GOING TO WAR AND GOING AHEAD WITH THE LAW

JAMES A.R. NAFZIGER*

In most cases those who go to war have persuasive causes, either with or without justifiable causes. There are some indeed who clearly ignore justifiable causes. To these we may apply the dictum uttered by the Roman jurists, that the man is a robber who, when asked the origin of his possession, adduces none other than the fact of possession.

—Hugo Grotius[1]

I was hoodwinked.

—Senator J. William Fulbright[2]

TABLE OF CONTENTS

constitute the permissive causes of armed conflict or at least help explain it, the ultimate precipitation of the conflict and the justification for it might seem rather trivial. The *casus belli* might seem incidental at best. But when international law has failed to resolve the underlying tensions or disputes, it has a critical last chance to avoid warfare's unnecessary or disproportionate suffering by demanding a legitimate if not commendable justification for the use of force. Unfortunately, the legal requirements for a legitimate *casus belli* have proven to be unsatisfactory. That is why we need to refine the criteria for adjudging the validity and hence acceptability of justifications for the immediate use of force.

What follows is a think piece that builds upon the three historical pretexts for the use of force whose major anniversaries coincide in 2014. The study highlights the inadequacy of the law for evaluating a *casus belli* declaration and argues for more detailed, uniform, and effective guidance in the law.

II. PRETEXTS AND THEIR CONTEXTS

A. The Assassination in Sarajevo (1914)

By 1914, the prolonged run up to World War I, generally coinciding with the late Victorian and Edwardian eras, was characterized by contentious alliances—the Triple Alliance (variously Germany, the Austro-Hungarian Empire, and Italy) and the Triple Entente (variously Britain, France, and Russia)—and their expanding militias.[3] An arms race may best define the relationship between the two pacts. On June 28 of that year, Archduke Franz Ferdinand, the heir-apparent of the Austro-Hungarian Empire, paid an official visit to Sarajevo, the capital of Bosnia–Herzegovina, which was then within his domain. It was a rash move. Failing to heed warnings, the Archduke arrogaiTc 0.

the Turks in 1386 at the Battle of Kosovo, annually ignited South Slav resentment of foreign domination in the Balkans.[4] The substantial presence of ethnic Serbs in Sarajevo posed an obvious risk, as did their view that the imperial governance in Bosnia was

the possibility of indirect Serbian complicity in the assassination plot and irresponsibility in its aftermath, and there was a general consensus that Austria was entitled to impose moderate demands on Serbia in the wake of the assassination,[10] but the extreme nature of the ultimatum shocked the international conscience.

On the urging of both Russia and Britain, however, Serbia agreed to the gist of the Austrian demands with the important exception of one that Serbia considered to be a fundamental violation of its constitution and laws of criminal procedure: that Austrian officials must be included in a pre

determined to exercise against Serbia. It was a weakling's reliance on a show of strength in a desperate effort to overcome its fading status as a European power. To facilitate their interventionist plan, the Austro-Hungarian and German governments engaged in an elaborate strategy of dissemblance to lull their European neighbors into a

on their arrival the previous year in Austria.[21] It was blatant aggression. As he had always done, however, Hitler fabricated an imminent threat to Germany as a *casus belli* to justify his aggression. Even after the Munich agreement, with its weak constraints against a military takeover of Czechoslovakia, Hitler seized on a declaration by Nazi sympathizers in Slovakia of their independence from Czechoslovakia—which Hitler perhaps orchastrated—as evidence, contorted as it was, that the government in Prague was unable to exercise control over Czechoslovakian territory and hence threatened its neighbors.[22] Also, the acceptance in advance of Nazi conquests by intended victims became as routine as the victims themselves were intimidated.

again with the acquiescence of Britain and France, as in his earlier conquests. But Hitler was faced with the problem that if he did so, the limited *casus belli* would have been accomplished, thereby depriving him of an excuse to accomplish what he really wanted in the interest of *lebensraum*: to conquer all of Poland.[24] He unquestionably wanted more than Danzig and an easement through the Polish corridor, determined as he was to push steadily eastward in a sort of revival of the *Drang nach Osten* promoted by the earlier Hohenzollern monarchy.[25] Just the previous year Hitler had expressed frustration to his SS honor guard that the Munich

tipping point to justify intervention in Poland.[30] The Gestapo, led by a veteran—who had faked incidents in Slovakia during the run up to the Nazi conquest of Czechoslovakia—dressed up twelve or thirteen condemned criminals from concentration camps in Polish uniforms. They then were killed with fatal injections, filled with gunshot wounds, and deposited on the ground at the radio station as evidence of Polish terrorism. SS men in disguise, wearing identical Polish uniforms, were then "captured" and presented as having "led" the attack. Unfortunately for them, the SS men themselves were later liquidated to keep them from talking.

The staging of these incidents as a pretext for the invasion of Poland was, indeed, "a clumsy, vaudevillian excuse."[31] For Hitler, however, it was "not a question of conquering populations but of conquering territories suitable for cultivation. . . . Expansion cannot be achieved without smashing lives, and without taking risks."[32] In the interest of *lebensraum*, any *casus belli* would do.

The massive invasion occurred Friday, September 1, 1939, just one day after Operation Canned Goods, all along the western and southern borders of Poland, thereby belying any pretense that the human rights, or even simply interests, of the German-speaking population of Danzig had alone been instrumental. The British response was delayed because, as Winston Churchill quipped, the British ruling class liked "to take its weekends in the country" whereas "Hitler takes his countries in the weekends."[33]

offers a third example of a questionable pretext for military action, in this case taking the form of a massive escalation of limited skirmishes. In the wake of the Viet Cong's victory in its war of independence against France, Vietnam was militarily and politically divided along a "provisional military demarcation" line between north and south. According to the Agreement on the Cessation of Hostilities in Vietnam between France and the Democratic Republic of Vietnam on July 20, 1964,[35] the partition was intended to be temporary. The Agreement otherwise provided (1) for a cessation of hostilities; (2) withdrawal of opposing forces to their respective sides of a dividing line to form separate "military regrouping zones"; (3) prohibitions of alliances; (4) the establishment of an International Commission for Supervision and Control in Vietnam, consisting of Canada, India, and Poland, whose purpose was to control and supervise application of the agreement; (5) a general election to establish the government of a unified Vietnam; and (6) civil administrators in each of the regrouping zones that the respective party in military control provided. An unsigned Final Declaration of the Geneva Conference endorsed the Agreements.[36] All parties to the conference—except the United States and the State of Vietnam based in Saigon (South Vietnam, as it became known)—accepted the Agreements. The United States, however, did pledge not to use force to disturb the two Agreements.[37]

Unfortunately, this framework was a failure. The International Commission was ineffective, no general election was ever held, and systematic violations of the Agreement were not redressed.[38] After French forces withdrew from their military regrouping zone in the south, tensions mounted and the partition hardened between the two Vietnamese governing authorities of the north and south. Despite

LAW 269–306 (5th ed. 2011).

35. Agreement Between the Commander-in-Chief of the French Union Forces in Indo-China and the Commander-in-Chief of the People's Army of Viet-Nam on the Cessation of Hostilities in Viet-Nam, Great Britain, Misc. No. 20, Cmd. 9239, at 27 (1954), 161 BRIT. & FOR. STATE PAPERS 818 (1954).

36. Final Declaration of the Geneva Conference on the Problem of Restoring Peace in

repeated efforts to renegotiate an effective settlement, Vietnam was doomed to over twenty-five years of armed conflict.

In the name of collective self-defense, each side attracted foreign military personnel and equipment. In 1961, President Kennedy put United States boots firmly on the ground by dispatching four hundred Special Forces troops and one hundred other military advisors.[39] Meanwhile, a continuous infiltration of Viet Cong troops from North Vietnam into South Vietnam posed a major threat to the regime in

President to take "all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting in defense of its freedom."[49] The Resolution provided for its expiration "when the President shall determine that the peace and security of the area is reasonably assured . . . except that it may be terminated earlier by concurrent resolution of the Congress."[50] On August 7, Congress passed the Resolution, with only two "no" votes (Senators Ernest Gruening of Alaska and Wayne Morse of Oregon).[51]

To be sure, there is no evidence whatsoever that President Johnson staged the Gulf of Tonkin incident. Whatever the facts may have been on August 4, the naval back-and-forth seems to have been conducted as a series of encounters entailing reprisals or countermeasures.[52] Although the United States' response may have been disproportionate, whether there was an attack or not, the incident does not seem in itself to have been a pretext for ratcheting the conflict up to a substantially higher level. Instead, the alleged incident is significant primarily in almost spontaneously generating the Gulf of Tonkin Resolution, with its expansive authorization of the president's use of force regardless of any direct relationship with the Gulf of Tonkin incident. In other words, the "necessary steps" could

this study for two reasons. First, it was the immediate product of an alleged attack to which the United States had fully—maybe more than fully—responded by bombing North Vietnamese coastal villages in the nature of a reprisal rather than an unanswered foreign threat or use of force. Unless the United States intended the Resolution as a punitive measure in violation of international law, it is difficult to understand its rationale as a response to the Gulf of Tonkin incident specifically. Second, the Resolution led predictably to a massive escalation, indeed recharacterization, of the Vietnam conflict. A question ever since has been: did the *casus belli* of the incident, as expressed in the Resolution, justify the escalation of the conflict, ultimately combining, as it did, "ineffectual with excessive force?"[54] To be sure, under international law the escalation of the conflict, indeed, the Vietnam War as a whole, was arguably supported by mutual defense obligations among members of the Southeast Asia Treaty Organization[55] and under Article 51 of the United Nations Charter.[56] But this authority has also been questioned as inadequate to justify the escalated conflict.

President Nixon agreed to repeal the Gulf of Tonkin Resolution in 1971, concluding, as had President Johnson, that his constitutional power as Commander in Chief was sufficient to take all necessary enforcement measures in the Vietnam theater of war.[57] Others disagreed, claiming that repeal of the Resolution either left a vacuum[58] or an unconstitutional war.[59] In any event, it is a third example in this study of military action based on a questionable *casus belli*. It is, indeed, telling that the distinguished floor manager of the Resolution, Senator William Fulbright, later confessed that he had been "hoodwinked"[60] and became a dedicated opponent of the

54. Falk, *supra* note 44, at 1144.

55. Southeast Asia Collective Defense Treaty, Sept. 8, 1954 [1955] 6 U.S.T. 28, 81, T.I.A.S. No. 3170. It is interesting that the Department of the Army legal guidance that was published just two months before the Gulf of Tonkin incident identified regional arrangements, not unilateral actions, as a default in the absence of United National Collective security. *See* DEP'T OF THE ARMY, 1 INTERNATIONAL LAW 118–19 (June 1964).

56. *See* United Nations Participation Act of 1945, 22 U.S.C. § 287(a)–(e) (2008).

57. The repeal took the form of a rider to the Foreign Military Sales Act of 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055 (1971).

58. *See* Don Wallace, Jr., *The War-Making Powers: A Constitutional Flaw?*, 57 CORNELL L. REV. 719, 740, n.116 (1972).

59. *See* Edwin Brown Firmage,

Vietnam campaign.

III. THE LAW: PAST, PRESENT, AND FUTURE

A. Introduction

Of the two broad categories that comprise the law of war—the *jus in bello* (the law governing the conduct of war) has developed impressively in recent years whereas the *jus ad bellum* (the law governing the initiation of war) has scarcely developed at all. Explanations for this disparity mostly highlight the growth and visibility of the *jus in bello*. The factors include: (1) exhaustive coverage by the global media (traditional and social) of brutality during armed conflict; (2) global consciousness-raising; (3) consequent demands by NGOs for effective constraints on unacceptable conduct by military personnel; (4) the related growth of humanitarian norms and rules; and (5) the visibility of newly established war crimes tribunals and other specialized institutions to address the brutality by prosecution or other means. To be sure, the initiation of armed conflict has also generated substantial media coverage and robust public opinion. In particular, the 2003 intervention in Iraq, led by the United States and the United Kingdom, sparked enormous controversy that continues to be

Fulbright's about face, see *Record of '64 Senate Hearings on Tonkin Gulf Issued*, N.Y. TIMES,

influential. Indeed, the essence of the controversy has been the focus of this study, namely the validity of a declared *casus belli*. Also, in policy-making and other professional circles the complicated question under international law of appropriate military responses to acts of terrorism, as opposed to ordinary law enforcement, has been as prominent as it has been perplexing. Both of these examples of a focus by the media and the public on the *jus ad bellum*, however, highlight the lack of a corresponding development of specific rules or even guidelines to define and better operationalize it.

B. The Legal Framework

For seven decades, several provisions of the United Nations Charter have defined the legal framework governing the use of force. All of them seek to operationalize, first and foremost, the commitments of its Members, as expressed in the Charter's Preamble: "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."[61] Under Article 2(4), "[a]ll Members shall 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." Under Article 42, however, the Security Council, acting under Article 24 and its Chapter VII powers as the United Nations organ primarily responsible for maintaining international peace and security, may itself take "such action by air, sea or land forces as may be necessary to maintain or restore international peace and security."

A threshold issue in the formative years of the United Nations arose out of the lack, even today, of an ongoing system of collective security, which the architects of the United Nations intended to be a premise of military action. Fundamentally, the failure to provide for collective security is essentially a failure of Members to fulfill their obligation under Article 43 to provide and finance armed forces for deployment under United Nations supervision whenever called upon to do so. Given the failure of collective security, did the Security Council have any power under the circumstances to apply Article 42

standing and universal recognition of an implied power vested in the Security Council to take action in the absence of the intended system of collective security. Article 48 offers some indirect textual authority for that by obligating members to "carry out the decisions of the Security Council for the maintenance of international peace and security . . . ." More specifically, in line with customary international law regardless of a collective security mechanism, Article 51 provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations [pending Security Council action]." Finally, Article 53 enables "regional arrangements" also to take "enforcement action" (meaning the use of force), but only if authorized by the Security Council.

The interpretation of these Charter provisions has been endlessly problematic and debated. Chief among the questions pertaining to this study have been these: were rules of customary international law besides Article 51 grandfathered into the framework when the Charter was opened for signature and ratification in 1945? If so, does customary international law justify unilateral humanitarian intervention to rescue a state's nationals or even non-nationals from another state's failure to acquit its responsibility to protect them? Can humanitarian intervention be justified in the otherwise prohibitive language of Article 2(4) simply on the basis that such intervention furthers the essential purposes of the United Nations2.7-2.1(c)1.226of the4ha qsuch2191y1

how do the Charter's rules apply to non-state actors in an age of terrorism?

All of these questions bear on the validity of a declared *casus belli*. And, for answers, they all suffer from a lack of detailed, explicit, and authoritative guidance. That is partly because global constraints on the use of force are of fairly recent origin.[63] But the other problem has been that the progressive development of the law in further defining and operationalizing the Charter's rules has been painfully slow. Still, a wealth of commonly accepted principles, norms, and insights are instructive.

C. Guiding Principles, Norms, and Insights

1. Historical Sketch

The fathers of modern international law inherited certain rules of sovereign conduct related to the use of force from classical and medieval practice. Most importantly, they inherited the "just war" concept, with its roots in the Augustinian and Thomist doctrines of the Church.[64] As to the *casus belli*, Thomas Aquinas argued that just war depended on a just cause. By the sixteenth and early seventeenth centuries, however, the Spanish theologian–jurists Francisco de Vitoria and Francisco Suárez were disturbed by the abuses of the doctrine. Vitoria particularly was troubled by its unjust application against the indigenous population of Spain's emerging colonial empire in South America. Their articulation of a three-fold right of self-defense to justify the use of force—to protect life and property, and to counter an unjust attack—shaped the monumental work in the seventeenth century of Hugo Grotius. His detailed rules for a law of war, all based on natural law and the concept of a just war, still have a modern ring. For example, his definition of war recognized public, *private*, and *mixed* wars. The latter two categories describe military actions that non-sovereign authorities conduct[65]—such as al-Qaeda

63. "Prior to the adoption of the UN Charter, there was no clear prohibition on the use of force." STEPHEN MCCAFFREY, DINAH SHELTON & JOHN CERONE, PUBLIC INTERNATIONAL LAW: CASES, PROBLEMS, AND TEXTS 1155 (2010).

64. For a summary of the development of the just war concept in the history of international law, see SYDNEY D. BAILEY, PROHIBITIONS AND RESTRAINTS IN WAR 1–57 (1972).

65. *See* P.P. REMEC, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIUS AND VATTEL 3–6 (1960) (emphasis added), *quoted in* MCCAFFREY ET AL., *supra* note 63, at 1157.

International Criminal Court.

2. International Custom: The Requirements of Immediacy, Necessity, and Proportionality

Even during the nineteenth-century heyday of sovereign autonomy, durable rules of custom to govern the use of force emerged. The prime example is the rule in *The Caroline*.[72] Accordingly, an anticipatory or preemptive use of force prior to an actual attack is justified as a self-defense measure when "the necessity of that self-defence is instant, overwhelming, and leaving no moment for deliberation."[73] Coupled today with a requirement of proportionality, the *Caroline* rule is still authoritative so long as its exercise otherwise conforms to the accountability requirement in Article 51 of the United Nations Charter. Based on the requirnts [illegible])18quid2.2(un

anticipatory or preemptive use of force, with its requirements of immediacy and necessity coupled with that of proportionality.

The *Caroline* rule is just one example of a role of custom in helping define the *jus ad bellum*. The long history of just war thinking has generated other customary rules. Many of them lack criteria even as precise as those of the *Caroline* rule.

3. World Court Decisions

The International Court of Justice has decided several important cases involving use-of-force issues. *Nicaragua v. United States*,[75] in particular, addressed questions of

> the law of the Charter rises above the current cacophony. . . . [T]he present Judgment is an exercise in inappropriate self-restraint.[78]

More succinctly, a recently published textbook of international law, apparently on a note of optimism, observed that:

> A body of practice has begun to shape the content of the prohibition on the use of force. While uncertainties remain at the periphery, there is very little disagreement over the central cases to which the prohibition is directed. Where a use of force would be unlawful, a threat to use such force is similarly prohibited.[79]

That is certainly correct, but it is also discouraging to acknowledge that such a practice has only "*begun* to shape the context of the prohibition on the use of force."[80]

4. Going Ahead with the Law: The Future Agenda

The chief interpretive questions regarding the Charter-based legal framework governing the use of force cry out for detailed, stable, and authoritative requirements. Preliminarily, further guidance for policymakers and legal advisors would be advantageous. The pertinent literature is vast, the expertise is available, and the need for codification or restatement of principles and rules is apparent. The political challenge of doing so is also apparent. For example, United Nations Secretary–General Kofi Annan's High-Level Panel on Threats, Challenges and Change issued a report that addressed self-defense issues and articulated interpretive principles together with the Secretary–General's response to the report, but the General Assembly ignored the effort.[81] Still, the process of formulating uniform and detailed responses may be worthwhile in itself. For example, although the General Assembly's definition of aggression has not been as effective as originally hoped, it nevertheless engaged the international community in a worthwhile project to spell out in some detail the specific actions that

aggression.[82] Not only are the basic rules clear, but also the international collaboration in formulating those rules was worthwhile. Moreover, a common vocabulary for diplomacy is in itself valuable.

Contemporary threats of international terrorism present particularly difficult challenges to the rule of law within a framework that was established before the contemporary era of threats. Governmental initiatives to clarify policy and stabilize expectations about counterterrorist operations are essential, although they lie an(ara)7.6 note wortys. Tmn

Such NGO and academic initiatives as these are sorely needed, if only to spark governmental and inter-governmental commitments, which are essential to the success of such initiatives.

IV. CONCLUSION

Three anniversaries of either the initiation of major armed conflict—World War I and World War II—or the vast expansion of it—the Vietnam War—highlight the importance of declared justifications for the use of force. In all three instances, the justifications—the *casus belli*—were either false or inadequate. Today, the United Nations Charter, supplemented by international custom and decisions, broadly defines the law governing the initiation of war—the *jus ad bellum*—although there is a creditable argument

progress the global community has made in that regard since the time of Hugo Grotius nearly four centuries ago. The outbreak of World War I a hundred years ago, for example, demonstrated the impotence of legal constraints on the relentless force of geopolitical posturing against common sense and compromise.[90] Since then, history has borne out this reality.

Recent efforts to formulate precise principles and rules of humanitarian intervention or of anticipatory or preemptive self-defense against non-state actors, for example, are promising. We should encourage similar efforts to go ahead with the law for going to war by crafting effective rules to govern the validity of a declared *casus belli*. Such efforts must engage policymakers and government legal advisers in drafting the principles and rules and eventually committing their governments to them. Meanwhile, important anniversaries, even of the three dubious declarations of a *casus belli* highlighted in this study, are a good time to learn from the past, to get our bearings on the present, and to seek a better future.

90. *See* Adam Gopnik, *Comment: Two Ships*, NEW YORKER, Jan. 6, 2014.

> Even open societies, sailing, so to speak, on the open seas of history, are not immune to the appeal to honor and the fear of humiliation. The relentless emphasis on shame and face, on position and credibility, on the dread of being perceived as weak sounds an icy note through the rhetoric of 1914—from the moment Franz Ferdinand is shot to the moment the troops are sent to the Western Front. The prospect of being discredited, "reduced to a second-rate power," was what drove the war forward. The German Kaiser kept saying that he would never again allow himself to be embarrassed by the British. Lloyd George, in London, felt that Britain had to go to war or it would never be "taken seriously" in the councils of Europe. Needless wars are rushed along, it seems, by an overcharge of the language of honor and credibility, when the language of common sense and compromise would be a lot more helpful.

Id. at 18.