ALL'S FAIR IN LOVE AND WARS OF SELF-DEFENSE: IN SUPPORT OF THE "CONSERVATIVE APPROACH" TO *JUS AD BELLUM*

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"The power to wage war is the power to wage war successfully."

-Chief Justice Charles Evan Hughes

"There is only one principle of war and that's this. Hit the other fellow, as quick as you can, and as hard as you can, where it hurts him the most, when he ain't looking."

-Sir William Slim

INTRODUCTION

In late summer 2019, Israel carried out a series of drone strikes across Lebanon and Iraq.[1] Specifically, these sorties targeted "machinery vital to Hezbollah's precision-missile production effort" near Beirut and destroyed ammunition storehouses and killed a commander related to the Iranian-backed Popular Mobilization Front militia near Qa'im.[2] Israel claimed the strikes were aimed at preventing the establishment of a weapons supply line from Iran through Northern Iraq and Syria into Lebanon.[3] Israel, however, made no claims that the strikes were aimed at preventing an actual or

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1. David M. Halbfinger, Ben Hubbard and Ronen Bergman, *The Israel-Iran Shadow War Escalates and Breaks Into the Open*, N.Y. TIMES (Aug. 28, 2019), https://www.nytimes.com/2019/08/28/world/middleeast/israel-iran-shadow-war.html (Israel also carried out strikes in Northern Syria but those strikes are not discussed here).

2. *Id*.; Craig Martin, *Questions on Legality of Israeli Strikes in Iraq and Lebanon*, JUST SECURITY (Sep. 10, 2019), https://www.justsecurity.org/66120/questions-on-legality-of-israeli-strikes-in-iraq-and-lebanon/.

3. Craig Martin, *Questions on Legality of Israeli Strikes in Iraq and Lebanon*, JUST SECURITY (Sep. 10, 2019), https://www.justsecurity.org/66120/questions-on-legality-of-israeli-strikes-in-iraq-and-lebanon/.

imminent armed attack and seemed to offer no legal justification for the strikes.[4]

As befits 21st Century conflict, this situation set off a Twitter debate among international law scholars about the legality of Israel's actions.[5] Aside from discussions of the "unwilling and unable" doctrine and notions of "preventative self-defense," a particular aspect of this exchange revolved around a very specific question: whether *jus ad bellum* continues to apply where a victim state uses force in self-defense pursuant to Article 51 of the United Nations Charter.[6] Assuming for the sake of argument that, as Israel claims, it is in an ongoing international armed conflict with Iran, the scholars debated whether the *jus ad bellum* principles of necessity and proportionality continued to apply once action was legitimately taken under the UN Charter.[7]

On one side of this debate were those, like Craig Martin, who hold the 'majority' view[8] that these principles apply even after the threshold for Article 51 action has been crossed.[9] In particular, Martin stated that:

> The better view is . . . that *jus ad bellum* continues to operate, and . . . in particular the principles of necessity and proportionality continue to constrain the actions of the defending state, throughout the period of international armed conflict and *regardless of the scale of the conflict*.[10]

On the other side were those who channeled Yoram Dinstein and the so-called "conservative view." In particular, this conservative view argues that while principles of proportionality govern actions 'short-of-war,' that "once a situation of [all-out defensive] war exists, *jus ad bellum* ceases to constrain the use of force, which is now regulated by *jus in bello* alone."[11]

For those like Martin holding the majority view, Israel's strikes were subject to the principles of necessity and proportionality whether or not Israel is engaged in an ongoing all-out defensive war with Iran. To the contrary, those holding the conservative view believe that once the all-out defensive war was triggered, Israel was no longer constrained by *jus ad bellum* but only

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4. *Id*.

5. *Id*.; Craig Martin, @craigxmartin, TWITTER (Aug. 28, 2019), https://twitter.com/craigxmartin/status/1167808556458029057 (showcasing the debate between Ryan Goodman, Marty Lederman, Adil Haque, Monica Hakimi, Craig Martin, and Eliav Lieblich).

6. Craig Martin, @craigxmartin, TWITTER (Aug. 28, 2019), https://twitter.com/craigxmartin/status/1167808556458029057.

7. Craig Martin, *Questions on Legality of Israeli Strikes in Iraq and Lebanon*, JUST SECURITY (Sep. 10, 2019), https://www.justsecurity.org/66120/questions-on-legality-of-israeli-strikes-in-iraq-and-lebanon/.

8. *See id*. (describing the conservative view as the "minority" perspective).

9. *Id*.

10. *Id*. (emphasis added)

11. *Id*.

by *jus in bello*, and was (and is) thus allowed to carry on the war as it sees fit until (1) the UN Security Council intervenes or (2) Iran is defeated and can no longer carry on its war against Israel.[12]

This paper focuses on assessing the majority and conservative views and argues that Dinstein's conservative approach is the *best approach* to *jus ad bellum*. In particular, it asserts that Dinstein's framework for applying *jus ad bellum* to self-defense actions under Article 51 both (1) reconciles traditional *jus ad bellum* principles with those espoused by the ICJ in the *Nuclear Weapons* opinion, thereby making international law more coherent, and (2) ensures that *jus ad bellum* retains legitimacy by allowing states to take all necessary means—within the constraints of *jus in bello*—to ensure their continued existence once all-out defensive war is initiated. Viewed from the realist perspective of international relations scholarship, the adoption of Dinstein's approach ensures that states will remain free to defend themselves appropriately in a world without a global hegemon and in which the UN Security Council is often so divided that it often cannot reach the consensus necessary to intervene.

This paper proceeds as follows: First, it outlines the general principles of *jus ad bellum* along with the basic tenets of the majority view. Next, it describes the conservative approach taken by Dinstein and other scholars. Then, it compares the two approaches and uses ICJ case-law and realist principles of international relations scholarship to justify why the conservative view's framework is the best approach for preserving *jus ad bellum*'s legitimacy in an 'anarchic' world. Finally, it identifies several critiques of the conservative approach, addresses each, and concludes that the conservative view weathers them well.

I. THE GOVERNING FRAMEWORK: *JUS AD BELLUM*

This Part addresses the overarching framework of *jus ad bellum*. It proceeds first by analyzing the concept's general principles as derived from the UN Charter. It then discusses two opposing views of *jus ad bellum*'s application—what are termed here the majority and conservative views, respectively. In doing so, this Part sets up Part II's discussion of which approach is best.

A. General Principles

Jus ad bellum is the regime of international law that regulates the use of force and self-defense actions carried on by nation states, international

12. *See* YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE (4TH ED. 2005).

organizations, and non-state actors.[13] In modern international relations, these principles are primarily derived from Article 2(4) and Article 51 of the UN Charter.[14] Specifically, Article 2(4) states that: "All members *shall refrain in their international relations from the threat or use of force* against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[15] Article 51 provides an exception to the prohibition on the use of force when used in self-defense. Specifically, it states that:

> Nothing in the present Charter shall impair the inherent right of individual or collective *self-defence if an armed attack occurs* against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[16]

Together, these Articles operate to reserve the legitimate use of force in international relations to either that prescribed by the UN Security Council *or* self-defense under Article 51 in response to an "armed attack."[17] This paper focuses, in particular, on force used pursuant to Article 51.

Given that the prohibition on the use of force remains in place until an armed attack takes place, much ink has been spilled attempting to describe what counts as an armed attack.[18] It is generally agreed that the threshold for an armed attack is higher than that for conduct amounting to a use of force under Article 2(4).[19] There is no agreement, however, about the minimum intensity required for an action to be deemed an armed attack.[20] Nevertheless, case-law provides some guidance.

For instance, the ICJ stated in the seminal *Nicaragua* case that, without more, a state's training, arming, and equipping of armed groups operating against another state constitutes a threat or use of force but not an armed

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13. KEIICHIRO OKIMOTO, THE DISTINCTION AND RELATIONSHIP BETWEEN *JUS AD BELLUM* AND *JUS IN BELLO* 7 (2011).

14. *Id*.

15. U.N. Charter, art. 2, para. 4 (emphasis added).

16. U.N. Charter, art. 51 (emphasis added).

17. Okimoto, *supra* note 13, at 7.

18. *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 [hereinafter *Nicaragua*]; Okimoto, *supra* note 13, at 45–56.

19. Okimoto, *supra* note 13, at 46.

20. *Id*.

attack.[21] However, the dissenting opinions in that case implied that a combination of these actions, e.g., both arming *and* providing logistical support, may meet the threshold.[22] Additionally, the *Nicaragua* majority held that a state's operational control over an armed group may be enough to attribute to it an armed attack by that group. And the *Tadic* case implied that attribution is justified even where an armed group functions only as a *de facto* organ of the state, even though the state does not exercise operational control over the group's actions.[23]

Other cases indicate that (1) an armed attack is often carried out by one state against another, including by armed groups operationally controlled by one or both of those states (i.e., proxies) and (2) that armed attacks are normally launched across international borders.[24] Scholars also assert that (1) the Global War on Terrorism demonstrates that terrorist attacks can be considered armed attacks for the purposes of Article 51[25] and (2) "that, [where] a distinctive pattern of behavior emerges, a series of pin-prick assaults might be weighed in its totality and count as an armed attack."[26]

While the concept is not painted in black and white, together these principles aid the ICJ and legal experts in assessing forceful actions and determining, on a case-by-case basis, which actions amount to an armed attack and thereby activate the self-defense provisions of Article 51. After this determination has been made, however, two divergent views prescribe the legal principles governing the use of force in self-defense.

B. The Majority View

Once the threshold question for the use of force in self-defense is satisfied, many scholars agree that all self-defense actions are constrained by the principles of necessity and proportionality, *no matter the intensity of armed attack*.[27] This observation is ostensibly founded in case-law in which the ICJ has stated that "[t]he submission of the exercise of the right of self-

21. *See Nicaragua*.

22. DINSTEIN, *supra* note 12, at 203–04.

23. *Id*. at 203–04. This approach also cites the *Tehran* case for the idea that states fail in their duty to exercise vigilance to protect the interests of other states when they "tolerate, encourage, or enable armed non-state actors to attack from their territory." In doing so, these state "assume[] international responsibility for this international wrongful act of omission." *Id*. at 206.

24. Okimoto, *supra* note 13, at 46 (citing the *Wall* and *Nicaragua* cases).

25. DINSTEIN, *supra* note 12, at 206–08.

26. *Id*. at 202.

27. Craig Martin, *Questions on Legality of Israeli Strikes in Iraq and Lebanon*, JUST SECURITY (Sep. 10, 2019), https://www.justsecurity.org/66120/questions-on-legality-of-israeli-strikes-in-iraq-and-lebanon/; Okimoto, *supra* note 12, at 57; *but see* DINSTEIN, *supra* note 12, at 235.

defence to the conditions of necessity and proportionality is a rule of customary international law."[28] Thus, these principles deserve elaboration.

Specifically, in a self-defense action, necessity asks whether the use of force was necessary or whether there other, less-forceful means available to address the threat.[29] The *Nicaragua* case is instructive with regards to this approach. There, the United States argued that while acting in collective self-defense with El-Salvador, it had used force to repel Nicaraguan-affiliated armed groups who were threatening the Salvadorian government.[30] The ICJ, however, found that the United States' actions violated the principle of necessity:

> First, these measures were only taken, and began to produce their effects, several months after the major offensive of the armed opposition against the Government of El Salvador had been completely repulsed (January 1981), and the actions of the opposition considerably reduced in consequence. Thus it was possible to eliminate the main danger to the Salvadorian Government without the United States embarking on activities in and against Nicaragua. Accordingly, it cannot be held that these activities were undertaken in the light of necessity.[31]

The ICJ echoed similar reasoning in its *Oil Platforms* case, noting the United States' failure to complain or take other actions vis-à-vis Iran regarding the military activities of the platforms it attacked, and suggesting that those attacks were not necessary following the Iranian attacks on the *Sea Isle City* and the *USS Samuel B. Roberts*.[32] Thus, in scenarios in which there are alternatives to the use of force that can address the problem at hand, international actors seemingly violate the principle of necessity by resorting to violent self-defense.[33]

The principle of proportionality, on the other hand, refers to the limits and extent of an actor's forceful response to armed attack. Many legal experts agree that the principle of proportionality involves a balancing test between "an armed attack and the aim to halt and repel it."[34] Additionally,

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28. *Legality of the Threat or Use of Nuclear Weapons,* 1996 I.C.J. 245, para. 41 [hereinafter *Nuclear Weapons*].

29. Okimoto, *supra* note 13, at 91. Scholars also suggest that necessity may ask "whether the measures taken in self-defence were to the extent necessary to halt and repel an armed attack." *Id*. Since this conception is "synonymous" with the definition of proportionality articulated below, however, this paper adopts the definition of necessity cited above. *Id*. at 92.

30. *Nicaragua* at para. 237.

31. *Id*.

32. Oil Platforms (Iran v. U.S.) (Merits), 42 I.C.J. 1334 at para. 76 [hereinafter *Oil Platforms*].

33. *Nicaragua* at para. 237; *Oil Platforms* at para. 76.

34. Okimoto, *supra* note 13, at 59–60. In fact, legal experts adopt either this view or one that balances "an armed attack and the military response taken against it." This paper assumes *arguendo* that

scholars usually evaluate proportionality with reference target-selection as well as the temporal and geographic reach of the use of force vis-à-vis the armed attack.[35] Yet, while the principle of proportionality is "a universally recognised customary rule of self-defence that regulates the conduct of self-defence," there is "no universal consensus" as to its content and application.[36]

Some scholars posit that the principle of proportionality only allows such force as is immediately necessary to halt and repel the specific armed attack that triggered a victim state's Article 51 rights.[37] Under this conception, a victim state's self-defense actions would no longer be proportionate once conditions were returned to the *status quo ante bellum*. This seems to be the principle guiding the ICJ in the *Armed Activities* case where the court stated:

> . . . the Court has already found that the legal situation after the military intervention of the Ugandan forces into the territory of the DRC was, after 7 August, essentially one of illegal use of force by Uganda against the DRC (see paragraph 149 above). *In view of the finding that Uganda engaged in an illegal military operation against the DRC, the Court considers that the DRC was entitled to use force in order to repel Uganda's attacks*. The Court also notes that it has never been claimed that this use of force was *not proportionate* nor can the Court conclude this from the evidence before it. It follows that any military action taken by the DRC against Uganda during this period *could not be deemed wrongful* since it would be justified as action taken in self-defence under Article 51 of the United Nations Charter.[38]

Thus, this definition of proportionality seemingly limits actions in self-defense only to those that can be classified as a direct counterstrike to an aggressor's actions, i.e., a tit for tat that restores the international situation to what it was before the attack took place.

Many other experts assert that the principle of proportionality allows victim states to take self-defense measures that go beyond merely halting and repelling the aggressor's armed attack and instead serve to deter future attacks.[39] This type of reasoning has been used, for instance, to justify the

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the first balancing test, i.e., that between the armed attack and the aim to repel and halt it, is the correct approach. This assumption is based on the favorable language in a report made by the UN International Law Commission as well as in the *Oil Platforms*, *Wall*, and *Armed Activities* cases. *See id*.

35. Okimoto, *supra* note 13, at 62.

36. *Id*. at 59.

37. *Id*. at 61.

38. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, para. 304 [hereinafter *Armed Activities*] (emphasis added).

39. Okimoto, *supra* note 13, at 61 (citing multiple sources).

United States' actions against Al Qaeda in the wake of the September 11th attacks. The following statement was made by the US representative to the United Nations following those terrorist actions:

> In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defense following armed attacks that were carried out against the United States on September 11, 2001. . . . In response to these attacks, and in accordance with the inherent right of individual and collective self-defense, United States armed forces have initiated actions designed *to prevent and deter future attacks* on the United States.[40]

State practice in the era of the War on Terror continues to reinforce this deterrence view.

When assessing this principle within either conception of proportionality, the ICJ and legal experts generally evaluate self-defense actions vis-à-vis their target selection and temporal and geographic scope with relation to the Article 51-triggering armed attack. As to target selection, experts tend to agree that "the targets which the victim state is attacking should be objects that are relevant to the initial armed attack."[41] This seems to mean that the victim state must aim its response against the equipment and personnel involved in the armed attack and that other targets are off-limits. The *Oil Platforms* case seemingly confirms this approach. There the ICJ implied that since the US could not show that some of the platforms it attacked were involved in the attacks on the *Sea Isle City* and the *USS Samuel B. Roberts*, that they were not "appropriate military target[s]."[42] Additionally, the court viewed the US response in light of the entirety of Operation PRAYING MANTIS during which multiple Iranian ships and facilities had been attacked.[43] It concluded that in response to "the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life," that attacks on a

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40. Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, available at https://www.cambridge.org/core/journals/international-legal-materials/article/united-nations-security-council-letter-dated-7-october-2001-from-the-permanent-representative-of-the-united-states-of-america-to-the-united-nations-addressed-to-the-president-of-the-security-council/A4457B7F32A6AA183FD0C5FFEF73073F (emphasis added).

41. Okimoto, *supra* note 13, at 62.

42. *Oil Platforms* at para. 76.

43. *Id*. at para. 77.

wide-array of targets not immediately related to the alleged armed attack were disproportionate.[44]

With regards to temporal scope, the proportionality of the victim state's use of force is generally assessed from the moment of the armed attack to the time at which attack is halted and repelled or further attacks have been effectively deterred.[45] The problem arises in determining when the self-defense actions are appropriately deemed at an end. Possible endpoints include the time at which the victim state's actions have returned the situation to the *status quo ante bellum* or once all the aggressor's forces participating in the armed attack have been destroyed.[46] Once one of those endpoints is reached, the use of force beyond that point is appropriately classified as disproportionate.[47]

Evaluating proportionality with reference to the geographic scope of self-defense actions is more problematic as there is no real consensus among legal experts.[48] There are essentially two viewpoints: (1) self-defense actions must be confined to the geographic area of the armed attack itself or (2) such actions may extend to the source of the armed attack.[49] For instance, some would argue that in a situation where an aggressor invades and occupies the victim state, that self-defense actions are only proportionate so long as they remain confined to the geographic areas necessary to drive the aggressor back across the international border.[50] Thus, the UK's actions during the Falklands conflict and the coalition's actions during the First Gulf War were considered appropriate as they operated only in the discrete areas that had been invaded (i.e., The Falklands and Kuwait, respectively).[51] By contrast, state practice in self-defense actions in the Global War on Terror has extended far beyond the geographic scope of the justifying armed attack. After September 11th, Congress authorized the President:

> . . . to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of

44. *Id*.
45. Okimoto, *supra* note 13, at 73.
46. *Id*.
47. *See id*.
48. *Id*. at 66.
49. *Id*. at 66–67.
50. *Id*. at 69.
51. *Id*.

> international terrorism against the United States by such nations, organizations or persons.[52]

In accordance with this authorization, the US has carried out attacks against Al-Qaeda and its affiliates in places such as Afghanistan and Yemen—regions far-removed from Ground Zero. While this practice supports the second conception of proportionality's geographic scope, some scholars opine that "this approach would render the principle of proportionality irrelevant."[53]

At bottom, whichever conception of proportionality is correct, the ICJ and most scholars believe that, along with the principle of necessity, it serves to constrain a victim state's temporary need to use force in self-defense until, as Article 51 specifies, "the Security Council has taken the measures necessary to maintain international peace and security."[54] There is an alternate view, however, that argues that there is a distinction between self-defense actions short-of-war and those that amount to all-out war, and that the principles of necessity and proportionality do not apply to the latter. For the reasons addressed below, this approach should be taken seriously.

C. The "Conservative View"

In sharp contrast with the framework set out above, a minority of scholars take the controversial approach that an armed attack of a certain intensity can trigger the legitimate use of *all-out defensive war* under Article 51 and that in such a war the principles of necessity and proportionality no longer apply.[55] This conception of *jus ad bellum*—perhaps best articulated by Yoram Dinstein—has been described as "the conservative view" and is set out in detail in this section.[56]

Like the majority view, the conservative approach to self-defense begins with the requirement that the victim state demonstrate that an armed attack has occurred. The same legal principles outlined above—for example, those espoused in the *Nicaragua* case—guide the legal inquiry into whether an armed attack has happened. After this threshold question has been answered, however, the conservative view further classifies armed attacks into two categories depending on their intensity.

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52. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. §1541 (2006))

53. Okimoto, *supra* note 13, at 71.

54. U.N. Charter art. 51.

55. DINSTEIN, *supra* note 12, at 237.

56. Eliav Lieblich, Reflections on the Israeli Report and the Gaza Conflict, JUST SECURITY (June 25, 2014), https://www.justsecurity.org/24197/reflections-israeli-report-gaza-conflict/.

The first category is comprised of armed attacks of lesser intensity, including small-scale, localized attacks directed at particular units or personnel—for instance, what the United States has defined as attacks requiring unit-level self-defense.[57] As an example of this type of attack, Dinstein cites the *Corfu Channel* case in which warships in international waters were fired upon by shore batteries.[58] Noting that the ICJ stated that warships in these situations would be entitled to "retaliate quickly" with force, the author concludes that such bombardments "clearly" qualify as armed attacks under Article 51.[59] However, noting that such attacks would not require a "national," full-scale response—but instead a response "short-of-war"—Dinstein counsels that the ordinary *jus ad bellum* framework would continue to apply.[60] Thus, with regards to these types of lesser attacks, the principles of necessity and proportionality apply more or less in the same fashion as with the majority view,[61] and the conservative approach counsels that proportionality, in particular, would require "a symmetry or an approximation in 'scale and effects' between the unlawful force and the lawful counter-force."[62]

Things become interesting with the second category of higher-intensity attacks. These types of attacks include those that more immediately threaten the survival of the state and require measures of national self-defense, i.e., all-out self-defensive war. Examples include, *inter alia*, an invasion of the victim state, a serious isolated attack, or an organized series of pin-prick attacks designed to threaten the state's continued existence as a political entity.[63] Put differently, these are the types of armed attacks that are so serious that they existentially threaten the state.

In these situations, a quasi-necessity-and-proportionality analysis is completed, but only at the outset, i.e., simultaneously with the threshold assessment of the armed attack. As to necessity, the analysis is more or less the same as with the majority view. Essentially, the victim state must abide by the principle that "[b]efore . . . open[ing] the floodgates to full-scale hostilities, it is obligated to verify that a reasonable settlement of the conflict in an amicable way is not attainable."[64]

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57. DINSTEIN, *supra* note 12, at 219–20.

58. *Id*. at 220.

59. *Id*. at 221.

60. *Id*. at 220.

61. *Id*. at 237 ("To gauge proportionality in these settings, a comparison must be made between the quantum of force and counter-force used, as well as the casualties and damage sustained.").

62. *Id*.

63. *Id*. at 238.

64. *Id*. at 237.

As to proportionality, however, the conservative view takes a vastly different approach. Dinstein states that "[w]hen war looms on the horizon, the comparative evaluation of force and counter-force has to take place not at the termination of the exercise of self-defence but at its *inception*."[65] Thus, the only application of proportionality here is in the ex ante choice of all-out defensive war or measures short-of-war: if after "sifting the factual evidence" the aggressor's actions are "critical enough," "the victim State is free to launch *war* in self-defence."[66] This is where the conservative approach takes a radical turn—if the armed attack is severe enough such that war is the chosen response, proportionality *no longer applies*. Specifically, the conservative view asserts that:

> There is no support in the practice of States for the notion that proportionality remains relevant – and has to be constantly assessed – throughout the hostilities in the course of war. Once war is waging, the exercise of self-defence may bring about 'the destruction of the enemy's army', regardless of the condition of proportionality. . . . The scale of counterforce used by the victim State in a war of self-defence will be far in excess of the magnitude of the original force employed in an armed attack 'short of war', and the devastation caused by the war will surpass the destructive effects of the initial use of unlawful force. Proportionality, as an approximation of the overall force employed . . . cannot be the yardstick for determining the legality of a war of self-defence caused by an isolated armed attack.

This conceptualization, though seemingly extreme, is more or less rooted in ICJ case-law. Specifically, Dinstein cites the *Nuclear Weapons* case for the proposition that when states face existential threats—such as those posed by high-intensity armed attacks—the principle of proportionality no longer constrains a state's self-defense actions.[67] This principle is derived from statements where the ICJ reasoned that "the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake".[68]

Since nuclear weapons would violate every traditional notion of proportionality, conservatives argue that this language allows an exception to the application of the proportionality principle where survival is implicated. While this deduction seems to be the proverbial legal episode of

65. *Id*. at 238 (emphasis added).
66. *Id*. at 238 (emphasis added).
67. *Id*. at 239.
68. *Nuclear Weapons*, para. 105

"giving an inch, taking a mile," this proposition nonetheless forms the lynchpin of the conservative view.[69]

In the end, the conservative view dismisses proportionality in the context of a *war* of self-defense and argues that such a war "may be carried out until it brings about the complete collapse of the enemy belligerent, and . . . can be fought in an offensive mode to the last bunker of the enemy dictator" or until the Security Council takes actions to contain the hostilities.[70] Put differently, and couched in the majority view's language, such defensive actions "may well have to assume dimensions disproportionate to those of the attacked suffered."[71] Specifically, for Dinstein and other conservatives, this no-holds-barred approach is meant to serve as a deterrence to potential aggressors: they should not only fear the (unlikely) intervention of the UN Security Council but also the (more credible) threat of severe force used by the victim state in self-defense. In the end, this framework seeks to make potential aggressors recognize that "when an armed attack brings about a war of self-defense . . . the stakes are mortal."[72]

II. ALL'S FAIR IN *WARS* OF SELF-DEFENSE

This Part compares and contrasts the majority and conservative views and then advocates that the conservative approach correctly reconciles competing international law principles and more readily aligns with a realist view of international relations. For this reason, the conservative approach is put forth as the *best* framework for the application of *jus ad bellum*. The Part then analyzes the many counterarguments that could be mounted against the conservative view and shows why they do not fatally undermine the approach. In the end, I conclude that the conservative view's 'all's fair in defensive war' principle is best aligned with the contemporary world order.

A. The Conservative Approach as the Best Approach

While drawing from the same body of international law, the majority and conservative views reach what turn out to be vastly different conclusions regarding *jus ad bellum*'s application. Specifically, whereas the majority view asserts that the principle of proportionality governs all self-defense actions—no matter the intensity of the armed attack responded to—the conservative view argues that armed attacks that rise to a level of intensity

69. DINSTEIN, *supra* note 12, at 239.
70. *Id*. at 240.
71. *Id*. at 240.
72. *Id*. at 241.

implicating state survival and the need for all-out war obviate the application of that principle.[73] In such cases, only *jus in bello* constrains the victim state's use of force and the defensive actions may continue until the UN Security Council intervenes or the aggressor state is attrited to the point at which it capitulates.

Although these approaches are seemingly opposed to one another, a closer look suggests that the conservative view essentially reflects an adaptation of the majority view's *jus ad bellum* principles to the realities of a world in which states face existential threats. To wit, on the one hand, this approach continues to apply these principles in actions short-of-war and, on the other hand, eschews their application in situations threatening the survival of the state, i.e., those requiring all-out defensive war. At bottom, whereas majoritarians like Martin[74] ignore the implications of the *Nuclear Weapons* advisory opinion, Dinstein and other conservatives have taken the ICJ's admonitions to heart and have crafted a regime that proclaims that *jus ad bellum* principles cannot undermine the "fundamental right of every State to survival."[75] Thus, the conservative approach achieves coherence in international law by bifurcating the definition of armed attack and thereby resolving the conflict between principles of *jus ad bellum* and the fundamental right of a state to take the actions necessary to survive.

Beyond the logical niceties of legal coherence, the conservative approach finds further support in dominant realist theories of international relations. This framework—espoused most notably by authors such as Kenneth Waltz[76] and John Mearsheimer[77]—posits that world politics are anarchic and Hobbesian with each state vying with all others to survive.[78] Within this system, states are ultimately driven by self-interest and the need to use all the elements of national power to survive by achieving hegemony as a regional power.[79] Existing in a system without a global hegemon—a nation exercising sovereign control over world politics and law[80]—realist

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73. *See supra* Part I.B–C.

74. Craig Martin, *Questions on Legality of Israeli Strikes in Iraq and Lebanon*, JUST SECURITY (Sep. 10, 2019), https://www.justsecurity.org/66120/questions-on-legality-of-israeli-strikes-in-iraq-and-lebanon/ (The better view, then, is that *jus ad bellum* continues to operate, and that in particular the principles of necessity and proportionality continue to constrain the actions of the defending state, throughout the period of international armed conflict and *regardless of the scale of the conflict* (emphasis added)).

75. *See Nuclear Weapons*, para. 96.

76. KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979),

77. JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS (2014).

78. *See, e.g.*, *id*. at 4–8.

79. *Id*.

80. The United Nations is not a global hegemon as it not a unified sovereign but rather a collection of states. Should nations such as the United States or Russia refuse to abide by sanctions or contribute

theory suggests that individual states will be constrained by international law only so long as that legal regime does not interfere with their ability to survive, i.e., their ability to achieve regional hegemony.[81]

In a world governed by realist theory, the conservative view aligns well with state self-interest. Specifically, where armed attacks fall short of threatening the state's existence, the legitimacy derived from adhering to the constraining norms of international law outweighs the need to employ excessive force in violation of those norms. This corresponds well with how the conservative approach continues to apply the principles of *jus ad bellum* where an armed attack is of a lesser intensity and Article 51 self-defense measures short-of-war are taken. When the state's existence is threatened, however, the need to employ the force necessary to survive outweighs the incentives to adhere to international law. Simply put, and as with the justifications put forth for lethal self-defense under the common law, it means nothing to obey the law if you do not survive the discharge of your legal duties. Again, the conservative approach aligns well with this dynamic. To wit, when faced with the prospect of imminent demise, states are authorized to ignore the principle of proportionality and pursue all-out defensive war until the UN Security Council intervenes to save the state or until it forces the aggressor to capitulate thereby ending the existential threat. Thus, in doing so, the conservative view allows the old adage to ring true: All's fair in war.[82]

B. Weighing the Critiques

This is not to say that the conservative view does not have its weaknesses—there are numerous counterarguments to this approach. For one, it hangs a very large hat on the *Nuclear Weapons* advisory opinion. Given that almost all other case-law suggests that the principles of *jus ad bellum* continue to apply no matter the nature of the armed attack, this singular case is forced carry a great deal of weight. Nevertheless, since other cases, such as *Nicaragua* and *Oil Platforms*, do not deal with the types of existential threats addressed in the *Nuclear Weapons* opinion, the ICJ may have not yet had another opportunity to espouse the principles relevant to the conduct of all-out war in response to a threat to state survival. Thus, the lack of corresponding case-law should be taken with a grain of salt.

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their military forces to an enforcement action, any decree by the UN would have no 'teeth.' As such, there is no global hegemon in the 21st Century. *See, e.g.*, JOSEPH S. NYE, SR., UNDERSTANDING INTERNATIONAL CONFLICTS: AN INTRODUCTION TO THEORY AND HISTORY, 276–77 (1993).

81. *See id.*

82. JOHN LYLY, EUPHUES (1578).

Additionally, the conservative view places a great deal of weight on drawing a distinction between those attacks permitting responses short-of-war and those that rise to the intensity permitting all-out war.[83] Yet, the case-by-case analysis necessary to draw lines between low-intensity and high-intensity armed attacks leaves little ex ante certainty about the legality of all-out war except with regards to the most extreme attacks. This is certainly an area that requires more research and development to delineate manageable guiding principles. Nonetheless, this is a problem that already exists when making distinctions between Article 2(4) uses of force and Article 51 armed attacks,[84] and is one which has not proved destabilizing of the Charter's regime of international law.

Another critique of the conservative view is that it permits states to resort to all-out war, an option that is seemingly inapposite to one of the objectives set forth in the UN Charter: the elimination of interstate war. In fact, many scholars argue that the UN Charter enshrined the notions of the 1928 Kellogg-Briand Pact and outlawed war altogether.[85] Since the conservative approach allows the use of disproportionate force—all-out war—to defeat an aggressor, the approach would violate the original intent of the UN Charter as conceived by those scholars. It is unclear, however, that this intent is embodied in the Charter. First, one must consider that the Charter was signed in June 1945—before the unconditional surrender of Japan.[86] Specifically, Article 107 of the Charter states:

> Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action.[87]

In fact, advocates of the conservative approach argue that the historical context and language of the Charter "shows that the liberation of the immediate victim of an armed attack is not necessarily enough, and a war of self-defence may aim much higher."[88]

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83. *See supra* Part I.C.

84. *See, e.g.*, *Nicaragua*.

85. *See, e.g.*, Oona Hathaway, *Making war illegal changed the world. But it's becoming too easy to break the law*, THE GUARDIAN (Sep. 14, 2017), https://www.theguardian.com/news/2017/sep/14/making-war-illegal-changed-the-world-but-its-becoming-too-easy-to-break-the-law ("The new United Nations that they created to keep the peace was built around the commitment of the pact to outlawing war.").

86. DINSTEIN, *supra* note 12 at 241.

87. U.N. Charter art. 107.

88. DINSTEIN, *supra* note 12 at 241.

Finally, constructivist theories of international relations, such as those posited by Alastair Johnston,[89] provide one last counterargument to the conservative view. Specifically, those theories hold that international law can serve a pedagogical and socialization function vis-à-vis states.[90] For example, Johnston cites the example that an emerging China—a state with every reason to seek ICBM development—chose instead to abide by missile-limiting treaties, ostensibly to gain legitimacy in the international order.[91] This obedience to international law at the expense of realist self-interests seems to show that a legal regime can serve a powerful socialization function. As such, in a world in which we (presumably) desire an end to war, it makes since to hold fast to a regime prohibiting the resort to war in hopes that states will eventually learn to conform their conduct to that principle.

This idealist notion is perhaps the strongest critique of the conservative approach in that it stands in direct opposition to the support provided by realist theories.[92] Nevertheless, realist scholars have critiqued constructivists by examining state practice and positing that the learning effects that Johnston and others believe they observe are, in actuality, states 'pretending' to abide by international law.[93] Under this theory, states only go through the motions of obeying international law until the conditions are ripe for them to take decisive action. For instance, a realist critique of Johnston's China example could say that China was merely biding time until technological and manufacturing conditions were ripe to pursue rapid missile development. This realist critique is powerful in relation to the constructivist notions of outlawing war, especially given contemporary facts. For instance, it is common knowledge that nations like the United States, China, Russia, and others continue to train for "peer or near-peer" engagements and have well-developed operational plans tied to certain triggers on the world stage.[94] Such plans seek the decisive defeat of the enemy, not a return to the *status quo ante bellum*.[95] Thus, while these states have seemingly obeyed—since 1945— the notion that all-out war is prohibited by the UN Charter, in reality, they are preparing for just such a fight if and when it becomes necessary.

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89. ALASTAIR IAIN JOHNSTON, SOCIAL STATES: CHINA IN INTERNATIONAL INSTITUTIONS, 1980-2000 (2008).

90. *See id*.

91. *See id*.

92. *See supra* notes 77–80 and accompanying text.

93. *See, e.g*., MEARSHEIMER, *supra* note 77.

94. *See, e.g*., Dep't of Defense, National Defense Strategy of the United States 1 (2018), available at https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf (citing China, Russia, and Iran as peer or near-peer threats against which the United States is articulating a strategy to "compete, deter, and *win*". (emphasis added)).

95. *See id*.

This well-known willingness to flout the principle of proportionality threatens the legitimacy of the majority approach since everyone knows that key world powers are going to throw the concept out the window when it no longer is amenable to their desired ends. This is not the case with the conservative view, however, because it provides an emergency pressure release valve in the form of an exception to proportionality in the case of all-out defensive war.

Thus, while the conservative approach must deal with many counterarguments, these do not ultimately undermine its usefulness. At the end of the day, this paper argues that the conservative view best reconciles competing legal notions and state self-interests and, in doing so, best serves to preserve the legitimacy of *jus ad bellum* as a regime of law that all states can adhere to at all times.

CONCLUSION

At bottom, in a world without a global hegemon able to effectively coerce obedience to international law, the legitimacy of regimes like *jus ad bellum* ultimately depends upon states' willing compliance. The conservative approach is both supported by ICJ case-law and, by comporting with notions of realist self-interest, ensures that states are incentivized to obey traditional principles of international law to the maximum extent possible, i.e., up to the very moment that their imminent demise prevents them from doing so. In assuring this compliance, the conservative regime preserves the legitimacy of the principles of necessity and proportionality. Put differently, since the vast majority of conflicts and uses of force will fall outside that of the existential threat category, *jus ad bellum* will almost always apply under the conservative approach in the very same fashion that it does under the majority view, and states will almost always have appropriate incentives, i.e., concerns regarding legitimacy, to adhere to these principles. In those situations involving survival, however, self-interest requires that states take actions to ensure that aggressors are not only repulsed but are also put in a condition where their behavior is not capable of future repetition. Here, the conservative approach offers the *best* approach in our anarchic world. To wit, unconstrained by the tenets of proportionality, states will be free "wage war successfully"[96] and—within the constraints of *jus in bello*—to follow Sir Willim Slim's advice about the only principle governing *war*: "Hit the other fellow, as quick as you can, and as hard as you can, where it hurts him the most, when he ain't looking."

96. Hughes, *supra* quote 1.