRESSION IN INTERNATIONAL CRIMINAL LAW* 81–82 (2014) (discussing the U.N. Security Council response to the attacks on September 11, 2001).

215. See *id.* (noting the Security Council considered the attack comparable to armed attacks under Article 51).

216. See Karl Zemanek, *Armed Attack*, in *MAX PLANCK ENCYC. PUB. INT'L L.* ¶ 21 (Oct. 2013), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e241> (discussing that what constitutes an armed attack does not depend on the device or weapon used).

a use of force and/or an armed attack.²¹⁷ Under the “effects-based” doctrine, the employment of any instrumentality that results in more than *de minimis* levels of destruction to property or injury to persons, as long as it occurs under circumstances where the *jus ad bellum* regime applies, constitutes a use of force.²¹⁸ When operations result in considerable loss of life and extensive destruction of property, it also constitutes an armed attack.²¹⁹ This analytical approach has gained considerable support among states and commentators, including the United States, as a means for categorizing cyberattacks.²²⁰ There is growing support, in the cyberwarfare context, for an extension of the effects-based approach to encompass cyber operations that do not directly result in any physical damage, but that nevertheless result in destructive second-order effects.²²¹ Some commentators have suggested that the effects-based approach may also logically be extended to other activities involving physical violence that produce extensive destruction.²²²

Finally, there is some support for the proposition that certain non-kinetic or non-“armed” activities may implicate Articles 2(4) and 51.²²³ During the Cold War, this concept primarily related to activities that might variously be described as “subversive intervention” or political warfare carried out via non-military means.²²⁴ State practice during the Cold War indicates that insufficient support existed for recognizing political interference as violative of Article 2(4).²²⁵ However, the General Assembly recognized as early as 1950 that the “fomenting of civil strife in the interests of a foreign power” constitutes “a pattern of aggression.”²²⁶ In addition, during negotiations over the *Definition of Aggression*, France suggested that “serious . . . cases of subversion” should be analyzed as armed attacks under Article

217. See *supra* text accompanying notes 211–18.

218. See Lotrionte, *supra* note 182, at 81–82 (explaining that the leading approach is one considering the effects of the actions).

219. See *id.* at 87–88 (discussing the “scale” and “effect” threshold to constitute an armed attack).

220. See, e.g., *id.* at 87–89 (discussing the extension of armed attacks to cyberattacks); Shaun Roberts, *Cyber Wars: Applying Conventional Laws to War to Cyber Warfare and Non-State Actors*, 41 N. KY. L. REV. 535, 564–65 (2014) (explaining U.S. adoption of the effects-based approach and extension to technology and cybersecurity).

221. See Lotrionte, *supra* note 182, at 88–89 (examining the development of states in recognizing cyberattacks).

222. See Cardiel et al., *supra* note 192, at 118 (arguing for the extension of the effects-based approach to non-armed force).

223. See *infra* text accompanying notes 225–29.

224. See Waxman, *supra* note 190, at 429–30 (proposing a definition of force as interference focused on the object of the action).

225. See *id.* at 430 n.41 (citing to Thomas Franck for the proposition that, during the Cold War, while nations understood external incitement of revolution through military or paramilitary means constituted a use of force, external incitement of revolution via propaganda, cultural subversion, and non-military assistance was understood to fall outside the prohibition of Article 2(4)).

226. See John B. Witton, *Hostile International Propaganda and International Law*, 398 ANNALS AM. ACAD. POL. & SOC. SCI. 14, 18 (1971) (quoting the General Assembly in its *Peace Through Deeds Resolution*).

51.²²⁷ Similarly, during its consideration of the North Atlantic Treaty, the U.S. Senate Foreign Relations Committee recognized that a revolution aided and abetted by an external power might constitute an armed attack.²²⁸ These authorities suggest that while efforts to merely influence the political disposition of populations fail to violate Article 2(4), non-military or paramilitary efforts to foment revolution or insurgency may constitute a use of force.

The ICJ repeatedly referred to the takeover of the U.S. embassy in Tehran as an “armed attack” in the *United States Diplomatic and Consular Staff in Tehran (Hostages Case)*.²²⁹ The ICJ referred to the mob that stormed the embassy as an “armed group” comprised of “militants,” but did not explicitly state that any weapons were utilized to capture the embassy.²³⁰ Rather, the ICJ discussed the militants’ seizure of buildings and forcible entry into the U.S. embassy compound.²³¹ The ICJ’s opinion is bereft of any facts indicating that serious death or destruction resulted from that attack.²³² The *Hostages Case*, therefore, suggests that unarmed, physical force carried out at low levels of violence may constitute an armed attack, insofar as that force is employed against vital state interests or has non-destructive physical effects functionally similar to those that might be achieved via armed force.

An analogous doctrine has developed around cyber operations that do not result in physical destruction. Under the “non-kinetic effects” approach, a cyber operation is characterized as an armed attack if it produces non-kinetic effects that implicate the victim state’s right to survival in a manner comparable to the effect of an activity that was unquestionably recognized as an armed attack at the time the U.N. Charter was adopted.²³³ Likewise, the Dutch government endorsed an analysis that would recognize an organized cyber operation carried out against the “essential functions of the state,” which leads to a “serious disruption of the functioning of the state or serious and long-lasting consequences for the stability of the state,” as an armed attack.²³⁴ In addition, some members of the International Group of Experts that drafted the Tallinn Manual were willing to characterize a cyber operation producing particularly severe, albeit non-physical, consequences for the security of a state as

227. RUYS, *Armed Attack*, *supra* note 41, at 150.

228. Luis Kutner, *Due Process of Rebellion*, 7 VAL. L. REV. 18 (1972). Note that the North Atlantic Treaty, which created the North Atlantic Treaty Organization (NATO), provides for mutual defense obligations based on whether a member state comes under “armed attack,” which reflects the concept of armed attack in Article 51. Relatedly, the Southeast Asia Treaty Organization (SEATO) Treaty provided for mutual security against “armed attack” as well as “subversive activities directed from without against [the] territorial integrity and political stability” of its member states. Jan Klabbers, *Intervention, Armed Intervention, Armed Attack, Threat to Peace, Act of Aggression, and Threat or Use of Force: What’s the Difference?*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 488, 491–92 (2015).

229. *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Judgment, 1980 I.C.J. 3, ¶¶ 57, 63, 91 (May 24).

230. *See id.* ¶¶ 17–18 (describing in detail the events of the assault).

231. *Id.*

232. *See generally id.*

233. *See Roberts, supra* note 220, at 555, 564–65 (describing the non-kinetic effects approach and identifying implicit U.S. endorsement of the approach).

234. Lotrionte, *supra* note 182, at 107 n.98.

an armed attack.²³⁵

C. Identifying Armed Attacks on the Basis of Operational Effects

1. Low-Intensity Conflict

A force gap is harmful only if it prohibits self-defense in circumstances where states are strategically compelled to respond with a higher quantum of force after facing a series of low-intensity attacks. When such defensive responses are condemned as illegal, the law incentivizes aggression.²³⁶ Therefore, *jus ad bellum* must recognize any aggressive use of force that objectively threatens the security interests of a state as an armed attack.²³⁷ Operationalizing that principle requires analyzing the scale and effects of a use of force based upon its intended or actual operational effects.²³⁸ Thus, it must be determined whether, and to what extent, a projection of force threatens the security of a state by disrupting its military capacity, economic potential, or political cohesion.²³⁹ When this consideration is taken together with the intent requirement, accidental or otherwise harmless uses of low-intensity force would not rise to the level of an armed attack, whereas hostile uses of force that objectively threaten the security interests of a state would. This view preserves the de-escalatory benefits of the force gap while preventing that policy from facilitating aggression.

An approach that more realistically assesses whether an armed attack has occurred in the context of irregular warfare must adhere to the accumulation of events doctrine.²⁴⁰ Irregular warfare campaigns are population-centric and have been most successful when armed violence has been limited and targeted.²⁴¹ For example,

235. See Michael N. Schmitt, *The Use of Cyber Force and International Law*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 1110, 1113, 1119–20 (2015) [hereinafter *Use of Cyber Force*] (describing how drafters of the Tallinn manual disagreed on some issues but concluded that psychological operations exclusively intended to undermine confidence in a government do not constitute use of force).

236. See Moore, *Low-Intensity Conflict*, *supra* note 202, at 27 (reasoning that where international law fails to condemn low-intensity aggression, and instead repudiates defensive responses that are necessary to terminate it, that system fails to deter aggression).

237. See *id.* (explaining that creating an international system which properly condemns aggression requires an understanding of the nature of aggression and the legal mechanisms that may work to deter such aggression).

238. See Jordan, *supra* note 146, at 56–57 (arguing that the non-kinetic effects doctrine, focusing on the ends, should determine whether a particular cyberattack constitutes an armed attack). This approach implicates the concept of operational effects, because non-kinetic effects concept places significance on the extent to which a tactical action is capable of contributing to the disruption of an enemy military system. See *infra* Part IV.C.2 for a discussion of the concept of operational effects.

239. See RAYMOND ARON, PEACE AND WAR: A THEORY OF INTERNATIONAL RELATIONS 154–56 (Richard Howard & Annette Baker Fox trans., Doubleday & Co. ed. 1966) (explaining the stakes of war in terms of military capabilities, economic capacity, and political cohesion relating to a state's potential power and ability to ensure its security).

240. See *infra* text accompanying notes 242–44.

241. See Shy & Collier, *supra* note 162, at 850 (explaining the importance in the Maoist revolutionary theory of “foco” attacks: small, directed acts of violence that lead to political changes

insurgencies aim to militarily or politically exhaust, rather than defeat, their enemies.²⁴² Terror campaigns rely on violence not to destroy enemy military forces, but rather to coerce populations.²⁴³ Consequentially, a state faced with irregular warfare operations may only be subject to militarily-insignificant and sporadic force, but the operational effect of those activities may be extremely consequential. That effectiveness should thus be reflected in *jus ad bellum*. That can be best accomplished by recognizing the right of states victimized by those campaigns to respond to those operations with a degree and nature of force proportionate to the totality of the campaign that threatens their security.

2. Non-“Armed,” Non-Violent, and Non-Kinetic Force

Two similar strategic realities also counsel in favor of recognizing a variant of the non-kinetic effects approach, which focuses on the operational effects of a projection of force as a means of identifying armed attacks.²⁴⁴ First, in the modern era, the existence of transnational ideologies and identities, coupled with the reality of mass politics, has facilitated the ability of states and non-state actors to mobilize, organize, and control populations en masse within and across state borders.²⁴⁵ An important corollary of this revolution has been the growing capacity of non-state actors to seize state power.²⁴⁶ In addition, this transformation has made central to the conduct of modern war the ability of a state to influence its population and the population of its enemies.²⁴⁷ Second, modern technological developments have expanded the means available to engage in such coercion and increased the vulnerability of populations to those instruments.²⁴⁸ Technological progress in the fields of information, transportation, and connectivity has exponentially expanded the flow of funds, persons, material, and information across international frontiers.²⁴⁹ Meanwhile, dramatic increases in population growth and urbanization have created

or organization rather than the other way around).

242. See *id.* at 839 (discussing Mao’s guerrilla tactics of exhausting the enemy).

243. See John Philip Jenkins, *Terrorism*, ENCYC. BRITANNICA (July 27, 2020), <https://www.britannica.com/topic/terrorism> (defining terrorism and its use).

244. See *infra* text accompanying notes 245–58.

245. See, e.g., Martin Wright, *Wars of Gain, Fear, and Doctrine*, in *WAR* 90, 92–94 (Lawrence Freedman ed., 1994) (discussing the concept of wars involving doctrinal conflicts and explaining that such conflicts go beyond borders and possess both intra-state and inter-state dimensions); Shy & Collier, *supra* note 162, at 824–25 (noting the dual intra-state and inter-state character of the French Revolution and the French Revolutionary Wars).

246. See Andrew M. Scott, *Internal Violence as an Instrument of Cold Warfare*, in *INTERNATIONAL ASPECTS OF CIVIL STRIFE* 154, 155, 161–62 (James N. Rosenau ed., 1964) (discussing the way non-state warfare upsets a state’s control of force in that country).

247. See J.F.C. FULLER, *THE CONDUCT OF WAR, 1789–1961* 73–75 (1961) (describing the importance of the state’s ability to exercise influence over its population and the population of its enemy).

248. See Shy & Collier, *supra* note 162, at 837 (discussing the importance of the radio and the airplane to pro-Allied resistance elements in Nazi-occupied Europe during WWII); see also Kilcullen, *supra* note 133, at 66–67 (referring to the importance of modern telecommunications technologies in contemporary unconventional warfare).

249. See Scott, *supra* note 246, at 160 (suggesting modern developments have made it impossible for states to fully control the movements across its borders).

critical societal nerve centers vulnerable to internal attack.²⁵⁰ These developments allow states to influence the populations of other states via “informal access,” access by agents of one state to the population of another state, outside of formal, state-to-state relations.²⁵¹

Taken together, these two trends have resulted in an unprecedented ability for states to stimulate internal unrest in foreign countries through non-armed or non-kinetic force.²⁵² Modern communications technologies increasingly enable special forces and intelligence agents to remotely organize, support, and direct resistance forces operating in denied territory, requiring limited physical infiltration by such personnel.²⁵³ Relatedly, the existence of ideologically-aligned non-state elements within the target state may allow the intervening state to mobilize an already-organized force on its behalf.²⁵⁴ In the twentieth century, successful internal resistance and unconventional warfare campaigns have been more likely to take the form of civil resistance, non-violent subversion, and other types of political warfare, as opposed to violent insurgency.²⁵⁵ Those campaigns primarily employ political agitation, strikes, riots, and mass protests to seize power.²⁵⁶ Political warfare campaigns are capable of attracting greater levels of domestic political support than violent insurgencies,²⁵⁷ and can operate effectively in major urban centers, seizing control of societal nerve centers with limited kinetic force.²⁵⁸

Moreover, irregular warfare activities are central to the conduct of “non-linear” warfare campaigns—operations that integrate irregular, cyber, and conventional activities, that do not contemplate the existence of clear front lines on the battlefield, and are expected to dominate the conduct of great power war in the twenty-first century.²⁵⁹ Non-linear warfare contemplates the use of irregular forces, not in discrete campaigns as a substitute for conventional forces, but rather in highly-integrated and coordinated operations as a means of facilitating the projection of

250. See Kilcullen, *supra* note 133, at 66 (examining modern trends and changes to the environment of populations).

251. See Scott, *supra* note 246, at 155–57 (discussing the evolution of informal access in history).

252. See *supra* text accompanying notes 245–51.

253. See Kilcullen, *supra* note 133, at 66 (highlighting changes brought by technological and connectivity advancements).

254. See Scott, *supra* note 246, at 155–56 (describing modern techniques of informal attacks).

255. See Joseph L. Votel et al., *Unconventional Warfare in the Gray Zone*, 80 JOINT FORCES Q. 101, 107–08 (2016) (considering the change in conditions over the past seventy years that have impacted modern unconventional warfare).

256. Votel et al., *supra* note 255, at 106–07. Armed force may eventually be employed, but only following violent government repression. *Id.* at 107.

257. See *id.* at 106 (considering the increased use of resistance based in social change).

258. See Kilcullen, *supra* note 133, at 67–68 (explaining that political warfare operations are highly effective in high-population urban areas, and that the efficacy of modern forms of unconventional warfare can allow resistance forces to achieve their aims with limited levels of kinetic force).

259. See Tad A. Schnauffer II, *Redefining Hybrid Warfare: Russia's Non-linear War Against the West*, 10 J. STRATEGIC SEC. 17, 20–21, 30 (2017) (defining non-linear warfare and the blurred lines that have been the result, as well as the significant role it will continue to play in the future).

conventional force.²⁶⁰ Non-linear operations employ special forces, paramilitary units, and insurgents to intensely prepare the battlespace over an extended period to create enemy vulnerabilities and exploit them in coordination with conventional fires and maneuver forces.²⁶¹ Irregular forces are meant to destabilize population centers, capture or sabotage critical infrastructure,²⁶² and strike military systems located deep in enemy territory.²⁶³ The irregular warfare component of non-linear operations is thus integral to the ability of such campaigns to achieve operational asymmetries against conventional enemy forces. Therefore, modern irregular warfare operations—including non-“armed” political warfare operations—are likely capable of creating new forms of operational maneuver that threaten the viability of modern conventional deterrence operations.

The foregoing realities necessitate an analysis of the concepts of force and armed attack at a more fundamental level, based on an understanding of what existing prohibitions are designed to accomplish. Given the prevalence of various forms of coercion in international relations, this requires distinguishing illegitimate coercion from legitimate forms of pressure.²⁶⁴ With respect to irregular warfare, one method of distinction relates to the manner in which a state gains either access or influence over the population of another state. Whereas it is legitimate for states to communicate in their official capacity to the populations of other states, the dissemination of propaganda or disinformation to produce dissent or foment insurgency constitutes unlawful intervention into the affairs of another sovereign.²⁶⁵ Similarly, economic sanctions do not rise to the level of a use of force, because each state has the right to determine its own trading partners.²⁶⁶ By contrast, a blockade—an armed attack—actively deprives another state of the ability to access economic resources abroad.²⁶⁷

The second distinction relates to the manner in which an irregular warfare operation affects the security of the victim state. As with cyber operations, irregular warfare operations are capable of producing immense harm without the kind of physical destruction associated with the use of armed force.²⁶⁸ Therefore, any approach to identifying an armed attack based on kinetic effects alone is flawed,

260. See Martin N. Murphy, *Understanding Russia's Concept for Total War in Europe*, HERITAGE FOUND., 4 (Sept. 12, 2016) (discussing the extensive employment of irregular warfare activities to create conditions conducive to the introduction of regular ground forces).

261. See Peter A. Mattsson, *Russian Military Thinking—A New Generation of Warfare*, 1 J. BALTIC SEC. 61, 62–63, 65–67 (2015) (referring to Sixth Generation Warfare).

262. See MURPHY, *supra* note 260, at 4–6 (using Russian operations in Crimea as an example of irregular, new generation warfare in action).

263. See Mattsson, *supra* note 261, at 65–67 (discussing Major General Alexander Vladimirov's idea of new war).

264. See Waxman, *supra* note 190, at 429 (characterizing this distinction as between unlawful coercion and lawful pressure).

265. Maziar Jamnejad & Michael Wood, *The Principle of Non-intervention*, 22 LEIDEN J. INT'L L. 345, 374 (2009).

266. Waxman, *supra* note 190, at 430.

267. Roberts, *supra* note 220, at 555.

268. See Schmitt, *Use of Cyber Force*, *supra* note 235, at 1120 (discussing whether cyber operations can be characterized as armed attacks).

because it fails to account for potentially devastating non-physical harm.²⁶⁹ The non-kinetic effects approach—insofar as it contemplates the operational effects of a projection of force irrespective of whether those effects are produced via destructive, kinetic, or “armed” means—resolves this deficiency.²⁷⁰ Therefore, where a state’s irregular warfare operation constitutes an illegal intervention into the affairs of another state, and creates consequences to the survival and security of the victim state that are equivalent in severity to those produced by a kinetic armed attack, that action should constitute an illegal use of force and an armed attack giving the victim state the right to lawfully respond in self-defense. Specifically, an armed attack should be recognized where an illegal form of intervention is capable of neutralizing the political-military systems, critical infrastructure, productive capacity, or strategic economic resources of the state; harming its population; destabilizing its political control over populations within its jurisdiction; or otherwise exercising control over the population, assets, government, or territory of the state.²⁷¹

V. POTENTIAL FORCE

A. Threats of Force

In conjunction with its prohibition on the use of force, Article 2(4) of the U.N. Charter also proscribes the threat of force in international relations.²⁷² As a definitional matter, the paradigm case of a prima facie threat of force has been understood as an act or expression that implicitly or explicitly communicates an intention to employ force against a state, conditional on that state’s non-acceptance of certain demands.²⁷³ In *The Legality of the Threat or Use of Nuclear Weapons*, the ICJ endorsed a similar position when it referred to a threat of force as “a signaled intention to use force if certain events occur.”²⁷⁴ However, while the foregoing interpretation encompasses the ordinary definition of a threat as “a statement of an intention to inflict . . . hostile action . . . in retribution for something done or not done,” it fails to define the threatened outcome as a “thing likely to cause damage or danger.”²⁷⁵ This distinction is important, because while threats of force under the

269. Roberts, *supra* note 220, at 563–64.

270. *Id.*

271. See *infra* note 309 for a discussion of the operational and importance of the military capabilities, economic capacity, and political cohesion of a state to its national security; see also STEPHEN DYCUS ET. AL., NATIONAL SECURITY LAW 454–55 (6th ed. 2016) (identifying cyberattacks that cripple the economy of states as armed attacks).

272. MICHAEL WOOD, USE OF FORCE, PROHIBITION OF THREAT, MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW ¶ 1 (June 2013), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e428>.

Unlike with the ban on the use of force, relatively little jurisprudence or scholarship has addressed the contours of the Charter’s restrictions on the threat of force, despite the ubiquity of the phenomenon in the international arena. *Id.* ¶ 2.

273. James A. Green & Francis Grimal, *The Threat of Force as an Action in Self-Defense Under International Law*, 44 VAND. J. TRANSNAT’L L. 285, 295–96 (2011).

274. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 47 (July 8).

275. *Threat*, LEXICO, <https://www.lexico.com/en/definition/threat> (last visited Feb. 14, 2020).

traditional formulation may include certain positive actions—such as military exercises or the concentration of forces on an international frontier²⁷⁶—not all threatening behavior is necessarily violative of Article 2(4).²⁷⁷

According to the ICJ, the legality of a *prima facie* threat of force depends upon the lawfulness of the envisaged use of force.²⁷⁸ If the use of force is illegal under the relevant circumstances, then the threat to use such force is likewise prohibited.²⁷⁹ Interpreted formalistically, the ICJ's position is that a threat of force can only be used lawfully in place of the lawful employment of actual force.²⁸⁰ Under the prevailing view of self-defense, this would mean that a state can threaten force only if it has come under armed attack or is threatened with an imminent armed attack, giving rise to the right of anticipatory self-defense.²⁸¹ This interpretation would not, however, sanction a threat of force employed against a threatened armed attack that is not imminent.²⁸²

A more functional view of the ICJ's position, however, leads to the conclusion that threats of force—potential force—may be employed against a potential armed attack²⁸³ even if that threatened armed attack is not imminent.²⁸⁴ Under this formulation, the legality of the threat considers the conditional nature of the threat and inquires as to whether, were the conditions under which the use of force is threatened to arise, the threatened use of force would be lawful.²⁸⁵ In other words, unlike with the formalistic view, which considers the legality of the threatened use of force amid the circumstances as they exist at the time the threat is made, the functional view considers the legality of the threatened use of force under the circumstances that—according to the relevant threat—would give rise to the actual use of force.²⁸⁶ The ICJ's *Legality of the Threat or Use of Nuclear Weapons* opinion

276. Green & Grimal, *supra* note 273, at 296–97.

277. *Id.* at 293.

278. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 47 (July 8).

279. *Id.*

280. Green & Grimal, *supra* note 273, at 313.

281. *Id.* at 313–14. Anticipatory self-defense encompasses a use of force taken in response to an imminent armed attack and has been widely recognized as a right possessed by states pursuant to their inherent right of self-defense.

282. *Id.* at 320. It should be noted that the existence of a right to so-called preventative self-defense—which recognizes the right of a state to lawfully use force against hypothetical, non-imminent threats that do not give rise to the right of anticipatory self-defense—has been broadly rejected by the international community. RUYSS, *ARMED ATTACK*, *supra* note 41, at 320–24.

283. Green & Grimal, *supra* note 273, at 315. The authors employ the terms potential force and potential armed attack when referring to threats of force and threatened armed attacks, respectively. *Id.*

284. See Matthew A. Myers, Sr., *Deterrence and the Threat of Force Ban: Does the UN Charter Prohibit Some Military Exercises?*, 162 MIL. L. REV. 132, 173 (1999) (arguing that U.S. military maneuvers to deter a North Korean invasion of South Korea are lawful threats of force insofar as the implicit message communicated to North Korea was that the United States would use force only if North Korea launched an armed attack against Seoul).

285. See *id.* (applying functional view of ICLJ's position to U.S. military exercises carried out in relation to North Korea).

286. To illustrate, under the formalistic view, the implied U.S. commitment to employ

suggests that, as a positive matter, the functional view is correct. The Court noted the existence of active policies of strategic nuclear deterrence among several of the great powers,²⁸⁷ suggested that the strategy of deterrence constitutes a *prima facie* threat of force,²⁸⁸ and yet did not declare that policy illegal under *jus ad bellum*.²⁸⁹

B. Threatened Armed Attack

Some authorities have distinguished between threats of force violative of Article 2(4) and activities that constitute preparation for aggression.²⁹⁰ One commentator has suggested, for example, that “[s]ecret military exercises or maneuvers” may be carried out in preparation for armed aggression, but will not amount to threats of force insofar as they remain clandestine, as they are necessarily unknown to the victim and therefore cannot be perceived as a threat.²⁹¹ Therefore, it may be that “preparatory threats” can be differentiated from “pure threats” as a legal matter, although the two are not necessarily mutually exclusive.²⁹²

Although “preparatory threats” may not always violate the prohibition on the threat of force, they are nevertheless significant insofar as they implicate the reality of a threatened—or potential—armed attack.²⁹³ The concept of a threatened armed

strategic nuclear weapons against an adversary that launches a “first-strike” would be illegal, because at the time that the threat was made, the United States was not faced with an actual or imminent armed attack, and therefore was not at that time entitled to launch a retaliatory strike. However, under the functional view, the U.S. deterrent *does* constitute a lawful threat of force, because the United States has indicated that if it will launch a retaliatory strike only if it comes under strategic nuclear attack. Presumably, were the United States to come under strategic nuclear attack, it would be entitled to launch the strike it had previously threatened to execute under those circumstances.

287. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 67 (July 8).

288. *See id.* ¶ 48 (explaining that an effective policy of strategic nuclear deterrence requires a state pursuing that policy to communicate a credible intention to use nuclear weapons in certain circumstances, and that deterrence is predicated upon a demonstration that aggression will not succeed).

289. *Id.* The Court indicates that the policy of strategic deterrence does not violate of Article 2(4) insofar as it is “intended as a means of defense” and complies with the requirements of necessity and proportionality. *Id.*

290. Green & Grimal, *supra* note 273, at 297–98 (citing Marco Roscini, Threats of Armed Force and Contemporary International Law, 54 NETH. INT'L L. REV. 229, 237 (2007)).

291. *Id.* at 297.

292. *Id.* at 297–98. Both concepts were, for example, implicated by Russian military activities prior to the 2008 Russo-Georgian War. According to the Independent International Fact-Finding Mission on the Conflict in Georgia (IIFMCG), military exercises and troop deployments carried out by the Russian Federation prior to its 2008 invasion of Georgia constituted a threat of force. François Dubuisson & Anne Lagerwall, *Threat or Use of Force and Ultimata*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 910, 923 (Marc Weller ed., 2015). The IIFMCG explained that the Russian military maneuvers—which were defined by numerous features distinguishing them from routine exercises and which were both preceded and followed by troop deployments on the Russo-Georgian border and in the breakaway Georgian province of Abkhazia—“generated a definite sense that . . . Georgia ran a substantial risk of Russian military intervention.” *Id.*

293. *See* Myers, *supra* note 284, at 172 (indicating that the concentration of the Iraqi Army on the Iraq-Kuwait border prior to the Iraqi invasion of Kuwait constituted both a threat of force

attack is important because it relates to the concept of an imminent armed attack, the existence of which gives rise to the right to engage in preemptive self-defense.²⁹⁴ The concept also implicates circumstances under which threats of force may be lawfully employed. Specifically, ICJ jurisprudence and state practice indicate that the employment of threats of force constitutes a lawful defensive response to potential armed attacks that are too remote in time to justify a forcible response under the doctrine of anticipatory self-defense.²⁹⁵

C. Threats of Force as a Defensive Response to Threatened Armed Attacks

In Europe, between 1968 and 1990, NATO and Warsaw Pact forces were engaged in a dynamic military confrontation along a line of contact known as the Central Front.²⁹⁶ High-readiness NATO and Warsaw Pact conventional forces were concentrated against each other in operational postures designed to defeat the opposing force in high-intensity conventional warfare.²⁹⁷ At the height of that confrontation, Warsaw Pact forces were structured to launch a surprise, sustained, and large-scale conventional invasion of Western Europe.²⁹⁸ Until 1987, under the direction of an increasingly militant Soviet military leadership, those forces were engaged in constant preparations for the initiation of an aggressive, high-intensity war against NATO forces.²⁹⁹ Critically, those preliminaries took place amid circumstances in which the ability of the United States to utilize nuclear arms in order to halt a Soviet invasion had been eroded by the reality of Mutually Assured Destruction (MAD).³⁰⁰

and preparations for that armed attack).

294. See Noam Lubell, *The Problem of Imminence in an Uncertain World*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 697, 699–700 (Marc Weller ed., 2015) (alluding to the connection between a threatened armed attack and an imminent armed attack).

295. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 67 (July 8) (suggesting lawfulness of strategic nuclear deterrence); see also Myers, *supra* note 284, at 173 (characterizing U.S. conventional deterrence in Korea as lawful in response to non-imminent, potential armed attacks by North Korea).

296. E.g., Diego A. Ruiz Palmer, *The NATO-Warsaw Pact Competition in the 1970s and 1980s: A Revolution in Military Affairs in the Making or the End of a Strategic Age?*, 14 COLD WAR HIST. 533, 537–38 (2014) (referring to a confrontation during the 1970s and 1980s). The Soviet buildup that initiated that confrontation began in 1968. See FRIEDMAN, *supra* note 170, at 425 (discussing the buildup of Soviet military spending). The “Central Front” ran along the Inner-German and West German-Czechoslovakian borders. JOHN J. MEARSHEIMER, CONVENTIONAL DETERRENCE 169–70 (Cornell Univ. Press 1983).

297. Palmer, *supra* note 296, at 537–38.

298. E.g., DAVID M. GLANTZ, THE MILITARY STRATEGY OF THE SOVIET UNION: A HISTORY 208–10 (1992) [hereinafter GLANTZ, MILITARY STRATEGY].

299. See, e.g., Vojtech Mastny, *The Warsaw Pact as History*, in A CARDBOARD CASTLE?: AN INSIDE HISTORY OF THE WARSAW PACT 1, 44–46, 73 (Vojtech Mastny et al. eds., 2005) (explaining that avoidance of major NATO-Warsaw Pact war occurred in spite of intense preparations of Soviet military leadership). Soviet preparations were focused exclusively on the conduct of offensive operations in Western Europe. Beatrice Heuser, *Warsaw Pact Military Doctrine in the 1970s and 1980s: Findings in the East German Archives*, 12 COMPAR. STRATEGY 437, 441–42, 446–47, 450–51 (1993).

300. ROBERT R. TOMES, U.S. DEFENSE STRATEGY FROM VIETNAM TO OPERATION IRAQI FREEDOM: MILITARY INNOVATION AND THE NEW AMERICAN WAY OF WAR, 1973–2003 31–35,

As a consequence, by the late 1970s, Soviet capabilities and preparations for aggressive war against NATO presented a clear and present danger that the Soviet Union might initiate a successful conventional invasion of Western Europe.³⁰¹ Accordingly, an enhanced NATO conventional force posture became a primary objective of the Western Allies.³⁰² NATO forces along the Central Front were therefore augmented with new capabilities and placed in a higher state of readiness.³⁰³ In addition, the operational posture of those forces was restructured in accordance with new operational concepts designed to defeat a Soviet offensive without nuclear arms.³⁰⁴ Critically, by the late 1980s, the full implementation of that force structure had effectively neutralized the threat of a Soviet invasion.³⁰⁵

The foregoing Soviet conduct constitutes the paradigm case of a threatened armed attack—the use of potential military force for purposes of preparing for the aggressive use of kinetic military force. However, it is less clear whether the nature of that conduct implicates the concept of an imminent armed attack against which NATO could have lawfully directed preemptive armed force. Historically, the imminence of an armed attack could be evinced by the mobilization or maneuver of enemy forces which indicated that preparations for armed aggression were underway or that an offensive operation had already been launched despite not yet having physically attacked the target state.³⁰⁶ However, modern offensive military operations may be launched suddenly and rapidly without extensive preparations or maneuvers that unambiguously indicate that they will soon materialize.³⁰⁷ In the case of the NATO-Warsaw Pact confrontation, the Warsaw Pact operational posture was specifically designed to allow for the initiation of an offensive against Western

49–53 (2006).

301. See Mastny, *supra* note 299, at 44–46, 73 (explaining that Soviet preparations for a conventional invasion of Western Europe constituted an increasingly severe national security threat beginning in the late 1970s as it became increasingly realistic that such an operation could be successful).

302. See DAVID M. WALSH, *THE MILITARY BALANCE IN THE COLD WAR: U.S. PERCEPTIONS AND POLICIES 1976–1985* 111, 124 (2008) (discussing the centrality of enhancing NATO conventional deterrence capabilities to U.S. foreign policy during the late 1970s and early 1980s).

303. Palmer, *supra* note 296, at 551–52 (noting increased readiness of NATO forces and their improved capabilities for conducting “forward defense” and “follow-on-forces attack” operational concepts before Warsaw Pact forces were capable of launching a surprise, sustained, and large-scale invasion of Western Europe).

304. See, e.g., WILLIAM E. ODOM, *THE COLLAPSE OF THE SOVIET MILITARY* 75–80 (1999) (explaining that U.S. Air-Land Battle doctrine neutralized Warsaw Pact forces’ ability to launch a conventional invasion of Western Europe by mid-1980).

305. *Id.*; see also David M. Glantz, *Soviet Operational Art Since 1936: The Triumph of Maneuver War*, in *HISTORICAL PERSPECTIVES ON THE OPERATIONAL ART* 247, 273–76 (Michael D. Krause & R. Cody Philips eds., 2005) (articulating effects of NATO Air-Land Battle operational concepts on Soviet operational thought).

306. Michael N. Schmitt, *Responding to Transnational Terrorism Under the Jus Ad Bellum: A Normative Framework*, 56 *NAVAL L. REV.* 1, 17 (2008) (explaining that initiation of conventional armed attacks are often clearly preceded by mobilization of reserve forces or movement of forces towards political borders).

307. Geoffrey S. DeWeese, *Anticipatory and Preemptive Self-Defense in Cyberspace: The Challenge of Imminence*, in *7TH INTERNATIONAL CONFERENCE ON CYBER CONFLICT* 81, 87 (M. Maybaum et al. eds., 2015).

Europe without the need for an extensive mobilization that would alert NATO that such an operation was imminent.³⁰⁸ Instead, massive, high-readiness Warsaw Pact forces were forward-deployed along the Central Front, designed to preempt NATO defenses in the event of offensive operations against NATO.³⁰⁹

Those realities, therefore, raise questions as to how the concept of an imminent armed attack must be understood in the modern era. Over the past two decades, in particular, it has been reasoned, including by the United States, that the reality of modern military threats requires an expansion of the concept of imminence which would encompass situations in which the threat of an armed attack is more remote, or a general threat of armed attack exists, despite the lack of clear evidence that a specific attack will take place.³¹⁰ However, those arguments have been criticized on the grounds that such an expansion would condone the use of armed force against inchoate threats on a preventative basis, which has long been understood as illegitimate under *jus ad bellum*.³¹¹ At the same time, it has been recognized that the concept of imminence necessarily relates to a probabilistic determination that a threat will materialize, and that the gravity of certain types of threatened armed attacks may justify anticipatory defensive responses that are predicated upon a lesser degree of certainty.³¹² Therefore, the preemptive use of force may be justified where a state uses force in the last “window of opportunity” it possesses to defend itself against a grave threat that is expected to materialize rapidly.³¹³

The dramatically increased dangers of great power conventional warfare in the modern era suggest that a threatened armed attack such as that posed by the Warsaw Pact in the 1970s and 1980s constitutes a grave threat. In part, the gravity of that threat is based upon the potentials for escalation, the destructiveness, and the human and material costs inherent to such conflicts.³¹⁴ It also, however, involves the reality that, in the modern era, great powers almost necessarily engage peer adversaries in conventional warfare only where vital interests are at stake.³¹⁵ Defeat in such a conflict is likely to constitute a grave threat to the national security interests of the

308. GLANTZ, *MILITARY STRATEGY*, *supra* note 298, at 208–10.

309. Palmer, *supra* note 296, at 551–52.

310. See, e.g., JEFFREY DUNOFF, STEVEN R. RATNER, & DAVID WIPPMAN, *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 743–45 (4th ed. 2015) (discussing the 2002 National Security Strategy of the United States, which advocated for the preemptive use of armed force against terrorist threats, as well as subsequent statements by U.S. policymakers regarding anticipatory self-defense in the context of the U.S. armed conflict against al-Qaeda).

311. *Id.* at 744–45 (referring to report issued by U.N. Secretary General Kofi Annan, which explained that preventative, as opposed to anticipatory, use of armed force is violative of the principle of non-intervention).

312. Lubell, *supra* note 294, at 713–16.

313. DeWeese, *supra* note 307, at 87–88.

314. E.g., Crevel, *supra* note 6, at 31–32, 34 (articulating risks of nuclear escalation in modern great power war, and the destructive potential of conventional arsenals possessed by great powers in modern era).

315. See Chris Loveman, *Assessing the Phenomenon of Proxy Intervention*, 2 *CONFLICT, SEC. & DEV.* 29, 40–41 (2002) (explaining that great powers will only engage in conventional wars that carry grave risks those states perceive that such courses of action are necessary to secure their interests).

defeated state. Therefore, it may be legitimate for a state facing those circumstances to use force on an anticipatory basis in order to defend itself against such a threat during the last “window of opportunity” in which it can do so, even if the attack is not yet *per se* in progress.

The legitimacy of anticipatory self-defensive responses also depends upon the necessity of any contemplated use of force.³¹⁶ It has been recognized that expanded concepts of imminence must be bounded by determinations that the anticipatory use of force is the only legitimate means of defending against a threatened armed attack.³¹⁷ In this regard, it is critically important that the Soviet threat of a surprise, sustained, and large-scale invasion of Western Europe was neutralized not by an anticipatory use of force, but by the robust conventional deterrence posture adopted by NATO in the 1980s.³¹⁸ In terms of *jus ad bellum*, NATO effectively employed defensive threats of force to vitiate the threatened armed attack posed by the Warsaw Pact. The use of defensive threats demonstrates both the operational efficacy and legal propriety of recognizing defensive threats of force as legitimate responses to threatened armed attacks under *jus ad bellum*. It, therefore, also suggests that such defensive threats should at least constitute the initial response of great powers faced with a threatened armed attack characterized by the threat of a potential conventional invasion by an adversary great power. As mentioned, however, the NATO-Warsaw Pact confrontation also demonstrates the dangers associated with a threatened armed attack, even if that attack does not justify anticipatory defensive responses. As a result, *jus ad bellum* should operate to prohibit such uses of potential armed force. Therefore, Article 2(4) should recognize potential uses of armed force that constitute preparations for armed aggression—irrespective of their imminence—as illegal threats of force.

VI. SYSTEMATIC AGGRESSION AND DEFENSIVE WAR

A. Systematic Aggression in Modern Great Power War

As a strategic matter, the Cold War was the third global, great power war of the twentieth century.³¹⁹ States across the globe were threatened by large-scale, systematic aggression perpetrated by the Soviet Union and its satellites.³²⁰ As had

316. *E.g.*, Lubell, *supra* note 294, at 700.

317. Daniel LovBethlehem, *Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 1, 6–7 (2012) (reasoning that while the concept of imminence must be understood in light of the nature of modern military threats, use of force on a preemptive basis is legitimate only as a last resort).

318. *See, e.g.*, ODOM, *supra* note 304, at 75–80 (indicating that NATO Air-Land Battle and Follow-on-Forces Attack operational concepts had effectively neutralized Soviet offensive concepts for aggressive war against NATO by the late 1980s); *see also* Mastny, *supra* note 299, at 60 (explaining that, by the late 1980s, Soviet leadership had determined that new NATO operational concepts would lead to Soviet defeat in a major NATO-Warsaw Pact war).

319. LIND, *supra* note 34, at 4; *see also* COLIN S. GRAY, MODERN STRATEGY 9 (1999) (describing the Cold War as the third great war of the twentieth century and a virtual Third World War).

320. *See* LIND, *supra* note 34, at 4–28 (providing an overview of Soviet armed aggression between 1945 and 1991). *See generally* Friedman, *supra* note 170; Zbigniew Brzezinski, *The Cold*

Nazi Germany during WWII, the Soviet Union aimed not at limited territorial aggrandizement, but rather the totalitarian domination of Eurasia.³²¹ However, the specific contours of Soviet aggression in the Cold War—carried out via a series of proxy wars, irregular warfare campaigns, and threatened conventional invasions—were strategically distinct from the large-scale aggression carried out by the Axis Powers in WWII. Nevertheless, the similar objectives and scale of Soviet Bloc aggression posed an existential threat to the inchoate international order conceived in 1945, analogous to that presented by Nazi Germany and its fascist allies only a few years prior.³²² It is likely that, in the future, similar cases of aggression will resemble, from a strategic perspective, the campaign carried out by the Soviet Union, rather than that perpetrated by Nazi Germany. Therefore, it is necessary to determine the legitimacy, under *jus ad bellum*, of defensive responses to the kind of aggression waged by the Soviet Bloc during the Cold War, and potential future iterations of such a campaign.

B. The Nature and Scope of Self-Defense and Collective Defense

1. Article 51

Under the U.N. Charter, the inherent right of states to lawfully employ force individually or collectively for defensive purposes is recognized in Article 51.³²³ Under that provision, a state is entitled to employ force in accordance with its right

War and Its Aftermath, 71 FOREIGN AFFS. 31 (1992).

321. See Brzezinski, *supra* note 320, at 32–33 (explaining that the Nazi-Soviet Non-Aggression Pact included an agreement that the two powers would establish collective control over Eurasia and exclude U.S. power from that region and indicating that Soviet objectives during the Cold War were unchanged with respect to Eurasia).

322. See ARON, *supra* note 239, at 155–56 (Richard Howard & Annette Baker Fox trans., Doubleday & Co. 1966) (explaining that both Nazi Germany and the Soviet Union sought to establish de facto empires and justified their conquest and subjugation of other societies by proclaiming the superiority of their political identities and ideological systems).

323. U.N. Charter art. 51. Since the drafting of the Charter, scholars have debated whether the right recognized under Article 51 is coextensive with the pre-Charter right to self-defense, whether Article 51 limits that pre-Charter right, or if the Article 51 right exists in addition to the pre-Charter right. RUYSS, ARMED ATTACK, *supra* note 41, at 54–55; T.D. Gill, *The Second Gulf Crisis and the Relation Between Collective Security and Collective Defense*, 10 GROTIANA 47, 62–63 (1990) [hereinafter *Collective Security and Collective Defense*]. The synthesis view is not broadly accepted, however, at least insofar as it recognizes as lawful self-defense actions that do not conform to the Article 51 requirements. Kretzmer, *supra* note 198, at 241. In addition, the restrictive view of Article 51 is bolstered by the fact that the plain meaning of the text only allows the right to be exercised by a state under armed attack, thereby acknowledging self-defense only within a larger framework of collective security. RUYSS, ARMED ATTACK, *supra* note 41, at 59–60. Importantly, the restrictive view of Article 51 is not mutually exclusive to an expansive interpretation of the concept of “armed attack.” Furthermore, while it may be the case that state practice has altered or invalidated a restrictive interpretation of Article 51, modern analyses of the right of self-defense invariably proceed from an interpretation of that provision. See, e.g., T.D. Gill, *When Does Self-Defence End?*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 737, 738–39 [hereinafter *When Does Self-Defence End?*] (beginning with an interpretation of Article 51 requirements).

of self-defense when it has come under armed attack.³²⁴ The armed attack also gives rise to the right of collective defense by that state and its allies.³²⁵ Article 51 thus entitles third states to aid the victim state by employing force against the aggressor on behalf of the victim, provided that the victim state desires the assistance.³²⁶

Article 51 also provides that the right to self-defense and collective defense is only operative “until the Security Council has taken measures necessary to maintain international peace and security.”³²⁷ Under one view of this provision, the Article 51 right terminates once the Security Council has taken any action with respect to an armed attack.³²⁸ A second interpretation, by contrast, maintains that unless the Security Council takes effective action—measures that restore international peace and security—the individual and collective use of defensive force remains lawful.³²⁹ The plain meaning of this language, its drafting history, and state practice interpreting it all suggest that the second view is correct.³³⁰ State practice makes clear that Security Council military enforcement action under Article 42 invariably constitutes an effective measure.³³¹ It further suggests that other enforcement measures terminate that right only insofar as the enforcement action in fact re-establishes international peace and security.³³²

Beyond the express text of Article 51, customary principles of necessity and

324. See *supra* Part IV for a discussion of what constitutes an armed attack.

325. See RUYS, ARMED ATTACK, *supra* note 41, at 85, 88–89 (indicating that the right of collective defense is both (1) the right of the victim state to allow third states to come to its defense and (2) the right of third states to come to the defense of the victim state if thus requested).

326. *Id.* The ICJ explained in its *Nicaragua* opinion that as a matter of custom, it is also necessary for the victim state to declare that it has come under armed attack and publicly request the assistance of third states. Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 195, 199, 211 (June 27). However, those supposed requirements have been broadly rejected as failing to properly reflect customary practice. RUYS, ARMED ATTACK, *supra* note 41, at 83–84, 91. Article 51 does, however, unequivocally require that actions taken in self-defense and collective defense be reported to the Security Council. U.N. Charter art. 51, *supra* note 323. It should be noted that failure to meet this requirement does not necessarily make unlawful actions taken in self-defense and collective defense but may instead give rise to a rebuttable presumption that an ostensibly defensive use of force was not, in fact, of a defensive character.

327. U.N. Charter art. 51, *supra* note 324. Note that, unless otherwise explicitly contrasted, the terms “self-defense” and “collective defense” will both be referred to as “self-defense” in the text that follows.

328. Thomas K. Plofchan Jr., *Article 51: Limits on Self-Defense?*, 13 MICH. J. INT'L L. 336, 340–41 (1992).

329. *Id.* at 342.

330. RUYS, ARMED ATTACK, *supra* note 41, at 76–78. The U.S. delegation to the San Francisco Conference that created the United Nations repeatedly made clear that the right of self-defense would remain operative unless and until the Security Council took “effective action” or “all necessary measures” to restore international peace and security. *Id.* at 77.

331. *Id.* at 79. Importantly, Security Council resolutions providing for enforcement action in both the First Gulf War and the Korean War explicitly or implicitly recognized a concurrent right to self-defense and collective defense. *Id.* at 79–80, 82–83; see also Plofchan, *supra* note 328, at 364–65 (discussing Korean War).

332. RUYS, ARMED ATTACK, *supra* note 41, at 81.

proportionality also govern the right to self-defense.³³³ Necessity requires the existence of an ongoing armed attack.³³⁴ Importantly, an ongoing armed attack is recognized not only where an aggressor continues to carry out active combat operations against the victim state, but also where it occupies the victim state's territory, remains in a position to carry out further attacks,³³⁵ or carries out military operations aimed at facilitating further attacks.³³⁶ The paradigmatic case of an ongoing armed attack includes an invasion or other large-scale use of force and implicates the concept of a full-scale war of aggression, such as the campaigns launched by the Axis Powers in WWII.³³⁷ The concept of ongoing armed attack also includes a series of armed attacks launched from a common source, carried out over an extended period of time.³³⁸ Similarly, a single, ongoing armed attack may be identified in circumstances when a series of coordinated armed attacks are launched from a variety of locations by multiple actors.³³⁹ In such circumstances, the existence of a single, ongoing armed attack depends upon whether those actors are pursuing a common strategy and actively coordinating those attacks.³⁴⁰

In contrast to necessity, the *jus ad bellum* principle of proportionality is an altogether more nebulous concept.³⁴¹ In the modern era, some scholars have interpreted the principle as requiring a quantitative equivalence between an unlawful act of force and a lawful, forcible response.³⁴² The majority view, however, interprets proportionality as requiring that the forcible means employed in accordance with self-defense are necessary to achieve the legitimate aims of a defensive use of force.³⁴³ Under this conception, proportionality requires a determination of the legitimate objectives that the state may pursue when acting in self-defense, followed by an analysis of what forcible means are necessary to achieve those ends.³⁴⁴ In this context, necessity may refer to the existence of a rational link between the means employed to attain those legitimate aims or the absence of less harmful alternatives to those means utilized in pursuance of those

333. Gill, *When Does Self-Defence End?*, *supra* note 323, at 743.

334. *Id.* at 744. It should be noted that, with respect to anticipatory self-defense, which arises in circumstances where an armed attack is imminent but has not yet occurred, necessity requires that a threatened armed attack be immediate, overwhelming, and leave no effective recourse to means other than the use of defensive force. *Id.* at 743–44 (referring to an armed attack that is about to be launched); Gill, *Collective Security and Collective Defense*, *supra* note 323, at 67.

335. Gill, *Collective Security and Collective Defense*, *supra* note 323, at 67.

336. Gill, *When Does Self-Defence End?*, *supra* note 323, at 745.

337. *Id.* at 742. The concept of a full-scale war of aggression also includes the North Korean invasion of South Korea in 1950 and the Iraqi invasion of Kuwait in 1990. *Id.*

338. *Id.* at 750.

339. *Id.* at 748.

340. *Id.*

341. Kretzmer, *supra* note 198, at 237.

342. *Id.* at 237–38. It should be noted that, under traditional just war theory, the concept refers to the relationship between the good expected from going to war, relative to the anticipated harm, and some scholars continue to adhere to this view. *Id.* at 237.

343. RUYS, ARMED ATTACK, *supra* note 41, at 112; Kretzmer, *supra* note 198, at 238.

344. Kretzmer, *supra* note 198, at 239.

objectives.³⁴⁵

Though some states support the aforementioned quantitative approach,³⁴⁶ it has been widely rejected as a principle generally applicable to all cases of self-defense.³⁴⁷ Instead, state practice indicates that it is applicable only where the nature and scale of an armed attack is limited to circumstances that, in the pre-Charter era, would have justified only a resort to “reprisals” as opposed to defensive war.³⁴⁸ In such circumstances, the victim state is faced with a single, isolated armed attack of relatively low intensity and is limited to responding with force to prevent or deter future attacks.³⁴⁹

When a state is instead faced with an ongoing, large-scale, armed attack, proportionality is determined on the basis of assessing the legitimate war aims of the victim state and the means necessary to achieve those objectives.³⁵⁰ Here, there is considerable disagreement as to what permissible ends states may seek via the defensive use of force. Many scholars claim that the only legitimate aim of self-defense is halting and repelling an armed attack.³⁵¹ Under the most literal and restrictive variant of this view, which the ICJ has implicitly endorsed, once an attack has been repulsed, the use of force against the aggressor state no longer constitutes lawful defensive action.³⁵² Crucially, this interpretation considers an attack to have

345. *Id.*

346. See RUY, ARMED ATTACK, *supra* note 41, at 113–16 (discussing prevalence with which some states have invoked the quantitative approach to proportionality when discussing legitimacy of forcible, defensive responses).

347. *Id.* at 111–12. Importantly, even under a strict quantitative approach, it is generally accepted that proportionality does not require defensive actions to be restricted to exactly the same type of weapons or number of forces that comprised the attack. *Id.* at 133, 142. Neither does the principle demand that a forcible, defensive response employ the same tactics that were utilized in the attack. Gill, *Collective Security and Collective Defense*, *supra* note 323, at 67.

348. Kretzmer, *supra* note 198, at 238–39. Kretzmer notes that, according to scholarly interpretations of the U.N. Charter regime, as well as state rhetoric on the matter, armed reprisals are illegal. *Id.* at 251; see also RUY, ARMED ATTACK, *supra* note 41, at 117 (describing forcible defensive action taken after the completion of an armed attack as an illegal reprisal). Nevertheless, state rhetoric in the post-1945 era does not correlate with state practice; states faced by limited armed attacks that have already been initiated and concluded have often responded with limited military force and have claimed the right to do so as a means of self-defense. Kretzmer, *supra* note 198, at 257. Kretzmer therefore argues that while states do not utilize the language of “reprisals” to justify such defensive responses as lawful, state practice suggests that those measures are legitimate where they are undertaken in the aftermath of a limited armed attack in order to deter or prevent similar aggression in the future. *Id.* at 258.

349. Kretzmer, *supra* note 198, at 256–57. Note that, while state practice suggests that defensive responses akin to “reprisals” are lawful under *jus ad bellum* in the foregoing context, most scholars reject the position that states can respond with armed force to armed attacks that have been concluded. RUY, ARMED ATTACK, *supra* note 41, at 117; Kretzmer, *supra* note 198, at 257.

350. Kretzmer, *supra* note 198, at 239; see also DINSTEIN, *supra* note 41, at 240 (citing to Professor Ago for the proposition that the proportionality analysis in the context of self-defense against armed aggression that rises to the level of full-scale war centers on the objectives the defensive action is designed to achieve).

351. Kretzmer, *supra* note 198, at 260.

352. Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶¶ 76–77 (Nov. 6). It should be noted that, here, the ICJ was referring to circumstances involving a limited armed attack.

been repulsed once defensive measures have resulted in the re-establishment of the status quo *ante bellum*; the right to undertake further forcible action designed to remove any continuing security threat posed by the aggressor is not encompassed by the right of self-defense, but rather is the prerogative of the U.N. Security Council pursuant to its authority over collective security.³⁵³

Other interpretations, however, view the nature of the armed attack as altering the character of the legitimate war aims that the victim state may pursue.³⁵⁴ Where a state is faced with smaller-scale, more limited armed attacks, it is limited to repulsing the attack and restoring the status quo.³⁵⁵ However, once a state is faced with a large-scale armed attack—including a series of actions that collectively rise to that level under the accumulation of events theory—it is justified in taking forcible action that goes beyond halting and repulsing the attack.³⁵⁶ One view holds that a state faced with a large-scale armed attack may take action to eliminate imminent and reasonably foreseeable threats.³⁵⁷ Another theory provides that a state faced by such aggression may use force to remove any threat posed by the aggressor state, irrespective of the imminence of those threats; once attacked, the victim state and its allies may undertake to destroy the military potential of the aggressor or otherwise take measures to “restore the security of the state.”³⁵⁸

Finally, the broadest conception of legitimate defensive aims draws on traditional *jus ad bellum* concepts to differentiate limited armed attacks from those of a more extensive scale and intensity.³⁵⁹ In the former situation, the victim state is limited to carrying out quantitatively-congruous forcible responses that effectively amount to what was understood as lawful “reprisals” in the pre-Charter era.³⁶⁰ However, where the nature and gravity of an armed attack are so serious as to amount to what was regarded as a full-scale, aggressive “war” prior to 1945, the right of self-defense encompasses the right to wage a full-scale war that aims to achieve total victory over the aggressor state.³⁶¹ Once the justice of waging a defensive war has been established, proportionality under *jus ad bellum* is satisfied and need not be re-evaluated over the course of the conflict, and the conduct of the victim state and its

353. Kretzmer, *supra* note 198, at 260–61.

354. *Id.* at 270; *see also* Gill, *When Does Self-Defence End?*, *supra* note 323, at 743 (referring to the impact of a nature of the armed attack on the right to self-defense and collective defense).

355. Kretzmer, *supra* note 198, at 270.

356. *Id.*

357. *Id.* at 264–66.

358. *Id.* at 261–63, 270. It should be noted that this position explicitly accepts the existence of a “force gap,” and rejects defensive action against uses of force that do not rise to the level of an armed attack. *Id.*

359. *Id.* at 258 (noting that Yoram Dinstein is the most notable proponent of this perspective). It should be noted that this view nevertheless rejects the existence of a force gap *per se*. *Id.*

360. DINSTEIN, *supra* note 41, at 221–22, 225 (reasoning that in such circumstances, the magnitude of the defensive response must be limited to that of the unlawful use of force).

361. *Id.* at 237–40, 242 (stating that once armed aggression of a sufficient magnitude gives rise to the right of a state to wage full-scale war against the aggressor as a means of engaging in self-defense, that war may be prosecuted until the aggressor state is defeated). That state may aim to achieve “the complete collapse” of the aggressor state. *Id.* at 240.

allies is bounded only by *jus in bello*.³⁶²

Even when none of the immediately foregoing theories are explicitly endorsed, a related position recognizes that the nature and gravity of the armed attack faced by a state is relevant to the legitimate defensive aims that the victim state may pursue.³⁶³ This interpretation holds that when a state is faced with large-scale, systematic, and ongoing armed aggression, or when an armed attack otherwise threatens the existence of a state, the victim state may neutralize the source of that aggression.³⁶⁴ An armed attack of that nature—a war of aggression—may give rise to the right of the victim state to wage a defensive war against the aggressor aimed at repulsing the ongoing armed attack and forestalling future attacks.³⁶⁵ In the most exigent circumstances, achieving that objective may require the military defeat of the aggressor state,³⁶⁶ the occupation of its territory, and the removal of its regime.³⁶⁷ Importantly, under this interpretation, any escalation undertaken by the aggressor state following the initial outbreak of hostilities may expand the range of legitimate objectives the victim state may seek.³⁶⁸

2. U.N. Security Council Failure and Collective Security

The provisions of Article 51 were adopted as part of the larger U.N. Charter system.³⁶⁹ At the center of that system is the Security Council, which was designed to maintain international order through collective security mechanisms.³⁷⁰ Therefore, insofar as Article 51 operates to restrict the customary right of self-defense to allow for mere self-preservation, it does so within the context of a broader legal regime that assumes the existence of an instrumentality that will restore international peace and security where aggression occurs.³⁷¹ However, in cases of great power war where the principal aggressor is a member of the Security Council, that organ is likely to be rendered incapable of fulfilling its role under the Charter system. Throughout the Cold War, the fact that the Soviet Union was the principal

362. Kretzmer, *supra* note 198, at 258–59; *see also* DINSTEIN, *supra* note 41, at 239–40 (indicating that while a war of self-defense remains bounded by international humanitarian law, that war may be prosecuted throughout the entire region in which the relevant armed conflict takes place). The region of war includes the territories of all belligerent parties to the armed conflict. *Id.* at 19–20. Dinstein argues that, once a war of self-defense is justified by *jus ad bellum*, ongoing proportionality analyses under *jus ad bellum* are unnecessary. *Id.* at 237–38.

363. *See, e.g.*, RUYS, ARMED ATTACK, *supra* note 41, at 116–17 (explaining that the nature and gravity of the armed attack faced by a state are the primary determinates of what defensive aims are legitimate under the *jus ad bellum*); Gill, *When Does Self-Defence End?*, *supra* note 323, at 743 (indicating that the nature and mode of the armed attack will determine the nature and the duration of the defensive response, and are related to the requirement of proportionality).

364. RUYS, ARMED ATTACK, *supra* note 41, at 117.

365. Gill, *When Does Self-Defence End?*, *supra* note 323, at 742, 749.

366. RUYS, ARMED ATTACK, *supra* note 41, at 117.

367. *Id.*

368. *Id.* at 118.

369. Robert J. Delahunty, *Paper Charter: Self-Defense and the Failure of the United Nations Collective Security System*, 56 CATH. U. L. REV. 871, 871–72 (2007).

370. *Id.*

371. *Id.*

aggressor,³⁷² as well as a permanent member of the Security Council, rendered the U.N. collective security system inoperative.³⁷³

In such circumstances, any interpretation of Article 51 that restricts the right to self-defense to mere self-preservation of the state until such time as the Security Council acts is not only removed from reality, but facilitates aggression³⁷⁴ and is fundamentally immoral.³⁷⁵ The restrictive view of Article 51 is therefore illegitimate if the Security Council has failed as a collective security mechanism.³⁷⁶ It should not so easily be assumed that the constitution of our international order is a suicide pact.³⁷⁷ It might then be the case that the Charter system is no longer applicable—that the failure of collective security via the Security Council mechanism has invalidated the rules of that order.³⁷⁸ But that need not be the result. Rather, the rules of the Charter system may instead be interpreted in accordance with their basic purpose—the prevention and termination of aggression and the maintenance of international peace and security. Collective security, in turn, may be understood as the obligation not of any one particular entity, but rather as the responsibility of all states that have committed themselves to an international order based on the rule of law.³⁷⁹

In 1945, the United States and its allies recognized that if one of the permanent members of the Security Council were to engage in large-scale, systematic aggression, then prevention of a third world war through that organ would necessarily be impossible.³⁸⁰ The right to self-defense was therefore preserved under the Charter because it was contemplated that the Security Council might fail.³⁸¹

372. See *supra* Part VI.A for a discussion of Soviet aggression in the Cold War; see also Nicholas Rostow, *The International Use of Force After the Cold War*, 32 HARV. INT'L L.J. 411, 412–13 (1991) (explaining that the core issue of the failure to achieve international order during the Cold War was the Soviet belief that it possessed the right to engage in military intervention in order to achieve the violent overthrow of non-Marxist-Leninist foreign governments).

373. See, e.g., Delahunty, *supra* note 369, at 926–33 (noting the various ways in which the collective security system has failed); Roman Sadurska, *Threats of Force*, 82 AM. J. INT'L L. 239, 251 (1988). Notably, even in the post-Cold War period, the Security Council has generally failed to operate as intended. See Jane Boulden, *Double Standards, Distance and Disengagement: Collective Legitimization in the Post-Cold War Security Council*, 37 SEC. DIALOGUE 409, 411 (2006) (discussing perceived failures of the Security Council in the post-Cold War period).

374. Kretzmer, *supra* note 198, at 262.

375. Delahunty, *supra* note 369, at 941–42.

376. See *id.* at 872 (“Given that the nations of the world cannot rely on the Charter’s collective security system to protect them from attack, they should be relieved of any legal obligation to accept the limits prescribed by Article 51, as construed by the ICJ, when considering the legality of proposed measures of self-defense.”).

377. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159–60 (1963) (noting this fact with respect to the U.S. Constitution).

378. See Michael J. Glennon, *The Limitations of Traditional Rules and Institutions Relating to the Use of Force*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 79, 91–92 (Marc Weller ed., 2016) (arguing that state practice contrary to the Charter system has transformed the *jus ad bellum* from that which was created under that system).

379. Delahunty, *supra* note 369, at 887.

380. *Id.* at 891.

381. Robert F. Turner, *State Sovereignty, International Law, and the Use of Force in*

Specifically, Article 51 was to preserve the sovereign right that had previously been articulated in the Kellogg-Briand Pact—the right of states to engage in lawful defensive war when faced with armed aggression.³⁸² Under Kellogg-Briand, aggressive war was made illegal, and that proscription was to be enforced through the conduct of a defensive war by the victim state and its allies; armed aggression constitutes a breach of the Pact that gives rise to the right of other parties to engage in a defensive war.³⁸³ Critically, the Pact did not deny those states the right to prosecute an *offensive military campaign* when necessary to terminate an *aggressive war*.³⁸⁴

The explicit inclusion in Article 51 of the right of states to engage in collective defense is further evidence of this interpretation. Self-defense is largely concerned with self-preservation, the right of a state to ensure its continued survival. Collective defense, by contrast, implicates principles of collective security—its aim is not merely to defend the political independence or territorial integrity of a state, but rather to forge and uphold international order.³⁸⁵ The Charter system was founded on the principle that the most exigent danger to international peace was large-scale, systematic, armed aggression that threatens the security of multiple societies, as had been precipitated by Nazi Germany between 1933 and 1945.³⁸⁶ Therefore, when large-scale, systematic, armed aggression occurs, a preemptory norm of international law is breached, and the international community is faced with a public emergency.³⁸⁷ At that moment, all states are at least empowered³⁸⁸—and even perhaps compelled³⁸⁹—to act in accordance with their right to engage in collective defense on behalf of the international order.³⁹⁰ And when states are thus empowered to act, they are authorized to terminate the threat that has given rise to the aggression that endangers international peace and security.³⁹¹ It is thus in accordance with that comprehensive understanding of the Charter framework that the justice of defensive responses to large-scale, systematic, and ongoing aggression in modern great power war must be evaluated.

Countering Low-Intensity Aggression in the Modern World, in 67 LEGAL AND MORAL CONSTRAINTS ON LOW-INTENSITY CONFLICT 43, 62–64 (Alberto R. Coll et al. eds., 1995).

382. RUYSS, ARMED ATTACK, *supra* note 41, at 128–29 (explaining that aggression and self-defense were understood as correlative issues when both the Kellogg-Briand Pact and the U.N. Charter were created); Turner, *supra* note 381, at 62–64 (indicating that Article 51 expressly preserves the inherent right to self-defense and collective defense where a state is faced with armed aggression under the Kellogg-Briand Pact).

383. Turner, *supra* note 381, at 62–63; Delahunty, *supra* note 369, at 897–98.

384. Delahunty, *supra* note 369, at 901.

385. Gill, *Collective Security and Collective Defense*, *supra* note 323, at 72–74.

386. Franck, *supra* note 159, at 812.

387. Themistoklis Tzimas, *International Public 'Emergency' and Collective Security*, 20 J. CONFLICT & SEC. L. 335, 352 (2015).

388. *Id.* at 357.

389. *Id.* at 351 (noting that the International Law Commission has stated that a breach of a pre-emptory norm requires that all states act collectively to terminate the breach and are prohibited from recognizing the breach as legitimate).

390. *Id.* at 352.

391. Gill, *When Does Self-Defence End?*, *supra* note 323, at 739–42.

C. Ensuring Collective Security in Modern Great Power War

The object of a just war is a better state of peace—a post-war state of affairs that provides the victim of an aggressive war with greater security against future aggression.³⁹² Determinations as to the legitimate ends of defense therefore require an analysis of how a particular unjust war threatens the security of other societies, and what specific defensive objectives constitute the establishment of greater security.³⁹³ This necessitates a distinction between different types of aggression with respect to the extent to which they endanger the security of other states. Principally, that distinction must be made between large-scale, systematic aggression that threatens international order, and other, more limited armed attacks.³⁹⁴

In certain circumstances where a state comes under armed attack, that state must have the right to resist that attack and prevent future attacks.³⁹⁵ When a state faces a single, isolated armed attack limited in scope, intensity, and duration, it should be permitted to launch a limited, quantitatively congruous defensive response designed to deter the attacker from taking further forcible action. Such a response will likely prevent similar aggression in the future while inhibiting escalation. Further, when a limited, ongoing armed attack is undertaken against a state, the victim state should be permitted to eliminate reasonably foreseeable threats of similar, future armed attacks. Finally, where a state is faced with large-scale, premeditated aggression, it must be permitted to neutralize the military capacity of the aggressor. In either case, the victim state and its allies must be allowed to force upon the aggressor a settlement that ensures that such an attack will not be repeated.³⁹⁶

In the foregoing cases, the circumscribed nature of the attack suggests that the aggressor state, once disarmed to an extent such that it cannot carry out similar attacks in the future, may be efficaciously reintegrated into the international community.³⁹⁷ When, however, a great power or great power coalition carries out a

392. See MICHAEL WALZER, *JUST AND UNJUST WARS* 121–22 (4th ed. 2006) (describing the aims of a just war).

393. See *id.* at 59 (discussing the victim of aggression and its allies are justified in self-defense because aggression is a crime against all of society that necessitates resistance and future deterrence).

394. See Moore, *Low-Intensity Conflict*, *supra* note 202, at 28–30 (indicating that a great threat to international peace and security in the twentieth century was large-scale, systematic aggression, but more recent low-intensity attack has been insidiously destructive because the focus and criticism is placed on the response to the attack and not the attack itself).

395. See WALZER, *supra* note 392, at 118 (“In responding to an armed invasion, one can legitimately aim not merely at a successful resistance but also at some reasonable security against future attack.”).

396. See DINSTEIN, *supra* note 41, at 224–28 (discussing legitimacy of defensive armed reprisal, to induce the attacker to abide by the law in the future provided the reprisal meets the conditions of necessity, proportionality, and immediacy); see also *id.* at 34–59 (discussing the various means of terminating war or suspending hostilities through treaty, armistice, *debellatio*, cease-fire, etc.).

397. See ARON, *supra* note 239, at 132 (indicating that while ordinary nation-states may be adversaries and rivals, they do not seek to destroy each other, and therefore may work together to

large-scale, premeditated, and ongoing campaign of armed aggression against multiple states, the aggressor threatens not only the autonomy and security of a single society, but the maintenance of international peace and security. The aggressor evinces an aspiration not merely to territorial aggrandizement or greater geopolitical influence, but rather to overturn the existing international order via the subjugation of other societies and establish a *de facto* empire—an international order in which the aggressor controls all other independent centers of power and reserves unto itself a monopoly on the legitimate use of violence.³⁹⁸ The war that results from such aggression is not, therefore, a normal inter-state war, but a war for the character of the international order—a war the outcome of which will necessarily result in either the establishment of empire by the aggressor, or the exercise of hegemony over the aggressor by the states that resist and defeat that aggression.³⁹⁹ Consequently, when faced with an active, ongoing, large-scale campaign of systematic armed aggression, the victim states and their allies are justified to wage a defensive war against the aggressor state or coalition; those states may have, as their ultimate political objective in the conflict, an absolute military victory over the aggressor via the conduct of offensive military operations.⁴⁰⁰ A regime that carries out such a campaign of aggression is, moreover, fundamentally incompatible with the concept of *just* international order.⁴⁰¹ That regime is inherently aggressive—compelled by imperial and revolutionary impulses not only to dominate other states, but also to overthrow their internal political systems.⁴⁰² The regime itself thus threatens just international order. Therefore, the victim state and its allies may also aim to overthrow the aggressor regime, and force the unconditional capitulation and

uphold international order in the aftermath of hostilities); *see also* WALZER, *supra* note 392, at 116, 119–20 (discussing the necessity of establishing future partnerships with former enemy states in the aftermath of wars).

398. *See* ARON, *supra* note 239, at 151, 155–56 (outlining the idea of empire as a form of international order, and discussing the imperial nature of Nazi and Soviet aggression in WWII and the Cold War, respectively). In the aftermath of WWI, the only countries to wage major, ongoing campaigns of armed aggression against multiple states were led by totalitarian, or at any rate non-democratic single-party political forces with repressive tendencies. Moore, *Low-Intensity Conflict*, *supra* note 202, at 28–29. The basic aim of the aggressor states was the fundamental restructuring of the international order, carried out via the subjugation of other societies. *See generally* Reto Hofmann, *The Fascist New–Old Order*, 12 J. GLOBAL HIST. 166 (2017) (discussing the interplay of fascism and imperialism in the Axis powers, their desire to reorder the makeup of nations, and their use of violence to political advantage).

399. *See* ARON, *supra* note 239, at 153–54 (defining a super-state or imperial war as a war that has as its object, origin, or consequence the elimination of certain belligerents and the formation of a political unit on a higher level). Aron explains that a war becomes super-state or imperial where one of the belligerents, voluntarily or involuntarily, is led to establish hegemony or empire over its rival if it achieves victory. *Id.*

400. *See id.* at 86 (discussing how a state without the responsibility of initiating hostilities may seek military victory over the aggressor). *See supra* Part VI.B for a discussion of the concept of a defensive war.

401. *See* WALZER, *supra* note 392, at 113, 116 (explaining that a regime that has as its aim the conquest and conversion of other societies, and the creation of an international order devoid of political pluralism is fundamentally hostile to and incompatible with the concept of just international order).

402. *See* ARON, *supra* note 239, at 85 (noting that such hegemony epitomizes aggression).

political reconstruction of the aggressor state or coalition.⁴⁰³

A modern great power war of aggression is likely to be carried out via a series of discrete, interrelated armed attacks separated in time and space. In the Cold War, the Soviet Union attempted to seize control over other states via a series of distinct, large-scale invasions and insurgencies carried out by proxy forces in disparate parts of Asia, the Middle East, and Africa over almost five decades.⁴⁰⁴ During the same period, multiple terror attacks, political warfare campaigns,⁴⁰⁵ and threatened conventional invasions were directed against the western allies in Europe and Northeast Asia.⁴⁰⁶ Thus, to ascertain the overall scale of a modern war of aggression, the individual armed attacks that comprise that campaign must be evaluated collectively under the concept of an ongoing armed attack.⁴⁰⁷ The concept of a single, ongoing armed attack must thus include a series of armed attacks carried out by a state or coalition of states over an extended period.⁴⁰⁸ Once that campaign has been launched, it must be recognized as ongoing insofar as any illegal occupation, imminent or non-imminent preparations for future armed attacks, or operations capable of facilitating armed attacks are carried out by the aggressor coalition, or insofar as the aggressor coalition otherwise remains in a position to carry out further attacks.

Ascertaining the scale of an ongoing campaign of armed aggression must also consider the scale of the individual armed attacks that comprise the war of aggression. A large-scale armed attack should be recognized not only where the aggressor employs a high quantum of “armed” force against a state. Instead, in accordance with the non-kinetic effects-based approach, the concept should encompass any form of armed aggression that has the potential to comprehensively and severely threaten the security of a state.⁴⁰⁹ The comprehensiveness and severity of an armed attack must thus be determined by the extent to which the attack is capable of neutralizing the political-military systems, critical infrastructure, productive capacity, or strategic economic resources of the state; harming its population; destabilizing its political control over populations within its jurisdiction; or otherwise exercising control over the population, assets, government, or territory of the state.⁴¹⁰ Critically, that analysis must consider the capacity of non-linear

403. See WALZER, *supra* note 392, at ix-xii (providing the example of regime change and political reconstruction of Germany during and after WWII).

404. LIND, *supra* note 34, at 4–30.

405. Friedman, *supra* note 170, at 339–43, 400–01, 408–11.

406. See *supra* Part VI for a discussion of the Soviet threatened armed attack against NATO in the 1970s and 1980s.

407. See *supra* Part VI.A for a discussion of how the concept of an ongoing armed attack undertaken by multiple actors may inform necessity under *jus ad bellum*.

408. See *supra* Part VI.B.1 for a discussion of the concept of a single, ongoing armed attack.

409. See RUYSS, ARMED ATTACK, *supra* note 41, at 117 (suggesting that the scale of an armed attack, for purposes of the legitimacy of a defensive response, goes to the extent to which the attack threatens the existence of a state). See *supra* Part IV for a discussion of the non-kinetic effects doctrine for determining the existence of an armed attack, which may be extended to similarly determine the existence of a large-scale armed attack on the basis of non-physical features.

410. See *supra* Part IV.C.2 for a discussion of the importance of these factors in identifying an armed attack on the basis of the non-kinetic, operational effects of a projection of force.

operations to comprehensively disrupt the military capacity, economic potential, and political cohesion of a state prior to or absent the onset of conventional, kinetic action.⁴¹¹

In accordance with their right to wage a defensive war, victim states and their allies must be permitted to undertake military, paramilitary, and intelligence operations that achieve the comprehensive disruption and neutralization of the military systems—including the military, paramilitary, and intelligence forces; productive capacity, assets, and infrastructure; and leadership structures—of the aggressor, to the extent permitted by *jus in bello*.⁴¹² In a modern great power war, states waging a defensive war must aim to neutralize enemy military systems to achieve an absolute military victory over the aggressor, and thus achieve the aims of a defensive war.⁴¹³ Those states must therefore also be permitted to effectuate the economic and political collapse of the aggressor state or coalition to the extent permitted by *jus in bello*, as the economic power and political cohesion of the aggressor permits it to mobilize and sustain the military systems it deploys into the battlespace.⁴¹⁴

These operations cannot be confined to existing theaters of active hostilities. During the Cold War, U.S. “limited wars” in peripheral theaters, undertaken against specific instances of Soviet Bloc aggression, failed to effectively terminate the broader campaign of Soviet expansionism.⁴¹⁵ Those operations suffered from being highly reactive—undertaken in response to a series of invasions and insurgencies initiated at a time and place of the enemy’s choosing—and restrictive—designed to merely halt and reverse specific instances of Soviet aggression, and largely undertaken apart from broader efforts to neutralize Soviet military capabilities.⁴¹⁶ Instead, states waging a defensive war must be permitted to concentrate their forces in those theaters and against those enemy military systems that are most vital to the attainment of their ultimate military objectives.⁴¹⁷ Therefore, those states must be

411. See *supra* Part IV.C.2 for a discussion of the growing importance of non-linear warfare operations.

412. See *supra* Part VI.B for a discussion of the concept that a state waging a defensive war may undertake to eliminate the military capacity of the aggressor.

413. See ARON, *supra* note 239, at 22 (explaining that the objective of an absolute military victory is to disarm the opponent militarily). See *supra* Part II for a discussion of how the concepts of operational disruption and neutralization have replaced the concept of destruction as the objective of military operations in the modern era.

414. See ARON, *supra* note 239, at 54 (noting that potential military power of a state is determined by the economic resources it can mobilize over an armed conflict, and by its capacity for collective action).

415. See DONALD STOKER, WHY AMERICA LOSES WARS: LIMITED WAR AND US STRATEGY FROM THE KOREAN WAR TO THE PRESENT 56–57 (2019) (describing this phenomenon as the problem of nested wars and indicating that Soviet aggression in Korea and Vietnam operated so as to frustrate U.S. containment policy).

416. *Id.* at 95–105 (explaining that geographic and international political constraints complicated the ability of the United States to achieve a decisive military victory in Korea or Vietnam, but that those constraints were rational insofar as the United States did not want to undertake major military operations in those theaters).

417. See ARON, *supra* note 239, at 44 (discussing the strategic imperative of directing military resources to those theaters and objectives that are most central to the state’s political and military

allowed to target all enemy capabilities located throughout the entire region of war under *jus in bello*, even if those geographies are located outside of a theater of active hostilities.⁴¹⁸

In addition, states waging a defensive war must be permitted to conduct military activities against the aggressor over an extended period, and refrain from carrying out that response for so long as is necessary to execute it efficaciously. In a modern great power war, the threat of escalation may not permit an immediate, effective response to a campaign of armed aggression.⁴¹⁹ Further, the efficacious execution of non-linear military operations in such a conflict will require that various campaigns be carried out both successively and simultaneously over an extended period.⁴²⁰ In particular, those operations will include the punctuated use of large-scale conventional force to effectuate the rapid exploitation of ephemeral enemy operational vulnerabilities following extensive periods in which irregular forces prepare the battlespace.⁴²¹

Further, states conducting a defensive war must be permitted to use whatever level and type of force or threats of force—consistent with *jus in bello*—are necessary to effectively neutralize enemy military systems. The exigencies of modern warfare demand that states waging a defensive war be empowered to exploit favorable cross-domain and operational asymmetries against the aggressor.⁴²² Those states must therefore be allowed to employ any coercive instruments and operational concepts that will efficaciously achieve those operational effects in accordance with *jus in bello*. At the height of the Cold War, U.S. concepts of “limited warfare” specifically contemplated symmetrical, intra-domain operations as the only viable and legitimate response to Soviet aggression, and largely resulted in failure.⁴²³ By contrast, the United States effectuated the collapse of Soviet power in Eastern Europe via the execution of asymmetrical, cross-domain operations.⁴²⁴ In the near

interests).

418. See Mattsson, *supra* note 261, at 62 (noting the importance, in Sixth Generation Warfare doctrine, of targeting enemy military systems beyond the boundaries of existing operational spaces). As explained above, the region of war in an armed conflict includes the full extent of the territories of all the belligerent parties to the armed conflict. DINSTEIN, *supra* note 41, at 19–20.

419. See, e.g., ARON, *supra* note 239, at 699 (reasoning that, by 1966, the emergence of MAD between the United States and the Soviet Union had increased the threat that U.S. efforts to liberate Eastern Europe from Soviet control would risk escalation to the level of a nuclear exchange). In addition, it should be noted that major military campaigns invariably require the assemblage of significant resources before they can be launched. See Kennedy, *supra* note 2, at 347–48 (noting preparations for Allied offensives in WWII).

420. See Mattsson, *supra* note 261, at 62–63 (describing the use of indirect and irregular means to prepare the battlespace over an extended period of time, and the coordinated employment of special forces, insurgents, and contactless systems to neutralize critical enemy systems, as contemplated by Sixth Generation Warfare doctrine).

421. See *id.* at 62–63, 65–67 (explaining that Sixth Generation Warfare doctrine contemplates the rapid exploitation of emerging enemy vulnerabilities by coordinated military campaigns).

422. See *supra* Part II for a discussion of the importance of cross-domain and operational action in modern warfare.

423. Carver, *supra* note 15, at 787–88 (discussing the failure of the limited war fought in Vietnam).

424. U.S. political warfare operations supported anti-Soviet civil resistance campaigns in the

future, the ability to achieve myriad and complex asymmetrical advantages over an aggressor will become even more central to the successful conduct of modern great power warfare. Non-linear operations contemplate the coordinated use of diverse military, paramilitary, and intelligence capabilities to target specific points of cohesion within enemy military systems.⁴²⁵ The specific coercive instruments and operations to be employed will differ in accordance with the stage of a campaign, the nature of the enemy system and its vulnerabilities, and the specific operational effects the proponent aims to create.⁴²⁶ Critically, the exploitation phase of non-linear operations may require the rapid escalation of kinetic force in order to decisively disrupt the military, economic, and political systems of the enemy.⁴²⁷

Finally, the level and type of force justified in a defensive war under *jus ad bellum* must be in part dependent upon the level of resistance faced by the victim states and their allies.⁴²⁸ Once the aggressor state or coalition has capitulated, or its government has been overthrown, the ultimate political objective of the defensive war has largely been accomplished.⁴²⁹ However, where necessary, the victim states and their allies must be permitted to undertake activities consistent with *jus in bello* in order to obtain political control over the territory, assets, and infrastructure, and populations of the aggressor state or coalition to ensure its political reconstruction.⁴³⁰

VII. THE RIGHT TO WAR IN THE MODERN AGE

Great power war in the modern era has taken on a character that is radically distinct from every major interstate conflict that was waged between the onset of the

Eastern Bloc, generating massive civil unrest that rapidly disrupted the cohesion of Warsaw Pact forces and the mass of political-military systems that maintained communist control over Eastern Europe. GEORGE H.W. BUSH & BRENT SCOWCROFT, *A WORLD TRANSFORMED* 145, 197–98, 209, 213–15, 232 (1999) (noting the neutralization of the Warsaw Pact as an offensive military instrument, and describing the collapse of Soviet control over East Germany); GATES, *supra* note 148, at 450–51, 464–70. Simultaneously, enhanced NATO conventional military power deterred Moscow from using force to restore communist control in Eastern Europe and contributed to the economic and consequent military collapse of the Soviet Union. *E.g.*, ODOM, *supra* note 304, at 118–19, 397–404 (explaining that massive Soviet military expenditures, generated due to the buildup of Soviet forces concentrated against NATO on the Central Front, resulted in the economic collapse of the Soviet Union); ANDREW COTTEY, *EAST-CENTRAL EUROPE AFTER THE COLD WAR: POLAND, THE CZECH REPUBLIC, SLOVAKIA AND HUNGARY IN SEARCH OF SECURITY* 36 (1995) (suggesting that NATO leaders provided informal security guarantees to Poland in 1991 after coup attempt in the Soviet Union led to Polish concerns of Soviet invasion).

425. *See, e.g.*, Mattsson, *supra* note 261, at 62–63, 65–67 (referring to Sixth Generation Warfare doctrine); MURPHY, *supra* note 260, at 4–6 (discussing hybrid warfare, New Generation Warfare, and non-linear warfare concepts); *see also* Dixon, *supra* note 18 (articulating the importance of targeting points of cohesion within enemy military systems).

426. Mattsson, *supra* note 261, at 65–67.

427. *Id.*

428. *See supra* Part VI.B for a discussion of the requirement that a defensive war must be waged in proportion to the resistance offered by the enemy.

429. Walzer, *supra* note 392, at 114–15 (reasoning that a successful uprising of the German people against the Nazi government would have vitiated the need for the Allies to force the unconditional surrender of Nazi Germany).

430. *Id.* at 121.

First Industrial Revolution and the dawn of the Nuclear Age. The emergence of absolute destruction as a strategic reality in 1945 resulted in the proliferation of proxy wars, irregular warfare, and potential force as strategic phenomena central to the conduct of great power war. Irrespective of those developments, however, systematic armed aggression perpetrated by great powers remains a central threat to the viability of an international order predicated upon the rule of law. The Charter system, which was designed following the defeat of the paradigm case of aggression, is capable of proscribing that threat. It is, moreover, capable of sanctioning as lawful those defensive responses that aim to bring aggression to an end. We must never forget that it is the *right to war* that we are expounding.⁴³¹

431. *See* *McCulloch v. Maryland*, 17 U.S. 316, 405–07, 411 (1819) (noting that an expansive interpretation of the powers granted to the federal government under the U.S. Constitution is necessary, because of the profound importance associated with the legitimacy of that supreme law).