THE THIRTEENTH WALDEMAR A. SOLF AND MARC L. WARREN CHAIR LECTURE IN NATIONAL SECURITY LAW: DEFENDING DEFENSE IN THE LAW OF *JUS AD BELLUM*[*]

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General Berger, Colonel McConnell, distinguished participants, and guests, it is a special pleasure and honor for me to deliver this Solf-Warren Lecture. A special pleasure because I delivered the first Solf lecture thirty-seven years ago. An even more special pleasure because I have known and worked with both Wally Solf and Marc Warren, two of the finest international lawyers our Nation has produced and each a testament to the high caliber of the Judge Advocate General's Corps.

[*] This is an edited transcript of a lecture Professor John Norton Moore delivered on 11 March 2020 to members of the staff and faculty of The Judge Advocate General's Legal Center and School, their distinguished guests, and officers of the 68th Judge Advocate Officer Graduate Course. The Waldemar A. Solf Chair of International Law was established at The Judge Advocate General's School on 8 October 1982 in honor of Colonel (COL) Waldemar A. Solf. On 16 August 2007, the Chair was renamed the Waldemar A. Solf and Marc L. Warren Chair in International and Operational Law. Colonel Waldemar Solf (1913–1987) was commissioned in the Field Artillery in 1941. He became a member of the Judge Advocate General's Corps in 1946. He served in increasingly important positions until his retirement twenty-two years later. Colonel Solf's career highlights include assignments as the Senior Military Judge in Korea and at installations in the United States; Staff Judge Advocate, Eighth U.S. Army/U.S. Forces Korea/United Nations Command and U.S. Strategic Command; Chief Judicial Officer, U.S. Army Judiciary; and Chief, Military Justice Division, Office of The Judge Advocate General. After two years of lecturing with American University, COL Solf rejoined the Judge Advocate General's Corps in 1970 as a civilian. Over the next decade, he served as Chief of the International Law Team in the International Affairs Division, Office of The Judge Advocate General, and later as chief of that division. During this period, he served as a U.S. delegate to the International Committee of the Red Cross Conference of Government Experts on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. He also served as Chairman of the U.S. delegation to the International Committee of the Red Cross Conference Meeting of Experts on Signaling and Identification Systems for Medical Transports by Land and Sea. He was a representative of the United States to all four diplomatic conferences that prepared the 1977 Protocols Additional to the 1949 Geneva Conventions. After his successful efforts in completing the Protocol negotiations, he returned to Washington and was appointed the Special Assistant to The Judge Advocate General for Law of War Matters. Having been instrumental in promoting law of war programs throughout the Department of Defense, COL Solf again retired in August 1979. In addition to teaching at American University, COL Solf wrote numerous scholarly articles. He also served as a director of several international law societies and was active in the International Law Section of the American Bar Association and the Federal Bar Association.

And to deliver this lecture is for me an honor because I have the highest regard for the Judge Advocate General's Legal Center and School. Since the School's permanent establishment at the University of Virginia in 1951, it has led in the quality of its legal training for both military and civilian officials. When I drafted a plan for a Democracy Training Institute for Africa, a dream of mine funded by Congress at the exploratory stage but unfortunately never implemented by the United States Agency for International Development, I had modeled the Institute on the Judge Advocate General's School.

I. Defending Defense in the Law of *Jus ad Bellum*: The Contemporary Crisis

Although nations are free to interact and seek change through peaceful means, they may not use force for change. This principle, introduced centrally into international law by the Kellogg-Briand Treaty in 1928,[1] subsequently became a cornerstone of the United Nations [when the Charter was adopted in 1945]. It is widely known as the prohibition against aggression, or within international law circles, a normative principle of *jus ad bellum*.

Correctly understood, modern *jus ad bellum* is not a blanket prohibition against use of force. Rather, it permits defense against aggression, actions lawfully authorized by the United Nations [Security Council], actions undertaken with sovereign consent, and certain other regional and humanitarian actions. Of particular importance, for *jus ad*

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[1] General Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57. This treaty is commonly known as the Kellogg-Briand Pact or "Pact of Paris." John Norton Moore, *Strengthening World Order: Reversing the Slide to Anarchy*, 4 AM. U. J. INT'L L. & POL'Y 1, 9 (1989).

bellum as a normative principle to inhibit aggression, as is the very purpose of the norm, it must differentially impose costs on the aggression it seeks to deter. If, to the contrary, [the law] treats aggression and defense equally, by failing to effectively differentiate between them, or even worse, it effectively favors aggression by ignoring an aggressive attack while condemning a defensive response, then it will have turned this central normative principle into a cipher. Like an autoimmune disease, it will have turned the international order's own immune system against itself, thus encouraging aggression.[2]

Sadly, the right of effective defense is today under attack. And until this is reversed, *jus ad bellum* will offer little deterrence to aggressors and the world will continue to move further from the goal set forth in the United Nations Charter "to save succeeding generations from the scourge of war . . . ."[3]

There are, I believe, three principal causes of the current crisis. The first is new forms of clandestine aggression which make it harder for the general population to perceive that an attack is taking place. In turn, this creates confusion that the open defensive response is itself the attack.

The second cause is a steady erosion of the right of defense within the international law community. This stems from "minimalist" interpretations of the right of defense from both international law scholars and the International Court of Justice. In turn, these "minimalist" interpretations seem driven by a misunderstanding as to the meaning of the United Nations Charter, as well as "a naïve belief that the road to peace is to sanction all uses of force, whether defensive or otherwise."[4]

A third cause, though perhaps more an effect of the above two than an independent cause, is that totalitarian aggressors have increasingly understood that international institutions, such as the International Court of Justice, are open for the aggressor's use to attack the defensive response. That is, the aggressors have learned to use "lawfare" against the defensive response. Let us briefly exam each of these in turn.

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[2] The first two substantive paragraphs of Professor Moore's lecture are drawn from his 2012 article published in the *Virginia Journal of International Law*. See John Norton Moore, *Jus ad Bellum Before the International Court of Justice,* 52 VA. J. INT'L L. 903 (2012), for a discussion of *jus ad bellum* as interpreted by the International Court of Justice.

[3] U.N. Charter pmbl.

[4] Moore, *supra* note 2, at 905.

A. Cause One: New Forms of Aggression

The United Nations Charter was adopted after two world wars, each begun by an aggressive attack carried out through an open massed invasion. True, Germany confused the world for a few days at the beginning of World War II through Operation Himmler by faking Polish attacks against Germany—including a false flag operation run by the SS against a German radio station, but the world soon knew that Germany was the aggressor. While we have continued to see open invasions subsequent to the Charter, such as the 1950 North Korean invasion of South Korea, or Saddam Hussein's invasion of Kuwait in the 1990 Gulf War, most contemporary aggression is carried out through clandestine support for "wars of national liberation," "secret warfare," terrorism, or arming of political movements and their paramilitaries. The North Vietnamese aggression against South Vietnam, Cuban and Sandinista aggression against El Salvador, support for terrorism from multiple aggressors, clandestine mining of international waterways such as the Iranian mining of the Persian Gulf, and, most recently, Iranian creation and arming of combined political/paramilitary movements such as Hamas in the Gaza Strip and Hezbollah in Lebanon and multiple groups in Iraq. This latest form of aggression particularly leads to confusion and effective "lawfare." It proceeds by supporting one or more political/social movements in the target state, and creating and arming a parallel military wing.

As the political movement grows, it has the potential to take over through the electoral process despite the movement being externally controlled; as the paramilitary wing grows, it has the potential to replace or defeat the official state military. Each of these more contemporary forms of aggression carried out through sophisticated intelligence means—always clandestine and denied—pose a very real perception problem for the largely open and admitted defensive response. In these settings, it is all too easy to tar the defensive response as itself the attack. Supporters of the aggressor, as well as misled media, and critics in countless "teach-ins," pillory the defensive response while ignoring the aggressive attack. As with many in this audience, I have seen this effect here at home in wars such as Vietnam and Central America. For a democracy, the public can indeed be the "center of gravity" controlling "the will to act" as Clausewitz taught us in *On War*.[5] To lose that center, and the "will to act," is to lose the defensive effort.

[5] CARL VON CLAUSEWITZ, ON WAR (Michael Howard & Peter Paret trans., Princeton Univ. Press 1984).

B. Cause Two: Eroding of the Right of Defense

Now, is the right of defense really being eroded? Let's look at a few "minimalist" interpretations of *jus ad bellum* law from the academic community, as well as the use of force decisions of the International Court of Justice.

1. Academic and Diplomatic "Minimalists"

Beginning with academic and diplomatic "minimalists," here are a few of many erroneous academic arguments eroding the effective right of defense.[6] Each is from one or more recognized international law scholars or diplomats.

- [A defensive] attack on the territory of a state perpetrating terrorism cannot be a "proportional" response and can hardly be a "necessary" response to defend against an act of terrorism already committed or even to deter future terrorist attacks. This is from a top international law scholar teaching at one of our finest law schools.

- The right of defense does not include a right of response against the territory of a state directing "indirect aggression" or "secret warfare" against another state.

- The right of defense ceases once an issue has been referred to the Security Council. This is from a former Legal Adviser to the United States Department of State prior to the United States' response against Saddam Hussein's invasion of Kuwait.

- The U.S. bombing of Afghanistan, beginning on October 7, 2001, was inconsistent with article 51 [of the Charter] because the bombings came long after the 9/11 attack [against the United States]. This is from an address to the Swedish Military Academy by a former Swedish Ambassador to the United Nations following the initiation by NATO of its post-9/11 action in Afghanistan.

- Following a successful aggressive blitzkrieg attack now occupying the victim state, there is no longer a right of defense because the victim state has no one that can lawfully request collective defense on their

[6] Examples of statements from recognized international law scholars or diplomats collected by Professor Moore for his course in National Security Law at the University of Virginia and the Georgetown University Law Center.

behalf. This is my favorite statement, which was made to declare unlawful any right of defense for Kuwait prior to the U.S. response against Saddam Hussein's invasion, and made by an American academic who had formerly worked in the Department of Defense General Counsel's office.

2. The International Court of Justice

Turning to the International Court of Justice, here are a few erroneous "minimalist" examples from decisions of the Court.[7]

- [T]he right of defense does not include the right to sweep mines clandestinely emplaced in an international waterway [transited by international] shipping (implicit in the *Corfu Channel* decision);

- [T]here is no right of . . . defense against . . . "less grave" . . . or "indirect aggression" (the *Nicaragua* decision) (also factually incorrect [as to] the seriousness of the multi-faceted covert Sandinista attack against neighboring states);

- [T]here is no right of individual or collective defense against indiscriminate attacks (implicit in the *Iran Platforms* case) (also factually incorrect . . . about the attacks not knowingly directed against U.S. shipping in the Persian Gulf);

- [T]here is no right of individual or collective defense against non-state actors (the *Israeli Wall* case) [(astoundingly rewriting the text of article 51 of the Charter by adding the phrase "by one State against another State" in making its pronouncement)];

- [T]here is no right of individual or collective defense against insurgent . . . attacks from the territory of a third state where that third state is . . . unwilling or unable to stop the attacks (implicit in the *Congo* decision); and

- [T]here is no right of [individual or] collective defense until an attacked state has . . . declared itself to be attacked and has publicly requested assistance (the *Nicaragua* decision) (also factually incorrect as an assumption about the absence of declaration of an attack . . . .).[8]

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[7] See generally Moore, *supra* note 2, for a critique of the International Court of Justice use of force decisions.

[8] *Id.* at 947–48.

The Court's rewriting of the use of force provisions of the Charter has also been accomplished with an all too frequent disregard for proper legal craftsmanship. Rewriting article 51 of the Charter in the *Israeli Wall* case by adding the phrase, "by one state against another state" in order to enable the Court to conclude that article 51 does not permit defense against non-state actors is not ignorant or careless—it is simply a scandalous disregard of the Charter. Or, as Judge Sir Robert Jennings noted in his dissenting opinion in the *Nicaragua* decision, how can the Court, jurisdictionally barred from applying the United Nations Charter in that case, decide the case based on asserted "customary international law" when such law could only be applicable if consistent with the Charter, which the Court was barred from interpreting?

C. Cause Three: The Aggressors Discover "Lawfare"

I will not repeat here the outstanding work done by Major General Charles J. Dunlap Jr. on "lawfare."[9] Let me just note, however, that it was the Sandanista aggressor in the *Nicaragua* case that took the case to the International Court of Justice against the defensive response by the United States. And, learning from this successful "lawfare" by the Sandinistas, it was the Iranians who took the *Iran Platforms* case to the International Court of Justice against a defensive response from the United States. Further, it was the terrorist attackers against Israel who successfully sought the General Assembly request for an advisory opinion from the Court in the *Israeli Wall* case in response to Israel simply building a wall to discourage ongoing terror attacks.

II. Restoring an Effective Right of Defense: Classic International Law to the Rescue

How do we restore an effective right of defense? We do so simply by a return to accurate, correct, classic international law, which has always recognized an effective right of defense.

A. The United Nations Charter

First, we must recognize the centrality of the United Nations Charter. The United Nations Charter, just as much today as at its adoption, governs the lawfulness of the initiation of force in international relations. Article 103 of the Charter makes clear that "[i]n the event of a conflict between

[9] *See generally* Charles J. Dunlap Jr., *Lawfare: A Decisive Element of 21st-Century Conflict?*, 54 JOINT FORCES Q., 3d Quarter 2009.

the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[10] Though the Charter does not specifically mention the customary law requirements of "necessity" and "proportionality," it is well accepted that these principles of customary law apply to all uses of force other than those taken by Security Council actions under Chapter VII.[11] But absent clear evidence through widespread state practice of customary international law not inconsistent with the Charter, such as the long-accepted principles of necessity and proportionality, the Charter prevails. For if the Charter prevails over inconsistent international treaties, it certainly prevails over inconsistent customary international law. Moreover, none of the asserted "minimalist" restrictions on the right of defense are anywhere near demonstrating the level of state practice required for customary international law, whether or not inconsistent with the Charter.

B. Restoring the Meaning of the Charter

Second, we must restore the classic and correct meaning of the Charter from its history, text, and *travaux*.[12] "Minimalist" interpretations of the right of self-defense under the Charter tend to focus on the "if an armed attack occurs" text of article 51 of the Charter. From this singular textual focus, they conclude that much of the "secret warfare" spectrum does not qualify for a right of defense and that there is no right of anticipatory defense. But, in making these arguments, the "minimalists" ignore the history of the Charter, the *travaux* of the Charter, and the textual interrelationship between articles 2(4) and 51, as well as other ambiguities in the text of article 51.

The textual history of the use of force provisions of the United Nations Charter began where the 1928 Kellogg-Briand Pact left off. That is, as under Kellogg-Briand, there was no discussion in the text of the right of individual or collective defense. Rather, there was a simple prohibition of war as a modality of conducting foreign policy. Charter drafts simply wrote this concept into article 2(4), expanding Kellogg- Briand from "war"

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[10] U.N. Charter art. 103.

[11] *E.g.*, NAT'L SEC. L. DEP'T, THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 4 (2020).

[12] "Travaux préparatoires is the name used to describe the documentary evidence of the negotiation, discussions, and drafting of a final treaty text." *What Are Travaux Préparatoires and How Can I Find Them?*, DAG HAMMARSKJÖLD LIBR. (May 14, 2018), https://ask.un.org/faq/14541.

to "threat or use of force" and, thus banning force short of war and the "threat" of force as well, provided that such use or threat of force was "inconsistent with the Purposes of the United Nations." Just as with Kellogg-Briand, it was understood that this prohibition on force in article 2(4) did not ban individual or collective self-defense.

Initial drafts contained no article 51 or reference to the right of defense, following the example of Kellogg-Briand. Thus, the final draft of the Dumbarton Oaks Proposal, that is the final draft of the preparatory conference for the United Nations, simply provided, "All members of the organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the organization."[13]

It is important in understanding the *travaux* of the Charter to understand that the principal discussion concerning lawfulness of the use of force occurred in Committee 1 of Commission 1, dealing with the purposes and principles of the United Nations. This is the discussion in the most important committee, which produced article 2(4) of the Charter. Indeed, it was initially assumed that article 2(4) would be the only provision in the Charter concerning both the ban on the use or threat of force as a modality of change and implicitly retaining the lawfulness of defense and other uses of force not "inconsistent with the purposes" of the United Nations.

The only significant change to this formulation in Committee 1 was an addition suggested by Australia, adding the phrase "against the territorial integrity or political independence," so that the final article 2(4) provided, "All 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."[14] According to the head of the Australian delegation, H.V. Evatt, this addition was intended to clearly include "the most typical form of aggression . . . ." Subsequently, the Deputy Prime Minister of Australia stated, "The application of this principle should insure that no question relating to a change of frontiers or an abrogation of

[13] Paragraph 4 of Section II, as modified by the Australian proposal, became article 2(4) of the UN Charter in the last minutes of the San Francisco Conference.
[14] U.N. Charter art. 2, ¶ 4.

a state's independence could be decided other than by peaceful negotiation."[15]

That is, the purpose of the Australian addition was to make clear that aggression for the purpose of altering territorial integrity or removing political independence—the two principle use of force concerns of the framers—was covered by the article 2(4) ban. There is no evidence that the purpose of this language was to serve as a determining criterion for all lawful uses of force. With respect to the right of defense under the final article 2(4), as adopted by the Conference, Commission I, Committee 1, stressed in its final report that "[t]he use of arms in legitimate self-defense remain admitted and unimpaired."[16] And Subcommittee I/1/A, responsible for drafting an acceptable proposal for what was adopted as article 2(4), reported that "it was clear to the subcommittee that the right of self-defense against aggression should not be impaired or diminished."[17]

The discussion leading to article 51 took place not in Committee 1, the most important committee, but in a subsidiary committee: Committee 4 of Commission III, which dealt with regional arrangements. Unlike Committee 1 of Commission I, Commission III and its subcommittees dealt with the "Security Council" and were not charged with the "Purposes and Principles" of the Charter. As such, the discussion leading to article 51 was a discussion focused on the relationship between regional arrangements and the Security Council, rather than a discussion focused on the right of defense under the Charter.

As was just noted, the right of individual and collective defense was accepted as implicit in article 2(4) and had been dealt with in Committee 1 of Commission I. Article 51 emerged in Committee 4 of Commission III as an initiative of the American states in view of their recently concluded Act of Chapultepec, a predecessor to the collective security Rio Treaty for the American States. These states were simply seeking clarity that their Act of Chapultepec regional defense system would be consistent

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[15] Verbatim Minutes of the Second Plenary Session, U.N. Doc. 20 P/6 (Apr. 28, 1945), *in* 1 UNITED NATIONS INFORMATION ORGANIZATION, DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION: SAN FRANCISCO 1945, at 174 (1945), https://digitallibrary.un.org/record/1300969/files/UNIO-Volume-1-E-F.pdf.

[16] MYERS S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 599–600 (1961).

[17] Report of Rapporteur of Subcommittee I/1/A to Committee I/1, U.N. Doc. 739 (June 1, 1945), *in* 6 UNITED NATIONS INFORMATION ORGANIZATION, DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION: SAN FRANCISCO 1945, at 721 (1945), https://digitallibrary.un.org/record/1300969/files/UNIO-Volume-6-E-F.pdf.

with the UN Charter being negotiated, and that their right of individual and collective defense would not be taken away by the Security Council. There is no indication in the *travaux* that article 51 was drafted to represent the entire right of defense under the Charter, a core issue which was within the province of Commission I, not Commission III.

To summarize, there is no indication in the *travaux* that delegates to the San Francisco Conference discussed within the conference sessions narrowing the customary right of self-defense, banning the customary right of anticipatory self-defense,[18] banning the customary right of use of force for the protection of nationals, or banning whatever preexisting right of humanitarian intervention might have existed at the time. Further, there is strong evidence in the *travaux* that the framers intended that "the right of self-defense against aggression should not be impaired or diminished," for they said exactly that in the most important drafting committee dealing with the use of force. Moreover, there is strong evidence that the meaning of the addition in article 2(4) of "against the territorial integrity or political independence" suggested by the Australian delegation to the San Francisco Conference was not to add a condition qualifying all lawful uses of force, but rather to clarify that the most historically concerning threats—those of altering a frontier or removing political independence—were included in the article 2(4) ban. For this latter interpretation was that presented to the San Francisco Conference by the Australian Delegation itself.

Now the "minimalists" do not want us to look at the history and *travaux* of the Charter. They assert that examining the history and *travaux* just presented is impermissible because, they argue, if a treaty text is clear—as they assert is the case with the article 51 language of "if an armed attack occurs"—then the text alone controls.

There are two major problems with this "minimalist" argument for American international lawyers. First, the American view, as reflected in

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[18] See Daniel G. Donovan, The International Legal Right to Use Armed Force in Anticipatory Defense: The Iranian Nuclear Threat to Israel as a Case Study (2019) (S.J.D. dissertation, University of Virginia), for the best analysis to date of the right of anticipatory defense. Pages 69 through 80 of this dissertation set out a superb overview of what Donovan refers to as the "Restrictionist" versus the "Counter-Restrictionist" interpretations of the use of force provisions of the United Nations Charter. *Id*. at 69–80. Donovan supports the "Counter-Restrictionist" interpretation. *Id.* at 73. The first 125 pages of this dissertation address the right of anticipatory defense from Medieval Canon Law through 2017 and 2018 contemporary interpretations of the right of anticipatory defense under the United Nations Charter. *Id.* at 1–125.

Supreme Court decisions and American practice, is that it is always permissible, indeed desirable, to consult the negotiating history of a treaty in interpreting provisions of that treaty. The "minimalist" focus on textualism is predominantly a European view of treaty interpretation as embodied today in the Vienna Convention on the Law of Treaties.

I will always remember the outrage expressed against this approach by my professor of international law at Yale, Myres McDougal, who had been a member of the U.S. Delegation to the Vienna Convention negotiations. In large part because of this difference in treaty interpretation, over fifty years after the conclusion of the Vienna Convention, the United States is still not a party to this Convention.

But there is a second and even more obvious reason why the "minimalist" effort to avoid the history and *travaux* of the Charter is wrong. For, even under the extreme textualist approach embodied in the Vienna Convention on the Law of Treaties, under article 32 of that Convention "the preparatory work of the treaty [(i.e., *travaux*)] and the circumstances of its conclusion [(i.e., history)]" may be examined when the "meaning [is] ambiguous or obscure."[19]

Now, it is obvious that the correct meaning of article 51 under the United Nations Charter is at minimum "ambiguous." But, before demonstrating this ambiguity from the text of the use of force provisions of the Charter, let me share with you a great story about the importance of not overlooking the obvious.

Sherlock Holmes and Dr. Watson were in their tent one night, camping under the stars. In the middle of the night, Holmes poked Watson awake and asked, "Watson, look at all those stars. What do you deduce?" A sleepy Watson responds, "Well, there must be billions of stars. Perhaps there are planets like Earth, and perhaps there is life elsewhere. A disgusted Holmes responded, "Watson, you idiot, someone stole our tent!"[20]

In their blinkered, textual focus the "minimalists" fail to note the obvious semantic and syntactic ambiguities in the text of the Charter itself. First, would not article 2(4), negotiated in Commission I on the purposes and principles of the Charter and which was clearly felt by the framers to be the general provision concerning the scope of the right of defense,

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[19] Vienna Convention on the Law of Treaties, art. 32, May 23, 1969, 1155 U.N.T.S. 331.
[20] Jill Lawless, *The World's Funniest Joke*, CBS NEWS (Oct. 3, 2002, 12:39 PM), https://www.cbsnews.com/news/the-worlds-funniest-joke.

prevail if in conflict with article 51, negotiated in Commission III on regional arrangements? That is, at minimum, there are two articles in the Charter dealing with the use of force, and they must be interpreted together. Second, the language of article 51 itself, counter to the "minimalists," is not clear. For if the right of individual or collective self-defense is an "inherent" or "natural" right as set out in article 51, can such a right be limited by the subsequent phrase in the same article of "if an armed attack occurs"? Third, the equally authentic French version of article 51 uses "aggression armée" rather than "armed attack". This language seems to point to the broader traditional terminology of "aggression." Finally, does the language in article 51 of "if an armed attack occurs" mean "if, and only if, an armed attack occurs," or is it simply one critically important example as to where the right of defense is preserved—that of the occurrence of an armed attack. A clear and unambiguous way of expressing the "minimalist" interpretation, easily available to the framers, is to have phrased article 51 precisely as "if, and only if, an armed attack occurs." But absent this truly clear language, even article 51 taken alone can also equally clearly simply be presenting one obvious example of a lawful right of defense.

Thus, in addition to the history and *travaux* of the Charter, it is simply myth to believe that the text of the Charter either prevents our examining the history and *travaux* of the Charter or that it best supports the "minimalist" interpretation of the right of defense.

C. Limitations of International Court of Justice

Third, we must understand the limitations of International Court of Justice decisions and, importantly, that decisions of the International Court of Justice cannot amend the United Nations Charter. The International Court of Justice has decided five major cases implicating *jus ad bellum.* It should be understood, however, that except between the parties to each of these cases, these decisions have no binding force. Thus, article 59 of the Statute of the Court itself provides: "The decision of the Court has no binding force except between the parties and in respect of that particular case."[21] Further, article 38 of the Statute of the Court, setting out the law to be applied by the Court, specifically qualifies the effect of prior "judicial decisions" as "subject to the provisions of Article 59," which says that they have no precedential effect.[22] Most importantly, the provisions concerning amendment of the United Nations Charter, which include amendment of

[21] Statute of the International Court of Justice, June 26, 1945, art. 59.
[22] *Id*. art 38.

the use of force provisions at the core of the Charter, contain no provisions for amendment by judicial decision. Instead, as provided in article 108 of the Charter, amendments of the Charter—including change in the use of force provisions—would require participation of two thirds of the members of the General Assembly and all the permanent members of the Security Council.[23] Let me emphasize this point. Any amendments to the Charter's use of force provisions would require unanimity among the permanent members of the Security Council, including agreement by the United States.

D. Coordinated Public Response

As a fourth possibility in ending the erosion in the right of defense, another classic tool of international law available to the United States in rejecting an erroneous judicial decision is simply to coordinate with American allies and other interested nations in preparing a public response rejecting the erroneous view. There is no reason that the United States could not take the lead in a widely adhered declaration by governments, for example, that there is a full right of individual and collective defense against non-state actors. Indeed, despite the decision of the International Court of Justice in the *Israeli Wall* case, following the 9/11 attacks, the Security Council itself has clearly recognized the right of defense against non-state actors. A practice of such declarations against erroneous decisions might also have a generally useful effect on future use of force decisions of the Court itself.

Related to this fourth approach, and of possible help in restoring sanity in *jus ad bellum* law, I am pleased to inform this distinguished audience that Professor Yoram Dinstein of Tel Aviv University and I have been working with David Graham and scholars and practitioners from eleven countries in preparing a manual on *jus ad bellum*, tentatively titled *The Virginia Manual on the Law Concerning the Use of Force and the Exercise of Self-Defense*. Once in draft form, the manual will be circulated to governments—most particularly to include the United States Department of Defense—for incorporation of comments before finalization. The manual is well along, with agreement on multiple black letter rules, and is in the process of adding commentary to the rules. As this audience knows well, such manuals have been useful in dealing with *jus in bello* issues.

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[23] U.N. Charter art. 108.

III. Conclusion and Thanks

With your leadership, we can restore the law of *jus ad bellum* to its classic and correct meaning. That meaning was supported by many of the finest international law minds in the world—including Professors Myres McDougal,[24] C.M.H. Waldock,[25] and Derek W. Bowett.[26] A fully effective right of defense is an essential element in deterring aggression. In a world of sophisticated secret warfare, that right is needed more than ever.

We have a choice today. We can support the Charter framework as it supports defense and works against aggression, or we can avert our eyes as that framework is dismantled piece by piece.

In concluding, I would be remiss if I did not extend my thanks to all in this audience for your important service to the Nation, to freedom, and to the rule of law. May God be with each of you and may God be with the greatest Nation on earth, the United States of America.

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[24] *See* MCDOUGAL & FELICIANO, *supra* note 16.

[25] 81 C.M.H. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, HAGUE ACAD. RECUEIL DES COURS 451, 498 (1952).

[26] D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 188–89 (1958).