Something is Not Always Better than Nothing: Problematizing Emerging Forms of *Jus Ad Bellum* Argument

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ABSTRACT

Since the adoption of the UN Charter, an unending debate concerning the permissible exceptions to the use of force prohibition has filled the pages of countless law reviews. The resulting legal regime, the jus ad bellum*, has become increasingly strained as the international community faces new threats and encounters unforeseen scenarios. The post-war legal architecture is, so the debate goes, either insufficiently enabled to address contemporary challenges or consistently undermined by actors who seek exceptions to the strict limits placed upon state conduct. Debates regarding different instances when force is used exhibit a predictable pattern. Those that wish to limit the scope of the permissible use of force by states (minimalists) offer legal arguments that emphasize the importance of adhering to a strict reading of the UN Charter. Responding, those that support broadening the instances in which force is permissible (expansionists) provide moral arguments that stress the need to bridge the gap between what the law says and what is required to ensure a just international society. This Article identifies a significant shift in the structure of this debate. Following the controversial airstrikes by US, French, and UK forces in Syria, proponents of an expansionist approach have moved from pursuing moral arguments about the necessity of armed intervention to embracing argumentative techniques that attempt to nullify minimalist apprehensions. The Article describes three forms of emergent expansionist arguments that have altered the traditional form of expansionist claims. Each instance suggests that good-faith expansionist efforts to ensure the legitimacy of the* ad bellum *regime are undermined by this emerging argumentative prioritization. The Article concludes by proposing reversion to a form of legal argument that accentuates moral implications and positions international law to maintain its*

relevancy by effectively contributing to the redress of many of the most consuming challenges that face a nonideal world.

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I. INTRODUCTION

In February 2018, Bashir Al-Assad began an offensive to reclaim the Damascus suburb of Eastern Ghouta. Week after week, the Syrian military conducted airstrikes. Barrel bombs and cluster munitions devastated residential neighborhoods that were home to nearly four hundred thousand.[1] By the end of February, human rights monitors

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reported that well over five hundred people had been killed. At least 120 were children. Thousands more were injured.[2] Hospitals and other medical facilities were targeted.[3] Amnesty International announced that civilians were trapped in a "daily barrage of attacks that [were] deliberately killing and maiming them, and that constitute flagrant war crimes."[4] UN Secretary General Antonio Guterres described Eastern Ghouta as "hell on earth."[5]

As the fighting peaked and the death toll rose, the Security Council adopted a resolution (Council Resolution 2401) demanding that all parties to the conflict allow a "durable humanitarian pause for at least 30 consecutive days."[6] The ceasefire resolution followed years of Security Council paralysis. Since the earliest stages of the Syrian civil war, Russian officials had pledged to veto any attempt by states to seek Security Council authorization to intervene.[7]

The thirty-day humanitarian pause failed to curb the ceaseless violence. In the two weeks that followed the adoption of Council Resolution 2401, more than a thousand were killed.[8] Then, on April 7, 2018, the Syrian Government deployed chemical weapons in Douma. The World Health Organization reported forty-three deaths from

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Transnational Law whose careful attention improved this Article considerably. Mistakes are our own.

1. Alex Ward, *"Siege, Starve, and Surrender": Inside the Next Phase of the Syrian Civil War*, VOX (Feb. 28, 2018, 9:00 AM), https://www.vox.com/2018/2/28/17057736/syria-eastern-ghouta-attack-assad [https://perma.cc/8UCF-4FLA] (archived Sept. 18, 2020).

2. *Syria War: Air Strikes in Eastern Ghouta 'Kill 500'*, BBC NEWS (Feb. 24, 2018), https://www.bbc.com/news/world-middle-east-43182854 [https://perma.cc/BY8V-4LPY] (archived Aug. 31, 2010); *see also Rescuers in Syria's Ghouta Unable to Count Dead as Bombing Continues*, MIDDLE EAST EYE (Feb. 24, 2018, 3:25 PM), https://www.middleeasteye.net/news/rescuers-ghouta-say-they-cannot-keep-death-count-bombardment-continue-493676101 [https://perma.cc/Q7HF-H5VD] (archived Aug. 31, 2020).

3. Martin Chulov, *Medical Crisis in East Ghouta as Hospitals 'Systematically Targeted'*, GUARDIAN (Feb. 23, 2018, 12:33 AM), https://www.theguardian.com/world/2018/feb/22/eastern-ghouta-medical-crisis-as-hospitals-systematically-targeted [https://perma.cc/HMM7-UDXL] (archived Aug. 31, 2020).

4. *Syria: Relentless Bombing of Civilians in Eastern Ghouta Amounts to War Crime*, AMNESTY INT'L (Feb. 20, 2018, 5:44 PM), https://www.amnesty.org/en/latest/news/2018/02/syria-relentless-bombing-of-civilians-in-eastern-ghouta-amounts-to-war-crimes/ [https://perma.cc/T897-888H] (archived Aug. 31, 2020).

5. *Syria War: UN Plea to End 'Hell on Earth' Eastern Ghouta Crisis*, BBC NEWS (Feb. 22, 2018), https://www.bbc.com/news/world-middle-east-43146042 [https://perma.cc/N9C7-PED2] (archived Aug. 31, 2020) (internal quotation marks omitted).

6. *See* S.C. Res. 2401, ¶ 1 (Feb. 24, 2018).

7. Anders Henriksen & Marc Schack, *The Crisis in Syria and Humanitarian Intervention*, 1 J. ON USE OF FORCE & INT'L. L. 122, 122 (2014).

8. Tamara Qiblawi, *More Than 1,000 People Killed in Eastern Ghouta in 2 Weeks, MSF Says*, CNN NEWS (Mar. 8, 2018, 7:24 PM), https://www.cnn.com/2018/03/08/middleeast/syria-eastern-ghouta-death-toll-soars-intl/index.html [https://perma.cc/KDL9-JTJ9] (archived Sept. 5, 2020).

symptoms consistent with "exposure to highly toxic chemicals."[9] States rushed to condemn the attack. The Secretary General added that "[a]ny confirmed use of chemical weapons, by any party to the conflict and under any circumstances, is abhorrent and a clear violation of international law."[10]

The United States, France, and the United Kingdom deployed force against Syria. On April 14, British, French, and US forces launched upwards of one hundred missiles at a research center in Damascus and at a weapons storage facility and command post near Homs.[11] As in 2017, when the United States conducted airstrikes against Syrian targets following an earlier chemical weapons attack by Al-Assad, the resulting use of force occurred absent Security Council approval. Nikki Haley, then the US Ambassador to the UN, claimed that "when the United Nations consistently fails in its duty to act collectively, there are times in the life of states that we are compelled to take our own action."[12]

The international legal response followed a familiar pattern. Largely, legal scholars agreed that the US-led airstrikes violated international law. The undertaken military action disregarded the prohibition on the use of force contained within Article 2(4) of the UN Charter.[13] A notable number of states, explicitly or implicitly, condoned the airstrikes as politically necessary and, in select instances, as legally warranted.[14] Legal questions arose, and the

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9. *WHO Concerned About Suspected Chemical Attacks in Syria*, WORLD HEALTH ORG. (Apr. 11, 2018), http://www.who.int/mediacentre/news/statements/2018/chemical-attacks-syria/en/ [https://perma.cc/M4VE-2K92] (archived Sept. 5, 2020).

10. U.N. Secretary-General, *Statement of the Secretary-General on Syria*, U.N. (Apr. 10, 2018), https://www.un.org/sg/en/content/sg/statement/2018-04-10/statement-secretary-general-syria [https://perma.cc/K83R-9A6B] (archived Sept. 5, 2020).

11. Somini Sengupta & Rick Gladstone, *Nikki Haley Says U.S. May 'Take Our Own Action' on Syrian Chemical Attack*, N.Y. TIMES (Apr. 5, 2017), https://www.nytimes.com/2017/04/05/world/middleeast/syria-chemical-attack-un.html [https://perma.cc/U82J-52U8] (archived Sept. 5, 2020).

12. *Id.*

13. *See* Kevin Jon Heller, *The Coming Attack on Syria Will be Unlawful*, OPINIO JURIS (Apr. 12, 2018), http://opiniojuris.org/2018/04/12/the-coming-attack-on-syria-will-be-unlawful/ [https://perma.cc/B346-HDPM] (archived Sept. 5, 2020); *see also* Marko Milanovic, *The Syria Strikes: Still Clearly Illegal*, EJIL: TALK! (Apr. 15, 2018), https://www.ejiltalk.org/the-syria-strikes-still-clearly-illegal/ [https://perma.cc/5FUK-5E9J] (archived Sept. 5, 2020); William Partlett, *Does It Matter That Strikes Against Syria Violate International Law?*, PURSUIT (Apr. 16, 2018), https://pursuit.unimelb.edu.au/articles/does-it-matter-that-strikes-against-syria-violate-international-law [https://perma.cc/B2NK-FUDF] (archived Sept. 5, 2020).

14. *See* Alonso Gurmendi Dunkelberg, Rebecca Ingber, Priya Pillai & Elvina Pothelet, *Update: Mapping States' Reactions to the Syria Strikes of April 2018*, JUST SEC. (May 7, 2018), https://www.justsecurity.org/55790/update-mapping-states-reactions-syria-strikes-april-2018/ [https://perma.cc/E3M9-JQ52] (archived Sept. 5, 2020) [hereinafter Dunkelberg et al., *Mapping Reactions*].

events in Syria became a new episode in an ongoing discourse regarding the *jus ad bellum* regime.

Since the formulation of the modern *ad bellum* framework in 1945, the accompanying legal discourse has shifted from early doubts questioning the relevancy and durability of the prohibition on the use of force.[15] Though some continue to contend that each controversial use of force further contributes to the prohibition's redundancy, this Article addresses the contemporary manifestations of the *ad bellum* debate that instead consider how best to promote the legitimacy and efficacy of the Charter-based regime.[16] Within these debates, efforts to ensure against the regime's erosion diverge. Opposing contestations situate between two broadly conceived camps—minimalists and expansionists.[17] Each grouping covers significant ideological and theoretical grounds; they both present responses to the uncontemplated or unaddressed challenges that face the *ad bellum* regime when the collective security system fails to meet its founding ideals.

The minimalist camp believes that strict doctrinal adherence to the UN Charter's prohibition on the use of force is necessary to ensure validity and to prevent abuse. Advocates resist departures from, or expansive readings of, the narrow exceptions to the use of force; they insist that the four corners of the Charter are fixed. Antithetically, the expansionist camp holds that the *ad bellum* regime is threatened by a schism between the dictates of reality or moral necessity and a formalist interpretation of the law limiting or prohibiting the use of force.[18] In contrast to minimalists, expansionists may either posit a reformist claim that an action occurring beyond acknowledged *ad bellum* limits should be permissible or work to bring the proposed action within the boundaries of legal permissibility by advocating for a broad conception of where the four corners of the Charter situate. Issue-specific *ad bellum* debates that include the use of force against nonstate actors, around the permissibility of preemptive self-defense,

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15. *See, e.g.*, Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809, 836 (1970); *see also* Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544, 545 (1971).

16. *See* Jean D'Aspremont, *Mapping the Concepts Behind the Contemporary Liberalization of the Use of Force in International Law*, 31 U. PA. J. INT'L L. 1089, 1090–91 (2010); *see also* Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 608 (2003).

17. These two camps are described in greater detail *infra* Part II.A.

18. David Hughes & Yahli Shereshevsky, *Something is Not Always Better Than Nothing: Against a Narrow Threshold Justification for Humanitarian Intervention*, OPINIO JURIS (May 7, 2018), http://opiniojuris.org/2018/ 05/07/something-is-not-always-better-than-nothing-against-a-narrow-threshold-justification-for-humanitarian-intervention/ [https://perma.cc/4DZM-Q58T] (archived Sept. 5, 2020).

and concerning the legality of humanitarian intervention reflect this discursive dichotomy.

This Article is about a contemporary shift in the argumentative form that is assumed by the *expansionist* camp. Prominent expansionist claims are drifting from the normative foundation that traditionally supports the expansionist appeal. Three types of justifications are identified that are expressive of an emergent "new expansionist" argumentative form. The first invokes rules-based justifications that appeal to the Charter regime. Citing the example of unilateral humanitarian intervention (UHI)—an instance in which a proposed use of force is not contemplated by the relevant Charter provisions—this new expansionist argument attempts to frame a proposed humanitarian action as existing within a traditional use of force exception. The second exhibits arguments that present narrow or limited justifications to permit a particular use of force. This is observed through recent contentions by states and scholars that support military responses to the use of chemical or biological weapons (CBWs). These arguments permit the use of force in response to a specific incident rather than supporting a broad intervention following a general humanitarian catastrophe. The third features procedural justifications. These appeals validate *ad bellum* claims through expansive invocations of the collective security regime.

This Article suggests that each of the identified forms reflect, and are constructed to respond to, the prominence of minimalist reasoning within the international legal discourse regarding the use of force. These new expansionist arguments attempt to reach broader audiences by prioritizing those features of their legal claims that are designed to address prevalent minimalist objections. Each implies that something—such as a limited right to UHI or the ability to forcefully respond following the use of a particular weapon—is better than nothing. This Article ponders the deficiency of this new argumentative form and suggests that it overemphasizes considerations of effectiveness to the detriment of the expansionist camp's principal appeal—its ability to bridge the gap between the *lex lata* and the *lex ferenda* by providing a moral account of how international law can respond to the evolving demands of a contemporary international environment unforeseen upon the establishment of the modern *ad bellum* regime.

Emerging expansionist claims, by states and scholars alike, increasingly prioritize the nonnormative features of their legal argument. This may facilitate an immediate objective, it may defend the necessity of a particular use of force, but it raises subsequent questions about the argument's ramifications. Throughout, this Article suggests that justifications of expansionist claims that reference particular circumstances or predetermined criteria, and fail to reflect

general principles, are imprudent and undermine the legitimacy of the *ad bellum* regime. This recalls Alan Buchanan's suggestion that

> violations of fundamental rules of existing international law, such as the prohibition against preventive war and against any use of force that does not qualify as self-defense and lacks Security Council authorization, are irresponsible, unless they are accompanied by a sincere effort to construct superior international legal structures to replace those they damage or render obsolete.[19]

This Article does not suggest that every expansionist claim include a complete reformist account or provide a full theory of international law.[20] Yet good-faith claims that wish to ensure the efficacy and legitimacy of the *ad bellum* regime are most effectively advanced when they reflect the normative allure that distinguishes expansionist appeals from alternative readings of the *jus ad bellum*.[21] New expansionist appeals, described throughout the subsequent Parts, become maladaptive to their professed purposes if they fail to ground specific pronouncements in an assessment of how the expansionist claim promotes a more just conception of international law. To avoid deviating from the distinctive normative structure that traditionally informs expansionist claims, the Article suggests that the expansionist objective—that is rendering the *ad bellum* system workable—is most effectively pursued by emphasizing moral considerations while providing legal assessments. This better situates an *ad bellum* response that both exhibits the strengths of expansionist claims and mollifies the apprehensions shared amongst minimalists.

In so doing, this Article does not assess the legality or wisdom of any particular *ad bellum* assertion. Instead, it considers the structure of the arguments that undergird issue-specific legal claims. Part II traces the post-war emergence and divergence of the minimalist and expansionist camps. Despite seemingly contradictory readings of the UN Charter and the *ad bellum* regime, this Part positions both camps as promoting contradictory approaches that are each intended to achieve a common objective. Here, the Article considers how the *ad bellum* debate has evolved and, specifically, how the expansionist camp has evolved in response to these debates. Part III details contemporary and emergent manifestations of the resulting discourses. It documents the increasing prevalence of rules-based, narrow or limited, and procedural justifications that accompany the use of force. And it

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19. ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 441 (2004).

20. *See, e.g.*, Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1746 (1995).

21. On the importance of such, see, e.g., Andrew Hurrell, *Legitimacy and the Use of Force: Can the Circle Be Squared?*, 31 REV. INT'L STUD. 15, 25 (2005).

describes how these emergent approaches blur the distinction between two separate notions of legitimacy in a manner that undermines the expansionist camp's traditional appeal. Part IV responds to these concerns. It offers a normative account that is intended to reflect the internal coherence of the expansionist *ad bellum* claim. Moral considerations, those appeals that reflect the purported necessity of force and constitute the normative core of expansionist claims, are grounded in a standard of global justice. Legal assessments, the feature of the expansionist claim that describes where the proposed action fits within the *ad bellum* framework, articulates a standard of legal soundness. This does not suggest that an effective expansionist claim must follow a prescribed formula. Instead, an account is presented that reemphasizes the purported purposes and priorities that motivate expansionist claims. Part V concludes.

Divergence from black-letter adherence to the *ad bellum* regime will always entail significant costs and present considerable risks. The strongest justification for incurring these costs and accepting these risks remains the contention that acceptance is less onerous, less perilous, than the costs and risks incurred by failing to address the dictates of reality or the demands of morality. Expansionist arguments that endeavor to amend the balance between the permissibility and prohibition of force—to ensure legitimacy, to provide adaptability, to better defend or more effectively protect—are contingent on their ability to persuade that deviation is required from something as sacrosanct as the prohibition on the use of force, must remain grounded in a strong normative rationale. When attempting to navigate a dysfunctional *ad bellum* regime, where *realpolitik* and the national interest so often guide international reactions, when the fear of inaction to an emerging threat or to an ongoing atrocity gives way to demands for action, it is tempting to preference any legal rationale that will facilitate a desired response. However, despite these demands and devoid of a strong, clearly articulated normative basis, something is not always better than nothing.

II. THE EVOLVING *JUS AD BELLUM* DEBATE

The modern *ad bellum* regime disrupted the assumption that war was an unfettered sovereign right, that war was an unregulated fact of inter-state relations. From its antecedents in the late nineteenth and early twentieth centuries, the UN Charter formalized the legal regulation of force.[22] Article 2(4), the cornerstone of the contemporary *ad bellum* regime, instilled the presumption that uses of force by states

22. *See* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 77–85 (4th ed. 2005).

were prohibited.[23] Exceptions to the prohibition were delineated. The Charter restricted the use of force to instances of Security Council approval under Chapter VII and to the right of individual and collective self-defense as per Article 51.[24] In response to a threat to, or breach of peace, the Charter empowered the Security Council to undertake collective security measures that included the use of force.

Notwithstanding the confident rhetoric accompanying this most comprehensive iteration of the *ad bellum* regime, the Charter's flaws were soon identified. The Security Council became associated with inaction. It failed to facilitate productive relations amongst the major powers and became subject to Cold War politics and international apathy.[25] Occurrences of state aggression and instances of Security Council passivity heralded prognostications of the *ad bellum* regime's demise. Ensuing debates considered whether the post-war efforts to formalize a legal framework governing the use of force maintained relevancy.[26] Article 2(4) would, however, endure. Despite periodic violations, the norm prohibiting the use of force against the territorial integrity or political independence of another state would crystalize under customary international law, achieve *erga omnes* status, and become the definitive tenet of the international order.[27]

The *ad bellum* regime's enduring relevancy did not, however, equate to confidence in its operationalization. Perceived as cumbersome and ineffectual, the *ad bellum* regime was understood as either too slow or unable to address the evolving nature of conflict and the emergence of new threats. It was assessed as ill-equipped to effectively regulate "certain types and instances of recourse to force, especially in relation to the recourse to force by non-state actors."[28] Despite broad acceptance of the Charter's legitimacy and the fundamental premise of the *ad bellum* regime, the legal and political questions raised by various use of force scenarios caused strain. Agreement concerning the appropriate recourse remains elusive. Those committed to the legitimacy of the *ad bellum* regime diverge on the necessary means both to ensure the Charter's continued relevancy and to maintain its objectives of "saving succeeding generations from

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23. U.N. Charter art. 2(4).

24. U.N. Charter arts. 42, 51.

25. *See* Vaughn Lowe, Adam Roberts, Jennifer Welsh & Dominik Zaum, *Introduction* to THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945 1, 50 (Vaughn Lowe et al. eds., 2008).

26. *See generally* Franck, *supra* note 15, at 809; *see also* Jean Combacau, *The Exception of Self-Defence in U.N. Practice*, *in* THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 9, 9 (Antonio Cassese ed., 1986).

27. *See* Barcelona Traction, Light, and Power Co. (Belg. v. Spain), Second Phase, Judgment, 1970 ICJ Rep. 3, ¶ 34 (Feb. 5).

28. *See* NOELLE HIGGINS, REGULATING THE USE OF FORCE IN WAR OF NATIONAL LIBERATION – THE WEED FOR A NEW REGIME: A STUDY OF THE SOUTH MOLUCCAS AND ACEH 47–48 (2010).

the scourge of war" and "reaffirm[ing] faith in fundamental human rights."[29]

A. *A Schism in the Emergent* Ad Bellum *Regime*

The Charter's aspirational tone, its narrow formulation of the *ad bellum* regime, is strained by the worst impulses and perils of the international community. Famously, Michael Walzer claimed that the Charter regime's rules-based, positivist conception of the *jus ad bellum* constituted a "paper world, which fails at crucial points to correspond to the world the rest of us still live in."[30] Emergent threats and modern challenges now assume alternate forms from those that informed the post-war establishment of the *ad bellum* regime. Inter-state combat has become less common.[31] Classification, and thus regulation, of armed events is more difficult as the line between international and internal armed conflict blurs.[32] Civil war and decolonization pose questions concerning the relationship between self-determination and the use of force.[33] The proliferation of transnational terrorist networks and the prevalence of nonstate armed groups stretch the *ad bellum* regime further.

A dichotomy of abandonment and devotion accompanies the Charter's waning efficacy and the international community's reiteration of its commitment to the prohibition of the use of force. Minimalist and expansionist responses structure the resulting treatments of the *jus ad bellum*. Though these approaches differ in form and substance, adherents to the expansionist and minimalist camps both endeavor to ensure the effective function of international law within a deeply conflicted and imperfect world.

In accordance with these categorizations and, as Sir Michael Wood notes, the ensuing debates regarding shortcomings in the law governing the use of force often become disputes between what the law

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29. U.N. Charter pmbl.

30. MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS xx–xxi (4th ed. 2006); *see also* Michael Glennon, *The Limitations of Traditional Rules and Institutions Relating to the Use of Force*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 79, 90–91 (Marc Weller ed., 2015) [hereinafter Glennon, *Limitations of Traditional Rules*].

31. Christine Gray notes that the conflicts between Iran and Iraq; Iraq and Kuwait; in the Falklands; between Israel and its neighboring states; and between Eritrea and Ethiopia "were exceptional rather than typical." Christine Gray, *The UN Security System*, *in* THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945 86, 87–88 (Vaughn Lowe, Adam Roberts, Jennifer Welsh & Dominik Zaum eds., 2008).

32. Gray notes the conflict in Korea, Vietnam, and the former Yugoslavia as examples. *See id.* at 88.

33. *Id.*

is and what the law ought to be.[34] Observers and actors alike ask whether existing rules—readings of the Charter's provisions and corresponding applications of the *ad bellum* regime—are sufficient to address contemporary demands or to minimize the wanton use of force. Of course, engagements with the Charter vary. Uses and users exhibit diverse motives. A state may wish to ensure a robust conception of when and under what circumstances force is allowed.[35] Alternatively, a state or other actor may wish to confine those instances when force is permissible in accordance with the belief that a strict reading of the *ad bellum* architecture advances international stability.[36] Alongside these legal engagements, commentators offer an array of assertions. These may be understood, at least in some part, as competing efforts to ensure the legitimacy of the *ad bellum* regime.

Tensions between the vision offered by the Charter's drafters and the demands of a contemporary international society continue to increase. New norms have developed, and rules and exceptions have been asserted. While several norms are fixed and provide certainty, many more exist in constant flux, their status uncertain or contested. Monica Hakimi and Jacob Katz Cogan note that, in certain instances, the uses of force "that stray from these norms are still perceived to be unlawful, but such operations might be tolerated or even supported in practice."[37] Other norms, "are highly contested. These norms' substantive content is so openly and heatedly debated that the credibility of the entire regime has been called into question."[38]

The accompanying debates assume varied forms. Our division of the *ad bellum* debate between minimalists and expansionists is but one of several articulations of the continuing discourse regarding the law that governs the use of force. Alongside substantive differences, the core of these debates exhibit contrasting conceptions of international law's purpose and function. Scholars have presented various categorizations of these opposing perspectives. Hakimi and Cogen

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34. *See* Michael Wood, *International Law and the Use of Force: What Happens in Practice?*, 53 INDIAN J. INT'L L. 345, 354 (2013).

35. Perhaps the most expansive reading of the UN Charter was contained within the U.S. 2002 National Security Strategy's interpretation of the imminence requirement. *See* WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 14–15 (2002), https://2009-2017.state.gov/documents/organization/63562.pdf (last visited Sept. 5, 2020) [https://perma.cc/P7QS-QXK6] (archived Sept. 5, 2020).

36. For example, see the formal position of the Non-Aligned Movement in relation to questions concerning the existence of a norm favoring humanitarian intervention and the expansiveness of the self-defense criteria. *See* Comments of the Non-Aligned Movement on the Observations and Recommendations Contained in the Report of the High-Level Panel on Threats, Challenges and Change, ¶¶ 14–15, 23–24, U.N. Doc. A/59/565 (Feb. 28, 2005).

37. Monica Hakimi & Jacob Katz Cogan, *The Two Codes on the Use of Force*, 27 EUR. J. INT'L L. 257, 257 (2016).

38. *Id.*

identify "two codes" that stem from the Charter but each possess their own procedural and substantive norms. The "institutional code" promotes a strict limitation on the use of force. It is emblematic of the structured and collective decision-making processes of international institutions in which the Security Council is the preferred arbiter. The "state code" favors a horizontal decision-making process through which states offer *ad hoc* responses to specific cases. Permissive norms are elevated as part of efforts to deregulate the use of force.[39]

Substantive debates regarding the permissibility of force may also be understood as methodological disputes.[40] These occur between what Olivier Corten dubs the extensive and the restrictive approaches.[41] Adherents to the extensive approach interpret *ad bellum* rules "in the most flexible manner possible: in this way, doctrines such as 'preventive self-defense', the 'implicit authorisation' of the Security Council, or the right of 'humanitarian intervention', for example, can be accepted as conforming to the rules."[42] Proponents of the restrictive approach favor a "much stricter interpretation of the prohibition, making it much less likely that new exceptions will be viewed as acceptable."[43] The result, as Corten explains, is a methodological divide. Opposing conceptions of legitimacy undergird the competing *ad bellum* assertions. The extensive approach "assumes that moral and other non-legal considerations will be taken into account, and emphasizes the practice of major states, which are considered better able to satisfy the demand of legitimacy and effectiveness."[44] The restrictive approach

> denounces this method as subjective, even ideological, preferring instead to insist on the necessity of differentiating law from politics or morality. From this perspective, the customary rule outlawing the use of force can evolve only by means of the intentional acceptance of the international community of states as a whole, the prohibition on the use of force being considered as a foundational rule of international public order.[45]

This dichotomy may be further extended. Following the Cold War, political bipolarity eased and the Security Council reengaged in legal

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39. *Id.* at 258.

40. *See generally* Olivier Corten, *The Controversies over the Customary Prohibition on the Use of Force: A Methodological Debate*, 16 EUR. J. INT'L. L. 803 (2005) [hereinafter Corten, *Controversies over the Customary Prohibition*].

41. *Id.* at 804.

42. *Id.* at 803.

43. Corten contrasts the works of Thomas Franck and Christine Gray as representative of these diverging approaches. *See id.* at 804. *See generally* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTIONS AGAINST THREATS AND ARMED ATTACKS (2002) [hereinafter FRANCK, RECOURSE TO FORCE]; CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE (Malcolm Evans & Phoebe Okowa eds., 2000).

44. Corten, *Controversies over the Customary Prohibition*, *supra* note 40, at 821.

45. *Id.* at 821–22.

debates concerning the use of force. An ensuing discourse, Matthew Waxman explains, emerged between "bright-liners" and "balancers."[46] The permissibility of a particular use of force—one that extends beyond a black-letter reading of the Charter—is either dismissed by bright-liners who promote rigid and codified rules or (potentially) advocated for by the balancers who espouse context-adaptive standards.[47] In so doing, the bright-liners employ a restrictive methodology. This is grounded in existing texts and uncontroversial doctrine. It draws upon "clear manifestations of universal *opinio juris*" to support a rigorous reading of the Charter.[48] In contrast, balancers preference an integrative approach that bends law, practice, and values to find instances that justify the authorization of a particular use of force that has been deemed necessary.[49]

These dyadic understandings of contemporary *ad bellum* debates emphasize divergent conceptions of legal methodology and doctrine. Our preferred grouping of the expansionist and minimalist approaches accentuates the role that legitimacy assumes within each camp. As these debates manifest, each camp offers a contrasting interpretation of the Charter's limits. They contest whether the four corners of the Charter are narrowly fixed or broadly conceived.

Minimalists acknowledge that a strict reading of Charter-based exceptions discounts instances where the use of force may otherwise appear necessary. Legitimacy, they assert, will be eroded through the exploitation of an alternative, more flexible, regime that facilitates state overreach. A minimalist reading of the relevant Charter provisions is therefore the surest way to preserve the system's legitimacy and protect against the dangers of excess.

Expansionists too endeavor to ensure the *ad bellum* regime's legitimacy. They, however, diverge on the means by which this is achieved. The expansionist camp is joined by the belief that legitimacy is compromised by interpretations of international law that prohibit uses of force when it is otherwise compelled by the demands of morality or necessity. The *ad bellum* regime, the expansionist suggests, should gradually develop to meet evolving circumstances. This belief conjoins the expansionist camp which otherwise expresses disparate views concerning Charter rules. In certain cases, most notably in relation to UHI, expansionists acknowledge that their endorsement of the protective use of force is beyond the Charter's limits. More often, such as in relation to the unwilling or unable doctrine, expansionists present

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46. Matthew C. Waxman, *Regulating Resort to Force: Form and Substance of the UN Charter Regime*, 24 EUR. J. INT'L L. 151, 155 (2013).

47. *Id.*

48. *See* Olivier Corten, *Regulating Resort to Force: A Response to Matthew Waxman from a 'Bright-Liner'*, 24 EUR. J. INT'L. L. 191, 191–92 (2013).

49. *Id.* at 192.

interpretative positions that stretch the boundaries of the Charter through justifications that portend to reflect the dictates of reality.

In this sense, the contributions of *both* camps are distinguishable from the more critical strands of reasoning that hold that the *ad bellum* regime is inherently flawed, that it facilitates rather than constrains the use of force by states.[50] Instead, expansionists and minimalists acknowledge the deficiencies in the *ad bellum* regime while striving to ensure that the regime functions effectively. They recognize the challenges, the novel threats, and the unanticipated scenarios that muddy contemporary legal debates regarding the use of force. A minimalist approach that assesses the permissibility of a particular use of force, that navigates the *ad bellum* regime's indeterminacy or incompleteness, understands that legal claims "will only be accepted as legitimate if they are based, methodologically speaking, on a reference to the relevant legal rule as it appears in the formal sources."[51] With similar purpose, but through divergent methods, expansionist approaches move beyond a strict reading of the Charter to suggest that a necessary use of force derives legitimacy "from the facts and circumstances that the States believe made it necessary."[52]

B. *Internal Coherence within the Evolving* Ad Bellum *Discourse*

What is broadly categorized here as expansionist arguments have, since the earliest manifestations of these *ad bellum* debates, exhibited an internal argumentative logic. Particular legal appeals are presented in response to the perception that a gap exists between how the Charter's drafters envisioned the international legal system and the realities that followed the establishment of the post-war *ad bellum* regime. Though its responses to contemporary challenges and debates concerning the use of force vary, the expansionist camp coalesces around the belief that the *ad bellum* regime's legitimacy is contingent upon bridging this gap. Accordingly, the traditional commencement of the expansionist contribution features substantive normative arguments. These normative appeals are most persuasive when they are grounded in a moral account. They are most convincing when they

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50. *See* Dawood I. Ahmed, *Defending Weak States Against the "Unwilling or Unable" Doctrine of Self-Defense*, 9 J. INT'L L. & INT'L REL. 1, 24 (2013); Ntina Tzouvala, *TWAIL and the "Unwilling or Unable" Doctrine: Continuities and Ruptures*, 109 AM. J. INT'L L. UNBOUND 266, 270 (2017), https://www.cambridge.org/core/ journals/american-journal-of-international-law/article/twail-and-the-unwilling-or-unable-doctrine-continuities-and-ruptures/D6F783C5A82C8F5CB3661929C9E4220A (last visited Sept. 20, 2020) [https://perma.cc/4HQU-E546] (archived Sept. 20, 2020). *See generally* DAVID KENNEDY, OF WAR AND LAW (2006).

51. Corten, *Controversies over the Customary Prohibition*, *supra* note 40, at 815.

52. William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq and International Law*, 97 AM. J. INT'L. L. 557, 557 (2003); *see also* Corten, *Controversies over the Customary Prohibition*, *supra* note 40, at 805.

present coherent, compelling, and overarching rationales of why force is a necessary response to a particular circumstance that would otherwise be deemed beyond the allowances provided by a formalist reading of the UN Charter.

The normative foundation of this core expansionist claim divides between distinct fields of *ad bellum* arguments concerning: the use of force in self-defense, the use of force to protect others, and collective security. This Article focuses on the latter two considerations. Expansionist accounts of the *jus ad bellum* push the law towards what proponents frame as a reasonableness or common-sense standard grounded in a basic appeal to morality.[53] These arguments share the assertion that within a nonideal world, uncontemplated or unknown upon the Charter's drafting, contemporary events compel expansive understandings of permissibility.

Events in South-Eastern Europe renewed constitutive features of the issue-specific *ad bellum* debates that now dominate contemporary scholarship and discourse. NATO's Kosovo campaign posed various questions regarding the scope and purposes of Article 2(4) and the *ad bellum* regime.[54] In the General Assembly and at the Security Council, states contested whether NATO's actions evidenced an emerging humanitarian exception to the use of force prohibition or amounted to a direct violation of the UN Charter.[55] NATO had amended its strategic purpose prior to the intervention. Previously limited to collective defense, the alliance would move to ensure that the Balkans were "free from violence and instability" and would work to build "security, prosperity and democratic civil society."[56]

The justification that accompanied the resulting military intervention would not, however, directly invoke a humanitarian exception. Instead, NATO members presented a series of moral and political appeals that did not include an explicit legal claim.[57] The resulting events placed the question of humanitarian intervention, and auxiliary *ad bellum* discussions, at the forefront of international legal discourse. The decision of a majority of NATO members to opt against formalizing what amounted to an expansionist *ad bellum* action

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53. This is documented in greater detail below. *See infra* Part III.

54. *See, e.g.*, GRAY, *supra* note 43, at 31–32.

55. *Id.*

56. *See* Press Release, Heads of State and Government Participating in the Meeting of the North Atlantic Council, An Alliance for the 21st Century, NAC-S (99)64 (Apr. 24, 1999), https://www.nato.int/docu/pr/1999/p99-064e.htm (last visited Sept. 20, 2020) [https://perma.cc/66KR-XNM8] (archived Sept. 20, 2020); *see also* GRAY, *supra* note 43, at 40.

57. GRAY, *supra* note 43, at 40; *see also* Press Release, NATO, Statement by the North Atlantic Council on Kosovo, PR (99)12 (Jan. 30, 1999), https://www.nato.int/docu/pr/1999/p99-012e.htm (last visited Sept. 20, 2020) [https://perma.cc/FGC4-744Y] (archived Sept. 20, 2020).

created uncertainty.[58] Michael Matheson, then the State Department's Legal Advisor, recalled that

> we listed all the reasons why we were taking action and, in the end, mumbled something about it being justifiable and legitimate but not a precedent. So in a sense, it was something less than a definitive legal rationale—although it probably was taken by large parts of the public community as something like that.[59]

Yugoslavia proceeded to petition the International Court of Justice. Claiming that ten NATO members had breached the use of force prohibition and violated Yugoslav sovereignty, officials in Belgrade disputed the legal status of humanitarian intervention.[60] The majority of NATO states would still not formally engage in the *ad bellum* debate.[61] Belgium, however, provided a full legal justification of the NATO decision to use force.[62] A moral justification served as the foundation for an expansionist *ad bellum* claim. The intervention was, Belgium submitted, an effort to "protect fundamental values enshrined in the *jus cogens* and to prevent an impending catastrophe recognized as such by the Security Council."[63] The threat to peace and security were referenced and forwarded alongside accounts of the unfolding atrocities. Moral assertions were grounded in a series of Security Council resolutions and recalled legal precedents. Collectively, these factors were said to evidence the Belgian claim that the undertaken humanitarian intervention was compatible with an evolving reading of Article 2(4) of the UN Charter.[64]

Belgium's legal response situates alongside a tradition of expansionist appeals. It provides a coherent argumentative structure that reflects the expansionist belief that the *ad bellum* regime's legitimacy is contingent upon reducing the gap between a strict reading of the Charter and the exigencies of a contemporary event that compels international attention. Variants of this expansionist approach have long been favored by states (both in form and in substance). Predictable results followed. A litany of engagements, often

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58. GRAY, *supra* note 43, at 41.

59. MICHAEL P. SCHARF & PAUL R. WILLIAMS, SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER 125 (2010).

60. *See* Memorial of Federal Republic of Yugoslavia, Legality of Use of Force (Yugoslavia v. Belg.), 2000 I.C.J. Pleadings 303–04 (Jan. 5, 2000); *see also* GRAY, *supra* note 43, at 44.

61. GRAY, *supra* note 43, at 45.

62. *See* Legality of Use of Force (Yugoslavia v. Belg.), Verbatim Record, ¶ 11 (May 10, 1999, 3 p.m.), https://www.icj-cij.org/public/files/case-related/105/105-19990510-ORA-02-01-BI.pdf (last visited Dec. 21, 2020) [https://perma.cc/D8CP-RELG] (archived Dec. 21, 2020).

63. *Id.* ¶¶ 11–12.

64. *Id.* ¶ 12.

forwarded by powerful states, gradually broadened the conditions in which the use of force was claimed as permissible.[65] Purportedly humanitarian justifications were understood as a means to extend narrow state interests.[66] To protect against overreach, to safeguard from abuse, a preponderance of international lawyers offer minimalist responses to expansionist claims.

The minimalist camp suggests that the language of reasonableness or sensibleness risks becoming apologetic. It contributes to a vague legal regime, defined by indeterminacy and susceptible to state manipulation. Proponents of the expansionist camp acknowledge the tension between the provision of what they consider to be the latitude necessary to address emerging needs and the potential that states may abuse this latitude. In response, the expansionist camp articulates conditions that purport to restrict potential abuse. These measures become a means to address minimalist concerns. It is, of course, necessary to engage with one's detractors. However, a series of recent expansionist *ad bellum* appeals exhibit the potential shortcomings of emphasizing a response to the minimalist critique rather than establishing the normative foundations of the expansionist claim. As these argumentative structures manifest through issue-specific *ad bellum* debates, more recent iterations of the expansionist appeal have subtly shifted to increasingly display a novel argumentative form.

III. THE EMERGING EXPANSIONIST FORM

Considerations of an argument's utility, its expediency, and its efficacy reveal much about the purpose and function of international law. Recently, prominent expansionist offerings have drifted from their traditional normative structure. These new expansionist appeals—that profess to better maintain the legitimacy of a workable *ad bellum* regime—have begun to favor assessments of effectiveness over normative articulations. They prioritize responses to minimalist concerns while relegating the need to adhere to the traditional expansionist argumentative form. As the following sections demonstrate, within contemporary debates regarding the use of force, this evolving expansionist form preferences legal appeals that provide rules-based justifications that appeal to the Charter, express a narrow or limited justification, and/or forward a procedural justification. By abandoning or deemphasizing the expansionist camp's internal normative logic, this emergent argumentative form risks becoming

65. *See generally* D'Aspremont, *supra* note 16.

66. *See generally* ANNE ORFORD, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT (2011).

myopic or *ad hoc*. These arguments neglect or relegate what should be, and traditionally has been, the principal evaluative criterion of the expansionist camp—its ability to offer a compelling normative argument that bridges the *lex lata* and the *lex ferenda* through legal appeals that respond to shifting realities and the corresponding need to act in self-defense or in the defense of others.

A. *Rules-Based Justifications that Appeal to the UN Charter: The Case of Humanitarian Intervention*

The distance between the expansionist and formalist camps is greatest in relation to the question of unilateral humanitarian intervention (UHI). Debates accompanying various military forays—in the Balkans, Sierra Leone, Libya, and Syria—offer a blend of legal, moral, political, and pragmatic appeals. The ensuing discourse has become the paradigmatic example of *ad bellum* considerations that assess the appropriateness of the use of force as a means to defend others. These debates are set against an unforgiving backdrop. Instances of genocide and mass atrocities, as Alex Bellamy tells, end either when the perpetrator succeeds or is forcibly prevented from continuing to kill.[67] The resulting debates regarding the legality and suitability of UHI commonly occur beyond the four corners of the UN Charter. Adjacent *ad bellum* debates, those concerning the use of force against nonstate actors or in preemptive self-defense, dispute the allowances that Charter formulations permit.[68] These expansionist appeals attempt to pacify minimalist concerns by assuring opponents that permissive readings remain grounded in an established use of force exception. Such parallels usually do not extend to the case of UHI.[69] Accordingly, with the elevation of state interest, the potential for the abuse of a vague legal regime is greater than in instances when (expansive) state actions are grounded in the Charter.

The moral case for UHI is nevertheless compelling. Good faith appeals to a norm permitting the use of force in the defense of others

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67. Alex J. Bellamy, *The Changing Face of Humanitarian Intervention*, 11 ST. ANTONY'S INT'L REV. 15, 17 (2015).

68. *See generally* Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L. L. 769 (2012); Jutta Brunnée & Stephen Toope, *Self-Defence Against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?*, 67 INT'L. & COMP. L.Q. 263 (2018); Amos N. Guiora, *Anticipatory Self-Defence and International Law – A Re-Evaluation*, 13 J. CONFLICT & SECURITY L. 3 (2008); Kimberley N. Trapp, *Back to Basics: Necessity, Proportionality, and the Right to Self-Defence Against Non-State Terrorist Actors*, 56 INT'L. & COMP. L.Q. 141 (2007); Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699 (2005).

69. Nico Krisch, *Legality, Morality, and the Dilemma of Humanitarian Intervention after Kosovo*, 13 EUR. J. INT'L L. 323, 325–26 (2002) [hereinafter Krisch, *Humanitarian Intervention*].

promises to alleviate the most horrific occurrences of human suffering. It compels fervent debate that spreads through emotive pleas that move the general public and the international community alike. Furthermore, moral deliberations, international criminal law, and the domestic regulation of the individual use of force all accept the defense of others as a permissible exception that parallels self-defense allowances.[70] Yet proponents of UHI are unable to ground their expansionist *ad bellum* appeal in language derived from the Charter. As Kevin Jon Heller details, the drafting history of Article 2(4) explicitly conveys that the prohibition on the use of force is without exception but for those permissions contained within the Charter itself.[71] Continuing, Heller reminds that UHI fails to find the required legal exemption.[72] Definitionally, UHI is unauthorized by the Security Council, it occurs absent the consent of the territorial state, and it does not follow an armed attack against the state using force.[73]

As with additional use of force debates, the opposing camps contest the legitimacy and relevancy of the *ad bellum* regime. The formalist camp emphasizes that the Charter does not contain any basis to support UHI. Its proponents accentuate the risk of abuse—both historical and contemporary—by states pursuing self-interest under the guise of humanitarian values.[74] Expansionist appeals accentuate the gravity of the triggering atrocity. Louis Henkin, for example, begins by establishing the emotive facts of the Kosovo case—citing massive human rights violations, the commission of crimes against humanity, and instances of genocide—as the basis for intervention.[75] By elevating morality-based considerations above what they frame as an unworkable reading of international law that unduly prioritizes anachronistic conceptions of sovereignty and order, expansionists appeal to the post-Holocaust pledge of "never again" and the moral imperatives that compel intervention.[76] These arguments depart

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70. *See, e.g.*, Rome Statute of the International Criminal Court art. 31(1)(C), July 17, 1998, 2187 U.N.T.S. 3; SUZANNE UNIACKE, PERMISSIBLE KILLING 47 (1996); Seth Lazar, *Just War Theory: Revisionists Versus Traditionalists*, 20 ANN. REV. POL. SCI. 37, 46 (2017).

71. Kevin Jon Heller, *The Illegality of 'Genuine' Unilateral Humanitarian Intervention* 2 (Amsterdam Law School, Research Paper No. 48, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3492412&download=yes [https://perma.cc/UL4U-CE4P] (archived Aug. 30, 2020); *see also* SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 71–72 (1996).

72. Heller, *supra* note 71, at 2.

73. *Id.*

74. *See* Ryan Goodman, *Humanitarian Intervention and the Pretexts for War*, 100 AM. J. INT'L L. 107, 112–13 (2006) (describing the resistance to UHI).

75. *See* Louis Henkin, *Kosovo and the Law of Humanitarian Intervention*, 93 AM. J. INT'L. L. 824, 826–28 (1999) [hereinafter Henkin, *Kosovo*].

76. *See* Krisch, *Humanitarian Intervention*, *supra* note 69, at 327; *see also* Martti Koskenniemi, *'The Lady Doth Protest Too Much': Kosovo, and the Turn to Ethics in*

significantly from black-letter legal claims. Instead, UHI's most influential endorsements provide *lex ferenda* appeals that reflect the gravity of the underlying atrocity, the necessity of intervention, and the belief that the use of force constitutes a last resort.[77]

Informed by the Kosovo fact pattern and now inspired by atrocities in the Levant, the new expansionist approach endeavors to appease the minimalist camp's enduring apprehensions. Though the Kosovo case raised the prospect of the normative and legal recognition of UHI, interventions in Iraq and Libya cast a long shadow upon military undertakings that offered humanitarian overtures and promised to produce local transformation and global stability.[78] Subsequently, the minimalist position has been widely embraced by the international legal community.[79] The first form of the new expansionist argument must contend with an unwelcome empirical record. In response to prominent minimalist concerns, proponents of an expansionist approach increasingly offer rules-based justifications that purport to limit and guide a proposed UHI by employing a vernacular that resembles existing legal regulations contained within the UN Charter.

In 2013, British Prime Minister David Cameron proposed to Parliament that the United Kingdom join the United States and consider military action in response to Syrian atrocities.[80] In support of the proposed action, the Foreign and Commonwealth Office (FCO) provided a detailed legal analysis of UHI.[81] This traced a similar argumentative line that UK officials had presented in support of NATO action in Kosovo and when imposing a no-fly zone in Iraq during the

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International Law, 65 MOD. L. REV. 159, 171 (2002); W. Michael Reisman, *Kosovo's Antinomies*, 93 AM. J. INT'L L. 860, 861–62 (1999).

77. *See* W. Michael Reisman & Myres McDougal, *Humanitarian Intervention to Protect the Ibos*, *in* HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167, 173 (Richard Lillich ed., 1973); *see also* NIKOLAOS K. TSAGOURIAS, JURISPRUDENCE OF INTERNATIONAL LAW: THE HUMANITARIAN DIMENSION 98–100 (2000); NICHOLAS J. WHEELER, SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY 51 (2000). Some proponents of UHI do, however, claim that the use of force for humanitarian purposes has received status through customary international law or that it constitutes an expansive form of self-defense. *See, e.g.*, FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 67 (3d. ed. 2005); Jens David Ohlin, *The Doctrine of Legitimate Defense*, 91 INT'L L. STUD. 119, 140–41 (2015).

78. *See* Benjamin A. Valentino, *The True Costs of Humanitarian Intervention*, 90 FOREIGN AFF. 60, 62 (2011).

79. Milanovic, *supra* note 13.

80. Nicholas Watt & Rowena Mason, *David Cameron Recalls Parliament over Syria Crisis*, GUARDIAN (Aug. 27, 2013), https://www.theguardian.com/politics/2013/aug/27/david-cameron-recalls-parliament-syria [https://perma.cc/5G3F-P85C] (archived Sept. 3, 2020].

81. 29 Aug. 2013, Parl Deb HC (2013) col. 1425 (UK), https://publications.parliament.uk/pa/cm201314/cmhansrd/cm130829/debtext/130829-0001.htm (last visited Sept. 3, 2020) [https://perma.cc/9WZJ-55JT] (archived Sept. 3, 2020).

1990s.[82] The FCO contended that if the Security Council is unable to act, international law permits the use of exceptional measures to avert a humanitarian catastrophe if

> (i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate relief; (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and (iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim.[83]

The British employ an argumentative technique that supposes legality in instances when a proposed UHI satisfies predetermined criteria. This aligns with what Ashley Deeks terms multipart tests.[84] When Security Council authorization is unlikely, safeguards and tests are employed to "structure and assess state uses of force in nontraditional contexts."[85] The British application of evaluative factors maintains consistency with traditional expansionist appeals. By requiring evidence of extreme humanitarian distress that demands immediate relief, the FCO's articulation ensures the expansionist camp's normative structure. However, Deeks emphasizes that the efficacy of a multipart test is contingent on its ability both to limit the discretion provided to the state intending to use force and the test's ability to track the Charter or a customary *ad bellum* rule.[86] This assessment drifts from the normative appeals to gravity and necessity that have structured past expansionist contentions.[87] It reflects an increasing reprioritization by the expansionist camp that foregrounds considerations of effectiveness and prioritizes the ability to appease minimalist concerns by anchoring expansionist claims in an appeal to the rule of law that reflects Charter conditions.

The protagonist of this emergent expansionist approach, Harold Koh, articulates a six-part test that is positioned as both narrower *and* wider than conventional expansionist endorsements of UHI

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82. John Bellinger, *The UK Legal Position on Humanitarian Intervention in Syria: Kosovo Redux*, LAWFARE (Aug. 29, 2013), https://www.lawfareblog.com/uk-legal-position-humanitarian-intervention-syria-kosovo-redux [https://perma.cc/3U6T-5PFU] (archived Sept. 3, 2020).

83. U.K. FOREIGN AND COMMONWEALTH OFFICE, FURTHER SUPPLEMENTARY WRITTEN EVIDENCE FROM THE RT. HON. HUGH ROBERTSON MP, MINISTER OF STATE: HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT, Jan. 14, 2014, Annex A.

84. *See generally* Ashley Deeks, *Multi-Part Tests in the* Jus Ad Bellum, 53 HOUS. L. REV. 1035 (2016).

85. *Id*. at 1035.

86. *Id*. at 1061.

87. *See* Nigel S. Rodley, *'Humanitarian Intervention'*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 775, 788–91 (Marc Weller ed., 2015); *see also* WHEELER, *supra* note 77, at 35.

> (1) If a humanitarian crisis creates consequences significantly disruptive of international order—including proliferation of chemical weapons, massive refugee outflows, and events destabilizing to regional peace and security—that would likely soon create an *imminent threat* to the acting nations (which would give rise to an urgent need to act in individual and collective self-defense under U.N. Charter Article 51);
>
> (2) a Security Council resolution were not available because of persistent veto; and the group of nations that had persistently sought Security Council action had *exhausted* all other remedies reasonably available under the circumstances, they would not violate U.N. Charter Article 2(4) if they used
>
> (3) *limited force for genuinely humanitarian purposes* that was necessary and proportionate to address the imminent threat, would demonstrably improve the humanitarian situation, and would terminate as soon as the threat is abated. In particular, these nations' claim that their actions were not wrongful would be strengthened if they could demonstrate:
>
> (4) that the action was *collective*, e.g., involving the General Assembly's Uniting for Peace Resolution or regional arrangements under U.N. Charter Chapter VIII;
>
> (5) that collective action would prevent the use of a *per se illegal means* by the territorial state, e.g., deployment of banned chemical weapons; or
>
> (6) would help to avoid a *per se illegal end*, e.g., genocide, war crimes, crimes against humanity, or an avertable humanitarian disaster, such as the widespread slaughter of innocent civilians, for example, another Halabja or Srebrenica.[88]

Koh's proposed criteria diverge from the traditional justifications and tests that supplement endorsements of UHI.[89] Gravity, so often the cornerstone of the expansionist appeal, goes unmentioned. Where the United Kingdom began its justificatory approach by demonstrating "extreme humanitarian distress," Koh prioritizes the requirement that the humanitarian crisis creates a situation of imminent threat to the acting state.[90] Koh links the proposed UHI to the Charter exception of individual and collective self-defense. This unorthodox approach fails to establish a satisfactory nexus between considerations of self-defense and the normative reasoning that would (potentially) support UHI. The suggested requirements of international disruption and a (perceived) threat to the intervening state(s) risk facilitating claims that are more self-interested than humanitarian. The principle of political neutrality—the establishing criterion often presented to limit state misuse—is rendered meaningless by an argumentative structure

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88. Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 HOUS. L. REV. 971, 1011 (2016) (emphasis omitted).

89. For a critical account of Koh's position along similar lines, see generally Kimberley N. Trapp, *Unauthorized Military Interventions for the Public Good: A Response to Harold Koh*, 111 AM. J. INT'L L. UNBOUND 292 (2017).

90. Koh, *supra* note 88, at 1011.

that replaces the requirement of impartiality with an appeal to direct benefit.[91]

Koh attempts to bridge the gap between Charter exceptions and UHI. Perhaps motivated by the sense that something is better than nothing and a desire to limit the instances when the expansive use of force is permissible, Koh's account amounts to a good faith promotion of humanitarian values. However, features of the proposed criteria undermine the internal logic of the expansionist approach. If considerations of gravity and impartiality provide normative weight, if they persuasively establish the necessity of responding to an ongoing atrocity, then imposing a criterion that elevates the narrow interests of, or the perceived threat to, the intervening state is irrelevant. Koh's approach gives undue weight to explanations that tell of why a state elects to intervene in a specific case despite a general reluctance to do so. The desire to impose limiting criteria provides a sensible means to address minimalist apprehensions. It may even be empirically warranted. However, Koh's failure to require support of the proposed intervention through normative justification undermines expansionist coherence. It is difficult to imagine a plausible argument, distinct from a separate Article 51 justification, which allows humanitarian intervention in response to genocide only if the motivating atrocity *also* poses an imminent threat to the intervening state. Though such reasoning attempts to accommodate the well-established apprehensions of detractors, abandoning the internal logic, moral appeal, and normative strength of the expansionist form risks exacerbating, not allaying, minimalist concerns.

Koh's proposed criteria further exhibits features of the new expansionist form. The fifth criterion—the supplementary requirement that collective action would prevent the use of a *per se* illegal means by the territorial state—such as the deployment of chemical weapons—is increasingly featured in expansionist appeals.[92] These narrow or limited justifications commonly undergird the arguments offered by states and scholars in support of using force in scenarios that purportedly blend humanitarian and defensive considerations.

B. *Narrow or Limited Justifications: The Case of a Chemical Weapons Exception*

Narrow or limited justifications respond to minimalist concerns by reducing the scope of an expansionist appeal. The proposed use of force is offered as a reply to an exceptional event that can be qualitatively determined. Accordingly, expansionists contend that such a narrow or

91. *See, e.g.*, Rodley, *supra* note 87, at 798.
92. Koh, *supra* note 88, at 1011.

limited reading of the *jus ad bellum* facilitates a necessary course of action while reducing the indeterminacy accompanying those broader justifications that remain susceptible to overreach. Such reasoning is most prevalent in response to the use of chemical or biological weapons by a dictatorial regime. Narrow or limited justifications feature prominently within the reasoning provided by those states that used force following the deployment of chemical weapons by Syria in 2018. This form of reasoning was again displayed by the additional states that, explicitly or implicitly, supported the offensive action as an acceptable response following the use of CBWs.

States increasingly find such form of reasoning appealing. Narrow or limited justifications—such as the determination of a CBW threshold—allow the state to pursue a strategic objective in select instances but abstain from acting in other events that may exhibit greater moral urgency but provide weaker incentives to engage. Al-Assad's use of chemical weapons evoked diverse state responses.[93] However, in contrast to previous state endorsements of UHI, those nations that expressed legal or political support for the US, British, and French airstrikes offered narrow justifications.[94]

The United Kingdom was the first of the three states that recently intervened in Syria to provide legal reasoning. The United Kingdom initially maintained its gravity-based approach. Recalling the justificatory structure that has undergirded its past, purportedly, humanitarian initiatives and that reflects the traditional expansionist form, British officials reiterated their 2013 rationale.[95] Legality was premised upon the state's ability to provide evidence of humanitarian distress, to illustrate the absence of alternative measures, and to demonstrate the necessary, proportionate, and limited application of force. Now, however, the British departed from the encompassing notion of gravity that accompanied their decision to use force in Kosovo. British officials cited the more limited use of chemical weapons in satisfaction of the test's gravity criterion. Their legal reasoning held that "military intervention . . . in order effectively to alleviate humanitarian distress by degrading the Syrian regime's chemical weapons capability and deterring further chemical weapons attacks was necessary and proportionate and therefore legally justifiable."[96]

While the British justification began by appealing to the gravity of the Syrian crisis, its turn to the specific use of CBWs was accentuated by other states. In its statement to the Security Council,

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93. Dunkelberg et al., *Mapping Reactions*, *supra* note 14.

94. *See id*.

95. PRIME MINISTER'S OFFICE, *Syria Action – UK Government Legal Position*, U.K. GOV'T (Apr. 14, 2018), https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position (last visited Sept. 20, 2020) [https://perma.cc/AVL6-MZ49] (archived Sept. 20, 2020).

96. *Id*.

France noted Syria's disregard for basic humanitarian principles. After citing the scope of the catastrophe, France shifted emphasis. Its Permanent Representative to the UN recalled that "the Syrian regime has been using the most terrifying weapons of mass destruction—chemical weapons—to massacre and terrorize its civilian population."[97] This focus on the use of chemical weapons prioritized strategic interest above gravity-based humanitarian considerations. France declared that the use of such weapons constituted a threshold of which violation could not be tolerated. In response to the deployment of CBWs, the Syrian operation was described as compliant with the UN Charter. France noted that military action "was developed within a proportionate framework, restricted to specific objectives . . . Syria's capacity to develop, refine, and manufacture chemical weapons has been rendered inoperative. That was the *only* goal and it was achieved."[98]

The United States did not provide a formal legal justification. However, US officials have linked the legality of the airstrikes with a requirement to stem the proliferation of CBWs. Then Secretary of Defense Mattis told a press briefing that "we worked together to maintain the prohibition on the use of chemical weapons. We did what we believe was right under international law, under our nation's laws."[99] US officials were clear that the humanitarian character of the military response and the accompanying rhetoric were subsidiary considerations. Principally, the airstrikes were a demonstration of "international resolve" to prevent future uses of chemical weapons in an unstable region of the world.[100]

Qualified support of the attack was forthcoming from several states whose responses ranged from indirect legal acquiescence to direct political endorsement.[101] Numerous states premised their (often

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97. François Delattre, Syria – Speech by the Permanent Representative of France to the United Nations – Security Council (Apr. 14, 2018), https://id.ambafrance.org/Syria-Speech-by-the-Permanent-Representative-of-France-to-the-United-Nations (last visited Sept. 5, 2020) [https://perma.cc/YG5J-U3X8] (archived Sept. 5, 2020).

98. *Id.* (emphasis added).

99. Helene Cooper, *Mattis Wanted Congressional Approval Before Striking Syria. He Was Overruled.*, N.Y. TIMES (Apr. 17, 2018), https://www.nytimes.com/2018/04/17/us/politics/jim-mattis-trump-syria-attack.html [https://perma.cc/72EB-V62M] (archived Sept. 5, 2020).

100. Press Release, Dep't of Def., Statement by Secretary James N. Mattis on Syria (Apr. 13, 2018), https://www.defense.gov/DesktopModules/ArticleCS/Print.aspx?PortalId=1&ModuleId=764&Article=1493610 [https://perma.cc/QV2Q-4GSB] (archived Sept. 5, 2020).

101. There were, of course, numerous states that objected to the airstrikes on the grounds that they directly violated the prohibition on the use of force contained with Article 2(4) of the U.N. Charter. *See, e.g.*, Media Statement, Ministry of Int'l Relations and Cooperation, Namibia Concerned About the Situation in Syria (Apr. 16, 2018), http://www.mirco.gov.na/documents/140810/509249/Media+Statement+on+the+situation+in+

limited) reasoning on the use of chemical weapons. Prime Minister Trudeau noted that "Canada condemns in the strongest possible terms the use of chemical weapons in last week's attack . . . . Canada supports the decision by the United States, the United Kingdom, and France to take action to degrade the Assad regime's ability to launch chemical weapons attacks against its own people."[102] Similarly, Japan's Foreign Minister stated,

> Japan's position is that we will never accept the use of chemical weapons, we believe that in the case that chemical weapons are used, the parties who used them must be punished. . . . In this context, Japan is able to support the present determination of the United States, the United Kingdom, and France not to accept the proliferation of the use of chemical weapons, and understands these measures.[103]

Similar responses were commonplace.[104] Emblematic of the new expansionist approach's prioritization of narrow or limited justifications, proponents emphasized the reduced scope of the endorsed CBW exception. Perhaps most explicitly, the Bulgarian Minister of Foreign Affairs announced,

> We consider missile strikes in Syria as a one-time military operation and as an opportunity to prevent new chemical attacks. We believe that this is a one-time limited blow to bases for the production of chemical weapons. We believe that this one-off action should prevent the use of chemical weapons against peaceful citizens.[105]

The emergence of narrow or limited appeals exhibits an outward perspective. This detracts from the expansionist camp's internal logic and normative appeal. It cuts against the very basis and rationale that has most persuasively justified deviations from a black-letter Charter account. States that offer narrow or limited justifications may be less concerned with the integrity of the *ad bellum* regime or the structure

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Syria/a7688479-f282-4ac0-84ea-3b97d9b80d46 [https://perma.cc/7AWQ-JCZ4] (archived Sept. 5, 2020).

102. Justin Trudeau, Prime Minister of Canada, Statement by the Prime Minister on Airstrikes in Syria (April 13, 2018), https://pm.gc.ca/eng/news/2018/04/13/statement-prime-minister-airstrikes-syria [https://perma.cc/GKB5-4CYB] (archived Sept. 19, 2020).

103. Ministry of Foreign Affairs of Japan, *Extraordinary Press Conference by Foreign Minister Taro Kono*, JUST SEC. (Apr. 14, 2018), https://www.justsecurity.org/wp-content/uploads/2018/04/Japan-Syria-strikes-2018.pdf [https://perma.cc/9UEE-EKKD] (archived Sept. 6, 2020).

104. For an exhaustive account, see Dunkelberg et al., *Mapping Reactions*, *supra* note 14.

105. *Bulgaria Calls for De-Escalation of Tensions After US-led Airstrike on Syria*, SOFIA GLOBE (Apr. 14, 2018), https://sofiaglobe.com/2018/04/14/bulgaria-calls-for-de-escalation-of-tensions-after-us-led-air-strike-on-syria/ [https://perma.cc/WXK8-RES3] (archived Sept. 6, 2020).

of the arguments offered in support of the use of force. State appeals may constitute attempts to circumvent Charter prohibitions by invoking familiar legal principles like the ban on the use of chemical weapons.[106] They may prioritize immediate need. Such motivations are unlikely to provide a robust or introspective evaluation of how the proposed action affects the viability of the *ad bellum* regime. While there is a risk of oversubscribing intention to the positions assumed by states, this same argumentative form is increasingly prevalent amongst scholars that promote expansionist positions within contemporary *ad bellum* debates.

Examples of this expansionist form divide between methodological and normative claims. Several authors interpret state endorsements of the airstrikes as evidencing a separate, specific right to intervention in response to the use of CBWs.[107] Following a similar series of strikes by US forces in 2017, Michael Schmitt and Christopher Ford claimed that state practice is contributing to the crystallization of a right to intervention.[108] The determinative factor, however, does not reflect the scale of suffering, but rather "the attendant suffering [that] resulted from the use of a long-demonized unlawful weapon."[109] Schmitt and Ford's conclusion suggests that "the *nature* of harm should be considered as a factor to consider vis-à-vis humanitarian intervention in addition to, or perhaps even in lieu of, the *quantum* of harm."[110] This recalls Harold Koh's fifth criterion, which offered the limited allowance that an intervention's legality would be bolstered if undertaken to prevent the use of a *per se* illegal means such as the use of a CBW.[111]

Interpreting state responses, Anders Henriksen identifies the emergence of a limited form of intervention.[112] The airstrikes against

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106. *See generally* Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1992, 1975 U.N.T.S. 45 (entered into force Apr. 29, 1997).

107. *See, e.g.*, Michael P. Scharf, *Striking a Grotian Moment: How the Syrian Airstrikes Changed International Law Relating to Humanitarian Intervention*, 19 CHI. J. INT'L L. 586, 591–92 (2019); *see also* Charlie Dunlap, *Do the Syrian Strikes Herald a New Norm of International Law?*, LAWFIRE, (Apr. 14, 2018), https://sites.duke.edu/lawfire/2018/04/14/do-the-syria-strikes-herald-a-new-norm-of-international-law/ [https://perma.cc/YC8W-YAJK] (archived Sept. 6, 2020); Jen Lemnitzer, *Syria Strikes Violated International Law—Are the Rules of Foreign Intervention Changing?*, CONVERSATION (Apr. 18, 2018), https://theconversation.com/syria-strikes-violated-international-law-are-the-rules-of-foreign-intervention-changing-95184 [https://perma.cc/K9AX-XPL6] (archived Sept. 6, 2020).

108. *See* Michael N. Schmitt & Christopher M. Ford, *Assessing U.S. Justifications for Using Force in Response to Syria's Chemical Attacks: An International Law Perspective*, 9 J. NAT'L SECURITY L. & POL'Y 283, 284 (2017).

109. *Id.* at 303.

110. *Id.*

111. Koh, *supra* note 88, at 1011.

112. Anders Henriksen, *Trump's Missile Strike on Syria and the Legality of Using Force to Deter Chemical Warfare*, 23 J. CONFLICT & SECURITY L. 33, 46 (2018).

Syria are differentiated from traditional, broad understandings of humanitarian intervention. Instead, Henriksen argues that they serve the "more limited purpose of seeking to deter the Syrian regime from continuing its use of chemical weapons against civilians in the civil war."[113] Relying upon the absolute prohibition of the use of CBWs, Henricksen suggests that a norm permitting the use of force to deter chemical warfare may be in the initial stages of development.[114] Henricksen explains that, as the resulting right to use force would grant an exception to the Article 2(4) prohibition, "such an exception should be construed as narrow as possible."[115]

Further normative content is provided by Andrew Bell who proposes that force may be used in response to the deployment of chemical weapons.[116] Grounding the proposed exception in the absolute ban on the use of such forms of warfare, Bell portends that force, when exercised in response to a CBW attack, is justifiable.[117] Support for this expansive *ad bellum* contention, Bell insists, is bolstered as the limited use of force can be assessed on the basis of a clear and determinate threshold.[118] This is intended to alleviate the minimalist concern that liberal interpretations of the Charter result in the erosion of the use of force prohibition. Accordingly, Bell argues that the inclusion of a CBW threshold provides a "clear, objective, bright-line criterion."[119] This, Bell claims, will "do much to alleviate the concerns of R2P opponents who prioritize international stability, the strength of the international legal regime, and the protection of human rights."[120]

Bell exhibits an increasingly familiar trend. To assuage minimalist apprehensions regarding the open-ended, abuse-prone nature of expansive use of force claims, Bell presses the limited and determinate nature of a CBW exception.[121] Again, this adheres to an argumentative form that turns away from its normative allure to emphasize an ability to respond to anticipated detractors. Notwithstanding the necessity of safeguards, these narrow or limited justifications fail to build upon the internal, normative coherence of the expansionist camp. They neglect the prominent role that gravity affords to the expansionist appeal. The use of chemical weapons is

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113. *Id.* at 35.
114. *Id.* at 47.
115. *Id.*
116. Andrew M. Bell, *Using Force Against the "Weapons of the Weak": Examining a Chemical-Biological Weapons Usage Criterion for Unilateral Humanitarian Intervention Under the Responsibility to Protect*, 22 CARDOZO J. INT'L & COMP. L. 261, 319 (2014).
117. *Id.*
118. *Id.*
119. *Id.* at 267.
120. *Id.* at 268.
121. *Id.* at 267–68.

clearly illegal and the cause of great suffering.[122] It is, however, difficult to articulate a coherent argument that draws upon a gravity justification and allows intervention in response to the use of chemical weapons, but not to instances of equal or greater suffering by other means.

To reiterate, the allure of expansionist claims is derived from the contention that a proposed use of force can prevent a humanitarian catastrophe. This appeals to our collective memory, one that recalls failure to prevent the Holocaust and reflects unwillingness to react to the Rwandan genocide. Gravity anchors all such insistences. A limited approach, reduced to instances when a particular form of weaponry is employed, creates a scenario in which the deaths of hundreds of civilians from the use of chemical weapons merit a different reaction, and receive a distinct legal authorization, than do the far greater amount that have been killed in Syria or elsewhere through conventional forms of force. Moving from a gravity justification towards a narrow or limited threshold will, as Marko Milanovic observed, create a limited intervention that does little for the wider humanitarian catastrophe.[123] It will introduce and facilitate the strategic interests of states. The interests of powerful states are further accentuated when attention is restricted to the limitation of a particular form of weaponry that has repeatedly been described as the "weapon of the weak" and has, within several international contexts, been the subject of North–South debates.[124] Ultimately, this dynamic threatens to empower those that proponents of a limited approach endeavor to restrain.

C. *Procedural Justifications: The Case of Collective Security*

Issues concerning collective security do not feature prominently within contemporary *ad bellum* debates. This deemphasis likely reflects the relatively low number of instances in which force is used through the collective security mechanism.[125] Minimalist contributions to those debates that do engage with collective security commonly adhere to the now well-trodden perspective that structures

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122. Michael P. Scharf, *Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons Through Sanctions, Use of Force, and Criminalization*, 20 MICH. J. INT'L L. 477, 480 (1999).

123. Milanovic, *supra* note 13.

124. *See* Richard Price, *A Genealogy of the Chemical Weapons Taboo*, 49 INT'L. ORG. 73, 98, 103 (1995); Kevin Jon Heller, *The Rome Statute Does Not Criminalise Chemical and Biological Weapons*, OPINIO JURIS (Nov. 5, 2015), http://opiniojuris.org/2015/11/05/why-the-rome-statute-does-not-criminalise-chemical-and-biological-weapons/ [https://perma.cc/EN6G-V6LC] (archived August 31, 2020).

125. *See* Christine Gray, *A Crisis of Legitimacy for the UN Collective Security System*, 56 INT'L & COMP. L.Q. 157, 157 (2007).

their approach to various other *ad bellum* issues. Adherents emphasize the four corners of the Charter. They press the need to maintain a strict reading of the articles contained within Chapter VII. They insist upon the need to ensure a strict textual reading of Security Council resolutions.[126] Accordingly, minimalists hold that the use of force is *most* legitimate when it observes entrenched procedural processes.[127]

Expansionists present a more complicated narrative. Rather than drawing upon substantive normative factors, the appeal of collective security stems from its unambiguous legal status and limited application. This naturally aligns with minimalist predispositions. But expansionists make limited reference to collective security. When such references *are* forwarded, these limited mentions commonly cite the Security Council's systemic paralysis to evidence the need to broaden the ability of actors to use force in either self-defense or the defense of others.[128] These traditional references do not address the collective mechanism itself or propose enhancing the scope or authority of Chapter VII resolutions. However, expansionist arguments are not completely unaffected by the persuasiveness that accompanies the legitimizing pull of collective security.

The final shift in expansionist argumentation concerns the use of procedural justifications to address the collective security process itself. This form of legal appeal is expansionist—it suggests that a particular use of force is permissible when a black-letter reading of the Charter or a plain text reading of a Security Council resolution asserts otherwise. As with previous expansionist accounts, these justifications maintain that the Charter's limits are broader than many minimalists assume. And it is procedural—it presents a justification for a particular use of force by emphasizing a permissive interpretation of the collective security system's authorization process. Accordingly, claims of legality are grounded in the mere fact that the decision to use force was taken in accordance with the procedural requirements prescribed through the collective security system. By elevating the legitimizing force of the authorization process, proponents minimize substantive considerations concerning the validity of the threat to peace and security.[129] As with expansionist articulations of rules-based

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126. *See, e.g.*, Geir Ulfstein & Hege Fosund Christiansen, *The Legality of the NATO Bombing in Libya*, 62 INT'L & COMP. L.Q. 159, 171 (2013); *see also* Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT'L L. 124, 125 (1999).

127. *See* Corten, *Controversies over the Customary Prohibition*, *supra* note 40, at 815–16.

128. *See, e.g.,* David B. Rivkin, Jr., Lee A. Casey & Mark Wendell DeLaquil, *Preemption and Law in the Twenty-First Century*, 5 CHI. J. INT'L L. 467, 477 (2005).

129. *See generally* Ian Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14 EUR. J. INT'L. L. 437 (2003).

and narrow or limited justifications, such procedural emphasis misaligns with the traditional expansionist form.

A prominent form of these procedural justifications draws upon imprecise Security Council resolutions to provide either *ex post* or implied authorization of a specific use of force.[130] *Ex post* or retroactive authorization occurs when a Security Council resolution is presented to retroactively justify an armed intervention. Proponents suggest that NATO's decision to use force in Kosovo was subsequently justified through Security Council Resolution 1244 which, following the unauthorized aerial campaign, established a civilian and military presence in the former Yugoslavia and created the UN's Interim Administration Mission.[131] Similarly, Security Council Resolution 788—in which the Security Council commended the Economic Community of West African States (ECOWAS) "for its efforts to restore peace, security and stability in Liberia"—was presented to provide *ex post* legal authorization following the organization's incursion into the West African nation.[132]

Implied (or revived) authorizations cite a past Security Council resolution to justify an undertaken or proposed use of force that lacks direct, contemporaneous approval. States read an analogous or adjacent resolution and, through permissive interpretation, assert that the past proclamation authorizes the current use of force.[133] Following NATO's military campaign in Kosovo, several states cited Security Council Resolutions 1160, 1199, and 1203 to infer legitimacy.[134] However, while these resolutions condemned the excessive use of force by Serbia, they did not authorize a military response.[135] Implying present authorization from a past permission requires the user to transpose, and often strain, both the context and language of the cited resolution. This attracts controversy. When the US-led coalition began

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130. For a general discussion of implied authorization, see CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 361–81 (4th ed. 2018) [hereinafter GRAY, 4th ed.]. *See also* Ian Johnstone, *When the Security Council is Divided: Imprecise Authorizations, Implied Mandates, and the 'Unreasonable Veto'*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 227, 238–43 (Mark Weller ed., 2015).

131. *See* Henkin, *Kosovo*, *supra* note 75, at 827.

132. *See* S.C. Res. 788, ¶ 1 (Nov. 19, 1992); *see also* Erika De Wet, *The Evolving Role of ECOWAS and the SADC in Peace-Operations: A Challenge to the Primacy of the United Nations Security Council in Matters of Peace and Security?*, 27 LEIDEN J. INT'L L. 353, 358 (2016).

133. This form of argumentation resembles domestic efforts that insist the 2002 Authorization for the Use of Military Force provided authorization for U.S. officials to target the Islamic State. *See* Curtis A. Bradley & Jack Goldsmith, *Obama's AUMF Legacy*, 110 AM. J. INT'L L. 628, 637 (2016).

134. *See* GRAY, 4th ed., *supra* note 130, at 366 (explaining expansion of "implied authorization" by member states); *see also* Johnstone, *supra* note 130, at 239.

135. *See* GRAY, 4th ed., *supra* note 130, at 366; *see also* Johnstone, *supra* note 130, at 239.

its military campaign against Iraq in 2003, US, British, and Australian officials insisted that the resulting use of force received implicit authorization through Security Council Resolutions 678, 687, and 1441.[136] But again, these resolutions did not contemplate the concurrent use of force. Resolutions 678 and 687 were passed at the commencement of the first Gulf War in 1991.[137] Whereas Resolution 1441 recalled these earlier measures, it found that Iraq was in material breach of the imposed disarmament obligations and established a new inspections regime.[138]

These past instances of *ex post* and implied justification are devoid of direct Security Council authorization. Yet, these moments also tell of how procedural processes are employed by advocates of particular military initiatives to permissively suggest when and how the collective security system may authorize the use of force. They may also provide a means of assuring the validity of the *ad bellum* regime. Ian Johnstone suggests that these forms of argument do, at a minimum, bolster the relevancy of an otherwise inactive Security Council.[139] Johnstone and Michael Byers separately contend that ambiguity, resulting from variants of these forms of justification, can benefit international law (and, perhaps, the *ad bellum* regime less directly) by "cushioning it from the effects of deep political differences."[140] While such claims reflect traditional expansionist motivations, forwarding procedural justifications to facilitate features of the collective security system risks privileging process-based considerations to the exclusion of the proposed course of action's normative desirability.

Monica Hakimi offers a compelling vision of the *jus ad bellum* that shares similarities with this emergent expansionist form.[141] In so doing, Hakimi advances a further procedural claim, suggesting that processes occurring within the Security Council that fail to produce a formal resolution should nevertheless receive due consideration within resulting *ad bellum* analyses.[142] Hakimi presents a descriptive claim that convincingly demonstrates the significance of the identified informal processes.[143] Within this account, discussions amongst Council members and resolutions that do not explicitly authorize the use of force become part of the *jus ad bellum*. Often neglected by

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136. *See* GRAY, 4th ed., *supra* note 130, at 361–66.

137. *See* S.C. Res. 678 (Nov. 29, 1990); *see also* S.C. Res. 687 (Apr. 3, 1991).

138. *See* S.C. Res. 1441 (Nov. 8, 2002).

139. *See* Johnstone, *supra* note 130, at 243.

140. *Id*. *See also* Michael Byers, *Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity*, 10 GLOB. GOVERNANCE 165, 167 (2004).

141. *See generally* Monica Hakimi, *The Jus Ad Bellum's Regulatory Form*, 112 AM. J. INT'L. L. 151 (2018) [hereinafter Hakimi, *Regulatory Form*].

142. *See generally id.*

143. *See generally id.*

evaluative accounts, Hakimi demonstrates how these informal exchanges shape and define how the use of force is understood and then implemented. Informal lawmaking that draws upon "particularistic processes" are differentiated from those parts of the *jus ad bellum* that appeal to general standards of law.[144] The informal processes at the center of Hakimi's claim occur when a specific action exceeds accepted *ad bellum* standards. They occur when the informal processes confer legal legitimacy on the resulting uses of force.[145] Such instances are evidenced by the processes surrounding the 2017 US airstrikes in Syria and in response to military interventions in Mali and Yemen.[146]

Reactions to Hakimi's informal process largely focus on the way that the *ad bellum* regime is conceptualized.[147] Here, however, the focus is on Hakimi's normative contribution. In response to what are framed as the limitations of the strict adherence approach, Hakimi asserts that reliance on informal processes strengthen the *ad bellum* regime.[148] The resulting account is intended to address the presumptive concern that reliance on informal processes risks weakening restrictions on the unilateral use of force and may become susceptible to the attempts of states to broaden the boundaries of permissibility.

Hakimi compares informal regulation to an alternative universe that relies upon general principles.[149] The informal approach is deemed preferable. First, Hakimi suggests that the alternative to informal regulation is not strict adherence, but will instead amount to circumstances in which states act without Security Council approval.[150] This, Hakimi claims, will weaken the *ad bellum* regime in more significant and lasting ways.[151] Second, the informal approach is presented as limiting the precedential value of specific conduct.[152] And third, Hakimi tells that the informal process benefits by increasing the power of collective process.[153] This curbs the impulses of militarily-engaged states that otherwise promote expansive interpretations of the *ad bellum* regime.[154] Collectively, Hakimi's account offers a compelling means to protect the collective security system that is

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144. *See id.* at 163.
145. *See id.* at 167.
146. *See* Christian J. Tams, *Three Questions About "Informal Regulation"*, 112 AM. J. INT'L L. UNBOUND 108, 111–12 (2018).
147. *See* Ashley S. Deeks, *Introduction to the Symposium on Monica Hakimi, 'The Jus Ad Bellum's Regulatory Form'*, 112 AM. J. INT'L L. UNBOUND 94, 95–96 (2018).
148. *See* Hakimi, *Regulatory Form*, *supra* note 141, at 185–86.
149. *See id.* at 186–90.
150. *See id.*
151. *See id.*
152. *See id.* at 184.
153. *See id.* at 185.
154. *See id.* at 189–90.

premised on the belief that informal regulation can be more effective than consistent appeals to general standards.

In endorsing positions that stretch and, in select instances, exceed the boundaries of the UN Charter, Hakimi's informal approach situates alongside emergent expansionist appeals. By prioritizing a normative response to anticipated minimalist objectives, Hakimi exhibits a principle feature of the new expansionist approach. This is consistent with the argumentative form that proponents of an expansionist *ad bellum* claim increasingly employ to justify their legal assertions. The implications of this position merit consideration.

Relevant expansionist contentions are moved to supplement the deficiencies of collective mechanisms or the consequences of Security Council politicization. In response they present appeals that purport to facilitate just outcomes. The procedural accounts that inform Hakimi's preferred process do not, however, provide this requisite normative guidance. The content of the identified informal processes, intended to confer legitimacy on a particular use of force, is underarticulated. This can create scenarios in which deviations from the Charter may proceed in the absence of those strong normative justifications that traditionally position expansionist claims between what is and what ought. It is unclear how such a result, devoid of normative fodder, will tilt the persuasive balance between circumstances that require an expansive reading of the *jus ad bellum* and the duty to assure better substantive outcomes.

Procedures assume a highly significant role in promoting justice. However, in nearly all such instances, the identified procedure is established to provide more than pure *procedural* justice. It is, in nearly every instance, established to ensure due regard for substantive considerations. A pure procedural approach, employed to assess the appropriateness of a decision to use force, bears enormous consequence. The Security Council's authorization of the use of force constitutes a near unique example of an almost absolute procedural process. Although this is a deficiency of the current *ad bellum* regime that requires redress, current criticism of the Security Council is motivated by the Council's reluctance to intervene rather than the prospect of over-intervention.[155] Despite many deficiencies, the Security Council provides an identifiable procedure that, when uninterrupted, will produce a decision that reflects undisputed authority. Informal processes do not. Without an external, normative framework to legitimize such processes, a clear potential exists for abuse by states that seek to legitimize a particular use of force.

Informal regulation, Hakimi suggests, is preferable to unfettered occurrences of unilateral state action that discount Security Council

155. *See* GRAY, 4th ed., *supra* note 130, at 326, 366.

primacy and deviate from general principles of international law.[156] Nonetheless, when states act unilaterally, they lack the procedural legitimacy that accompanies Security Council authorization. There is therefore a greater prospect for reliance on traditional expansionist arguments that are based (and assessed) on the substantive moral justifications that hold that the use of force is required in response to a specific case. The promotion of an argumentative form that elevates such informal processes nullifies the core expansionist appeal. The provision of a procedural approach, to legitimize uses of force, relieves states (to a significant though not absolute extent) of a duty to provide substantive, moral, and normative justifications. It risks facilitating the pursuit of self-serving state interests.

Hakimi counters that informal regulation could be employed to blunt permissive lawmaking initiatives by states.[157] Citing the elevation of the unwilling or unable test, Hakimi claims that accompanying informal approaches may draw upon Security Council Resolution 2249 to resist expansive articulations.[158] This Resolution acknowledged the threat posed by the Islamic State and called upon member states to take all measures compliant with international law and the UN Charter to prevent or suppress acts of terror.[159] However, it is unclear whether Resolution 2249 has had any effect on the acceptance or development of the unwilling or unable test. More significantly, if one recognizes the potential of informal processes to mitigate the undesirable or unduly expansionist conduct of specific states, one must also accept that the opposite outcome is possible. In such a scenario, the majority of states at the Security Council may promote undesirable *ad bellum* positions in a manner similar to the General Assembly which has, in certain moments, promoted controversial resolutions. If instances in which an expansive use of force is proposed or undertaken are only governed by an informal approach to the collective process, they remain susceptible to shifting political tendencies.

Each of the identified expansionist justifications—rules-based, narrow or limited, and procedural appeals—shifts the argumentative emphasis that traditionally structures and strengthens expansionist *ad bellum* claims. Though this emergent argumentative form has been documented through its manifestation in various use of force debates, this Article does not move to endorse either the legality or desirability of the resulting interpretations or the posited doctrines. Many of the concurrent debates exhibit an inescapable assumption. Recalling the familiar duality of apology and utopia, there is a prevalent view that

156. Hakimi, *Regulatory Form*, *supra* note 141, at 183.
157. *Id.* at 187–88.
158. *Id.* at 188; *see also* S.C. Res. 2249 (Nov. 20, 2015).
159. S.C. Res. 2249, *supra* note 158, ¶ 1.

expansionist *ad bellum* appeals are offered in the service of state interests. Commenting on the transatlantic divide, Tom Ruys and Luca Ferro observe (while acknowledging the need for a nuanced view) that

> while there may be a more critical attitude on the part of European legal doctrine to expansionist claims concerning the permissible recourse to force, and a greater awareness for the possibility of abuse, a number of U.S. scholars seems focused primarily on justifying US actions to the broader international community and to provide the theoretical arguments to legally underpin these actions.[160]

There is an abundance of fact patterns that lend themselves to such unfavorable analysis and evidence instances of state misuse. It is, however, the purpose of this Article to move beyond this apologist paradigm by reorientating emphasis on the compelling case and not the cynical application. Throughout, this Part has emphasized expansionist claims that, like their minimalist analogues, wish to ensure international law's legitimacy and function. Though this Article suggests that the structure of the emergent and aforementioned expansionist form does not serve this end effectively, this Article does not intend to reinvent the wheel. Instead it proposes a reversion.

IV. A REVERSION TO FORM: THE BETTER EXPANSIONIST ARGUMENT

When Hersch Lauterpacht wrote his foretelling 1933 essay, *The Persecution of the Jews in Germany*, his call for a truly international response to the unfolding events appealed to "broad principles of international peace, political progress and social ethics commanding universal recognition."[161] Continuing, Lauterpacht grounded his call in the Covenant of the League of Nations. Articles 4 and 11 conferred, respectively, that the League may consider instances affecting or disturbing international peace or the good understanding between nations upon which peace depends.[162] Lauterpacht told his audience that the wrongs visited upon Germany's Jewish minority were of such magnitude that inaction compromised the international community's moral authority.[163] The existing legal architecture would not be

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160. Tom Ruys & Luca Ferro, *Divergent Views on the Content and Relevance of the Jus ad Bellum in Europe and the United States? The Case for the U.S.-Led Military Coalition Against 'Islamic State'*, *in* CONCEPTS ON INTERNATIONAL LAW IN EUROPE AND THE UNITED STATES 3 (Chiara Giorgetti & Guglielmo Verdirame eds., forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2731597 (last visited Sept. 20, 2020) [https://perma.cc/Z2JF-KMVH] (archived Sept. 20, 2020).

161. Hersch Lauterpacht, *The Persecution of Jews in Germany*, *in* 5 INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 728, 729 (Elihu Lauterpacht ed., 2004).

162. *See* League of Nations Covenant arts. 4, 11.

163. Lauterpacht, *supra* note 161, at 733.

interpreted to preclude an imperative demand. Inaction was indefensible so Lauterpacht derived a solution through a reading of international law that melded moral necessity with legal permissibility.[164]

The most compelling expansionist appeals exhibit a moral urgency that is based upon notions of self-defense or the defense of others. The structure of an expansionist claim, whether proposing an action that is beyond the limits of the Charter or forwarding a permissive conception of the Charter's boundaries, demonstrates that legal assessments reflect moral requirement. Such reasoning is neither straightforward nor will it appeal to many that are invested in *ad bellum* debates. States may be more responsive to fact-specific arguments grounded in considerations of effectiveness. A preponderance of minimalists hold that limiting permissible uses of force best maintains the moral purpose of the international order.[165] The nature of a particular moral appeal will compel some and fail to move others. The differing moral intuitions that inform the relevant *ad bellum* debates are reflected in the range of considerations that dictate how competing Charter interests are appropriately balanced. However, linking the moral necessity of an *ad bellum* appeal to an assessment of the appeal's legal soundness emphasizes the expansionist claim's distinctive character. It proceeds on the grounds that the expansionist camp itself has established. And, it provides an argumentative structure that couples moral and legal considerations and that reflects the principle strength of expansionist appeals—their ability to provide a permissive legal response to an urgent moral need through a normative reading that bridges the *lex lata* and the *lex ferenda*.

While the content of a particular moral appeal is context specific, a structured expansionist argument can persuasively link moral considerations with legal prescriptions by grounding a Charter interpretation in (i) a standard of global justice and (ii) a standard of legal soundness. Both elements of this argumentative form are mutually dependent. Contentions, structured accordingly, do more than address the exigencies of a particular threat or offer redress to a vulnerable population. They tell of why the expansionist action serves the purposes of international law. A particular fact pattern may well compel attention. It is, however, necessary for the expansionist argument to consider the institutional ramifications of the proposed action and ground the favored response in a desirable and feasible conception designed to advance international law's purposes.[166] This

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164. *Id.*

165. *See generally* D'Aspremont, *supra* note 16.

166. This reflects Buchanan's claim that to justify an assertion that a group satisfying particular conditions has a right to statehood, one must consider the effects on the system—in particular the effects on human rights and peace—of allowing alike

approach aligns with Richard Falk's appeal that international lawyers contribute to the creation of a systematic framework that reflects broad norms and international consensus and that can be applied to assess proposed uses of force that strain Charter allowances.[167]

By structuring moral before legal considerations, adherents to the expansionist camp emphasize their most appealing deliberative feature. An account that speaks to both the requirements of justice and the necessity of legal soundness maintains the internal logic of the expansionist camp. In accordance with this logic, proponents are better positioned to delineate an interdependence between moral ends and legal means that reflect and respond to the Charter's normative prescriptions. By conferring lexical priority upon justice or morality-based considerations—when a strict reading of the Charter delimits responses to the compelling need to ensure the defense of self or the defense of others—expansionists may offer solutions to complex problems that reflect general legal principles.

The prescribed standard of justice constitutes the normative core of the expansionist claim. It is a continuation of a long tradition whose adherents—Pufendorf, Vattel, Locke, Kant, Mill and so many others—reject realist predispositions. Instead, they insist that state relations are structured by a series of moral rules.[168] Grounded in a conception of global justice, the efficacious expansionist argument articulates, and thus reinforces, international law's moral basis as conveyed by the UN Charter's preamble.[169] It provides an account of why the expansionist *ad bellum* claim is in furtherance of, not a departure from, the norms enshrined through international law.

The legal soundness standard takes seriously international law's regulatory and prescriptive functions. It recognizes the need to convey a set of discernable rules that distinguish law from purely philosophical or policy-based pursuits. Insulation against the abuse or bad faith application of expansionist arguments, so often the source of the minimalist camp's apprehension, further motivates this constitutive standard. Considerations of legal soundness that draw upon the international rule of law—understood here as an ability to link a specific legal argument with a general principle or norm prescribed within the relevant legal frameworks—offer a standard that can merge the normative and prescriptive features of an expansionist

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groups that satisfy similar conditions to attempt to create a state of their own. *See* BUCHANAN, *supra* note 19, at 27.

167. *See* Richard A. Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415, 443 (1969).

168. Charles R. Beitz, *Bounded Morality: Justice and the State in World Politics*, 33 INT'L ORG. 405, 408 (1979).

169. *See* STEVEN R. RATNER, THE THIN JUSTICE OF INTERNATIONAL LAW: A MORAL RECKONING OF THE LAW OF NATIONS 1 (2015).

appeal.[170] The proffered interpretation of these rules and principles must be plausibly conceived and exhibit coherence.

Expansionists cannot expect the benefit of the doubt. Our war-weary society possesses a healthy dose of uncertainty about the appropriateness of military intervention. It exhibits a more corrosive, but nevertheless growing, hint of isolationism. Both factors conspire to resist the moral pull of humanitarianism. The invisible college of international lawyers—conditioned by instances of abusive uses of force and quick to cite disastrous, misleading, or incomplete interventions—will continue to divide over how international law's legitimacy is best maintained. Where a particular context—one in which a state faces a direct and violent threat to its population—may provide a *prima facie* justification for the use of force, the expansionist cannot assume that a compelling fact pattern alone will favor action that pushes the Charter's limits.

Any use of force must be explained. States commonly resort to a mix of moral and legal language to articulate the reasoning that accompanies military action.[171] The resulting use of force will, by its nature, strain an *ad bellum* regime that is ostensibly intended to minimize the reasons for which force is permissible.[172] A particular use of force that pushes beyond a plain text, uncontroversial reading of the UN Charter further strains the purpose of the *ad bellum* regime and, if persuasive, provides an additional account of when a state may use force. It is thus contingent on the proponent of this particular use of force to demonstrate that their reading of the Charter, that their advocacy of military action, does not frustrate but instead reassures the *ad bellum* regime.[173]

When Thomas Franck referenced the paradox of good law producing bad results, he envisioned instances in which adherence to a sound legal requirement, like Article 2(4), caused or allowed a morally indefensible outcome.[174] There would be no simple solutions. Franck noted that exceptions to otherwise desirable legal rules risk undermining law's claim to legitimacy which is, in part, contingent on consistent application.[175] Equally, however, law's legitimacy erodes if legal adherence produces indefensible consequences.[176] The worst

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170. *See infra* Part IV.C.

171. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1621 (1984).

172. *See* BRIAN OREND, THE MORALITY OF WAR 31–32 (2006).

173. This can be understood as a continuation of Michael Reisman's acknowledgement that traditional conceptions of sovereignty have been replaced by a "new constitutive, human rights-based conception of popular sovereignty." *See* W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 870 (1990).

174. FRANCK, RECOURSE TO FORCE, supra note 43, at 175.

175. *See id.*

176. *See id.*

impulses of international society frequently mount frontal challenges that push society to question law's function. Yet the killing fields and the mass graves that document the twentieth century's most egregious atrocities have been credibly cited both in support of and in opposition to expansionist interpretations of the *ad bellum* regime.[177]

The tension between strict adherence to the wording of the *ad bellum* regime and interpretative approaches that respond to conditions on the ground are inescapable. Disassociating legal and moral considerations may allow (many) international lawyers to avoid engaging with the corollary between adherence and outcomes, but it does little to shield international law from the consequences of Franck's paradox. Both minimalists and expansionists make a choice. When proponents of an expansionist approach seek to preserve the legitimacy of international law by reconciling legal prescriptions with the demands of a nonideal world, their contentions maintain consistency and coherence with their professed objective if they take seriously and look to meld moral and legal considerations. Such dual reasoning is, however, avoided by both minimalists who favor a strict reading of the *ad bellum* regime and by expansionists who promote rules-based, limited or incident-specific, and procedural justifications. The moral and the legal need not be so purposefully uncoupled.

A. *The Intermittent Relationship between International Law and Morality*

International law's relationship with morality has been both constitutive and absent. The modern international lawyer remains largely, though not exclusively, indebted to a positivist legal tradition.[178] Bound by treaty and custom, international law is understood as a social fact that is formed through a process of state consent.[179] As Steven Ratner explains, while international lawyers hold strong moral convictions, these are often separated from scholarly endeavors and deemed *ultra vires* to legal pursuits.[180]

The contemporary division between law and morality is, however, a modern advent.[181] In ancient Rome, the *jus civile* and the *jus gentium*

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177. *See generally* JOSHUA JAMES KASSNER, RWANDA AND THE MORAL OBLIGATION OF HUMANITARIAN INTERVENTION (2013); DAVID N. GIBBS, FIRST DO NO HARM: HUMANITARIAN INTERVENTION AND THE DESTRUCTION OF YUGOSLAVIA (2009).

178. Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law*, 13 EUR. J. INT'L L. 401, 428 (2002).

179. Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137, 140 (2005).

180. *Id*. at 20.

181. *See* FRANCK, RECOURSE TO FORCE, *supra* note 43, at 175.

were conceived symbiotically.[182] From Aquinas to Blackstone, law and morality were understood as interdependent aspects of a cohesive legal system.[183] It was not until the Reformation cast aspersions on divine interpretation and an era of European secularism heralded positivism's dominance that morality and law were perceived as separate pursuits.[184] Though removed from much of the contemporary international legal discourse, questions of law's relationship with morality would again come to structure many of the great post-war jurisprudential debates.[185]

Attempts to regulate the use of force reflect this trajectory. Nearly all efforts to regulate recourse to war accept that, in certain circumstances, when particular conditions are satisfied, the use of force may be justifiable.[186] These considerations—determinations of what the circumstances are and how the conditions are met—historically present as moral deliberations. Michael Walzer begins *Just and Unjust Wars* by explaining that "for as long as men and women have talked about war, they have talked about it in terms of right and wrong."[187] Since antiquity, these deliberations contemplate the appropriateness of violence, the means by which force may be employed, and the instances in which war should be limited or permitted.[188]

In *De Civitate Dei*, St. Augustine proffered that while war was lamentable, a "wrong suffered at the hands of an adversary imposed the necessity of waging just wars."[189] This prescription was both grounded in a conception of morality—Augustine contended that the only valid reason to engage in war was to preserve peace—and initiated a tradition of regulating the use of force that would develop within just war doctrine and formalize through international legal regulation from the nineteenth century onwards.[190]

Whether forged in theology, the subject of secularization, or through formalist prescription, legal and moral considerations have long structured how we justify, condemn, and debate war. Though positivism, from the time of Hobbes and the Peace of Westphalia,

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182. *See id.*

183. *Id.* at 175–76.

184. *Id.*

185. *See, e.g.*, H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); *see also* Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

186. *See* HIGGINS, *supra* note 28, at 7–8.

187. WALZER, *supra* note 30, at 3.

188. *See* MARCO SASSÒLI & ANTOINE M. BOUVIER, HOW DOES LAW PROTECT IN WAR? 121 (2d ed., vol.1 2006); *see also* HIGGINS, *supra* note 28, at 9.

189. ST. AUGUSTINE, DE CIVITATE DEI CONTRA PAGANOS 150–51 (Book XIX Sec. VII 1960).

190. *See* DINSTEIN, *supra* note 22, at 64. *See generally* John Langan, *The Elements of St. Augustine's Just War Theory*, 53 J. REL. ETHICS 19 (1984).

muted the formal influence of moral deliberation, this too would ebb. Moral considerations again became instructive.[191] Following the Second World War, the establishment of the Nuremberg Tribunal, and a jurisprudential shift, a moral account of international justice informed and grounded the legal prescriptions enumerated throughout the UN Charter.[192]

The contemporary *ad bellum* regime repudiated an era when "notions of sovereignty and positivism meant that every state had a sovereign right, and indeed the 'proper authority' to initiate warfare, regardless of its cause."[193] Post-war efforts to reform the *ad bellum* regime and redress the shortcomings of previous initiatives like the Kellogg-Briand Pact were firmly grounded in moral propositions.[194] Article 1(1) of the UN Charter declared that the Organization's basic purpose was to "maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to peace."[195] While Article 2(4), the cornerstone of the *ad bellum* regime, codified the norm prohibiting the use of force in all but limited circumstances, this construction is fully understood as providing formal legal articulation to the Charter's moral purpose.

The *ad bellum* regime's moral foundation vests in the Charter's Preamble. The preparatory section declares the determination of member states to save succeeding generations from the scourge of war, to reaffirm faith in fundamental human rights, to ensure respect for international law, and to promote social progress.[196] Collectively, these purposes offer a vision of global justice that Dag Hammarskjöld believed to be "greater than the Organization in which they are embodied, and [that] the aims which they are to safeguard are holier than the policies of any single nation or people."[197]

From inception, the Charter's efforts to regulate the use of force were conceived as a set of broad norms that would guide state behavior. Lord Halifax, the British diplomat who led the United Kingdom's delegation at the San Francisco Conference, explained that "instead of trying to govern the actions of the members and the organs of the United Nations by precise and intricate codes of procedure, we have preferred to lay down purposes and principles under which they are to

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191. FRANCK, RECOURSE TO FORCE, *supra* note 43, at 176.

192. *Id*. at 177.

193. *See* HIGGINS, *supra* note 28, at 18.

194. General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57, 732 (entered into force July 24, 1929).

195. U.N. Charter art. 1(1).

196. *Id*. art. 2.

197. U.N. SCOR, 11th Sess., 751st mtg. ¶ 4, U.N. Doc. S/PV.751 (Oct. 31, 1959).

act."[198] Though Lord Halifax believed that the Charter functioned as a "living instrument" that would prescribe moral standards of behavior while providing states "freedom to accommodate their actions to circumstances which today no man can foresee," the core of the debate between minimalists and expansionists reflects competing visions of the Charter.[199]

Expansionists, as has been noted, embrace some iteration of the view that law is not merely a set of rigid rules. Instead, law is viewed as existing for certain ends. This is necessary, says J.L. Brierly, because "the life with which any system of law has to deal is too complicated, and human foresight too limited, for law to be completely formulated in a set of rules, so that situations perpetually arise which fall outside all rules already formulated."[200] When facing uncontemplated scenarios, when functioning within a nonideal world where prescribed systems of redress and protection have proven ineffectual or insufficient, expansionists identify relevant principles. These principles determine and guide appropriate actions. Brierly continues, "[l]aw cannot and does not refuse to solve a problem because it is new and unprovided for; it meets such situations by resorting to a principle, outside formulated law . . . appealing to reason as the justification for its decisions."[201]

Expansionist appeals are either normative or methodological. Normative contentions propose legal revision. These claims identify law's insufficiencies, its blind spots, and its failures. In response, they argue what the law ought to be.[202] Methodological contentions insist that the law is correctly interpreted in a way, and in accordance with a means, that produces a different, purportedly more efficacious, result than that which occurs through a black-letter reading of the relevant legal provision.[203] This, as with the broader distinction between minimalists and expansionists, reflects what Frederick Schauer identifies as at the core of all jurisprudential debates—opposing

198. Lord Halifax, *Verbatim Minutes of First Meeting of Commission 1, June 14, 1945*, U.N. Doc. 1006 (June 15, 1945), *in* UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION: SELECTED DOCUMENTS 529, 537 (1946).

199. *Id*.

200. J.L. BRIERLY, THE LAW OF NATIONS 23 (5th ed. 1955); *see also* FRANCK, RECOURSE TO FORCE, *supra* note 43, at 177.

201. BRIERLY, *supra* note 200, at 23–24.

202. *See, e.g.*, Eliav Lieblich, *Internal* Jus ad Bellum, 67 HASTINGS L.J. 687 (2016); *see also* Henkin, *Kosovo*, *supra* note 75, at 826–28; Robert Howse & Ruti Teitel, *Why Attack Syria?*, PROJECT SYNDICATE (Sept. 4, 2013), https://www.project-syndicate.org/commentary/humanitarian-versus-punitive-purposes-in-military-interventions-by-robert-howse-and-ruti-teitel?barrier=accesspaylog (subscription required) [https://perma.cc/63FG-YJMZ] (archived Aug. 30, 2020).

203. *See, e.g.*, Scharf, *supra* note 122, at 508–10.

contentions "about which sources of decisional guidance are to be treated as law."[204]

Expansionist claims that endeavor to ensure the *ad bellum* regime's legitimacy are motivated by a normative undercurrent and the belief that a reading of the law that produces an unacceptable outcome, a *reductio ad absurdum*, is an incomplete reading of the law. The subsequent debates regarding the reasons and principles that justify both forms of expansionist arguments are furthered when grounded in this inherent purpose. They most consistently reflect expansionist objectives when they embrace their claim to international law's moral purpose. The moral grounding that distinguishes expansionist arguments from minimalist claims may be articulated in various ways. The principle of global justice, however, provides a compelling standard to forward a legal argument that draws upon morality. Upon this basis, *ad bellum* arguments that purport to be more responsive to modern threats and better ensure the defense of self or the defense of others may be advanced and, ultimately, adjudged.

B. *The Standard of Justice*

Considerations of justice have moved from the domestic to the international sphere. Contemporary events—genocide and mass atrocities, the rise of and response to transnational terrorism, and the proliferation of human rights—now augment the lineage of debates that offer justice-based theories to determine when and how force may be used. Where traditional accounts present notions of *international* justice that afford centrality to the state, more recent contestations of *global* justice position the individual as the primary unit of concern.[205] The resulting accounts of global justice provide an effective frame to advance first order moral considerations that place notions of gravity and necessity at the forefront of an expansionist *ad bellum* argument.

Instances of war and persecution, those moments when the use of force is applied in response to or in furtherance of a wrong, inform foundational articulations of global justice.[206] The scope of global justice, however, exceeds assessments of the use of force. Myriad issues including poverty and inequality, wealth distribution, environmental derogation, trade regimes, and public health considerations illuminate global justice discourses.[207] Collectively, the philosophical, legal, and

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204. Frederick Schauer, *Law's Boundaries*, 130 HARV. L. REV. 2434, 2436 (2017).

205. *See* Gillian Brock, *Global Justice*, STAN. ENCYCLOPEDIA OF PHIL. ¶ 1.1 (Mar. 6, 2015), https://plato.stanford.edu/archives/spr2017/entries/justice-global/ [https://perma.cc/QM8C-QTG5] (archived Sept. 1, 2020).

206. *See, e.g.*, JOHN RAWLS, THE LAW OF PEOPLES 6–7 (1999).

207. *See, e.g.*, RATNER, *supra* note 169, at 11.

political manifestations of these inquiries ask some iteration of the question: Can an identifiable set of norms provide a basis to measure, and ultimately advance, the structures and institutions, as well as the rights and obligations of actors, operating within the international community?[208]

Global justice offers a prosaic standard that places the protection of individuals at the center of *ad bellum* claims.[209] Conceptions of global justice differ.[210] However, articulations of justice concur that a just international society is one in which the preservation of peace and the protection of human rights are afforded primacy.[211] As Steven Ratner explains, "these are the first two principles mentioned in the UN Charter, the most important document of contemporary international law. They are the subject, explicit and implicit, of numerous treaties and areas of customary international law; and they guide decisionmakers in most of the great questions facing global governance today."[212]

The most telling objection to expansionist *ad bellum* arguments is consequentialist. Beyond the substantive merits of any particular contention, critics hold that expansionist justifications leave an indelible mark on the *ad bellum* regime. The compounding implications of claims that seek to broaden exceptions to the use of force prohibition spurred Jean d'Aspremont's assertion that the greatest threat to Article 2(4) is not willful disregard, but instead the prohibition's disintegration through liberalization.[213]

This concern is urgent. It cannot be ignored by proponents of expansionist claims. Yet, the standard of global justice facilitates another form of consequentialist reasoning. The well-founded fear that a lack of circumscription undermines the *ad bellum* regime can be offset by demonstrating that the demands of justice are contingent on the proposed expansionist action. As Alan Buchanan shows, the most cogent means of advancing a rights claim is to identify an interest that carries moral weight and then demonstrate why this interest demands

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208. *See id.* at 41, 43.

209. *See, e.g.*, Andreas Follesdal & Thomas Pogge, *Introduction* to REAL WORLD JUSTICE: GROUNDS, PRINCIPLES, HUMAN RIGHTS, AND SOCIAL INSTITUTIONS 1 (Andreas Follesdal & Thomas Pogge eds., 2005); *see also* Laura Valentini & Tiziana Torresi, *International Law and Global Justice: A Happy Marriage*, 37 REV. INT'L STUD. 2035, 2036 (2011).

210. *Compare* RAWLS, *supra* note 206, at 10 (arguing that groups of peoples should establish laws to reflect shared moral norms, despite any remaining inequality), *with* THOMAS W. POGGE, WORLD POVERTY AND HUMAN RIGHTS 92–94 (2002) (emphasizing that conceptions of global justice should account for social and economic human rights for all).

211. RATNER, *supra* note 169, at 65; *see also* BUCHANAN, *supra* note 19, at 27.

212. RATNER, *supra* note 169, at 65.

213. D'Aspremont, *supra* note 16, at 1092.

formal protection.[214] The efficacious expansionist argument is grounded in an account of how the proposed action is consistent with a justice-based vision of international law. The risks of expansionism must be weighed against the consequences of inaction and the proactive need to ensure the foundational interests of preserving peace and ensuring human rights.

The contours and content of a global justice framework range. John Rawls posits that determinations of justice are similar in both their domestic and international manifestations.[215] The latter articulation of justice is, Rawls believes, contingent upon the freedom and independence of peoples, compliance with treaties and undertakings, the equality of peoples who are parties to the agreements that bind them, a duty of nonintervention, the notion that war is only advanced in self-defense, honoring human rights, observance of restrictions during the conduct of war, and a duty to assist others living under unfavorable conditions.[216] Assessments of *jus ad bellum* are, in Rawls's influential nonideal account, guided by just war theory.[217] Recalling Augustinian values, Rawls contends that "[t]he aim of a just war waged by a just well-ordered people is a just and lasting peace among peoples."[218]

Elsewhere, Alan Buchanan moves away from the Westphalian boundaries accepted within the Rawlsian model.[219] Buchanan offers a moral theory of international law.[220] Described as the "natural duty of justice," Buchanan defends a minimal moral duty to ensure that all persons have access to institutions that protect basic rights.[221] Accordingly, a moral theory of international law is structured upon an account of international law's most important moral goals, the most persuasive reasons to support the institution of international law as a means of achieving its predetermined goals, a specification of the conditions required to ensure the moral legitimacy of the international legal system, and a justification of the substantive norms that constitute the international legal system.[222] For Buchanan, a moral account of international law understands the foremost purposes of the international legal system to be the assurance of peace among and within states and the provision of justice.[223]

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214. BUCHANAN, *supra* note 19, at 25–26.
215. RAWLS, *supra* note 206, at 4.
216. *Id.* at 37.
217. *Id.* at 89.
218. *Id.* at 94.
219. Allen Buchanan, *Rawls's Law of Peoples: Rules for a Vanished Westphalian World*, 110 ETHICS 697, 701 (2000).
220. *Id.* at 698.
221. BUCHANAN, *supra* note 19, at 27.
222. *Id.* at 59–60.
223. *Id.* at 60.

International law provides processes to transform moral convictions into identifiable rules and norms.[224] To reflect the expansionist purpose and to effectively link moral intuition and legal prescription, arguments that stress the necessity of a particular use of force must demonstrate why the proposed action is necessary to further a vision of international law that is not merely desirable, but that advances the purposes conveyed through the UN Charter's preamble. An action grounded in a moral vision insulates the *ad bellum* regime. Episodic *ad bellum* engagements may serve narrow or immediate interests. However, their singular focus fails to convey a holistic understanding of both why the action is required within the particular circumstances and how it is a necessary undertaking, consistent with or in advancement of, the just purposes of international law.

Steven Ratner provides an erudite framework to assess whether a particular norm satisfies the imposed standard of justice.[225] A norm is evaluated based on its capacity to advance international and intrastate peace and to respect human rights.[226] The purpose of this Article has not been to offer or endorse a particular vision of global justice. Instead, it has sought to identify a standard that expansionist arguments *may* apply to demonstrate the moral necessity of their claim—such an argumentative structure will better reflect the strength of the expansionist camp. While remaining conscious of the potential for abuse and embracing the overall desire to restrict those instances in which the use of force is permissible, the expansionist claim must weigh these risks against an identifiable moral standard. The persuasive appeal will be one that illustrates that the demands of morality and the legitimacy of the international legal system compel action despite well-founded reservations.

C. *The Standard of Legal Soundness*

An intricate body of law governs the use of force. While this Article has emphasized the necessity of structuring *ad bellum* arguments upon first order moral considerations, the resulting process is more than a philosophical pursuit. Expansionist appeals must be placed within an existing legal framework. It is, as Terry Nardin shows, necessary to complement moral assessments with considerations of legal appropriateness.[227] A novel legal argument amends existing rules and replaces accepted interpretations. Nardin suggests that the proposed alteration conforms to underlying (legal) principles and

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224. *See* RATNER, *supra* note 169, at 1–2.

225. *Id.* at 84.

226. *Id.*

227. Terry Nardin, *Justice and Authority in the Global Order*, 37 REV. INT'L STUD. 2059, 2061 (2011).

"must not contradict the integrity and coherence" of the relevant legal system.[228]

The proposed requirement of legal soundness introduces similar criteria. Of course, not any moral proposition can claim legal status. Certain characteristics and identifiers must be present to advance a credible *legal* claim. This Article, however, resists a strictly positivist vision of international law and its sources. Instead, the proposed standard favors flexibility. This reflects Jeremy Waldron's observation that the distinction between characterization and normativity in legal argument is often blurry.[229] Recognizing that expansionist claims can either be methodological assertions about what the law is, normative contentions about what the law ought to be, or some admixture of both, this final Part suggests that a standard of legal soundness (i) grounds itself in a conception of the international rule of law and (ii) that it demonstrates coherence. While the standard of justice provides identifiable legal principles, a standard of legal soundness compels proponents to link moral assertions with legal substance.

The first criterion holds that *ad bellum* appeals are based in a particular notion of the international rule of law. While conceptions of the rule of law are multi-faceted, varied, and contested, Waldron demonstrates a degree of congruence amongst prevalent iterations.[230] This reflects agreement that public norms should guide the exercise of power and structure debates regarding its use.[231] For present purposes, this is expanded into the international sphere and suggests a straightforward understanding of the rule of law—that is, the notion that the specific legal argument demonstrates compliance with or furtherance of an identifiable legal principle or norm contained within the relevant legal architecture.

This uncomplicated articulation is, as Ian Hurd explains, better suited to the international sphere.[232] Hurd demonstrates that the more intricate traditional conceptions of the rule of law are not easily transferable from the domestic to the international context.[233] Instead of imposing the latter on the former, Hurd proposes an understanding of the international rule of law that is centered around adherence to principles.[234] This reflects an "intellectual and political commitment"

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228. *Id*.

229. Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 49 (2008).

230. *Id.* at 8–9.

231. *See id.* at 6 (noting that the prevailing conception of the rule of law requires that those with authority exercise power according to public norms instead of their personal preferences or ideologies).

232. IAN HURD, HOW TO DO THINGS WITH INTERNATIONAL LAW 12 (2017).

233. Characteristics of the domestic rule of law, like the requirement that rules are public and stable, that rules apply to governments as well as citizens, and that rules are applied equally, fail to find easy international analogies. *See id.* at 12.

234. *Id.* at 18.

to the notion that state behavior is expected to conform to relevant international legal obligations.[235] The international rule of law then manifests through the expectation that states employ the resources of international law to explain and justify their actions and decisions.[236]

From this, one may extrapolate that to argue in accordance with this rule of law requirement one must ground contentions in an identifiable legal principle(s). The principle anchors the assertion within an existing deliberative environment. It provides a fulcrum for further assessments—legal, moral, and political—of the proffered contention. The identified principle need not advance a formalist reading of the *jus ad bellum*; such a requirement is antithetical to the expansionist camp's orientation. It is instead reflective of a Dworkinian conception of principles that states an argumentative reason but does not necessitate a particular decision.[237]

It is not the intention of this Article to define or limit the potential sources that may ground an expansionist contention within legal discourse. Instead, it is simply suggested that reversion to the aforementioned moral considerations provides an identifiable point of commencement. The standard of global justice—understood as affording primacy to the preservation of peace and the protection of human rights—is entrenched within international law.[238] These standards are so prevalent within the relevant legal frameworks that Hersch Lauterpacht described the enactment of rules eliminating state violence as international law's primordial duty.[239]

The second criterion requires that *ad bellum* contentions exhibit coherence. This appeal to legal coherence is concerned with the content and application of the identified legal principle.[240] Any effective expansionist argument should demonstrate a logical consistency both across propositions and in the intended and (potential) future implementation of the proposed reading. Both the underlying moral assumption and the identified legal principle that supports the expansionist claim must not profess to be *sui generis* but should instead express uniform appropriateness.

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235. *Id.* at 45.

236. *Id.*

237. *See* Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 26 (1967).

238. This recalls Steven Ratner's acknowledgement, noted above, that the preservation of peace and the protection of human rights are enshrined in the UN Charter's preamble, constitute customary international law, and are the subject of numerous treaties. *See* RATNER, *supra* note 169, at 65.

239. HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 64 (2000).

240. This notion of coherence may contrast with a separate notion of coherence that is concerned with the unity and fragmentation of international law. *See* Yannick Radi, *Coherence*, *in* FUNDAMENTAL CONCEPTS FOR INTERNATIONAL LAW: THE CONSTRUCTION OF A DISCIPLINE 105, 105–06 (Jean D'Aspremont & Sahib Singh eds., 2019).

This recalls Ronald Dworkin's account of law as integrity.[241] Coherence, for Dworkin, requires that like cases are treated alike and that the application of a particular rule is consistent with the general principles expressed by the system from which it is derived.[242] Framing expansionist claims as exceptions, compelled by unique conditions, undermines the equal application requirement. A compelling moral claim is applicable both when expediency demands action and in circumstances where the assurance of justice does not convey an obvious or immediate interest on actors that are otherwise proponents of an expansionist approach.

The complications that follow the inconsistent or unequal application of (international) law are familiar.[243] While consistent practice assuages the external component of the coherence requirement, its internal features merit attention. Franck demonstrates that a rule, standard, or principle gains appeal if a foundational principle conjoins the proposition with a network of other rules.[244] Again, while it is not the present intention to provide a ridged account of how such arguments must be structured, it is worth recalling how the identified principle of justice—ubiquitous throughout the UN Charter and the relevant bodies of law—may serve as a lodestar for subsequent considerations and necessary features of an efficacious *ad bellum* claim. It is also our hope that by structuring such claims around first, moral considerations, and second, legal assessments, good-faith expansionist assertions can better navigate well-founded concerns of abuse, erosion, and subjectivity.

V. CONCLUSION

If international law is conceived as a language, supplying the vocabulary that structures legal interventions into many of the most pressing global challenges, much is dependent on *how* the resulting arguments are constructed. International lawyers continue to divide on whether international law prescribes the form or the content of legal appeals.[245] Regardless of one's preferred disposition, legal argument assumes a central role in the resulting discourse. This Article has

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241. RONALD DWORKIN, LAW'S EMPIRE 178–81 (1986).

242. *Id.*

243. *See* Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 738 (1988).

244. *Id.* at 741.

245. *See, e.g.*, MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 1 (2005); *see also* Jean D'Aspremont, *Uniting Pragmatism and Theory in International Legal Scholarship: Koskenniemi's From Apology to Utopia Revisited*, 19 REVUE QUÉBÉCOISE DROIT INTERNATIONAL 353 (2006).

considered the structure, efficacy, and consistency of this discourse within contemporary debates regarding the *jus ad bellum*.

Perhaps unusually, we have not assumed a position on the legality (or sensibility) of the particular use of force debates that have been documented within the preceding Parts. It is likely that we would diverge on several of these questions. We are instead motivated by the form that the underlying arguments assume. Collectively, we sense a great urgency in ensuring that international legal appeals reflect a coherent vocabulary that will allow the discipline to navigate the uncontemplated and the uncertain. We believe that the role and persuasiveness of a legal appeal affects international law's capacity to contribute to the process of redressing many of the most confounding challenges that demand international attention within a nonideal world.

If an advocate seeks to advance an international law-based claim but does not know the identity or legal predilections of the audience that will assess the claim's validity, she can proceed in several ways. Whether in a classroom, a courtroom, or a political assembly, our advocate wishes to offer the most effective argument possible to advance a particular legal contention. To persuade the audience of the argument's merit, she may use (i) a strictly legal argument; (ii) an argument that offers policy or moral considerations; or (iii) an ideal argument that features both legal and moral claims. However, in this instance, it is not possible to credibly advance the third type of appeal. Perhaps, the legal basis is weak. Or, the advocate may be insufficiently prepared to articulate the necessary moral or policy grounds to effectively make the claim. Denied the ideal option, we suggest that the advocate's objective is most effectively advanced through adherence to the argumentative form that is reflective of her strengths and convictions.

Expansionist *ad bellum* appeals are unable to provide a credible black-letter reading of a Charter provision. They must work within an existing architecture that is continuously strained. To avoid stagnation, expansionists traditionally rely on moral implications and policy considerations to produce legal arguments when a formalist approach would unduly restrict what the expansionist purports is a necessary action. Thus, the expansionist is unable to employ the ideal argumentative structure. The emergent argumentative form, documented throughout this Article, foregoes the principle expansionist appeal by placing undue emphasis on legal claims that endeavor to address minimalist apprehensions. In such a scenario, the expansionist is unlikely to mollify the core minimalist concern. To fully pacify minimalist fears would be to concede the expansionist position. Furthermore, by prioritizing minimalist apprehensions, the expansionist relinquishes the moral terms that have long-structured international legal debates. Denied the ideal argumentative form, the

emerging expansionist approach forgoes its normative allure and opts for an unaccustomed style that is ill-positioned to persuade on terms that reflect the strengths and convictions of the expansionist camp.

As these debates continue and evolve, as expansionist *ad bellum* arguments are advanced or dismissed, numerous factors will influence how legal claims are made. The nature of the threat faced and the imminence and gravity of the impending atrocity will spur calls for action. The motives of the intervening force and the prospect of success will provide reason to pause. Often these debates divide along familiar lines. They reflect jurisprudential schisms. And they are inseparable from nonlegal influences. Our purpose has been to assure the place of moral considerations within this matrix; to place them alongside considerations of power, politics, pragmatism, formalism, legitimacy, and feasibility as the international community continues to grapple with law's role in redressing the most challenging circumstances facing a nonideal world.