The Legal Definition of War

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I. INTRODUCTION: THE PREMISE FOR A DEFINITION OF WAR

"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," wrote Karl von Clausewitz. He said that war is but a policy laid down.[1] Very much like law, war is a command of the

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sovereign imposed upon the subjects.[2] Historically, "war" has been considered to be a state of hostilities between nations characterized by the use of military force,[3] traditionally "undertaken for the purpose of overpowering another."[4] It marks the passage from relatively harmonious relations to armed contention,[5] and can be traced as far back as prehistoric times.[6] An age-old saying even goes on to state that "to secure peace is to prepare for war."[7]

Heads of state and authorities have not only regarded going to war as a lawful course of action for a sovereign state, but an action that can be taken as a matter of right by such an entity.[8] War became the supreme right of sovereign states and the hallmark of their sovereignty.[9]

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1. CARL VON CLAUSEWITZ, ON WAR 223 (Michael Howard & Peter Paret eds., 1984).
2. *See generally* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE (1832); WILFRED E. RUMBLE, THE THOUGHT OF JOHN AUSTIN: JURISPRUDENCE, COLONIAL REFORM, AND THE BRITISH CONSTITUTION LONDON (1985).
3. Jana Gilliland Dalton, *What is War? Terrorism as War After 9/11*, 12 ILSA J. INT'L. & COMP. L. 523, 523 (2006).
4. GERHARD VON GLAHN, LAW AMONG NATIONS 583 (1986).
5. ANTONIO CASSESE, INTERNATIONAL LAW 325 (2001).
6. *See* JEAN GUILAINE, THE ORIGINS OF WAR: VIOLENCE IN PREHISTORY 9 (2005). (In fact, when man first learned how to write, he already had wars to write about.).
7. FLAVIUS VEGETIUS RENTAUS, THE MILITARY INSTITUTIONS OF THE ROMANS (Lt. John Clarke trans., 1767), *available at* http://www.pvv.ntnu.no/~madsb/home/war/vegetius/ (last accessed NOV. 5, 2008).
8. VON GLAHN, *supra* note 4, at 583.
9. HERSCH LAUTERPACHT, THE GROTIAN TRADITION IN INTERNATIONAL LAW IN INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 10, 24 (Richard Falk, et al. eds., 1985). A former United States (U.S.) Secretary of State echoed this thought when he wrote that "[t]o declare war is one of the highest acts of

War has even been sanctioned by many religious texts.[10] Religious reasons are not the only factors in warfare however. Other historical reasons for war have included the need for resources,[11] genocide,[12] independence,[13] ideologies,[14] and politics.[15] Studies indicate that there have been some 14,000 wars during the past 5,000 years, killing about five million human beings, and that, in the past 3,400 years, the world has known only 20 years of peace.[16]

Since time immemorial, wars have wrought devastation on the populations of the contending parties, with civilians suffering no less than combatants.[17] "War" is a term which has acquired deep psychological and emotional significance, implying a full-scale combat which offends pacific sentiment and is wasteful of lives and national resources,[18] having tremendous consequences wherever and whenever it occurred. The Vietnam War, for example, had cost the lives of over 58,000 Americans and 1.2 million Vietnamese.[19] World War II (WWII) had a casualty count of 62 million people, of which the civilian toll was 37 million. It was the single

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sovereignty." VON GLAHN, *supra* note 4, at 583 (citing HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 5 n.1 (1947)).

10. In the Bible, Israelites praised their God by singing, "the Lord is a man of war, the Lord is his name." *Exodus* 15:3. In the Koran, their Prophet was asked to: "urge the believers to war." *Sura* 8:65. The Talmud has been interpreted by Jewish Rabbis as permitting the use of force by the Israeli Defense forces. *See* Arye Edrai, *Divine Spirit and Physical Power: Rabbi Schlomo Goren and the Military Ethic of the Israeli Defense Forces*, 7 THEORETICAL INQUIRIES L. 255 (2006).

11. For example, Japan's case in World War II.

12. For example, Germany's case in World War II under the Führer, Adolf Hitler.

13. For example, the revolutionary war between the American Colonies and the British Empire or Israel's war for independence in 1948.

14. For example, China's civil war between the Communists, led by Mao Zedong, and the Nationalists, led by Chang Kai-Shek. Another example is the Cold War between democratic and capitalist countries, led by the U.S., and the communist countries, led by the former Union of Soviet Socialists Republics (U.S.S.R.).

15. *See* VON CLAUSEWITZ, *supra* note 1, at 75 ("war is an extension of politics by other means.").

16. JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 79 (1985 ed.).

17. CASSESE, *supra* note 5, at 325.

18. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE 27 (1965 ed.) [hereinafter BROWNLIE, FORCE].

19. ROBERT MCNAMARA, IN RETROSPECT: THE TRAGEDY AND LESSONS OF VIETNAM 356 (1995).

deadliest conflict the world had ever seen.[20] Despite all these, war remains a practice today — perhaps even the only nearly universal practice existing,[21] as every country, race, or people has waged war at one point in time in their history.

Within the reality of contemporary international law, however, uncertainties exist in the treatment of war:[22] it is no longer treated as a legally accepted paradigm which may be used and applied by states, but as a factual event regulated by law.[23] Ambiguity has thus risen in the determination of the existence of a state of war, as such determination largely rests on subjective intent of states. This Note offers a remedy: a proposed definition of war.[24]

A. The Subjective Ambiguity Problem

That the legal concept of war, as well as its legal implications and significance, has given rise to confusion and ambiguity even among experts can be traced to the shifting reality of international law, which has undone many of the classic doctrines with regard to war.[25]

Traditional methods of determining the existence of a state of war focused on the subjective intent of states. Hugo Grotius divided wars into declared wars (which, in his opinion, were legal) and undeclared wars (which were illegal). Along with other authorities, he claimed that a declaration of war was a prerequisite before a war could legally exist.[26] Even treaties reflected this thinking.[27] Ian Brownlie has written, however, that

20. JOHN KEEGAN, WAR AND OUR WORLD 2 (2001 ed.).

21. GUILAINE, *supra* note 6, at 5.

22. *See generally* D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 4 (5th ed. 1998).

23. *See generally* Carsten Stahn, *'Jus ad bellum', 'jus in bello' ... 'jus post bellum'? — Rethinking the Conception of the Law of Armed Force,* 17 EUR. J. INT'L L. 921 (2006).

24. This Note focuses on the legal concept of war, and not its natural conception. War, in its natural sense, is a universally known concept, usually pertaining to its destructive nature, rather than its legal conception.

25. Stahn, *supra* note 23, at 923-24. *See also* LORD MCNAIR & A.D. WATTS, THE LEGAL EFFECTS OF WAR 4 (1966).

26. INGRID DETTER, THE LAW OF WAR 6 (2d ed. 2004). (citing HUGO GROTIUS, DE JURE BELLI AC PACIS) Lord McNair and A.D. Watts stated that "war may begin, first, by a declaration of war." MCNAIR, *supra* note 25, at 7.

27. The Hague Convention III of 1907 included an obligation to make declarations of war in signifying a nation-state's intent to enter into a state of war. *See* Convention (III) Relative to the Opening of Hostilities, Oct. 17, 1907, art. 1, 205 CTS 264 [hereinafter 1907 Hague Convention III].

such a subjective determination of war is, in his opinion, unsatisfactory.[28] Many jurists echo this thought and the law seems to be veering towards the thinking that the intent of states is no longer an important factor in determining the existence of a state of war.

Traditional legal thinking on war also once stated that a state of war could only exist between nation-states, but this has been largely criticized by many authors due to countless conflicts involving non-state parties in recent years.[29] There is a lack of clarity with regard to when a state of war legally exists, how it may exist, and even who may be considered participants in a war.

Adding to the confusion is that many states and non-state parties are generally hesitant to declare outright the existence of a state of war. There have been many explanations for this hesitation, ranging from the commercial implications of such declaration to its psychological impact.[30]

Many states engaged in hostilities have even denied that they were at war.[31] This situation has led to absurd circumstances wherein hostilities are often relegated to mere "incidents" which would preclude the application of various legal implications that a state of war may entail.[32]

The existence of war, thus, seems overly dependent on the subjective intent of states, leading to ambiguity and confusion in international law. This situation has sparked much debate and controversy, especially in light of the

28. BROWNLIE, FORCE, *supra* note 18, at 399.

29. DETTER, *supra* note 26, at 5.

30. John Alan Cohan, *Legal War: When Does It Exist, and When Does It End?*, 27 HASTINGS INT'L & COMP. L. REV. 221, 224 (2004).

31. CHRISTOPHER GREENWOOD, THE LAW OF WAR (INTERNATIONAL HUMANITARIAN LAW) IN INTERNATIONAL LAW 785 (Malcolm D. Evans ed., 2006).

32. For instance, the U.S. once denied that the events in Vietnam, Korea, and Kosovo constituted war. Both Japan and China also refused to characterize the 1937 fighting between them as a war. DETTER, *supra* note 26, at 18. As did the United Kingdom and Argentina in the Falkland Islands conflict. HARRIS, *supra* note 22, at 860. In Iraq and Afghanistan, questions remain as to whether the U.S. invasions of those two states are to be considered war or whether such invasions were legal or illegal, as well as whether the U.S. proclamation of a War on Terror constituted a war in the legal sense. *See* Jeffrey F. Addicott, *Legal and Policy Implications for a New Era: The War on Terror*, 4 SCHOLAR 209 (2002); *see generally* Lee Kuan Yew, *The United States, Iraq and the War on Terror*, 86 FOREIGN AFF. (2007); *see also* Kenneth Roth, *The Law of War in the War on Terror*, 83 FOREIGN AFF. (2004); Michelle Juan, *Testing the Legality of the Attack on Afghanistan*, 47 ATENEO L.J. 499 (2002).

current state of international law where objective criteria determine the existence of a state of war.[33]

B. The Existence of a State of War

Whether a state of war exists remains a topic of particular significance in international law[34] because being "at war" is a technical concept[35] referring to a state or condition to which international law attaches far-reaching consequences, and which confers upon affected states a distinct legal status.[36]

The legal consequences attached to the existence of a state of war, such as the operation of wartime legislation or the activation of wartime clauses in life insurance contracts, make the knowledge of when it begins and ends imperative.[37] Furthermore, a state of war, if declared, can determine the legitimacy of counter-measures or whether treaties are abrogated or suspended.[38] Another reason for knowing whether a state of war exists is that *jus in bello* rules apply in cases where an actual state of war exists.[39] The U.S. *Prize Cases*[40] described the change in relations between states during the existence of a state of war: people of the two countries immediately become enemies; almost all interaction between the two states becomes illegal; existing transactions are suspended and partnerships are dissolved; property of the people of both countries become subject to confiscation as enemy's property; and, all treaties between them are annulled.[41]

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33. *See* discussion *infra* Part II. (These discussions elaborate on how objective criteria should prevail when determining the existence of a state of war.).

34. DETTER, *supra* note 26, at 5.

35. MCNAIR, *supra* note 25, at 2.

36. *Id.* at 3 ("This doctrine that war entails a special legal status is of long standing: Grotius writing in the early seventeenth century states that by *'bellum'* is meant *'non action sed status.'*").

37. Cohan, *supra* note 30, at 222.

38. DETTER, *supra* note 26, at 5. In particular, "a state of war brings about a special relationship between the belligerent state and enemy nationals, and permits the former to take all necessary measures so as to prevent [the latter] from engaging in any activity harmful to its welfare or security." BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 53 (1953 ed.).

39. Cohan, *supra* note 30, at 234. *Jus in bello* refers to the law which governs how wars may be fought. The belligerent's behavior during this time operates under rules concerning permissible weapons, methods of combat, and humanitarian actions. Detter, *supra* note 26, at 6.

40. Prize Cases, 67 U.S. 635, 668 (1862).

41. *Id.* at 687 (Nelson, J., dissenting).

The determination of a state of war would allow for the applicability of specific rules and legal effects, some of which nation-states wish to avoid. Yet because of the subjective ambiguity problem, determining exactly when these legal effects are applicable is difficult at best, often impossible in the worst situations.

C. The Proposed Solution

This Note posits that the creation of a common definition of war under international law would resolve the subjective ambiguity problem. This Note, thus, determines the varied legal effects of the existence of a state of war and fashions a sensible and realistic definition for it, by reference to its elements in the same manner the International Law Commission (ILC) codified a legal definition for aggression.[42]

This proposition is not without basis or precedent. Many authors have proposed their own definitions of war.[43] Even Brownlie said that "a definition of war depending on objective criteria ... would provide guidance as to the stages in any conflict at which the law of neutrality and the laws of war or international humanitarian law were to apply."[44]

This Note discusses the concept of a state of war, derives the characteristics of war using the sources of international law, proposes a definition of war, and applies the proposed definition of war through case studies of several recent conflicts — such as that of Lebanon, the U.S. conflicts, and those in the Philippines against Communist insurgents and Muslim separatists.

II. THE STATE OF WAR

When a state of war began, in the legal sense, was once determined subjectively. The best indication then of a state of war was intent of the state-parties, usually by way of a declaration of war. Such intent was the basis for what came to be called the "state of war" doctrine which, by the 20th century, was no longer greatly used in practice.[45]

A. The State of War Doctrine

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42. *See Report of the International Law Commission on its Third Session, 16 May to 27 July 1951, to the General Assembly*, Chapt. III, ¶¶ 35-53, U.N. GAOR, 6th Sess., Supp. No. 9, U.N. Doc. A/1858 (1951), reprinted in [1951] 2 Y.B. Int'l L. Comm'n 131, U.N. Doc. A/CN.4/48 & Corr. 1 & 2, *available at* http://untreaty.un.org/ilc/documentation/english/a_cn4_48_corr1-2.pdf (last accessed Nov. 5, 2008) [hereinafter ILC Report Defining Aggression].

43. *See* discussion *infra* Part III (f).

44. BROWNLIE, FORCE, *supra* note 18, at 399.

45. GREENWOOD, *supra* note 31, at 786.

Given the gravity of the existence of a state of war, it cannot be lightly implied.[46] Historically, the determination of the existence of a state of war was made through a declaration of war — the focal point of the State of War Doctrine,[47] which links the state of war to the intention of both or either of the parties, not to objective facts[48]

Under the State of War Doctrine, a war in the formal sense exists if: (1) one state issues a declaration of war against another state; (2) absent such a declaration, one state commits an act of aggression against another state (e.g. a blockade, invasion by military troops, or other act traditionally regarded as aggression) and calls upon other states to observe the international obligations of neutrality; or, (3) absent such a declaration, a state commits an act of aggression against another state and the latter state, in deploying forces to repel the aggression, chooses to regard the circumstances as establishing a state of war between the two states.[49]

In essence, the State of War Doctrine provides that there are two requirements for the commencement of a state of war: the declaration of war and the *animus belligerendi*, or the intent to go to war.

1. Declaration of War

The commencement of a state of war depends greatly on the circumstances and actions of the parties involved. Traditional views, as espoused by Lord McNair and A.D. Watts, on the commencement of a state of war depended greatly on whether or not a declaration of war was made. This became a requirement under the 1907 Hague Convention II, specifying the moment a war arises.[50] Grotius, in claiming the necessity of such a declaration for the existence of war,[51] categorized wars as either declared wars, which he

46. MCNAIR, *supra* note 25, at 8.

47. *See* BROWNLIE, FORCE, *supra* note 18, at 27. Also known as the doctrine of *de jure* war, the doctrine of war in the legal sense, or the doctrine of war in the sense of international law.

48. DETTER, *supra* note 26, at 11. The state of war doctrine holds that the existence of a state of war depends not upon objective facts, such as the nature and scale of the acts, but upon the subjective "state of mind" of the parties and their intentions. Cohan, *supra* note 30, at 254. As a legal status, it depends on subjective determination by governments of the legal significance of their own actions. BROWNLIE, FORCE, *supra* note 18, at 27.

49. Cohan, *supra* note 30, at 254.

50. DETTER, *supra* note 26, at 8-9.

51. *Id.* at 10.

considered legal, and undeclared wars, which were not necessarily illegal.[52] Thus, war may begin by a declaration of war.[53]

A declaration of war was usually sufficient evidence that a state of war existed: for if there was a declaration of war, the commencement of war can be readily determined.[54] Such a declaration was held to be an instrument with definite legal consequences and not a "mere challenge" which could be "accepted or refused at pleasure."[55] In fact, under the 1907 Hague Convention III, all state parties are required to give, at the relevant time, a previous and unequivocal warning, though without specifying any interval which must intervene before hostilities begin.[56] The basis for requiring a declaration of war was to preclude the possibility of a treacherous attack.[57]

Hence, a declaration of war, even a unilateral one, was usually sufficient evidence that a state of war existed.[58] What if, however, no such declaration was made, but there was a clear intent to wage a war? One must then look to the *animus belligerendi* of the states.

2. *Animus Belligerendi*

The existence of a state of war also depends upon the determination of the parties to the conflict, even where only one party asserts the existence of a state of war, while the other denies it or keeps silent.[59]

McNair and Watts state that the traditional rule on *animus belligerendi* under the State of War Doctrine is that a state of war arises when a state-authorized act of force is committed, through either *animo belligerendi* or *sine animo belligerendi*, and the state which is the recipient of such acts expressly

52. *Id.*

53. *Id.* at 7; *see also* DINO KRITSIOTIS, WHEN STATES USE ARMED FORCE IN THE POLITICS OF INTERNATIONAL LAW 53 (Christian Reus-Smit ed., 2004).

54. GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 191 (5th ed. 1967).

55. DETTER, *supra* note 26, at 9 (citing The Eliza Ann, 1 Dodson 244 (1813)).

56. 1907 Hague Convention III, *supra* note 27.

57. BROWNLIE, FORCE, *supra* note 18, at 29.

58. DETTER, *supra* note 26, at 11.

59. MCNAIR, *supra* note 25, at 8. According to Ian Brownlie, "state practice has emphasized that war is not a legal concept linked with objective phenomena such as large-scale hostilities between the armed forces of organized state entities but a legal status *the existence of which depends on the intention of one or more of the states concerned.*" BROWNLIE, FORCE, *supra* note 18, at 26 (citing VII J.B. MOORE, DIGEST OF INTERNATIONAL LAW 153 (1906)) (emphasis supplied).

or impliedly elects to view it as creating a state of war, retroactively from the first use of force.[60]

In 1927, however, the Report of the Secretary-General of the League of Nations stated that, legally speaking, it is the intention of the states that is controlling and not their acts, no matter how drastic certain measures may seem.[61] Detter explained this controversy: while some believe that, even after an attack by an armed force, a state has the liberty to decide whether there was a state of war, others saw the attack as the very cause of the "state of war," even retroactively introducing its legal effects.[62]

As a result of this subjective state of affairs, many conflicts that would have been otherwise categorized as war were not considered as such. In the period between 1798 and 1920, for example, a variety of military occupations, invasions, bombardments, blockades, and various conflicts took place without any declaration of war,[63] necessarily precluding a state of war under the State of War Doctrine. This provided states obvious advantages: a state could refrain from declaring war so as to avoid the necessity of complying with the law of war.[64]

It was, thus, accepted for a long time that it was the intention of states rather than the nature of their acts that decided whether a state of war existed.[65] In the Sino-Japanese conflict, where Japan invaded China, the Council of the League of Nations found no state of war existed between the two parties in 1933.[66] The U.S. also insisted that no wars existed in Vietnam or Korea,[67] despite actual indications to the contrary.

Because of the subjectively arbitrary nature of determining the existence of a state of war (where a state could easily avoid the application of the legal effects of war by simply disavowing any intention of waging war and avoiding any statement which could be construed as a declaration of war), this doctrine is now in decline. The modern trend on this subject matter is to ignore subjective statements of states, referring instead to objective characteristics in ascertaining the existence of a state of war.[68] Nevertheless,

60. MCNAIR, *supra* note 25, at 7-8.

61. *Report presented by the Secretary-General*, League of Nations Doc. A.14, 1927, V. 14, at 83 (1927).

62. *See* DETTER, *supra* note 26, at 11.

63. BROWNLIE, FORCE, *supra* note 18, at 27.

64. LOUIS HENKIN, INTERNATIONAL LAW 665 (1987 ed.).

65. DETTER, *supra* note 26, at 12.

66. *Id.* at 13 (citing LOMJ, 1933, Spec. Suppl. 122. 22).

67. *Id.* at 13.

68. *See* discussion *infra* Part II (3).

confusion remains due to the insistence of nations in isolated state practice that intention, not objective traits, determines war.[69]

3. The Decline of the State of War Doctrine

Despite the voluminous international law support in favor of the State of War Doctrine, there is now evidence that this doctrine, specifically the requirement for a declaration of war, is probably obsolete: the existence of war no longer relies on the mere subjective will of a party to the conflict.[70] Professor Rebecca Wallace has even proclaimed that declarations of war have ceased to be the norm,[71] due to the reluctance of governments to make such declarations. While such reluctance is usually linked to varied policy reasons — such as the "[i]ncreased danger of misunderstanding of limited objectives, diplomatic embarrassment in recognition of non-recognized guerrilla opponents, inhibition of settlement possibilities, the danger of widening the war, and unnecessarily increasing a President's domestic authority"[72] — probably the most compelling reason "is that there is no reason to do so."[73]

"[F]ormer Secretary of Defense [Robert] McNamara has pointed out '[T]here has not been a formal declaration of war — anywhere in the world — since World War II.'"[74] Despite this fact, no one will deny that there have been wars since World War II. This clearly shows that the State of War Doctrine is in decline. Evidence of the absurdity of a state of war being dependent merely on the subjective will of states may be seen even as early as the 19th century.

The importance of factual or objective circumstances can be seen in the U.S. *Prize Cases*. It was noted in the *Prize Cases* that "[t]he battles of Palo Alto and Rasaca de la Palma [were] fought before the passage of the Act of Congress of May 13, 1846 [which declared] a state of war [as] existing by the Act of the Republic of Mexico."[75] In that situation, a declaration of war was

69. An example would be the U.S. practice with regard to its conflicts against Iraq and Afghanistan. *See* discussion *infra* Part III (C).

70. LORD MCNAIR & A.D. WATTS, THE LEGAL EFFECTS OF WAR 8 (1966).

71. REBECCA WALLACE, INTERNATIONAL LAW 260 (2d ed. 1992).

72. John N. Moore, *The National Executive and the Use of the Armed Forces Abroad*, 21 NAVAL WAR C. REV. 28, 33 (1969).

73. *Id.*

74. *Id.*

75. Prize Cases, 67 U.S. 635, 668 (1862). That battle involved an incursion by the U.S. into Mexico in 1846. Professor John Alan Cohan of the University of California Hastings College of Law had described the battle:

> In 1846, President [James] Polk authorized General Zachary Taylor to occupy disputed land claimed by Mexico between the Nueces and Rio

issued after hostilities had already broken out, yet the declaration did not mark the commencement of a state of war. It served only as notice of when the war had actually commenced. "Such a declaration effectively admit[ted] that war was already in existence before the declaration was issued, in which case the declaration serve[d only] as a retroactive declaration of war."[76]

As war already existed before a declaration of war or any viable intention of war could be ascertained, it was, therefore, the objective characteristics of combat (i.e. fighting between armed forces) that determined the existence of a state of war. In four out of the five instances that the U.S. Congress formally declared war, the declaration recognized the prior existence of a war,[77] further indicating that objective characteristics should serve to determine the existence of a state of war.

A recent indicator of the doctrine's obsolescence would be *Dalmia Cement Ltd. v. National Bank of Pakistan*,[78] an international arbitration case. Initially, this arbitration appears to support the State of War Doctrine. A more thorough study, however, results in a different conclusion. The case revolved around the issue of whether there was a state of war between India and Pakistan. Arbitrator Pierre Lalive held that there was no war, despite a broadcast announcement made by Ayub Khan, which one party claimed to be a declaration of war. The arbitrator found that this communication did not amount to a declaration of war.[79] He found a subjective declaration of war insufficient to amount to a state of war and, in examining all the circumstances, he found nothing to corroborate the existence of war. The

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> Grande Rivers. The President instructed General Taylor to treat any crossing of the Rio Grande as an invasion authorizing him to attack first in defense and even enter Mexican territory in pursuit of the invaders. When, as expected, Mexican forces struck, and the battles between the parties had begun, Polk presented the Congress with a *fait accompli*, and Congress responded by authorizing further hostilities. The President sought to justify his recourse to arms without first securing such approval from the Congress by the claim that he was defending the United States against attack. Polk's actions set a precedent for viewing 'war' as the invasion of disputed territory claimed under a treaty of annexation.

Cohan, *supra* note 30, at 241.

76. Cohan, *supra* note 30, at 241.

77. *Id.*

78. Dalmia Cement Ltd. v. National Bank of Pakistan, 67 I.L.R. 751 (1967).

79. It is possible that the arbitrator had in mind this statement by Lord McNair when he ruled that the communication was not a declaration of war: "where leading political figures of a country engaged in hostilities refer to their country being 'at war,' caution must be exercised before concluding therefrom that a state of war exists in any legal sense, since such references may prove to be more of emotional and political significance than legal." MCNAIR, *supra* note 25, at 8.

case provides that other criteria were necessary for there to be a finding of war, contrary to the State of War Doctrine. Objective criteria and circumstances were necessary, independent of a declaration or an intention of war, before a state of war could occur.

Another example would be Resolution XI of the 21st International Committee of the Red Cross (ICRC) Conference in Istanbul in 1969, which referred to parties to a conflict. According to Professor Ingrid Detter, that resolution omitted any mention of declarations of war as relevant, implying that the State of War Doctrine was no longer applicable.[80] Although Red Cross resolutions are not, *per se*, considered as binding international law, if they are adopted at an ICRC Conference, they are regarded as expressions of the international community's legal convictions.[81] Resolutions of the ICRC Conference, therefore, have some impact on international law.[82]

A further indication of this new position on war is the marked increase of what Detter refers to as internationalized wars, or wars that start as internal conflicts but which, as new states emerge, become wars in the world scene, the sphere regulated by international law.[83] Such wars generally do not involve any declarations of war and, therefore, would have given no indication of any intent to go to war.

In the U.S., because of the seemingly broad extent of the executive war powers, the War Powers Resolution[84] was passed by Congress in order to temper the President's power to commit troops in situations which were not necessarily war or were short of war.[85] "To some extent, the Resolution provides a mechanism which can be relied upon as a source of determining whether a time of war exists."[86] In essence, the Resolution provides that the President must consult with Congress before deployment of its troops and report to Congress within 48 hours. Within 60 days of the report, the troops must be withdrawn unless Congress has authorized a continuation of the

80. *See* DETTER, *supra* note 26, at 13 n.82.

81. Philippe Abplanalp, *The International Conference of the Red Cross as a factor for the development of international humanitarian law and the cohesion of the International Red Cross and Red Crescent Movement*, INT'L REV. RED CROSS, Oct. 31, 1995, *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JMR9 (last accessed Nov. 5, 2008).

82. *Id.*

83. DETTER, *supra* note 26, at 14.

84. War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1973).

85. *See* THOMAS BUERGENTHAL & SEAN D. MURPHY, INTERNATIONAL LAW IN A NUTSHELL 206 (1986); *see also* Cohan, *supra* note 30, at 250.

86. Cohan, *supra* note 30, at 250.

deployment.[87] "The War Powers Resolution appears to have brought to the surface what was known to be the case *sub silencio*, that is, that Congress can authorize war without declaring war."[88] This implies that there can be war even without any political determination of such (i.e. a declaration) or overt intent; thus, the Resolution is another indicator against the State of War Doctrine.

Also, noted scholars have criticized the State of War Doctrine and its subjective roots. Brownlie wrote that a definition of war depending on objective criteria would have considerable value in a number of contexts.[89] He also wrote that any reference to *animus belligerendi* in a definition of war should be avoided, as this reference would be circuitous and would create serious difficulties in practice.[90] To Brownlie, mere subjective declarations are insufficient to indicate a state of war.

Detter seems to concur with Brownlie, writing that it now appears that war may well exist although there has been no declaration of it[91] and that the State of War doctrine is probably obsolete.[92] In spite of these developments, in doctrine and in practice, the doctrine is still occasionally put forward[93] and this subject remains an area of vast controversy.

B. When Does a State of War Begin?

Today, it is a settled norm of international law that a formal declaration of war is not a necessary condition for there to exist a state of war.[94] As the intention of states is no longer a completely acceptable determining factor of when a war commences and exists, there is ambiguity in the law. State practice indicates that most parties are unaware of when exactly they have

87. 50 U.S.C. § 1543 (a) (1973). The Philippine Constitution already reflects similar provisions with regard to martial law and the suspension of the privilege of the writ of *habeas corpus*. *See* PHIL CONST. art. VII, § 18 (Note that the Philippine Constitution's restriction of presidential power refers mostly to martial law and the privilege of the writ of *habeas corpus*, rather than war or troop deployments. Nevertheless, the requirements of reporting to Congress are similar to those of the War Powers Resolution.).

88. Cohan, *supra* note 30, at 250.

89. BROWNLIE, FORCE, *supra* note 18, at 399.

90. *Id.* at 401.

91. DETTER, *supra* note 26, at 14.

92. *Id.* at 13.

93. *Id.*

94. 2 LASSA OPPENHEIM, INTERNATIONAL LAW 93 (Hersch Lauterpacht ed., 7th ed. 1952).

entered into a state of war. They just know that, based on events happening, they are already "at war."[95]

Objective criteria, as embodied in a definition of war, would remedy this. The moment the conflict fits the definition, the parties may be considered at war.

For now, it would seem that a war commences upon the beginning of hostilities; but such a statement must be taken with caution, for "common sense tells us that not every act of hostility creates a state of war between nations."[96] Any initial determination of the existence of a state of war must consider when the "relevant threshold between intermittent hostilities and war has been crossed."[97] Therefore, war may be said to commence "from the point when hostilities intensify into a sustained pattern of action."[98]

Nevertheless, it is the opinion of many jurists and authors that "objective elements now guide the question of whether a war has started."[99] It is with objective elements in mind that this Note proposes a definition of war that would let the beginning and existence of a state of war be easily determined.

III. DRAFTING A DEFINITION OF WAR UNDER PUBLIC INTERNATIONAL LAW

In drafting this definition of war, the author begins with three preliminary observations. First, there is a marked trend in opinion away from the State of War Doctrine, where subjective intent of parties determine the existence of a state of war, towards a more objective determination of whether a war exists.[100] Second, for a definition of war to be accepted internationally, its basis must be sound — necessarily requiring that its characteristics be found in "the sources of international law such as treaty law, custom, jurisprudence and jurists."[101] Third, the primary purpose of a commonly-accepted definition of war is to ensure the removal of subjective ambiguity in determining the existence of a state of war, specifically, when such a state begins. This would ensure that mere subjectivity of the parties would not overturn objective circumstances.

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95. The conflicts serve as indicators of state practice in the area of international law. *See* discussion *infra* Part III (C).

96. Cohan, *supra* note 30, at 228.

97. DETTER, *supra* note 26, at 343.

98. *Id.*

99. *Id.*

100. The doctrine was considered by several noted authors to be absurd. *See* discussion *infra* Part II (A) (3).

101. Sir Frederick Pollock, *The Sources of International Law*, *in* ESSAYS ON INTERNATIONAL LAW FROM THE COLUMBIA LAW REVIEW 3 (1965 ed.).

A. Treaty Law on War

A treaty is defined as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[102] It represents the most tangible and reliable method of identifying what is agreed upon between states.[103] Their binding nature is established from the voluntary decision of states to enter into and thereby obligate themselves to its provisions.[104] Therefore, all treaties (in force) are binding on contracting parties: the legal nexus between such states is derived from their consent to be bound by it, *ex contractu advenit vinculum.*[105]

Though the formulation of treaties pertaining to the conduct of hostilities in war are dated as beginning in the mid-19th century,[106] the Treaty of Westphalia in 1648 already provided for the peace of Westphalia and attempted to abrogate the wars which were so prevalent in the middle ages,[107] although wars could still be waged as a matter of right and as part of state diplomacy, with seemingly no limitations on its conduct.

The Hague Convention III of 1907[108] was one of the earliest conventions in the modern era to specifically deal with the conduct of hostilities in war, though it did not define it. Its provisions included an obligation to make declarations of war before any hostilities could begin between nation-states.[109] This convention was, however, only part of a series of conventions adopted at the Hague Conferences of 1899 and 1907, where the laws of war, now known as international humanitarian law, were

102. Vienna Convention on the Law of Treaties, May 29, 1969, art. 2(1), 1155 U.N.T.S. 331 [hereinafter VCLT]. It must have an international character. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 14 (2000).

103. WALLACE, *supra* note 71, at 19.

104. *See* WALLACE, *supra* note 71, at 19.

105. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 7 (2004 ed.) [hereinafter DINSTEIN, ARMED CONFLICT].

106. *Id.* at 9.

107. *See* William C. Bradford, *The Duty to Defend Them: A Natural Law Justification for the Bush Doctrine of Preventive War*, 79 NOTRE DAME L. REV. 1365, 1373 (2004) (citing Treaty of Peace of Münster, Fr.-Holy Roman Empire, Jan. 30, 1648, 1 Consol. T.S. 271; Treaty of Peace of Osnabrück, Swed.-Holy Roman Empire, Oct. 24, 1648, 1 Consol. T.S. 119. Both treaties ended the Thirty Years' War and are collectively known as the Treaty of Westphalia). The Treaty of Westphalia served as the *de facto* constitution for Europe and would later pave the way for the modern concept of sovereign states.

108. 1907 Hague Convention III of 1907, *supra* note 27.

109. *Id.*

codified. These conventions concerned limitations on land and naval warfare and still form the bases of existing rules.[110]

The subsequent Covenant of the League of Nations in 1919, the precursor of the United Nations (U.N.) Charter, had provisions on war as well. It provided for qualifications on the right to resort to war which were exceptional for its time[111] as it included certain procedures for peaceful settlement.[112] Although the general presumption was that war was still a right of sovereign states, signatories to the Covenant were bound not to conduct specific hostilities and any resort to war in violation of the Covenant was illegal — a violation of a treaty obligation under the Covenant.[113] In addition, Article II of the Kellogg-Briand Pact of 1928 stated that "the settlement of all disputes or conflicts of whatever nature or ... origin ..., which may arise among them, shall never be sought except by pacific means."[114] Both treaties attempted to prohibit war, or at least, attempted to prohibit aggressive war.[115]

In the Sixth Assembly of the League of Nations in 1925, a resolution was adopted stating that a war of aggression constituted an international crime.[116] The same resolution declared the members bound to conform to this principle.[117] This would later pave the way for the abovementioned

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110. MALCOLM SHAW, INTERNATIONAL LAW 576 (2d ed. 1986). Note, however, that only the following of the Hague Conventions are still applicable: Hague Conventions IV (War on Land) and its Regulations, V (Neutrality), VII (Conversion of Merchant Ships into Warships), VIII (Automatic Submarine Contact Mines), IX (Naval Bombardment), XI (Right of Capture in Naval Warfare) and XIII (Neutrality in Naval Warfare). ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 252 (2005 ed.) [hereinafter AUST, HANDBOOK].

111. BROWNLIE, FORCE, *supra* note 18, at 66.

112. *See* League of Nations Covenant art. 12 (committing states-parties not to resort to war against other states-parties "within three months" after an unsuccessful attempt to arbitrate the dispute).

113. BROWNLIE, FORCE, *supra* note 18, at 66.

114. Treaty Providing for Renunciation of War as an Instrument of National Policy, art. II, Aug. 28, 1928, 46 Stat. 2343, 2345, 2 Bevans 732, 734 (the Kellogg-Briand Pact).

115. "Aggressive" war is currently defined as the use of armed force against the territorial integrity or political independence of another state. *See* Resolution on the Definition of Aggression, G.A. Res. 3314, at 142, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (1975) [hereinafter U.N. Definition of Aggression].

116. BROWNLIE, FORCE, *supra* note 18, at 70 (citing Resolutions of the Sixth Assembly, at 21, A. 1925. C.I, pp. 25 seq.).

117. *Id.* at 72.

Kellogg-Briand Pact which also "condemn[ed] recourse to war for the solution of international controversies, and renounc[ed] it, as an instrument of national policy" in relations between state-parties.[118]

The accumulation of treaties with a general prohibition against war, however, neither stopped WWII from happening, nor established a definition of war. There was merely a general agreement among the states as to the illegality of war, which, at the time, consisted mainly of aggressive war. This would imply that war *per se*, as it then existed, except for defensive wars, was considered illegal under international law and, as a result, states attempted to adhere closely to the provisions of the Kellogg-Briand Pact against war.[119] Note, however, that these treaties did not abolish war, but merely placed limitations upon the use of force.[120]

This general prohibition against war would continue after WWII and during the founding of the U.N. The emerging trend against war found written expression in Article 2 (4) of the U.N. Charter, which provided that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any state."[121] A later treaty, the Agreement between the United States of America and the Union of Soviet Socialist Republics in the Prevention of Nuclear War in 1973, which was concluded for an unlimited duration, provided in Article II that "each party will refrain from threat or use of force against the other Party, against Allies of the other Party and against other countries in circumstances which may endanger international peace and security."[122] This treaty, which basically reiterates obligations already existing under the U.N. Charter, reinforces the duty to refrain from the use of force[123] and, concomitantly, the prohibition against war.

In keeping with this trend, the term war itself was banished from the U.N. Charter,[124] which is, perhaps, partly the reason for the current

118. Joseph Sweeney, *The Just War Ethic In International Law*, 27 FORDHAM INT'L L.J. 1865 (2004) (citing Treaty Providing for Renunciation of War as an Instrument of National Policy, art. I, Aug. 28, 1928, 46 Stat. 2343, 2345, 2 Bevans 732, 734).

119. *See* BROWNLIE, FORCE, *supra* note 18, at 76 (for an in-depth discussion on how the Kellogg-Briand Pact affected state practice in the years leading up to World War II).

120. WALLACE, *supra* note 71, at 242.

121. U.N. Charter art. 2, ¶ 4.

122. Agreement between the United States of America and the Union of Soviet Socialist Republics in the Prevention of Nuclear War, U.S.-U.S.S.R., art. II, June 22, 1973, 917 U.N.T.S. 86.

123. DETTER, *supra* note 26, at 65.

124. Sweeney, *supra* note 118, at 1878.

difficulty in ascribing a definition of war. Since 1920, draftsmen of treaties have usually avoided war as a term of art and, instead, referred variously to "aggression," "war of aggression," "acts of aggression," "acts of hostility," "unprovoked attack," and, more recently, the "use of force," "armed attack," and "armed aggression."[125]

The Geneva Conventions of 1949,[126] also known as the Red Cross Conventions, later made use of the terms "war" and "prisoners of war,"[127] but did not define war. The term "war" disappeared almost completely in international law when the 1977 Protocol relating to international armed conflict was jointly added to the Geneva Conventions with another instrument (Protocol II) dealing with non-international armed conflicts.[128] Neither Protocol made much use of the term "war" and instead used the term "armed conflict." These subsequent instruments did not overly delve on war as being illegal, but instead categorized specific acts of war or acts in an armed conflict — for example, the targeting of civilians[129] — as illegal.

Under treaties, the position of international law as to war is that it is, by itself, not necessarily legal or illegal. The illegality or legality is attached to the actions within an armed conflict instead. Furthermore, "war" as a term is also no longer in favor with jurists who draft international treaties. Even so, treaties establishing international tribunals continue to use or refer to it. The Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) dealt with violations of the laws or customs of war.[130] The recent Rome Statute of the International Criminal Court[131] does not use the term

125. BROWNLIE, FORCE, *supra* note 18, at 393.

126. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention (I)]; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.NT.S. 135 [hereinafter Geneva Convention (III)]; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

127. *See generally* Geneva Convention (III), *supra* note 126.

128. DINSTEIN, ARMED CONFLICT *supra* note 105, at 11.

129. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I of 1977].

130. Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 3, S.C. Res. 827, May 25, 1993, U.N. Doc. S/RES/827.

131. Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter ICC Statute].

"war," instead using the term "armed conflict,"[132] but it does use the term "war crime" extensively.[133] Even though it would seem the term "war" is out of favor, the fact that "war crimes" is still the current terminology used even in treaty law may imply that "war" itself is still an acceptable terminology.

B. Custom on War

Custom is the widespread repetition, in a uniform way and over a long period, of a specific type of conduct (*repetitio facti*), in the belief that such conduct is obligatory (*opinio jure sive necessitatis*). It is a series of successive acts, which gradually become common practice, observed in good faith, and, finally, respected by all.[134]

1. Early Custom: The Just War Doctrine

Customary international law used the private law of the Roman Empire in *Corpus Juris Civilis* promulgated by the Emperor Justinian in 535 A.D. to fill in the gaps in written authority in the Middle Ages.[135] The prevailing concept with regard to war under Roman doctrine was that of the Just War: if the war was just, it could be waged, but otherwise a state could not resort to war under international law.[136] This doctrine was prevalent in the writings of the "fathers of international law" in the 16th through the 18th centuries and was borrowed from the Church Canonists, who, in turn, borrowed greatly from Roman Law.[137]

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132. The Rome State even adopts a variation of the phraseology of the *Prosecutor v. Tadic* in defining armed conflict — where it held that "protracted armed violence" was necessary for an armed conflict. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995). The Rome Statute, refining that statement, stated that, "[i]t applies to armed conflicts that take place in the territory of a State when there is *protracted armed conflict* between governmental authorities and organized armed groups or between such groups." ICC Statute, *supra* note 131, art. 8 (2) (f) (emphasis supplied).

133. ICC Statute, *supra* note 131, art. 5 (1) (c).

134. François Bugnion, *Just wars, wars of aggression and international humanitarian law*, 84 INT'L REV. RED CROSS 523 (2002).

135. Sweeney, *supra* note 118, at 1868.

136. Alexander C. Linn, *The Just War Doctrine and State Liability for Paramilitary War*, 34 GA. J. INT'L & COMP. L. 619, 639 (2006); Ruti Teitel, *The Wages of Just War*, 39 CORNELL INT'L L.J. 689, 692 (2006); John F. Coverdale, *An Introduction to the Just War Tradition*, 16 PACE INT'L L. REV. 221, 260 (2004).

137. Yoram Dinstein, *Comments on War*, HARV. J. L. & PUB. POL'Y, 877, 878 (2004) [hereinafter Dinstein, *Comments*].

St. Augustine, widely considered to be the founder of the Just War Doctrine, opined that, under natural law, war was even obligatory under certain conditions.[138] He stated that a war was just — ordained by God — when it avenged injuries or punished wrongs or restored what was unjustly taken.[139] St. Thomas Aquinas then expounded on this by concluding that there were three requisites for a just war:

> (1) *auctoritas principis,* only a sovereign ruler has the authority to declare war because only a ruler is entrusted with the welfare of his people; (2) *causa justa,* the cause for war must be just, it must be based on some fault, avenge a wrong, or restore what has been seized unjustly; (3) *intentio recta,* the belligerents must have a rightful intention to advance good and to avoid evil.[140]

Thus, under the Just War Doctrine, a Christian's religious duty compelled him to take up arms against an enemy when the cause was just.[141] Because of the strong influence of this doctrine, the early 16th century formation of international law this basic premise.[142] Early writers on international law, Francisco Suarez and Franciscus de Victoria, Spanish clerics of the Catholic Church, construed the legality of the use of force by a state based primarily on the Just War Doctrine.[143]

The doctrine, however, was not without criticism. For example, two warring states may both conclude that their use of force is justified; however, because the doctrine considered war as a judicial and punitive procedure for punishment of the guilty party[144] and redress of wrongs suffered,[145] it implied that one state is errant, while the other is "just."[146]

Neither was it without limitation. A Christian thinker stated that "when war is declared on just grounds, if it is waged ruthlessly and with a view to vengeance, it thereby becomes unlawful, so that things captured may not be rightly detained."[147] St. Augustine himself ruled out shallow justifications for war, such as "the desire for harming, the cruelty of revenge, the restless and

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138. Linn, *supra* note 136, at 626.

139. BROWNLIE, FORCE, *supra* note 18, at 5 (citing VI ST. AUGUSTINE, QUAESTIONES IN HEPTATEUCHUM, 10b).

140. Linn, *supra* note 136, at 627 (citing St. Thomas Aquinas, *Summa Theologica, in* BASIC TEXTS IN INTERNATIONAL RELATIONS 31 (Evan Luard trans., 1992)).

141. *Id.* at 628.

142. *Id.* at 629.

143. *Id.* at 629-30.

144. BROWNLIE, FORCE, *supra* note 18, at 8.

145. *Id.* at 13.

146. *See* MICHAEL BYERS, WAR LAW 56 (2005 ed.).

147. BROWNLIE, FORCE, *supra* note 18, at 8.

implacable mind, the savageness of revolting, and the lust for dominating."[148] The doctrine would later evolve in the 17th century when Grotius declared that a just war could only be fought on narrow grounds: "(1) in self-defence; (2) to enforce rights; (3) to seek reparations for injury; and (4) to punish a wrong-doer."[149]

Thus, the Just War Doctrine, even at its peak, was mostly used as a convenient tool states to go to war whenever they deemed fit, leading to its abandonment in the 19th century.[150] Skepticism from the academe and proponents of legal positivism,[151] the breakdown of the Church's authority and the emergence of the sovereign state,[152] as well as disfavor of the doctrine in battlefields[153] eventually led to the doctrine's relegation to morality or propaganda.[154]

Though the Just War Doctrine is no longer widely accepted, many commentators have written on its supposed resurgence in view of recent conflicts[155] — "the peculiarity of the terrorist threat, which has impacted the scope of permissible 'self-defense' and 'preventive' war."[156] A strong proponent of the resurgence of the Just War Doctrine is no less than U.S. President George W. Bush, whose policies in Iraq, Afghanistan, and the "War on Terror" looked extensively to this doctrine for justification.[157]

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148. ST. AUGUSTINE, THE CITY OF GOD 447 (1958).

149. Linn, *supra* note 136, at 634 (citing HUGO GROTIUS, THE LAW OF WAR AND PEACE 10-11 (Louise R. Loomis trans., 1949)).

150. Dinstein, *Comments*, *supra* note 137, at 878.

151. *See* Linn, *supra* note 136, at 636.

152. WALLACE, *supra* note 71, at 242.

153. Linn, *supra* note 136, at 637.

154. BROWNLIE, FORCE, *supra* note 18, at 14.

155. *See* Linn, *supra* note 136, at 619; *see also* Teitel, *supra* note 136, at 689; Coverdale, *supra* note 136, at 221; Sweeney, *supra* note 118, at 1865; Kathryn Jean Lopez, *Justice in War: Just-War Theory*, NAT'L REV. ONLINE, Oct. 15, 2001, *available at* http://www.nationalreview.com/interrogatory/interrogatory101501b.shtml (last accessed Nov. 5, 2008) ("The use of military force against terrorist networks and regimes abetting their crimes is certainly justifiable ... according to Just War principles.").

156. Teitel, *supra* note 136, at 692.

157. STEPHEN MANSFIELD, THE FAITH OF GEORGE W. BUSH 143-45 (2003) (This book quotes a lecture in Rome given by Professor Michael Novak, who argued that the invasion of Iraq "comes under traditional just-war doctrine, for this war is a lawful conclusion to the just war fought and swiftly won in February 1991" (i.e. the First Iraq War or Operation Desert Storm).).

2. Modern Custom: Prohibition on the Use of Force

The customary international law on war underwent a metamorphosis only in the 20th century: first, in the Kellogg-Briand Pact; and second, in Article 2 (4) of the U.N. Charter, where there was a prohibition against the use of force[158] and, impliedly, a prohibition against war.

The prohibition on the use of force is now regarded as a principle of customary international law, which has attained the character of *jus cogens,*[159] and, as such, is addressed to all members of the international community.[160]

Though there is little custom on war *per se,* there is much custom on the use of force, which is necessarily and obviously included in any conception of war. The use of force[161] as it stands under custom requires, among others, the protection of civilians and the concomitant differentiation between combatants and civilians as well as the differentiation between military and civilian objectives, the right of self-defense, whether anticipatory or not, and the application of the principle of proportionality.[162]

Civilians are protected in times of war by the targeting prohibitions under international humanitarian law, which prohibit the targeting of

158. Dinstein, *Comments*, *supra* note 137, at 878. To reiterate, Article 2 (4) of the Charter enjoins states to "[r]efrain in their international relations from the threat or use of force against the territorial integrity and political independence of any State, or in any manner inconsistent with the purposes of the United Nations." U.N. Charter art. 2, ¶ 4.

159. VCLT, *supra* note 102, art. 53 (which provides that *jus cogens* is a peremptory norm of general international law, which is a norm accepted and recognized by the international community of States as a whole as one from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.). *See* Maurizio Ragazzi, Norms of *Jus Cogens* and Obligations *Erga Omnes*: A Revival of the Natural Law Tradition in International Law?, *available at* http://www.catholicsocialscientists.org/cssr2002/Abstract--Ragazzi.pdf (last accessed Nov. 5, 2008).

160. WALLACE, *supra* note 71, at 243. This prohibition is also be reflected in jurisprudence: it was endorsed as customary international law by the International Court of Justice in 1986 in *U.S. v. Nicaragua.* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 99-100 (June 27, 1986).

161. *See* John C. Yoo, *Force Rules: U.N. Reform and Intervention*, 6 CHI. J. INT'L L. 641 (2006) (which discusses the basic legal framework in the United Nations (U.N.) Charter on the use of force); *see also* John C. Yoo, *Using Force*, 71 U. CHI. J. L. REV. 729 (2004) (which expounds on the use of force governing self-defense).

162. *See* BYERS, *supra* note 146, at 54; *see also* DINSTEIN, ARMED CONFLICT *supra* note 105, at 31; FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 57 (1991).

civilians by military personnel in an armed conflict, as provided for in Additional Protocol I of 1977[163] which is largely seen as reflective of customary international law.[164]

Under customary international law, the use of force had to be justified if states were at peace.[165] The use of force by one state against another with which it was not at war was *prima facie* unlawful.[166] The basic exception to this is self-defense.[167] Many of the recent conflicts characterized as war have started with at least one party invoking self-defense.[168] Self-defense is essentially a reaction by a state against the use or threat of use of force by the armed forces of another state.[169] The exercise of force in self-defense is justified under customary international law provided the need for it is instant, overwhelming, and immediate, and there is no other viable alternative.[170] This right of legitimate self-defense is subject to objective and legal determination and is confined to reaction to immediate dangers to the physical integrity of the state.[171]

It is generally assumed that customary law permits anticipatory action in the face of imminent danger, as it is comprehended by the right of self-preservation and the doctrine of necessity.[172] Nevertheless, it must taken with caution, as the concept of anticipatory self-defense is open to various objections,[173] as a result of which, in modern practice — barring the actions of the U.S. in Iraq and Afghanistan — there have been few instances of anticipatory action in self-defense.[174]

The essence of the customary right to self-defense is proportionality to the threat, creating a presumption that force is only lawful as a reaction

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163. Additional Protocol I of 1977, *supra* note 129.

164. Kenneth Watkin, *Controlling the Use of Force: A Role for Human Right Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 15 (2004).

165. WALLACE, *supra* note 71, at 246.

166. *Id.* (emphasis supplied).

167. *Id.*

168. For example, the American invasion of Afghanistan. *See* Juan, *supra* note 32, at 506. The British government justified the military operations against Egypt in 1965 by arguing that self-defense comprehends the protection of nationals. BROWNLIE, FORCE, *supra* note 18, at 255.

169. BROWNLIE, FORCE, *supra* note 18, at 252.

170. WALLACE, *supra* note 71, at 247.

171. *Id.*

172. *Id.* at 257.

173. *Id.* at 259. *See* BROWNLIE, FORCE, *supra* note 18, at 250, 366-68, 372-73, 429, 433. (objections to anticipatory self-defense).

174. WALLACE, *supra* note 71, at 260.

against force.[175] This is an important principle, which was originally espoused in *The Caroline Case* wherein Daniel Webster's correspondence stated that self-defense must involve "nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it."[176]

The custom on the use of force — and, concomitantly, the custom on war — indicates, therefore, that there is a standing prohibition against the use of force against another state, except in self-defense, as espoused in Article 51 of U.N Charter,[177] and subject to the limitations of proportionality and targeting, among others.

C. Survey of Conflicts: A Look at State Practice on War

State practice is one of the two elements that make up custom[178] — the other being *opinio juris,* the obligation to act in a specific way because such practice is considered obligatory by a rule of law.[179] This Note surveys the significant conflicts over the last century that fall under two classifications — those that have been legally considered as war and those that have not been legally considered as war. These conflicts shall serve as indicators of state practice in this area of the law. An analysis of state practice to ascertain the characteristics of war follows.

1. Significant Conflicts Legally Considered As War

In 1902, German and British forces seized most of the Venezuelan fleet after it gave no reply to a joint British and German ultimatum.[180] Nevertheless, because of escalating land hostilities — wherein a mob seized and looted a British ship docked in the Venezuelan city of Puerto Cabello — Germany, Britain, and Italy notified third parties of a blockade of Venezuelan ports on 20 December 1902.[181] This blockade was soon lifted after mediation by the U.S. The German government referred to this blockade as a "warlike blockade" and considered a state of war to have existed during that time.[182] The British Secretary of State stated that the blockade created an *ipso facto*

175. *Id.* at 252 & 261.

176. II J.B. MOORE, DIGEST OF INTERNATIONAL LAW 409-14 (1906) (Webster-Ashburton Treaty — The Caroline "Case").

177. U.N. Charter art. 51.

178. *See* Asylum (Colom. v. Peru), 1950 I.C.J. 266, 277 (NOV. 20, 1950).

179. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 98 (June 27, 1986).

180. Cohan, *supra* note 30, at 269.

181. *Id.*

182. *Id.*

state of war between Great Britain and Venezuela.[183] Although no actual declaration of war was given by any of the warring parties, since the intention of the parties indicated they were at war, they were legally considered as being at war. The Permanent Court of Arbitration at the Hague in *Venezuelan Preferential Claims* even referred to the blockade as "war between the blockading powers and Venezuela."[184]

This exemplified the State of War Doctrine, in that it was the intention of the parties that was considered before they were deemed at war. Nevertheless, it was not merely the intent of the states that was considered, but also their actions. A similarly exhaustive consideration of all the factors was also undertaken in *Dalmia Cement*: it was held that no war existed since, under the circumstances then present, no facts were found to corroborate the contention that a state of war existed.[185]

The primary indicator of the State of War Doctrine, the declaration of war, seems to have gone into decline in the last 100 years.[186] Most states have chosen to invade or resort to hostilities first, with declarations of war, if any, made as an afterthought. One of the last few formal declarations of war in the 20th century would be the 1967 declaration of war made by the Nigerian Government against Biafra.[187] World War I was perhaps one of the last to display consistent use of declarations of war by nation-states.[188]

The next World War, WWII, showed a variance in the use of the declaration of war.[189] Japan did not declare war when it attacked the U.S. in

183. *Id.*

184. *Id.*

185. Dalmia Cement Ltd. v. National Bank of Pakistan, 67 I.L.R. 610, 751 (1967); *see* discussion *infra* Part II (A) (3).

186. *See* discussion *infra* Part II (A) (3).

187. DETTER, *supra* note 26, at 40.

188. *See* FirstWorldWar.Com, The War to End All Wars, *available at* http://www.firstworldwar.com/ (last accessed Nov. 5, 2008) [hereinafter FirstWorldWar.Com]. This war began with the assassination of a prince by the Black Hand liberation group. This sparked off declarations of war when alliances and treaties between the original warring states came into play and hostilities invariably escalated. It was the bloodiest war the world had ever seen at that time because of the use of trench warfare and various new technologies, such as the machine gun, airplanes, tanks, and chemical weapons. *Id.* A direct result of this war was the founding of the League of Nations and the Kellogg-Briand Pact, which succeeded in maintaining peace for a few decades. KEEGAN, *supra* note 20, at 2.

189. KEEGAN, *supra* note 20, at 3.

Pearl Harbor.[190] Neither did Germany — when it suddenly annexed the Sudentenland and invaded much of Europe — with the exception of its invasion of Poland, where it made a declaration of war,[191] albeit under what many consider to have been false pretenses. Nevertheless, the U.S., France, and Great Britain did declare war before undertaking any hostilities against the Axis powers, even though most of the latter did not return this "courtesy." The early conflicts in this war showed an intention by the warring parties to not consider such hostilities as war.[192]

Although in the two world wars the U.S. consistently made declarations of wars before embarking in hostilities, many of its other conflicts did not show such a practice. The U.S., for a time, denied the very existence of Korean and Vietnam Wars. Later on, both conflicts were fully considered as wars by the U.S. Even now, the Korean War is not officially over, in that both the U.S. and North Korea are still officially considered, despite the cessation of hostilities, at war.[193]

The hesitation of the U.S. and many others — such as the United Kingdom (U.K.), North Atlantic Treaty Organization (NATO), Israel, and several Arab states — in considering conflicts as war would continue.

2. Significant Conflicts Not Legally Considered As War

In 1916, the U.S. dispatched a military expedition to Mexico following a raid by a Mexican armed band led by the infamous Pancho Villa.[194] The expedition withdrew from Mexican territory in little less than a year. The Mexican government first promised cooperation, but soon demanded withdrawal of U.S. forces under the threat of armed defense.[195] Clashes with

190. *See* The World at War, History of World War 1939-1945, *available at* http://www.euronet.nl/users/wilfried/ww2/ww2.htm (last accessed Nov. 5, 2008).

191. JOAQUIN G. BERNAS, S.J., INTRODUCTION TO INTERNATIONAL LAW 383 (2002 ed.).

192. Japan, for example, insisted that its incursions into China in the 1930s did not consist war, even though these led to the annexation and subsequent creation of the state of Manchukuo, with the last Emperor of China, Pu Yi, installed as a puppet ruler. XU CHENGBEI, OLD BEIJING: IN THE SHADOW OF THE IMPERIAL THRONE 63 (1st ed. 2001).

193. U. S. Department of State, Bureau of Consular Affairs, Republic of Korea Consular Specific Information, *available at* http://travel.state.gov/travel/cis_pa_tw/cis/cis_1018.html (last accessed Nov. 5, 2008).

194. BROWNLIE, FORCE, *supra* note 18, at 37 (citing Grob, at 30-34; U.S. For. Rel. 1916, at 581; I C.C. HYDE, INTERNATIONAL LAW 240-44 (1947); 10 Am. J. Int'l L. 337, 890 (1916); 11 Am. J. Int'l L. 399, 406 (1917)).

195. *See* BROWNLIE, FORCE, *supra* note 18, at 37.

Mexican forces soon occurred, but were settled peacefully. Neither did either state declare a state of war, nor even consider themselves at war with each other in any manner.[196]

In 2 April 1982, Argentine forces invaded and took over possession the Falkland Islands which were under U.K. administration.[197] Though Britain initially lost the islands, British forces were able to recapture the islands within 74 days when a large naval taskforce forced Argentine forces under Commander Mario Menendez to sign a surrender document.[198] During the time of the hostilities, war was never declared by either side,[199] even though it was widely considered a war.[200] Furthermore, a U.N. Security Council Resolution calling for a halt to hostilities by way of a ceasefire was crafted,[201] while diplomatic attempts to end the war continued.[202] In the end, Britain was the clear victor in this "war," and that state formally declared an end to hostilities in 20 June 1982.[203]

After 9/11, the U.S. announced that it possessed evidence that Al-Qaeda had been responsible for the terrorist attacks.[204] After demands made on Afghanistan — long considered a supporter and hide-out for Al-Qaeda — were ignored, the U.S., along with a coalition of other nations which included the U.K., commenced attacks against the Taliban-governed Afghanistan.[205] This consisted of surgical missile strikes, B-52 carpet bombing of Taliban forces, and an invasion of ground troops assisting the Northern Alliance forces.[206] None of the participants in this conflict considered the attack on Afghanistan as a war. The U.S. State Department

196. BROWNLIE, FORCE, *supra* note 18, at 37.

197. *The battle over the Falklands*, BBC NEWS, Oct. 25, 1998, *available at* http://news.bbc.co.uk/2/hi/ uk_news/199850.stm (last accessed Nov. 5, 2008) [hereinafter *Battle over the Falklands*]. This was because of a long-standing dispute between the two states over possession and ownership of the islands in question. Britain had long asserted sovereignty since 1833, but Argentina had always disputed this. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. S.C. Res. 505, U.N. Doc. S/RES/505 (May 26, 1982).

202. *Battle over the Falklands, supra* note 197.

203. *Id.*

204. *See generally* Paul Harris, et al., *Unfinished Business (The War in Afghanistan)*, OBSERVER, Dec. 9, 2001, *available at* http://observer.guardian.co.uk /afghanistan/story/0,,615858,00.html (last accessed Nov. 5, 2008).

205. *Id.*

206. *Id.*

considered the attack against Afghanistan as in accordance with the right to self-defense under the U.N. Charter.[207]

In 2003, the U.S. also attacked and invaded Iraq, with its own massive troops, along with "a coalition of the willing," which initially included the Philippines. The "Iraq War," as it had been called by the media, ended with the toppling of Saddam Hussein from power.[208] An insurgency movement, however, still continues in that country, as of this writing, and some pundits have called the Shi'a and Shi'ite hostilities a "civil war."[209] This Iraq war was not, however, the first conflict between U.S. and Iraq. Operation Desert Storm also involved the two states, among many others, when the U.S. led a U.N.-sanctioned force to repel an Iraqi army which had invaded Kuwait.[210] None of these hostilities involved a declaration of war or any statement officially or legally considering these conflicts as war. They were instead considered as justified uses of force under the U.N. Charter.[211]

During the NATO action in Yugoslavia in 1999 — an action to force that state to cease the ethnic cleansing of Albanians in Kosovo — it was emphasized by the U.K., that there was no "state of war," but only forceful military intervention. Nevertheless, NATO (except the U.K.) admitted that a state of war existed against Yugoslavia,[212] even though there had been no declaration of war by NATO or any of its members.

Israel has experienced few years of relative peace since the state's inception. The country itself was forged in what has come to be known as the "1948 war" even though no formal declarations of war were involved.[213] This war, which involved the fledgling state of Israel and nearly all the other Arab states, was a success for Israel, with armistices being signed between

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207. *See* Juan, *supra* note 32, at 501-04 (more detailed discussion on the factual details of the U.S. attack on Afghanistan.).

208. *Iraq, in* ENCYCLOPAEDIA BRITANNICA, *available at* http://www.britannica.com/eb/article-232299/Iraq (last accessed Nov. 5, 2008).

209. *See* Charles Krauthammer, *Iraq: A Civil War We Can Still Win*, WASH. POST, Sep. 8, 2006, at A17, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/09/07/AR2006090701616.html (last accessed Nov. 5, 2008); William S. Lind, Civil War in Iraq?, *available at* http://www.antiwar.com/lind/?articleid=3120 (last accessed Nov. 5, 2008).

210. NAT'L SECURITY ARCHIVE, OPERATION DESERT STORM: TEN YEARS AFTER (Jeffrey T. Richelson ed., 2001), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB39/ (last accessed Nov. 5, 2008).

211. The Desert Storm conflict, in particular, included a mandate from the U.N. Security Council. *See* S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990).

212. DETTER, *supra* note 26, at 8.

213. *See* DAVID W. ZIEGLER, WAR, PEACE AND INTERNATIONAL POLITICS 72-82 (5th ed. 1990).

Israel and the other states.[214] The 1956 and 1967 wars were similarly successes for Israel, allowing it to achieve important foreign policy goals and gain territory — some of which (the Sinai Oil fields) it would have to give up in the 1973 war, where Israel and an alliance of Arab states signed peace treaties in 1979.[215] Most of those wars, which threatened Israel's territorial security, were initiated by the Arab states. None of these conflicts involved a formal declaration of war, although a state of war was recognized by the combatants, as evidenced by the signing of armistices and peace treaties at the end of each conflict.[216]

The 1982 invasion of Lebanon by Israel was less to repel a clear threat to their security than to accomplish abstract political ends. A gunman shot the Israeli ambassador to Britain and, immediately, Israeli forces moved into Southern Lebanon.[217] The Lebanese army was in no position to offer resistance, so the real opponents were the forces of the Palestinian Liberation Organization (PLO), who were virtual rulers in several areas of Lebanon and had mounted terrorist attacks against Israel.[218] Israel engaged in siege warfare, attacking Beirut by airplane and artillery while suffering small but steady losses from their ground troops. This siege ended with a negotiated withdrawal of PLO forces from Beirut, though many of those forces quickly returned to Lebanon by way of Syria.[219] This "war" had the effect of weakening one of Israel's enemies. The people living in Southern Lebanon were Shi'ite Muslims who originally had nothing to do with the conflict, but Israel's occupation of their territory drew them into the fight. Repeated attacks on Israel's occupation forces, often in the form of terrorist-style guerrilla attacks, such as car bombs and suicide attacks, eventually forced Israel to withdraw from the territory.[220] Many of those involved in such attacks would later coalesce into an organization known as Hezbollah. Like previous conflicts involving Israel, no formal declarations of war were involved, though it has been widely considered as a war.[221]

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214. ZIEGLER, *supra* note 213, at 72-82. The Arab states involved in the conflict were Egypt, Syria, Lebanon, the Arab bands from Palestine, and the Arab Legion of Trans-Jordan (now the Hashemite Kingdom of Jordan).

215. *Id.*

216. *Id.*

217. *Id.* at 83.

218. *Id.* (Note that the factual circumstances of that conflict seems eerily similar to the 2006 invasion of Lebanon by Israel. The differences seem to lie mainly in the parties fighting Israel — i.e. in 1982, the Palestinian Liberation Organization (PLO); in 2006, Hezbollah.).

219. *See* ZIEGLER, *supra* note 213, at 83.

220. ZIEGLER, *supra* note 213, at 84.

221. *Id.*

3. Analysis of the Survey

A cursory glance at the survey of state practice indicates a marked decline in the use of a declaration of war as a sign of a state of war, a trend since the advent of WWII, wherein many hostilities began before any attempt to make a declaration of war. In fact, since 1939, most armed conflicts have commenced without a declaration or ultimatum.[222] Most of the wars in the last century were only considered wars after hostilities had reached a specific level. Many of the conflicts which had not been called war could be considered as such if previous wars were used as an indicator. Thus, where a declaration of war cannot be an indicator in determining the existence of a state of war, objective criteria should be the norm used.

Nevertheless, there remain some states which refuse to consider themselves in a state of war, even when, for all intents and purposes, they already are in such a state. Of the states mentioned, the U.S., the U.K., and Israel seem to have a predisposition towards this practice, even though the conflicts they were engaged in were widely considered to be wars. While the major conflicts of the last five decades usually involved any of these three states, they have generally refused to look at the objective facts in front of them — that they were at war. State practice is thus mixed: even though state practice generally indicates that objective criteria should be used to determine a state of war, there are still states that steadfastly hold on to subjective intent in determining a war.

Each of the conflicts, whether they were legally considered as war or not, generally involved one factor: a high level of hostile and intense armed violence that threatened the existence of the government of a state or a juridical entity or person of the state. The Falkland Islands war involved armed violence which threatened the former British administration in the islands and, later, the occupying Argentine forces. Recent conflicts share the same element. The Israel conflicts all involved threats to the existence of either the Israeli government or the governments of the Arab states. The U.S., in its invasion of Iraq and Afghanistan, threatened the existence of the governments of those states, in fact, toppling and causing the replacement of these governments with new administrations. The only seeming exception in the survey would be the "blockade-war" of Venezuela by Britain, Italy, and Germany, wherein a low-level of violence was involved. Nevertheless, the State of War Doctrine reigned in that instance and so any contention of the existence of a war at that time was dependent on such subjective intent.

Hence, it may be derived from the survey that the level of intensity of armed violence in a conflict considered as a war, whether declared or not, must be of a high scale. Professor Ray August would state that the scale of the warfare and the level of intensity of the fighting must be such that it

222. BERNAS, *supra* note 191, at 383.

threatens the existence of a government of a state or of an equivalent juridical entity or person.[223]

D. Jurisprudence on War

Judicial decisions may be applied in international law, "subject to the provisions of Article 59"[224] of the ICJ Statute, which provides that "the decision of the Court has no binding force except between the parties and in respect of that particular case."[225] It must also be noted that Article 38 (I) (d) of the Statute[226] is not confined to international decisions and that decisions of national tribunals have evidential value.[227] Hence, municipal decisions are often used even in international practice and many writers, such as William Edward Hall, Lassa Oppenheim, John Bassett Moore, Charles Cheney Hyde, and McNair, make frequent reference to municipal decisions.[228] In fact, municipal decisions have been an important source of material on recognition of belligerency, the concept of a state of war, war crimes, and belligerent occupation, among others.[229] With this in mind, this Note takes up several pivotal cases, both international and municipal, which provide for a rich discussion on the subject matter of war.

U.S. v. Nicaragua,[230] decided by the ICJ, has provided that the prohibition on the use of force against another state has reached customary status in international law,[231] and as war of any kind involves the use of force, it therefore follows that there is a standing prohibition against war, subject to specific limitations.

According to the ICTY in *Tadic*, "protracted armed violence" is required in order to launch the application of international humanitarian law in times of armed conflict.[232] The Tribunal pronounced armed conflict as

223. *See* Ray August, Lecture 10 – Part 1: War, *available at* http://www.cb.wsu.edu/~KalvinJoshi/pil/lect-101/notes101.htm (last accessed Nov. 5, 2008).

224. WALLACE, *supra* note 71, at 25.

225. Statute of the International Court of Justice, art. 59, June 26, 1945, 33 U.N.T.S. 993.

226. *Id.* art. 38.

227. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 23 (4th ed. 1990).

228. *Id.*

229. *Id.*

230. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 99-100 (June 27, 1986).

231. *Id.*

232. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995).

existing "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups within a state."[233] This implies that a necessary element in war, as it is already a necessary element in armed conflict, would be "protracted armed violence."

Dalmia Cement Ltd. held that, in a war, at least one party has an *animus belligerendi*.[234] Here, the arbitrator found that a so-called declaration made by one party was not a communication by one State to another and, therefore, not an actual declaration of war, which would effectuate the existence of a war.[235] Looking at other factual circumstances and not merely relying on the supposed declaration of a state, Arbitrator Lalive held that there was no war between India and Pakistan.[236] The case, therefore, provided that, before a war can be determined to be in existence, there must be factual circumstances which determine the reality that there is a war, as well as an intention of going to war, is usually indicated through a declaration of war — although in this case, no such declaration was considered to be present.

English law has acknowledged that war has a technical meaning and has recognized only a state of war and a state of peace, with no intermediate state.[237] It has also seemingly adhered to the State of War Doctrine. This can be seen in *Janson v. Driefontein Consolidated Mines*,[238] where it was said that, since there can never be an intermediate state, everything hinges on the government's declaration.[239] In *in re Grotian*,[240] it was said that, without this declaration, a state of peace exists.[241] McNair, notes, however, that as a consequence of this adherence to the State of War Doctrine, there have been many cases wherein British courts have held that there was no state of war, although it was clear that a formal state of war existed, and vice versa.[242]

Earlier decisions by English courts, however, belie their allegiance to the State of War Doctrine, under which the commencement of a state of war would be expressly determined by Executive (or the Crown's) pronouncement. In *Blackburne v. Thompson*, it was said that, "in the absence of any express promulgation of the will of the Sovereign as to the existence

233. *Id.*

234. Dalmia Cement Ltd. v. National Bank of Pakistan, 67 I.L.R. 610, 751 (1967).

235. *Id.*

236. *Id.*

237. MCNAIR, *supra* note 25, at 34.

238. *Id.* (citing Janson v. Driefontein Consolidated Mines, [1902] A.C. 484 (H.L.)).

239. *Id.*

240. *In re* Grotian, 1 Ch. 501 (1955).

241. MCNAIR, *supra* note 25.

242. *Id.* at 36.

of a state-of-war, it may be collected from other acts of state."[243] In *The Maria Magdalena*, the Prize Court held that "a lawful and perfect state of war may exist without proclamation."[244] Nevertheless, English jurisprudence in general would seem to indicate adherence to the State of War Doctrine, therefore requiring a declaration of war before the determination of the existence of war.

American jurisprudence has also dealt with the existence or non-existence of war in deciding controversies. In *Ludecke v. Watkins*,[245] the U.S. Supreme Court was asked to determine whether the President's wartime powers continued three years after the defeat of Germany and Japan in World War II on the basis of executive pronouncements that a "state of war" persisted. The Court asserted that the termination of a state of war does not take place when the "shooting stops," but is, rather, a "political act" reserved for the President to determine.[246] This implies that the beginning and end of a war — hence, war itself — are matters of political determination vested in the Executive Branch. In *Robb v. United States*,[247] war was construed to require a formal declaration before the Court could recognize its existence. The U.S. Military Tribunal in *U.S. v. Krauch* held that, after German annexation of Sudentenland and Austria, these areas were not under belligerent occupation and that Hague Regulations did not become applicable "as a state of actual warfare ha[d] not been shown to exist."[248] In *Hammond v. National Life and Accident Insurance Co.*,[249] it was held that there was "no war" in Vietnam.[250] It interpreted the term "time of war" against the insurance company and construed it to give maximum benefit to the deceased.[251]

Other American cases have, however, ignored the requirement of a declaration under the State of War Doctrine. Around the same period of time as some of the abovementioned cases were decided (i.e. the 1940s), *New York Life Insurance Co. v. Bennion*[252] held that, when a declaration is insisted upon, while a war, in the real sense of the word, is going on, the

243. *Id.* at 36 (citing Blackburne v. Thompson, [1939] 2 K.B. 544).

244. *Id.* at 38-39 (citing The Maria Magdalena, 15 East 81, 90).

245. Ludecke v. Watkins, 335 U.S. 160 (1948).

246. *Id.* at 167-68.

247. Robb v. United States, 456 F. 2d 768 (Ct. Cl. 1972).

248. BROWNLIE, FORCE, *supra* note 18, at 399 (citing U.S. v. Krauch, 15 Ann. Dig. 668, 671-72 (U.S. Mil. Trib. Nuremberg 1948)).

249. Hammond v. National Life and Accident Insurance Co., 243 SO. 2nd 902 (La. App. 1971).

250. *Id.* at 903.

251. *Id.* at 903.

252. New York Life Insurance Co. v. Bennion, 158 F.2d 260 (10th Cir. 1946).

courts "shut their eyes to realities ... and cut off the power to reason with concrete facts."[253] *Broussard v. Patton*[254] provided that, for the purposes of military law, war must include a *de facto* war, where there has been no declaration of war by any competent body. The court here chose to follow a *de facto* notion of war rather than requiring a formal declaration of Congress. As a result, the court allowed the military to define "time of war" retroactively so as to impose court-martial jurisdiction on those soldiers who had returned to civilian life.[255]

In *Bas v. Tingy*,[256] which involved a conflict between the U.S. and France, the court found for the existence of a war despite the absence of a declaration of war. Here, Justice William Paterson referred to the military operations as "an imperfect war, or a war as to certain objects and to a certain extent,"[257] and Justice Samuel Chase referred to the conflict between America and France as a "limited partial war."[258] Going further, Justice Bushrod Washington stated that public wars may be classified either as solemn wars or imperfect wars. Solemn wars are those which comply with all the necessary formalities, while imperfect wars are those which exist without formal authorization.[259] Each of the justices agreed that a "public war" existed even though it was being waged in a limited manner.[260] The court seemed to have reached this conclusion based on the fact that the hostilities were ordered or condoned by the political branches of the government. Justice Washington evaluated the situation at stake in that case, a conflict between France and the U.S., in relation to what he deemed as a "true definition of war."[261]

Cases which involve war, therefore, indicate that, in the beginning, even learned jurists were unclear as to whether the existence of war would depend on a formal declaration of war. More recent cases, however, have adopted a policy of looking at objective criteria to determine a state of war.

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253. *Id.* at 265.

254. Broussard v. Patton, 466 F. 2d 816 (9th Cir. 1972) (where the Court noted that there had been no declaration of war in the Vietnam War).

255. Broussard, who had deserted the military on Oct. 1, 1964, was then tried and convicted by court-martial. *Id.* at 818.

256. Bas v. Tingy, 4 U.S. 37 (1800).

257. *Id.* at 45.

258. *Id.* at 43.

259. *Id.* at 40.

260. Cohan, *supra* note 30, at 260.

261. *Bas*, 4 U.S. at 41. This is, coincidentally, the basic contention espoused by this Note.

Recent jurisprudence on the War on Terror is illuminating. *Padilla v. Bush*,[262] for example, involved a U.S. citizen who was arrested and held as an "enemy combatant" by the authorities.[263] As one author said, "[t]his case most clearly raised the issue of the applicability of the 'armed conflict' rubric to the ongoing conflict between the U.S. government and Al-Qaeda — a conflict with no particular spatial location, no foreseeable temporal delimitation, and fought between a state and a transnational non-state group or network."[264] José Padilla argued that the conflict could not be viewed as an "armed conflict" as understood by the Geneva Conventions because Al-Qaeda was an "international criminal organization that lacks clear corporeal definition [and] the conflict can have no clear end."[265] The District Court ruled on that proposition, citing the Geneva Conventions, saying that *jus in bello* applies regardless of declarations of war.[266] The court declared that "[s]o long as American troops remain on the ground in Afghanistan and Pakistan in combat with and pursuit of al Qaeda [sic] fighters, there is no basis for contradicting the President's repeated assertions that the conflict has not ended."[267] The case looked more to the objective elements to determine the existence of war.

In *Padilla v. Rumsfeld*,[268] however, the Circuit Court held that "whether a state of armed conflict exists against an enemy to which the laws of war apply is a political question for the President, not the courts."[269] The court then declared that, while it did not challenge the executive's "power to deal with imminent acts of belligerency on U.S. soil outside a zone of combat," it believed that this power did not extend to "the detention of a United States citizen as an enemy combatant taken into custody on United States soil outside a zone of combat" purely on the basis of "inherent wartime power."[270] Hence, the Second Circuit Court of *Padilla v. Rumsfeld* denied the factualist or objective underpinnings of the District Court decision in *Padilla v. Bush.*

Hamdi v. Rumsfeld,[271] which involved an American citizen captured in Afghanistan who was alleged to have fought for the Taliban, brought up the

262. Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

263. *Id.* at 569.

264. Nathaniel Berman, *Privileging Combat? Contemporary Conflict and The Legal Construction of War,* 43 COLUM. J. TRANSNAT'L L. 1, 60 (2004).

265. *Padilla,* 233 F. Supp. at 588.

266. *Id.* at 590.

267. *Id.*

268. Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003).

269. *Id.* at 712.

270. *Id.* at 715.

271. Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004).

question of whether his detention — projected to be for the indefinite duration of the War on Terror — was legal. The Supreme Court cited the "clearly established principle of the law of war that detention may last no longer than active hostilities,"[272] but it also noted that this would not provide a reasonable limit on the duration of Yaser Esam Hamdi's detention and held that U.S. citizens should have the opportunity — which Hamdi was denied — to exercise the right to due process and "to be heard before an impartial adjudicator."[273] Nevertheless, the court noted that "[a]ctive combat operations against Taliban fighters apparently [we]re ongoing in Afghanistan."[274] The detention of "Taliban combatants who engaged in an armed conflict against the United States,"[275] therefore, as opined as well by one author, continues to be legitimate.[276] This recognized the existence of an armed conflict in Afghanistan and fighters engaged in conflict against the U.S. It showed that the court leaned more towards factual and objective determination of whether a war existed, rather than depending simply on the political determination of the government.

Court decisions show a marked trend towards working with the reality of a situation in determining whether a war exists or not, rather than simply waiting for political and subjective determinations. *New York Life Insurance* aptly described the court's position when it stated that, "[t]o say that courts must shut their eyes to realities and wait for formalities, is to cut off the power to reason with concrete facts."[277] Now, they must work with the objective facts present in any such situation, rather than wait for the subjective intent of the parties involved.

E. Inclusion of Non-State Parties: Belligerents and Combatants

One possible reason why past definitions of war have not achieved common acceptance by states is that most proposed definitions have failed to be exhaustive — focusing merely on wars between states, but ignoring the possibility of wars between a state and a non-state party. Some of the conflicts since WWII have not only been between states, but have also involved non-state parties.[278]

272. *Id.* at 2641.

273. *Id.* at 2647.

274. *Id.* at 2642.

275. *Id.*

276. Berman, *supra* note 264, at 65.

277. New York Life Insurance Co. v. Bennion, 158 F.2d 260, 265 (10th Cir. 1946).

278. For example, the conflicts in Kosovo, Lebanon, and Palestine, wherein non-state parties were involved.

The prevalence of non-state parties, such as belligerents and combatants, may perhaps be traced to WWII, where partisans and resistance movements played a remarkable role in liberating much of Europe. They were not formally legitimized by existing law at that time, because they operated in territories under military occupation and also because they often lacked one or more of the requirements needed for lawful combatant status.[279] After the war, a general feeling emerged from the Allies that some provision should be made in the future for granting these movements legitimacy under the law. In fact, when guerrilla warfare spread throughout colonial countries, majority of states felt that guerrillas, who normally do not fulfill the requirements under the Hague Conventions, should be upgraded to the status of lawful combatants.[280] As a result, "in numerous recent hostilities, belligerents have often been units other than States."[281] "Even other groups, if they have some consolidated structure, can be classified as belligerents."[282]

As such, any plausible definition of war, in order to be comprehensive, must include a reference to non-state participants yet if a definition of war were to include every conflict which involves a non-state participant (i.e. any fighter), however, it is surmised that it would unduly expand the definition to absurd consequences. It is, therefore, necessary that non-state participants meet specific criteria — that they meet the requirements for belligerency status and that their fighters be considered as combatants — before they can be classified as a party capable of entering into a war.

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279. CASSESE, *supra* note 5, at 328-29.

280. *Id.* This "upgrade" led to the provision in the Hague Conventions of 1949 which allowed for another class of combatants, namely "the inhabitants of a territory not under occupation, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having the time to organize themselves." (CASSESE, *supra* note 5, at 331) Thus, for this kind of combatant, only two conditions were required: to carry arms openly and to respect the laws and custom of war. *Id.* at 331; *cf.* FirstWorldWar.Com, *supra* note 188. As for guerrillas, a compromise formula adopted during the 1974-1977 Geneva conferences led to what Cassese calls the "convoluted" provision of Article 44, which left unaffected three of the requirements provided for in the 1949 formulation for combatants (namely, being linked to a party to the conflict; being under a responsible command; and complying with the laws of war) while it reduced the other two criteria (carrying a distinctive sign recognizable at a distance and carrying arms openly) to one: combatants "are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack (article 44.3, first sentence) ... in addition, combatants are only required to comply with this condition *during* an armed attack or immediately *prior* to it." CASSESE, *supra* note 5, at 332; *cf.* FirstWorldWar.Com, *supra* note 188.

281. DETTER, *supra* note 26, at 18.

282. *Id.* at 132 ("as is amply demonstrated in contemporary warfare, for example, in Korea, in Vietnam, the Middle East, Rwanda, Somalia, and Kosovo.").

Article 13 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention (I)) provides that to be a combatant, a person would have to be (1) commanded by a person responsible for his subordinates; (2) having a fixed distinctive sign recognizable at a distance; (3) openly carrying arms; and (4) conducting operations in accordance with the laws and customs of war.[283] These requisites are also present in the other Geneva Conventions such as the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention (III)).[284]

Assuming that an organized faction possesses combatants that fulfill the requirements of combatant status under the Geneva Conventions, they must also meet the requirements for belligerency status. The requirements for belligerency are: (1) existence of an armed conflict within a state; (2) occupation by the rebels of a substantial portion of national territory; (3) conduct of hostilities by organized groups according to the rules of war; and (4) existence of the necessity for the state to define its attitude to the situation.[285]

It is important to differentiate between a combatant and a belligerent. "In inter-state wars the belligerents will be the States and the combatants the members of their armed forces."[286] For conflicts involving other entities, such as liberation movements, such entities will be the belligerents, while the members of their armed forces will be the combatants. In theory, one cannot achieve belligerency status without having combatants to fight one's cause. "But even if members of the armed forces of various entities are potential combatants, they do not become actual combatants for the purposes of application of the law of war unless there are hostilities of a certain intensity."[287]

While it is noteworthy that belligerents must first be recognized as such before they may claim such status, recent trends indicate otherwise. "Although a practice of recognition of belligerents has existed, it was later accepted that entities which have not received such formal recognition may also qualify as belligerents: non-recognition of groups, fronts, or entities has

283. Geneva Convention (I), *supra* note 126, art. 13.

284. Geneva Convention (III), *supra* note 126, art. 4.

285. SHAW, *supra* note 110, at 569; HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 176 (1948) [hereinafter LAUTERPACHT, RECOGNITION].

286. DETTER, *supra* note 26, at 134.

287. *Id.* at 134-35.

not affected their status as belligerents neither the ensuing status of their soldiers as combatants."[288]

The basic legal effect of a belligerent status is that it grants such an entity with international standing.[289] According an author, it is one step closer to claiming full recognition as the sole government or a separate state within the nation's territory.[290] Belligerent status gives rise to certain legal rights and obligations.[291] "[A]rmed conflict classified as a belligerency fall under the more rigorous application of article 2" of the 1949 Geneva Conventions, which concern conflicts of an international character.[292]

Belligerents may, therefore, be considered as non-state participants in a war and, consequently, any definition of war must also make reference to such parties, provided they meet the requisites for belligerent status.

F. Proposed Definitions by Various Authors

Publicists are considered a material source of international law and a means of ascertaining what the law actually is on a given subject.[293] Various authors have written on war and its probable definition and, though these definitions have never achieved common use in international practice, they serve as useful templates for crafting a relevant and common definition of war.

Oppenheim believed that "war is a contention between two or more states through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases."[294] This has been criticized, as current victors in war are no longer free to impose whatever they wish.[295]

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288. *Id.* at 134.

289. Jorge L. Esquirol, *Can International Law Help? An Analysis of the Columbian Peace Process,* 16 CONN. J. INT'L L. 23, 27 (2000).

290. *Id.* at 40-41.

291. Jan Fermon, et al., Legal Opinion on Status of National Liberation Movements and their Use of Armed Force in International Law, Nov. 17, 2002, at 4, *available at* http://www.josemariasison.org/jumi02/legalcases/related/legal_status_of_NLMs.pdf (last accessed Nov. 6, 2008).

292. *Id.* at 6.

293. WALLACE, *supra* note 71, at 28.

294. DETTER *supra* note 26, at 7 (citing 2 LASSA OPPENHEIM, INTERNATIONAL LAW 202 (1906)).

295. *See* DETTER, *supra* note 26, at 7 (concurring to this assessment on Lassa Oppenheim's definition).

A wider definition one by John Westlake: "War is a state or condition of Governments contending by force."[296] Hyde seemingly concurred with a similarly broad definition: war is "a condition of armed hostility between states."[297] Such overbroad definitions are, however, generally unusable in this day and age due to the prevalence of intra-state conflicts,[298] many of which involve units with belligerent status[299] and combatants, most of whom, in turn, are non-state parties.[300]

War has also been called "a legal condition of things in which rights are or may be prosecuted by force" by Moore,[301] while A.V. Verdross called it "the state of force between States with suspension of peaceful relations."[302] The problem, however, with Moore's definition is that it would mean there may be wars without force, when the option of prosecution by force is not exercised by a state or non-state party,[303] while Verdross's version would seemingly limit war only to state parties, a contention which has already been criticized.

Georg Schwarzenberger's legalistic definition states that war is when "powers are in a state of war with each other and of neutrality towards third states, if, subject to limitations of international customary and treaty law, they choose to apply against each other power to the utmost, i.e. military as well as political and economic power."[304] It, however, overemphasizes the State of War Doctrine. Hans Kelsen also provided for a legalistic point of view: "War is, in principle, an enforcement action involving the use of

296. MCNAIR, *supra* note 25, at 6 (citing II JOHN WESTLAKE, INTERNATIONAL LAW 1 (1913)).

297. *Id.* (citing III C.C. HYDE, INTERNATIONAL LAW 1686 (2d ed. 1945)).

298. Yoram Dinstein considers intra-state conflicts as civil wars which are regulated by the 1977 Additional Protocol to the Geneva Conventions. He said that this may occur between two or more clashing groups within the territory of one of the belligerent states where a civil war is raging. DINSTEIN, ARMED CONFLICT, *supra* note 105, at 14.

299. Professor Ingrid Detter believes that with regard to the organization of a group, there must be certain requirements regarding its structure to warrant belligerent status. DETTER, *supra* note 26, at 26.

300. For example, the PLO's war against Israel or, more relevantly, Israel's conflict against Hezbollah in Lebanon.

301. DETTER, *supra* note 26, at 7 (citing VII J.B. MOORE, DIGEST OF INTERNATIONAL LAW 153 (1906)).

302. *Id.* (citing A.V. VERDROSS, VÖLKERRECHT 432 (5th ed. 1964)).

303. *See* DETTER, *supra* note 26, at 7.

304. MCNAIR, *supra* note 25, at 6 (citing GEORG SCHWARZENBERGER, THE FRONTIERS OF INTERNATIONAL LAW 246 (1962 ed.)).

armed force performed by one state against another, constituting as it does an unlimited interference in the sphere of interests of the other state."[305]

Nearly all the above definitions deal only with a definition of war involving state-parties which, in light of recent hostilities involving non-state parties or belligerents, may be obsolete. Furthermore, they apply the State of War Doctrine and, therefore, necessitate a declaration of war before there can a war. In the opinion of one author, this is absurd.[306]

Brownlie has not crafted a definition of war, but has, nevertheless, called for one, saying that a definition of war depending on objective criteria would have considerable value in a number of contexts,[307] and that any reference to *animus belligerendi* in such a definition would be circuitous and would create serious difficulties in practice.[308]

Detter offers a more up-to-date definition, which includes elements of international humanitarian law as embodied in the Geneva Conventions, specifically with regard to the requisites for combatant status:[309] "War is thus a sustained struggle by armed force of a certain intensity between groups of a certain size, consisting of individuals who are armed, who wear distinctive insignia and who are subjected to military discipline under responsible command."[310] It takes into consideration not only the size of the conflict, but also the involvement of state and non-state parties, as well as the role of combatants in hostilities. After all, parties which engage in war do not have to be recognized as states by their enemy. A country, nation or group can be a belligerent in spite of non-recognition of such a status.[311] Her definition places great importance on international humanitarian law, as the individuals referred to in her definition correlates to the requisites for combatant status under the Geneva Conventions.[312]

It is submitted that, of all the definitions offered, Detter's definition serves as the most useful, practical, and relevant, in light of the conflicts in recent years, as well as her use of combatant requisites under international humanitarian law. Even so, it has not achieved any form of uniform acceptance in international practice. It is, therefore, also submitted that some modifications to the definition be applied in order to improve its relevance,

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305. HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 32 (1956 ed.).

306. BROWNLIE, FORCE, *supra* note 18, at 26.

307. *Id.* at 399.

308. *Id.* at 401.

309. *See* Geneva Convention (I), *supra* note 126, art. 13.

310. DETTER, *supra* note 26, at 26.

311. *Id.* at 16.

312. *See* Geneva Convention (I), *supra* note 126, art. 13; Geneva Convention (III), *supra* note 126, art. 4.

applicability, and possible acceptance in international law. This Note, thus, uses Detter's basic definition as a template and improves it based on characteristics derived from current international law.

G. The Characteristics of War

1. The Primary Characteristic: The Objective Element

Based on the earlier discussions, one thing is clear: war is no longer a state which may be determined solely by the subjective determination of a single party. There is now an objective element in determining a state of war. Nevertheless, "subjective criteria will always be relevant."[313] One author even believes that "it may never be completely eliminated, at least not until some impartial, probably judicial, body is entrusted with identifying the existence of armed conflict."[314] There is, however, strong basis in stating that a state of war exists based on objective criteria.

Any definition which would maintain adherence to subjective elements or to declarations of war would be outmoded and unacceptable — serving only to continue the ambiguity currently prevailing in this realm of the law. The existence of a state of war would remain unclear and utterly dependent on the will of one party, leading to absurd results.

2. Other Characteristics of War

As discussed, the following observations can be made with regard to war:

(1) The term war is no longer in favor among draftsmen of treaties;

(2) War and the use of force is prohibited, save under specific and narrowly construed circumstances, such as self-defense, as provided for by custom and treaties;

(3) Any war or use of force must follow specific rules of conduct, such as the rule on proportionality and targeting, among others;

(4) A war must include as a necessary element, "protracted armed violence," as per the *Tadic* case, in order for there to be an armed conflict;

(5) The scale of the warfare and the level of intensity of the fighting must be such that it threatens the existence of a government of a state or of an equivalent juridical entity or person;

(6) The State of War Doctrine, or the requirement for a declaration of war as signifying the intent of a party to go to war, is generally considered the most prevalent point of view in jurisprudence and among jurists; however, there have been some contrary indications and, therefore,

313. DETTER, *supra* note 26, at 14.

314. *Id.*

there is some controversy as to the current proper rule. Nevertheless, general state practice, jurisprudence, and even jurists have abandoned the State of War Doctrine and, therefore, intent is no longer a factor in determining the existence of a state of war; and

(7) War is no longer limited to state parties, but can also involve non-state parties (i.e. combatants and those with belligerent status).

These salient points on war help in deriving its current definition under international law; in fact, any plausible definition of war must necessarily include aspects of those points.

Hence, aside from the primary characteristic of objective criteria as a necessary element, there is also a need to ensure non-use of the State of War Doctrine, which requires a declaration of war in a definition of war. This would serve as the second important characteristic.

Another necessary characteristic in any definition of war would be reference to non-state parties and some indication as to their responsibility, such as answering or operating under a responsible authority. This is based on the legal requirements in identifying combatants.[315] Concomitantly, there must be an indication that such party is considered a belligerent under international law. This is to preclude the inclusion of every situation that involves fighting in the definition of war, which would otherwise stretch the proposed definition to absurdity.

Another characteristic would be reference to the size and length of time of the conflict between the parties. This can be traced to *Tadic*, which conceived of armed conflict as involving "resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups."[316] This has been the most cited definition of armed conflict to date[317] and has even been confused for a possible definition of war.[318]

In addition, so as to further narrow down the proposed definition of war, the scale of warfare and the level of intensity of the fighting must be such that it "threatens the existence of a government of a state or of an equivalent juridical entity or person."[319] This is based on the survey of significant conflicts, nearly all of which share that same characteristic.

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315. *See* discussion *infra* Part II (E).

316. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995).

317. Berman, *supra* note 264, at 32.

318. *See* Mary Ellen O'Connell, *When is a War Not A War? The Myth of the Global War on Terror*, 12 ILSA J. INT'L L. & COMP. L. 535 (2006).

319. *See* August, *supra* note 223.

In sum, a definition of war must therefore consist of the following characteristics:

(1) Reference to objective elements rather than subjective characteristics;

(2) Non-use of the State of War Doctrine;

(3) Reference to non-state parties and some indication as to the responsibility of those non-state parties (such as answering or operating under a responsible authority);

(4) Belligerency status;

(5) Reference to the size and length of time of the conflict between the parties (i.e. protracted armed violence); and

(6) Reference to the scale of the warfare and the level of intensity of the fighting, which threatens the existence of a government of a state or of an equivalent entity or juridical person.

IV. TOWARDS AN APPLICABLE DEFINITION OF WAR

A. Finding a Template

As previously mentioned, this Note uses Detter's definition in order to come up with an appropriate working definition of war.

Detter's definition is the most up-to-date: "War is thus a sustained struggle by armed force of a certain intensity between groups of a certain size, consisting of individuals who are armed, who wear distinctive insignia and who are subjected to military discipline under responsible command."[320] This definition takes into consideration the requirements under the laws of war (i.e. distinctive insignia, responsible command)[321] and "builds on the essential definition of combatant provided by the 1949 Geneva Conventions, trying to avoid any subjective state of mind of belligerent parties."[322] It also includes non-state parties as participants in a war. Her work on the law of war is the most comprehensive on the subject matter in recent years and no other treatise deals with the major legal aspects in a systemic manner.[323]

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320. DETTER, *supra* note 26, at 26.

321. Geneva Convention (I), *supra* note 126, art. 13; Geneva Convention (III), *supra* note 126, art. 4.

322. Marco Odello, *Ingrid Detter, The Law of War, Cambridge, Cambridge University Press, 2nd ed., 2000, 516 pages*, INT'L REV. RED CROSS, June 30, 2002, at 496, *available at* http://www.icrc.org/web/eng/siteengo.nsf/html/5C7CCP (last accessed Nov. 5, 2008) (reviewing INGRID DETTER, THE LAW OF WAR (2d ed. 2000)) (this is an earlier edition of Detter's book.).

323. *See* DETTER, *supra* note 26. It should also be recognized that Detter is "an acknowledged specialist in the law of war and in areas concerning the powers and duties of states. She is the adviser to the Holy See on international law and

While her definition is useful, this Note develops it in an attempt to address the criticisms against it. Firstly, it has not been widely accepted. Secondly, it does not take into consideration some of the more recent cases and events that have occurred in the international field, such as the War on Terror and the Iraq and Afghanistan invasions. Thirdly, it places overemphasis on subjective elements when it mentions "groups of a certain size," without setting guidelines to determine what groups actually fall under such categorization, and when it includes "sustained struggle of a certain intensity," without clarifying how to determine such intensity. As Professor Marco Odello said, the definition "does not sufficiently clarify one of the most important issues, namely the 'threshold' — the level of 'intensity' — of hostilities that determines the existence of an armed conflict."[324] The determination of the threshold of violence or intensity involved is of utmost importance, otherwise every form of hostilities, because of lack of sufficient guidelines, could be simply considered as war, regardless of the intensity involved.

Nevertheless, despite criticism, the definition can be used as a template within which the author proposes a definition of war.

B. The Proposed Definition of War

Looking at Detter's definition as a framework, one can see that she began by describing war — a sustained struggle by armed force.[325] Her use of the term "sustained" is useful, as it implies that a war must be continuous — despite the length of time being a variable element in war, as can be seen in various wars that have ranged in time from as short as days to as long as decades.[326] The use of the word "sustained" avoids short, sporadic conflicts from being designated as war. Nevertheless, "struggle" seems, in the opinion of the author, to minimize the concept of war. War necessarily involves a great deal of violence because "[s]ince time immemorial, war has been accompanied by atrocity, that is, mass violence directed at non-combatants or at prisoners of

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a consultant to many governments." Ingrid Detter Frankopan, 4-5 Gray's Inn Square, *available* at http://www.4-5grayinnsquare.co.uk/people/index.cfm?id=581 (last accessed Nov. 28, 2008).

324. Odello, *supra* note 322.

325. DETTER, *supra* note 26, at 26.

326. *See* discussion *infra* Part III (C).

war."[327] "Struggle" may, thus, be replaced with "violence," which, incidentally, is the term used in *Tadic* when it defined armed conflict.[328]

As "armed conflict" seems to be the popular terminology for hostilities under international law, it must then be included in the phraseology of the definition of war since, as a legal term, armed conflict should be encompassed by the legal concept of war in any case.[329]

While "armed force" is an obvious term to be used in a definition of war, since the *Tadic* case already provides that armed conflict involves armed violence,[330] it is proposed that "armed violence" be used instead of "armed force."

Detter uses "of a certain intensity" to describe war, but this leads to the problem of ambiguity, as it involves subjectivity in the determination of what the threshold is before a conflict becomes a war. It must be noted that the threshold of violence or intensity involved before a conflict may be considered a war is a debatable point. This is in fact one of the areas where Detter's proposed definition is considered weak.[331] As a solution, one can consider the August's statement that the scale of the conflict must be included in devising a definition:[332] "war must be of sufficient scale and

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327. Devin O. Pendas, *The Magical Scent of the Savage: Colonial Violence, the Crisis of Civilization, and the Origins of the Legalist Paradigm of War*, 30 B.C. INT'L & COMP. L. REV. 29, 29 (2007).

328. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995).

329. Note that there are differing opinions as regards the relationship between "armed conflict" and "war." The Institut de Droit International once questioned whether armed conflict includes war or vice versa. *See* DETTER, *supra* note 26, at 19 (citing ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 204 (1981)). Some commentators believe that the term "armed conflict" has replaced "war," while other scholars presume that the definition for armed conflict in *Tadic* serves as a definition of war, even though up to the 1990s, most scholars used the term "armed conflict" to denote something less than war, assuming that war is the larger concept and implying a more intense or full-scale situation than armed conflict. AUST, HANDBOOK, *supra* note 110, at 252; O'Connell, *supra* note 318, at 537; DETTER, *supra* note 26, at 20. Nevertheless, since armed conflict does not give rise to a separate and distinct legal state of affairs, while war does, logic seemingly dictates that war thereby encompasses armed conflict, although this issue remains contentious. *See* MCNAIR, *supra* note 25, at 2 & 19.

330. *Tadic*, ICTY-IT-94-1-I, ¶ 70.

331. Odello, *supra* note 322.

332. August, *supra* note 223.

duration that, in essence, it is a threat to the existence of the government of a state or an equivalent juridical person."[333]

In the survey of conflicts, it was observed that a high degree of violence is consistently present in a war.[334] There is always a high level of intensity which would "threaten the existence of a government of a state or an equivalent juridical person." This hurdles the problem on the threshold of intensity in the violence present in a conflict. Nevertheless, it is recommended that, rather than use "juridical person," "juridical entity" be used. Although they mean largely the same thing, the use of "entity" would ensure a wider application and would avoid the overly-limiting notion involved in the use of "person."

It is also proposed that "intense" be used and included in the proposed definition. Though "intense" still lends itself to some subjectivity, under the statutory construction principle *generalia verba sunt generaliter intelligenda*,[335] its plain meaning — "extreme"[336] — would prevail. This would be in keeping with the level of violence generally involved in conflicts already recognized as war and would avoid the problem concerning the threshold of intensity needed in a war.

As for reference to length of time, it is submitted that the phraseology used in *Tadic* be included. The ICTY pronounced armed conflict as existing "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups within a state."[337] By including "protracted," in addition to "sustained," the definition would emphasize that wars, as a general rule, must not be overly short in duration, nor be merely sporadic and intermittent. Though it would inject a certain subjectivity into the definition, an international tribunal has already seen fit to use the term,[338] it has even been adopted in the Rome Statute of the International Criminal Court.[339] The word is adopted in deference to the better judgment of international tribunal judges and learned treaty draftsmen.

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333. *Id.*

334. *See* discussion *infra* Part III (C) (3).

335. RUBEN AGPALO, STATUTORY CONSTRUCTION 183 (5th ed. 2003) ("What is generally spoken shall be generally understood or general words shall be understood in a general sense.").

336. Merriam-Webster's Collegiate Dictionary, Intense, *available at* http://www2.merriam-webster.com/cgi-bin/mwdictsn?va=intense (last accessed Nov. 5, 2008) ("existing in an extreme degree").

337. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995).

338. *Id.*

339. ICC Statute, *supra* note 131, art. 8 (2) (f).

The next part of Detter's definition, that war should involve "groups of a certain size," again falls prey to subjectivity. Barring a judicial determination of what this should consist of, numerically, there is no way to specifically determine the numbers necessary to make up such a group. It is suggested instead that "organized factions" be used and that reference to numbers or size be removed. War presupposes a large number of participants anyway, and the term "organized factions" would imply organization within the faction and, consequently, size as an element.

Furthermore, it is submitted that "belligerent" also be attached to the term "organized faction" to produce "organized belligerent factions." This status has four specific requisites: "(1) existence of armed conflict; (2) control of territory; (3) internal organization willing to enforce and follow laws of war; (4) circumstances necessary for outside states to define their attitude by means of recognition of belligerency."[340] Belligerent status as a prerequisite of war would prevent small-scale fights from being objectively considered a war.

To clarify that states may still be participants in a war, it is submitted that "State" still be included in the definition. This ensures that both state and non-state parties are included as possible participants in a conflict. To guarantee that all possible parties are covered, the connectives "and/or" should be used between "States" and "organized belligerent factions."

Detter's definition then makes use of the combatant status under the Geneva Conventions by adopting the requisites of a combatant.[341] It describes the participants of a war as "consisting of individuals who are armed, who wear distinctive insignia and who are subjected to military discipline under responsible command."[342] Since the proposed definition already uses "belligerent," it is suggested that it also include a reference to combatants. "Armed combatants" may be used, because the Geneva Conventions already provide for the requisites of a combatant.

Since current events indicate that not all participants in a war necessarily answer to a military command or organization,[343] it is suggested that

340. SHAW, *supra* note 110, at 569; LAUTERPACHT, RECOGNITION, *supra* note 285, at 176.

341. *See* note 321.

342. DETTER, *supra* note 26, at 26.

343. For example, the 2006 Israeli invasion of Lebanon, wherein the combatants involved on the Hezbollah side did not answer to a military command, although they may be considered as such. Karby Leggett & Jay Solomon, *Why Hezbollah Is Proving So Tough on the Battlefield*, WALL ST. J., Aug. 3, 2006, at A1 [hereinafter Leggett]. Further illustrating this are the conflicts in Africa where many of the combatants were not military units *per se*. Africa Sun News, About

reference to possible non-military commands be included. The definition may include a phrase stating that combatants in a war answer to either a military or non-military command.

Taking all these elements and phrases together, an up-to-date formulation of a definition of war would be as follows: *War is a sustained armed conflict that threatens the existence of the government of a State or an equivalent juridical entity, and which involves protracted and intense armed violence between States and/or organized belligerent factions, consisting of combatants that answer to a responsible military or non-military command.*

V. CASE STUDIES OF RECENT CONFLICTS: APPLYING THE PROPOSED DEFINITION OF WAR

Based on the proposed definition above, several requisites can be derived:

(1) There must be a sustained armed conflict;

(2) It must threaten the existence of the government of a State or an equivalent juridical entity;

(3) It must involve protracted and intense armed violence;

(4) It must be between States and/or organized belligerent factions; and

(5) The factions must consist of combatants that answer to a responsible military or non-military command.

This Note applies the proposed definition to the conflict in Lebanon, the invasion of Iraq and Afghanistan, the War on Terror, and in the Philippine conflicts with Communist ideologues and Muslim insurgents.

A. Israel's Invasion of Lebanon

On 12 July 2006, Hezbollah, a militant Islamic organization based in Lebanon, staged a massive raid into Israeli territory.[344] Two Israeli soldiers were kidnapped, while eight others were killed and over 20 were injured.[345] This sparked a three-week invasion by Israel of Lebanon in an attempt to

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Wars and Post-War Conflicts, *available at* http://www.africasunnews.com/wars.html (last accessed Nov. 5, 2008).

344. Kevin Peraino, et al., *Eye for an Eye*, NEWSWEEK, Aug. 14, 2006, at 14. "Hezbollah" is a term of Arabic origin meaning "party of God." Leggett, *supra* note 343, at 15.

345. Sami Moubayed, *It's war by any other name*, ASIA TIMES ONLINE, July 15, 2006, *available at* http://www.atimes.com/atimes/Middle_East/HG15Ak02.html (last accessed Nov. 5, 2008).

eradicate Hezbollah. The conflict lasted 34 days and claimed more than 950 lives, many of whom were Lebanese civilians.[346]

Hezbollah fighters proved to be elusive and deadly, attacking and then disappearing into the civilian population of Lebanon,[347] thereby making civilians plausible targets for Israeli attacks. Hezbollah also launched thousands of rockets into Israeli territory, targeting its civilian population.[348] Israel, within 24 hours of its Security Cabinet's decision to strike back, conducted some 1,000 air missions over Lebanon.[349] The incursion was halted by U.N. Resolution 1701.[350]

It is clear that the hostilities in Lebanon involved the use of force. As the fighting was neither sporadic nor intermittent, it was a sustained armed conflict between two opponents, the Israeli Defense Force (IDF) and the Hezbollah fighters. Thus, the first requisite was amply met.

The second requisite was met when the hostilities threatened the existence of the Lebanese government, although this did not seem to be the main objective of the Israeli forces. The conflict also threatened the existence of Hezbollah, arguably an "equivalent juridical entity" in Lebanon, as it is a political party and a self-sustaining army which held sway over much of Southern Lebanon.[351]

That the hostilities were intense can be gleaned from the death toll and the damage caused.[352] The question then is whether the conflict may be considered as protracted. The conflict started on 12 July 2006, and continued until a U.N.-brokered ceasefire went into effect on 14 August 2006, though it formally ended on 8 September 2006 when Israel lifted their naval blockade against Lebanon.[353] The conflict lasted a little less than a month, during which hostilities were very intense. While *Tadic* did not elaborate on

346. Associated Press, *Israel Begins Troop Pullout from Lebanon*, *reprinted in* PHIL. STAR, Aug. 16, 2006, at A-21.

347. Peraino, *supra* note 344, at 16.

348. *Id.*

349. Lisa Beyer, *What Was He Thinking?*, TIME, July 31, 2006, at 32 (particularly Southern Lebanon).

350. S.C. Res. 1701, at 2, U.N. Doc S/RES/1701 (Aug. 11, 2006) (The relevant provision states that the U.N Security Council calls for a full cessation of hostilities based upon the immediate cessation by Hezbollah of all attacks and the immediate cessation by Israel of all offensive military operations.).

351. *See* Peraino, *supra* note 344, at 13.

352. *Id.* at 14.

353. AFP, *Timeline of the July War 2006*, DAILY STAR, Oct. 11, 2006, *available at* http://www.dailystar.com.lb/July_War06.asp (last accessed Nov. 5, 2008) [hereinafter Timeline].

the exact length of time for a conflict to be considered protracted, the Inter-American Commission on Human Rights in *La Tablada Case* has invoked the law of non-international armed conflict in a conflict lasting only several hours.[354] This implies that even an overly short duration can allow for application of international humanitarian law, and thereby dictating that the hostilities be considered an armed conflict. One can, thus, apply international humanitarian law to a conflict that lasted less than a month, and consider such hostilities as an armed conflict. The month-long conflict, during which a very high level of hostilities were engaged in by both sides, therefore falls under the term "protracted." There have been wars in the past which lasted only a few days but which the world at large still considered a war, such as the 1967 six-day war between Egypt and Israel.[355]

The IDF is the instrument of a state and is an organized faction,[356] as is the Hezbollah group.[357] Hezbollah is "an Arab guerrilla army with sophisticated weaponry and remarkable discipline"[358] and organization. Both are comprised of combatants who answer to a responsible command — a military command for the IDF, and a possibly military command for Hezbollah. There is some doubt as to Hezbollah's designation as a belligerent and of the combatant status of its fighters.

There is yet no clear indication as to what Hezbollah is exactly. It has operated as a terrorist group, attacking Israel and the U.S.,[359] yet, at the same time, it controls vast amounts of territory and participates in government with several seats in Lebanon's parliament.[360] Its fighters have consistently used guerrilla warfare. Hezbollah has been described as "an Arab guerrilla army with sophisticated weaponry and remarkable discipline. The sort of weaponry Hezbollah has deployed is normally associated with a state, and when it suits its fighters, they can disappear into the civilian population."[361]

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354. La Tablada Case, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L./V/11.95, doc. 7 rev. ¶¶ 154-56 (1997); *see* Jonathan Somer, *Acts of Non-State Armed Groups and the Law Governing Armed Conflict,* 10 ASIL INSIGHTS, Aug. 24, 2006, *available at* http://www.asil.org/insights/2006/08/insights060824.html#_edn12 (last accessed Nov. 5, 2008).

355. *See Arab-Israeli Wars, in* ENCYCLOPAEDIA BRITANNICA, *available at* http://www.britannica.com/eb/article-9008143/Arab-Israeli-wars (last accessed Nov. 5, 2008).

356. *See* Israel Defense Forces, *available at* http://dover.idf.il/IDF/English/ (last accessed Nov. 5, 2008).

357. *See* Leggett, *supra* note 343, at 6.

358. Peraino, *supra* note 344, at 13.

359. Leggett, *supra* note 343, at 14.

360. *See* Peraino, *supra* note 344, at 13.

361. Peraino, *supra* note 344, at 13.

These actions are contrary to the rules of warfare under the Geneva Conventions, and these fighters are even, arguably, unlawful combatants,[362] because they do not meet the requirements to be considered a combatant.[363] These considerations may dictate that Hezbollah does not fall under the proposed definition.

Nevertheless, in a trial where prosecutors claimed that the captured Hezbollah fighters were unlawful combatants and, hence, unable to avail of Prisoner of War (POW) status, the defense claimed that Hezbollah fighters were "combatants who took part in a war between two countries, Israel and Lebanon,"[364] and that the Lebanese head of state said that they were "complementary to the Lebanese army."[365] In fact, statements from senior officials were used as basis for the assertion that Hezbollah fighters are part of Lebanon's forces.[366]

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362. *See generally* Joseph P. Bialke, *Al-Qaeda & Taliban unlawful combatant detainees, unlawful belligerency, and the international laws of armed conflict*, AIR FORCE L. REV. (2004), Mar. 22, 2004, *available at* http://www.encyclopedia.com/doc/1G1-126358148.html (last accessed Nov. 5, 2008). Joseph Bialke has opined that non-compliance with combatant requisites would make the fighter an unlawful combatant. Note that unlawful combatants is also the same term that the U.S. government uses in classifying detainees who are imprisoned in Guantanamo and it is asserted that Prisoner of War (POW) status does not apply to such combatants.

363. Geneva Convention (I), *supra* note 126, art. 13; Geneva Convention (III), *supra* note 126, art. 4.

364. *See* Hezbollah, Israel in Legal Battle Over Captured Fighters, *available at* http://www.aljazeera.com/me.asp?service_ID=13496 (last accessed Aug. 18, 2008).

365. *Id.*

366. The following statements by Lebanese high officials were cited by counsel in that case as their bases:

> President Emil Lahoud ("Hezbollah is the national resistance force, which complements the power of the Lebanese Army"); Prime Minister Fouad Siniora ("The Lebanese resistance is a faithful and natural expression of the right of the Lebanese people to defend its land and its honor in light of Israeli belligerence, threats and aspirations"); former defense minister Abdul Rahim Mourad ("Considering Lebanon's meager resources, reinforcing the resistance is the desirable method for reinforcing the country's military strength"); and Chief of Staff Michel Suleiman ("Reinforcing the resistance is one of the central principles of the Lebanese military doctrine").

Aryeh Dayan, POWS or illegal combatants?, *available at* https://www.haaretz.co.il/hasen/spages/842273.html (last accessed Nov. 5, 2008).

The factual circumstances seem to provide that the belligerency status of Hezbollah and its fighters is in question. This is because they clearly have not followed the laws and custom of war; neither have they fixed a distinctive sign recognizable at a distance, as required by the Geneva Conventions in order to avail of POW status. Nevertheless, the strong indication that Hezbollah forces may be considered members of Lebanon's armed forces because of pronouncements from Lebanon's government sidesteps the belligerent status issue. This makes Hezbollah fighters instruments of the state. Ironically, their status here hinges on the subjective intent of the government in objectively determining their status as belligerents. As Detter stated, however, subjective elements can never be entirely removed from war.[367]

The proposed definition of war would, thus, apply to the Lebanon conflict and would mark those hostilities as a war. In fact, this conflict has already been called a war, albeit under different names.[368]

B. Recent U.S. Conflicts as War?

11 September 2001 remains a pivotal moment in the U.S. Not only was it the day of the most infamous terrorist attack in history, it also marked the beginning of doctrinal shifts in international law and U.S. foreign policy. There are three significant conflicts the U.S. entered into since 9/11, all of which can be traced to the terrorist attack on the twin towers: the War on Terror, the invasion of Afghanistan, and the invasion of Iraq. While the U.S. administration has long considered the War on Terror a war, it has not considered the Afghanistan and Iraq invasions as wars.

1. The War on Terror

The so-called War on Terror began on 11 September 2001, with coordinated suicide attacks through hijacked domestic airplanes by 19 members of the Al-Qaeda terrorist network.[369] These simultaneous attacks occurred in New York, Washington, D.C., and Pennsylvania, killing over 3,000 people and destroying billions of dollars in property.[370] The goal of Al-Qaeda was to "attack the enemies of Islam all over the world."[371]

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367. DETTER, *supra* note 26, at 26.

368. Lebanon has taken to calling it the July War, while Israel has designated it the Second Lebanon War. Timeline, *supra* note 353.

369. Jeffrey F. Addicott, *Legal and Policy Implications for a New Era: The War on Terror*, 4 SCHOLAR 209, 218 (2002). Al-Qaeda is an umbrella organization founded in 1989 by a Saudi Arabian named Osama bin Laden.

370. *Id.*

371. *Id.* at 220.

Following this, the U.S. government took the position that it has been engaged for some years in a war with the Al-Qaeda terrorist movement.[372] Both the U.S. and NATO characterized the attacks as an "armed attack" on the U.S. and, therefore, equivalent to an act of war.[373] The U.S. government determined that Al-Qaeda was responsible for the attacks and that elements of the organization were linked to the Taliban government of Afghanistan, with much of its forces based in terrorist camps within that state.[374] After a refusal by the Taliban to surrender Al-Qaeda leaders, the U.S., with NATO and its other allies, invaded Afghanistan.[375]

U.S. President George Bush's choice of words in a joint address to Congress indicated the intent of the administration to place the U.S. under war-time conditions: "Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated."[376] It would seem that "the President's declaration and the subsequent Congressional resolution clearly signal an intent to attack terrorists whenever, wherever and with whatever methods the United States chooses."[377]

A cursory glance at the requisites under the proposed definition of war already indicates that no state of war exists under the supposed War on Terror. For one, there is no sustained armed conflict. There is also no protracted and intense armed violence. The War on Terror would only fall under "protracted" if "the word 'protracted' includes a conflict that is both spatially dispersed and temporally discontinuous, waxing and waning by fits and starts for over 10 years — and provided that such a discontinuous conflict is not disqualified as an armed conflict by describing it as 'sporadic.'"[378] Such an understanding of the word "protracted" would clearly not be feasible and would stretch the term to very absurd results.

Furthermore, Al-Qaeda cannot be considered to have belligerent status, nor can it even be considered a state: it "has none of the attributes of statehood (territory, population, government) and is no more than an underground terrorist movement whose recourse to violence is criminal."[379]

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372. GREENWOOD, *supra* note 31, at 787.

373. Addicott, *supra* note 369, at 221.

374. *Id.* at 222.

375. *Id.*

376. George W. Bush, Address to a Joint Session of Congress and the American People, Sep. 20, 2001, *available at* http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html (last accessed Nov. 5, 2008).

377. Brian Michael Jenkins, *Countering Al Qaeda, in* DEFEATING TERRORISM: SHAPING THE NEW SECURITY ENVIRONMENT 141 (2004).

378. Berman, *supra* note 264, at 32-33.

379. GREENWOOD, *supra* note 31, at 787.

Hence, the U.S. cannot be considered to have been at war or in armed conflict with Al-Qaeda even after 9/11, much less for years after that.[380] "International law has a definition of war, and it refers to places where intense, protracted, organized inter-group fighting occurs. It does not refer to places merely where terrorist suspects are found."[381]

The war on terror, however, does seem to meet the second requisite. The attack on the World Trade Center, as well as the suicide attacks aimed at both the Pentagon and the White House, could arguably have threatened the existence of the U.S. Government. Nevertheless, it must be remembered that this requisite is in the definition to provide for the scale of warfare, serving as a threshold of intensity. Since the War on Terror does not involve a consistently high scale of intensity of violence, it is submitted that, despite the grand attack on the World Trade Center, the level of intensity here does not meet the threshold of "threatening the existence of the government or of an equivalent juridical entity."

Since the so-called War on Terror does not even meet the initial requisites under the proposed definition — in fact, several authors agree that a state of war and its legal implications cannot apply to the war on terror[382] — the question remains then as to what the status of the U.S. is with regard to terrorism? Brian Michael Jenkins stated that "America is not 'at war' with terrorism, which is a phenomenon, not a foe. It is trying to *combat* terrorism."[383] It is clear that the War on Terror is, in reality, not a war.

2. Afghanistan and Iraq

The invasion of Afghanistan is related to the War on Terror and the 9/11 attack. After the terrorist attack, "the U.S. demanded that Afghanistan, long suspected to have financed and supported [Osama] Bin Laden, surrender him and all the members of his terrorist network."[384] The Taliban refused to do so and also refused to close down the terrorist camps located within its territory.[385] As a result, on 7 October 2001, the U.S. and its allies attacked Afghanistan with "a campaign designed to 'decapitate' the Taliban and Al

380. *See generally* GREENWOOD, *supra* note 31.

381. O'Connell, *supra* note 318, at 539 (Despite the appropriateness of Mary Ellen O'Connell's position on the War on Terror, she continues to equate a war with armed conflict and considers them one and the same. Many of the elements of a war that she refers to are reflected in the proposed definition of this Note.).

382. GREENWOOD, *supra* note 31, at 787; O'Connell, *supra* note 318, at 539; Jenkins, *supra* note 377, at 141.

383. Jenkins, *supra* note 377, at 141 (emphasis supplied).

384. Juan, *supra* note 32, at 503.

385. Addicott, *supra* note 369, at 218.

Qaeda leadership of Afghanistan."[386] Operation Enduring Freedom, as the operation was called,[387] was largely considered a success as the Taliban government was toppled, Al-Qaeda operatives fled, and a new democratic government was put in place in Afghanistan.[388] Nevertheless, some writers believe that the conflict is not over yet.[389]

In 2003, the U.S., along with a "coalition of the willing," which initially included the Philippines, also invaded the country of Iraq. This invasion was dubbed Operation Iraqi Freedom.[390] Coalition forces toppled the Hussein Iraqi government, defeated much of the Iraqi regular armed forces, and captured key cities in only 21 days.[391] On 1 May 2003, Bush declared the conflict over.[392]

Based on the factual circumstances, and applying the requisites of the proposed definition of war, both the Afghanistan and Iraq invasions may be considered as war, in the legal sense.

Both involved sustained armed conflicts that had intense and protracted violence. The term protracted may be applied because many do not believe that the hostilities in those countries have ended as of this writing.[393] Although Bush declared an end to major combat in Iraq in May 2003,[394] the

386. Juan, *supra* note 32, at 504.

387. Operation Enduring Freedom (OEF) U.S. Casualty Status Fatalities as of: November 5, 2008 10 a.m. EDT, *available at* http://www.defenselink.mil/news/casualty.pdf (last accessed Nov. 5, 2008).

388. Dan Plesch, *Can the Afghan Peace Hold?*, OBSERVER, June 23, 2002, *available at* http://www.guardian.co.uk/world/2002/jun/23/afghanistan (last accessed Nov. 5, 2008).

389. *Id.*; Paddy Ashdown, *Beware the Peace That Kills*, OBSERVER, Nov. 18, 2001, *available at* http://www.guardian.co.uk/world/2001/nov/18/afghanistan.terrorism7 (last accessed Nov. 5, 2008).

390. George W. Bush, President Discusses Operation Iraqi Freedom at Camp Lejeune, Apr. 3, 2003, *available at* http://www.whitehouse.gov/news/releases/2003/04/20030403-3.html (last accessed Nov. 5, 2008).

391. *War in Iraq*, CNN.COM, May 2003, *available at* http://edition.cnn.com/SPECIALS/2003/iraq/ (last accessed Nov. 5, 2008) [hereinafter *War in Iraq*].

392. George W. Bush, *President Declares End to Major Combat in Iraq*, CBS NEWS, May 1, 2003, *available at* http://www.cbsnews.com/stories/2003/05/01/iraq/main551946.shtml (last accessed Nov. 5, 2008).

393. *See* Griff Witte, *The Emerging Epicenter in the Afghan War*, WASH. POST, Mar. 15, 2007, at A12 (for Afghanistan); Lennox Samuels, *Unsafe Haven: Baghdad's Green Zone has become the latest battleground in the struggle for Iraq*, NEWSWEEK, Apr. 28, 2008, *available at* http://www.newsweek.com/id/134596 (last accessed Nov. 5, 2008) (for Iraq).

394. *War in Iraq*, *supra* note 391.

continued presence of U.S troops, as well as the ever-escalating violence, and various ongoing military operations in Iraq and Afghanistan seem to prove that hostilities have not ended.[395] Even so, from a legal standpoint, those conflicts can be considered to have ended when the opposing forces' leaders — Hussein in Iraq and the Taliban in Afghanistan — were deposed and new leaders, who did not consider themselves at war with the U.S. and the coalition forces, were put in place.[396] The very toppling of the then Iraq and Afghanistan leaders and their governments from power also meets the requisite that war must "threaten the existence of the government of a state or an equivalent juridical entity." The conflicts did not just threaten the existence of the governments of each state, but actually extinguished their existence, leading to the installation of new administrations.

Also, the conflicts were between organized belligerent factions. In Afghanistan, coalition forces went against Taliban government troops and "U.S. forces were led into conflict with the forces of another state."[397] While in Iraq, it was the Iraqi Army and its elite Republican Guard against the "coalition of the willing." Furthermore, these factions involved combatants on both sides that answered to a military command.

Since all the requisites are present in both conflicts, even without an official or subjective declaration of war, by applying the definition, it can be reasonably stated that a state of war did exist in both states.

C. Bringing Home the Definition: Applying the Definition of War in the Philippines

In the Philippines there are a number of conflicts persisting to this day. These conflicts involve several groups: Communist ideologues like the Communist Party of the Philippines (CPP) and the New People's Army (NPA), and Islamic separatists like the Moro National Liberation Front (MNLF) and the Moro Islamic Liberation Front (MILF). All consider themselves liberation movements.[398] There are continuous reports in the

395. *See* Project on Defense Alternatives, War Reports, *available at* http://www.comw.org/warreport/ (last accessed Nov. 5, 2008) (for continuously updated reports on the war in Iraq and Afghanistan).

396. In Afghanistan, Hamid Karzai is the head of government backed by the U.S. *See Hamid Karzai: Shrewd Statesman*, BBC NEWS, June 14, 2002, *available at* http://news.bbc.co.uk/1/hi/world/south_asia/2043606.stm (last accessed Nov. 5, 2008). In Iraq, the current head of the government is Prime Minister Nouri Maliki, who is but the latest in a line of Iraqi leaders since Saddam Hussein was toppled from power. *See* Ned Parker, *Iraq's leader can't get out of 1st gear,* L.A. TIMES, June 6, 2007, *available at* http://articles.latimes.com/2007/jun/06/world/fg-maliki6 (last accessed Nov. 5, 2008).

397. GREENWOOD, *supra* note 31, at 787.

398. *See* Macapanton Y. Abbas, Jr., *Is a Bangsa Moro State Within a Federation the Solution?*, 48 ATENEO L.J. 290 (2003); *see also* Fermon, *supra* note 291.

news of the clashes between government forces and these "liberators,"[399] leading one to ask the question: Is the Philippines in a state of war?

1. Applying the Definition to Conflicts with Muslim Separatist Groups

The MNLF and the MILF are the two primary Muslim separatist groups in existence in the Philippines.[400] The MNLF was founded in 1969, with its main objective being an independent Bangsa Moro homeland.[401] It has a number of bases in Sulu, Tawi-Tawi, Basilan, and the Zamboanga peninsula.[402] In 1976, the Tripoli Agreement between the MNLF and the Philippine government provided for autonomy in 13 provinces and nine cities in the Southern Philippines.[403] Tensions concerning the implementation of this agreement,[404] as well as the actual signing of it, however, led to "a political split in the MNLF with Salamat Hashim and several leaders arguing against any conciliation with the government."[405] This splinter group was the MILF. The difference between the two groups rests on ideology: the MILF believes in the Islamic concept of state and

399. *See, e.g.* Isagani Palma, *Soldier-NPA Clash in Davao; 14 killed,* MANILA TIMES, July 21, 2006, *available at* http://www.manilatimes.net/national/2006/july/21/yehey/top_stories/20060721top4.html (last accessed May 7, 2007); *(UPDATE) Militiamen, MILF clash in North Cotabato*, INQUIRER.NET, Jan. 27, 2007, *available at* http://services.inquirer.net/print/print.php?article_id=45983 (last accessed Nov. 5, 2008).

400. Abu Sayyaf, an organization purporting to be a separatist group is not included in this discussion as the Philippine government considers it a terrorist organization, more akin to criminals rather than an actual separatist group. *See* Lira Dalangin-Fernandez, *Arroyo condemns Abu Sayyaf beheading of 7 captives*, INQUIRER.NET, Apr. 20, 2007, *available at* http://newsinfo.inquirer.net/topstories/topstories/view_article.php?article_id=61521 (last accessed Nov. 5, 2008) ("Arroyo said these 'acts of terror' shall not go unpunished ...."); Office of the President, PGMA's Message on Abu Sayyaf, May 28, 2001, *available at* http://www.opnet.ops.gov.ph/speech-2001may28.htm (last accessed Nov. 5, 2008).

401. Ma. Nina Blesilda C. Araneta, Philippine Internal Armed Conflict and International Humanitarian Law: Applying Common Art. 3 and Additional Protocol II to Guerrilla Situations 15 (2004) (unpublished J.D. thesis, Ateneo de Manila University) (on file with the Professional Schools Library, Ateneo de Manila University).

402. *Id.*

403. *Id.*

404. *See* Abbas, Jr., *supra* note 398, at 321.

405. Araneta, *supra* note 401, at 16.

government, while the MNLF is more inclined towards secularism and has accepted the government's offer of autonomy.[406]

In the 1990s, then President Joseph Estrada waged an "all-out war" against the MILF,[407] though supposedly waged against "Muslim terrorists."[408] When the subsequent administration came to power, peace talks were resumed with the MILF,[409] though no positive and lasting peace has yet resulted from these talks. The MILF is said to have around 2,900 troops.[410] It considers itself in a state of war, which "cannot be stopped except for the realization of the Bangsa Moro people's objectives"[411] — an independent Islamic state.[412]

Though the MNLF has signed a peace accord, it has engaged in armed conflict with the government, leading to the incarceration of its founder Chairman Nur Misuari.[413]

The first requisite may be said to have been met by the factual circumstances, as both factions are still engaged in armed conflict; such clashes, however, have been intermittent at best and are often interspersed with peace talks.[414]

With regard to the threshold of intensity under the second requisite, although it is clear that the actions of the MILF and MNLF are violent and may pose a possible threat to the peace enforced by the Philippine government, it is equally clear that such a threat is neither imminent nor overwhelming to the government's existence. The MILF and MNLF forces,

406. Salamat Hashim, Perhaps the Moro Struggle for Freedom and Self-Determination is the Longest and Bloodiest in the Entire History of Mankind, *available at* http://www.islam.org.au (last accessed May 7, 2007).

407. *Id.*

408. Inday Espina-Varona & Johnna Villaviray, *Capture of MILF camps has downside for gov't*, MANILA TIMES, June 19, 2002, *available at* http://www.manilatimes.net/others/special/2002/jun/19/20020619spe1.html (last accessed Nov. 5, 2008).

409. Araneta, *supra* note 401, at 17.

410. Federation of American Scientists, Moro Islamic Liberation Front, *available at* http://www.fas.org/irp/world/para/milf.htm (last accessed Nov. 5, 2008).

411. Hashim, *supra* note 406.

412. Araneta, *supra* note 401, at 17.

413. Al Jacinto, *MNLF Reinstalls Nur*, MANILA TIMES, Feb. 17, 2006, *available at* http://www.manilatimes.net/national/2006/feb/17/yehey/top_stories/20060217top1.html (last accessed May 7, 2007).

414. *See, e.g.* Senate of the Philippines, Press Release, New Clashes Between AFP Troops and MILF Rebels May Imperil Peace Talks — Pimentel, July 2, 2006, *available at* http://www.senate.gov.ph/press_release/2006/0702_pimentel3.asp (last accessed Nov. 5, 2008).

as of this writing, do not possess the strength to overthrow the Philippine government, neither does the violence involved in the many clashes reach the scale of hostilities that would threaten the existence of the government. Hence, it does not cross the threshold of violence under the proposed definition.

The third requisite is not met either, as there has been no protracted and intense armed violence in the Philippines between the factions involved. Admittedly, recent actions — such as the ambush and beheading of Philippine Marines by supposed MILF elements[415] — may be construed as intense armed violence. Such attacks, however, do not reach the level of intensity or violence to be considered a war.

Even if the fifth requisite of "combatants that answer to a military or non-military command" could be met, the fourth requisite of "organized belligerent factions" would still remain questionable as the MILF and MNLF have not been recognized as having belligerent status. The ambiguity in the Hezbollah discussion with regard to recognition as belligerents and combatants also applies here. It must be noted, however, that there has been no indication of any form of recognition of the MILF or MNLF as belligerents, neither has there been any statement recognizing either as complementary or as part of any other armed force. Therefore, barring any judicial pronouncements or official statements of recognition, both organizations do not have belligerent status.

For these reasons, the conflict is not a war because it does not meet all the requisites of the proposed definition of war.

2. Applying the Definition to the Conflict with the CPP-NPA

The CPP, founded by Crisanto Evangelista in 1930, would pass a number of historical milestones before reaching its current state:[416] it would be declared illegal,[417] fight as rebels against the Japanese invaders,[418] form the NPA,[419]

415. *See* Julie Alipala & Christine Avendaño, *14 Marines killed; 10 were beheaded*, INQUIRER.NET, July 12, 2007, *available at* http://newsinfo.inquirer.net/breakingnews/nation/view_article.php?article_id=76172 (last accessed Nov. 5, 2008); Joel Guinto, *(UPDATE) Esperon to MILF: 'Hand over Marines' killers'*, INQUIRER.NET, July 16, 2007, *available at* http://newsinfo.inquirer.net/breakingnews/regions/view_article.php?article_id=76903 (last accessed Nov. 5, 2008).

416. Araneta, *supra* note 401, at 12.

417. Evangelista v. Earnshaw, 57 Phil. 354 (1932) (due to seditious activities.).

418. Araneta, *supra* note 401, at 14.

419. Orlando Buenaventura, The Communist Party of the Philippines/National Democratic Front Network Abroad, *available at* http://www.globalsecurity.org/military/library/report/1989/BOG.htm (last accessed Nov. 5, 2008).

and even form a political party, the National Democratic Front (NDF).[420] The CPP-NPA amalgamation started as a core group in 1971 and reached its zenith in 1980, when it led a successful campaign with over 25,000 fighters against the Ferdinand Marcos administration.[421] While the Philippine government has maintained a policy of negotiation with the CPP-NPA,[422] the latter continue to engage in conflict and sporadic violence against the government. As a result, the U.S. designated the NPA as a foreign terrorist organization in August 2002.[423]

Based on the factual circumstances, there exists an armed conflict between the CPP-NPA and the government. The scale of such armed conflicts, however, does not reach a level that would "threaten the existence of the government or of an equivalent juridical entity."

There is strong evidence that the CPP-NPA has belligerent status because it possesses all the requisites of belligerency as a national liberation movement,[424] although the Philippine government has refused to recognize it as such.[425] As it meets all the material conditions for a condition of belligerency,[426] the conflict, thus, meets the fourth requisite under the proposed definition — organized belligerent factions — despite the Philippine government's non-recognition of belligerency. The CPP-NPA also meets the requisite concerning combatants.

The CPP-NPA conflict, however, does not meet the second requisite, which refers to the scale of conflict that could "threaten the existence of the government of a state or an equivalent juridical entity," neither does it meet the third requisite of "protracted and intense armed violence." Though there is the existence of violence and armed conflicts between the government and CPP-NPA fighters, it does not reach the "protracted" or "intense" threshold. It does not even meet the "sustained" threshold as earlier stated.

Based on the proposed definition, it seems that the CPP-NPA and the Philippine government are currently not in a state of war.

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420. *Id.*

421. *Id.*

422. *Gov't pursuing with peace process CPF-NPA*, GOV.PH NEWS, Dec. 23, 2002, *available at* http://www.gov.ph/news/default.asp?i=2388 (last accessed Nov. 5, 2008).

423. Colin L. Powell, Designation of a Foreign Terrorist Organization, Aug. 9, 2002, *available at* http://www.state.gov/secretary/former/powell/remarks/2002/12542.htm (last accessed Nov. 5, 2008).

424. Fermon, *supra* note 291, at 76.

425. *Id.*

426. LAUTERPACHT, RECOGNITION, *supra* note 285, at 176; SHAW, *supra* note 110, at 569; Fermon, *supra* note 291, at 6.

In sum, this Note has determined that the Lebanon conflict is a war, the U.S. War on Terror is not a war, while the U.S.-led invasions into Iraq and Afghanistan are wars. Finally, in the Philippine setting, the Philippines is not in a state of war with either the MNLF, the MILF, or the CPP-NPA.

VI. CONCLUSION

The world did not seek, neither did it ask for, the existence of war. It did not expect, nor did it invite, a confrontation with the complexities of international law on war. More than any other time in world history, however, its wars are out of control, undefined, and often legally indescribable.

Nevertheless, the capacity of a legal system is often measured by how well it adapts to the exigencies of reality. Every time the world thinks that international law has met its capacity to meet a challenge or a controversy, its capacity proves limitless. It achieves what is necessary, such as create a definition of war, when to do otherwise may well cripple the legalities of a state of war.

The first measure of any academic discussion is definition. Yet, as this Note has stated, international law does not recognize the existence of an accepted definition of war. The academe has been tasked to fill this void. Despite many scholarly attempts to do so, none have embarked on a comprehensive study of the subject matter.

The foremost reason for having a definition of war is so that parties may know when a state of war legally exists. With a definition of war, the ambiguity that often plagues the application of the legal effects of war can be minimized.

This Note has derived a definition of war from various common characteristics which were taken from sources of international law. Following the same basic premise of the ILC when it drafted a legal definition of aggression by reference to the elements which constitute it,[427] it also studied the subject matter of war and drafted a definition by referring to the elements and characteristics which constitute it, the primary characteristic of which is objectivity.

After extensive study and analysis, and using Detter's definition of war as a template, the proposed definition of war this Note has arrived at is as follows: *War is a sustained armed conflict that threatens the existence of the government of a State or an equivalent juridical entity, and which involves protracted and intense armed violence between States and/or organized belligerent factions, consisting of combatants that answer to a responsible military or non-military command.*

427. ILC Report Defining Aggression, *supra* note 42.

Such a proposed definition would serve no purpose unless it can be practical, relevant, and applicable. Thus, using the requisites of the definition, case studies of the conflict in Lebanon, the War on Terror, the U.S.-led invasions into Iraq and Afghanistan and the Philippine insurgencies were carried out. When the factual circumstances of the conflict met all the objective criteria as laid down by the proposed definition of war, then it followed that a state of war existed and the attendant legal effects of war applied. It was, thus, determined that the Lebanon war was indeed a war, the War on Terror was not a war, while the Iraq and Afghanistan invasions were wars. The Philippine insurgencies were not considered as wars because they did not meet all the elements.

Much of the thrust and focus of this work has been on crafting a definition of war as a viable solution to the subjective ambiguity problem. This work has also attempted to fill a void in international law where, before this study, there was no viable definition of war. But in no case does this work advocate that, by defining war, it should be countenanced as a valid act of any state or party. War should never return to the level of pre-eminence it enjoyed when it was considered a vital part of diplomacy.

The world does not seek war. The world seeks to end war. But war cannot be dealt with, and neither can peace be achieved, unless it is defined. The world cannot deal with war unless we know what war is, in a legal sense. This work has attempted to define war. Defining war is but the first step of meeting the goal of achieving peace. By defining it and naming it, we can show our mastery over it, as Adam did in the Garden of Eden, when he named the animals of the world.[428] Adam proclaimed man's dominion over earth with that act. It is hoped that man can now have dominion over war with this definition.

VI. EPILOGUE: A PROPOSAL

In the course of applying the definition to the case studies, a number of procedural, administrative, and application issues came to the fore. For example, how would the international community accept the definition as binding and then apply it?

In this light, it seems appropriate to include, by way of an epilogue, a modest proposal that serves to initially answer the issue of application. Comprehensive and exhaustive answers to largely procedural and administrative questions for the international field are not entirely possible because of the already large scope and breadth of this study. Nevertheless, it is hoped that the initial proposal can be a good starting point for later research into the subject matter, as well as a plausible solution which takes into consideration the realities of international law.

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428. *Genesis* 2:19.

This Note proposes that the definition of war be codified in the same manner that a definition of aggression was codified by the ILC and later accepted and ratified by the U.N. General Assembly through a resolution.[429]

A. Creating a Proposed Draft Resolution on the Definition of War

One factor that has emboldened the author to pursue the main proposition of this Note is the definition of aggression which the U.N. passed in 1975. The definition of aggression initially suffered from a number of roadblocks, some of which the proposed definition of war faced as well.

The ILC studied a report entitled "The Possibility and Desirability of a Definition of Aggression," which was prepared as an annex of the Special Rapporteur's Report on the Draft Code of Offences against the Peace and Security of Mankind.[430] The Special Rapporteur stated that "whenever governments are called upon to decide on the existence or non-existence of 'aggression under international law,' they base their judgment on criteria derived from the 'natural' notion of aggression ... and not on legal constructions."[431] The Special Rapporteur came to the conclusion that this "natural notion" of aggression is a "concept *per se*," which "is not susceptible of definition."[432] "A 'legal' definition of aggression would be an artificial construction," which could not be comprehensive enough to comprise all imaginable cases of aggression, since the methods of aggression are in a constant process of evolution.[433]

In a later session of the ILC, some members considered the proposed definition of aggression "to be unsatisfactory as it did not comprehend all conceivable acts of aggression and that it might prove to be dangerously restrictive of the necessary freedom of action of the organs of the United Nations, if they were called upon in the future to apply the definition to specific cases."[434] Yet despite these problems, the ILC did not abandon the creation of a definition of aggression and it was later presented and then ratified by the U.N. General Assembly.[435] It was concluded that it was both "possible and desirable, with a view to ensuring international peace and security and to developing international criminal law, to define aggression by reference to the elements which constitute it."[436]

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429. U.N. Definition of Aggression, *supra* note 115.

430. ILC Report Defining Aggression, *supra* note 42.

431. *Id.*

432. *Id.*

433. *Id.*

434. *Id.*

435. *Id.*

436. U.N. Definition of Aggression , *supra* note 115.

This Note has also crafted a definition of a concept which has traditionally and historically been judged on its natural notion by states, rather than through its legal constructions. As a result, interesting parallels may be seen between aggression's definition and that of war. Both concepts were originally understood and seen only in their "natural" conceptions rather than their legal notions. Aggression was defined by reference to the elements which constitute it. War, under this Note, has been defined by reference to the elements and characteristics which also constitute it.

Because of the many parallels between the two legal terminologies, this Note modeled much of the provisions of this Draft Resolution on the Definition of War on the provisions of the Resolution on the Definition of Aggression. Both were considered incapable of definition, because they were seen as natural phenomena. Yet aggression became the subject of intense study and discussion, later evolving into a viable part of international law upon the signing of the resolution. It is hoped that the definition of war will have the same fate.

This Resolution includes, in Article 1, a definition of war and non-state parties with belligerent status. Article 2 of the Resolution provides that any armed conflict which falls under the definition of war should be legally considered, *prima facie*, as a war. The party entrusted to determine such a state in case of conflicting claims of war, is the Security Council. It is therefore tasked with ascertaining the facts of a situation and then determining whether a state of war exists based on the definition of war. Any such decision made by the Security Council with regard to the existence of war would have a binding legal effect, as mandated by the U.N. Charter in Article 25 which states that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[437]

Article 3 precludes the possibility of the definition being used as a means of legalizing the use of force or an act of aggression which would be against the Charter. Article 4 states that the definition may not be used to diminish or enlarge the scope of the Charter. Article 5 provides that the definition of war may not be used as a means of granting belligerency status to any non-state party, while Article 6 provides that nothing in the definition may be used to prejudice the right to self-determination, freedom, and independence. Finally, Article 7 provides for a rule of construction.

B. The Draft Resolution on the Definition of War

437. U.N. Charter art. 25.

UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 8888 (XXXX)

DEFINITION OF WAR

The General Assembly,

Having considered the report of the Special Committee on the Question of Defining War, established pursuant to its Resolution 7777, covering the work of its eighth session, held from 11 June 20XX to 31 July 20XX, including the draft Definition of War adopted by the Special Committee by consensus and recommended for adoption by the General Assembly,

Convinced that the revival of the term of War would contribute to the objective determination of a state of war between state and/or non-state parties and,

Deeply convinced that the adoption of the Definition of War would contribute to the strengthening of international peace and security,

(1) Approves the Definition of War, the text of which is annexed to this present resolution;

(2) Expresses its appreciation to the Special Committee on the Question of Defining War for its work which resulted in the elaboration of the Definition of War;

(3) Calls upon all states to refrain from acts of war and other uses of force contrary to the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations;

(4) Calls the attention of the Security Council to the Definition of War, as set out below, and recommends that it should, as appropriate, take into account that Definition as guidance in the determination, in accordance with the Charter, of the existence of a state of war.

ANNEX

5555th plenary meeting

9 September 20XX

The General Assembly,

Basing itself on the fact that one of the fundamental purposes of the United Nations is to maintain international peace and security and to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of war or other breaches of the peace,

Recalling that the Security Council, in accordance with Article 39 of the Charter of the United Nations, 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,

Recalling also the duty of States under the Charter to settle their international disputes by peaceful means in order not to endanger international peace, security, and justice,

Bearing in mind that nothing in this Definition shall be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations,

Reaffirming the duty of States not to use armed force to deprive peoples of their right to self-determination, freedom and independence, or to disrupt territorial Integrity,

Reaffirming also that the territory of a State shall not be violated by being the object, even temporarily, of military occupation or of other measures of force taken by another State in contravention of the Charter, and that it shall not be the object of acquisition by another State resulting from such measures or the threat thereof,

Reaffirming also the provisions of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,

Convinced that the adoption of a Definition of War ought to have the effect of deterring a potential aggressor state or non-state party, would simplify the determination of a state of war and the implementation of measures to negate war, and would also facilitate the protection of the rights and lawful interests of, and the rendering of assistance to, the victim,

Believing that, although the question of whether a state of war exists must be considered in the light of all the circumstances of each particular case, it is nevertheless desirable to formulate basic principles as guidance for such determination,

Adopts the following Definition of War:

Article 1. War is a sustained armed conflict that threatens the existence of the government of a state or an equivalent juridical entity, and which involves protracted and intense armed violence between States and/or organized belligerent factions, consisting of combatants that answer to a responsible military or non-military command.

Explanatory note: In this Definition the term "State:"

(a) Is used without prejudice to question of recognition or to whether a State is a member of the United Nations;

(b) Includes the concept of "a group of states" where appropriate.

Furthermore, in this definition the term "belligerent:"

(a) Is used with reference to the requisites of belligerency under international law;

(b) That the said requisites for belligerency are as follows: the existence of an armed conflict of a general nature within a state, the occupation by the rebels of a substantial portion of the national territory, the conduct of hostilities in accordance with the rules of war and by organized groups operating under a responsible authority and the existence of circumstances rendering it necessary for the states contemplating recognition to define their attitude to the situation.

Article 2. Any armed conflict which falls under the Definition of War shall constitute *prima facie* evidence of the existence of a state of war between the parties to the conflict, although the Security Council may, in conformity with the Charter, determine the existence of a state of war in an armed conflict.

Article 3. The Definition of War does not legalize any use of force or any act of aggression as enumerated under United Nations General Assembly Resolution 3314 (XXIX) which are in contravention of the Charter of the United Nations or the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States.

Article 4. Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.

Article 5. Nothing in this Definition could serve as recognition of belligerency status in any non-state armed group or organized military faction or organization which does not possess such belligerency status under international law.

Article 6. Nothing in this Definition could in any way prejudice the right to self-determination, freedom, and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination, nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

Article 7. In their interpretation and application, the above provisions are interrelated and each provision should be construed in the context of the other provisions.

END OF ANNEX