

Liberty University

From the Selected Works of Jeffrey C. Tuomala

January 1, 1994

Just Cause: The Thread That Runs So True

Jeffrey C. Tuomala, *Liberty University*



Available at: https://works.bepress.com/jeffrey_tuomala/2/

ARTICLES

Just Cause: The Thread that Runs so True

Jeffrey C. Tuomala*

Table of Contents

I.	Introduction	2
II.	Case Study: The Invasion of Panama	5
	A. <i>The Invasion</i>	5
	B. <i>The Decision to Invade</i>	8
III.	Just Cause and International Law	9
	A. <i>Customary International Law</i>	9
	B. <i>The United Nations Charter</i>	15
	C. <i>Operation Just Cause and International Law</i>	19
IV.	Just Cause and the U.S. Constitution	30
	A. <i>The Power to Declare War</i>	31
	B. <i>Presidential Powers</i>	33
	C. <i>The True Nature of the War Powers</i>	41
	D. <i>Changing World or Changing Mission?</i>	46
V.	Just Cause and Just War Doctrine	47
	A. <i>A Revival of Just War Doctrine</i>	47
	B. <i>Just War Doctrine</i>	51
	C. <i>Weinberger Doctrine</i>	59
VI.	Law in Support of Policy	64
VII.	Conclusion — Salvaging A Just Cause	67

*Associate Professor of Law, Regent University School of Law; Instructor U.S. Marine Corps Reserve, Law of War Detachment. B.S. 1973 The Ohio State University; J.D. 1976 Capital University; LL.M. 1984 George Washington University.

I. Introduction

Just cause is the single most important factor governing the decision to make war under customary international law. Interestingly enough, customary international law reached its pinnacle by the late 18th century, when the United States adopted its Constitution.¹ Consequently, the basic criteria and distinctions of customary law, particularly those pertaining to just cause, were influential in the Constitution's allocation of war powers. Just cause is also the central element in the centuries-old just war doctrine of Christian thought.² Indeed, customary international law adopted the concept of just cause nearly whole cloth from just war doctrine. Accordingly, just cause is the unifying thread that runs through customary international law, the U.S. Constitution, and the just war doctrine.

For centuries, customary law recognized a state's right to use force defensively against attack and offensively to punish and exact compensation for legal wrongs.³ However, since at least 1945, with the creation of the United Nations, there has been a radical departure from customary international law. The provisions of the U.N. Charter governing the use of force differ from customary law in two ways. First, the U.N. Charter attempts to monopolize the offensive use of force, thereby denying states that right.⁴ Second, the Charter permits U.N.-sanctioned force on grounds far more expansive than states are permitted under customary law.⁵ The Charter does not limit the United Nations to defending states and enforcing judgments for legal wrongs. Rather, it allows the United Nations to secure peace by imposing a particular vision of social, political, economic, and ideological order that it perceives is in the global interest. These two facts place the U.N.

1. Arguably, the influence of customary international law upon American legal tradition is evident from the following: Emmerich de Vattel's *THE LAW OF NATIONS* is the culminating treatise of classic international law. EMMERICH DE VATTEL, *LAW OF NATIONS* (Joseph Chitty trans., 1863). Part I of volume I of James Kent's *COMMENTARIES ON AMERICAN LAW*, the preeminent American legal treatise of the 19th century, is devoted to international law. JAMES KENT, 1 *COMMENTARIES ON AMERICAN LAW* (12th ed. 1873) (1758). Kent cites Vattel more than any other authority. He also notes that Vattel had been cited more freely for 50 years than any other writer despite what Kent believed were deficiencies of philosophical precision and insufficient citation of authority for precedent. 1 *Id.* at 18.

2. Just cause is one of several elements that comprise classic just war doctrine as it emerged after centuries of development in Western Christianity. For an analysis of all the elements of the just war doctrine, see *infra* part V.

3. See *infra* part III.A.

4. See *infra* part III.B.

5. *Id.*

JUST CAUSE

Charter outside the pale of both customary law and the just war doctrine.

Through both its membership in the United Nations and a transformation of its national mission, the United States has significantly altered its application of domestic law.⁶ The U.S. participation in the United Nations could be secured only through novel interpretations of the U.S. Constitution, resulting in a shift of the war powers from Congress to the President and U.N. Security Council.⁷ Moreover, as the national mission has changed, the touchstone for the use of force has shifted from the legal standard of just cause to the political test of national interest.⁸ To further complicate matters, since the Security Council has not functioned militarily as originally conceived, the United States has attempted to justify its own unilateral use of offensive force through implausible interpretations of the U.N. Charter.⁹ All of this breeds public cynicism toward law which comes to be viewed as little more than a political tool of indeterminate content used to justify policy choices.

Operation Just Cause, the 1989 U.S. military invasion of Panama, illustrates these contentions.¹⁰ As a case study, it offers a fairly discrete and manageable set of facts. The Panama invasion, and the U.S. justification for this action, raise each of the fundamental issues and highlight critical distinctions in the law regulating military force. Additionally, the very name of the operation — “Just Cause” — suggests that there are more fundamental standards for judging the conduct of

6. It is frequently claimed that the U.S. Constitution is ill-suited for a 20th century military superpower with world leadership responsibilities to enforce global peace. Former Secretary of State Daniel Webster portrayed the national mission and leadership role somewhat differently: “Our true mission is not to propagate our opinions or impose upon other countries our form of government by artifice or force, but to teach by example and show by our success, moderation, and justice, the blessings of self-government and the advantages of free institutions.” 6 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 898 (John Bassett Moore ed., 1906) [hereinafter DIGEST].

7. See *infra* part IV.B.3.

8. The Weinberger Doctrine designates certain criteria to be used as guidelines when making the decision of whether U.S. troops should be deployed overseas. See *infra* part V. However, this doctrine is little more than a political test based on national interest. *Id.* One author assesses this Doctrine as follows:

But whatever else one may think of the formula [Weinberger Doctrine] or its application to this case [Operation Just Cause], it clearly has nothing to do with conventional legal norms. Nor does it rest on any evident moral ones other than a kind of crude national utilitarianism: Unlike the powerful Aquinian [sic] Just War paradigm, it requires no *just cause* for the use of force.

Tom J. Farer, *Panama: Beyond the Charter Paradigm*, 84 AM. J. INT’L L. 503, 514 (1990).

9. See *infra* part III.C.

10. *Bush Announces Invasion of Panama*, in HISTORIC DOCUMENTS OF 1989 701 (Hoyt Gimlin, ed., 1990) [hereinafter HISTORIC DOCUMENTS].

nations than the dictates of social consensus or commands of positive law.

The principle of *jus cogens*, or peremptory norm, is a well-established principle of international law.¹¹ It is a higher law than treaty or custom based on state practice and cannot be altered by them. Classic just war doctrine contains several legal elements, including just cause, and each is a *jus cogens* governing the use of force in international law. As such, just cause is not only a thread common to international law, the U.S. Constitution and just war doctrine, it is the thread that runs so true.

This article focuses on the unilateral use of force, with special emphasis on the Panama Invasion of 1989. In the aftermath of Desert Storm and the collapse of the Soviet Union, some international scholars are optimistic that the world has entered an era when collective use of force, as envisioned in the U.N. Charter, will be the rule and not the exception. Multinational cooperation in numerous U.N. peacekeeping and enforcement ventures sustains that hope.¹² If indeed the future belongs to the United Nations and monopolized use of force, there is

11. The principle is included in article 53 of the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 344. Article 53, which is entitled Treaties Conflicting with a Peremptory Norm of General International Law (*Jus Cogens*), states:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Id. at 344.

The principle of *jus cogens* presents considerable conceptual difficulties for most lawyers who have been trained to live in a world of legal positivism. Since article 38 of the Statute of the International Court of Justice seems to recognize only positive law, *jus cogens* does not fit. STAT. I.C.J., art. 38, reprinted in 1976 U.N.Y.B. 1043, U.N. Sales No. E.78.1.1. It is something that exists but cannot quite be identified. A serious claim that it refers to a higher law evokes a mixed reaction of scorn and fear.

12. Some believe that the last big change in the American idea came in the 1940s and that the country is still run by an elite that views the world in terms of the Cold War era of superpowers. Michael Vlahos, *Our March Upcountry*, MARINE CORPS GAZETTE, Dec. 1993, at 20. When big change comes the old elite are unable to adapt and a new elite emerge. *Id.* Exactly what the world will look like is impossible to predict, but one thing is certain, it is those with a new and compelling idea that will emerge: *Id.*

It may be that Desert Storm is the last hurrah of a world dominated by two superpowers rather than the dawn of a new world order dominated by a single international organization. As such, "[t]he classic American form [of a new idea] would be a great religious revival that would wash away corruption in society. But that cleansing would surely frighten Europe's secular social democrats and more surely split what was the West." *Id.* at 29.

JUST CAUSE

reason to question the utility of analyzing the legality of unilateral actions or of revisiting Operation Just Cause. But just how effective the United Nations has become, or is ever capable of becoming, should be questioned, for it is at least as likely that the situations the United States faces in the 21st century will call for unilateral use of force.

Consequently, Part II of the article summarizes the events leading to the U.S. unilateral use of force in the invasion of Panama. Following Part II, Operation Just Cause is analyzed in light of the requirements of customary law, the U.S. Constitution, and the just war doctrine in Parts III, IV and V, respectively. Finally, Part VI considers the positive relation between law and sound policy decisions.

II. Case Study: The Invasion of Panama¹³

A. *The Invasion*

On December 20, 1989, a U.S. military force of 24,500 invaded Panama and easily defeated the 15,000-man Panamanian Defense Forces.¹⁴ U.S. casualties included twenty-three dead and 323 wounded.¹⁵ The Pentagon estimated Panamanian deaths at 600, half of them being civilians.¹⁶ In addition, the attack left 15,000 people homeless.¹⁷ Officials under the Bush Administration stated that the four objectives of the attack were: (1) to protect American lives; (2) to safeguard Panama Canal treaty rights; (3) to restore democratic government; and (4) to put an end to drug trafficking by removing General Manuel Noriega from power.¹⁸

General Noriega, the "*de facto*" head of the Panamanian government, had a 30-year symbiotic relationship with U.S. intelligence and defense officials.¹⁹ In return for payments, Noriega supplied the

13. For a brief survey of U.S.-Panamanian relations since the early 20th century see Alan Berman, *In Mitigation of Illegality: The U.S. Invasion of Panama*, 79 KY. L.J. 735, 736-39 (1991); see also Charles Maechling, Jr., *Washington's Illegal Invasion*, FOREIGN POL'Y, Summer 1990, at 113-115.

14. HISTORIC DOCUMENTS, *supra* note 10, at 701.

15. *Id.* at 703.

16. *Id.*

17. HUMAN RIGHTS WATCH, THE LAWS OF WAR AND THE CONDUCT OF THE PANAMA INVASION: AN AMERICAS WATCH REPORT 18 (1990).

18. H.R. DOC. NO. 127; 101st Cong., 2d Sess. 1 (1990) (letter from President Bush notifying Congress of the deployment of U.S. troops to Panama) [hereinafter PRESIDENT'S LETTER]; BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, POL'Y NO. 1240, PANAMA: A JUST CAUSE (1990) (statement of T. Pickering, U.S. Permanent Representative to the United Nations) [hereinafter PICKERING STATEMENT].

19. HISTORIC DOCUMENTS, *supra* note 10, at 704.

United States with information and cooperation in other matters, such as supporting anti-Sandinista contra forces.²⁰ At some point, however, he had become involved in criminal activities.²¹ His relationship with the Medellin drug cartel had turned Panama into a drug distribution center. As a result, the United States ended their relationship with Noriega, and in February of 1988, charged him with various drug-related offenses in two U.S. federal grand jury indictments.²² While Panama is not required to extradite its own nationals under an extradition treaty with the United States, it is required to prosecute them.²³ Because General Noriega was the *de facto* head-of-state, however, prosecution within Panama was not possible.

The United States made various attempts to resolve the problem without recourse to military action. Beginning in 1988, the United States instituted a wide array of diplomatic, political, and economic pressures. In particular, economic measures included a bar to military and economic aid, a freeze on Panamanian assets, an order to place all debts in escrow, a suspension of sugar imports, and a ban on Panamanian registered ships.²⁴ The cumulative impact of these acts was to leave Panama in economic ruin.²⁵ Other measures included portraying Noriega as evil incarnate, offering to negotiate asylum in Europe, encouraging attempts to overthrow him, and refusing to recognize his government or accept any candidate he offered to serve as Canal Administrator.²⁶ The United States also made unprecedented efforts to resolve the problem through the Organization of American States (OAS).²⁷ Finally, the United

20. *Id.*

21. *Id.*

22. *Id.* at 705. See also *United States v. Noriega*, 683 F. Supp. 1373 (S.D. Fla. 1988) (charging Noriega with contributing to an international conspiracy to import cocaine into the United States).

23. See Treaty Providing for the Extradition of Criminals, May 25, 1904, U.S.-Pan., art. 5, 34 Stat. 2851.

24. HISTORIC DOCUMENTS, *supra* note 10, at 702.

25. *Id.* See also *The OAS and the Panama Crisis*, 89 DEP'T ST. BULL. 67, 69 (1989) (Acting Secretary of State's statements before the Meeting of Consultation of Ministers of Foreign Affairs of the OAS on Aug. 24, 1989 and before the OAS Permanent Council on Aug. 31, 1989); *U.S. Severs Diplomatic Contact with Noriega Regime*, 89 DEP'T. ST. BULL. 69 (1989) (President's statement of Sept. 1, 1989); *Economic Measures Against Panama*, 89 DEP'T. ST. BULL. 69 (1989) (Department statement of Sept. 12, 1989); *U.S. Imposes Ban on Ships Under Panamanian Flag*, WALL ST. J., Dec. 1, 1989, at B2.

26. U.S. ST. DEP'T DOC. NO. 1815, A HISTORY OF DIPLOMATIC EFFORTS TO RESOLVE THE PANAMANIAN CRISIS 1-6 (1989); *U.S. Severs Diplomatic Contact with Noriega Regime*, *supra* note 25, at 69; Stephen Engleberg, *Bush Aides Admit a U.S. Role in Coup, and Bad Handling*, N.Y. TIMES, Oct. 6, 1989, at A1, A10; Robert Pear, *Aide to Noriega is Sworn in: U.S. Won't Recognize Him*, N.Y. TIMES, Sept. 2, 1989, at A3.

27. PICKERING STATEMENT, *supra* note 18, at 2.

JUST CAUSE

States pressured Noriega himself to give up power and leave the country.²⁸

At the same time the United States was attempting to peacefully rid Panama of Noriega, Noriega was engaged in his own campaign to harass Americans and Panamanians who worked in the Canal Zone. In 1988, under Noriega's command, detentions, threats, and intimidation of American servicemen and their dependents became routine.²⁹ The U.S. claimed that there were 300 armed violations of U.S. bases, 400 detentions, and 140 persons endangered.³⁰ In August 1989, the U.S. reported 900 incidents of harassment in violation of the Canal treaties to the Security Council.³¹ However, as late as November 1989, the State Department reported that Panama had not interfered with actual operations of the Canal and that Noriega had offered no direct threat to operations or exercise of U.S. rights.³²

In May of 1989, Panama held elections.³³ Observers claimed that candidate Guillermo Endara won by an overwhelming margin. Noriega responded by nullifying the election and having opposition candidates physically beaten on television.³⁴ An attempted coup failed in 1989.³⁵ Subsequently, Noriega had several of the coup leaders tortured and executed.³⁶ President Bush was criticized for not taking more decisive measures in support of the coup.

The caldron finally boiled over on December 15, 1989, when the Panamanian legislature declared that Panama was in a state of war with the United States and then named Noriega its Maximum Leader.³⁷ Thereafter, Noriega made public speeches probably designed to incite violence against the 35,000 Americans living in Panama and said that he looked forward to seeing American bodies floating in the Canal.³⁸ At

28. *Id.*

29. PRESIDENTS LETTER, *supra* note 18, at 1; PICKERING STATEMENT, *supra* note 18, at 2.

30. PRESIDENT'S LETTER, *supra* note 18, at 1; PICKERING STATEMENT, *supra* note 18, at 2.

31. PANAMA, UNITED STATES AGAIN BEFORE COUNCIL, U.N. CHRON., Dec. 1989, at 20.

32. STRATEGIC IMPORTANCE OF THE PANAMA CANAL, HEARING BEFORE THE SUBCOMM. ON PANAMA CANAL AND OUTER CONTINENTAL SHELF OF THE HOUSE COMM. ON MERCHANT MARINE & FISHERIES, 101st Cong., 1st Sess. 52 (1989) (statement of Michael G. Kozak, Deputy Assistant Secretary of State for Inter-American Affairs).

33. PICKERING STATEMENT, *supra* note 18, at 1; HISTORIC DOCUMENTS, *supra* note 10, at 705.

34. PICKERING STATEMENT, *supra* note 18, at 1; HISTORIC DOCUMENTS, *supra* note 10, at 705.

35. PICKERING STATEMENT, *supra* note 18, at 1; HISTORIC DOCUMENTS, *supra* note 10, at 705.

36. HISTORIC DOCUMENTS, *supra* note 10, at 705; *See also* Ann Devroy, *U.S. Keeps Troops on Sidelines*, WASH. POST, Oct. 4, 1989, at A1, A31; David Hoffman & Joe Pichirallo, *Rebels Held Noriega for Hours*, WASH. POST, Oct. 5, 1989, at A1, A60; Russell Watson, *The Invasion of Panama*, NEWSWEEK, Jan. 1, 1990, at 18.

37. PRESIDENT'S LETTER, *supra* note 16, at 1; HISTORIC DOCUMENTS, *supra* note 12, at 705.

38. PRESIDENT'S LETTER, *supra* note 18, at 1; William Branigin, *Noriega Appointed 'Maximum*

first, the United States did not take this "declaration of war" seriously. Yet, the next day Panamanian police killed an off-duty Marine officer and wounded another that had been stopped at a roadblock.³⁹ The Panamanian police also detained a Navy officer and his wife for several hours beating him and threatening her with sexual abuse.⁴⁰ The United States also claimed to have received evidence that Noriega was planning commando raids on American residences.⁴¹ The information about the commando raids was never confirmed. Further, such information was not received until after December 17, when the decision to invade had already been made.⁴² Panama claimed that none of the incidents in which Americans were harmed were authorized, yet no apology was ever made.⁴³

The invasion commenced on December 20, just hours after Endara was sworn in as the "legitimate" head-of-state.⁴⁴ Most of the fighting was over in two days, but sporadic resistance continued for more days, with looting breaking out in the capital.⁴⁵ After a ten-day standoff, Noriega surrendered himself on January 3, 1990 to the Papal Nunciature.⁴⁶ Drug Enforcement Agency officials immediately brought him to Florida.⁴⁷ Panama City rejoiced upon news of Noriega's capture.⁴⁸

B. The Decision to Invade

Shortly before the invasion commenced on December 20, 1989, President Bush informed Congressional leaders of his decision.⁴⁹ On December 21, 1989, he notified Congress of the invasion in an effort to be "consistent with the War Powers Resolution."⁵⁰ The U.S. Senate

Leader, WASH. POST, Dec. 16, 1989, at A21, A23.

39. PRESIDENT'S LETTER, *supra* note 18, at 1; HISTORIC DOCUMENTS, *supra* note 10, at 704.

40. PRESIDENT'S LETTER, *supra* note 18, at 1; HISTORIC DOCUMENTS, *supra* note 10, at 705-706.

41. Watson, *supra* note 36, at 21.

42. Berman, *supra* note 13, at 751-52 (Press Conference by U.S. Secretary of State James Baker on Dec. 20, 1989); Watson, *supra* note 36, at 21.

43. Andrew Rosenthal, *President Calls Panama Slaying A Great Outrage*, N.Y. TIMES, Dec. 19, 1989, at A1, A12.

44. Endara welcomed the invasion while he was protected on a U.S. military installation. PRESIDENT'S LETTER, *supra* note 18, at 1.

45. HISTORIC DOCUMENTS, *supra* note 10, at 701, 702.

46. *Id.*

47. *Id.*

48. *Id.* at 702.

49. *Id.* at 706 (reprinting President Bush's televised address to the nation on Dec. 20, 1989).

50. PRESIDENT'S LETTER, *supra* note 18, at 1. For more information on the War Powers Resolution, see *infra* part IV.

JUST CAUSE

had debated the issue of military intervention on October 5, 1989,⁵¹ and on February 7, 1990, both the Senate and the House of Representatives approved of the invasion by concurrent resolution.⁵²

Meanwhile, on December 20, 1989, the United States notified the U.N. Security Council of its decision to invade.⁵³ In response, the U.N. Security Council drafted a resolution characterizing the invasion as a flagrant violation of international law. Ten members voted for this resolution and one abstained. The United States and three other members vetoed the resolution.⁵⁴ The U.N. General Assembly adopted a resolution condemning the invasion by a vote of 75 to 20, with 40 abstentions.⁵⁵ Most of the opposing votes and abstentions were not based on the belief that the U.S. invasion was legal, but rather that the resolution failed to denounce Noriega's past conduct.⁵⁶

On December 22, the United States also notified the O.A.S. of its invasion.⁵⁷ The O.A.S. censured the United States for the invasion, by a vote of 20 to 1 with 6 abstentions.⁵⁸

III. Just Cause and International Law

A. Customary International Law

The law of war governs both the decision to go to war, *jus ad bellum*, and the manner in which war is waged, *jus in bello*.⁵⁹ The element of just cause pertains primarily to *jus ad bellum*. The development of *jus ad bellum* was grounded in the just war doctrine of Western Christianity. Yet, even when customary international law became severed from its overtly biblical and theological moorings, it nevertheless maintained the concept of just cause. Because customary international law remained firmly established in the natural school of jurisprudence, lawyers never viewed the law as simply a matter of human convention. Properly understood, customary international law reflects the immutable law of nature.⁶⁰

51. Cong. Rec. S12684-01, 101st Cong., 1st Sess. (1989).

52. H.R. Con. Res. 262, 101st Cong., 2d Sess. (1990).

53. PICKERING STATEMENT, *supra* note 18, at 1-2.

54. U.N. SCOR, 37 Sess., 2902d mtg., U.N. Doc. SC/5155 (1989).

55. U.N. GAOR, 44th Sess., 88th mtg., U.N. Doc. GA/7976 (1989).

56. Berman, *supra*, note 13, at 735, 755.

57. PICKERING STATEMENT, *supra* note 18, at 2 (statement of Luigi R. Einaudi, U.S. Permanent Representative to the OAS).

58. O.A.S. Doc. No. CP/Res.534 800/89 (1989). See also HISTORIC DOCUMENTS, *supra* note 10, at 703.

59. WILLIAM V. O'BRIEN, THE CONDUCT OF JUST AND LIMITED WAR 13 (1981).

60. See, e.g., VATTEL, *supra* note 1, at lviii ("We call that the *Necessary Law of Nations*

There are three crucial concepts found in customary international law as it relates to *jus ad bellum*. These concepts involve: (1) the distinctions between offensive and defensive wars; (2) legal and prudential judgments; and (3) state of war and act of war.

1. Offensive and Defensive Wars.—In assessing just causes of war, the classic legal scholars determined that the legal cause of every just war is an injury done to one nation by another.⁶¹ Injuries include any unlawful attacks or other violations of rights that are identified by international law.⁶² The kinds of injury giving rise to just cause are therefore extremely numerous.⁶³ As a result, there are three just and lawful objectives for which nations wage war. These objectives include: (1) obtaining compensation or reparations for losses; (2) punishing offenders by reprisal for wrongs done; and (3) defending against unlawful attacks.⁶⁴ Nations attain the first two objectives by resorting to offensive war and the third by waging defensive war. An understanding of the distinction between offensive and defensive war is also critical for interpreting the U.N. Charter and the U.S. Constitution.

Following a finding of just cause, nations are permitted to wage offensive war as a sanction to exact compensation for injuries and to punish for wrongs.⁶⁵ On the other hand, nations may wage just defensive war without such findings in the event of an unlawful attack.⁶⁶ Because there is no superior tribunal before which nations may bring charges or complaints, they must necessarily be the judges of their own cases.⁶⁷

which consists in the application of the law of nature to *Nations*. It is *Necessary* because nations are *absolutely* bound to observe it. This law contains the precepts prescribed by the *law of nature* to States"). Blackstone explained the prevailing 18th century understanding of the law of nature as follows:

This law of nature, being coeval [sic] with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all of the globe in all countries, and at all times; no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

1 WILLIAM BLACKSTONE, COMMENTARIES *41.

61. Vattel, *supra* note 1, at 302.

62. *Id.*

63. *Id.*

64. *Id.* Hugo Grotius listed the same three objectives of just wars: "Justifiable causes include defence, the obtaining of that which belongs to us or is our due, and the inflicting of punishment."

2 HUGO GROTIUS, THE LAW OF WAR AND PEACE 171 (Francis W. Kelsey trans., 1925) (1646).

65. Vattel, *supra* note 1, at 302.

66. *Id.*

67. Although the International Court of Justice exists, nations seldom resort to it for a variety of reasons. The 20th century has also witnessed many attempts to establish effective arbitration

JUST CAUSE

Before waging war, however, customary law does mandate that countries abide by certain procedural requirements. These requirements are based on the offensive-defensive war distinction. Customary international law requires a declaration before waging offensive, but not defensive, war.⁶⁸ The declaration must contain, or be preceded by, notice of cause and a demand for satisfaction for the injury suffered.⁶⁹ The purpose of such notice is to give the offender a final opportunity to settle matters peacefully.⁷⁰ In addition, the declaration may serve to notify one's own citizens of changes in legal relations or obligations.⁷¹ Consequently, the declaration of war is in effect a legal judgment in cases of offensive war.⁷²

The normal domestic legal system makes a similar distinction between offensive and defensive use of force.⁷³ Only after a judicial judgment may the state punish criminals or exact compensation.⁷⁴ However, an individual or the state may use force in self-defense without prior judicial authorization as long as there is an immediate threat to person or property.⁷⁵

2. Legal and Prudential Judgments.—Just because a nation has just cause does not mean that it should wage war. The decision to wage war entails both a legal judgment that there is just cause and a prudential judgment that war is in the national interest. A prudential or political judgment is founded on utility. Not only must the state have a legal right, it must be advisable and expedient to exercise that right. It would be unlawful and therefore immoral to wage war solely on national interest without just cause. Also, it would be imprudent and therefore immoral to wage war contrary to national interest even if there is just cause. This concept is described as follows:

The reasons which may determine [states] to [wage war] are of two classes. Those of the one class show that [a state] has a right to

tribunals.

68. Vattel, *supra* note 1, at 315, 316.

69. *Id.* at 314.

70. *Id.*

71. *Id.* at 314-16.

72. In fact, up to the beginning of the 20th century, the resort to war was considered an extraordinary form of a lawsuit. "A large number of writers described war as a judicial procedure involving also execution and punishment; it was looked upon as the 'litigation of nations', a means of obtaining redress for wrongs in the absence of a system of international justice and sanctions." IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 21 (1963).

73. See *infra* part III.A.3.

74. *Id.*

75. *Id.*

make war — that [a state] has just grounds for undertaking it: — these are called *justificatory reasons* [legal judgments]. The others, founded on fitness and utility, determine whether it be expedient for the sovereign to undertake a war, — these are called *motives* [prudential judgments].⁷⁶

Under international law, the right to initiate war resides only in the public authority who is responsible for making both the legal and prudential judgment.⁷⁷ However, allocation of war powers within a state is a matter of domestic law. Although the authority to make both judgments may reside in the same person or body, it may be allocated in some other fashion.⁷⁸

The classical international law commentaries discuss several additional legal and prudential requirements that decisionmakers must follow to insure that they waged war justly. For example, authorities must have proper motives for waging war and not do so upon pretext. Also, war is to be waged as a last resort when every other means of settling disputes peacefully has been exhausted. Perhaps most important, any punishment or reparations must be proportionate to the wrong done.⁷⁹

3. *State of War and Act of War.*—When considering the concept of just cause within customary international law, one must finally consider the distinction between act of war and state of war. This distinction is implicit in the requirement that the amount of force used must be proportionate to the injury suffered. This precept has been articulated as follows:

In reality the word “war” comprehends two meanings. It denotes (1) acts of war, and (2) the international condition of things called a “state of war.” Acts of war do not always or necessarily develop

76. VATTTEL, *supra* note 1, at 301. Vattel uses the word “motive” to refer to prudential considerations:

As the nation, or her ruler, ought, in every undertaking, not only to respect justice, but also to keep in view the advantage of the state, it is necessary that proper and commendable motives [prudential judgments] should concur with the justificatory reasons [legal judgments], to induce a determination to embark in a war. These reasons show that the sovereign has a right to take up arms, that he has just cause to do so. The proper motives show, that in the present case it is advisable and expedient to make use of his right. These latter relate to prudence, as the justificatory reasons come under the head of justice.

Id. at 303.

77. VATTTEL, *supra* note 1, at 292; GROTIUS, *supra* note 64, at 91-137.

78. *Id.*

79. *Id.* at 303-06.

JUST CAUSE

into the general international condition of things called a state of war, but they are nevertheless war and involve the "making" of war in a legal sense.⁸⁰

The distinction between state of war and act of war is important to both offensive and defensive war, but in somewhat different ways. Defensive war is waged in response to either an unjust act of war or an unjust initiation of a state of war.⁸¹ In neither situation does international law require a declaration of war, however, because defensive war is waged in response to an immediate threat or ongoing attack.⁸² In essence, then, the right to wage defensive war exists where "the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."⁸³ When unjust acts of war are relatively discrete incidents not developing into, or being part of a state of war, defensive force may be used as long as the threat or attack is immediate.⁸⁴ Once the danger has passed, redress may be had through resort to a proportionate offensive act of war if peaceful means are unsuccessful in obtaining justice.⁸⁵ This concept is very similar to the doctrine of self-defense in domestic law. A person may use proportionate force against an immediate threat or attack. Once damage has been done and the immediate threat is past, remedial action must be pursued in court. With unjust initiations of a state of war, however, the immediate threat or attack is continuous.⁸⁶ Therefore, wronged parties may still respond with defensive force without a declaration of war.⁸⁷

80. 5 JOHN BASSETT MOORE, THE COLLECTED PAPERS OF JOHN BASSETT MOORE 195 (1944) [hereinafter 5 COLLECTED PAPERS OF JOHN BASSETT MOORE]. There have been numerous forms of coercion not amounting to a "state of war" including "reprisals, pacific blockades, certain justifiable interventions, and naval demonstrations." BROWNIE, *supra* note 72, at 26. The 19th and 20th centuries have also witnessed the use of a wide variety of terms to refer to hostilities of a lesser nature than state of war including "war", 'actual warfare', 'de facto state of war', 'intervention', 'armed intervention', 'hostilities', 'expedition', 'military measures', and 'war-like acts'." *Id.* at 34. "They [types of force used for limited purpose] also share other characteristics related to the limited objective of the operations: in each case the conflict is limited in geographical terms or in the numbers of the forces involved, or in both senses." *Id.* at 40.

81. See *supra* part III.A.1.

82. *Id.*

83. 2 DIGEST, *supra* note 6, § 217. Although this standard was formulated for anticipatory attacks, it seems that it covers ongoing attacks as well. All self-defense is in some sense anticipatory. Nicholas Rostow, *Nicaragua and the Law of Self-Defense Revisited*, 11 YALE J. INT'L L. 437, 452 n.59 (1986).

84. 2 DIGEST, *supra* note 6, § 217.

85. VATTTEL, *supra* note 1, at 305.

86. 5 COLLECTED PAPERS OF JOHN BASSETT MOORE, *supra* note 80, at 195.

87. VATTTEL, *supra* note 1, at 305.

Offensive war, like the judgment of a civil court, must be proportionate to the wrong done.⁸⁸ If an enemy initiates an unjust state of war, which by its very nature involves an immediate and ongoing threat or attack, any response will be defensive from the victim's perspective.⁸⁹ Since the victim is acting in self-defense, no declaration of war is necessary as a matter of international law.⁹⁰ Therefore, just offensive war will invariably be waged to vindicate a prior unjust act of war. When an unjust attack is only an act of war, normally only an offensive act of war in response will be proportionate. The purpose of a declaration in such a case will not be to initiate a state of war, but rather an act of war. These declarations should place limits on the use of force to ensure that it is proportionate to the wrong done. Placing clear limits on the use of force will also satisfy prudential concerns.⁹¹ That is, if friendly forces and the enemy know that actions are to be limited, they will tend to prevent greater hostilities from ensuing.⁹²

88. See *supra* part III.A.1.

89. See *supra* text accompanying note 83.

90. See *supra* part III.A.1.

91. See *supra* part III.A.2.

92. During the 18th and 19th centuries many states promoted the view that the decision to initiate war is a purely political matter not governed by law. BROWNIE, *supra* note 72, at 14, 19-20, 41, 47. Even so, nations were reluctant to go to war without claiming what amounted to just cause. MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 135 (1961).

However, that view recognized, for the most part, that the way in which combatants wage war is subject to *jus in bello*. See *supra* note 60 and accompanying text. The London Charter and judgments of the International Military Tribunal at Nuremberg following World War II emphatically rejected the theory that there is no *jus ad bellum*. Trial of the Major War Criminals, 1 I.M.T. 1, 186 (1947) (Int'l Mil. Trib.). The allies tried, convicted and executed civilian and military leaders of Nazi Germany on charges including crimes against peace. *Id.* at 216-18. The Tribunal declared that "[t]o initiate a war of aggression, therefore, is not only an international crime, it is the supreme international crime" *Id.* at 186. The exact legal theory relied upon to justify the Nuremberg convictions for crimes against peace is unclear. The International Military Tribunal found that the Charter which created the Tribunal and defined the crime was decisive. *Id.* at 218. This is an unsatisfactory rationale and bears a striking resemblance to the positivistic approach the German jurists took at their trials. They argued that in punishing Germans who aided Jews they were simply applying the law of Nazi Germany. However, even if customary law forbidding aggressive war had disappeared by the early 20th century, it was reconstituted following World War I, as prohibitions against aggressive war in the Covenant of the League of Nations and the Kellogg-Briand Treaty that was almost universally accepted. BROWNIE, *supra*, note 72, at 56, 66, 107, 112, 216, 274.

There was a revival of natural law thought following World War II to counter the legal positivism that had become so prevalent in this century and so foundational to National Socialism. Unless there is a higher law governing nations that gives content to international law independent of treaty and custom, the law of the Nuremberg Tribunal is truly nothing more than "victor's justice" in the crassest sense.

JUST CAUSE

B. The United Nations Charter

The U.N. Charter radically alters customary law by denying nations the right to unilateral use of offensive force as a remedy for injuries.⁹³ Considerable controversy exists as to whether the right of self-defense is narrower under the Charter than under customary law. Under the U.N. Charter, the issue of unilateral use of force is embodied in two provisions, namely article 2(4) and article 51.

Article 2(4) establishes the basic rule prohibiting all unilateral force. Article 2(4) provides that “[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.”⁹⁴ The Charter further provides that member states delegate to the Security Council the right to determine whether there is “any threat to the peace, breach of the peace, or act of aggression.”⁹⁵ In addition to assessing threats, the Security Council alone has the authority to decide whether to use force or some other form of action to remedy matters.⁹⁶

Article 51 is the only U.N. Charter provision that recognizes an exception to the general prohibition on unilateral force. As enunciated by article 51:

Nothing 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, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁹⁷

93. *But cf.*, BROWNIE, *supra* note 72, at 281. Author Ian Brownlie argues that by 1945, customary law had already changed so as to disallow unilateral use of offensive force.

94. U.N. Charter art. 2, ¶ 4.

95. *Id.* art. 39. Article 39 provides that “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” *Id.*

96. *Id.* arts. 40-42.

97. *Id.* art. 51.

Article 51 imposes a procedural requirement to notify the Security Council of measures taken in self-defense. This requirement does not exist under customary law.⁹⁸

There is also disagreement over whether the right to self-defense acknowledged by article 51 is narrower than that recognized in customary law. This disagreement is primarily focused on the meaning of two phrases in article 51, namely the phrases "inherent right . . . of self-defence" and "if an armed attack occurs." Arguably, "inherent right" refers to customary law, thereby making article 51's right of self-defense identical to the customary right.⁹⁹ However, some scholars argue that the language "if an armed attack occurs" limits the right of self-defense to actual large-scale attacks across territorial borders.¹⁰⁰

98. Some diplomats and scholars have argued that the right of unilateral self-defense ceases once the Security Council has taken any measure to restore peace or once an invasion is complete. For example, once the invasion of Kuwait was complete or following Security Councils sanctions on Iraq short of war, Kuwait had no right to use force in self-defense. E.g., Kathryn S. Elliott, *The New World Order and the Right of Self-Defense in the United Nations Charter*, 15 HASTINGS INT'L & COMP. L. REV. 55 (1991). But cf., Thomas K. Plofchan, Jr., *Article 51: Limits on Self-Defense?* 13 MICH. J. INT'L L. 336 (1992).

99. There are several difficulties here. The first is determining whether "inherent right" is a reference to customary law based simply on state practice and *opinio juris* (the classic writers referred to this as permissive law) or whether it includes the law of nature. If it is only permissive law, to what does it refer? Is it customary law as it stood in 1945 or as it stands today? If "inherent" simply refers to custom as human convention or permissive law it gives no assurance of a basic immutable right. Classic scholar Grotius had this to say about such views of law and justice:

The delusion is as old as it is detestable with which many men, especially those who by their wealth and power exercise the greatest influence, persuade themselves, or as I rather believe, try to persuade themselves, that justice and injustice are distinguished the one from the other not by their own nature, but in some fashion merely by the opinion and the custom of mankind.

HUGO GROTIUS, *FREEDOM OF THE SEAS* 1 (Ralph van Deman Magoffin trans., 1916) (1608).

However, if "inherent" is given its normal meaning as something that cannot be changed by custom or treaty it is a meaningful concept. But then it points to a law that precedes and is unaltered by human convention. Oscar Schachter recognizes these two fundamentally opposed approaches to law.

While acknowledging that the concept "inherent right" has natural law origins, many authorities on international law reject the idea that the right of self-defense exists independently of positive law and cannot be altered by it However, the fact that the Court and international legal scholars consider that self-defense is governed by positive law has not obliterated an opposing conception of self-defense as an autonomous, nonderogable right that "exists" independently of legal rules. That conception, I believe, continues to influence popular and official attitudes concerning national security.

Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259, 259-60 (1989) [hereinafter *Self-Defense and the Rule of Law*].

100. [B]ut self-defence now has a more restricted and obvious meaning. For at least thirty years it has appeared in state practice principally, though not exclusively, as a reaction to the use of force against the territorial domain, the physical entity, of a state.

JUST CAUSE

This interpretation would preclude the right of anticipatory self-defense and humanitarian rescues even of one's own nationals.¹⁰¹

The International Court of Justice addressed the right of self-defense in *Nicaragua v. United States*,¹⁰² when it made a distinction between "armed attack" and other illegal uses of force.¹⁰³ In *Nicaragua*, the court held that there is an individual and collective right of self-defense, which includes the right to counterattack¹⁰⁴ against an armed attack. Additionally, the Court held that there is at least an individual-right to take "proportionate counter-measures" against other illegal use of force.¹⁰⁵ "Proportionate counter-measures" seems to imply the use of force. The factors distinguishing armed attacks from other illegal uses of force are the scale and effect of the attack.¹⁰⁶ As noted by the Court:

An armed attack is not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (*inter alia*) an actual armed attack conducted by regular forces, "or its substantial involvement therein" [However it does not include] assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be

BROWNIE, *supra* note 72, at 255-56. Brownlie also discusses issues of size and extent of the attack as well as attack by indirect means. *Id.* at 278-79. See also *Self-Defense and the Rule of Law*, *supra* note 99, at 272 ("Nearly all the cases have been discussed in UN bodies and, although opinions have been divided, it is clear that most governments have been reluctant to legitimize expanded self-defense actions that go beyond the paradigmatic case [of armed attack on the territory or instrumentality of the state]").

101. As to the issue of anticipatory self-defense see BROWNIE, *supra* note 72, at 366-67 ("In particular the terms of article 51 of the Charter would seem to preclude preventive action."). But see, Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1633-35 (1984) [hereinafter *The Right of States to Use Armed Force*]. "It is . . . not implausible to interpret article 51 as leaving unimpaired the right of self-defense as it existed prior to the Charter." *Id.* at 1634.

As to the right of humanitarian intervention to protect one's own nationals Brownlie writes: "In spite of the important instances since 1920 of use of this justification and the views of a considerable number of jurists, it is submitted that any legal basis of the right of intervention is now extremely tenuous." BROWNIE, *supra* note 72, at 298. But Schachter claims that most countries recognize the right to rescue their own nationals. *The Right of States to Use Armed Force*, *supra*, at 1628-33.

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

103. *Id.* at 127. "Nevertheless, such activities may well constitute a breach of the principle of the non-use of force and an intervention in the internal affairs of a State, that is, a form of conduct which is certainly wrongful, but is of lesser gravity than an armed attack." *Id.*

104. *Id.* at 102-03, 110.

105. *Id.* at 106, 127.

106. *Nicaragua*, 1986 I.C.J. at 103-04.

regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.¹⁰⁷

Accordingly, based upon *Nicaragua*, in cases of armed attack, a victim may unilaterally or collectively use force in self-defense, including armed counterattacks or intervention into the offender's territory.¹⁰⁸ The victim of other illegal uses of force may use "proportionate counter-measures."¹⁰⁹ The Court declined to say whether counter-measures could be taken in the offender's territory.¹¹⁰ However, it did rule that third parties may not intervene in the offender's territory with counter-measures in exercise of a right analogous to collective self-defense. The implication is that the victim may not intervene with forcible counter-measures either.¹¹¹

The Court claimed to decide *Nicaragua* on the basis of customary international law rather than the U.N. Charter.¹¹² The court stated that the right of self-defense as expressed in the Charter is not identical to customary law,¹¹³ but neither is it inconsistent.¹¹⁴

107. *Id.*

108. *Id.*

109. *Id.* at 110.

110. As stated by the Court:

However, since the Court is bound to confine its decision to those points of law which are essential to the settlement of the dispute before it, it is not for the Court here to determine what direct reactions are lawfully open to a State which considers itself the victim of another State's acts of intervention, possibly involving the use of force. Hence it has not to determine whether, in the event of Nicaragua's having committed any such acts against El Salvador, the latter was lawfully entitled to take any particular counter-measure.

Id. at 110. If forcible countermeasures in the offender's territory are illegal, this would constitute a significant departure from the "inherent" right of self-defense. It is not unlikely that the I.C.J. would make such a departure. Its analysis of "armed attack" follows very closely that of Brownlie:

Since the phrase 'armed attack' strongly suggests a trespass it is very doubtful if it applies to the case of aid to revolutionary groups and forms of annoyance which do not involve offensive operations by the forces of a state. Sporadic operations by armed bands would also seem to fall outside the concept of 'armed attack.' However, it is conceivable that a co-ordinated and general campaign by powerful bands of irregulars, with obvious or easily proven complicity of the government of a state from which they operate, would constitute an 'armed attack'

BROWNIE, *supra* note 72, at 278-79. Brownlie, who served as Nicaragua's Agent and Counsel in *Nicaragua*, also wrote that, "[i]ndirect aggression and the incursions of armed bands can be countered by measures of defence which do not involve military operations across frontiers." *Id.* at 279.

111. *Nicaragua*, 1986 I.C.J. at 110. "In the view of the Court, under international law in force today—whether customary international law or that of the United Nations system—States do not have a right of 'collective' armed response to acts which do not constitute an 'armed attack.'" *Id.*

112. *Id.* at 94-96.

113. *Id.*

114. *Id.* at 94, 96.

JUST CAUSE

It is also unclear to what extent the U.N. Charter and other treaties may have altered the content of pre-Charter customary law. The Court said that “inherent right” must refer to customary law that has a prior and independent existence from the Charter, yet that customary law might be affected or altered by the Charter.¹¹⁵ However, it would be impossible to know what current customary law is by simply asking what it was prior to the Charter of 1945.¹¹⁶ For example, even though there was clearly a customary right of anticipatory self-defense prior to 1945, that customary right may not be the same today. There is no evidence of a pre-1945 custom that makes a distinction allowing collective intervention in response to armed attack but not in response to other illegal use of force. Unfortunately, the Court offered no evidence of how this distinction arose in state practice since 1945.

Nonetheless, the “inherent right” of self-defense has an existence independent of custom or treaty. Customary law as it existed prior to the U.N. Charter incorporated and reflected that immutable right.

C. Operation Just Cause and International Law

The Bush Administration relied on two basic legal theories to justify the invasion of Panama. The primary theory was the U.N. Charter’s article 51 right of self-defense.¹¹⁷ Three of the invasion’s objectives, including protecting American lives, safeguarding treaty rights, and stopping drug trafficking, are tied to this justification. The second theory relied on was the right of humanitarian intervention.¹¹⁸ The fourth objective, establishing democracy in Panama, is based on the second theory. Nevertheless, the arguments that the invasion was a lawful act of self-defense or an act of humanitarian intervention are unconvincing. Likewise, the invasion was unlawful under customary law. Although the United States had just cause it did not meet other requirements for just war.

115. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a “natural” or “inherent” right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter.

Nicaragua, 1986 I.C.J. at 94. Of course under this interpretation, “natural” and “inherent” really have no fixed meaning at all. When rights are simply the creation of a political sovereign or communal consensus they offer no protection. See *supra* text accompanying note 99.

116. See *Nicaragua*, 1986 I.C.J. at 95, 96-97.

117. PRESIDENT’S LETTER, *supra* note 18, at 1; PICKERING STATEMENT, *supra* note 18, at 1.

118. PRESIDENT’S LETTER, *supra* note 18, at 1-2; PICKERING STATEMENT, *supra* note 18, at 1-2.

1. Operation Just Cause as Self-defense

(a) *The U.N. Charter.*—The U.S. invasion of Panama cannot be justified as self-defense against an armed attack as that right was defined by the International Court of Justice in *Nicaragua v. United States*. The United States appealed to three basic facts in justifying the invasion as self-defense. First, Noriega waged a harassment and intimidation campaign against Americans and U.S. military bases.¹¹⁹ Second, Noriega declared that Panama was in a state of war with the United States and encouraged violence against Americans.¹²⁰ Finally, Noriega's police killed an off-duty Marine officer at a roadblock in front of his office building and wounded another.¹²¹ They also arrested and abused a Navy couple who witnessed the shooting.¹²² Actions ordered or condoned by Noriega, and directed at Americans, certainly amounted to an illegal use of force, but they were not of sufficient magnitude to be characterized as an armed attack.¹²³

The United States was free to use proportionate countermeasures, including perhaps forcible ones, against any illegal use of force, but, in *Nicaragua*, the International Court of Justice left undecided the question of whether the victim may intervene in the offender's territory to do so.¹²⁴ Under the most likely interpretation, the victim may not intervene with forcible countermeasures. The Panama situation, however, presented special problems. American military personnel and civilians were in Panama under treaty rights and to a large measure mixed in with the Panamanian community.¹²⁵ Certainly measures limited in scope and effect as an immediate response to illegal acts were permitted in Panamanian territory under these circumstances. However,

119. PRESIDENT'S LETTER, *supra* note 18, at 1; PICKERING STATEMENT, *supra* note 18, at 1-2.

120. PRESIDENT'S LETTER, *supra* note 18, at 1; PICKERING STATEMENT, *supra* note 18, at 1-2.

121. PRESIDENT'S LETTER, *supra* note 18, at 1; PICKERING STATEMENT, *supra* note 18, at 1-2.

122. PRESIDENT'S LETTER, *supra* note 18, at 1; PICKERING STATEMENT, *supra* note 18, at 1-2.

123. It might be argued that Panama declared war on the United States, thereby placing the United States in a state of war and justifying an invasion as an act of self-defense. See *supra* part III.A.3. There are several problems with this argument. Words alone do not create a state of war any more than the absence of a declaration means there is no state of war regardless of objective reality. Certainly there was no state of war in Panama. The United States did not take the matter seriously when the "declaration" was made. The language of the "declaration" indicated little more than the fact that Noriega properly perceived that he was under a great deal of pressure to give up power.

124. See *supra* notes 102-116 and accompanying text.

125. Ruth Wedgwood, *The Use of Armed Force in International Affairs: Self-Defense and the Panama Invasion*, 29 COLUM. J. TRANSNAT'L L. 609, 610-11 (1991). This article contains factual information not found in most other articles on the Panama invasion. In the author's opinion, it is also the most evenhanded analysis of the factual material relating to self-defense.

JUST CAUSE

the U.S. invasion went beyond the limits of proportionate acts of self-defense or countermeasures and amounted to offensive operations.

One of the biggest problems under the U.N. Charter has been the propensity of states to engage in offensive acts while claiming they are acting in self-defense.¹²⁶ The International Court of Justice, in making a distinction between armed attack and other illegal use of force, attempted to set clear limits on these expansive redefinitions of self-defense while still allowing states to respond to very clear, serious and immediate danger.¹²⁷ Even though the particular consequences of the distinction the court makes between armed attack and other illegal use of force is not supported by customary law, it does seem roughly analogous to the distinction customary law made between state of war and act of war.¹²⁸ A state of war is most closely associated with an illegal invasion amounting to a large-scale and continuous state of hostilities that is easily identified.¹²⁹ The Court seems to state that it is an invasion-like breach of the peace that is required to constitute an armed attack.¹³⁰

Acts of war, on the other hand, can be somewhat self-contained in terms of scale and effect, and they are most likely limited in time and space.¹³¹ For these reasons, acts of war are akin to other illegal uses of force. Examples include clashes at sea or border incidents. Under customary law, those involved are entitled to defend themselves, and if the danger comes directly from within another state's borders, the threatening entity should be a fair target.¹³² The event should not provide a pretext for reprisals, but rather, it should justify the amount and type of force necessary to defend oneself.¹³³ The problem with equating "armed attack" in article 51 with invasion-type attacks is that it limits the inherent right of self-defense against small-scale attacks.¹³⁴

126. "In fact, the records of the Security Council are replete with cases where states have invoked self-defence in this broader sense but where the majority of the Council have rejected this classification and regarded their action as unlawful reprisals." Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 4 (1972). This same phenomenon occurred prior to the U.N. Charter when attempts were made to outlaw the offensive use of force through the Treaty Providing for the Renunciation of War as an Instrument of National Policy. BROWNIE, *supra* note 72, at 90.

127. See *supra* notes 102-116 and accompanying text.

128. *Id.*

129. See *supra* part III.A.3.

130. See *supra* notes 102-116 and accompanying text.

131. See *supra* part III.A.3.

132. *Id.*

133. *Id.*

134. Brownlie gives an example:

(b) *Customary law.*—Even if Panama's actions did not constitute an armed attack, the United States seemed to invoke the right of anticipatory self-defense,¹³⁵ which customary international law clearly recognizes.¹³⁶ There is no need for a country to wait until it has actually been attacked if the danger of attack is "instant, overwhelming, and leaving no choice of means, and no moment of deliberation."¹³⁷ The Bush Administration argued that there was such a drastic danger of armed attack in Panama. Of course, it is impossible to prove Noriega's intent with absolute certainty. His statements days before the invasion likely heightened tensions and contributed to the behavior of his police. However, his entire course of activity over two years seemed calculated not to give rise to a serious incident that could be used to excuse an American invasion. An argument relying on anticipatory self-defense is therefore very weak.

Arguably, the simple distinction between the customary concepts of act of war and state of war do not comport with the nature of most modern warfare. For example, in modern times, countries are faced with sporadic but recurring acts of war, such as terrorism, indirect aggression, such as aid to rebels, or a very low level of continuous conflict, such as a harassment campaign. These may drag on for years without amounting to an armed attack. Consequently, questions remain as to whether a state may only respond interminably to immediate threats or violence without going further to attack the source of the problem. Under the U.N. Charter, the Security Council is responsible for taking up and resolving these matters, but obviously that will not happen.¹³⁸ These kinds of illegal activity are the deliberate policy of some states who know they cannot win a direct confrontation with the United States. They are designed to wear down an opponent without provoking a significant response.¹³⁹

Some difficulty arises in the case of repeated attacks on shipping from a land base. If forces from the flag state counter-attack or intercept over territorial waters or territory of the source of attack it is possible to argue that infringement of territorial sovereignty and integrity is not a proportionate reaction to attack on shipping.

BROWNIE, *supra* note 72, at 305. This is a strange doctrine of proportionality to suggest that military forces are immune to counterattack so long as they stay in their own territory and engage in relatively low levels of hostility.

135. PICKERING STATEMENT, *supra* note 18, at 1-2; PRESIDENT'S LETTER, *supra* note 18, at 1. Both claim that Americans were in "imminent danger."

136. VATTEL, *supra* note 1, at 307-14; BROWNIE, *supra* note 72, at 258-61; *see also The Right of States to Use Armed Force*, *supra* note 101, at 1633-35.

137. *See* 2 DIGEST, *supra* note 83, § 217.

138. *See supra* part III.B.

139. R. Lynn Rylander, *The Future of Marines in Small Wars*, 40 NAVAL WAR C. REV. 64

JUST CAUSE

This sort of situation, however, is not unique to the 20th century. Some of the United States' earliest security problems involved low intensity conflicts. For example, in the early 1800s Tripoli attacked American ships for not paying tribute, and even declared war on the United States.¹⁴⁰ President Jefferson sent a small squadron of frigates to the Mediterranean with orders to protect American commerce.¹⁴¹ He then reported an ensuing incident:

One of the Tripolitan cruisers having fallen in with and engaged the small schooner *Enterprise* . . . was captured, after a heavy slaughter of her men, without the loss of a single one on our part. . . . Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries.¹⁴²

The U.S. Navy acted in self-defense against an act of war, but once the danger was past, the United States did not carry the war further. Any such action would have constituted a reprisal or offensive act.

Because unilateral reprisals are unlawful under the U.N. Charter, nations frequently engage in these acts under the guise of self-defense. The major problem, beside the dishonesty involved, is that nations then forego the requirements of customary law, including declarations of war, that are designed to settle disputes peacefully.¹⁴³ No nation will declare war today because such action would be considered a *prima facie* case of an illegal offensive war.¹⁴⁴ Such a result also discourages negotiations because, if a nation delays a counterattack, it is harder to argue that it was in response to an immediate danger.¹⁴⁵

(1987).

140. ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: THE ORIGINS* 208-14 (1976) [hereinafter *WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER*]; FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR* 23-25 (1986).

141. WORMUTH & FIRMAGE, *supra* note 140, at 23-25.

142. AMERICAN STATE PAPERS: NAVAL AFFAIRS (1860), *quoted in* WORMUTH & FIRMAGE, *supra* note 140, at 23-24.

143. Philip Marshall Brown, *Undeclared Wars*, 33 AM. J. INT'L L. 538, 540 (1939). The Treaty Providing for the Renunciation of War as an Instrument of National Policy (Kellogg Pact) in outlawing offensive use of force also contributed to wars without declarations of war. *Id.* at 540. Brown states, "[i]t is necessary, however, to stress the lamentable and unforeseen consequence of the Kellogg Pact in encouraging aggressor nations hypocritically to avoid any formal declaration of war in order to elude the constraints of this pious declaration." *Id.*

144. *See supra* part III.A.3.

145. *Id.*

Consequently, nations are left to pursue two courses of action to deal with these low intensity conflicts under the rubric of self-defense. One way is to counter these conflicts with similar conduct, as occurred in Panama, such as conducting covert operations or returning harassment. In Panama, the United States made veiled threats against Noriega's regime, encouraged coups, and conducted military exercises designed to intimidate the existing government.¹⁴⁶ The other course is to promote a relatively small incident as a very big attack that merits immediate retaliation. In either case, the self-defense justification is severely strained.

The cumulation of Noriega's wrongs was great. He targeted Americans for abuse, violated treaty agreements and engaged in an extensive conspiracy to break U.S. laws. The United States suffered injury and had just cause to wage offensive war against Noriega. However, the U.N. Charter precluded that option.¹⁴⁷ Customary law forbids engaging in offensive war except as a last resort and after a declaration of war. The appropriate U.S. response under customary law would have been to issue a conditional declaration of war setting out the just cause basis, demanding satisfaction, and giving an ultimatum.¹⁴⁸ Customary law requires good faith diplomatic efforts to settle matters peacefully. In the situation with Panama, this was extremely difficult to do since the United States basically refused to deal with Noriega. Had these procedures been followed it is quite possible Noriega would have left peacefully. The U.N. Charter denies the unilateral right of reprisals on the premise that this denial reduces the risk of wars.¹⁴⁹ In this case, however, the preclusion of reprisal probably would have increased the risk of war.

Several writers have noted the phenomenon of nations resorting regularly to reprisals under the cloak of self-defense.¹⁵⁰ Some have developed theories to openly give reprisals a color of legality.¹⁵¹ They

146. From President Bush's perspective, all these efforts failed to accomplish their goal. See PICKERING'S STATEMENT, *supra* note 16, at 1.

147. Kidnapping as an alternative to extradition is generally considered to be a violation of international law. It might seem that the invasion of a country to arrest its leader is an extremely aggravated form of kidnapping. If violation of U.S. law with a resulting failure to extradite or prosecute is a legal wrong then offensive force is justified under customary law to rectify the situation. The most proportionate use of force would be to arrest the one responsible. Certainly, that is preferable to collective punishment of a nation.

148. See *supra* part III.A.1.

149. See *supra* part III.B.

150. See *supra* note 126 and accompanying text.

151. See, e.g., Anthony Clark Arend, *International Law and the Recourse to Force: A Shift in Paradigms*, 27 STAN. J. INT'L L. 1 (1990); W. Michael Reisman, *Coercion and Self-Determination*:

JUST CAUSE

argue that since the Charter's use of force provisions have fallen into a virtual state of desuetude and the Security Council has not lived up to its responsibilities, the prohibition on unilateral offensive force is no longer binding.¹⁵² In part, the argument is also based on changed circumstances. Without the Soviet Union, reprisals are less likely to provoke a major war. In effect, this argument is one advocating customary substantive norms without customary procedures. The failure of the United Nations, together with the *de facto* practice of unilateral reprisals cannot be simply attributed to the fact that states cling to a world system based on national sovereignty and national interest. The U.N. scheme is a failure because it violates *jus cogens*. It denies nation-states their essential reason for existence, which is to do justice. Additionally, it attempts to centralize military power which historically has been a precursor for totalitarianism.

This subterfuge, by which offensive force is simply denominated as defensive, is illustrated even more clearly in U.S. Ambassador Pickering's defense of the U.S. invasion of Panama before the Security Council.

There is another issue at stake in this debate over Panama—the disgrace, the terrible evil of drug trafficking

This is a war as deadly and as dangerous as any fought with armies massed across borders; the survival of democratic nations is at stake.

Countries that provide safe haven and support for the international drug trafficking cartels menace the peace and security just as surely as if they were using their own conventional military forces to attack our societies. . . . That is aggression. It is aggression against us all, and now it is being brought to an end.¹⁵³

Construing Charter Article 2(4), 78 AM. J. INT'L L. 642 (1984).

152. See Arend, *supra* note 151, at 40; see also Reisman, *supra* note 151, at 643.

153. PICKERING STATEMENT, *supra*, note 18, at 2. Of course one could carry the implications of this analogy further. Those American's who support the enemy by engaging in drug trafficking or use should be tried for treason.

The practice of interpreting the right of "self-defense" in an extremely expansive manner is not unique to the U.N. Charter system. What amounts to reprisals may be called "self-defense" because offensive force is used to defend one's right. Anything that promotes the national interest defends one's way of life. Other terms used almost synonymously with self-defense in a broad sense are self-preservation, necessity, vital national interest, self-protection and self-help. Defining self-defense in this manner obliterates any meaningful standard for distinguishing offensive from defensive war or war based on just cause (a legal standard) from war based solely on national interest (a political standard). See BROWNIE, *supra* note 72, at 41-43, 48, 240, 244, 249, 253, 261, 291.

It is difficult to tell whether this is a legal argument under the Charter's article 51 or simply a rhetorical device designed to gain political support. It is certainly plausible to argue that drugs are one of the greatest problems in the United States. Foreign states that harbor criminals in violation of international law, or worse yet engage in drug trafficking, should not be immune from armed sanctions employed in accordance with customary law. In the case of Panama, drug trafficking caused injury to the United States, but it certainly did not amount to an armed attack under either the U.N. Charter or customary law.

2. *Operation Just Cause as Humanitarian Intervention.*—The Bush administration offered humanitarian intervention as a secondary theory to justify the invasion. The term has been used in practice to describe three fairly different situations. Arguably, the term refers to the rescue of one's own citizens held hostage in a foreign country.¹⁵⁴ At least one writer believes that, since American citizens were in danger there, the invasion of Panama was a "humanitarian rescue."¹⁵⁵ However, when the hostages are one's own citizens, if indeed they are hostages, such a rescue seems more akin to self-defense, and therefore, has a more solid ground of legality.¹⁵⁶

A second use of the term "humanitarian intervention" refers to intervention in a foreign state to prevent human rights violations against foreign nationals.¹⁵⁷ This principle was not well-established in customary international law, and until the United States went into Somalia, this principle was rarely relied upon.¹⁵⁸ While there is a strong humanitarian impulse to do something in such cases, world opinion usually views intervention skeptically.¹⁵⁹ Widespread serious human rights violations were apparently not among Noriega's faults, at least as compared to many other contemporary states.

The third use of the term "humanitarian intervention" refers to intervention for the purpose of establishing democracy, freedom, self-

154. Ved P. Nanda, *The Validity of United States Intervention in Panama under International Law*, 84 AM. J. INT'L L. 494, 496-97 (1990).

155. *Id.*

156. See *supra* part III.A, III.B.

157. Richard B. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in LAW AND CIVIL WAR IN THE MODERN WORLD 229 (John Norton Moore ed., 1974); Ian Brownlie, *Humanitarian Intervention*, in LAW AND CIVIL WAR IN THE MODERN WORLD 217 (John Norton Moore ed., 1974) [hereinafter *Humanitarian Intervention*].

158. Lillich, *supra* note 157, at 229; *Humanitarian Intervention*, *supra* note 157, at 217.

159. See Diana Jean Schemo, *U.S. Attacks Rebels in Somalia: Marine is Slain Later*, N.Y. TIMES, Jan. 26, 1993, at A12.

JUST CAUSE

determination or other political goals.¹⁶⁰ This purpose was in part the basis for U.S. intervention in Panama. However, the U.N. Charter does not make any exception to the prohibition on unilateral force for these purposes. Nor did such humanitarian concerns provide just cause for intervention under customary law. Indeed, the major thrust of the U.N. Charter is to restrict, not promote, unilateral force.

A variant of this third use of the term is "counterintervention," a concept vigorously supported by advocates in the Reagan Administration.¹⁶¹ What came to be known as the Reagan Doctrine was formulated to respond to illegal communist intervention that toppled "democratic" governments.¹⁶² Where there was an illegal intervention to establish communism, the United States could supposedly counter the intervention to support democratic factions.¹⁶³ It thus became known as "counterintervention."¹⁶⁴ The invasion of Panama could not be justified as "counterintervention." Noriega did not gain power from foreign intervention. Rather, it was Noriega's ruthlessness, involvement with drug trafficking, past relationships with the United States, and perhaps his own popularity that accounted for his rise to power and ability to maintain control. Nevertheless, it is not a major conceptual leap to go from "counterintervention," for the purpose of reestablishing democracy, to "humanitarian intervention," for the purpose of establishing democracy, as it should not matter what the source of the tyranny is.

The United States attempted to legitimize its humanitarian argument by asserting that the U.N. Charter and other treaties state that democracy, human rights, and self-determination are necessary conditions for world peace, and that all member states have a duty to abide by these values and to work with the United Nations in protecting and establishing them globally.¹⁶⁵ The United States further asserted

160. Reisman, *supra* note 151; see also Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645 (1984) [hereinafter *Pro-Democratic Invasion*].

161. Jeane J. Kirkpatrick & Allan Gerson, *The Reagan Doctrine, Human Rights, and International Law*, in RIGHT V. MIGHT 19, 31 (Council on Foreign Relations ed., 2d ed. 1991).

162. *Id.*

163. *Id.*

164. *Id.*

165. David J. Scheffer, *Introduction: The Great Debate of the 1980's* in RIGHT V. MIGHT, 1, 9-10 (Council on Foreign Relations ed., 2d ed. 1991). The U.S. humanitarian defense can be articulated as follows:

American leaders did not abandon the conviction that legitimate government is based on respect for individual rights and the consent of the governed or the belief that all people deserve such government.

that because the Security Council had miserably failed to do this, it is incumbent upon members to fulfill their responsibilities individually.¹⁶⁶ Under this view, the only limitations on U.S. intervention are political, those concerning perception of national interest, available resources and resolve. Accordingly, there is no just cause requirement of self-defense or injury. In essence, just cause is anything the United States perceives to be for the common good.

The U.S. defense is first based on the assumption that the United Nations may intervene in states' affairs not only to prevent gross human rights violations, but also to establish a particular political order. This notion is contrary to article 2(7) of the U.N. Charter, which precludes intervention in domestic matters.¹⁶⁷ Nevertheless, the international community has circumvented the mandate of article 2(7) by reclassifying what previously were considered domestic matters as international. In this manner, the international community has empowered the United Nations to become an instrument of world order, an entity no longer limited to refereeing disputes between nation states, but rather tasked with securing a particular political, social, economic and ideological order within and among the states.

The U.N.'s new role has been attributed to the international community's periodic shift of basic values.¹⁶⁸ This shift in values permits a reinterpretation of the U.N. Charter, regardless of its language, in order to accommodate changing political objectives. For example, originally, the highest value in the international hierarchy was peace.¹⁶⁹ The sovereignty of states was treated as sacred and unilateral force was therefore limited to self-defense. Eventually, justice replaced peace as the highest value.¹⁷⁰ This change allowed nations to resort to self-help

The United Nations Charter is not neutral between these conceptions. It is committed to democratic values and practices. Where one state uses armed force or economic and military assistance to aid in the suppression of democratic values and practices, other states are free to act to redress the balance and stop the forcible repression of these values.

Id.

166. Kirkpatrick & Gerson, *supra* note 161, at 34.

167. U.N. CHARTER art. 2, ¶ 7 states: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state" *Id.*

168. Arend, *supra* note 151, at 2-3.

169. *Id.* at 5-6.

170. *Id.* at 10-18.

JUST CAUSE

measures including reprisals.¹⁷¹ Supposedly, the world is now entering a new age where democratic values have taken top priority.¹⁷²

Consequently, the U.S. humanitarian intervention defense is further based on the assertion that peace can only exist if all states embrace democratic ideologies and therefore, military intervention used to establish these values is lawful. Even *assuming arguendo* that military intervention for democracy is lawful, the U.N. Charter clearly precludes such intervention by individual states, preserving the right of intervention for the Security Council. Accordingly, the U.S. humanitarian intervention defense for its Panama invasion is deficient in all aspects.¹⁷³

171. *Id.*

172. *Id.* at 40-42.

173. Given the international reaction condemning the Panama invasion, one may conclude that the world community does not prize democratic values so highly. Arend, *supra* note 151, at 44. On the other hand, perhaps the U.N. General Assembly and O.A.S. are dominated by anti-democratic elites from developing countries that don't reflect the true international consensus. Kirkpatrick & Gerson, *supra* note 161, at 34. "The majority vote of member-states of the UN General Assembly—which are predominantly nondemocratic—cannot deprive the United States or other democratic nations of this right [of intervention]." *Id.* That is, the decision-making elites in democratic nations are justified in establishing the form of government oppressed peoples everywhere really want.

This policy-oriented approach to law is supported by other types of arguments. They usually disparage "textualist" approaches to interpreting legal documents as too restrictive. Related to these theories are general observations about how the world has changed. Somehow changes in the world make the need for certain political and legal change self-evident. Criticizing the Vienna Convention on the Law of Treaties, which establishes the canons for interpreting the text of treaties, author Myres McDougal commented: "The great defect, and tragedy, in the International Law Commission's final recommendations about the interpretation of treaties is in their insistent emphasis upon an impossible, conformity-imposing textuality." Myres McDougal, *The International Law Commission's Draft Articles upon Interpretation: Textuality Redivivus*, 61 AM. J. INT'L L. 992, 992 (1967).

The defense that Judge Abraham Sofaer, Legal Advisor to the Department of State during Operation Just Cause, offered for U.S. actions also reflects this anti-textual, policy-oriented approach. Sofaer calls it the "Common Lawyer" approach:

[U]se of force rules should not be applied mechanically, as a "juristic push-button device," but with an appreciation for all the relevant circumstances of each case. This approach to international law looks not only to abstract propositions but to real-world results and involves a continuing search for principles that most effectively advance accepted international values.

Abraham Sofaer, *The Legality of the United States Action in Panama*, 29 COLUM. J. TRANSNAT'L L. 281, 283 (1991) [hereinafter *The Legality of the United States Action in Panama*]. The need to rely on this totality of the circumstances approach is one of the strongest indicators that Noriega's conduct was not an armed attack nor was one imminent. Apparently the language of legal documents has little value. Legal "principles" are little more than arguments of expediency designed to legitimize policy objectives.

IV. Just Cause and the U.S. Constitution

The invasion of Panama was not lawful under the U.S. Constitution because it was not authorized by Congress, who has the sole authority to declare war. There has been almost no analysis of the legality of the Panama invasion under U.S. domestic law. Americans were probably as supportive of the action as foreign governments were opposed. Most likely the invasion complied with the War Powers Resolution,¹⁷⁴ the primary focus of debate over domestic law and use of force. Operation Just Cause illustrates the fact that in some ways, the War Powers Resolution pretends to give the President more power than the Constitution gives him.

The central issue regarding the allocation of war powers is whether Congress or the President has the Constitutional authority to commit the nation to war. Article I of the Constitution states that Congress has the power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."¹⁷⁵ The President serves as "Commander in Chief of the Army and Navy of the United States."¹⁷⁶ These are the war powers clauses of greatest immediate relevance.

A legal debate of mammoth proportions focuses upon the meaning and application of these few words. Contemporary scholars frequently ridicule legal analysis that focuses on the Constitutional text or that attempts to clarify its meaning through studies designed to discern the original intent. It is therefore interesting that in debating the allocation of the war powers, scholars take a host of historical materials, including 18th century political philosophy, the proceedings of the Constitutional Convention, and early state practice, quite seriously.¹⁷⁷ These studies have proven to be very valuable, though not decisive, on many issues. One source that has not been especially emphasized is customary international law. With its distinction between offensive and defensive war, legal and prudential judgment, and acts of war and state of war, it provides the analytical framework for understanding the allocation of war powers.

174. 50 U.S.C. §§ 1541-1548 (1988).

175. U.S. CONST. art. I, § 8, cl. 11.

176. U.S. CONST. art. II, § 2.

177. E.g., WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER, *supra* note 140; W. TAYLOR REVELEY III, WAR POWERS OF THE PRESIDENT AND CONGRESS (1981); WORMUTH & FIRMAGE, *supra* note 140.

JUST CAUSE

A. *The Power to Declare War*

Many positions have been argued which attempt to limit or abolish the importance of Congressional declarations of war. The most important positions are first, that declarations are relevant only to large wars, and second, that due to state practice, declarations are not required at all.

Although one of the marks of classic 17th and 18th century international law treatises is that they took state practice very seriously, they never viewed law simply as human convention. Indeed, classic scholars recognized that the rules regarding declarations of war are requirements of the law of nature.¹⁷⁸ As such, while customary law may focus on state practice, it incorporates and is grounded in a fundamental law that is not subject to alteration by state practice or treaty. This general view was shared by the Founding Fathers and is evidenced by their legal defense in the Declaration of Independence, which appeals to the “laws of nature and of nature’s God.”¹⁷⁹ Classical scholars recognized that the rules regarding declarations of war are requirements of the law of nature.¹⁸⁰

The importance of declarations of war has also been recognized by the United States in this century. During the 18th and 19th centuries, nations increasingly failed to comply with the declaration requirement.¹⁸¹ To remedy this situation, Hague Convention No. III expressly incorporated the following customary norm: “The Contracting

178. See *supra* note 60 and accompanying text.

179. THE DECLARATION OF INDEPENDENCE paras. 1-2 (U.S. 1776):

When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.

Id. The Declaration, which is in fact the founding constitutional document of the United States, reflects the twofold nature of the decision to go to war set out in Vattel, *supra* note 1, at 301. It contains the legal bases, or just causes, for resort to war and the prudential concerns: “[p]rudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

180. Vattel, *supra* note 1, at 314-16; GROTIUS, *supra* note 99, at 634-35.

181. Clyde Eagleton, *The Form and Function of the Declaration of War*, 32 AM. J. INT’L L. 19, 20 (1938).

Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war."¹⁸²

Some scholars have argued that only large wars require declarations of war.¹⁸³ However, the critical distinction in customary law is not between large and small wars but between offensive and defensive wars.¹⁸⁴ The essential components of declarations are (1) notice of injuries and (2) demand for satisfaction.¹⁸⁵ More formal requirements are matters merely of state practice and, like other purely positive laws, are amenable to change.¹⁸⁶ Thus the power to "declare war" refers to all offensive wars, both large and small.¹⁸⁷

Early in the nation's history the U.S. Supreme Court dealt with the power to declare war in the case of *Bas v. Tingy*.¹⁸⁸ In so doing, Justice Washington distinguished perfect from imperfect war or state of war from acts of hostility as follows:

[E]very contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called *solemn*, and is of the perfect kind; because one whole nation is at war with another whole nation; and *all* the members of the nation declaring war, are authorized to commit hostilities against all the members of the other, in every place, and under every circumstance.

182. Hague Convention No. III Relative to the Opening of Hostilities, October 18, 1907, art. 1, 36 Stat. 2259; T.S. 538. Nazi Germany's violation of this provision formed a basis for the charge of waging crimes against peace. See Trial of the Major War Criminals, 1 I.M.T. 1, 216-17 (1947) (Int'l Mil. Trib.). The United States is a party to the treaty.

183. E.g., Eugene V. Rostow, *President, Prime Minister or Constitutional Monarch?*, 83 AM. J. INT'L L. 740, 744-45 (1989).

184. See *supra* part III.A.1.

185. See *id.*

186. VATTEL, *supra* note 1, at 316:

It is necessary that the declaration of war be known to the state against whom it is made. This is all which the natural law of nations requires. Nevertheless, if custom has introduced certain formalities in the business, those nations who, by adopting the custom, have given their tacit consent to such formalities, are under an obligation of observing them"

Id.

187. "The fact that Congress has the power to issue letters of marque and reprisal is further evidence of Congress' sole authority to initiate war and acts of war. These letters authorized private persons to seize or destroy enemy ships in particular as compensation or punishment for international offenses. Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 679-80, 693-94 (1972).

188. 4 U.S. (4 Dall.) 37 (1800).

JUST CAUSE

In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition.

But hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed *imperfect war*; because not solemn, and because those who are authorized to commit hostilities, act under special authority, and can go no farther than to the extent of their commission. . . .

But, secondly, it is said, that a war of the imperfect kind, is more properly called acts of hostility, orreprizal, [sic] and that Congress did not mean to consider the hostility subsisting between *France* and the *United States*, as constituting a state of war.¹⁸⁹

The case of *Bas v. Tingy* arose from the Naval War of 1798 with France.¹⁹⁰ Congress authorized certain acts of war by statute.¹⁹¹ A statute may be different in form from a “solemn” declaration, yet it fulfills all of the essential requirements of a declaration of war: It is a public pronouncement putting the enemy on notice of wrongs done and need for satisfaction. The critical distinctives of solemn declarations are that they authorize far more extensive hostilities and that they significantly alter legal relationships with foreign nationals and neutral states.¹⁹² When Congress authorizes “acts of hostility, or reprisals,” it declares imperfect war. The extent of hostilities is limited in proportion to the wrong done and as prudence would otherwise dictate.¹⁹³

B. Presidential Powers

1. *Historical View.*—In *Bas v. Tingy* and other early cases, the Supreme Court affirmed that Congress has the authority to initiate all offensive wars.¹⁹⁴ However, it did not directly address the question of whether Congress had the sole authority to initiate offensive war. In the

189. *Id.* at 40-41.

190. *Id.* at 37.

191. *Id.*

192. *Id.*

193. As stated in *Bas*:

Congress is empowered to declare a general war, or Congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli* [*jus in bello*], forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws.

Bas, 4 U.S. (4 Dall.) at 43.

194. *E.g.*, *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, (1804); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801).

absence of Congressional authorization, one must ask whether the President has some inherent power to take offensive action.

The contention that the President has the inherent executive power to initiate war does not appear to have been made in early cases or other public forums. The "inherent Presidential powers" argument has a particularly strong appeal if one believes that declarations of war, as used in the Constitution, refer only to "solemn" declarations required to initiate perfect wars.¹⁹⁵ However, there are several reasons, in addition to those given above, to reject the interpretation that the President has any inherent power to initiate offensive war.

First, one of the primary goals at the Philadelphia Convention of 1787 was to create a government that could deal effectively with other nations.¹⁹⁶ The Framers recognized the need for an effective executive branch, but they wished to avoid the dangers endemic to monarchical governments in which the war powers usually resided in one person.¹⁹⁷ An original draft of the Constitution gave Congress the power to "make war."¹⁹⁸ One delegate suggested that instead of Congress, the President should have the power to make war.¹⁹⁹ The proposal had so little support that the delegate did not make a formal motion.²⁰⁰ The delegates even rejected a proposal to place the power in the Senate. Several delegates believed the word "make" war was problematic.²⁰¹ Such discussion would suggest that Congress had the power to actually conduct war and that the President would have no authority to respond to sudden attacks. To fix this ambiguity, James Madison moved to "insert '*declare*' striking out '*make*' war, leaving to the Executive the power to repel sudden attacks."²⁰² It is unclear why the language, "power to repel sudden attacks," did not make it into the text.²⁰³ The Framers probably thought the power to wage defensive war was inherent in the Commander in Chief.²⁰⁴

195. See *supra* notes 188-93 and accompanying text.

196. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 318-19 (Max Farrand ed., 1937).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 318-19 (Max Farrand ed., 1937).

202. *Id.*

203. *Id.*

204. U.S. CONST. art. I, § 10, cl. 3 provides that "[n]o state shall, without the consent of Congress . . . engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." *Id.* The President's inherent power would be similar to the inherent power residing in the states.

JUST CAUSE

However, the Framers were especially anxious to avoid a framework like England's, where the King had all the power over foreign affairs, including both the power to initiate and conduct wars. As a result, England experienced wars based on slight cause or wars done in the name of conquest. These wars were often financed by debt and waged at great cost in national blood and treasure.²⁰⁵ Consequently, recognizing the importance of speed, secrecy and unity of action in conducting war, the Framers entrusted the President, as Commander-in-Chief, with the power to conduct war.²⁰⁶ However, to place restraints on the decision to initiate war, the Framers gave Congress the power to declare war. It was not until the 20th century that the exclusive authority of Congress to initiate war was seriously challenged.

2. *Modern View.*—In this century, presidents and members of Congress have continued to assert that the President has the inherent authority to initiate war.²⁰⁷ Some of these claims are arguably based on constitutional principles, while others are grounded simply in expediency. A principled argument is that Article II of the Constitution vests all executive powers in the President except for those explicitly given to Congress.²⁰⁸ Because the powers to both initiate and to conduct war are executive in nature, Congress' power over such inherently executive matters must be narrowly interpreted.²⁰⁹

Other claims advocating that the President has the power to initiate war are based simply on expediency. They usually appeal to the argument that rapidly changing world conditions and the nature of war

205. 2 ABRAHAM LINCOLN, THE WRITINGS OF ABRAHAM LINCOLN 51-52 (A. Lapsley ed., 1906):

The provision of the Constitution giving the war-making power to Congress was dictated, as I understand it, by the following reasons: Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppression, and they resolved to so frame the Constitution that no one man should hold the power of bringing oppression on us.

Id. at 52.

206. WAR, FOREIGN AFFAIRS, AND THE CONSTITUTIONAL POWER, *supra* note 140, at 48-49.

207. REPORT OF SENATE FOREIGN RELATIONS COMMITTEE ON THE WAR POWERS ACT, S. REP. NO. 220, 93rd Cong., 1st Sess. (1973).

208. U.S. CONST. art. II (pertaining to the executive power of the President).

209. ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION 56-58 (1991). This assertion is often accompanied by reference to John Locke's *Concerning Civil Government* ¶¶ 143-148 (Robert Maynard Hutchins ed., 1952) (1690). Locke calls the power to deal with external matters the "federative powers" and includes in them the "power of war and peace." LOCKE, *supra*, ¶ 146. He notes that the federative power is usually placed in the executive and that as a matter of prudence it should be. *Id.* ¶ 147.

require the speed in decision making and unity of foreign policy that only the President can provide.²¹⁰ These claims are accompanied by an interpretation of the Constitution that allows it to meet any "demand" of expediency.²¹¹

Proponents of the view that the war powers are inherently executive draw different conclusions as to the respective roles of Congress and the President. One view is that Congress has the power to initiate only perfect wars because the words "declare war" refer only to "solemn" ones.²¹² The President would have the sole authority to initiate all other wars.²¹³ A second view is that the Constitution vests concurrent authority in Congress and the President to initiate imperfect wars.²¹⁴ This position seems harder to justify by the text. A third position is that the Constitution actually does give Congress the sole authority to initiate

210. E.g., W. Michael Reisman, *War Powers: The Operational Code of Competence*, in *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 68 (Louis Henkin et al. eds., 1990) [hereinafter *War Powers: The Operational Code of Competence*].

211. The adaptivist approach relies upon custom to determine the Constitution's meaning. It addresses the deficiencies of the first two [reliance upon the text and original intent] methodologies by downplaying the primacy of the Constitution as originally conceived; the approach relies instead upon subsequent practice. . . . Dean Sandalow has written that constitutional law is not an exegesis, but a process by which each generation gives formal expression to the values it holds fundamental in the operations of government. MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 46 (1990).

212. Eugene V. Rostow, *President, Prime Minister or Constitutional Monarch?*, 83 AM. J. INT'L L. 740 (1989).

[T]he exclusive power to declare war conferred on Congress in Article I, section 8 gives Congress the sole authority to use or threaten to use the national force, save perhaps in the case of sudden attacks.

This common view rests on two simple errors. Under international law, to which the relevant paragraphs of Article I refer, declarations of war are required only for the rare occasions when states engage in unlimited general war. . . . And Hamilton argued that Congress's power to declare war, being an exception to the general powers of the Executive according to the model of the Founding Fathers knew best, that of the British Crown, should be confined to the terms of the text.

Id. at 744-45.

213. *Id.*

214. J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27 (1991).

The historical practice—that Congress has rarely declared war despite numerous deployments of force—is made more explicable as a matter of constitutional law if one reads *Bas* as a case about sovereignty rather than the separation of powers. . . . So viewed, *Bas* merely acknowledged that there exists a lacuna of undeclared war, which might be "authorized" by Congress, but which might also be directly waged by the President as Commander in Chief without prior congressional authorization (in which case Congress's "authorization" of such warfare, either prospective or retroactive, would be no more than hortatory).

Id. at 60-61.

JUST CAUSE

all offensive wars.²¹⁵ However, this delegation of power to Congress is to be interpreted very narrowly. More important, this interpretation argues that Congress may not intermeddle with Presidential decisions to deploy troops during time of war or peace.²¹⁶ If this view is correct, then the power of Congress to initiate war is greatly undermined. The President can simply deploy forces to places they will likely be attacked, in which case they may act in self-defense.

3. *U.S. Involvement with the U.N.*—The United States attempted to alienate any unilateral right to wage offensive war when it joined the United Nations. Consequently, many believe that the Constitutional issue of who has the authority to declare war has become moot.²¹⁷ To the contrary, this fact has not made the issue moot, it has only made it more complicated. It simply assumes that the President and Senate may delegate a power which constitutionally belongs to Congress.

Article 43 of the U.N. Charter requires member states to make armed forces available to the Security Council for enforcement actions.²¹⁸ These forces are supposed to be on call as provided in special agreements made between member states and the United Nations.²¹⁹ Congress passed the U.N. Participation Act of 1945,²²⁰

215. *Id.*

216. *The War Powers After 200 Years: Congress and the President at a Constitutional Impasse, Hearings Before the Special Subcomm. on War Powers of the Committee on Foreign Relations, 100th Cong., 1st Sess. 778 (1988)* (testimony of Robert F. Turner, Associate Director, Center for Law and National Security) [hereinafter *War Powers After 200 Years*].

If the President decides that the national interests require commencing a "war" against another State, he must obtain the approval of both the House and the Senate in advance of initiating such a conflict. Like other exceptions to the President's "Executive" powers, the power "to declare war" was intended to be construed narrowly. It gives Congress a "veto" over a presidential decision to launch an offensive "war," but it does not empower you to seize control of the President's independent constitutional powers on the theory that the President's management of military deployments might lead another State to commit aggression against the United States.

Id. at 851. However, it is unclear what "offensive war" means to Mr. Turner. It would seem to have included something less than "perfect" war but more than "hostilities." *Id.* at 856.

217. The fact that the importance of the congressional power "to declare war" has been reduced by the prohibition in the U.N. Charter of the types of war with which such declarations have historically been associated should not be viewed by you with dismay but with joy. You have "lost" nothing to the President—you have both gained by developments of law which seek to provide a more peaceful world.

War Powers After 200 Years, *supra* note 216, at 851.

218. U.N. CHARTER art. 43, ¶ 1 states: "All members . . . undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities" *Id.*

219. *Id.*

220. 22 U.S.C. §§ 287-287e (1988).

which authorizes the President to enter into Article 43 agreements. However, Congress must specifically approve any agreement that is negotiated.²²¹ Once Congress approves an agreement, the President may assign American forces to participate in U.N. actions without any further authorization of Congress.²²² The Act places no limits on size of forces to be made available.²²³ However, Congress could set limits when it approves an Article 43 agreement.²²⁴

Congress enacted the U.N. Participation Act of 1945 with the understanding that U.S. forces would thereby be used only in "police actions" and not "war."²²⁵ Of course, there is no constitutional basis for distinguishing between police actions and war. The understanding was that U.S. participation in U.N.-authorized actions amounting to war would require separate and specific authorization of Congress.²²⁶ In essence, this authorization was to be a declaration of war. At present, the United States has never entered into an Article 43 agreement.²²⁷ In 1945, neither Congress nor the President suggested that the President has inherent authority to make an Article 43 agreement, to commit U.S. forces to offensive action simply on Security Council authorization,²²⁸ or to commit U.S. forces to offensive actions simply on his own initiative.²²⁹

This understanding of article 43 changed dramatically with the Korean War, when President Truman committed American forces to war on U.N. authorization but without a Congressional declaration.²³⁰ A State Department memorandum claimed that as Commander in Chief the President had full control over U.S. forces and could employ them without Congressional approval to protect "the broad interests of American foreign policy."²³¹ This memo was either an assertion of very broad inherent executive powers or a very expansive redefinition of self-defense. In either case, it asserted the right of the President acting

221. *Id.* § 287(d) (1988).

222. *Id.*

223. *Id.*

224. *Id.*

225. Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597, 604 (1993).

226. *Id.* at 620.

227. *Id.*

228. *Id.* at 604, 614-15.

229. *Id.*

230. Stromseth, *supra* note 225, at 621. There is evidence he would have acted even without U.N. authorization. *Id.*

231. *Authority of the President to Repel the Attack in Korea*, DEP'T ST. BULL., July 1950, at 173, 174.

JUST CAUSE

alone to go beyond the just causes of customary law and to employ forces simply because he believes it is in the national interest.

President Bush presented similar views of executive power for commitment of U.S. forces to Desert Storm.²³² He stated afterwards that he “didn’t have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait.”²³³ It further appears that he believed he possessed this power independently of the U.N. authorization which he courted so carefully while virtually ignoring Congress. If he viewed the action in Kuwait as offensive he had an incredibly strong view of inherent executive power. On the other hand, he may have believed that Desert Storm was a defensive action even from the United States’ perspective, and therefore, required no Congressional approval. This would entail, however, an extremely expansive view of self-defense, making it little more than a promotion of national interest.

There are several theories that espouse the theme that the President alone, or the President along with the United Nations, does not need Congressional authorization to wage war. One theory states that all U.N. actions are police actions regardless of size.²³⁴ Since they are not wars, U.S. participation requires no Congressional approval.²³⁵ A similar theory argues that the Constitution does not require Congressional approval for Article 43 agreements once the United States became a member of the United Nations. The President then has the duty to execute the law of the land which includes treaty obligations.²³⁶ Of course, this argument also improperly assumes that nothing in the

232. President George Bush, Remarks to Texas State Republican Convention in Dallas, Texas, 28 WEEKLY COMP. PRES. DOC. 1119 (June 20, 1992).

233. *Id.* at 1120-21.

234. Thomas M. Frank & Faiza Patel, *Agora: The Gulf Crisis in International and Foreign Relations Law*, 85 AM. J. INT’L L. 63, 64 (1991). “As a textual matter, it is obvious on its face that the Charter, in creating the new police power, intended to establish an exclusive alternative to the old war system.” *Id.* at 64. As such, the authors imply that the U.S. Constitution may be amended by treaty stating that “[t]he hawks and doves, instead of welcoming a new era too long aborning, cling to a theory of constitutionalism that was specifically rebuffed by the Senate when ratifying the Charter and legislating the implementation of the new UN police power.” *Id.* at 64-65.

235. *Id.*

236. GLENNON, *supra* note 211, at 202.

On the other hand, presidents have argued on occasion that a treaty conferred discretionary authority to introduce the armed forces into hostilities to enforce the terms of that treaty

Although not always articulated this way, the claim might have been that the Constitution required that the President “take care that the laws be faithfully executed” and that treaties constitute law for purposes of the faithful-execution clause.

Id.

Constitution forbids altering or delegating the allocation of war powers by statute or treaty.²³⁷ A third theory is that all U.N. actions are in effect defensive since they serve the end of defending world peace or since an attack on anyone is considered an attack on all.²³⁸ Presumably, the President may commit forces without Congressional consent because the power to act on his own initiative in defensive wars has always been recognized.

A myriad of theories allow the President to act without Congressional approval or consent. All of these arguments are disingenuous attempts to alter the Constitution to fit contemporary "needs." Indeed, there is one common ploy used by the sophisticated and the simple to demonstrate that declarations of war are not required and that the President may therefore initiate war. This ploy is instituted as follows:

The question is asked: How many wars has the U.S. been involved in? The answer varies, but sometimes runs in excess of two hundred. The next question is asked: How many of these were declared wars? The answer given is five.

The simple end the discussion, having proven their point. The sophisticated proceed to talk about law-creating custom in which state practice gives new meaning to the living Constitution²³⁹ or to argue that this is proof that the Constitution does not require declarations for

237. The issue of the constitutionality of delegating government powers is similar to that found in domestic administrative law. In administrative law, the nondelegation doctrine is so eroded that little of it is left. There is greater judicial authority for delegating Congressional powers relating to foreign matters than even domestic ones. See, e.g. *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). On the other hand, there are several factors that may make the delegation of the war powers more restrictive. They are not legislative in nature and the Constitution gives them specifically to Congress. Because the Constitution doesn't specifically forbid their delegation, the test in *Reid v. Covert*, 354 U.S. 1 (1957) and *Missouri v. Holland*, 252 U.S. 416 (1920) would not seem to preclude delegation by treaty. Once a textual approach to the Constitution is abandoned there is absolutely no limit on delegation except political expediency.

238. Stromseth, *supra* note 225, at 613. A similar reasoning may apply to other collective security arrangements. NATIONAL SECURITY LAW 821 (John Norton Moore, et al. eds. 1990).

If the "constitutional processes" of the United States do not require a legislative authorization before the President can authorize hostilities in the face of an armed attack against the United States, and the treaty as a matter of law transforms an attack against a NATO ally into an attack against the United States, one could argue that the treaty is self-executing in that no additional legislative approval is needed.

Id.

239. GLENNON, *supra* note 211, at 40-42.

JUST CAUSE

all offensive war in the first place.²⁴⁰ Either way this approach involves a gross distortion of facts.

Many U.S. wars have gone undeclared for good reason. Most of them have been defensive. Therefore, no declaration has been required. Furthermore, as discussed above, “solemn” declarations are required only to initiate perfect wars.²⁴¹ All offensive wars require some declaration of war, but because they can only punish or exact compensation in proportion to the injury, most are limited or imperfect.²⁴² Therefore, Congress can authorize offensive actions with means other than “solemn” declarations.²⁴³ Congress has done this on several occasions.²⁴⁴

C. *The True Nature of the War Powers*

The argument that the war powers are inherently executive in nature is fundamentally flawed. The decision to go to war involves both a legal and a prudential judgment.²⁴⁵ The primary judgment is legal in nature. It is the determination that there is or is not just cause.²⁴⁶ This does not suggest that the decision to use force is to be determined by the courts. Rather it is a question of methodology that can be demonstrated by considering the two common ways in which people use the word “judgment.” A legal judgment is backward-looking. It determines what happened, or who did it, and whether a standard of conduct has been violated. If the law was broken, a judge awards punishment or compensation to satisfy the demands of justice.

Once a nation has made a legal judgment that there is just cause, it must still exercise “good judgment” in deciding how best to remedy those wrongs. This kind of judgment is prudential in nature, which is forward-looking.²⁴⁷ In making prudential judgments, persons apply what they have learned in the past and what they know about their current circumstance. They use this knowledge not to judge whether someone has committed an offense, but rather to achieve a particular

240. Eugene V. Rostow, “*Once More unto the Breach:*” *The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1, 5-6 (1986) [hereinafter *Once More unto the Breach*].

241. See *supra* notes 188-93 and accompanying text.

242. *Id.*

243. *Id.*

244. *War Powers Resolution: Hearings Before the Senate Committee on Foreign Relations*, 95th Cong., 1st Sess. 84 (1977) (testimony of Mr. Abraham Sofaer) [hereinafter *War Powers Resolution*].

245. See *supra* part III.A.2.

246. *Id.*

247. *Id.*

objective. The person who acts most appropriately and effectively in making decisions is said to exercise good judgment.

Legal judgments are the centerpiece of the customary law concept of *jus ad bellum*. The whole purpose of *jus ad bellum* is that war is governed by law and that a nation must judge that it has just cause before resorting to arms.²⁴⁸ However, once there is a legal judgment, a nation must make two distinct but closely related types of prudential judgments. Both types of prudential judgment are extremely important and often become the center of attention. The first is whether military force should be used at all.²⁴⁹ Military force may not be the wisest course of action even when all peaceful means have been exhausted. The wrong may be too slight or the offender too powerful to make an appeal to arms prudent. The second type of prudential judgment that must be made is how best to prosecute a war effort.²⁵⁰ Both of these decisions are designed to most effectively accomplish the mission at the least cost in lives and resources.

Indeed, one of the most familiar legal maxims is that no one should be the judge of his own case.²⁵¹ However, where there is no superior neutral judicial tribunal to which nations may take their cases, they must be their own judges.²⁵² The Framers of the U.S. Constitution obviously believed that Congress, a large and deliberative body, was more likely than a single executive to render impartial decisions. Additionally, if the nation was to commit its blood and treasure to war, the people's representatives were seen to be most fit to make that choice. James Madison noted that "the power to declare war, including the power of judging the causes of war, is fully and exclusively in the legislature."²⁵³ Once the nation is committed to war, however, the Constitution entrusts the prudential decisions involved in prosecuting the war effort to the President.²⁵⁴

The foreign policy powers, in particular the power to make war, bear some resemblance to the executive powers.²⁵⁵ John Locke

248. See *supra* part III.

249. See *supra* part III.A.2.

250. See *supra* notes 76-79 and accompanying text.

251. See *supra* note 67 and accompanying text.

252. *Id.*

253. 3 MICHAEL J. GLENNON & THOMAS M. FRANCK, UNITED STATES FOREIGN RELATIONS LAW 69, 79 (1981).

254. See generally THE FEDERALIST No. 69 (Alexander Hamilton).

255. Alexander Hamilton, Pacificus No. I, (Philadelphia, June 29, 1793), in 15 THE PAPERS OF ALEXANDER HAMILTON 33, 39 (Harold C. Syrett ed., 1969):

The general doctrine then of our constitution is, that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the exceptions and qu[al]ifications

JUST CAUSE

observed that they are “much less capable to be directed by antecedent, standing, positive laws” than even the executive power.²⁵⁶ Locke further noted that the executive and federative powers are distinct, though usually invested in the same person. Nevertheless, while in practice the chief executive of most states normally possessed federative powers, such powers are not inherently executive in nature.²⁵⁷ Only if one takes a purely functionalist approach in determining the nature of governmental powers may the federative powers be viewed—as executive.²⁵⁸ However, from a functionalist perspective it is improper to speak of anything as having an inherent nature.²⁵⁹ Madison, on the other hand, argued that the power to make war was legislative in nature because it bore similarities to law-making.²⁶⁰ Specifically, he contended that declarations of war significantly alter the legal relations, rights, and responsibilities of individuals and nations.

Federative powers are distinct from legislative and executive powers for a number of reasons. Locke wrote that nation states are in a state of nature with one another, meaning there is no superior civil authority.²⁶¹

which are expressed in the instrument.

Two of these have been already noticed—the participation of the Senate in the appointment of Officers and the making of Treaties. A third remains to be mentioned the right of the Legislature “to declare war and grant letters of marque and reprisal.”

Id.

256. LOCKE, *supra* note 209, ¶ 147.

257. *Id.*

258. Basically, for the functionalist, a thing is whatever it does. If the executive branch, be it King or President, commences wars then war-making must be an executive function because that is something the executive does.

In other words, instead of assuming hidden causes or transcendental principles behind everything we see or do, we are to redefine the concepts of abstract thought as constructs, or functions, or complexes, or patterns, or arrangements, of the things that we do actually see or do. All concepts that cannot be defined in terms of the elements of actual experience are meaningless.

Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 826 (1935).

259. James Madison, *Helvidius*, No. I, (1793), reprinted in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON, 615 (J.B. Lippincott & Co. ed. 1865):

All his [the President's] acts, therefore, properly executive, must presuppose the existence of the laws to be executed. . . .

. . . A declaration that there shall be war is not an execution of laws; it does not suppose pre-existing laws to be executed; it is not, in any respect, an act merely executive. It is, on the contrary, one of the most deliberative acts that can be performed, and, when performed, has the effect of repealing all the laws operating in a state of peace, so far as they are inconsistent with a state of war, and of enacting as a rule for the executive, a new code adapted to the relation between the society and its foreign enemy.

Id.

260. *Id.*

261. LOCKE, *supra* note 209, ¶ 145.

For the legal positivist, who believes that law is nothing more than the commands of a political sovereign, the fact that nations are in a "state of nature" makes law impossible.

Since the 19th century, international lawyers have tried to convince themselves and others that there really is such a thing as international law.²⁶² International law arises not from legislation but agreement among nations. This basic reality of independent nations is what makes it improper to speak of the federative powers as legislative or executive in nature. Congress does not enact laws regulating conduct between nations. The President does not act as a superior civil magistrate executing the law of Congress, but as one among equals appealing to a law that binds all nations.

If this analysis is correct, the Constitution's delegation of all executive powers to the President has little relevance for allocation of war powers. Therefore, any express grants of the federative powers, whether to the President or to Congress, should be interpreted no more narrowly or generously than any other specific grant of power. All of the federative powers, namely foreign affairs powers, belong to the government of the United States and are therefore federal powers.²⁶³

262. International lawyers have questioned the existence of international law since the time of JOHN AUSTIN'S *THE PROVIDENCE OF JURISPRUDENCE DETERMINED* (1832). See e.g., LOUIS HENKIN ET AL., *INTERNATIONAL LAW* 10 (3d ed. 1993):

International law has had to justify its legitimacy and reality. Its title to law has been challenged on the ground that by hypothesis and definition there can be no law governing sovereign states. Skeptics have argued that there can be no international law since there is no international legislature to make it, no international executive to enforce it, and no effective international judiciary to develop it or to resolve disputes about it. International law has been said not to be "real law since it is commonly disregarded, states obeying it only when they wish to, when it is in their interest to do so."

Id. International law, in large measure, is based on agreement, either express or implied, among nations. If there is no superior political authority, what makes these agreements legally binding? Hans Kelsen tried to answer this question when he wrote that it is binding "because a basic norm is presupposed which establishes his custom among states as a law-creating fact." This he says is "the 'constitution' of international law in a transcendental-logical sense." This forms the basis for all other norms including the obligation to keep one's treaties. HANS KELSEN, *PURE THEORY OF LAW* 216-17 (Max Knight trans., 1967). The classic commentaries believed that international law is legally binding and truly law because there is a higher law of nature that makes agreements binding and authorizes states to sanction breaches.

263. Hamilton, *supra* note 255, at 36. Hamilton notes further that, "[i]t will not be disputed that the management of the affairs of this country with foreign nations is confided to the Government of the United States." *Id.* In *United States v. Curtiss-Wright Export Corp.* 299 U.S. 304, 318 (1936), the Supreme Court noted that:

It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treatise, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.

JUST CAUSE

Any foreign affairs powers that the Constitution does not specifically allocate, may be allocated by Congressionally-enacted law to the other branches through the Constitution's necessary and proper clause.²⁶⁴

The Constitution gives Congress the power to declare war. This power entails the right to judge the causes of war, to judge the wisdom of going to war, and to make domestic legal changes necessary for the war effort. Congress may limit the nature, extent, and objectives of hostilities to ensure proportionality of reprisals and to check against dangerous expansion of the hostilities. The President, as Commander in Chief, has the power to conduct the war effort and defend against attack.

A more difficult question arises in regard to control of the President's decisions as Commander in Chief.²⁶⁵ Since that office is specifically delegated to the President, the powers entailed must have some content that Congress cannot interfere with. Tactical and operational decisions it would seem are relatively free from direct Congressional control. However, Congress has considerable influence over even these matters through the powers of the purse, raising armies, maintaining a Navy, and making rules to govern the armed forces.²⁶⁶

Another difficult question concerns the deployment of forces in peacetime. If the President deploys troops in places they are sure to be attacked, he would nullify the war powers of Congress. A great deal of

Id. *Curtiss-Wright* is cited only for the proposition that the power over foreign affairs resides in the federal government. Some implications of the decision regarding the source of the powers and their residence in the executive branch are erroneous. See David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946); Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973).

264. U.S. CONST. art. I, § 8, cl. 18. This use of the necessary and proper clause was discussed in the War Powers Act's legislative history. As noted by the debates:

It is also of great importance to note that the residual legislative authority over the entire domain of foreign policy—not just the war power—was placed in Congress by the Constitution. Members of Congress have themselves perhaps underestimated the authority vested in them by the “necessary and proper” clause That clause entrusts the Congress to make all laws “necessary and proper for carrying into execution” not only its own powers but “all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.”

Report of the Senate Foreign Relations Committee on the War Powers Act, S. Rep. 220, 93d Cong., 1st Sess. (1973).

265. THE FEDERALIST NO. 69 (Alexander Hamilton). “The President is to be commander-in-chief of the army and navy of the United States It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy” *Id.*

266. U.S. CONST. art. I, § 8.

the controversy over the War Powers Resolution focuses on this issue.²⁶⁷

If the conclusion reached in Part III is correct, namely that the Panama invasion was an offensive act of war, and the conclusion of this Part is correct, that only Congress has the power to authorize offensive war, then Operation Just Cause violated the U.S. Constitution. The United States violated customary and treaty law by proceeding without a declaration of war. It violated the U.N. Charter for going to war at all.

Surprisingly however, the President could argue quite persuasively that he complied with the War Powers Resolution²⁶⁸ even though he certainly would not admit being bound by it. Section 1541(c) of the Resolution states that the President may introduce forces into hostilities "only pursuant to (1) a declaration of war, (2) specific statutory authorization; or (3) a national emergency created by an attack upon the United States, its territories or possessions, or its armed forces."²⁶⁹ This section appears to be a simple restatement of the war powers as allocated in the Constitution. Moreover, this section appears to be based upon the customary law distinction between offensive and defensive war. However, sections 1543 and 1544 attempt to give the President greater power than the Constitution permits by allowing the President to introduce forces anywhere for up to 90 days without Congressional authorization.²⁷⁰ Operation Just Cause complied with this portion of the War Powers Resolution. Accordingly, while most debate over the Resolution has focused on the question of whether the War Powers Resolution unconstitutionally limits the President's power, the Panama invasion illustrates the fact that the War Powers Resolution attempts to delegate Congressional powers to the President.²⁷¹

D. Changing World or Changing Mission?

The "world is changing" approach to reinterpreting the Constitution is at the heart of the war powers debate.²⁷² It provides the basis for the view that inherent executive powers allow the President to initiate

267. 1 TURNER, *supra* note 209, at 80-85. Mr. Turner argues for broad powers. The analysis of authors WORMUTH AND FIRMAGE, *supra* note 140, finding limited inherent authority is more convincing.

268. 50 U.S.C. §§ 1541-1548 (1988).

269. 50 U.S.C. § 1541(c) (1988).

270. *Id.* §§ 1543, 1544.

271. THOMAS F. EAGLETON, WAR AND PRESIDENTIAL POWER: A CHRONICLE OF CONGRESSIONAL SURRENDER 203-05 (1973).

272. See *supra* notes 8, 12 and accompanying text.

JUST CAUSE

war and that the United States may delegate war-making powers to the United Nations. Certainly the world and the nature of war in some respects have changed, and certainly the Framers did not foresee the development of an organization like the U.N. However, writers seldom explain exactly how all of this requires a shift of war powers from Congress to the President, except to say that it generates a shorter time for responding to danger.²⁷³

All of this paints a picture of historical inevitability, but it belies the true nature of the change. In a discussion of the War Powers Resolution and the Constitution, one Presidential advisor, speaking with refreshing candor have stated the following:

It is not so much that the world has changed in two hundred years as that the United States and its role in the world have changed substantially. The Constitution did not legislate a government designed for maximum efficiency. It legislated a government designed to protect the rights of the individual against an overbearing government, and it does that very well. The problem is that the inefficiency that kind of freedom-protecting innovation dictates makes it very difficult for a world power to discharge its responsibilities.²⁷⁴

This view of law makes it little more than an instrument of policy. National policy has changed. Therefore, the Constitution must change. Law takes whatever form is necessary or expedient to legitimize policy decisions, and eventually law and politics become indistinguishable. Nevertheless, this is hardly a rule of law. Ironically, the rule of law and democratic processes of our Constitution are eliminated in order to make the world safe for democracy and the rule of law.

V. Just Cause and Just War Doctrine

A. *A Revival of Just War Doctrine*

A revival of interest in just war doctrine is evident in contemporary military education as well as in theological discourse. National leaders have appealed to the just war doctrine in recent wars to justify their decisions. American servicemen who must fight these wars and the American public who must support them both recognize the fundamental moral issues that are involved. Just war doctrine is not simply the

273. Resiman, *supra* note 151, at 70-71.

274. Symposium, *War Powers and the Constitution*, Am. Enterprise Inst. Pub. Pol'y Res., Dec. 6, 1983, at 4.

reflection of a 2000-year-old Western moral tradition based on social consensus. It reflects absolute and unchanging standards of right and wrong that are revealed in conscience, nature, and Scripture.²⁷⁵ Policy-makers, lawyers, and operators who ignore this fundamental reality do so at great risk to the nation's welfare. Customary international law, as formulated in the 17th and 18th centuries, incorporated the essential legal elements of the just war doctrine.²⁷⁶ Additionally, the U.S. Constitution delegates the war powers in such a way as to foster compliance with both the legal and prudential elements of that doctrine.²⁷⁷

Classic just war doctrine developed over the course of a thousand years, beginning with Augustine and culminating with the Spanish theologian and lawyer, Victoria. Augustine addressed all of the basic issues and set the framework for discussion that continues to this day. Theologians, knights, canon lawyers, and civil lawyers worked within that framework developing details and making applications.²⁷⁸ Occasionally, they made significant departures from it, most notably in the practice of holy war.²⁷⁹ Regardless of the relative influence of the various participants, the doctrine is uniquely a product of Christian thought. Although contemporary writers parse out the particulars of the doctrine in different ways, they are in essential agreement as to the basic contents. An identification of the elements includes just cause, right authority, right intention, proportionality of ends, last resort, reasonable hope of success, and the aim of peace.²⁸⁰

It is important to remember that "just cause" is only one element of a "just war." This fact highlights two different meanings of the word "justice" as used in Christian theology.²⁸¹ It also serves as a reminder

275. Yet, undoubtedly, the revealed law is of infinitely more authenticity than the moral system that is framed by ethical writers and denominated natural law, because one is the law of nature expressly declared so to be by God himself and the other is only what by the assistance of human reason, we imagine to be that law. BLACKSTONE, *supra* note 60, at *42.

276. See *supra* part III.A.

277. See *supra* part IV.

278. FREDERICK H. RUSSELL, *THE JUST WAR IN THE MIDDLE AGES* (1975); JAMES TURNER JOHNSON, *IDEOLOGY, REASON, AND THE LIMITATION OF WAR: RELIGIOUS AND SECULAR CONCEPTS 1200-1740*, 26-80 (1975).

279. See *infra* notes 295-307 and accompanying text.

280. James Turner Johnson, *Just War Thinking and its Contemporary Application: The Moral Significance of the Weinberger Doctrine*, in *THE RECOURSE TO WAR: AN APPRAISAL OF THE WEINBERGER DOCTRINE* 81 (Alan Ned Sabrosky & Robert L. Sloane eds., 1988) [hereinafter *Just War Thinking and its Contemporary Application*]. These are the *jus ad bellum* elements of just war doctrine. Johnson identifies two other elements relating to *jus in bello*: proportionality and discrimination (noncombatant immunity).

281. 1 CHARLES HODGE, *SYSTEMATIC THEOLOGY* 416 (1979).

JUST CAUSE

that just war doctrine is a composite of legal and prudential elements.²⁸² In Christian theology, upon which the just war doctrine is based, justice is used in a broad sense to refer to the sum total of a person's moral obligations.²⁸³ Justice may also be used in a narrow sense to refer to the judgment of a court.²⁸⁴ Judges must decide cases justly, but all men must also behave justly. To make just war, there must be a legal judgment that there is just cause and a prudential judgment that war will not be disproportionately costly. In Christian theology, all judgments, be they legal or prudential, are moral in nature, even though the judgments involve different methods of decision making.

Many question whether a doctrine that is fundamentally the product of Western medieval Christianity can have contemporary relevance. However, some scholars do believe that just war doctrine has a very practical and significant relevance in formulating U.S. defense policy. Those scholars propound that former Secretary of Defense Caspar Weinberger's criteria²⁸⁵ for the employment of U.S. combat forces overseas are basically those of just war doctrine:

282. See *supra* part III.A.2. Several elements of just war doctrine entail legal judgments, while some entail prudential judgments. Still others are a combination of legal and prudential.

283. The word justice, or righteousness, is used in Scripture sometimes in a wider and sometimes in a more restricted sense. In theology, it is often distinguished as *justitia interna*, or moral excellence, and *justitia externa*, or rectitude of conduct. . . .
. . . He [God] is a righteous ruler; all his laws are holy, just, and good. In his moral government He faithfully adheres to those laws. He is impartial and uniform in their execution.

HODGE, *supra* note 281, at 416.

284. As a judge he renders unto every man according to his works. He neither condemns the innocent, nor clears the guilty; neither does He ever punish with undue severity. Hence the justice of God is distinguished as rectoral, or that which is concerned in the imposition of righteous laws and in their impartial execution; and distributive, or that which is manifested in the righteous distribution of rewards and punishment. The Bible constantly represents God as a righteous ruler and a just judge.

HODGE, *supra* note 281, at 416. Hodge's use of the term "rectoral" corresponds with this article's use of the term "prudential," and his term "distributive" to this article's use of the term "legal." They are related but distinct terms.

Hodge further asserts that there are constant Biblical references to God as a just judge, including the following: "He will judge the world in righteousness; he will govern the peoples with justice." *Psalms* 9:8; "Endow the king with your justice; O God, the royal son with your righteousness." *Psalms* 72:1.

285. Caspar Weinberger, *The Uses of Military Power*, Remarks to the National Press Club (November 28, 1984) reprinted in CASPAR WEINBERGER, *FIGHTING FOR PEACE: SEVEN CRITICAL YEARS IN THE PENTAGON* 433 (1990). The six criteria listed in his remarks have become known as the Weinberger Doctrine.

[T]he Weinberger Doctrine provides a clear and persuasive contemporary example of just war thinking. I mean this claim in the following senses: first, that the categories of thought employed . . . in his "six conditions for committing United States military forces" correspond directly with major categories that have coalesced in historical just war tradition; and second, that the content . . . is consistent with the content of just war tradition.²⁸⁶

Specifically, those believing that just war doctrine affects U.S. defense policy claim that the Weinberger criteria correspond directly to the just war criteria as follows:²⁸⁷

<u>Just War</u>	<u>Weinberger Doctrine</u>
1. Just cause	1. Vital to national interests
2. Right authority	2. Support of American people and their elected representatives
3. Proportionality of ends	3. Continual assessment of objectives and forces committed
4. Reasonable hope of success	4. Clear intention of winning
5. Last resort	5. Last resort
6. Right intention	6. Clearly defined political and military objectives
7. End of peace	7. (Implied in 1 and 5)

The parallel drawn between the just war and Weinberger doctrines is extremely strained. While the two appear to be similar, there is a fundamental dissimilarity between the two doctrines that looms far larger than any similarities. The Weinberger Doctrine is a compendium of

286. *Just War Thinking and its Contemporary Application*, *supra* note 280, at 86. As stated by Professor Johnson, the leading contemporary writer on just war:

[T]he Weinberger Doctrine provides a clear and persuasive contemporary example of just war thinking. I mean this claim in the following senses: first, that the categories of thought employed . . . in his 'six conditions for committing United States military forces' correspond directly with major categories that have coalesced in historical just war tradition; and second, that the content . . . is consistent with the content of just war tradition.

Id.

287. *Id.* at 101. The order listed here is not Professor Johnson's nor former Secretary Weinberger's. It is the order in which the criteria are discussed below. The just war criteria begin with those that are primarily legal in nature and move on to those which are prudential.

JUST CAUSE

purely prudential considerations. At best, it is just war doctrine minus just cause.

In fact, the Weinberger Doctrine is clearly missing several other legal criteria than simply just cause. Additionally, the prudential criteria of the Weinberger Doctrine are narrower than those of the just war doctrine. Secretary Weinberger developed his standard in response to fears of imprudent U.S. military involvement in Central America or failed ventures like that in Beirut.²⁸⁸ Weinberger's main purpose was to limit the commitment of U.S. combat forces overseas and to assure our military of full national commitment where it is employed.²⁸⁹ From the Department of Defense's perspective the criteria provide some very important prudential guidelines for the use of force, and in that sense they are limiting factors.²⁹⁰ However, if the Weinberger Doctrine was meant to be a comprehensive list of criteria for the national decision to use force, it is severely wanting.

The elements of just war doctrine are described below. The description will show that legal criteria are the heart of the doctrine. This should not be viewed as a sacrifice of prudential concerns, such as, national interests, to an unrealistic legality. Law, as properly conceived, serves policy by being one of the surest guides to prudent decisions. Operation Just Cause is considered in light of these just war criteria. A comparative analysis of the Weinberger Doctrine then follows.

B. Just War Doctrine

1. *Just Cause*.—Augustine is considered the foremost expositor of just war doctrine, even though he did not describe it systematically at any one place in his writings. He wrote that wars which avenge injuries are just.²⁹¹ Later writers described with more specificity what it means to avenge injuries. Gratian's *Decretum*, the first and perhaps greatest systematic compilation and treatment of canon law, held that nations may use force in self-defense, to exact compensation and to punish.²⁹²

288. See Bernard Gwertzman, *Shultz in Warning on Combat Troops for Latin Region Fears Agonizing Choice: He Says Failure to Aid Rebels in Nicaragua Adds to Risk of U.S. Military Role*, N.Y. TIMES, May 24, 1985, at A1; Bernard Gwertzman, *U.S. To Rebuild Lebanon's Army; 40,000 Men is the Ultimate Goal*, Dec. 3, 1982, at A12.

289. Weinberger, *supra* note 285, at 433.

290. *Id.*

291. AUGUSTINE, THE CITY OF GOD bk. xix, ch. 7 (Robert Maynard Hutchins ed. & Marcus Dods trans., 1952) ("For it is the wrong-doing of the opposing party which compels the wise man to wage just wars . . ."). See also RUSSELL, *supra* note 278, at 18.

292. RUSSELL, *supra* note 278, at 60-68. Thomas Aquinas quotes Augustine as authority for defining just cause: "A just war is usually described as one that avenges wrongs, when a nation

These same bases were accepted by the civil lawyers of Medieval Europe.²⁹³ Sanctions were based on the existence of fault, and war was seen as an extraordinary form of lawsuit to vindicate justice. The underlying wrongs, and remedies available, were closely analogous to those in a domestic legal system. Gratian's threefold purpose for the use of force is also reflected in the international law treatises of Vattel and Grotius. Likewise, the writings of the Roman philosopher Cicero assert these three purposes, but Cicero's writings also differ from Christian just war doctrine in other ways.²⁹⁴

During the medieval period, attempts were made to expand the bases of just cause. The most noteworthy was the development of the concept of holy war.²⁹⁵ Holy war is supposedly justified on the sole basis that others do not share the same religious beliefs.²⁹⁶ The goals of conquest and conversion thus become lawful.²⁹⁷ Religious differences, even in the absence of other wrongs, are treated as just cause for war.²⁹⁸ This theory was used in part to justify the Carolingian conquest of Europe and the medieval Crusades in the Middle East.²⁹⁹ However, Pope Innocent IV and the canon lawyer Hostiensis denied the right to make war on Muslims or other pagans merely because they were unbelievers.³⁰⁰ This appears to have become the prevailing view in the just war doctrine. Only the traditional just causes are a proper basis for war. Crusades to recapture the Holy Land were justified not on the basis

or state has to be punished, for refusing to make amends for the wrongs afflicted by its subjects, or to restore what it has seized unjustly." THOMAS AQUINAS, *THE SUMMA THEOLOGICA* pt. II, ii, question 40, art. I (Robert Maynard Hutchins ed. & Fathers of the English Dominican Province trans., 1952).

293. RUSSELL, *supra* note 278, at 137-38. In medieval times, civil authority's very existence was to serve as God's agent of justice punishing criminals and exacting compensation for injuries. Thus, canon lawyers, theologians, and civil lawyers all shared the same perspective, namely that their authority was derived from God and the Bible. See, e.g., *Romans* 13:4 ("For he [the civil ruler] is God's servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God's servant, an agent of wrath to bring punishment on the wrongdoer.").

294. RUSSELL, *supra* note 278, at 5-6.

295. *Id.* at 195-212; 251-57.

296. *Id.* at 195.

297. *Id.*

298. *Id.*

299. RUSSELL, *supra* note 278, at 195-212; 251-57.

300. *Id.* at 199. It was Innocent IV and his pupil Hostiensis who provided the conclusive discussion of Christian claims to territories ruled by infidels. Innocent denied that Christians could make war on Saracens merely because they were infidels and expressly prohibited wars of conversion. *Id.*

JUST CAUSE

of religious differences, but by the fact it was territory that had been stolen from Christendom.³⁰¹

Holy war doctrine in Christian theology seems to have been laid to rest by Victoria. His treatise, *De Indis et De Jure Belli Relectiones*, which is arguably the first modern treatise on international law, rejected the justification of religious differences for war against the American Indians.³⁰² In fact, he argued for their right to fight against Christian nations in self-defense.³⁰³

Religious differences are the justification for Islamic Holy War or *Jihad*. The purpose of *Jihad* is conquest and conversion. The conquered who do not opt for conversion are usually accorded an inferior civil status.³⁰⁴

Holy war notions are not unique to religious thought. Cicero wrote approvingly of wars waged to impose the ideals of Rome.³⁰⁵ In the last two centuries, the counterpart to holy war has been war based on ideology. A common theme in most of these wars is that conquest is for the good of those who suffer under an inferior religious, social or political order.

In the more recent Operation Just Cause, there was a just cause basis for the invasion of Panama. There were numerous legal injuries that provided just cause for war including harm done to American citizens, breach of treaty rights, and failure to prosecute Noriega.³⁰⁶

301. But when Saracens invaded Christian territories or attacked Christians, both the Church and the Christian prince of the territory could wage a just war to avenge their injuries and losses. . . . When Saracens occupied the Holy Land the case was very different, for then either the Church or any Christian prince could make war on them since Saracen possession of the Holy Land was an offense to Christ and all Christians.

RUSSELL, *supra* note 278, at 199. Professor Johnson, leading scholar on the just war doctrine, contends that holy war was much more a part of the "warp and woof" of medieval just war doctrine. He also believes that it contributed to excesses in conducting war and to a retardation of development of *jus in bello*. See JOHNSON, *supra* note 278, at 1200-1740, 26-80.

Churchmen recognized that conversion is not effected through force of arms, but rather through the preaching of the Gospel and work of the Holy Spirit in individuals. While the Bible uses martial imagery, it makes a clear distinction between civil governments' "sword of steel" and the Church's "sword of the Spirit." See, e.g., 2 Corinthians 10:3-5; Ephesians 6:17; Hebrews 4:12. Since at least the 5th century, Christendom has drawn jurisdictional distinctions between Church and state based on this "two swords" doctrine. HAROLD J. BERMAN, *LAW AND REVOLUTIONS* 92 (1983).

302. FRANCISCUS DE VICTORIA, *DE INDIS ET DE IURE BELLI REFLECTIONES* 171 (John Pawley Bate trans. 1917).

303. *Id.* at 129-49.

304. Joseph N. Kickasola, *Kissing the Son: The Tragedy of the Conscience, the Crescent, and the Cross*, 136 *Christian Statesman*, July-Aug. 1993, at 3, 7-8.

305. BERNARD T. ADENEY, *JUST WAR, POLITICAL REALISM, AND FAITH* 24-27 (1988).

306. See *supra* parts II, III.C.

Whether or not Operation Just Cause complied with the other elements of just war doctrine is more problematic. Significantly, the Panama Invasion was not a war waged in self-defense as the United States claimed. Furthermore, Panama's lack of democracy was not a just cause for waging war. It was, in effect, an ideological justification. Ambassador Einaudi's statement defending Operation Just Cause before the Organization of American States displays the fervor and rationale of warfare motivated by religious ideology:

There are times in the life of men and of nations when history seems to take charge of events and to sweep all obstacles from its chosen path. At such moments, history appears to incarnate some great and irresistible principle, such as the nation-state in the 17th century, nationalism in the 19th century, and decolonization in the middle part of this century.

Today, we are once again living in historic times, a time when a great principle is spreading across the world like wild fire. That principle, as we all know, is the revolutionary idea that the people, not governments, are sovereign. This principle is the essence of the democratic form of government. It is an idea which has, in this decade, and especially in this historic year — 1989 — acquired the force of historical necessity.³⁰⁷

The purpose of war limited to just cause is to return the wronged party to the *status quo ante bellum* and not to use the war as an occasion to establish some new social order. The notion that war may be waged not simply to vindicate justice, but to establish a new social order, has its analogue in domestic law. Theories of social justice in a domestic system are designed to prevent all manner of injustice by remaking the social order by means of force rather than persuasion. The false assumption is that law and force can make people good or free or responsible or whatever else they are lacking. The same rationale that seems to justify the use of force for establishing democracy justifies using force for establishing the whole panoply of human rights. If world peace, and therefore national interest, depend on universal adherence to democracy and practice of human rights, there are no legal limits left on the decision to make war.

2. *Right Authority*.—There were several questions that medieval Christianity had to resolve under the element of right authority.³⁰⁸ The

307. H.R. Doc. No. 127, 101st Cong., 2d Sess. 2 (1990) (statement of Luigi R. Einaudi, U.S. Permanent Representative to the O.A.S.).

308. RUSSELL, *supra* note 278, at 68-85, 100-05, 138-55; see also AUGUSTINE, *supra* note 291,

JUST CAUSE

first was whether or not, and under what conditions, private individuals could resort to force.³⁰⁹ The second was what role the Church played in authorizing force.³¹⁰ The third question dealt with the allocation of authority among civil rulers.³¹¹ The question was raised as to whether the emperor was the only authority that could authorize war, or whether lesser authorities could do so as well.³¹² Although the particular answers given to these questions are not of immediate importance, they do highlight two important issues. The first issue is whether or not the decision-making authority is to be distributed among nation states. The second issue addresses how this authority is to be distributed within a particular state. The first issue has the strongest implications for international law and the second for domestic law.

For example, if the invasion of Panama violated the U.N. Charter, it would appear that the "right authority" principle of just war doctrine was violated as well. Of course, this assumes that nations may delegate the authority to wage offensive war to an international organization. It is arguable that the attempted delegation of authority to the United Nations is itself a violation of classic just war doctrine. Today, international law is treated as nothing more than a system of positive law based on treaty and custom. Under a positivist view nothing is inherently required or forbidden by international law. The whole attraction of just war doctrine, however, is that there are absolute standards governing the conduct of nations that serve as a higher court of appeal.

Medieval writers did not specifically address the question of whether a nation may delegate to an international organization its sovereign right to exact justice by engaging in offensive war. However, the issue is not totally novel to the 20th century, either. The medieval writers had a host of biblical and historical materials to draw upon if they had decided to directly address the matter. For example, Augustine's *The City of God* is replete with appeals to Scripture and history. In this work, Augustine gives a theological explanation for man's sin and resulting wars. He deals specifically with the biblical account of the Tower of Babel, in which God created a multiplicity of nations and spread them over the earth as a limitation on man's attempt to create a single political order

bk. I, ch. 21.

309. RUSSELL, *supra* note 278, at 68-85.

310. *Id.* at 100-05.

311. *Id.* at 138-55.

312. *Id.*

to replace the Kingdom of God.³¹³ Augustine's view holds that a multiplicity of nations with limited jurisdiction is a necessary limitation on political, social and economic evil.³¹⁴ Augustine's view is a direct contradiction to the new-world-order assumptions embodied in the vision of the United Nations.³¹⁵ The underlying premise of one-world government schemes is that a multiplicity of nations is the cause of evil rather than a limitation upon it.

The medieval writers further debated whether, among Christian rulers, the Holy Roman Emperor alone had the authority to wage offensive war.³¹⁶ Eventually, a consensus arose that lesser officials did have that right, but it remained difficult to determine at what level in the civil hierarchy that right resided.³¹⁷ In any event, the Emperor was unable to monopolize force then, just as the Security Council is unable to monopolize force today.

Most classic scholars based international law on the sovereignty of nation states. That basis has been seriously questioned in this century. Vattel also took a strong stand that international law included preexisting and immutable laws of nature. Although he did not argue that the law of nature required multiple nation-states, he certainly implied this in the title of his treatise *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*.³¹⁸ Moreover, he rejected the model which portrayed the system of nation-states more like a universal republic.³¹⁹ Thus, under a natural law framework, it is arguable that the delegation to the United Nations of the right to use force is not only unworkable and imprudent, it is unlawful as a violation of *jus cogens*.

313. AUGUSTINE, *supra* note 291, bk. XVI, ch. 4. See also Genesis 10; 11:1-9; *Deuteronomy* 32:8 ("When the Most High gave the nations their inheritance, when he divided all mankind, he set up boundaries for the peoples according to the number of the sons of Israel."); *Acts* 17:26-27a ("From one man he made every nation of men, that they should inhabit the whole earth; and he determined the times set for them and the exact places they should live. God did this so men would seek him . . .").

314. AUGUSTINE, *supra* note 291, at bk. XVIII, ch. 34.

315. Augustine based his view on the Biblical passages from the prophet Daniel. *Daniel* 2:44 ("In the time of those kings the God of heaven will set up a kingdom that will never be destroyed, nor will it be left to another people. It will crush all those kingdoms and bring them to an end, but it will itself endure forever."). From chapters 7-11 of *Daniel*, it becomes clear that the four kingdoms mentioned in the second chapter of *Daniel* were Babylon, Medo-Persia, Greece, and ancient Rome.

316. RUSSELL, *supra* note 278, at 138-55.

317. *Id.*

318. VATTEL, *supra* note 1.

319. CHRISTIAN WOLFF, *THE LAW OF NATIONS TREATED ACCORDING TO A SCIENTIFIC METHOD* 11-18 (Joseph H. Drake trans., 1934) (1749).

JUST CAUSE

Under our Constitution, only Congress may initiate war.³²⁰ Therefore, the Panama invasion violated the principle of right authority by violating the domestic law set forth by the Constitution. Additionally, the attempted delegation of war-making authority to the U.N. also violates both the U.S. Constitution, and therefore, the principle of right authority.

Although identification of right authority is a legal element of just war doctrine, it is also procedural in nature. Thus, the right authority identification differs from just cause determinations, which involve substantive identifications. In contrast, in identifying whether there is right authority, there is not only the legal inquiry as to whether the proper authority made the just cause judgment, but also the prudential judgments that are discussed below.

3. *Proportionality of ends.*—It is difficult to determine whether the requirement that the ends of the war be proportionate to the means is a legal requirement or a prudential one. It is probably both. In either case, the requirement serves as a limiting factor on the use of force. If a decision is made to use force, it must be proportionate to the wrong done.³²¹ Under the view that force is used to vindicate justice, punishment should be based on just desert and compensation on injury suffered. Proportionality is a necessary corollary of the just cause element and is probably implied in it. These same principles are applicable to sanctions in a civil court proceeding.

Proportionality is used in another sense. It is viewed as a prudential consideration that focuses on the impact of war on a state's own citizens. It asks whether the costs of exacting justice exceed the benefits to be gained by waging war.³²² These considerations are similar to those that law enforcement officials and prosecutors make in allocating resources or that private citizens make in deciding whether to sue. The cost in life and resources of prosecuting a war may be so great, or an injury so small, that it is better to forego the wrong. It often is unjust,

320. See *supra* part IV.

321. See *supra* part III.

322. AUGUSTINE, *supra* note 291, bk III, ch. 1.

To begin with, the ends held out as the just cause must be sufficiently good and important to warrant the extreme means of war, the arbitrament of arms. Beyond that, a projection of the outcome of the war is required in which the probable good expected to result from success is weighed against the probable evil that the war will cause.

O'BRIEN, *supra* note 59, at 272. There seems to have been little development or even recognition of this issue through most of the medieval period. However, the Bible counsels kings to make sound judgments concerning war. See, e.g., Luke 14:31; Proverbs 24:6.

not to the wrongdoer, but to one's own citizens, to pursue the matter by force.

Some writers confuse the meaning of proportionality. When weighing the costs and benefits of going to war, it must be asked whether the victim may weigh only its own relative costs and benefits, or the costs to the offender must be included as well. Some writers claim that the offender's costs must be calculated.³²³ Surely this cannot be right. Any time an offender is punished or forced to make restitution he is worse off in a material sense. Consequently, it is impossible to see how force could ever be proportionate if the offender's costs must be weighed as well as the victim's.

The relative costs and benefits of going to war are anything but a precise calculation. No one can determine with any certainty the loss of lives and resources, the impact on families and domestic tranquility, or the long-term effects on foreign relations. These factors all came into play in Operation Just Cause. It is impossible to weigh the value of lives lost, gains made on the war against drugs, or damage to relations in Latin America. Probably most Americans would say that it was worth the cost. However, such a decision has been entrusted to Congress, and Congress should have made the decision after weighing all of these concerns.³²⁴

4. *Reasonable Hope of Success.*—The element of reasonable hope of success is clearly prudential in nature.³²⁵ In fact, it seems to be a restatement of proportionality in the second or prudential sense as outlined above.

5. *Last Resort.*—Last resort is primarily prudential and relates closely to proportionality and reasonable hope of success. War is always costly and full of uncertainty. Therefore, nations are morally bound to pursue all peaceful means of settlement. This also insures fairness to the other party. There is one legal component of this element: A declaration of war. It is a requirement of both international and domestic law.³²⁶ Because declarations of war identify the just causes and are

323. O'BRIEN, *supra* note 59, at 28.

324. See *supra* part IV.

325. See O'BRIEN, *supra* note 59, at 27, 28. AQUINAS, *supra* note 292, pt. I, ii, question 105, art. III.

326. AQUINAS, *supra* note 292, pt. I, ii, question 105, art. III. Citing *Deuteronomy* 20:10, Aquinas argued that declarations of war are a fundamental requirement of God's law binding all nations. *Id.* In the medieval period the context of discussion of declarations of war focused more on the issue of who had authority to initiate war. RUSSELL, *supra* note 278, at 62, 64, 89.

JUST CAUSE

issued by lawful authority, they relate to those elements as well. Operation Just Cause was initiated without a declaration of war. The United States claimed to have made exceptional unilateral and collective diplomatic efforts through the O.A.S. to settle problems peacefully. One glaring problem, however, was the refusal on the United States' behalf to talk to Noriega prior to the invasion.

6. *Right Intention*.—Even if all the above criteria were met, Augustine believed that one wages unjust war if he does so out of hatred or other improper motives.³²⁷ However, it is also important to check one's motives because wrong motives often lead to a breach of the external requirements. This element is also designed to guard against the pretextual uses of force that appear to have played a part in Operation Just Cause.³²⁸

7. *End of Peace*.—The end of peace is another prudential concern. Peace is the supreme purpose for which war is waged.³²⁹ By doing justice, the magistrate sets conditions for peaceful relationships. It is one of the measures of success and also an important component of intention; therefore, it might be included under either of those elements. Peace is not a mere cessation of fighting. Theologically speaking it is reconciliation between enemies. While satisfaction of justice does not necessarily work reconciliation, it is a necessary objective condition for reconciliation.³³⁰ The U.N. Charter scheme which denies justice as the cost of peace ends up forfeiting both justice and peace.

C. Weinberger Doctrine

The main difference between the just war doctrine and the Weinberger Doctrine is that the latter is a list of prudential criteria only. In fact, the whole Weinberger list can probably be subsumed under the

327. AUGUSTINE, *supra* note 291, bk. III, ch. 14; AQUINAS, *supra* note 292, pt. II, ii, question 40, art. I. Aquinas wrote that there are three elements of just war: (1) lawful authority; (2) just cause; and (3) right intention. The element of right intention entails several of the elements listed in this article. Aquinas, quoting from Augustine, states, "[t]rue religion does not look upon as sinful those wars that are waged not for motives of aggrandizement, or cruelty, but with the object of securing peace, of punishing evildoers, and of uplifting the good." *Id.* Properly waged a just war is in the best interest of the offender as well. *Id.*

328. John Quigley, *The Legality of the United States Invasion of Panama*, 15 YALE J. INT'L L. 276, 310-14 (1990) (suggesting that the impetus for the Panama Invasion were actually goals less admirable than those publicly asserted).

329. AUGUSTINE, *supra* note 291, bk. XIX, chs. 11-14.

330. Jeffrey C. Tuomala, *Christ's Atonement as the Model for Civil Justice*, 38 AM. J. JURIS. 189 (1993).

element of "national interest." All of the other elements are particular considerations that guide decision makers in promoting the national interest.

1. *Vital to our national interest.*³³¹—One scholar correctly notes that, "Weinberger's conception of *just cause* is far more elastic than the international law conception, and at first look it is also more elastic than allowed in classic just war theory."³³² The Weinberger Doctrine is "far more elastic" than international law because it does not limit unilateral force to self-defense. In addition, it requires no just cause whatsoever. The only way it can be made consistent with classic just war theory is to read something into it that Secretary Weinberger did not even suggest in his remarks. If he intended the Doctrine to be the sum total of criteria for the use of force, the lack of legal criteria was a serious omission. On the other hand, if the Doctrine was intended to list the prudential considerations for the use of force once the legal elements were satisfied, it is of course less problematic, but it is certainly not a restatement of just war doctrine. There is every reason to believe, however, that it is nearly his sum total of criteria for the use of force. Actually, it seems to be a rejection of the just war doctrine.

At the beginning of his remarks, former Secretary Weinberger cast the context for his criteria in the broadest terms. He asked: "Under what circumstances, and by what means, does a great democracy such as ours reach the painful decision that the use of military force is necessary to protect our interests or to carry out our national policy?"³³³ The way in which he painted the world scene and the state of international law indicates that *jus ad bellum* has little relevance in most situations involving the use of force:

While the use of military force to defend territory has never been questioned when a democracy has been attacked and its very survival threatened, most democracies have rejected the unilateral aggressive use of force to invade, conquer or subjugate other nations. The extent to which the use of force *is* acceptable remains unresolved for

331. Weinberger, *supra* note 285, at 441.

[T]he United States should not commit forces to combat overseas unless the particular engagement or occasion is deemed vital to our national interest or that of our allies. That emphatically does not mean that we should declare beforehand, as we did with Korea in 1950, that a particular area is outside our strategic perimeter.

Id.

332. *Just War Thinking and its Contemporary Application*, *supra* note 280, at 104.

333. Weinberger, *supra* note 285, at 434.

JUST CAUSE

the host of other situations which fall between these extremes of defensive and aggressive use of force.

We find ourselves, then, face to face with a modern paradox: The most likely challenge to the peace—the gray area conflicts—are precisely the most difficult challenges to which a democracy must respond.³³⁴

Secretary Weinberger cast U.S. interests as universal in scope, yet he realized that the United States could not respond to all of these interests with force. The only limits he saw, however, were prudential, the single most important one being that the United States has “*a strong consensus of support and agreement for our basic purposes*.”³³⁵

Weinberger’s approach is very much like that of 19th century German military theorist, Carl von Clausewitz, whose writings on war are still in vogue today. As noted by Clausewitz:

We see, therefore, that war is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means. What remains peculiar to war is simply the peculiar nature of its means.³³⁶

Under modern theory, war is simply a prudential or political instrument whose distinguishing trait is violence. Such a theory purports that war is used first and foremost to serve the national interest, regardless of how that political interest is defined.

This view compliments the “national interest” approach to decision making. Under this view, one may ask only whether it is in the national interest to have a canal connecting two oceans, lower prices on oil, or political stability on another continent. If the answer is yes, and the objectives can’t be achieved by peaceful political intercourse, then the use of force is legitimized. This view does not ask whether a legal wrong has been committed against the United States. The only limitation on an action is whether the political costs outweigh the expected benefits. Under the national interest approach, any reason for invading Panama would have been sufficient if deemed in the national interest, including the purpose of promoting democracy or other human rights.

334. *Id.* at 435.

335. *Id.* at 437 (emphasis added).

Yet the outcome of decisions on whether—and when—and to what degree—to use combat forces abroad has never been more *important* than it is today. While we do not seek to deter or settle all the world’s conflicts, we must recognize that, as a major power, our responsibilities and interests are now of such scope that there are few troubled areas we can afford to ignore.

Id. at 436.

336. CARL VON CLAUSEWITZ, ON WAR 87 (Michael Howard & Peter Paret trans., 1976) (1832).

The view that the use of military force is first and foremost a political issue is fundamentally flawed. Other scholars present a quite different view. They believe that military force is to be used primarily to execute judicial judgments, not political ones. As James Kent wrote:

War . . . is one of the highest trials of right; for, as princes and states acknowledge no superior upon earth, they put themselves upon the justice of God by an appeal to arms.³³⁷

This view is reflected in the "Marine's Hymn" which affirms that the first reason for which Americans fight is "right and freedom."³³⁸ It does not say "first to fight for national interest." Primacy is given to law.

2. *Support of American people and their elected representatives.*³³⁹—Secretary Weinberger's whole concern over the public's support was not whether force had been authorized by the lawful authority, but whether there was enough political support for the proposed use of force. This is crucial not only for elected officials but also for assuring the public's continuing support of U.S. servicemen and their missions. It is noteworthy that Weinberger did not address Congress' constitutional role other than to say that the legislative branch had compromised "the centrality of decision-making authority in the executive branch."³⁴⁰ These six criteria are self-imposed by the executive branch. The assumption is that it is the President's, and not Congress', decision to authorize force. The American people supported the Panama invasion.³⁴¹ It is unclear, however, whether this support existed beforehand or only after the invasion proved successful. Seemingly, the American people are always initially supportive of military actions.³⁴²

337. 1 Kent, *supra* note 1, at 47.

338. *Marine's Hymn* (Anthem of the U.S. Marine Corps).

339. Weinberger, *supra* note 285, at 442.

[B]efore the U.S. commits combat forces abroad, there must be some reasonable assurance we will have the support of the American people and their elected representatives in Congress. This support cannot be achieved unless we are candid in making clear the threats we face; the support cannot be sustained without continuing and close consultation. We cannot fight a battle with the Congress at home while asking our troops to win a war overseas or, as in the case of Vietnam, in effect asking our troops not to win, but just to be there.

Id.

340. *Id.* at 435-36.

341. Watson, *supra* note 36, at 22.

342. *Id.*

JUST CAUSE

3. *Continual assessment of objectives and forces committed.*³⁴³—Scholars maintain that the continual assessment of objectives and the forces committed equates to the proportionality principle.³⁴⁴ The problem with this view is that there is no indication that it is the legal proportionality of just desert or restitution. It appears simply to call for a continuing assessment of the national interest and whether appropriate forces have been allocated to accomplish objectives. Operation Just Cause was so short that this element did not come into play in any significant way.

4. *Clear intention of winning.*³⁴⁵—The “clear intention of winning” is really a more specific statement of objectives. The objective with any war should be to win. This element does seem nearly identical to the just war element of reasonable hope of success. President Bush was committed to this objective in Panama.³⁴⁶

5. *Last resort.*³⁴⁷—The element of “last resort” in the Weinberger Doctrine may appear identical to that same element in the just war doctrine, but it is quite different. Because most use of force probably falls into Weinberger’s gray area the notion of war as a final remedy to right a wrong does not come into play. Weinberger said force should be used to prevent small problems from becoming big ones. As might be

343. Weinberger, *supra* note 285, at 442:

[T]he relationship between our objectives and the forces we have committed—their size, composition and disposition—must be continually reassessed and adjusted if necessary. Conditions and objectives invariably change during the course of a conflict. When they do change, then so must our combat requirements. We must continuously keep as a beacon light before us the basic questions: “Is this conflict in our national interest?” “Does our national interest require us to fight, to use force of arms?” If the answers are “yes,” then we must win. If the answers are “no,” then we should not be in combat.

Id.

344. *Just War Thinking and its Contemporary Application*, *supra* note 280, at 105.

345. Weinberger, *supra* note 285, at 441.

[I]f we decide it is necessary to put combat troops into a given situation, we should do so wholeheartedly, and with the clear intention of winning. If we are unwilling to commit the forces or resources necessary to achieve our objectives, we should not commit them at all. Of course if the particular situation requires only limited force to win our objectives, then we should not hesitate to commit forces sized accordingly.

When Hitler broke treaties and remilitarized the Rhineland, small combat forces then could perhaps have prevented the holocaust of World War II.

Id.

346. PRESIDENT’S LETTER, *supra* note 18, at 2.

347. “[T]he commitment of U.S. forces to combat should be a last resort.” Weinberger, *supra* note 285, at 442.

expected, Weinberger articulated no requirement for a declaration of war.

6. *Clearly defined objectives*.³⁴⁸—This criterion is entailed in 3 and 4 above.

VI. Law in Support of Policy

A critical issue that underlies an analysis of Operation Just Cause from the perspective of customary international law, the U.S. Constitution, and just war doctrine is the relationship between law and policy. Great powers are perceived by others, and perhaps themselves, as acting solely on the basis of national interest with bare deference paid to legality. For example, the expansive reinterpretation of self-defense under the U.N. Charter's article 51, and the assertion of a right of intervention, heighten this perception and undermine great power credibility.³⁴⁹ On the other hand, the advocacy of unilateral adherence to a narrow interpretation of article 51 fosters cynicism and contempt for international law.³⁵⁰ This dichotomy highlights a fundamental problem, the perception that law and sound foreign policy are incompatible. Compliance with law is seen as an impediment to policy implementation and as a severe handicap when dealing with other nations not similarly encumbered.

The proper relationship between law and policy can be demonstrated in considering the familiar adage that "honesty is the best policy." This adage makes several assumptions. The first is that there are immutable standards of conduct based on something other than expediency. The second is that doing what is right is not simply compatible with policy. It is the first step toward sound policy decisions. Finally, this adage assumes a view of reality in which compliance with the dictates of right

348. Weinberger, *supra* note 285, at 441-42.

[I]f we do decide to commit forces to combat overseas, we should have clearly defined political and military objectives. And we should know precisely how our forces can accomplish those clearly defined objectives. And we should have and send the forces needed to do just that. As Clausewitz wrote, "No one starts a war—or rather, no one in his senses ought to do so—without first being clear in his mind what he intends to achieve by that war, and how he intends to conduct it."

War may be different today than in Clausewitz's time, but the need for well-defined objectives and a consistent strategy is still essential. If we determine that a combat mission has become necessary for our vital national interest, then we must send forces capable to do the job—and not assign a combat mission to a force configured for peacekeeping.

Id.

349. See *supra* parts III.B, III.C.

350. See *supra* part III.B.

JUST CAUSE

conduct guarantees the attainment of true self-interest. The same should be said about law: "legality is the best policy." Of course, this whole analysis assumes that there are immutable and knowable standards of right and wrong and that they form the basis of the legal system.

The medieval just war writers and the great commentators on customary international law did not have the theoretical problem of trying to harmonize law and policy. They believed that there are immutable principles of divine or natural law revealed to men and nations, and consequently, justice was inseparable from sound policy, and a breach of justice was never advantageous.³⁵¹ This belief presupposed that positive law and policy decisions are made in the context of, and in conformity to, a legal order and superintending will that rules over nations and the affairs of men.

This extreme tension between the demands of law and policy is a product of legal positivism. Legal positivism altered the view of international and domestic law during the 19th century.³⁵² It views law as merely a human convention with no necessary moral content.³⁵³ Law then is nothing but one more political instrument to achieve policy objectives or to engineer a particular social or world order. When the legal instrument proves ineffective, nations resort to more expedient means. What begins as an implementation of policy by positive law becomes "an extension of policy by military force."³⁵⁴

The legal positivist chooses both the ends of the social order, and, through political and social experimentation, the best means of achieving those ends. For the positivist, law is not right or wrong. It is simply effective or ineffective as an instrument of political and social control.

The legal positivist, be it on the international or domestic level, faces two major problems that are highlighted in the legal analysis of Operation Just Cause. The first is that the goals or ends for which laws are made may change. The second is that the particular legal instrument or means may prove ineffective in achieving the ends for which these laws are made. The simple solution is to change the law so that it suits the new ends or proves more effective in accomplishing the old ends.

Nevertheless, this is not so easily accomplished when dealing with constitutional documents. The U.S. Constitution is very difficult to amend and the U.N. Charter nearly impossible.³⁵⁵ The only remedy

351. See *supra* note 293 and accompanying text.

352. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832).

353. *Id.*

354. CLAUSEWITZ, *supra* note 336, at 87.

355. See U.S. CONST., art. V; U.N. CHARTER, arts. 108, 109.

then is the disingenuous one of reinterpreting the document, as has happened with both the U.S. Constitution and the U.N. Charter.³⁵⁶ Those taking issue with this subterfuge are sure to be derisively labeled "textualists."

The fundamental purposes or ends of the United Nations as set out in article one of the Charter have certainly remained the same.³⁵⁷ The problem is that the means, or peacekeeping scheme of articles 39-51, have proven to be quite ineffective.³⁵⁸ As a result, nations and writers have devised ways to reinterpret or ignore the Charter since it would be so difficult to change. Perhaps there is nothing wrong with the ends, depending on one's vision of peace, but the means as established in the Charter deny nation-states the right to do justice.³⁵⁹ Indeed, this is an illustration of a policy-oriented jurisprudence, which is in effect a denial of the rule of law. Elite decision makers free themselves from a "conformity-imposing textuality" in order to utilize those means which they believe promote fundamental values and public order.³⁶⁰

With the U.S. Constitution, however, the problem seems to be a change of national mission or ends. The mission has changed from an emphasis on protecting the rights of citizens from an overbearing government to discharging the responsibilities of a world power. This view calls for increased efficiency which may be translated as an expansion of executive prerogative. Secretary Weinberger has also stressed the fact that the United States has responsibilities as world leader.³⁶¹ This fact implies a new mission, one different from that upon which the nation was founded. Because the United States is either the world policeman or is in a perpetual state of war on a thousand fronts, the President apparently must be able to continually choose when and where to engage the enemy or enforce the law. Unfortunately, the conflict between the executive and legislative branches is not so much over a change in national mission, but a conflict over who controls the means to establish and attain it.³⁶²

The United States is uniquely situated in world history to serve a leadership role that is not based on the old-world model. The founding

356. See *supra* parts III, IV.

357. See *supra* part III.B.

358. *Id.*

359. Judge Sofaer's disdain for the text of the Charter is clear in his rejection of the mechanical application of rules, of "juristic push-button devices," and of reliance on abstract propositions. See *The Legality of the United States Action in Panama*, *supra* note 173.

360. See *supra* note 237 and accompanying text.

361. See Weinberger, *supra* note 285, at 436.

362. See *supra* part IV.

JUST CAUSE

mission of preserving liberty and influencing the world by example has been savaged by a new mission that ranges from establishing democracy in Latin America, to defending Europe against communism, to saving a world economy dependent on Mideast oil.³⁶³ The change in national mission domestically and internationally has driven the United States to the brink of economic and moral ruin. Making policy judgments in disregard of law based upon a higher moral order is a prescription for disaster.

VII. Conclusion: Salvaging a Just Cause

Just cause is the primary criterion justifying the use of armed force. It forms the heart of the customary law doctrine of *jus ad bellum*. The classic legal treatises adopted just cause and several other elements from the just war doctrine of Christian thought. Critical distinctions between offensive and defensive war, legal and prudential judgments, and act of war and state of war follow from just cause. The allocation of war powers in the U.S. Constitution is based upon this analytical framework. Because of its natural law basis, just cause is the *jus cogens* governing the use of force. For this reason, *jus cogens* is not only a thread common to customary international law, the U.S. Constitution and just war doctrine, it is the thread that runs so true. The U.N. Charter scheme, the Weinberger Doctrine, and intervention for ideological reasons are incompatible with an approach which focuses on just cause.

By designating the invasion of Panama as Operation Just Cause, President Bush salvaged the essential moral and legal focus of the decision to go to war. If, however, just cause is just another name for national interest, law is reduced to just politics. The United States, in fact, had just cause for invading Panama, but the just cause has to be salvaged from the unsatisfactory rationales offered by the Administration. Although judgment on General Noriega was well-deserved, the President acted unlawfully in executing this invasion without the necessary judicial and prudential judgments of Congress. These deficiencies stemmed in part from the pursuit of a national mission that is incompatible with the Constitution.

363. David Hume savaged the old model of foreign policy that financed war by mortgaging the public revenues while entrusting posterity to pay off the encumbrances. DANIEL GEORGE LANG, *FOREIGN POLICY IN THE EARLY REPUBLIC: THE LAW OF NATIONS AND THE BALANCE OF POWER* 42 (1985).