

# States of War: Defensive Force Among Nations

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GEORGE P. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY* (Oxford: Oxford Univ. Press 2008)

The state of peace among men living in close proximity is not the natural state . . . ; instead, the natural state is one of war, which does not just consist in open hostilities, but also in the constant and enduring threat of them. The state of peace must therefore be *established*, for the suspension of hostilities does not provide the security of peace, and unless this security is pledged by one neighbor to another (which can happen only in a state of *lawfulness*), the latter, from whom such security has been requested, can treat the former as an enemy.<sup>1</sup>

Is international conflict governed by law? In the passage above, Kant distinguishes a state of war from a legal order. In a state of war, force is neither justified nor unjustified. It can be fought, but not argued with. In a legal order, by contrast, force is either unlawful or justified, depending on whether it violates legal rights or defends them.

The United Nations Charter was designed to transform international relations into such a legal order by bringing all force under the control of the Security Council. Thus, Article 2(4) of the Charter forbids the international threat or use of force against the political independence or territorial integrity of any state,<sup>2</sup> while Chapter VII envisions that international armed conflict will, if necessary, be prevented or suppressed by the armed might of the Security Council.<sup>3</sup> Nevertheless, Article 51 affirms the “inherent right of individual or collective self-defense if an armed attack occurs” against a member state until the Security Council has acted to restore “international peace and security.”<sup>4</sup> The Charter

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<sup>1</sup> IMMANUEL KANT, *PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS* 111 (Ted Humphrey trans., 1983).

<sup>2</sup> U.N. Charter, art. 2, para. 4.

<sup>3</sup> *Id.* arts. 39, 42–46.

<sup>4</sup> *Id.* art. 51.

requires member states to report exercises of this right to the Security Council,<sup>5</sup> and also empowers the Security Council to identify acts of aggression.<sup>6</sup>

By giving the Security Council jurisdiction over all breaches and threats to international peace and security, the Charter ascribes to the Security Council a near-monopoly on legitimate force and renders violence among nations presumptively illegitimate. The Charter eschews the term “war,” thereby treating armed conflict as a temporary and anomalous breach of the rule of law, rather than an enduring, and legally recognized relationship between states. Just as the rule of law has replaced the primitive dispute system of the bloodfeud, so the Charter purports to banish warfare as a primitive and barbaric practice.<sup>7</sup> In this enlightened scheme, self-defense is the only explicitly recognized justification for the use of force by states as such. Thus, the Charter’s scheme for regulating international force resembles the penal regulation of interpersonal violence within a state, and self-defense has a similarly justificatory role in both systems.

*Defending Humanity*, by George Fletcher and Jens David Ohlin, is the first systematic effort to think through the proper relationship between the criminal law and the international law of defensive force. The work begins by explaining and defending Fletcher’s Kantian theory of defensive force in criminal law.<sup>8</sup> According to this theory, the right to use force is derived from a legal order that secures equal autonomy by enforcing fair rules. (Pp. 28–29.) Thus, any actor is authorized to resist injury to anyone’s legal rights because these rights embody the legal order that protects the autonomy of all. (Pp. 76, 79, 83–85.) Fletcher and Ohlin justify defense on the basis of six conditions. Legitimate self-defense must be (1) reasonably necessary and (2) intended to repel an (3) overt, (4) imminent, (5) unlawful (6) attack. (Pp. 86–106.) Fletcher and Ohlin distinguish legitimate resistance from both preemptive and punitive force, as neither of these is necessary to repel an imminent attack. (P. 90.) They add that punitive force is illegitimate because states are moral equals without authority over one another. (P. 57.) They go on to apply this theory to a number of issues in the international law of war. These include controversies over the legitimacy of intervention against aggression, humanitarian intervention, irregular combatants, reprisals, and preemptive war.

In applying Kantian criminal justice theory to the international arena, Fletcher and Ohlin liken the international legal system, particularly as embodied by the United Nations, to a Kantian liberal state, and treat states and nations as individual citizens. (Pp. 59–60, 86.) Based on this analogy, they support the presumptive right of every state to intervene against aggression, until the Security Council takes

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.* art. 39.

<sup>7</sup> See MARY ELLEN O’CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE: CASES AND MATERIALS 7 (2009).

<sup>8</sup> Fletcher has developed his views on self-defense in a number of works, most notably GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 855–75 (1978), and GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL (1988).

effective action. (Pp. 76, 84–85.) They support humanitarian intervention in defense of national groups but not in defense of the human rights of individuals. (Pp. 129, 133–34.) They deny the right of unorganized individuals to attack or resist armies, and reason that such irregular combatants are therefore criminals rather than soldiers, and should be punished rather than preventively detained. (Pp. 180–84.) They oppose reprisals: only the Security Council has the authority to impose punitive sanctions, which will generally fall short of armed force. (Pp. 57, 95.) They reject preemptive defense, supporting the Charter's stricture that the right to use defensive force is triggered by an actual armed attack. (Pp. 157–58.)

Fletcher and Ohlin generally offer these positions tentatively, as starting points for analysis, acknowledging that countervailing practical considerations might alter their conclusions. (Pp. 45, 86, 140, 165.) Their aim is not to provide a comprehensive account of the law of defensive force, but to ground analysis in a conception of international law as an authoritative legal order.

Fletcher and Ohlin have performed an invaluable service in proposing, explicating, and defending a Kantian theory of defensive force in international law. Such a theory has considerable appeal because it provides a coherent rationale for the U.N. Charter's scheme for regulating the international use of force. Yet, by making the premises of the Charter scheme more explicit, Fletcher and Ohlin's theory also enable us to consider how well these premises reflect the realities of international conflict.

Fletcher and Ohlin's legal analysis of international force presumes a fairly close analogy between armed conflict in the international arena and violence between individuals within the jurisdiction of a sovereign state. I will argue, however, in Part One of this Review Essay, that there are important disanalogies between war and interpersonal violence that cast doubt on some of their solutions. Citizens can rely on the state to define and protect their rights. By contrast, political communities cannot rely on recognition and protection from any higher authority, including the United Nations. They must be prepared to use force not only to protect themselves, but sometimes also to win recognition for themselves. Thus, there may be good reasons for the international law of defensive force to diverge from the typical treatment of defensive force in criminal law.

In Part Two, I will examine Fletcher and Ohlin's specific proposals regarding the international law of armed force, and show that countervailing considerations flow from the disanalogy between warfare and interpersonal violence. Based on this disanalogy, I will identify arguments for restricting defensive and humanitarian interventions; for permitting some uses of force by irregular forces; and for permitting some reprisals and preemptive attacks. In addition, I will suggest that there may be special cases of interpersonal violence that resemble warfare and that justify preemptive force. Criminal law may have something to learn from the law of war about how to assess defensive force in such cases.

## I. INTERNATIONAL LAW AS A KANTIAN LEGAL ORDER

The Kantian theory of defensive force applies to a world of discrete persons subject to an effective and authoritative legal order recognizing their equal status as persons (pp. 28–29) and practically securing their equal autonomy.<sup>9</sup> For this reason, Kant thought that international relations could only be governed by law within an alliance of mutually respecting liberal states.<sup>10</sup> Outside of such an alliance, Kant considered the world of international relations to be an inherently violent state of nature, a “state of war,” rather than a pacific legal order.<sup>11</sup> Today, the world of international conflict is different in two important respects from the world presupposed by Kantian criminal law theory. First, it is not governed by a legal order with the legitimate authority to punish and the effective power to coerce. Second, it is composed of institutional actors of indeterminate and insecure status rather than discrete persons of equal status.

Fletcher and Ohlin treat the United Nations system as a legal order: “[M]uch has changed since Kant’s time. There is now a functioning international legal system, including the United Nations, which did not exist when Kant was writing. It can no longer be said that states are in a state of nature with each other.” (P. 157.) Certainly, the United Nations Charter establishes a legal order on paper. Yet the monopoly on legitimate force conferred on the Security Council by the Charter has proved to be a fantasy. As Thomas Franck wrote in 2001,

The noble plan for replacing state self-help with collective security failed because it was based on two wrong assumptions: first, that the Security Council could be expected to make speedy and objective decisions as to when collective [security] measures were necessary; and second, that states would enter into the arrangements necessary to give the Council an effective policing capability.<sup>12</sup>

During the Cold War, most armed conflicts involved surrogates for the rival superpowers, who exercised veto authority over Security Council action. As a result, Chapter VII was a dead letter.<sup>13</sup> Yet even after the Cold War, the Security Council has proved far weaker than originally intended. To see this, it is only necessary to reflect on its role in each of the two Gulf Wars.

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<sup>9</sup> See ROGER SCRUTON, *KANT: A VERY SHORT INTRODUCTION* 119 (2001); see also Guyora Binder, *Punishment Theory: Moral or Political?*, 5 *BUFF. CRIM. L. REV.* 321, 353–60, 371 (2002).

<sup>10</sup> See KANT, *supra* note 1, at 112–18.

<sup>11</sup> *Id.* at 110–11, 116.

<sup>12</sup> Thomas M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 *WASH. U. J.L. & POL’Y* 51, 51–52 (2001).

<sup>13</sup> The exception proving the rule was the action of the Security Council dispatching an American led force to defend South Korea in 1950, while the Soviet Union was boycotting the Security Council. O’CONNELL, *supra* note 7, at 369–70.

The first Gulf War was initially seen as evidence of a newly effectual role for the United Nations as part of a “new world order of international co-operation.”<sup>14</sup> The Security Council condemned the Iraqi invasion of Kuwait as a violation of Article 2(4) and took jurisdiction over the conflict as a breach of international peace and security. But then, instead of organizing its own armed response as contemplated by Chapter VII, it simply reaffirmed the inherent right of individual and collective self-defense recognized by Article 51.<sup>15</sup> This is the very right that is supposed to lapse when the Security Council fulfills its mandate to take measures of its own to restore international peace and security. Thus, the Security Council simply stood aside while the United States and its allies exercised a right to use force that had preexisted the Charter. It might be said that the Security Council acted by authorizing this exercise of collective self-defense in Resolution 678,<sup>16</sup> but the Charter’s recognition of this right as inherent implies that such defense requires no authorization. In any case, it is clear that in this case defensive force by states was not an exception to a legal order regularly enforced by the higher power of the Security Council. Instead, it was the only enforcement power available to the Security Council. Far from evidencing a newly effectual legal order, the first Gulf War was the exception that proved the rule that the enforcement of international law depends on the discretionary action of states.

The second Gulf War underscored this point, as the United States proceeded to forcibly occupy Iraq and topple its government without asking for Security Council authorization, and after it became apparent that the Security Council would not give such authorization. (France, for one, gave every indication it would veto an authorizing resolution.<sup>17</sup>) Instead, the United States relied on Resolution 678, saying it was already authorized, as a state cooperating in Kuwait’s self-defense, to enforce the disarmament obligations imposed on Iraq by subsequent resolutions.<sup>18</sup> Presumably, this disarmament was necessary to restore the international peace and security first breached by Iraq’s invasion of Kuwait thirteen years before. Thus, America ultimately based its invasion of Iraq on Kuwait’s inherent right of self-defense, which the Security Council’s protracted jurisdiction over the conflict paradoxically extended rather than extinguished. Indeed, by declaring a breach of the peace without taking effective measures to restore peace, the Security Council in essence characterized the relationship

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<sup>14</sup> U.N. SCOR, 45th Sess., 2933d mtg. at 17, U.N. Doc. S/PV.2933 (Aug. 6, 1990) (statement of Mr. Pickering, U.S.).

<sup>15</sup> S.C. Res. 660, U.N. Doc. S/RES/660 (Aug. 2, 1990); S.C. Res. 661, U.N. Doc. S/RES/661 (Aug. 6, 1990).

<sup>16</sup> S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990).

<sup>17</sup> U.N. SCOR, 45th Sess., 4707th mtg. at 13, U.N. Doc. S/PV.4707 (Feb. 14, 2003) (statement of Mr. de Villepin, Fr.).

<sup>18</sup> Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/351 (Mar. 21, 2003).

between Iraq and Kuwait's allies as an ongoing state of war, in direct contravention of the Charter's design.

Of course, America publicly explained its motives for exercising its discretionary right to resume the defense of Kuwait on the ground that it was preemptively defending itself against the possibility that Iraq—its wartime enemy—would supply terrorists with weapons of mass destruction for use against the United States.<sup>19</sup> The U.S. proceeded without Security Council authorization despite the U.N. Secretary General's warning that such action would violate the U.N. Charter.<sup>20</sup> The Security Council (over whose actions the U.S. exercises a veto) neither endorsed the invasion as an exercise of self-defense nor condemned it as aggression against the territorial integrity and political independence of another state.

In short, even after the Cold War, the Security Council has not proscribed war and has not functioned effectively as a legal authority superior to states. The power to enforce—and therefore also the power to define—international law is distributed among military powers. Fletcher and Ohlin concede the decentralization of enforcement power in the international legal system, but without seriously confronting the implications of such a right-of-the-stronger for the rule of law: "True, . . . [m]uch of international law must be enforced by the states themselves, and there is no international police force to execute judgments. But this is a facile point. Questions of international law are capable of adjudication . . . ." (P. 157.) For Kant, however, the subordination of executive power to legislative power was the key to law's character as a regime of *rules*. Law must be enforced effectively and consistently to fulfill its function of universalizing standards of conduct.<sup>21</sup>

Moreover, the international legal system's failure as a Kantian legal order is not only a matter of ineffectuality and irregularity. It is also a matter of democratic legitimacy. While Kant prioritized the rule of law over justice, he held that just law required the consent of those subject to it. This required that those subject to law have organized themselves as a political community and conferred legislative authority on a democratically responsive state.<sup>22</sup> If the international legal system lacks executive enforcement power, it is in large measure because no democratically constituted legislative power has authorized its creation. The U.N. is dependent on the largesse of its member states. It has no independent power to

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<sup>19</sup> David E. Sanger & John F. Burns, *Threats and Responses: The White House; Bush Orders Start of War on Iraq; Missiles Apparently Miss Hussein*, N.Y. TIMES, Mar. 20, 2003, at A1.

<sup>20</sup> Patrick E. Tyler & Felicity Barringer, *Annan Says U.S. Will Violate Charter if It Acts Without Approval*, N.Y. TIMES, Mar. 11, 2003, at A10.

<sup>21</sup> See JEFFRIE G. MURPHY, KANT: THE PHILOSOPHY OF RIGHT 117 (1970); see also ALLEN D. ROSEN, KANT'S THEORY OF JUSTICE 89–91 (1993).

<sup>22</sup> See IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS 119–21 (John Ladd trans., 1797) (2d ed. 1999); see ROSEN, *supra* note 21, at 14, 56–57, 62–63.

tax or conscript, no territory on which to base an army, and probably no independent power to immunize troops against legal liability.

Beyond the lack of a legitimate and effective central authority, there is another important difference between defensive force among nations and defensive force among citizens of a Kantian liberal state. A Kantian legal order presupposes a world of morally equal individuals, each inherently deserving equal respect as ends in themselves. In a Kantian legal order, these individuals have equal status as subjects and citizens. According to Kant,

[t]here are three juridical attributes inseparably bound up with the nature of a citizen as such: first, the lawful *freedom* to obey no law other than one to which he has given his consent; second, the civil *equality* of having among the people no superior over him except another person whom he has just as much of a moral capacity to bind juridically as the other has to bind him; third, the attribute of civil *self-sufficiency* that requires that he owe his existence and support, not to the arbitrary will of another person in the society, but rather to his own rights and powers as a member of the commonwealth. . . .<sup>23</sup>

The moral status of international actors is always contingent and contestable, however. The subjects of international law vary greatly in power, prosperity, independence, stability, national integration and democratic legitimacy. They are not tangible persons, but relationally complex legal fictions. In the ordinary case, international disputants are organizations claiming recognition as governments authorized to represent states that also may or may not merit recognition. They may claim on behalf of these states certain territory and other assets, or legitimacy as vehicles for the self-determination of certain peoples, or the right to protect certain persons. If tested, they must be prepared to use force, to warrant their effective control over their own societies and to show the deadly seriousness of their claims. In a customary legal system with decentralized enforcement power, actors must be prepared to defend their rights or lose them.

Thus, contestable claims to international legal personality and to associated rights are often precisely what are under dispute in war. Even the most egregious violations of sovereignty are usually justified by reference to some alternative claim of sovereignty. For example, in invading Kuwait, Iraq claimed to be responding to a request for assistance from a new revolutionary government for help in restoring order.<sup>24</sup> In 1939, Hitler justified his occupation of Bohemia and Moravia as necessary to protect the German minority.<sup>25</sup> The United States invoked

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<sup>23</sup> KANT, *supra* note 22, at 120.

<sup>24</sup> U.N. SCOR, 45th Sess., 2932d mtg. at 11, U.N. Doc. S/PV.2932 (Aug. 2, 1990) (statement of Mr. Kadrat, Iraq).

<sup>25</sup> Ian Brownlie, *Humanitarian Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 217, 221 (John Norton Moore ed., 1974).

the Ba'athist regime's atrocities and lack of democratic accountability in justifying its occupation of Iraq as respectful of Iraqi sovereignty and political independence.<sup>26</sup> In 1967, Egypt and its allies justified their mobilization against Israel on the basis of their non-recognition of Israeli statehood and their recognition of Palestinian sovereignty.<sup>27</sup> This non-recognition in turn rendered Egyptian mobilization all the more threatening, and contributed to Israel's reasons for attacking preventively. The mobilization and accompanying threats took place within the context of an ongoing, unresolved state of war over Israel's status as a state.

An authoritative legal order of the kind required by Kant's theory of criminal justice cannot abide a state of war, in which both parties see their relative status—and perhaps their very survival—as dependent on the outcome of a trial by force.<sup>28</sup> A Kantian legal order presumes that legal disputants are mutually respecting legal persons who will submit their differences for authoritative resolution according to fair rules. Except where competence is in question, the citizens of a liberal state must recognize one another as equally autonomous subjects. By contrast, the status of international disputants is always contingent on practical power and communal recognition. In so far as the international arena involves unpoliced conflict over status, it is less like the ideally just liberal state and more like the prison yard or the heroic society described in Norse sagas.<sup>29</sup> In such a society, self-defense is not merely a limited and temporary delegation of legitimate force from a higher authority. Self-defense is instead the constant condition of continued survival. It is not obvious why Kantian criminal law theory should apply in such a world.

## II. FLETCHER AND OHLIN ON THE LAW OF ARMED FORCE

Bearing in mind these doubts about Fletcher and Ohlin's conception of international law as a Kantian legal order, let us now assess the laws of armed force they derive from it. These are the legality of defensive intervention, the legality of humanitarian intervention in defense of national groups, the illegality of

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<sup>26</sup> President George W. Bush, Address Announcing Operations to Disarm Iraq (Mar. 19, 2003).

<sup>27</sup> A commitment to recognize exclusive Palestinian Arab sovereignty in the territory of Palestine was undertaken by Egypt in the Alexandria Protocol and reaffirmed in the Pact of the Arab League. GUYORA BINDER, *TREATY CONFLICT AND POLITICAL CONTRADICTION: THE DIALECTIC OF DUPLICITY* 11 (1988).

<sup>28</sup> 2 LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE, WAR AND NEUTRALITY* 56 (1906) (traditional definition of war as a process of disputing between states resolved by force to the satisfaction of the victor).

<sup>29</sup> See generally JACK HENRY ABBOTT, *IN THE BELLY OF THE BEAST: LETTERS FROM PRISON* (1981); WILLIAM IAN MILLER, *BLOODTAKING & PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND* (1990).



defensive force by irregular troops, the illegality of reprisals, and the illegality of preemptive war.

*A. The Legality of Defensive Intervention*

Fletcher and Ohlin propose that all states should have at least a *prima facie* right to intervene against aggression. In supporting this proposal they draw attention to an important but little noticed ambiguity in the Charter. Article 51 acknowledges the inherent right of "individual and collective self-defense." What does this mean? Fletcher and Ohlin acknowledge that the negotiating history suggests that "collective self-defense" was intended to mean only obligatory mutual defense by parties to regional treaty organizations. (Pp. 73–74, 79.) Nevertheless, they urge a more expansive interpretation of collective defense that would give states the right to defend each other outside the auspices of international organizations. (Pp. 44–45, 76–78, 84–85.) They offer two main arguments.

First, they argue that this view better accords with the official French language text, which acknowledges the "natural" right of "legitimate defense." (Pp. 76–78.) They reason that in French criminal law this term means the right of any person to defend any other against unlawful attack. (Pp. 44, 76.) Indeed, they argue that only common law systems traditionally restricted the right of self-defense to the victim or persons standing in a special relationship to the victim. This is because only the common law originally classified self-defense as excused, to be distinguished from the justified use of force by officials. Yet common law systems have now moved away from such limits (p. 81), while civilian systems have long analyzed self-defense as just a special case of the right of any actor to use force to prevent a crime. (Pp. 29, 63.)

Fletcher and Ohlin also argue that defense against aggression is properly seen as a defense of the international legal order. (P. 84.) According to this view, the territorial integrity and political independence of each state (and the right to self-determination of each people) are rights guaranteed by the international legal order, just as the rights to personal security and liberty are guaranteed in a Kantian liberal state. The "objective right" of the legal order is embodied in the "subjective rights" of its citizens. (Pp. 28–29, 42, 45.) Just as any private citizen can defend the law in an emergency, before officials have arrived on the scene, so may any state defend international law in an emergency, until the Security Council has established control of the situation.

An unqualified right of intervention against aggression poses several risks, however. One such risk that the authors acknowledge is the danger that states will intervene against the will of states they purport to defend. (P. 45.) Powerful states might use conflict as a pretext to occupy weak neighbors and thereby pose a greater threat than the aggressor to the supposed beneficiary of their aid. Another danger the authors do not consider is that of conflict spreading as allies intervene on both sides. This is less likely if assistance must be organized by regional

organizations. Such organizations can make a collective, authoritative determination of fault before anyone is allowed to intervene. If they identify an aggressor, they can demand that states intervene on only one side of the conflict, perhaps bringing it to a swifter conclusion. If they cannot determine an aggressor, they can limit the conflict by forbidding intervention by other states in the region.

It is important that we assess the proposed unqualified right of intervention against aggression realistically. This means we must recognize that aggression is in the eye of the beholder, and that superficially plausible claims of justification for the use of force as “defensive” will usually be available. This is even more likely if, as the authors propose, justified defensive force is extended to cover some cases of intervention to defend populations against their own governments. We must also acknowledge that the occasions for lawful intervention by states in international conflict are not likely to be exceptional or ephemeral. Experience has taught us that the cavalry is not coming: the Security Council is not going to take military control of any large-scale international conflict.

If we accept these more realistic premises, there is still much to be said for Fletcher and Ohlin’s general right of defensive intervention. Since the U.N. will not enforce its own prohibitions, mutual defense is the only enforcement possible. The Security Council can play the more limited role of declaring aggression, and so authorizing mutual defense as was done in the first Gulf War. Yet we should not delude ourselves that the power to authorize intervention also implies the power to forbid intervention. The United States and other permanent members of the Council can always claim that emergency compelled them to act in advance of Security Council authorization. They can always block any subsequent resolution questioning the legality of their intervention, as was done in the second Gulf War. Perhaps the strongest argument for a general right of defensive intervention, then, is the realist one. A general right of intervention by all states in wars is effectively the regime we have; not as a corollary to the Charter regime, but in place of it.

### *B. The Legality of Intervention in Defense of National Groups*

Fletcher and Ohlin would extend the general right of defensive intervention to include the defense of national groups who are not organized into states. (Pp. 145–47.) They propose this novel expansion of “collective self-defense” as a solution to the controversy over humanitarian intervention. Whenever government repression threatens mass death, human decency seems to demand that any other state with the military capacity to do so interfere. Accordingly, several scholars have advocated a right, and even a duty, to intervene to prevent catastrophic human rights violations.<sup>30</sup>

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<sup>30</sup> See Richard B. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 229–51 (John Norton Moore ed., 1974); FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* (1988); Anthony D’Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 *AM. J. INT’L L.* 516 (1990).

Yet international law has never accepted this view.<sup>31</sup> The Charter authorizes unilateral force only for purposes of defense, and authorizes U.N. military intervention only to maintain or restore international peace and security. The United Nations famously failed to intervene against genocide in East Timor in 1975,<sup>32</sup> and in Rwanda in 1994. (Pp. 129–31.) On the other hand, the Security Council was only restrained from condemning Viet Nam's overthrow of the infamous Pol Pot regime by a Soviet veto, and the General Assembly refused to seat representatives of the new government Viet Nam installed.<sup>33</sup> At best, the U.N. has sometimes turned a blind eye to unilateral humanitarian intervention without endorsing it.<sup>34</sup>

International lawyers defend this position with several arguments. First, they argue that state autonomy must take precedence over international human rights, because the authority of international law rests on the consent of states. Second, they point to the humanitarian costs of war: Did the casualties of Saddam Hussein's repression outnumber the casualties of the civil conflict following his overthrow? Third, they argue that if states have discretion to intervene on humanitarian grounds, they will claim such grounds as pretexts. Powerful states like the United States may use force to remove enemies or gain access to strategic resources like oil, while claiming humanitarian motives. At the same time, they may ignore the worst humanitarian crises because they have no interest at stake there. Fourth, sometimes the humanitarian crises used to justify military intervention result from earlier acts of political intervention, such as arming and supporting repressive governments or encouraging secessionist movements.<sup>35</sup>

Fletcher and Ohlin concede that humanitarian intervention as such may not be permitted by international law, but respond that an attack on one national group by members of another is a breach of international peace and that defense of a national group against armed attack is a legitimate defense under the Charter. Fletcher and Ohlin base the status of national groups on the principle of self-determination of peoples, identified as a purpose of the U.N. in its Charter, and recognized as a right in the International Covenant on Civil and Political Rights. (Pp. 136–40.)

This proposal has four difficulties. First, it is by no means clear that the right of self-determination protects national groups. The prevailing view in

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<sup>31</sup> See Brownlie, *supra* note 25, at 217–18; SIMON CHESTERMAN, *JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* (2001).

<sup>32</sup> See ANNE ORFORD, *READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW* 6–37 (2003).

<sup>33</sup> Nehal Bhuta, 'Paved with Good Intentions...'—*Humanitarian War, The New Interventionism and Legal Regulation of the Use of Force*, 25 MELB. U. L. REV. 843, 850–51 (2001) (reviewing SIMON CHESTERMAN, *JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* (2001)).

<sup>34</sup> Franck, *supra* note 12, at 62 (discussing Tanzanian intervention in Uganda, French intervention in Central African Empire and Indian intervention in East Pakistan).

<sup>35</sup> Brownlie, *supra* note 25, at 220–25; see also ORFORD, *supra* note 32, at 6–37.

international law is that the self-determination principle ordinarily entails only a right to majoritarian electoral institutions for populations of states.<sup>36</sup> Self-determination of peoples is usually understood to provide a right to choose secession only for colonial territories.<sup>37</sup> This is a surprisingly difficult category to define,<sup>38</sup> and it is not clear it should be defined by the characteristics of the population rather than those of the territory and its government. For example, it would be reasonable to define Quebec and Catalonia as distinct nations, but odd to define them as colonies. International lawyers would probably ascribe a right of decolonization only to noncontiguous separately administered territories, perhaps acquired by conquest, whose populations lack full representation in their states' governments. There are few such colonies left in the world today and these have generally exercised their self-determination rights to retain their dependent status.

Some scholars favor secession of minority enclaves as a last resort remedy for systematic human rights violations arising from discrimination against the minority.<sup>39</sup> But if a national right of self-determination is just a remedy for human rights violations, the case for intervention in defense of national self-determination is no stronger than the case for any other kind of humanitarian intervention. International law resists a right of national groups to secede for the same reason it resists humanitarian intervention. In a legal system founded on state consent, state sovereignty takes priority over the international obligations of states to their own citizens.

Second, even if the self-determination principle did protect national groups, a right to defend national groups against ethnic violence would leave out some atrocious humanitarian abuses. For example, Pol Pot's destruction of up to one-third of his own nation's population was not motivated by ethnic hatred. Thus, Fletcher and Ohlin's proposed right to defend national groups seems to draw the line between permitted and forbidden intervention in a morally arbitrary place.

Third, Fletcher and Ohlin stress the need for objective criteria for defensive force, criteria that an ideologically diverse Security Council can agree upon. This is their explanation of the Charter's requirement that defense only be exercised against an armed attack. (Pp. 87, 168–69.) Yet they also concede the inherent indeterminacy of the concept of nationality. (Pp. 140, 142.) Is the Security Council equipped to decide which regional populations or ethnic, religious, or linguistic minorities are distinct nations?

Moreover, because nationality is a social concept rather than a jurisdictional one, the concept of *armed attack* against a national group is murky, as well. Unlike a state, a nation has no defined territory that can be invaded or official army that can be fired upon. Suppose that an ethnic minority in a given country is

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<sup>36</sup> See Guyora Binder, *The Kaplan Lecture on Human Rights: The Case for Self-Determination*, 29 STAN. J. INT'L L. 223 (1993).

<sup>37</sup> *Id.* at 236–38.

<sup>38</sup> *Id.* at 243–46.

<sup>39</sup> *Id.* at 246–48.

subject to private discrimination and violence in violation of the country's laws. Some members of the group, dissatisfied with their government's failure to protect them, organize a militia and take control over minority enclaves. The government sends in troops to dislodge them by force. In the course of the fighting, civilian minority members are unintentionally but predictably killed by government troops. Is this "aggression"? Is it an unlawful "armed attack" on a "nation" that would justify defensive intervention?

The difficulty here is not just one of the administrability of the Security Council's test for blessing defensive force. The problem is also conceptual. Fletcher and Ohlin conceptualize their international legal order as a fair regime of cooperation among equal citizens. It is already troubling that these formally equal citizens include states of disparate power and independence. If the citizens of the international legal order now also include social groups without territory, or the ability to fulfill any of the international obligations of states, they are no longer even formally equal. At this point, the metaphor of international society as a Kantian legal order seems stretched to the breaking point.

A fourth problem is that Fletcher and Ohlin's rejection of humanitarian intervention except in defense of nationalities may be at odds with Kant's own views about the conditions required for peaceful international relations. In his essay "To Perpetual Peace," Kant presented international relations as a state of nature, ungoverned by any higher legal authority. Because no state has legal rights against aggression, Kant described this situation as a perpetual state of war. He thought the only security against attack available was a peace agreement. Kant reasoned that republics will make good treaty partners because they are ruled by their populations, who would suffer the casualties and pay the costs of any war.<sup>40</sup> Thus, he concluded, a federation of such republics would be able to establish a stable peace amongst themselves. Only if such a federation became universal, would "perpetual peace" become possible.<sup>41</sup> Based on such reasoning, Fernando Tesón has argued that liberal states may regard dictatorships as posing an inherent threat to their security, and as having no right against intervention. Tesón proposes that liberal states give preference to liberal governments in recognition decisions; and that liberal governments should intervene in illiberal states in situations of civil conflict or massive human rights abuse to set up liberal governments.<sup>42</sup>

Fletcher and Ohlin understandably and sensibly object to pursuing humanitarian aims through aggressive regime change. Yet they base this position on Kantian principle rather than prudence:

. . . No state can assume the authority to dictate policy to another. If some states—those, say, with liberal democracies—were morally

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<sup>40</sup> KANT, *supra* note 1, at 117, 125.

<sup>41</sup> *Id.* at 111–13, 115–18.

<sup>42</sup> See Fernando R. Tesón, *Collective Humanitarian Intervention*, 17 MICH. J. INT'L L. 323, 332–33 (1996); Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 91–93 (1992).

superior to others, they would naturally claim a right to . . . decide when there should be a “regime change” for the sake of human rights or democratic politics. Once the principle of moral superiority is admitted, however, oppressive fundamentalist regimes could plausibly invoke the same principle of intervention to advance their “true religion.” (P. 37.)

. . . Regime change is not a justification for aggression. There might be some who think that the aim of spreading freedom and democracy justifies deposing foreign dictators and staging free elections. But it is hard to avoid the conclusion that these righteous goals are but the modern secular analogue of the just wars of the Christian tradition. (P. 169.)

This is an objection based on the sovereign equality of states in a Kantian legal order. Yet Kant himself saw any possible international legal order as rooted in the voluntary agreement of states; and he saw states as incapable of making credible commitments or fulfilling international obligations unless they were liberally governed. Moreover, it is not clear why an illiberal government should be entitled to exercise international legal personality if it does not represent the will of its people. In supporting intervention only against genocide, Fletcher and Ohlin have offered a plausible answer to what they acknowledge is a tragically difficult line-drawing problem. (P. 147.) It is not obvious, however, how their conclusions follow from their Kantian premises.

### *C. The Illegality of Irregular Defensive Force*

While Fletcher and Ohlin blur the line between states and populations when it comes to victims of unlawful force, they distinguish between official and irregular forces when the question is who can defend those victims. In one of their most interesting chapters, “The Collective Dimension of War,” they pose the hypothetical problem of a Polish farmer who fires on a passing company of invading German soldiers during World War II. They conclude that because he is not part of an organized army, he is not protected by combatant immunity and is guilty of a crime. He is not justified by the fact that he is resisting aggression. (Pp. 180–81.) They add that their analysis would not change if he were a member of a partisan force. (P. 182.)

This is an arresting conclusion. I think many Americans would be surprised at the idea that their right to bear arms would not entail a right to defend their communities against an invading army. Many French citizens would no doubt be outraged to hear the national heroes of the Resistance condemned as murderers. But Fletcher and Ohlin reason that this is the price of Kantian consistency. International law distinguishes the law *of* war from humanitarian law, or law *in* war. The German invasion may be an illegal war, but that would not justify the Polish army in executing German prisoners. Since humanitarian law also protects

civilians from attack by soldiers, Fletcher and Ohlin reason, it should protect soldiers from attack by civilians, even when those soldiers are fighting an illegal war. (P. 181.) Thus, the British Army could come to the aid of the Polish Army, but Polish civilians could not. Fletcher and Ohlin invoke this principal in condemning irregular soldiers as “terrorists,” not only when they target civilians, but also when they battle soldiers. (P. 182.) Yet, they insist that such terrorists are not “illegal combatants” who can be killed in their beds like encamped soldiers (pp. 182–83), or detained indefinitely like prisoners of war, but are simply criminals, who must be tried and punished. (Pp. 181, 183.)

It seems to me their principle of Kantian consistency does not necessarily support their conclusion. It would be just as consistent to treat any civilian who takes up arms against an invading army, whether singly or as part of a partisan group, as a combatant. Such an irregular combatant could be subject to the same risks of battle, humanitarian protections, and legal immunities as any other soldier. Noncombatant civilians would retain all the ordinary protections of humanitarian law.

While there is nothing inconsistent about permitting irregular combatants, Fletcher and Ohlin’s position can nevertheless be defended on instrumentalist grounds. When soldiers are subject to surprise attack from civilians, they tend to dispense with the niceties of humanitarian law. They impose burdensome restrictions on the civilian population, and shoot first and ask questions later. A clear separation between civilians and combatants protects the civilian population from these risks.

On the other hand, it seems oddly inconsistent to say that foreign armies can come to the aid of conquered nations and beleaguered minorities, but that such undefended populations cannot organize in their own defense. After all, the inherent right recognized by the English language text of Article 51 is first and foremost one of *self-defense*. Fletcher and Ohlin would respond that national groups can defend themselves but that populations of conquered states cannot defend their states. They view the threat justifying defense of a national group as a different and more personal one. Intervention in defense of national groups is only permissible when their members’ lives are threatened. This personal threat also justifies their self-defense as individuals. Thus, Fletcher and Ohlin justify the Warsaw ghetto uprising as personal self-defense by Jews against genocide. (P. 180.) They even suggest that if the Polish farmer was Jewish, he would be justified in firing on the German soldiers because of the threat German conquest would ultimately pose to his life. (Pp. 180–81.) Thus, they conclude, irregular combatants can lawfully defend themselves and one another against war crimes; they just cannot defend a state against an illegal war.

Difficulties remain, however. First, given Fletcher and Ohlin’s conception of legitimate self-defense as defense of the legal order open to any actor, there seems no good reason to restrict the right of legitimate defense to those who are *personally* threatened with war crimes. It should suffice that a successful Nazi invasion would predictably subject the civilian population to atrocities to justify

anyone in resisting the invasion. The farmer's religion should not matter, and the heroes of the French Resistance should not be charged with murder.

Second, there is a troubling disparity between Fletcher and Ohlin's justification for intervention in defense of national groups and their justification for self-defense by national groups. By hypothesis, the international community has an interest in state use of force against national groups that overrides national sovereignty and justifies intervention, yet it does not have an interest of similar weight in the human rights of individuals. The distinctively international interest in the defense of national groups is based on their right to self-determination. This argument implies that national groups are worthy of intervention because they have a political status in the international community that individuals do not. An armed conflict with a nation is already an international conflict, not an internal conflict that would be internationalized by intervention. If other states may defend the collective, political interests of national groups, however, why may not national groups do the same? Why may they only defend their lives?

Fletcher and Ohlin's justification for intervention in defense of national groups implies that conquered Poles can reassert their right of self-determination by forming a partisan army to liberate their homeland. By the same logic, it would seem that Palestinians can form irregular forces and assert their self-determination claims to Israeli territory by force, so long as they attack only military targets rather than civilian targets. The logic of Fletcher and Ohlin's argument points toward armed insurgent movements pursuing wars of national liberation. Yet it is hard to see where they would draw the line between such insurgencies and the irregular forces they would condemn as terrorists.

#### *D. The Illegality of Reprisals*

Reprisals have customarily been understood as uses of force by one state against another that would ordinarily be illegal, but justified by three conditions: (1) a prior violation of international law committed by the target state; (2) an unsatisfied demand for redress of the violation; and (3) proportionality between the reprisal and the unredressed violation.<sup>43</sup> A reprisal is retaliatory rather than compensatory; it is in lieu of compensation or other redress. Nevertheless, it is an enforcement sanction, functioning to reassert a claim to a right under international law and to deter its future violation.

Fletcher and Ohlin reject reprisal because, invoking Kant, they deny the authority of equal states to punish one another. (Pp. 41, 57, 90.) States, they reason, may use force to prevent violation of their rights by resisting an ongoing or imminent attack; but they may not use force to punish a past or deter a future attack. They distinguish retributive punishment from mere retaliation, in that retribution expresses authoritative denunciation on behalf of a legal system, rather

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<sup>43</sup> See *Naulilaa incident*, 6 HACKWORTH DIGEST § 19, at 154-55 (report of arbitral decision declaring these criteria for justified reprisals).



than merely resentment on the part of a wronged victim. In a Kantian legal order, they reason, retributive punishment cannot be justly imposed on an *ad hoc* basis at the discretion of private actors, because just law requires the systematic enforcement of rules.<sup>44</sup> (P. 90.) Only the Security Council has the authority to impose punitive sanctions, they conclude, although acknowledging it has done so rarely. (P. 57.)

Thus, Fletcher and Ohlin interpret Kant as rejecting reprisal among equal states, but permitting justifiable self-defense. In fact, however, Kant equated reprisal and self-defense among nations. Because he viewed international society as a state of nature, subject to no higher authority, he viewed *all* state use of force as neither justifiable nor wrongful.

[W]ar is but a sad necessity in the state of nature (where no tribunal empowered to make judgments supported by the power of law exists), one that maintains the rights of a nation by mere might, where neither party can be declared an unjust enemy (since this already presupposes a judgment of right) and the outcome of the conflict (as if it were a so-called “judgment of God”) determines the side on which justice lies. A war of punishment . . . between nations is inconceivable (for there is no relation of superior and inferior between them).<sup>45</sup>

If there is no higher authority to stand in judgment over states, there can be no determinate rights or boundaries, and so every state is a threat to every other. There can be no justifiable self-defense for the same reason there can be no punishment: because without a legal order, there can be no rights to violate. In the state of war that is natural to relations among equal states, force can neither be justified nor condemned.

While Fletcher and Ohlin’s rejection of reprisals receives little warrant from Kant, it is supported by post-Charter international law authority. In the 1949 *Corfu Channel* case, the International Court of Justice (I.C.J.) held that the United Kingdom violated Albanian sovereignty when it proceeded over Albanian protest to clear a section of Albanian territorial waters of mines after an explosion damaged a British ship.<sup>46</sup> Since reprisals were, by definition, justifiable violations of sovereignty, this case does not explicitly condemn reprisal. However, the General Assembly’s 1970 “Declaration on Principles of International Law concerning Friendly Relations” proscribes “acts of reprisal involving the use of force.”<sup>47</sup> In its 1986 Nicaragua case, moreover, the I.C.J. approvingly cited the

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<sup>44</sup> See MURPHY, *supra* note 21, at 117; ROSEN, *supra* note 21, at 89–91.

<sup>45</sup> KANT, *supra* note 1, at 110.

<sup>46</sup> *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 33–36 (Apr. 9).

<sup>47</sup> Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), ¶ 1, U.N. Doc. A/8082 (Oct. 24, 1970).

prohibition on armed reprisals in the Declaration on Friendly Relations.<sup>48</sup> It held that illegal use of force short of armed attack (such as arming insurgents) could not justify the use of force in response.<sup>49</sup>

Yet—as Fletcher and Ohlin acknowledge (p. 57)—reprisals remain a fact of life in international relations, particularly in situations of ongoing conflict such as the Israeli-Palestinian dispute. Such conflicts may be analyzed as low intensity wars. Often these conflicts are interrupted by cease-fires and truces. When one side violates a truce, the other side may reasonably decide on a measured retaliation rather than a full-scale resumption of hostilities, in hopes of prolonging the truce. Although supposedly superseded by the Charter, the concept of a state of war helps make sense of and even justify the continuing custom of armed reprisal.

If Fletcher and Ohlin resist the legitimacy of reprisal, this may be because they reject the idea of war itself as a logical impossibility within a Kantian legal order. Thus, they question the legality of the U.S. invasion of Afghanistan, reasoning that Al Qaeda's September 11 attack against the United States had ended and there was no evidence that invading Afghanistan to destroy Al Qaeda bases was necessary to prevent another imminent attack. They treat past and future Al Qaeda attacks as isolated events rather than episodes in an ongoing transaction. They therefore classify the invasion of Afghanistan as an understandable, but nevertheless unjustifiable, act of retaliation. (Pp. 95–96.) Thus, they also resist the characterization of the 9/11 attack as an *act of war* initiating a *state of war* and entailing a continuing right of self-defense.

#### E. *The Illegality of Preemptive Attack*

Fletcher and Ohlin distinguish sharply between defensive force, i.e., repelling a present or imminent armed attack, and preventive force, i.e., destroying the capacity for such an attack. They endorse the former as permissible and condemn the latter as impermissible. (Pp. 155–62.) They offer as examples of illegal preemptive attack the Israeli destruction of Iraq's Osirak nuclear reactor in 1981 (pp. 159–160, 165), and the Second Gulf War, in so far as it was justified as necessary to prevent weapons of mass destruction from becoming available for use in terrorism or aggression. (Pp. 160, 165–66.)

Fletcher and Ohlin base their position in part on the language of Article 51, which defines the right of self-defense as one against “armed attack” rather than against, say, a “threat to peace and security.” Yet this language could just as easily be read to preclude defense against imminent attack, as when Israel struck first in 1967. Fletcher and Ohlin justify such early defense based on criminal law, which, they point out, generally permits defensive force intended and reasonably necessary to repel overt imminent illegal attack. They acknowledge that the Model

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<sup>48</sup> *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J.14, 101, (June 27).

<sup>49</sup> *Id.* at 127.

Penal Code and many American jurisdictions do not require imminence. (Pp. 163–65.) They also acknowledge that feminist writers have criticized the imminence requirement as a barrier to consideration of battered women’s reasons for killing their physically and emotionally dominant abusers when those abusers are vulnerable rather than during confrontations. (Pp. 164–65.) Yet they ultimately reject the Model Penal Code test and reassert the requirement of imminence for the defensive killing of abusers, as well as for international defensive force. (P. 168.)

Fletcher and Ohlin argue that a requirement of demonstrably imminent attack is necessary in order to provide a bright line test for the international community and the Security Council to use in distinguishing aggressors from defenders. (P. 169.) Moreover, they contend, dispensing with a requirement of actual or demonstrably imminent aggression will encourage warfare. If, they reason, states are free to attack whenever they feel that delay will enable a determined enemy to gain a strategic advantage, then every move made by one rival to strengthen its defenses will justify the other rival in attacking. Under such circumstances, they worry, cold confrontations will be far more likely to develop into hot conflicts. (Pp. 168, 174–76.)

Fletcher and Ohlin argue that a legal regime that permits both belligerents to claim justification is not only imprudent, but also illogical under the Kantian test of universalizability. Fletcher and Ohlin reassert that “[i]nternational law is based on the premise that states are free and equal persons under the law.” (P. 168.) Thus, if one state asserts a right of preemptive defense against its enemy, it must logically afford its enemy the same right. Universalizing a practice of preemptive attack, they reason, would render the “rights” to territorial integrity, political independence, and self-defense worthless.

Based on this logic, Fletcher and Ohlin reject the right of Israel to attack Iraq’s nuclear reactor: “Suppose that Israel were justified in attacking the Osirak reactor; would Iraq also be justified in defending its territory against attack? One would think so. Israel would certainly defend [its reactor at] Dimona against Iraqi incoming warplanes.” (P. 168.) Applying the same logic, they also deny the right of battered women to kill their abusers before an attack is imminent:

[I]t cannot be the case that an abused woman is justified in attacking her sleeping batterer, but if he wakes up under a falling knife, he cannot justifiably act to avoid the assault. This creates exactly the kind of incoherence that bothered Kant. If we universalized this maxim of preemptive intervention at the international level, the result would be a world of total violence . . . . (P. 168.)

In making such arguments, Fletcher and Ohlin isolate preemptive force from a prior context of provoking violence. They treat relations between Israel and Ba’athist Iraq, and between battered women and their abusers, as governed by a rule of law based on formal equality and a monopoly on legitimate force. Yet, as they acknowledge, Israel argued that its preemptive strike on Osirak was justified

by its context within an ongoing state of war. They respond that “there was a de facto armistice, which Israel had unilaterally violated . . . .” (P. 165.)

Kant would not have been persuaded by this rejoinder. In his view, neighboring states naturally share a state of

war, which does not just consist in open hostilities, but also in the constant and enduring threat of them . . . for the suspension of hostilities does not provide the security of peace, and unless this security is pledged by one neighbor to another . . . the latter . . . can treat the former as an enemy.<sup>50</sup>

Indeed, Fletcher and Ohlin admit that Kant “surprisingly, argued in favor of preemptive war, suggesting that any preparation for war represented a shift in the balance of power that constituted an act of aggression.” (P. 156.)

What considerations would have justified Israel in perceiving the “constant and enduring threat” of “open hostilities” and in treating Iraq’s development of a nuclear reactor as an act of war? Let us say, for the sake of argument, that Israel was established to provide the Jewish people security against a demonstrated danger of genocide, on the assumption that the international community could not be relied on for protection. Against this background, Iraq’s refusal to recognize Israel as a state and its expressed commitment to destroy Israel; its past attacks on Israel in stated furtherance of that goal; and its refusal to negotiate peace, gave Israel a vital interest in Iraq’s strategic capability to attack Israel. Under such circumstances, Israel could hardly be expected to rely on the international legal order for protection against a nuclear attack. Nor could it regard its relations with Iraq as governed by an effective rule of law. It is arguably unfair to expect a state to share the burdens of equal citizenship under law when it does not share in the benefits of such a legal order and its enemies do not accept it as an equal citizen.

A similar framework could be used to justify the American invasion of Afghanistan to depose the Taliban regime that had sheltered Al Qaeda’s terrorist bases. If terrorist attacks are connected over time in a campaign, and are explained as a response to irresolvable grievances, and their victims are declared unworthy of the protections of humanitarian law, they bespeak an ongoing threat. They can fairly be interpreted as acts of war.

Not all attacks imply non-recognition in this way. Sometimes violence is a demand *for* recognition, a prelude to negotiation. But attacks that imply non-recognition express an existential threat and announce a conflict of purposes that is non-negotiable. The resulting situation is indeed “a world of total violence” beyond the rule, and often beyond the help, of any law. To respond passively in the face of such an existential threat is to invite destruction. Within a context of continuing violent degradation, any resistance should arguably be accepted as legitimate defense.

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<sup>50</sup> KANT, *supra* note 1, at 111.

If this argument justifies preemptive defense in some contexts of international conflict, perhaps it is portable to some criminal law contexts as well. Perhaps there are contexts where the rule of law fails to protect victims, and where private actors use violence to subordinate victims and express that they are unworthy of the protections of law. A violently imposed status of subordination arguably expresses an existential threat. The oppressor conveys that the victim survives only at the sufferance of the oppressor.

To which contexts might this principle apply? Obviously, a kidnap victim who has been forcibly deprived of her liberty and placed beyond help has a right to use force to free herself, without waiting for an imminent attack on her life. Kidnappings are thankfully rare in the United States. But the same principles of self-defense should apply to immigrant laborers and prostitutes who are held by violence in conditions of slavery. Similarly, if we allow prison violence to reach the point where inmates systematically enslave one other by force, we must grant their victims the right to defend their autonomy. They should not have to wait until they are under overt attack, and should not be forced to rely for their security on a legal order that has abandoned them.

Finally, consider the victim of cyclic domestic abuse, who is degraded, isolated from all help, punished for every expression of independence, and threatened with death.<sup>51</sup> Is she not also consigned to “a world of total violence?” Legal psychologist Charles Ewing has argued that a victim of systematic abuse should be entitled to use deadly force in “psychological self-defense” when abuse so thoroughly degrades her and deprives her of autonomy that her personality is threatened with disintegration.<sup>52</sup> Why should the abuser be protected by the legal order he forbids his victim to access? When private violence creates its own illegitimate dominion, why should not its victims have a continuing right to resist?

### III. CONCLUDING THOUGHTS

Fletcher and Ohlin may fairly respond to my arguments about preemptive force by pointing out that there are many situations of mutual non-recognition in political life. This is often the case in situations of ethnic or religious conflict, or civil war. As Fletcher and Ohlin argue, “Al Qaeda claims to be defending itself against American imperialism; the United States defends itself against Islamic terrorists. The Palestinians defend themselves against Israeli aggression; Israel defends itself against Palestinian terrorism.” (P. 5.) They add that a test that permits both antagonists in such an ideological conflict to attack preemptively foments armed conflict. (P. 168.) And, perhaps it is predictable that militant

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<sup>51</sup> See generally Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991) (offering analysis of abusive relationships as coercive confinement).

<sup>52</sup> Charles Patrick Ewing, *Psychological Self-Defense: A Proposed Justification for Battered Women Who Kill*, 14 LAW & HUM. BEHAV. 579, 581 (1990).

movements whose grievances consist precisely in being denied control over territorial states will use irregular forces against undefended targets.

Within the sphere of social life regulated by criminal law, rival gangs and warring ethnic communities may have similarly antagonistic relationships. Fletcher and Ohlin may therefore object that a right of preemptive defense against an ongoing existential threat will simply authorize the escalation of precisely those bitter conflicts that most threaten peace and security and that a rule of law must suppress. This is a powerful argument, but I think it has somewhat different implications in the settings of criminal law and international law.

Within a Kantian rule-of-law state, the claims of gangs, ethnic communities, or religious cults to territorial jurisdiction and dominion over persons are per se illegitimate. They should not be recognized by the state and may not be defended by individuals. The claims of individuals to autonomy and personal security, however, are legitimate, and individuals should be able to defend themselves preemptively against those who endeavor to use violence to establish dominion over them. A Kantian rule-of-law state is based on the equal citizenship of persons, not groups. In such a state, the claims of individuals to autonomy should not be controversial, and regimes of private dominion enforced by systematic violence should be the exception rather than the norm. A liberal state can afford to grant a privilege of preemptive self-defense to individuals in these (hopefully) rare circumstances. Of course this means that a liberal state must take seriously its obligation to protect the autonomy and dignity of prisoners, prostitutes, illegal immigrant laborers, and victims of domestic abuse.

Within the international sphere, the claims of different communities to self-governing autonomy and to control over resources are inherently contestable. There are no "natural" legal persons in the international sphere. It seems to me that Fletcher and Ohlin concede as much when they insist that nations should have self-defense rights despite their admission that "the *nation* is a confusing concept with inexact boundaries" that has "something to do with 'peoples' and with 'culture' . . ." (P. 137 (emphasis added)) There is no fact of the matter about how many international legal persons should exist, and no guarantee that such legal persons will be—or even should be—remotely equal in size, wealth, power, or independence.

At the same time, if contestation over the existence and recognition of political communities becomes violent, the international legal system lacks the capacity to put a stop to it. The use of force by governments to establish and maintain dominion is not an exception within international society. Instead, the capacity to use such force is largely constitutive of their status as international legal persons. Under these circumstances, violent contestation over the status of political communities is not an exception or an anomaly within an otherwise comprehensive international legal order. Two hundred years after Kant wrote, international society still has not yet achieved the transition from the heroic society of the duel and the blood feud to the rule of law. Under these circumstances,

defensive force is always the defense of status rather than the defense of a legal order that secures the status of all.

Kant thought a community of states could best approximate a rule of law if it confined its membership to pacifically inclined liberal states.<sup>53</sup> There can be no Kantian legal order in the international sphere unless the international community is willing and able to converge on normative criteria for recognizing states and governments, and to enforce these criteria militarily. Moreover, if the social conditions for effective self-government do not exist everywhere, an international rule of law would require international institutions capable of imposing civil order by force and cultivating the conditions for legitimate governance. Even to try to establish an international rule of law before the conditions for self-government have become universal would entail taking on the responsibilities, the contradictions, the collateral consequences, and the casualties of benevolent imperialism. An international rule of law might suppress the use of armed force, but it would take considerable force to establish such a rule of law under current conditions.

Fletcher and Ohlin have persuasively developed the implications of Kantian principles of justice for the international use of force. As things stand, however, international society does not fulfill the conditions for a Kantian legal order. International institutions lack the legislative and executive capacities of the modern state. Indeed, many states still lack these capacities. Under these circumstances fundamental existential conflicts will arise that cannot be neatly sorted into the categories of unlawful attack and legitimate defense. Until this situation changes, we will have to make our peace with states of war.

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<sup>53</sup> KANT, *supra* note 1, at 117, 125.

