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AVOIDING A DEATH DANCE: ADDING STEPS TO THE INTERNATIONAL LAW ON THE USE OF FORCE TO IMPROVE THE SEARCH FOR ALTERNATIVES TO FORCE AND PREVENT LIKELY HARMS

*Brian J. Foley**

I. INTRODUCTION

The world seems engaged in a death dance. In the past two years we have seen a massive terrorist attack that targeted New York City and Washington, D.C., and a response by the United States that included invading Afghanistan and toppling its government.¹ A year and a half later, the U.S. invaded Iraq and toppled its government, based on the argument

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1. Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L.J. 41, 41–42 (2002); *Battle Without Borders: The War on Terror*, WORLD PRESS REVIEW, at <http://www.worldpress.org/specials/wtc/front2.htm> (last visited Sept. 2, 2003).

that Iraq posed a direct threat to neighboring nations and an indirect threat to distant nations, since its government could potentially supply terrorists with nuclear, biological and chemical weapons.²

The wars against Afghanistan and Iraq were either violations of international law or represented a modification of that law through state practice, thereby making it easier for all nations to resort to the use of force.³ Such a modification may be necessary or logical. The world appears increasingly dangerous, given the possibility that terrorist organizations might repeat the horrific level of destruction visited upon the U.S. on September 11, 2001, or perhaps inflict even greater damage with more destructive weapons. On the other hand, if violence begets violence, then we may not be moving toward a peaceful future but dancing toward the precipice of an abyss of lawlessness and violence. We cannot know for certain whether we are setting the stage for a more violent or more peaceful world. However, the presumption in the United Nations Charter and the customary law of self-defense is against using force.⁴

International law controls the resort to and use of force, by either the UN or a single nation. The precise nature of this control, however, is vague. This Article implicitly argues for an understanding of these laws as a three-step process, a clarification that would be a "reform" in and of itself. The three steps are: (1) whether the situation to be addressed falls within the category of situations where force is one of the allowable responses; if so, (2) whether force is a necessary response, that is,

2. President George W. Bush, Speech On Iraq (Mar. 17, 2003), CBS NEWS, available at <http://www.cbsnews.com/stories/2003/03/17/iraq/main544377.shtml> (last visited Oct. 10, 2003); United Kingdom Prime Minister Tony Blair, Address to the Nation (Mar. 20, 2003) BBC NEWS, available at http://news.bbc.co.uk/2/hi/uk_news/politics/2870581.stm (last visited Oct. 10, 2003).

3. Erwin Chemerinsky, *Commentary: By Flouting War Laws, U.S. Invites Tragedy*, L.A. TIMES, Mar. 25, 2003, at B13 (providing a succinct look at this danger).

4. U.N. CHARTER art. 2, 51; Alan D. Surchin, *Terror and the Law: The Unilateral Use of Force and the June 1993 Bombing of Baghdad*, 5 DUKE J. COMP. INT'L L. 457, 473 (1995); Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U.PITT. L. REV. 889 (2002) [hereinafter O'Connell, *Lawful Self-Defense*]; Jack Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J. L. & PUB. POL'Y. 559, 567 (Spring 2002) [hereinafter Beard, *America's New War*].

whether meaningful alternatives to force exist; and, (3) whether the force used as a response complies with the norms of military necessity, proportionality and discrimination. Steps One and Two can be described as concerns of the *jus ad bellum* (the law governing the decision of whether to use force). Step Three contains concerns of the *jus in bello* (the law regulating how force is actually used and how hostilities are conducted).

This Article proposes to modify the laws concerning the use of force by focusing on Steps Two and Three, because these steps can serve, *prospectively*, to prevent the automatic and undisciplined use of force in response to a crisis or attack. That is, once decisionmakers have identified a serious problem that might be addressed with force (Step One), they still must decide whether to use force, as opposed to other means. Step Two, which limits force to when it is “necessary,” implies that a search for alternatives is required. Yet the law provides little guidance for such a prospective search. This Article suggests ways that it can. Of course, it is difficult to “legislate” how many options a decisionmaker must consider, how thoroughly a decisionmaker must consider them, and whether the decisionmaker has to think up any options outside of traditional ones. Nevertheless, to “legislate” such a thinking process is the subject of this Article.

Step Three (*jus in bello*), which controls how force is actually used, such as denoting which weapons and targets are legal and declaring how civilians and prisoners of war are to be treated during hostilities, protects against many of the harms that can result. This Article argues, however, that much of this protection comes too late — after the shooting starts.⁵ Indeed, some of the “protection” comes only after hostilities end, in the form of war crimes tribunals.⁶ Such tribunals do little for those killed, maimed, orphaned, widowed or psychologically damaged by the use of force and do nothing to prevent those damages prospec-

5. Judith G. Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 404 (1993) [hereinafter Gardam, *Proportionality and Force*] (noting that “many of the decisions involving the application of proportionality, “predominately a *jus in bello* concern,” are “taken at the planning stage” of military campaigns).

6. Chris af Jochnick & Roger Normand, *A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 95 (1994).

tively. There may be a deterrent effect,⁷ but prosecution for war crimes is perhaps the exception rather than the rule, and prosecution is selective. Last, enforcement of the *jus in bello* is often left in the hands of the combatants. Prospective consideration of *jus in bello* concerns, before the shooting starts, in the way this Article suggests, could increase international control over and participation in these protections.

This Article explores how such prospective guidance can be implemented at the UN as well as on the national level. This Article also explores how, even without a formal change to the UN Charter, change could occur as a result of practices and recommended interactions between the Security Council, General Assembly, International Court of Justice ("ICJ"), non-governmental organizations ("NGO"), and national leaders.

A. Proactive, "Reforming Attitude" is Necessary for Change

Three phenomena have prevented significant reform of the laws of war, especially the *jus ad bellum*: (1) the belief that nations' resort to war is incapable of regulation; (2) the lack of an enforcement mechanism in international law; and, (3) the doctrines of custom and state practice, which are descriptive tools for determining what the law is. A detailed study of these subjects is beyond the scope of this Article, but a brief discussion shows why proactive reform of the laws should be considered now. The first, the belief that war cannot be regulated, can be dismissed readily. Wars are created by human beings, with identifiable causes, and as such can be regulated.⁸ Wars do not usually erupt like fistfights but require planning. Second, under a robust enforcement mechanism, such as an international court system (or, in the case of the UN, a highly active Security Council), the legality of particular actions would be clarified.⁹

7. M. Cherif Bassiouni, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROB. 9, 18 (1996).

8. YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 71 (Oxford University Press 2d ed. 1994) (1988).

9. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 11-12 (2000). After reviewing a draft of this Article, Judith Gardam opined that many of the changes I propose would likely have come about if there were an enforcement mechanism in international law.

Leaders could look to the law as a guide to avoid negative consequences. Indeed, international law on the use of force would likely develop in the same way that law has developed over time in the Anglo-American common law system, adapting to changed conditions. In such a system, optimistic, would-be reformers might choose not to reform at all, but to wait, believing that, over time, the law will change and even improve. However, one probably waits in vain for such change where there is no enforcement mechanism. For example, in the past two years, the United States has invaded two countries, and the Security Council, the organ of the UN charged with primary responsibility for the use of force, has made no pronouncement on the legality of these wars, despite meeting shortly after each incident and issuing Resolutions concerning, *inter alia*, humanitarian aid and provisional government.¹⁰ Similarly, the Security Council has not remarked on several other uses of force since 1945, including the Vietnam War and the Soviet invasion of Afghanistan; only after seven years did the Council respond to the Iraq-Iran War of 1980–88.¹¹

Instead, the determination of legality has been left to commentators. This is where the third impediment to reform arises. Commentators often focus on whether the particular use of force constitutes state practice or customary law. A pattern has emerged where a nation uses force, and scholars comment *post facto* on whether such use of force was legal.¹² Be-

10. See S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/RES/1483 (2003); S.C. Res. 1476, U.N. SCOR, 58th Sess., 4743d mtg., U.N. Doc. S/RES/1476 (2003); S.C. Res. 1472, U.N. SCOR, 58th Sess., 4732d mtg., U.N. Doc. S/RES/1472 (2003); S.C. Res. 1386, U.N. SCOR, 56th Sess., 4443d mtg., U.N. Doc. S/RES/1386 (2001); S.C. Res. 1383, U.N. SCOR, 56th Sess., 4434th mtg., U.N. Doc. S/RES/1383 (2001); S.C. Res. 1378, U.N. SCOR, 56th Sess., 4415th mtg., U.N. Doc. S/RES/1378 (2001).

11. PETER MALANCZUK, *AKERHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 391 (1997). The Security Council is not required to act in any instance, which has led critics to complain of its "notorious selectiveness." *Id.* at 427.

12. See, e.g., Christopher C. Joyner, *Reflections on the Lawfulness of Invasion*, 77 AM. J. INT'L L. 131 (1984) (discussing legality of 1983 U.S. invasion of Grenada); Gregory Francis Intocchia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE WESTERN RES. J. INT'L L. 177 (1987) (discussing legality of 1986 U.S. bombing of Libya); Ved P. Nanda, *AGORA: U.S. Forces in Panama: Defenders, Aggressors or Human Rights Activists?* 84 AM. J. INT'L L. 494 (1990) (discussing legality of 1989 U.S. invasion of Panama); John Quig-

cause state practice and custom are a source of international law, commentators will often conclude that the exercise of force was legal.¹³ The dangers inherent in such a system are obvious. A nation that is, so to speak, entrepreneurial in using force could thus make each use of force sufficiently different from the previous one, and as such, the legality of the action would always be indeterminate at the time. For example, the country could attack country A for harboring terrorists; attack country B for building weapons of mass destruction; attack country C for repressing its populace; attack country D for encouraging and assisting rebels or terrorists in a neighboring nation; attack country E for spreading deadly industrial pollution to neighboring countries; and so on. Of course, there may be roadblocks along the way to make this slope less slippery, but the potential for such entrepreneurialism nevertheless exists.

Notwithstanding the doctrines described above, there has, of course, been reform in international law. But notably, the major reforms have been proactive. Such was the case with the

ley, *The United States and the United Nations in the Persian Gulf War: New Order or Disorder?* 25 CORNELL INT'L L. J. 1, 23–4 (1992) (discussing legality of 1991 Gulf War) [hereinafter Quigley, *New Order*]; Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537, 554 (1999) (discussing legality of 1998 U.S. missile strikes against al Qaeda); Nigel. D. White, *The Legality of Bombing in the Name of Humanity*, 5 J. CONFLICT & SECURITY L. 27 (2000) (discussing legality of 1999 NATO bombing in former Yugoslavia); O'Connell, *Lawful Self-Defense*, *supra* note 4, at 889 (discussing legality of 2001 coalition invasion of Afghanistan); John Quigley, *The Afghanistan War and Self-Defense*, 37 VALPARAISO U. L. REV. 541 (2003) (same).

13. GRAY, *supra* note 9, at 119.

A few of these commentators seem prepared to treat any US action as a precedent creating new legal justification for the use of force...The lack of effective action against the USA as a sanction confirms them in this view. But the vast majority of other states remain firmly attached to a narrow conception of self-defence.

Id.; DINSTEN, *supra* note 8, at 92–97 (noting that the law does not change so easily, and that there are indeed instances where the law is simply broken instead of refashioned). Concerning the doctrine of custom and state practice, and how it affects the law, see MALANCZUK, *supra* note 11, at 39–48. The seeming illogic of law-breaking as a source of international law is expressed in a comment by former U.S. Attorney General William P. Barr, who opined, “Well, as I understand it, what you’re saying is the only way to change international law is to break it.” John R. Bolton, *Is There Really “Law” in International Affairs?*, 10 TRANSNAT'L L. & CONTEMP. PROBS. 1, 6 (2000).

creation of the UN and the International Criminal Court, both of which have been called “paradigm-shifting.”¹⁴ Regarding the use of force, proactivity and a normative approach are crucial because, as explained above, without them change appears possible only if nations actually go ahead and use force. Moreover, proactive reform is necessary given that these laws seek to *prevent* violence, bloodshed, and misery —“the scourge of war,” as the UN Charter Preamble states.¹⁵

B. This Proposal Fills a Gap in the Scholarship

This Article fills a gap in the scholarship regarding how Steps Two and Three of the law on the use of force can be applied to limit the use of force and the damage that results. There is already significant scholarship with respect to Step One, namely the categorization of situations or events to which force is a legal response. Several commentators argue that the categories of “threat to” or “breach of international peace and security,” “aggression,” and “armed attack” should be more precisely defined, or expanded, to include, *inter alia*, humanitarian intervention, anticipatory self-defense, and responses to terrorism.¹⁶ Indeed, a fairly recent proposal to change the *jus ad bellum* focuses on categorizing which uses of force should be legal and which should be illegal, essentially collapsing what this Article argues should be a three-step process into a single step.¹⁷ Step Two has been the subject of commentary that seeks to water down the requirement of a search for alternatives to force, precisely the opposite of what this Article argues; this commentary will be addressed *infra*, in Section III(A)(3). The *jus in bello*, the subject of Step Three, has been the focus of intense reform

14. See Roger S. Clark, *Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court*, 15 LEIDEN J. INT’L L. 859, 868 n.31 (2002) (noting that International Criminal Court represents a “paradigm shift”).

15. U.N. CHARTER, pmb1.

16. See, e.g., Beard, *America’s New War*, *supra* note 4, at 567; Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1628, 1633 (1984).

17. See ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM 195–202 (1993).

and scholarly commentary since World War II.¹⁸ Yet, the problem in timing as described above persists. The potential of the *jus ad bellum* to prevent harm to the interests governed by the *jus in bello* has been recognized,¹⁹ but precisely how it can do so has not been explored.²⁰ Its potential remains unfulfilled.

Moreover, this Article comes at a time when a broader recognition is forming within the UN that the law on the use of force needs reform. The most prominent recent call for reform has come from UN Secretary General Koffi Annan, who said that the recent U.S.-U.K. war against Iraq, waged without UN approval or control, should occasion reconsideration of the rules on the use of force.²¹

There are several reforms that can be made to international law concerning the use of force: the composition of the Security Council could be changed to reflect current realities; the veto power enjoyed by the Security Council's Permanent Five Mem-

18. See generally Joseph L. Kunz, *The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision*, 45 AM. J. INT'L. L. 37 (1951); Hersch Lauterpacht, *The Problem of the Revision of the Laws of War*, 29 BRIT. Y. B. INT'L. L. 360 (1952); Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical Analysis of the Gulf War*, 35 HARV. INT'L L. J. 387, 412-16 (1994); Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L. J. 49, 95 (1994). See also Michael N. Schmitt, *Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict* 19 MICH. J. INT'L L. 1051 (1998) (discussing how the *jus in bello* will be pressured, and ultimately modified, by technological change) [hereinafter Schmitt, *Bellum*]. The primary example of the significant reform of the *jus in bello* since World War II are the Geneva Conventions.

19. See Judith Gardam, *Legal Restraints on Security Council Military Enforcement Action*, 17 MICH. J. INT'L L. 285, 301-02 (1996) [hereinafter Gardam, *Legal Restraints*] (questioning the separation of the *jus ad bellum* and the *jus in bello* and stating, "It is becoming increasingly apparent, however, that to rely on the *jus in bello* to provide real protection to the civilian population in times of armed conflict is a failure to acknowledge the far greater potential of the *jus ad bellum* to achieve this goal.").

20. Michael N. Schmitt, *The Resort to Force in International Law: Reflections on Positivist and Contextual Approaches*, 37 A. F. L. REV. 105, 107 (1994) ("By contrast [to the *jus in bello*], the *jus ad bellum*, the law which governs resort to force, is relatively unexplored territory.").

21. Dharam Shourie, *United Nations in Need of Fundamental Reform*, at <http://www.rediff.com/news/2003/oct/02un.htm>. See also Press Release, Transcript of Secretary General Kofi Annan Speech to the General Assembly (Sept. 23, 2003), UN Doc. SG/SM/8891, available at <http://www.un.org/News/Press/docs/2003/sgsm8891.doc.htm>.

bers could be eliminated;²² and war crimes could be defined more clearly, perhaps in the new International Criminal Court. Many such changes would be welcomed and should be explored. This Article, however, focuses instead on how the law can be modified so that it may prospectively guide decisionmakers to resort to force less often, by requiring decisionmakers to devise and consider alternatives to force, and by requiring decisionmakers proactively to consider the particular harms that a proposed use of force could cause, and to devise ways to avoid or limit these harms.

II. LEGAL BACKGROUND: UNDERSTANDING THE LAW ON THE USE OF FORCE (*JUS AD BELLUM* AND *JUS IN BELLO*) AS A THREE-STEP PROCESS

International law can be read as detailing a three-step process regarding the use of force: (1) the conflict must fall within one of the categories in which force may be used; (2) there must be a search for alternatives to force; and, (3) any use of force must be disciplined and limited. Indeed, much of the reform for which this Article argues is merely heuristic: recognizing these three steps can help decisionmakers take a prospective, considered and creative approach to determining whether force should be authorized. What follows is a reading of the UN Charter, customary law of self-defense, and agreements such as the Geneva Conventions that reveals this three-step framework.

A. Step One: Does the Problem to be Solved Fall Within a Category Where Force May be a Permissible Response?

Chapter VII of the UN Charter outlines the Security Council's approach to using force, and it can be read as requiring a thinking process. First, the Security Council must "determine the existence of any threat to the peace, breach of the peace, or act of aggression."²³ Such threats or breaches are undefined by the Charter and, presumably, the Security Council has discre-

22. MALANCZUK, *supra* note 11, at 376-77, (noting the unwillingness of permanent members to relinquish their power). *Id.* at 430 (discussing possibility of reforming UN structure).

23. U.N. CHARTER art. 39.

tion in making such a determination.²⁴ Indeed, it has been argued that the Security Council has no limits in this regard.²⁵ However, this discretion should not be seen as unbounded, given that the Security Council is required to “act in accordance with the Purposes and Principles of the United Nations.”²⁶

Thus, Step One is a categorical one: the Security Council must ask if the event or crisis is a “breach of” or threat to international peace and security,” an “act of aggression,” or an “armed attack.” In some cases the categories are clear. For example, a military invasion of a country would be a “breach of international peace and security” and an “armed attack.”²⁷ On the other hand, the leader of one nation burning the flag of another nation, and shouting insults at that other nation on television, would not fall within such a category, and, as such, would not occasion the legal use of force as a response. And then there are gray areas. Is it an “armed attack” when foreign men steer civilian passenger planes into a military headquarters and two privately owned skyscrapers?²⁸ Is the possession of chemical or nuclear weapons a “threat to international peace and security”?²⁹ Is a government’s repression of its own populace,³⁰ or widespread ethnic massacres during a civil war,³¹ or

24. See *id.*; O’Connell, *Lawful Self-Defense*, *supra* note 4, at 905; Schmitt, *Bellum*, *supra* note 18, at 1070.

25. DINSTEN, *supra* note 8, at 282 (Security Council has “carte blanche” in this regard).

26. U.N. CHARTER art. 24, para. 2.

27. See, e.g., S.C. Res. 660, U.N. SCOR, 45th Sess., 2932d mtg., U.N. Doc. S/RES/660 (1990) (Iraq’s invasion of Kuwait a breach of international peace and security).

28. Beard, *America’s New War*, *supra* note 4, at 567 (arguing that September 11 attacks were “armed attacks” despite that relevant Security Council resolutions [1368 and 1373] did not use that term but instead called the attacks “terrorist attacks”).

29. See, e.g., S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (2002) (calling Iraq’s “non-compliance with Council resolutions and proliferation of weapons of mass destruction and long-range missiles” a threat to international peace and security).

30. Such as the situation in Kosovo in 1999, where the Security Council did not act.

31. See, e.g., S.C. Res. 918, U.N. SCOR, 3377th mtg., U.N. Doc. S/RES/918 (1994) (declaring the situation in Rwanda “a threat to peace and security in the region”).

the military coup of a democratically elected government³² a “threat to or breach of international peace and security”? It has been suggested that these gray areas are increasingly seen in black and white, that is, that the Security Council has broadly interpreted its mandate to act under Chapter VII and found many of these gray area situations permitting the use of force in response.³³

On the other hand, an individual nation is afforded no such discretion to use force.³⁴ Nations are required to “confer on the Security Council primary responsibility for the maintenance of international peace and security.”³⁵ Nations are required to settle their disputes “by peaceful means in such a manner that international peace and security, and justice, are not endangered,”³⁶ and are explicitly required to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”³⁷

There is one, limited exception to this rule: self-defense, when a nation may defend itself individually or collectively, “if an armed attack occurs.”³⁸ However, the nation may defend itself only “until the Security Council has taken measures necessary to maintain international peace and security.”³⁹ The nation acting in self-defense must act within strict confines. It may not ignore the authority of the Security Council.⁴⁰ The nation must

32. MALANCZUK, *supra* note 11, at 407 (discussing 1994 Security Council authorization of force to remove the military junta that had overthrown the democratically elected President Aristide of Haiti, but without specific determination that there had been a breach to international peace and security).

33. For a listing of instances that the Security Council has deemed a breach or threat of international peace and security, see Michael Schmitt, *The Sixteenth Waldemar A. Solf Lecture in International Law: Bellum Americanum Revisited: U.S. Security Strategy and the Jus ad Bellum*, 176 MIL. L. REV. 364, 405–07 (2003) (arguing that the Security Council’s discretion to label situations a threat and fashion an appropriate response has been exercised quite creatively) [hereinafter Schmitt, *Bellum Americanum Revisited*].

34. U.N. CHARTER art. 33, para. 1; *id.* at art. 2, para. 3–4.

35. *Id.* art. 24, para. 1.

36. *Id.* art. 2, para. 3.

37. *Id.* art. 2, para. 4.

38. *Id.* art. 51.

39. *Id.*

40. *Id.*

immediately report the measures being taken to the Security Council.⁴¹ Still, the nation itself is often the entity that must determine whether an “armed attack” has occurred such that the nation may defend itself, presumably with force. Usually, this determination is not difficult.⁴²

Further discussion of Step One (determining whether an event falls within a category where force is a permissible response) is beyond the scope of this Article. Perhaps, it would be counterproductive to attempt to limit the Security Council’s ability to address a problem or crisis, because the Security Council has a wide range of possible solutions, not limited to military force, to bring to bear on some of the most pressing crises of the day.⁴³

B. Step Two: Is Force Necessary? The Search for Alternatives

Once inside a category where force is a permissible response, alternatives to force must be explored.

41. *Id.*

42. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), at para. 195. (“In case of individual self-defense, the exercise of this right is subject to the State concerned having been the victim of an armed attack...There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attack...”). *But see* GRAY, *supra* note 9, at 96 (noting “there are disagreements as to what constitutes an armed attack...[because] of cross-border activity by irregular forces...[and] of the special characteristics of particular weapons”).

43. THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 44 (2002) (The Security Council’s expansive view of threats to or breaches of international peace and security to include crises that are arguably national, not international, has not come about

fraudulently or cynically. Rather, the meaning of ‘threat to the peace, breach of the peace, and act of aggression’ is gradually being redefined experientially and situationally ... the global system is responding, tentatively and flexibly, through *ad hoc* actions rather than by systematic implementation, to new facts and threats that are redefining the threshold of what is seen to constitute a threat to peace, requiring a powerful collective response.

Id.

1. The UN Charter Requires the Security Council to Search for Alternatives to Force

Throughout the UN Charter articles that address the use of force by the Security Council, such force is limited to when it is “necessary.” The structure of the Charter as it pertains to the Security Council presents a number of hurdles which must be overcome before force can be used.

Article 41 states that, in dealing with threats to peace and security:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.⁴⁴

The following Article 42 states:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations.⁴⁵

Article 42 requires careful, thorough consideration of — if not actual attempts to implement — the means set forth in Article 41, which can be broadly described as both economic and political sanctions. Military forces can be used “as may be necessary,” but those uses should at first be non-violent, for example “demonstrations” and/or “blockade[s].”⁴⁶ Actual violence ap-

44. U.N. CHARTER art. 41.

45. U.N. CHARTER art. 42.

46. Of course, blockades might need to be enforced with occasional, limited violence, and longstanding and comprehensive blockades can wreak enormous damage, perhaps greater damage in some cases than that caused by the use of armed force. See Joy Gordon, *Cool War: Economic Sanctions as a Weapon of Mass Destruction*, HARPER'S MAGAZINE, Nov. 2002, at 43 (describing effects of UN sanctions on Iraq after the Gulf War and stating that 500,000 Iraqi children under age five are estimated to have died as a result). See also Max Rodenbeck, *The Occupation*, 50 N. Y. REV. OF BOOKS 14 n.2, Aug. 14, 2003 (“The very lowest of many estimates of child deaths between 1990 and 2000, caused

pears to fall under the perhaps euphemistic “other operations,” as defined in Article 42.

Chapter VI, “The Pacific Settlement of Disputes,” supports the argument that the Security Council must try peaceful means before resorting to force, at least when dealing with cognizable, international disputes.⁴⁷ “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a resolution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”⁴⁸ The Security Council “shall, when it deems necessary, call upon the parties to settle their dispute by such means.”⁴⁹ Under this Chapter, the Security Council is also able to investigate international disputes at its own behest,⁵⁰ and nations themselves may bring disputes to the Security Council.⁵¹ However, the text of the Charter is unclear regarding whether these steps, and specifically the dispute resolution steps set forth in Chapter VI, *must* occur before the consideration of military force in Chapter VII. Still, it seems reasonable to assume that they must occur first, given that many disputes could be resolved in this manner.⁵² Nevertheless, the Charter’s suggestion of particular methods of peaceful dispute resolution adds weight to the ar-

by the rise in mortality rates from pre-Gulf War levels, is 100,000”) (citing *Iraq Sanctions: Humanitarian Implications and Options for the Future*, GLOBAL POLICY FORUM (New York), Aug. 6, 2002)).

47. U.N. CHARTER Ch. VI. Indeed, the UN Charter’s drafters’ placing this chapter before Chapter VII, which governs the use of force, adds weight to this argument.

48. U.N. CHARTER art. 33, para. 1.

49. U.N. CHARTER art. 33, para. 2.

50. *See* U.N. CHARTER art. 34.

51. U.N. CHARTER art. 35.

52. That the Chapter VI methods are to be tried before force is authorized is set forth in a pronouncement by the President of the Security Council on May 13, 2003 that,

The Security Council reiterates its commitment to make a wider and effective use of the procedures and means enshrined in the provisions of the Charter of the United Nations on the pacific settlement of disputes, particularly Articles 33–38 (Chapter VI), as one of the essential components of its work to promote and maintain international peace and security.

U.N. SCOR, 58th Sess., 4753d mtg., U.N. Doc. S/PRST/2003/5 (2003).

gument that a meaningful search for alternatives is a required step.

2. The Customary Law of Self-Defense Requires Individual Nations to Search for Alternatives to Force

The Charter provides no specific guidance on what measures a nation under armed attack may take. For that, nations turn to the customary rule of self-defense, known as the *Caroline* Rule: “There must be a ‘*necessity* of self-defense, instant, overwhelming, leaving *no choice of means*, and *no moment for deliberation*’ and the action taken must not be ‘unreasonable or excessive,’ and it must be ‘limited by that necessity, and kept clearly within it.’”⁵³ Thus, force is authorized only where there are no alternatives.⁵⁴ Implicit in the *Caroline* rule is the notion that, if possible, a decisionmaker would have to try any cognizable alternatives unless “they clearly would be futile.”⁵⁵ States must engage in this effort in good faith.⁵⁶

53. MALANCZUK, *supra* note 11, at 314 (quoting Daniel Webster) (emphasis added). This rule was penned by U.S. Secretary of State Daniel Webster in an exchange of diplomatic papers concerning an 1837 incident where British forces crossed the border from Canada and destroyed the *Caroline*, an American ship, in a New York port, because it was being used to assist Canadian rebels against Great Britain. The rule is widely regarded as the “classic” rule on self-defense in international law. *Id.* Of course, there is some controversy over whether the *Caroline* standard is truly customary international law. For a good summary of this discussion, see Michael C. Bonafede, *Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism After the September 11 Attacks*, 88 CORNELL L. REV. 155, 167 n.57 (2002) (concluding that the *Caroline* rule is the customary standard). *See also* GRAY, *supra* note 9, at 105–06.

As part of the basic core of self-defence all states agree that self-defence must be necessary and proportionate...irrespective of the status of the *Caroline* incident as a precedent, necessity and proportionality have played a crucial role in state justification of the use of force in self-defence and in international response.

Id.

54. DINSTEIN, *supra* note 8, at 202.

55. *Id.* (quoting Schachter, *supra* note 16, at 1635).

56. *Id.*

C. Step Three: Can the Harms Caused by the Use of Force be Prevented or Limited?

Once resorted to, force must be used in accordance with the norms of customary international humanitarian law of war, also known as the *jus in bello*.⁵⁷ These norms consist of necessity, proportionality, and discrimination⁵⁸ and apply to the Security Council, nations acting under its authorization, and nations acting in self-defense.⁵⁹

The term “necessity” here means military necessity, that is, force required to accomplish a reasonable military goal.⁶⁰ “Proportionality” limits belligerents in the means that they may use and the extent of the damage which they may cause.⁶¹ “Discrimination” requires distinguishing between combatants and civilians in target selection.⁶² These rules apply regardless of the legality of the war itself.⁶³ The *jus in bello* is concerned with limiting the harms of war, and covers issues such as protecting civilians,⁶⁴ protecting the environment,⁶⁵ protecting cultural

57. O’Connell, *Lawful Self-Defense*, *supra* note 4, at 902–03.

58. *Id.*

59. See, e.g., Gardam, *Legal Restraints*, *supra* note 19, at 312 (applying necessity and proportionality “to the emerging new system of forceful actions involving the Security Council are [sic] not only appropriate but warranted by elementary considerations of humanity”); O’Connell, *Lawful Self-Defense*, *supra* note 4, at 905.

60. O’Connell, *Lawful Self-Defense*, *supra* note 4, at 903 (citing W. Michael Reisman and Douglas L. Stevick, *The Applicability of International Law Standards in United Nations Economic Sanctions Programmes*, 9 EUR. J. INT’L L. 86, 94 (1998)).

61. Gardam, *Proportionality and Force*, *supra* note 5, at 391.

62. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978), art. 51, para. 4 [hereinafter Protocol I].

63. See MALANCZUK, *supra* note 11, at 306 (calling this a “recognized principle” of international law).

64. See, e.g., Protocol I, *supra* note 62, art. 45–58.

65. See, e.g., *id.* art. 55.

treasures,⁶⁶ protecting prisoners-of-war⁶⁷ and prohibiting certain types of weapons.⁶⁸

III. LEGAL REFORM OF STEP TWO (SEARCH FOR ALTERNATIVES TO FORCE) AND STEP THREE (PREVENTING AND LIMITING HARM)

Steps Two and Three fail to guide decisionmakers in the search for alternatives to force and ways to prevent or limit the harms of force. This section shows how the law fails to guide such consideration and then proposes specific ways that the law could be reformed so that it would provide such guidance, first in Step Two and then in Step Three.

A. Reforming Step Two, the Search for Alternatives to Force

This section shows the lack of guidance for the Security Council and individual nations in seeking alternatives to force. It then addresses how current practice and scholarship appear to be limiting, if not eliminating, this required search. The section concludes by offering a set of specific methods that decisionmakers can use to carry out the search for alternatives to force.

1. Problem: Lack of Guidance for Security Council's Search for Alternatives

Based on the discussion above, this much is clear: the UN Charter limits the use of force to instances where it is necessary and encourages the use of pacific means to settle disputes; such settlements can include participation by Member Nations, the Security Council, the UN General Assembly and the ICJ.⁶⁹ Yet, questions linger: Must all of the methods of dispute settlement enumerated in Article 33 be tried? If so, are they the only ones that must be tried? How vigorously must they be tried? How

66. See, e.g., *id.* art. 53.

67. See, e.g., Protocol I, *supra* note 62, art. 44; Geneva Convention Relating to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

68. See, e.g., Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

69. See generally U.N. CHARTER Ch. VI, "Pacific Settlement of Disputes."

thoroughly must a search for alternatives to force be conducted? What standard applies to this search and the decision of whether to apply its results, a “reasonable person” standard (itself often vague, as lawyers know well), or something else?⁷⁰ These questions are unanswered in the law of war; indeed, they are not even explicitly posed.⁷¹ Yet, these questions go to the heart of the thinking process about when force may be used, a thinking process that the law should guide.

The Security Council decides when force is necessary, but there are no formal rules, procedures or proceedings to guide the search for other means, or to determine after the fact whether other means could have been used.⁷² If the Security Council delegates control over armed forces to a nation, or coalition of nations, what level of oversight must it maintain? Must the nations to whom the use of force has been delegated continue to search for alternatives to combat? The law provides

70. See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 434 (Oxford University Press 1968) (1963) (using term “reasonably necessary” in discussing necessity element of self-defense).

71. Nor are these issues addressed fully in the Just War standard, which permits force only as a “last resort.” NATIONAL COUNCIL OF CATHOLIC BISHOPS, *THE HARVEST OF JUSTICE IS SOWN IN PEACE* 5–6 (1993) (“Last Resort: force may be used only after all peaceful alternatives have been seriously tried and exhausted.”). That force may be used only as a “last resort” is akin to the international law concept of necessity. Michael J. Matheson, Conference, *Just War and Humanitarian Intervention: Comment on the Grotius Lecture By Professor Jean Bethke Elshtain*, 17 *AM. U. INT'L. L. REV.* 27–28 (2001). Notably, there is a lack of clarity over how a decisionmaker determines when force is a “last resort.” See George Weigel, *The Just War Tradition and the World After September 11, Pope John XXIII Lecture*, 51 *CATH. U. L. REV.* 689, 712–13 (2002) (arguing that “last resort” must not be read “mechanistically” to require trying, and coming to the end of, a series of non-violent options before force may be used but instead that force is permitted, “where there is plausible reason to believe that non-military actions are unavailable or unavailing”). There appears to be little guidance for the search for non-violent actions, a lack that carries into at least one recent proposal to change Just War theory. See, e.g., PETER S. TEMES, *THE JUST WAR: AN AMERICAN REFLECTION ON THE MORALITY OF WAR IN OUR TIME* 168 (2003) (declaring that the “principle of last resort is pointedly not among the criteria that I suggest we reaffirm...[because] what nations do instead of war — blockades, propaganda campaigns, and restrictions on trade — often create terrible harm among an enemy nation’s civilians while leaving the military and political leadership intact.”). Temes’ argument ignores the possibility of options beyond his description of “what nations do instead of war.”

72. U.N. CHARTER art. 42, para. 1.

little guidance and thus misses an opportunity to protect against the harms that arise from the use of armed force.⁷³

2. Problem: Lack of Guidance for Individual Nations to Consider Alternatives to Force for Self-Defense

The same questions regarding the Security Council's determination of necessity arise when individual nations consider using force in self-defense. What "other means" must be tried, and how diligently must decisionmakers try them? If nations must try non-violent means unless they would prove futile,⁷⁴ how is such futility proved? Self-defense requires that the nation has no time to do anything other than use force.⁷⁵ This is understandable if an attack is in progress, but can the assertion be made that after suffering an armed attack, a nation may exercise the right to defend itself from further possible attacks?⁷⁶ Can this nation then take weeks or months to plan its military campaign?⁷⁷ Can a nation that has not been attacked use force in anticipation of an attack?⁷⁸ To what degree must other options be tried first?

Furthermore, when a single nation acts unilaterally, the need for control over the use of force seems greater than when the Security Council uses force, because the search for solutions is likely truncated by lack of input and perspective. The decision-making group in such cases is likely small and in many ways homogeneous, and there is a risk that it might engage in "groupthink."⁷⁹ After an attack, decisionmakers might be un-

73. Of course, the Security Council itself can bolster its procedures to ensure that force is used only as a last resort. Notably, in the Resolution the Security Council issued concerning Iraq on November 8, 2002, the Council stated that should Iraq fail to comply with the new demands for weapons inspections, the Council would convene to decide what measures to take; there would be no automatic use of force. S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg., U.N. Doc. S/RES/1441, at para. 12 (2002).

74. See *supra* note 55.

75. See Bonafede, *supra* note 53, at 170.

76. MALANCZUK, *supra* note 11, at 311–14 (describing the controversy over anticipatory self-defense).

77. See Bonafede, *supra* note 53, at 170 (noting "considerable dispute" over how long this right to use force in self-defense lasts).

78. MALANCZUK, *supra* note 11, at 311–14. See *supra* note 76.

79. RICHARD L. JOHANNESSEN, ETHICS IN HUMAN COMMUNICATION 154 (5th ed. 2002) ("'Groupthink' is the collective label used by social psychologist Ir-

able to convene or communicate with one another, or unable to think clearly if the attack was surprising or shocking. The decisionmakers may be influenced by political concerns, such as public demands for revenge, or the fear that if they take a quiet, behind-the-scenes approach, they will appear indecisive or passive.

3. Problem — and a Brief Comment: The Required Search for Alternatives is Not Carried Out in Practice, and Some Commentators Argue for its Elimination

Step Two (the search for alternatives to force), appears to be skipped in practice. For example, the U.S.-led coalition waged the 1991 Gulf War under authority of Security Council Resolution 678, which authorized “all necessary means” to eject Iraqi troops from Kuwait.⁸⁰ Force was used, but there was never an explicit finding by the Security Council that military force was necessary.⁸¹ It has been noted that the inclusion of the phrase “all necessary means” in the resolution was understood to authorize the use of force.⁸² Arguably, this eliding of a search for alternatives violated Article 42,⁸³ but the fact remains that nei-

ving Janis to describe characteristics of small groups whose process of problem solving and policy determination typically result in ineffectiveness, low quality decisions, and failure to obtain objectives.”)

80. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., at para. 2, U.N. Doc. S/RES/678 (1990).

81. Quigley, *New Order*, *supra* note 12, at 23–24.

82. GRAY, *supra* note 9, at 153 (“It is clear from the Security Council debates that this formula was understood to mean the use of force.”); Quigley, *New Order*, *supra* note 12, at 3–4 n.14 (same, citing worldwide news accounts of deliberations).

83. Quigley, *New Order*, *supra* note 12, at 23–24.

In failing to call for military force in explicit terms, the Council played loose with the Article 42 requirement of an express finding of the need for military force...For the state that is the object of such action, the consequences can obviously be devastating. If the Council is to take such action, it must address it directly and decide explicitly that it is necessary. It may not conceal such a momentous decision in metaphorical language. Stipulating that states might take ‘all necessary means’ is too imprecise an authorization for war.

Id. But see DINSTEIN, *supra* note 8, at 291, 295 (arguing that the 1991 Gulf War was authorized as collective self-defense under Article 51 and that Article 42 has never been invoked by the Security Council). Nevertheless, if the coali-

ther that article nor the rest of the UN Charter is clear on how express the finding of “necessity” must be, how the Security Council is to arrive at this finding, or how the Council is to show that the finding was made.⁸⁴ Indeed, there is a danger that the word “necessary” may be taking on a talismanic role, devoid of its usual meaning. That is, the Security Council’s conclusion that a state may take “all necessary means” may be seen as approval for using force — rather than requiring the search for and exhaustion of alternatives implied by the word “necessary.”⁸⁵

Some international law commentators have suggested *eliminating* the requirement that force be used only when “necessary” in the struggle against terrorism, to give nations, especially the U.S., an expanded right to use force internationally.⁸⁶

tion was acting under Article 51, its use of force would be limited by necessity and proportionality. *See supra* Part II.B.2.

84. Malaysia complained that Resolution 678 contained no requirement that the Security Council actually permit force. Quigley, *New Order*, *supra* note 12, at 24–25.

85. GRAY, *supra* note 9, at 153 (discussing use of “necessary” in Resolution 678 and noting, “The same (or similar) euphemistic formula has been used in almost all of the subsequent [Security Council] resolutions authorizing the use of force by states.”).

86. Beard, *America’s New War*, *supra* note 4, at 585–86 (2002). Beard simply skips over any requirement of necessity and dismisses the *Caroline* rule — stated *supra*, at Part II.B.2 — by saying, “some writers are fond of citing [the *Caroline* rule].” Beard also adds that “[s]uch a strict and self-defeating version of necessity expansively based on the *Caroline* test does not appear to be consistent with the right of self-defense under customary international law and has been vigorously opposed by a number of writers, particularly in the context of fighting terrorism.” *Id.* *See also*, Alberto Coll, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 AM. SOC’Y INT’L L. 297, 302 (1987) (arguing that the *Caroline* standard should not apply to terrorist threats); Sean D. Murphy, *Terrorism and the Concept of ‘Armed Attack’ in Article 51 of the U.N. Charter*, 43 HARV. INT’L L.J. 41, 50 n.57 (2002) (“Addressing the customary international law constraints relating to necessity and proportionality is outside the scope of this Essay.”). But the Author appears to extinguish the requirement of necessity when asking,

Can the United States possibly be expected not to respond to the source of such actions through resort to proportionate military force? While the desire to minimize the trans-boundary use of military force is central to contemporary world order, international rules that preclude a state from responding forcibly to extraordinary threats to its fundamental security interests — indeed, perhaps when ‘the very survival of a State would be at stake’ — are destined not to endure.

To allow for this expansion is illogical, because the goal for which force is used should not alone dictate whether force can be used. One terrorist target might be dealt with more effectively with force than another. For example, force might be effective against a terrorist training camp, yet ineffective, or even counterproductive, if used against a nation where terrorists are known to live among unwitting or subjugated civilians, or among civilians who share their political views. So legalizing the use of force against "terrorists" or "terrorism" is inappropriate, because not only might force be unnecessary, but it could actually exacerbate the situation by breeding more terrorism. Terrorists might fight back, but not against the soldiers who are destroying their camps. They (or their allies, family or friends) might plant bombs in the capital of the country that dispatched troops to destroy the camps.⁸⁷ In any given case, there may well be other, more effective, and less destructive, options.⁸⁸ Catego-

Id. Advisory Opinion 95, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 266 (July 8); William V. O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterror Operations*, 30 VA. J. INT'L L. 421, 471 (1990) (arguing that with the advent of terrorism, particularly in the context of Israel's war with the Palestinian Liberation Organization, the "interpretation of necessity is very different from that in a singular incident along the U.S.-Canadian border"); Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 96-97 (1989) (*Caroline* rule "exaggerates the test of necessity in a situation where the issue was dicta... [and] when war was still a permissible option for states that had actually been attacked").

87. The efficacy of military force against terrorism has been questioned, recently by UN Secretary General Kofi Annan. *World Leaders Meet in NY for Counterterrorism Conference*, CHANNEL NEWSASIA, Sept. 23, 2003.

We delude ourselves if we think that military force alone can defeat terrorism. It may sometimes be necessary to use force to counter terrorist groups but we need to do much more than that if terrorism is to be stopped. Terrorists thrive on despair. They may gain recruits or supporters where peaceful and legitimate ways of redressing a grievance do not exist.

Id. Also, it appears that the U.S. military action in Afghanistan has not succeeded in defeating or meaningfully weakening Al Qaeda. See e.g., Faye Bowers, *Al Qaeda May be Rebuilding*, CHRISTIAN SCIENCE MONITOR, May 5, 2003, LEXIS-NEXIS Library; David Johnston, *C.I.A. Puts Risk of Terror Strike at 9/11 Levels*, N.Y. TIMES, Oct. 18, 2002, at A1.

88. For a creative, wide-ranging, general list of ways to combat terrorism, see United Nations Office for Drug Control and Crime Prevention, *A Classification of Counter-Terrorism Measures*, available at http://www.undcp.org/terrorism_measures.html (last visited Aug. 25, 2003).

rization risks that decisionmakers will focus on the wrong questions, diverting inquiry from alternatives to using force or the effectiveness of using force. For example, instead of asking, "Are the people we want to kill 'terrorists'?", decisionmakers should ask, "How can we accomplish this goal (e.g., defeating terrorists, preventing genocide, etc.) without using force?" The latter question may well lead to different, and better, answers. Indeed, the arguments that legal strictures on use of force should be loosened to deal with terrorism show why these strictures need to be kept tight, especially during crises, where emotions can outrun common sense and clear thinking.

There is no foundation in law, either, for loosening the necessity requirement in dealing with terrorism. Notably, there is no agreed-upon definition of terrorism in international law.⁸⁹ Therefore, to allow nations to use force against terrorists would place too much discretion in the hands of national leaders in an area of law that seeks to limit such discretion; under the UN Charter, nations pledge to place primary control over the use of force in the Security Council.⁹⁰ It would not necessarily reduce terrorism, but it would almost certainly result in an overall increase in the use of force, and its attendant miseries, which would contravene the UN Charter values of peace and security.⁹¹ Furthermore, eliminating the necessity requirement here

89. Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L. J. 145, 181 (2000) (nothing that there is no definition of "terrorism" in international law).

90. U.N. CHARTER art. 24, para. 1. It is likely that ignoring necessity as a legal requirement could simply be aggressive "lawyering" on behalf of the U.S. This explanation cannot be readily dismissed when the commentators are U.S. government officials. For example, Jack Beard, when he wrote his article cited *supra* note 4, was Associate Deputy General Counsel (International Affairs), U.S. Department of Defense; Abraham D. Sofaer, cited *supra* note 86, was a Legal Adviser to the U.S. Department of State from 1985–1990; and Alberto R. Coll, cited *supra* note 86, was Secretary of the Navy Senior Research Fellow, U.S. Naval War College.

91. See U.N. CHARTER pmbl. See also W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279 (1985). Professor Reisman sees the danger that such categorization poses for UN Charter values. He lists nine categories where there appears to be "varying support for unilateral uses of force," but cautions, "[m]erely locating an individual use of force in a particular category does not mean that it is lawful." *Id.* at 281–82. Professor Reisman suggests using as a guiding principle the question, "Will a particular use of force, whatever its justification otherwise, enhance or

is an avoidance of law, in the sense of due process, as such action appears partially grounded in a desire to punish terrorists.⁹² Whenever possible, terrorists should be dealt with through the existing legal system, national or international.⁹³

This categorical approach ultimately amounts to an attempt to use the ends to justify the means.⁹⁴ And, in the international law concerning the use of force, the means matter. If a goal can be accomplished without the use of force, then force should not be used. The inquiry into non-violent means is thus a crucial component of this area of law, and the law should give more, not less, guidance for it. It is to such a reform that this Article now turns.

4. A Solution: Requiring Decisionmakers to Engage in Thinking Techniques that Can Improve the Search for Alternatives to Force

The interest of this Article lies in the thinking and questioning that go to the heart of the decision-making process regarding the necessity of force in a particular instance, questions that can lead to reasonable alternatives to force and prevent its use in the first place. As a norm, some search for alternatives must be undertaken, and that search must be conducted with creativity and with a good faith effort to avoid the use of force, not to seek justification for it.

An initial difficulty is defining “good faith” and “creativity” in this instance. This difficulty can be overcome, at least in part, by recognizing that the search for other means is obligatory, and that it is the embodiment of the purposes and principles of the UN Charter to avoid war.⁹⁵ The difficulty may also be over-

undermine world order?” *Id.* at 282. This Article suggests specific criteria along lines similar to Professor Reisman’s guiding principle, as well as ways to guide decisionmakers to discover alternatives to force. *See infra* III.A.4., III.B.2.

92. *See, e.g.,* Coll, *supra* note 86, at 299 (“There are three general purposes behind military responses to terrorism: long-term deterrence, short-term prevention, and punishment.”).

93. *See* O’Connell, *Lawful Self-Defense*, *supra* note 4, at 904–06.

94. *See* Judith G. Gardam, *Noncombatant Immunity and the Gulf Conflict*, 32 VA J. INT’L L. 813, 836 (1992) [hereinafter Gardam, *Noncombatant Immunity*].

95. U.N. CHARTER, pmbl.

come by requiring strict adherence to the capabilities and tools that already exist in the UN to help resolve disputes.⁹⁶ These tools could also be improved, and disciplines and practices such as conflict resolution, conflict prevention and preventive diplomacy could be made the rule instead of the exception.⁹⁷ These tools can work, if tried.⁹⁸

Another improvement would be to require decisionmakers to follow specific guidelines or answer specific questions that help them find and consider alternatives, as well as requiring decisionmakers to explain why particular alternatives were not, or are not being, tried. In the UN Security Council, for example, committees could be formed to seek alternatives to the use of force, perhaps in consultation with appropriate experts. Such committees could be required to conduct this search before any actual use of force is authorized. In times of peace, such committees could be encouraged to address hypothetical crises for the purpose of creating documents, studies, or commentary to the laws of war that would provide examples that can be turned to, examined, and perhaps applied in times of conflict.

The Security Council should “judicialize”⁹⁹ its decisionmaking, i.e., show the thinking behind its conclusions regarding the use of force. The Security Council could be required to prepare a document on the necessity of the use of force in a particular instance.¹⁰⁰ Legitimate use of force may be proven by show-

96. For a clear explanation of this and other methods, see KEITH SUTER, *ALTERNATIVE TO WAR: THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES* (1st ed. 1986).

97. See LOUIS B. SOHN, *BROADENING THE ROLE OF THE UNITED NATIONS IN PREVENTING, MITIGATING OR ENDING INTERNATIONAL OR INTERNAL CONFLICTS THAT THREATEN INTERNATIONAL PEACE AND SECURITY* 5–6 (Int'l R. of L. Center Occasional Papers, 2d Ser., No. 1, 1997).

98. See MALANCZUK, *supra* note 11, at 430 (“In the final analysis, the effectiveness of the United Nations depends on the willingness of member states to cooperate, and no amount of changes in the structure of the United Nations will guarantee its effectiveness” without cooperation.).

99. I am grateful to Professor Kevin Boyle of the University of Essex for using this term to describe my presentation of this idea at the *International Symposium on Terrorism and Human Rights*, sponsored by the Cairo Institute for Human Rights Studies, Cairo, Egypt, January 26–28, 2002. At that time Professor Boyle was serving as Senior Adviser to the UN High Commissioner on Human Rights.

100. The Security Council is not required to act in any instance. MALANCZUK, *supra* note 11, at 427. Nor is it required to give any basis for its

ing that there were no reasonable alternatives, and that force actually would be effective in achieving the desired outcome or goal.¹⁰¹ Such a document could be styled as findings of fact and conclusions of law, as used in the U.S. legal system. This “opinion” could be required for all uses of force within and without formal Security Council control, such as where the Security Council authorizes a coalition of member nations to use force, as in the 1991 Gulf War;¹⁰² where the Security Council has not participated at all, as in the 1999 NATO air strikes in the former Yugoslavia;¹⁰³ where the Security Council has not authorized force, as in the 2003 invasion of Iraq;¹⁰⁴ or, where a nation acts under a claim of self-defense, as in the U.S.-led invasion of Afghanistan in 2001.¹⁰⁵ Such a document could be required even after the fact, if time constraints made it impossible or unduly burdensome to write it before force was used. This process would provide at least some oversight and create examples for future reference.

Added to all of the tasks of the Security Council or other decisionmakers could be the encouragement or even requirement to

reasoning in a particular situation, as it is a political, not a judicial, body. DINSTEN, *supra* note 8, at 207, 282, 304–08.

101. Effectiveness is part of the determination of necessity. Lobel, *supra* note 12, at 554.

102. See S.C.Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (1990).

Authoriz[ing] Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991, fully implements, as set forth in paragraph 1 above, the foregoing resolutions, to use all necessary means to uphold and implement resolution 660 [requiring Iraqi forces to withdraw from Kuwait] and all subsequent relevant resolutions and to restore international peace and security in the area.

Id.

103. White, *supra* note 12, at 41–42.

104. Although the Security Council did not authorize the U.S.-U.K. invasion of Iraq, the Security Council has not made an authoritative statement or passed a resolution declaring whether the invasion violated the UN Charter or other international law.

105. The Security Council did not specifically authorize military action against Afghanistan following the attacks of September 11, 2001. Nor did it declare that the U.S.-led coalition violated the UN Charter when it invaded that country. See S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001); S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001).

use “creative problem solving,” a method of problem-solving where one defines the problem, generates a wide variety of possible solutions and then, using reason and experience, chooses the best among them.¹⁰⁶ A characteristic of competent problem-solving (as well as critical thinking) is asking the right questions.¹⁰⁷ For example, in generating solutions, one might repeatedly ask, “What else might we do here?” To guide that inquiry, one might also ask, “How can we see this problem as an opportunity to address the needs of a wide spectrum of people and constituencies?” To generate answers, one would use an array of thinking techniques and methods, both traditional and innovative, all of which can be taught and learned.¹⁰⁸ It may be difficult to come up with alternatives to force, but it is possible, especially if many people with relevant and broad experience are included in the process.

106. “Creative Problem Solving,” which employs this method, is a growing movement in U.S. legal education and beyond. This method has been described as follows:

Creative problem solving is an evolving intellectual discipline that requires lawyers to define problems so as to permit the broadest possible array of solutions, both legal and non-legal. Creative problem solving seeks many points of view, and systematically examines problems for their relational implications at the individual, institutional and societal levels. It seeks a caring approach and solutions that are imaginative or transformative in nature.

Creative Problem Solving Offers Hope...and Solutions, RES ISPA: THE MAGAZINE OF CALIFORNIA WESTERN SCHOOL OF LAW, at 2 (Winter 1999) (quoting Janeen Kerper, Professor and Academic Director, McGill Center for Creative Problem Solving, California Western School of Law, San Diego, California). The following is a step-by-step description of creative problem solving from a workbook that teaches the process: Exploring the Problem; Establishing Goals; Generating Ideas; Choosing the Solution; Implementing the Solution; Evaluating the Solution. ROBERT A. HARRIS, CREATIVE PROBLEM SOLVING: A STEP-BY-STEP APPROACH (2002).

107. See HARRIS, *supra* note 106, at 37–46. See also JOSINA M. MAKAU & DEBIAN L. MARTY, COOPERATIVE ARGUMENTATION: A MODEL FOR DELIBERATIVE COMMUNITY 16–18 (2001) (importance of questioning to critical thinking).

108. See generally *e.g.*, JAMES L. ADAMS, CONCEPTUAL BLOCKBUSTING: A GUIDE TO BETTER IDEAS 1–3 (1985 3d ed.); EDWARD DE BONO, DE BONO’S THINKING COURSE (1985). These are but two of some of the outstanding leaders, and books, in the field. The Security Council could be trained to use such techniques. Such training is in fact regularly provided by consultants to high level management of large corporations and other institutions, particularly elite ones. See Jay Cocks, *Let’s Get Crazy!: Creativity is the Buzz Word as Companies Try to Spark Daring New Ideas*, TIME, June 11, 1990, at 40.

The following are examples of questions that decisionmakers could be required to ask and answer when they are considering whether the use of force is necessary:

Defining the problem:

- (1) What is the threat or harm to be limited?
- (2) What is/are the precise goal(s), and what value(s) are sought to be achieved and vindicated?

Process:

- (3) What cognitive techniques or methods can we use to find possible solutions?
- (4) Who outside of the decision-making group should be involved in this search for alternatives?
- (5) What facts are needed?
- (6) What are some possible solutions? Will they work? Why/why not?

Effectiveness:

- (7) What are the best ways to achieve the goal and vindicate the value? (Attitude is important. For example, the question is not, "Can we use force?" but, "*Must* we resort to force, and how can we avoid using force?")
- (8) What are the *short term* costs and benefits of each possible solution? Are there ways to increase benefits and limit costs? Will our goal be met in the short run? The short term can be broken into specific terms: one week, one month, two months, etc.
- (9) What are the *long term* costs and benefits of each possible solution? Are there ways to increase benefits and limit costs? Will our goal be met in the long run? The long term can be broken into specific terms: six months, one year, two years, etc.
- (10) What is the likely response by the target nation? Will the nation fight back? If it fights back, will it respond with force — conventional or "asymmetrical," i.e., terrorism? Is the target allied with other forces that might fight back regardless of the response by the target, thus increasing overall violence?

Of course, these questions can be refined, but should serve as starting points for reform. Some of these questions may be unanswerable to a reasonable degree of certainty in some situa-

tions. Finding answers will be more likely if the Security Council's ability to conduct fact-finding in given instances is improved.¹⁰⁹ Before discussing further how to implement this set of questions into the Security Council's decision-making process, this Article turns to reforming Step Three.

B. Reforming Step Three, Limiting Harm

1. Problem: Bad Timing — Step Three Fails to Protect Against Likely Harms

There is a temporal gap between the *jus ad bellum*, the law on *when* a nation or the UN may resort to force, and the *jus in bello*, the law on *how* a nation or the UN may use force, that is, how it may conduct a war.¹¹⁰ In other words, Steps One and Two are taken before force is used, and Step Three is not taken until force is being used. This gap can be deadly. Military strategies, weapons and tactics are often developed and implemented before a decision has been reached as to whether they are legal (in the *jus in bello*).¹¹¹ Moreover, the legality and practical effects of new developments in weapons or strategy are not considered as part of the decision of whether to authorize force.¹¹² For example, Resolution 678 authorized Member Nations to use "all necessary means" to eject Iraqi troops from Kuwait in the 1991 Gulf War.¹¹³ The Security Council appears to have been unaware of the coalition's plans to target civilian water purification plants and the electrical grid in Iraq, argua-

109. John Quigley, *Security Council Fact-finding: A Prerequisite to Effective Prevention of War*, 7 FL. J. INT'L L. 191, 193 (1992) (arguing that "the Security Council's fact-finding capability is inadequate, and that more active fact-finding is needed so that the Council can make rational decisions about breach of the peace complaints.").

110. See Gardam, *Proportionality and Force*, *supra* note 5, at 397.

111. Gardam, *Noncombatant Immunity*, *supra* note 94, at 836 ("This is not unusual for the law of armed conflict, where its provisions always lag behind new developments in warfare. As soon as one method of warfare is regulated, another is revealed."); Schmitt, *Bellum Americanum Revisited*, *supra* note 33, at 418–19 (2003) (considering "cyber operations" as an example of a rapidly evolving technology which may be used militarily although the legality of such practices is yet to be determined).

112. U.N. CHARTER arts. 39–42.

113. U.N. S.C. Res. 678, U.N. Doc. S/RES/678 (1990).

bly an attack on Iraqi civilians violating the *jus in bello*.¹¹⁴ The Security Council may also have been unaware of the likely extent of civilian casualties.¹¹⁵ Planners believed that 2,000 would perish,¹¹⁶ when by some counts, many times that number were killed.¹¹⁷ After the war, the Security Council was silent about the extent of this destruction in Iraq, which was arguably not “necessary” to the process of ejecting Iraqi troops from Kuwait.¹¹⁸

The law concerning the decision to use force also neglects to address other, non-military harms that can occur as a result of war planning.¹¹⁹ For example, knowledge that the U.S. would attack Afghanistan after September 11, 2001 led many Afghans to flee to the mountains where they lived in refugee camps and risked starvation.¹²⁰ Additionally, in preparation for that war, U.S. officials cut deals with various nations for fly-over and basing rights; some of these nations, such as Uzbekistan, Turkmenistan and Tajikistan, were already notorious

114. See, e.g., Quigley, *New Order*, *supra* note 12, at 19 n.112 (1992) (arguing that these attacks violated Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, which prohibits “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”). See also Gardam, *Proportionality and Force*, *supra* note 5, at 404 (“[m]any of the decisions involving the application of proportionality would have been taken at the planning stage of the campaign” in the Gulf War).

115. Quigley, *New Order*, *supra* note 12, at 19 (arguing that “the damage to civilian objectives as assessed by the UN team was too extensive to be excused as inevitable damages incidental to lawful targeting”).

116. *Id.* at 19 n.112 (citing BOB WOODWARD, *THE COMMANDERS* 341 (1991)).

117. The number of Iraqi civilians killed in the Gulf War is notoriously hard to pin down. Estimates of the number of civilians killed ranged from 5,000 – 15,000 during the war, and 4,000–6,000 afterward, from lack of medical care for wounds or malnutrition. George Lopez, *The Gulf War: Not so Clean*, 47 BULLETIN OF THE ATOMIC SCIENTISTS 7 (Sept. 1991). CNN.com, in its “Gulf War Facts,” notes simply that “[a]ccording to Baghdad, civilian casualties numbered more than 35,000,” at <http://www.cnn.com/SPECIALS/2001/gulf.war/facts/gulfwar/> (last visited Aug. 20, 2003).

118. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (1990). See Quigley, *New Order*, *supra* note 12, at 19.

119. U.N. CHARTER arts. 39–42.

120. *Mass Migration from Afghanistan*, S. F. CHRONICLE, Sept. 25, 2001, at A1 (“A U.N. official called the mass migration within Afghanistan and across its borders ‘the worst humanitarian crisis in the world.’”).

abusers of human rights.¹²¹ In some cases the presence of U.S. and other foreign troops exacerbated the risk of protests and resistance among citizens, which led leaders to further repress their populaces.¹²² The law of war should address such consequences of war-planning.

Another limitation of the *jus in bello* is that, in general, these rules are enforced by the belligerents themselves, as there is generally no third party to referee the fighting. International control, if any, comes later, in the form of war crimes tribunals.¹²³ However, such tribunals are rare, and those who commit war crimes often go unpunished.¹²⁴ Prosecution is also selective. For example, it is unlikely that there will be international tribunals to try U.S. soldiers for alleged war crimes in Afghanistan or Iraq.¹²⁵ Indeed, U.S. leaders fought against the efforts of other nations to include U.S. military personnel and political leaders under the jurisdiction of a new, permanent international tribunal, the International Criminal Court, which came into effect on July 1, 2002 and which has jurisdiction over war crimes and crimes against humanity.¹²⁶

121. *America's Central Asian Allies*, N.Y. TIMES (editorial), Oct. 2, 2001, at A24. These are rights that the UN Security Council can simply require, but for which a nation acting unilaterally must negotiate. U.N. CHARTER art. 43, para. 1.

122. See *For Whom the Liberty Bell Tolls*, THE ECONOMIST, Aug. 31–Sept. 6, 2002, at 18 (detailing widespread reduction (legitimate and illegitimate) of human rights by governments worldwide under the color of anti-terrorism after September 11, 2001). See also Nick Paton Walsh, *US Looks Away as New Ally Tortures Islamists: Uzbekistan's President Steps up Repression of Opponents*, THE GUARDIAN (London), May 26, 2003, at 13; Craig Skehan, *Afghan War Sparks New Repression In Kyrgyzstan*, THE AGE (Melbourne), Sept. 28, 2002, at 18.

123. Bassiouni, *supra* note 7, at 9, 18 (arguing that this post hoc justice can have a deterrent effect, which can help “the pursuit of peace”).

124. *Id.* at 11.

125. For example, no international tribunal has been formed concerning an alleged atrocity that may have involved U.S. and Northern Alliance soldiers. Babak Dehghanpisheh et al., *The Death Convoy of Afghanistan*, NEWSWEEK, Aug. 26, 2002, at 20. An international forum is not only important to vindicate the rights of victims, but it is also important to vindicate soldiers, and their sponsoring nation, who may have been wrongly accused of a war crime.

126. For a sometimes humorous account of the U.S. antipathy toward the ICC, see Lauren Comiteau, *The International Criminal Court: In Dutch with America*, CHIC. TRIB., July 22, 2002, at C1.

Finally, because international control over war-planning is lacking, there is a risk in the case of self-defense that national leaders will be ill-equipped to decide whether to apply force, because they lack both perspective and information. For example, according to an ICJ opinion, the proportionality requirement for self-defense may be interpreted to permit the use of nuclear weapons “in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.”¹²⁷ But how “extreme” must the circumstances be? That is, what would count as threatening “the very survival of a State”? There is a risk that national leaders might overcompensate in the fog and stress of an attack.¹²⁸

2. A Solution: Requiring Decisionmakers to Consider Likely Harms, and Ways to Prevent or Limit Them, as Part of the Determination of Whether to Authorize Force

How decisionmakers intend to use force should be considered in determining *whether* they may legally use force. One possible reform is for the Security Council to consider the proposed military strategy as part of its decision of whether to authorize force. The Security Council should explore specific ways to avoid or limit the likely harms that will result from the plan and then require such protective measures.¹²⁹ This is primarily a change in timing. Instead of maintaining the separation of *jus ad bellum* and *jus in bello* concerns, international law should seek to develop a more fluid approach. This approach would be more realistic, given that some of the harms that the *jus in bello* seeks to prevent may have already occurred before the *jus in bello* is addressed, as described in the previous section.¹³⁰

127. Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons* 1996 I.C.J. 226, 227, 263, 266 (July 8).

128. See BROWNIE, *supra* note 70, at 436 (“There is...great agreement and community of interest behind the proposition that, in the era of nuclear and thermonuclear armament, self-help involves intolerable risks.”).

129. Secrecy of plans should not be a concern: the Security Council is capable of meeting in secret, if necessary. O’Connell, *Lawful Self-Defense*, *supra* note 4, at 908 n.117.

130. See *supra* Part III.B.1. Notably, the Independent International Commission on Kosovo, in its proposed principles for assessing the legitimacy of humanitarian interventions, suggests that the principles may be “applied

The following are some questions that decisionmakers should be required to ask in determining whether force can be used legally. These questions address harms that result directly and immediately from the decision to use force, falling within the gap between the *jus ad bellum* and the *jus in bello*:

General:

- (1) What are the likely civilian casualties, and can they be limited?
- (2) What are the likely military casualties on both sides, and can they be limited? This criterion should recognize that combatants are often conscripts.
- (3) Will there be a meaningful chance for soldiers to surrender before any opening salvos?

Weaponry:

- (4) What are the short term and long term medical effects of the weapons being used? Will weapons create danger in the conflict theater long after hostilities end, as is the case with depleted uranium and unexploded cluster bombs and land mines?

“Conflict contagion”¹³¹:

- (5) What is the likelihood that a proposed conflict will escalate? That it will exacerbate existing conflicts or spark new ones?

Human rights:

either before an intervention in order to determine whether force should be used, or [afterward] to assess whether an intervention was justifiable.” INDEPENDENT INT’L COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INT’L RESPONSE, LESSONS LEARNED 193 (Oxford University Press 2000). One such principle is that “[t]here must be even stricter adherence to the laws of war and international humanitarian law than in standard military operations. This applies to all aspects of the military operation, including any post cease-fire occupation.” *Id.* at 195. Such a heightened adherence to these laws is in keeping with the rationale behind intervention, which is to protect a civilian population. That said, it can certainly be argued that civilian populations should be shown such concern whatever the reason force is used.

131. See Carl Conetta, “Operation Enduring Freedom: Why a Higher Rate of Civilian Bombing Casualties?” Cambridge, MA: Commonwealth Institute, Project on Defense Alternatives *Briefing Report* #11, 18 Jan. 2002 (revised Jan. 24, 2002), at <http://www.comw.org/pda/0201oef.html>.

(6) Will the use of force have a negative effect on human rights of people in combatant and neighboring nations? Is there likely to be repression by these governments?

(7) Will the conflict touch off humanitarian crises such as refugees and starvation? Will the destruction of military or "dual use" civilian/military targets (such as electrical grids and water treatment plants) also affect the lives of civilians?

Economics:

(8) How will the conflict affect the economies of various nations, and of the world? What will the effect be on world markets, such as stock exchanges or oil markets?

International peace and security:

(9) Will the government of the targeted nation be changed as a result of the use of force against it? What kind of government will replace it? What will be the resulting effects on international peace, security, and human rights?

(10) With respect to rebuilding conflict zones, what types of weaponry will be used? Will dangers from these weapons persist for civilians and builders after the war? Will important infrastructure be targeted? Is there a rebuilding plan? Will the war result in chaos, creating humanitarian disasters or an environment conducive to terrorism?

Development and respect for international law:

(11) What precedent will the use of force in this case yield?

(12) Balancing of harms: How will these harms be balanced against the goal that the use of force meant to achieve?

A dynamic could come into play: by being forced to consider in advance the likely harms and costs associated with the use of force, and, where possible, to make these considerations public, planners proposing to use force could see that option as less and less attractive. There might be increased public pressure on leaders to avoid these costs and, ultimately, to avoid the use of force.¹³²

This Article now turns to implementing the recommended reforms of Steps Two and Three.

132. Indeed, national laws requiring leaders to consider these costs could be proposed. See *infra* Part IV.E.

IV. BEYOND LEGAL REFORM: IMPLEMENTING THESE PROPOSALS THROUGH IMPROVED PRACTICES

One way to make these changes part of international law would be to include the series of questions set forth above in the UN Charter, perhaps as commentary or in an appendix.¹³³ Of course, such a change might be difficult to effect. Nevertheless, there are ways to implement these proposals through less formal changes in practice. For example, political pressure could lead the Security Council to articulate its decision concerning the use of force. Such pressure can also be enhanced by initiatives from other entities such as the General Assembly, ICJ, NGOs, scholars in universities and think tanks, and the public. Also, changes in U.S. and other nations' laws can help protect some of the interests that this Article seeks to protect under international law.

A. Rethinking Security Council Practice

There are many ways as a practical matter that the Security Council could improve its search for alternatives to force as well as its consideration of ways to prevent or limit harms likely to result from any use of force. It could voluntarily adopt the process and questions set forth above.¹³⁴ As part of this process, the Security Council could continue its trend of working with outside experts, which could help it find alternatives to force. In various other matters, the Security Council encourages such participation. For example, since 1995, the NGO Working Group on the Security Council, a group of about 30 representatives from NGOs such as Amnesty International, CARE, and Oxfam, has endeavored to build informal relationships with members of the Security Council.¹³⁵ This involvement is a step

133. See, e.g., GRENVILLE CLARK & LOUIS B. SOHN, *WORLD PEACE THROUGH WORLD LAW* (Harvard University 1958) (proposing a revised UN Charter, which would include detailed commentary and "annexes").

134. See *supra* Parts III.A.4. and III.B.2.

135. NGO Working Group on the Security Council Information Statement, at <http://www.globalpolicy.org/security/ngowkgrp/statements/current.htm> (last visited Sept. 2, 2003) (noting that "Council members have found that NGOs can provide exceedingly valuable field information from their contacts in crisis areas, helping to improve their delegations' awareness of the issues and contributing to the Council's policy-making process. In many cases, NGOs may even be directly involved in UN field programs."). Information about the NGO

in the right direction. With the weight and eyes of the world upon it, the Security Council should welcome such input.

Yet, that grave weight also encourages secrecy, which can hamper another way to improve the Security Council's consideration of alternatives to force and of ways to prevent the likely harms that force can cause: transparency. Much of the work of the Security Council already takes place behind closed doors, especially among the Permanent Five Members (China, France, Russia, the U.K. and the U.S.).¹³⁶ Greater transparency would likely encourage the inquiry and debate that can lead to better ideas. Transparency and openness can discipline decision-making by encouraging those involved to adhere to principles of reason and equity. As groups such as Human Rights Watch suggest, it is easier to ignore human rights when no one is looking.¹³⁷ Thus, the time has come to reform current Security Council and UN rules and practice to encourage inclusiveness and openness when possible.¹³⁸

As pointed out above, the Security Council could be required to produce a document discussing alternatives to force and evaluating the likelihood of success of each alternative. Thus, the range of the search could be seen, and specious, tendentious arguments exposed.¹³⁹ Such attention should be required because few decisions are graver or more worthy of discussion

Working Group on the Security Council can be found on the Global Policy Forum website at www.globalpolicy.org (last visited Aug. 21, 2002).

136. MALANCZUK, *supra* note 11, at 376–77 (noting the “lack of transparency of the decisionmaking by the P5...or P3 (the Western powers which often hold meetings in secret, following which only the formal votes become part of the public record”).

137. Information about Human Rights Watch can be found on the Human Rights Watch website at <http://www.hrw.org/about/> (last visited Sept. 2, 2003).

138. Of course, if it is being led in creative problem solving exercises, privacy might be required, as some of these exercises promote a wide-ranging search for answers that permits introduction of possibly silly or outlandish ideas as a way of arriving at practical ideas. See *e.g.*, Adams, *supra* note 108, at 134–37 (describing group “brainstorming” exercise and its requirement to come up with many “wild” ideas).

139. See BROWNLEE, *supra* note 70, at 436 (“In attempting to provide effective legal controls the jurist must concentrate on the immediate source of danger — the use of force — and characterize the conditions in which it is prohibited in such a way that states can only give justifications for their illegal acts in terms of considerable implausibility.”).

than whether to unleash a modern war-making machine, which produces death, refugees and other crises.

B. Rethinking General Assembly Practice

If the Security Council will not conduct an inquiry regarding the necessity of using force and ways to limit the attendant harms in a given case, then the General Assembly should do so instead. The Security Council has “primary” but not exclusive responsibility for matters concerning international peace and security.¹⁴⁰ If the Security Council fails to act, the General Assembly may thus exercise a secondary authority, making non-binding recommendations to nations.¹⁴¹ There is nothing to stop the General Assembly from working with experts, activists and scholars to find alternatives to force in impending conflicts, which could pressure the Security Council to justify its decisions. The General Assembly could produce a “brief” or “opinion” as described above¹⁴² to make sure that the questions set forth above are asked and answered.¹⁴³ In addition, the General Assembly could proactively initiate UN focus on looming problems that could, if left to fester, endanger international peace and security.

C. Rethinking International Court of Justice Practice

A more active use of the ICJ¹⁴⁴ by UN member nations has the potential to provide guidance for the development of the *jus ad bellum*. Member nations could initiate claims for damages in

140. UN Charter, art. 24, para. 1. *See also* Nigel. D. White, *The Legality of Bombing in the Name of Humanity*, 5 J. CONFLICT & SEC. L. 27, 41–2 (2000).

141. *See* Schachter, *supra* note 16, at 1622.

The General Assembly, which may decide important questions by a two-thirds majority, has on occasion adopted decisions that involve judgments on the use of force. These decisions are not binding under the Charter. That does not mean that they lack ‘authority,’ for at least in some cases such resolutions will be regarded as expressing the ‘general will’ of the international community and as persuasive evidence of legal obligation.

Id. *See generally* Schachter, *Alf Ross Memorial Lecture: The Crisis of Legitimation in the United Nations*, 50 NORDISK TIDSSKRIFT FOR INT’L. RET. 3 (1981).

142. *See supra* Parts III.A.4. and IV.A.

143. *See supra* Parts III.A.4. and III.B.2.

144. U.N. CHARTER art. 92.

the ICJ concerning particular, actual uses of force. Non-combatant nations that are indirectly affected by a particular use of force (such as by suffering economic or environmental damage) could develop legal theories on which to base claims for damages. Such actions would help create legal doctrines and potentially prevent future uses of force.¹⁴⁵ Individuals, businesses and other entities that are not entitled to bring cases under ICJ jurisdiction could file similar claims in other courts with international jurisdiction. Also, it remains to be seen how practice before the new International Criminal Court will take shape, but prosecution for war crimes — especially of leaders who violate the *jus ad bellum* — could be a promising way to clarify and develop this law.

The ICJ offers the potential for prospective guidance, too. The General Assembly or qualified UN organizations could flex their muscles under Article 96¹⁴⁶ to request that the ICJ issue an advisory opinion in certain instances.¹⁴⁷ Indeed, the ICJ has shown that it can conduct thorough inquiries concerning the legality of the use of force.¹⁴⁸ In advisory opinions, questions can be framed more broadly than the question a particular member nation may pose in the context of an actual claim for damages. For example, in 1996, the ICJ issued an advisory opinion in response to a General Assembly request, which the ICJ framed as follows: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?”¹⁴⁹ The advantage of

145. GRAY, *supra* note 9, at 11–12 (noting the potential of the International Court of Justice to clarify the laws on “this sensitive subject matter of the use of force” as states increasingly bring claims before it).

146. U.N. CHARTER art. 96, para. 1.

147. The General Assembly may “authorize other UN organs or specialized agencies to request advisory opinions on ‘legal questions arising within the scope of their activities.’” Advisory opinions are not legally binding but nonetheless have substantial persuasive value.” JEFFERY L. DUNOFF, ET. AL., INTERNATIONAL LAW: NORMS ACTORS, PROCESS 69 (2002). *See also*, U.N. CHARTER art. 96.

148. *See, e.g.*, Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

149. Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons 1996 I.C.J. 226, 228 (July 8). This question was originally, “Is the threat or use of nuclear weapons in any circumstance permitted under international law? [Est-il permis en droit international de recourir a la menace ou a l’emploi d’armes nucleaire en toute circonstance?]” UN GA Res. 49/75K (Dec. 15, 1994). This question was not novel: The General Assembly passed a reso-

the advisory opinion here is obvious: no nation had to wait to be attacked by nuclear weapons before raising the question. Perhaps similar questions could be framed by the General Assembly regarding what could be considered, in light of September 11, pressing international legal issues: whether the use of military force to topple the governments of “terrorist nations” is legal, and under what circumstances would it be legal to use force in response to terrorist attacks? Obviously, great care would be needed to frame such a question, but seeking an advisory opinion is a viable way of challenging the increased and increasing readiness of various nations to use (and perhaps abuse) force in this way. A similar question could be framed regarding under what circumstances the use of force would be a legitimate method of countering the proliferation of weapons of mass destruction.

One can also imagine a country that feared an attack, perhaps a preemptive strike to destroy actual or alleged weapons of mass destruction,¹⁵⁰ asking the ICJ for a provisional ruling on the legality of such an attack.¹⁵¹ Even if the ICJ ultimately re-

lution in 1961 declaring nuclear weapons illegal, and the request for the advisory opinion from the ICJ was originally brought in 1993 by the WHO. See MALANCZUK, *supra* note 11, at 346–50.

150. Such as the 2003 U.S.-U.K. war against Iraq. Further wars are likely, given the *National Security Strategy* published by the Bush Administration in 2002, which claims that the U.S. has a right to wage such wars as a counterproliferation measure. *The National Security Strategy of the United States of America*, Chapter V, at <http://www.whitehouse.gov/nsc/nss.html> (last visited Sept. 30, 2003).

151. The ICJ entertained and ultimately rejected a claim by Libya for provisional measures to prevent a feared attack or embargo by the U.S. for refusing to extradite two Libyan nationals suspected of bombing Pan Am Flight 103 over Lockerbie, Scotland on December 21, 1989, which killed over 250 people. Libya claimed that it was exercising its rights pursuant to the 1971 Montreal Convention on terrorism against aircraft. Between the time of Libya’s filing for provisional measures and the Court’s decision, the Security Council set forth a Resolution requiring extradition. The Court rejected Libya’s request for provisional measures and held that in this instance the Security Council Resolution had to be followed, but added that it was “not at this stage called upon to determine definitively the legal effect of Security Council resolution 748 (1992).” *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.)*, 1992 I.C.J. 114, 126–27 (Apr. 14). As such, the case leaves open the possibility of a sort of “judicial review” of Security

jected such a move, the nation fearing attack could benefit from making its case in this forum so that alternatives and likely harms might be considered, which in turn might erode international support for the attack.

D. Rethinking Practices of NGOs, Scholars, and the Public to Promote Better Thinking About Using Force and to Pressure Decisionmakers to do the Same

In lieu of, or in addition to, these efforts by UN organs, interested experts, activists and scholars should step up their own efforts to generate and publish alternatives to using force, and generate popular support by showing the common benefits that will accrue to all nations. Such ideas should be published widely, including in times of peace, because once an attack occurs or a crisis unfolds, individuals who oppose military action are often asked, "If you oppose war, then what do you suggest instead?" and, "Are you saying we should do nothing?" A population responding to an attack (and fearing further attacks) is, understandably, not in a calm and deliberative mood. The law must take this reality into account. Ideally, leaders and experts would be able to point to concrete alternatives to war that could likely prove less costly and more effective in achieving the desired goal in a time of crisis.¹⁵²

Ultimately, one way or another, governments respond to their people. If problems are capable of solutions less costly than war, and those solutions are published widely, reasonable publics would demand that they be tried. Shining light on the decision-making process, challenging decisionmakers to be smarter and more creative, and publicly judging them on these qualities

Council resolutions, a power which — if it exists — could help develop the law of war. *See* GRAY, *supra* note 9, at 10.

152. Few alternatives to force were published after the September 11 attacks. For a comprehensive explanation of the problems with Operation Enduring Freedom and its ineffectiveness in defeating the threat of Al Qaeda, as well as an alternative approach, see CARL CONETTA, COMMONWEALTH INSTITUTE PROJECT ON DEFENSE ALTERNATIVES RESEARCH MONOGRAPH 6, STRANGE VICTORY: A CRITICAL APPRAISAL OF OPERATION ENDURING FREEDOM AND THE AFGHANISTAN WAR (Cambridge, MA, Jan. 30, 2002), available at <http://www.comw.org/pda/0201strangevic.pdf>.

could increase their incentive to find, and try, peaceful options.¹⁵³

E. Rethinking National Law to Limit Nations' Resort to Force

A nation's people are the ones who must fight, be killed and maimed, and suffer from the wars initiated by their leaders, so it is the people who must be persuaded to support a war. One possibility of limiting the use of force thus rests with the people of particular nations.¹⁵⁴

Legally requiring national leaders to justify any conclusion that force is necessary and to show how they will limit likely harms and costs would be a giant step in limiting the recourse to military force. Currently, these matters are not part of the public discourse.¹⁵⁵ Reformers, however, could propose a law, entitled, "The Responsible Use of Military Force in International Affairs" (RUMFIA), codifying this idea and making it a part of the public discourse. Politicians could rally around this proposal as a way of protecting U.S. servicemen and women,

153. For a discussion of the role of the populace in determining the appropriateness of the use of force, see generally DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW (Charlotte Ku & Harold K. Jacobson eds., 2002) (concluding that "national-level mechanisms" have been most important in assuring democratic accountability of national and international decisionmakers in deploying forces under NATO and UN authority) [hereinafter DEMOCRATIC ACCOUNTABILITY]. Public observation of the Security Council deliberations in the run up to the U.S. war against Iraq earlier this year could accelerate changes in Security Council practice. Brian J. Foley, *Recent (Indecent) Exposures: Impact on International Law of U.S. Policies Toward Iraq and North Korea*, PROCEEDINGS, U.S. NUCLEAR POLICY AND COUNTERPROLIFERATION 26 (Feb. 26 2003, sponsored by Center for Defense Information and Physicians for Social Responsibility), available at <http://www.lawyersagainstthewar.org/legalarticles/foleyexposure.html> (last visited Sept. 2, 2003).

154. DEMOCRATIC ACCOUNTABILITY, *supra* note 153, at 65.

155. See Ruth Wedgewood, *Implementing Limitations on the Use of Force: The Doctrines of Necessity and Proportionality*, 86 AM. SOC'Y INT'L L. PROC. 39, 58 (1992).

Proportionality and necessity have been segregated from American public policy debate, cabined as technical military doctrines to be handled by the war colleges and Pentagon staff. My claim here today is that proportionality and necessity belong at the center of civilian debate on the use of force in foreign affairs.

Id.

citizens, and people in other countries,¹⁵⁶ and of fostering international stability.

There may be popular support for such a measure. A large, worldwide, antiwar movement sprang up in opposition to the U.S. war against Iraq during its planning stages.¹⁵⁷ Even if such support could not succeed in passing RUMFIA, a movement's merely drafting it and campaigning for its adoption would focus public attention on these issues. For example, most U.S. citizens are probably unaware of the extent of death and damage caused by the 1991 Gulf War or the invasions of Afghanistan and Iraq.¹⁵⁸ As more accurate and timely information about the actual effects of war becomes readily available, a movement to ensure that the decision to use force includes consideration of these harms could gain popular support.

The recent debate over whether to go to war against Iraq exemplifies the need for more national focus on alternatives to war and the precise harms that could result from waging war. At the end of July and the beginning of August 2002, the Senate

156. See *id.*, at 59 (comments by Professor Ruth Wedgwood: "Strategic proportionality asks that civilian casualties be weighed against the justification for using force in the first place.").

157. Patrick E. Tyler, *A New Power in the Streets*, N.Y. TIMES, February 17, 2003, at A1.

158. For an example of the ideological sparring in the U.S. media concerning the numbers of civilians killed in U.S. military actions, see John Leo, *The Truth About Casualties*, U.S. NEWS & WORLD REPORT, Mar. 31, 2003, at 3 (expressing skepticism that the number of dead in Iraq would turn out as high as initial reports: "In a number-obsessed society, focusing relentlessly on the deaths of innocents — and inflating the numbers, if necessary — is a conventional way of undermining support for war."). The corollary would appear to obtain as well: underreporting the deaths of innocents is a conventional way of creating and maintaining support for war. Regarding U.S. media coverage of the war against Afghanistan, see Neil Hickey, *A Time of Testing: Special Report*, COLUM. JOURNALISM REV. Jan.-Feb. 2002, at 40 (calling Pentagon's rules limiting journalists as "toughest ever"); Michael Massing, *Grief Without Portraits*, THE NATION, Feb. 4, 2002, at 6 (discussing lack of media reporting on non-U.S. casualties of war); Patrick McCormick, *See No Evil: While Movie Wars are Raging on Screens Across the Nation, Uncle Sam has Managed to Keep Both Media and Citizens in the Dark About the Ugly Reality of Our Real-Life War on Terror*, U.S. CATHOLIC, July 1, 2002, at 46. The failure of the media to highlight the horrors of war is by no means a new phenomenon, nor is it limited to U.S. media, as the previous citations may appear to suggest. See generally PHILLIP KNIGHTLY, *THE FIRST CASUALTY: THE WAR CORRESPONDENT AS HERO AND MYTH-MAKER FROM THE CRIMEA TO KOSOVO* (2000).

Committee on Foreign Relations held hearings on the need for a war against Iraq.¹⁵⁹ These hearings, however, considered only a few of the likely harms set forth above. There was little or no focus on likely civilian casualties, casualties among conscripted Iraqi soldiers, or human rights deprivations that could result in other nations if their leaders supported the war against the wishes of their populaces or insurgent factions.¹⁶⁰ There was no meaningful discussion of possible alternatives to the use of force and violence.¹⁶¹ Finally, the Congressional debate that led to the resolution allowing President Bush to use of force to invade Iraq did not highlight these concerns.¹⁶²

In addition, a movement to pass such a law could have a beneficial effect on U.S. international relations. This movement, and any resulting law, could enhance American moral authority, arguably the real source of power, whether national or international.¹⁶³

Likewise, people in other nations could seek to limit their own governments' use of force, and their own governments' support for other nations' military actions. For example, citizens of democratic nations, especially those on the Security Council, could demand laws to prohibit their governments' support for other nations' military ventures unless the questions set forth above in Section III¹⁶⁴ or similar questions are answered satisfactorily.

These issues could also be aired through court challenges to the national authority to wage war. For example, five weeks before the U.S. and U.K. invaded Iraq in 2003, a motion for a preliminary injunction was filed in the U.S. District Court for the District of Massachusetts by members of the House of Representatives, military personnel, parents of military personnel,

159. *Hearings to Examine Threats, Responses, and Regional Consideration Surrounding Iraq: Before the S. Comm. on Foreign Relations*, 107th Cong. (2002), available at <http://www.lib.umich.edu/govdocs/pdf/iraqhear.pdf>.

160. *Id.*

161. *See id.*

162. *Excerpts From Senate Debate on Iraq Policy*, N.Y. TIMES, Oct. 10, 2002, at A20; *The House Makes Its Decision: "Let Us Take This Stand Against Terror,"* N.Y. TIMES, Oct. 11, 2002, at A14 (excerpts of floor speeches by Democrat and Republican leaders).

163. JOSEPH S. NYE JR., *THE PARADOX OF AMERICAN POWER* 8–9 (Oxford University Press, 2002) (using the term "soft power" for this type of authority).

164. *See supra* Parts III.A.4 and III.B.2.

and others to stop President Bush from initiating war.¹⁶⁵ The court denied the motion, and the U.S. Court of Appeals for the First Circuit affirmed, holding that it was beyond the court's powers to decide the issue at that time, because it was not clear that there was any dispute between President Bush and Congress, or that either governmental branch had done or was about to do anything in violation of their constitutional duties or other laws.¹⁶⁶ Similarly, in the U.K., the Campaign for Nuclear Disarmament sued the British government in British courts, arguing that the court should interpret UN Security Council Resolution 1441 as not permitting the U.K. (or other nations) to use force against Iraq, and as requiring an additional Security Council Resolution before force could be used.¹⁶⁷ A court dismissed the suit on December 17, 2002, reasoning that interpreting a Security Council resolution fell outside the court's jurisdiction.¹⁶⁸ These lawsuits, despite failing, brought increased attention to the issue of a government's war-making abilities and, in the long run, could play a part in forcing governments to use these powers in strict accordance with the law.

V. CONCLUSION

This Article has been concerned with a very particular reform to the international law on the use of force: developing it to guide decisionmakers, *prospectively*, to find alternatives to force, and to find ways to prevent or limit the harms that are likely from a proposed use of force. The law on the use of force, perhaps more than any other area of law, must provide prospective guidance, because harms caused by the use of military force cannot be undone. Those killed cannot be "un-killed," the dismembered cannot be "re-membered," widows cannot be "un-widowed," and orphans cannot be "un-orphaned"; indeed, there are no such words in the English language. The use of force, regardless of any noble intentions, causes severe harm and dis-

165. Doe v. Bush, 323 F.3d 133, reh'g. den., 322 F.3d 109 (1st Cir. 2003).

166. *Id.* at 137-41, 143-44.

167. BBC, *CND Loses Fight Against War* (Dec. 17, 2002), at http://news.bbc.co.uk/1/hi/uk_politics/2583207.stm. The text of the briefs and the court opinion are available at <http://www.cnduk.org/pages/campaign/legal>.
tm.

168. *Id.*

order. State-sponsored violence is thus a measure that must be used sparingly, and with great discipline and restraint.

This Article poses questions for decisionmakers to consider before permitting the use of force. These questions should improve the search for alternatives to force and guide decisionmakers to find solutions that avoid or limit the harms caused by the use of force. At times, the answers to these questions may lead to the conclusion that force is the best and most effective option. Nevertheless it is hoped that such instances will be rare, rarer than they are today. This Article also raises questions regarding the clarity of international law on the use of force, and about the attitudes and rigor that decisionmakers should bring to the task of determining whether to use force in a given instance. This Article has answered these questions normatively, by prescribing proposals for reform.

Beyond question is the fact that international law on the use of force will not, on its own, develop into a tool for the sort of guidance proposed in this Article. There is no enforcement mechanism, and the emphasis of scholars on state practice and custom will often make pronouncements on legality late-coming and debatable, perhaps endlessly so. Moreover, those pronouncements may be ill-suited to prevent future uses of force, because circumstances may differ, making any "precedent" inapplicable. Indeed, a nation that is entrepreneurial in the use of force, and capable of using force without fear of suffering damaging responses, can offer various justifications for using force, each different from those that came before. International law scholars would trail behind, trying to make sense of the destruction, to determine whether, after all, the action was legal, while remaining impotent to prevent future damage or to influence state practice.

Thus, it is necessary to approach the law of war, and especially the *jus ad bellum*, proactively, with a reformer's attitude. International law is nascent, a work-in-progress. As such, the opportunity exists for scholars not merely to describe state practice but also to import the best ideas they can find from other legal systems, or create themselves, to build a body of law that is fair and sensible, and capable of preventing all but the most necessary and limited uses of force. Future generations will thank us.