

Chapter II

Low-Intensity Conflict and The International Legal System

by
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I. Introduction

One way of thinking about the legality of actions taken in response to “low-intensity” conflict is to inquire about the limits of State sovereignty. That is, to what extent will the limits of State sovereignty be regarded as absolute and to what extent will they yield to pressures to respond to sustained patterns of terrorism, democide[†] or massive human rights violations, or even uncontrolled narcotics trafficking? Since I believe that conceptual discussion focusing on “sovereignty” is not the most useful way of clarifying the limits of permissible State intervention and use of force under the Charter — nor, indeed, is it even in the mainstream of the international legal approach to these issues over the last decade — this paper does not examine the low-intensity conflict issue in this “sovereignty” framework. The thrust of the legal realist and postlegal realist jurisprudential movements over the last half century has been to analyze by discrete recurring issues or classes and not principally in terms of doctrinal conceptualization, although the latter approach has continued to exert a pull like that of a distant body receding in space. Moreover, for years now international law has ignored “sovereignty” in imposing minimum human rights standards, and issues concerning the use of force have been dealt with not under the rubric of “sovereignty” but in terms of intervention theory, humanitarian intervention, collective defense and other areas of international concern.

The range of relevant issues or claims concerning the limits of external intervention across the borders of third States in relation to “low-intensity conflict” seems to me primarily to relate at present to three categories, although there are others and each of these three can, in turn, be broken down into sub-categories. These three principal categories are:

[†]Coined by Professor Rudy Rummel of the University of Hawaii, democide refers to systematic or widespread acts of murder for any purpose. Its meaning is broader than that specified by the U.N. definition of genocide, from which killing for political reasons was excluded at the request of the U.S.S.R.

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a. The extent to which force may lawfully be used to respond to sustained and serious low-intensity aggression, such as continuing State sponsored terrorism, which provides external assistance to insurgents or fuels other “secret warfare.” Examples would include the Vietnam War in early stages, the secret war in Central America, ongoing Libyan support for terrorism, the bombing of the United States Embassy and the Marine Barracks in Lebanon and the taking of American hostages (and torture death of some) in Lebanon.

b. The extent to which force may lawfully be used to respond to systematic and major human rights violations, including democide and genocide, whether or not associated with crimes against peace. Examples include the slaughter of civilians in Bangladesh prior to the Indian intervention, Pol Pot’s largely ignored democide in Cambodia and, more recently, Saddam Hussein’s slaughter of the Kurds.

c. The extent to which force may lawfully be used, if at all, to respond to sustained and intense narcotics trafficking. If, of course, a widely recognized government requests such assistance then there is likely to be little issue under international law, provided such assistance meets the requirements of human rights and other relevant constraints under the law of war. If there is no consent, traditional international law would, in most such settings, deny any right of intervention through direct use of force. The ability of the drug trade to overwhelm and corrupt governments of small nations, and the new alliance of narcotics traffickers with insurgents, may require substantial reevaluation of traditional constraints in this category.

This paper will deal primarily with issues in the first category, although it may have some relevance for discussion of categories two and three. There is, for the most part, a rich literature concerning the principles and limits of humanitarian intervention dealing with category b; although, as we learn more about the prevalence of democide, this is a category that may need rethinking and a liberalization of criteria for response in settings of genuine democide or genocide. Moreover, we certainly could benefit from more effective international machinery to deal effectively with these crimes. Category c is more difficult for generalization and may be more context dependent than even Categories a and b. As this paper illustrates, however, I believe that there is a major conceptual problem in the present approach of many, including some international lawyers, to the Category a problem and, accordingly, this paper focuses on that issue.

While I expect that the theme of this paper will be welcomed by many, it may be unwelcome to others. The task of a scholar, however, is not to please the audience but rather to pursue the truth. The truth we are pursuing here is a truth about how to reduce aggression, whether overt or covert. That is, it is a truth about reducing a major category of war and violence. The importance of truth concerning this critical issue places a special burden on all of us, scholars and policymakers alike, not to simply pursue gentle debate, but rather, vigorous

debate in the search for truth. In my judgment, we are urgently in need of “new thinking” in this area and the real control of low-intensity aggression awaits a broader understanding of a new paradigm. I hope that this paper will at least serve to begin the “new thinking” about the role of law in deterring low-intensity (and high-intensity) aggression even as it is certain to raise the decibel level of the debate.

The simple but important message presented in this paper is that widely held models about the origins and control of violent conflict between nations, including the low-intensity conflict spectrum, are themselves part of the problem in the continuation of such violent conflict. These models are a part of the problem in so far as they lead to a focus on policies that in the real world fail to add to deterrence of the aggressive use of force and, conversely, lead to an avoidance of policies that can make a more substantial contribution to peace.

The central symptom of this problem in the international legal system, as it is presently applied, is the system’s all too frequent failure to systematically and strongly condemn the aggressive use of force, particularly in the low-intensity conflict spectrum, while simultaneously and perversely condemning and constraining the use of defensive force in response to such aggression. The net effect in such settings is that the international legal system’s contribution to the deterrence of aggression, particularly in the low-intensity conflict spectrum, is virtually zero. Thus, as widely applied, the legal system needlessly becomes largely irrelevant in dealing with a central challenge of our age.

Indeed, in some settings, conventional wisdom, with the best of intentions and the worst of consequences, on balance has actually aided aggression, thus turning the legal system upside down. It is as though the international legal system itself were suffering from a severe auto-immune disorder that has turned on its own defenses to aggression. Fortunately, the cure for the auto-immune disorder, if not to the virus of aggression itself, is relatively simple. The remedy requires clear thinking about the nature of aggression and defense in the international system, coupled with a variety of policies intended to deter more effectively the entire spectrum of aggression. Such policies would include, with respect to the international legal system, enhancing the international systemic response *against aggression* and *in support of defense*, particularly regarding the low-intensity conflict portion of the spectrum. It must be understood that a legal system that treats the defensive response to overt or covert aggression the same as, or more severely than, it treats the aggression itself, is either irrelevant in the real world of conflict avoidance, or worse, it assists the aggressive attack. Unfortunately, though the cure may be simple, it will nonetheless be difficult to reeducate against powerful conventional myths that seemingly promote peace and restraint, but actually, add nothing to—or even undermine—the deterrence of aggression.

II. Low-Intensity Conflict in Context: Competing Models of Aggression and Deterrence

Each generation has a favorite panacea for peace. From the turn of the century until World War I, it was the creation of machinery through which third parties could work to settle disputes between nations. From the aftermath of World War I until the present, there has been a major interest in creating effective international organizations for managing the peace. And from the mid-1960s until the recent revolution in the Soviet Union and its subsequent disintegration, the principal focus of efforts to bring peace in our time have focused on nuclear arms control. Although all of these traditional techniques for war avoidance have an important role to play, third-party dispute settlement and arms control, at least as panaceas, seem to be rooted in the belief that wars originate in disputes between nations, accidents, or spiraling arms races. The inadequacy of this etiology of conflict has led us to underestimate the serious theoretical and real-world difficulties in building effective international organizations to manage the peace.

Within this intellectual tradition, the role of the international lawyer has been seen as one of seeking to reduce the lawful uses of force, thus progressively constraining the defensive response and increasingly treating both the aggressive attack and the defensive response as equivalent offenses against rational opportunities for diplomacy and third-party legal settlement.¹ This mind-set is principally responsible for a majority opinion in the *Nicaragua* case before the International Court of Justice that ignores the evidence of the “secret” or low-intensity Sandinista attack against El Salvador and the apparent perjury of Nicaragua’s agent before the Court about Nicaragua’s involvement in this attack. It reaches out instead to condemn the lesser United States assistance to the Contras, which was provided in response to Nicaragua’s program of covert subversion.

There is today, however, a powerful body of evidence that the principal international wars of the Twentieth Century — World Wars I and II, the Korean War, the Indo-China War, the Falklands War, the Iran-Iraq War, the war in Afghanistan, the conflict in Central America, and the recent Gulf conflict, among others — did not arise principally because of unresolved disputes (although they were a factor), accidents, or “arms races,” but rather because of a synergy between two critical and necessary sets of conditions. The first set of conditions involves a typically totalitarian or, at least, non-democratic regime bent on the use of aggressive force to alter the contemporary political or territorial dispensation in fundamental violation of the United Nations Charter. The second set of conditions is a system-wide failure of deterrence. Systemic deterrence is here taken to embrace the strength of international organizations against aggression, the balance of power, military capabilities, defensive alliances, clarity about

intentions to respond to aggression, the strength of the international legal system, and the extent of economic interdependence.

Where an aggressor is absent, as in United States-Canadian and Swiss-French relations, there is no risk of major war, even in the absence of deterrence. Where deterrence is present at effective levels, as it was in the North Atlantic Treaty Organization (NATO) against Soviet power, war can be avoided even if there may be aggressive intent. Importantly, we should also note that the overwhelming majority of aggressive regimes in this century have been totalitarian, or at least non-democratic, and that they tend to exhibit what I have elsewhere called "the radical regime syndrome" of a one-party political system with a repressive internal security system. Indeed, one of the most interesting connections in this respect, is that these regimes are not only aggressors in initiating major wars, but they are also engaged in slaughtering their own people. One current researcher believes that these regimes may have killed about four times the total number of people as have been killed in all of the major wars of the twentieth century combined.² Hitler's Third Reich, Stalin's Soviet Union, Ho Chi Minh's Vietnam, and Pol Pot's Kampuchea are examples. In contrast, democratic nations almost never attack other democratic nations or commit democide against their own people.

If this model of a synergy between an aggressive regime (typically a radical regime that is also engaged in democide or other massive human rights violations against its own people) and a system-wide deterrence failure is the principal form of major international conflict in our time, then the policies most used in seriously working for peace are quite different than those which flow from the "conventional" legal, arms control, and peace studies models. The most useful policies include overall political engagement strategies (such as the Commission on Security and Cooperation in Europe (CSCE) process) to seek to promote more democratic regimes around the world as a major component of the foreign policy of democratic nations coupled with a variety of means to *strengthen* system-wide deterrence against aggressive threats from radical regimes. It is of critical importance that we retain the military power to effectively deter such regimes (the Korean War partly resulted from a deterrence collapse driven by a precipitate United States demobilization after World War II); we *must* send clear deterrence signals (here see World Wars I and II; the Korean War; the Indo-China conflict, French and U.S. phases, particularly the U.S. post-Paris Accords phase; the Falklands War; and, most recently and dramatically, the Gulf conflict); and we must strengthen the overall international legal system to severely sanction aggression *and*, just as importantly, to strongly support *defense* against *aggression*.

It is largely the *difference* between the treatment of aggression and the treatment of defense that measures the effectiveness of the legal system in deterring aggression—*not* the degree to which the use of force is outlawed. If an aggressor knows that a potential victim State or its allies will be condemned as much as the

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aggressor, if not more, for a defensive response against an aggressive attack, then the real-world legal system that sends the signal is simply irrelevant as a factor in war avoidance; or even worse, it may encourage conflict. This point is so important, and so pervasively misunderstood in much of the legal literature, that I will repeat it with emphasis: *It is largely the difference between the treatment of aggression and the treatment of defense that measures the effectiveness of the legal system in contributing to the deterrence of aggression—not the degree to which the use of force is outlawed.* Moreover, this effect may be magnified when—as the model posits—the non-democratic aggressor is little affected by internal criticism of “legal violations,” but the responding democratic nation, precisely because it is democratic, may be substantially inhibited or deterred by such a charge of illegality.

Low-intensity conflict, it should be noted, seems also to fit the “new thinking” conflict model of an aggressive regime/deterrence failure synergy. In major part, although not exclusively, low-intensity conflict is simply a range of actions—from sporadic terrorism through sustained insurgency—pursued by insurgent groups or repressive regimes to attain their aggressive aims. Perhaps the major difference between low-intensity conflict and conventional warfare is that the ambiguity and low visibility of low-intensity attack escalate the effect in the “conventional” model of ignoring the attack and largely focusing the systemic response against the defensive response to the aggressive attack. Only when the aggression is as flagrant as the armored invasion of Kuwait in August 1990—the first effort ever made to aggressively swallow a Member state of the United Nations—does the system clearly condemn the attack and support the defense, and even then the action was opposed by many. Suppose that Iraq had sought the same result through support of an insurgency within Kuwait; would the world community have responded as it did? Would it have responded at all? In this connection it might be noted that one of the “lessons” Libyan leader Moammar Qadhafi seems to have learned from the Gulf conflict is that Iraq should have pursued its objective by an indirect warfare or guerilla strategy. In a recent address to the Benghazi Military Academy, he told the graduates: “Had it [Iraq] sent guerrillas there, they would have occupied the whole region.”³

III. The Role of Law in Aggression and Deterrence: A Case of Auto-Immune Disease as Applied to the Spectrum of Low-Intensity Aggression

This paper should not mistakenly be read as an attack against international law. I believe that, as intended under the United Nations Charter, a system of law that vigorously condemns aggressive attack, whether overt or covert, and mobilizes in important ways that may predictably be known in advance to support the defensive response against aggression, is of the utmost importance in promoting a more peaceful world. Indeed, I would assert that we greatly underestimate

the important role a revitalized legal system could play. That legal system, however, must get back to basics. Aggression, whether overt or covert, *must* be clearly condemned. Defense, whether overt or covert, *must* be clearly supported and assisted. *And* it must be understood that it is the *difference* between the systemic treatment of aggression and defense that will largely determine whether the legal system will play a significant role in war avoidance.

Sadly, however, there are many reasons to believe that, particularly when confronted with low-intensity conflict, the present international legal system suffers from a severe auto-immune disease that compels it to treat the defensive response more severely than the aggressive attack. Typically, many international lawyers will respond to United States assistance and efforts toward collective defense against low-intensity aggression, such as assistance to the Contras or the raid on Libya, by ignoring the aggressive attack which precipitated the U.S. action and by focusing their objections on the U.S. defensive response. By ignoring the long-term pattern of aggressive low- and mid-intensity attack, these “restrictivist” or “minimalist” international lawyers characterize the response as an illegal “reprisal” to a single incident, or they over narrowly condemn the action as non-proportional, even if, in reality, the action is insufficient to end the continuing low-intensity aggressive attack.

The following excerpts from the legal literature, condemning defensive responses to low-intensity attack, with little focus on the precipitating aggression, provide all too recurrent examples of the auto-immune disease.

One of the best known American international lawyers is Professor Louis Henkin of Columbia University. I will pick on him first precisely because he is one of the most able international lawyers and is not a polemicist. In a recent chapter “Use of Force: Law and U.S. Policy” done for the prestigious Council on Foreign Relations, Professor Henkin argues in support of the majority opinion of the International Court of Justice in the *Nicaragua* Case (and against the dissenting opinion of Judge Stephen Schwebel of the United States): “Extravagant claims of right to act in self-defense have been the principal threat to the law of the Charter.”⁴ Just think about that one! Does Professor Henkin really believe that World War II (remember that the Kellogg-Briand Pact already incorporated the non-aggression proscription of the Charter along with the right of defense), the Korean War, the Vietnam War, the Soviet invasion of Afghanistan or the recent Gulf conflict (occurring as Professor Henkin wrote his chapter), among others, resulted from difficulties in seriously differentiating aggression from defense? Does he really believe that Hitler, Kim Il Sung and Saddam Hussein were actually confused as to the scope of the right of lawful defense? These “principal threats” to the Charter did not result from an expansion of the right of defense but rather because of a willingness by aggressive totalitarian regimes to commit aggression and a system perceived by them as unlikely to provide effective defense. True to form, Professor Henkin then goes on to

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condemn out of hand United States actions in Grenada, Libya, and Nicaragua (which presumably he believes were the “principal threats” to world order. Note in this connection that the United States forces that were killed in the single terrorist act of the bombing of the Marine barracks in Lebanon exceeded United States casualties in all three of these criticized actions combined.). Professor Henkin singles out and condemns these three U.S. actions, despite literature supporting the lawfulness of United States actions in all three conflicts, in respectively three sentences, two sentences and four sentences. Good technique, Professor Henkin—one need not address the merits, factually or legally, of positions contradicting one’s world view provided it can be said that the “alleged grounds have been widely challenged” or “the legal justification . . . was widely rejected.”⁵ Certainly no specific factual or legal reasons for one’s conclusions should be given. Professor Henkin further goes on to bring this message home to responses against terrorism—without differentiating whether such terrorism constitutes a sporadic act or an ongoing and sustained low-intensity attack:

Nor is interstate force the solution to the scourge of terrorism, or even a significant deterrent to it. Little of contemporary terrorism is in fact perpetrated by States; too many States condone it, but surely the law does not—ought not—permit the use of military force against any State that does so. Even where a State is satisfied that another State has in fact perpetrated an act of terrorism against its diplomatic personnel, it is undesirable to permit the victim State to respond by military force against the territory of the perpetrator. The exceptions in article 51 were limited to cases of armed attack that are generally beyond doubt; a State’s responsibility for acts of terrorism is rarely beyond doubt and difficult to prove to international satisfaction. Article 51 gives a right of self-defense, a right to use necessary and proportional force to defend against an armed attack. This right does not allow retaliation for past attacks. The response in self-defense to an armed attack must be necessary and proportional; an attack on the territory of a State perpetrating terrorism cannot be a “proportional” response and can hardly be the “necessary” response to defend against an act of terrorism already committed or even to deter future terrorist acts. The international community must develop stronger determination and seek other remedies against terrorism. A State that has been the victim of an act of terrorism will have to pursue other remedies against States that it believes responsible and against the States that encourage, promote, condone, or tolerate terrorism or provide a haven to terrorists.⁶

Professor Falk, who had widely condemned as illegal United States actions in defending South Vietnam against North Vietnamese aggression, wrote an article condemning as illegal the United States/Republic of Vietnam incursion into Cambodia during the course of the Vietnam War despite use of Cambodian sanctuaries by 40,000 regular North Vietnamese troops in attacks against American and Republic of Vietnam forces in South Vietnam.⁷

Professor Jordan Paust condemned as illegal President Ford's actions in the *Mayaguez* seizure, arguing: ". . . the American response was wholly disproportionate to the Cambodian action — an action that was, moreover, lawful."⁸

Professor Francis Boyle has written widely condemning most United States and Israeli uses of force in recent years. Barely do his writings focus on the pattern of low-intensity aggressive attack triggering some of these actions. When Israeli troops went into Lebanon to stop persistent and ongoing terrorist attacks against Israel (not just threatened future attacks) Boyle said that "even assuming the contemporary international legal order still recognizes the regressive doctrine of preemptive self-defense, the Israeli invasion of Lebanon fails to meet that test as well."⁹ And when the United States sought to deter Libyan terrorism (and extreme oceans claims) by sending ships of the Sixth Fleet into international waters in the Gulf of Sidra where they had every right to be under international law in both peace and war, Boyle declared the U.S. action a breach of the peace under Article 39, and a threat of force in violation of Article 2(4) of the U.N. Charter.¹⁰

Specific constraints catalogued by the author that have been urged on the customary law right of defense over the past several decades include the following, among others:

- interpretation of Article 51 of the Charter as limiting the customary law right of defense, particularly arguments that it prevents "anticipatory defense" or defense against action other than a brazen assault;
- arguments that the right of defense does not include response against the territory of a State that is providing major assistance to or directing "indirect" aggression or secret warfare;
- arguments that "proportionality" requirements prevent a response against the territory of a State engaged in continuing low-intensity aggression;
- arguments that effective military responses (whether in the *Mayaguez* case, the Gulf conflict or the Central American conflict) are disproportional;
- arguments that the right of defense under Article 51 ceases once an issue has been referred to the Security Council for action;
- arguments that if a collective defense action does not *immediately* respond to an armed attack (for example it delays three months for a necessary military build-up and an effort at peacemaking) that the right is lost;
- arguments that an occupied country has no one that can lawfully request collective defense assistance on their behalf following a successful blitzkrieg attack;
- arguments that the right of defense in settings of civil conflict (even in the face of illegal assistance to insurgents) should not permit direct involvement of foreign nationals in the defensive military effort on behalf of the Government; and
- arguments that the right of defense under Article 51 of the Charter does not include a right to require unconditional surrender and alter the government in a post-war setting (a restriction that would have come as a shock to the Allies in

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World War II and that may have prevented the successful democratic transitions of Germany and Japan after that war).

Most recently, abundant examples may be found relating to the overt Iraqi aggression in the Gulf conflict. Thus, Professor Abram Chayes questioned whether, following early Security Council resolutions on the Gulf conflict, there was any right of collective defense remaining under Article 51 of the Charter.¹¹ Professor Al Rubin urged the extraordinary position (effectively supporting quick armored invasions) that following the total occupation of Kuwait there was no lawful Kuwait government to request collective assistance against Iraq's aggression.¹² Professor Oscar Schachter, generally one of the most sensible observers of use of force law and who, in fairness, demolished the Chayes argument, opined with virtually no discussion that the coalition force bombing of Iraq was disproportionate and that it would have been illegal under Article 51 of the Charter for the coalition to have gone to Baghdad and replaced the Saddam Hussein government.¹³ Professor Burns Weston, while conceding that the coalition action was lawful, condemned it as resulting from impermissible United States and British arm twisting in the Security Council.¹⁴ Even the Secretary General of the United Nations at one point proclaimed the silly proposition that after three months (to permit the necessary military build-up for an effective response and to give peace efforts a chance) the right of collective defense under Article 51 of the Charter had been lost.¹⁵ And, of course, the usual polemicists were actively at work. Former United States Attorney General Ramsey Clark worked with a "National Coalition to Stop U.S. Military Intervention in the Middle East" and toured the world charging the United States with war crimes and crimes against humanity in its conduct of the Gulf hostilities.¹⁶ A statement by Ramsey Clark said:

The commission accuses the U.S. of preplanning war, blocking negotiations, controlling the media, manipulating the United Nations, deliberate genocide and other crimes against humanity and violations of the U.N. Charter and international law.¹⁷

Although Clark had previously expressed an intention to present evidence of Iraqi war crimes in Kuwait, the agenda released for his "war crimes tribunal" included no such testimony.¹⁸

Similarly, William Arkin, Director of Military Research at Greenpeace, and Director of Greenpeace's Nuclear Information Unit, co-authored a report that focused on the environmental issues in the Gulf War. This report goes lightly on condemnation of Saddam Hussein's illegal environmental terrorism in the Gulf and projects an overall impression that the environmental damage in the Gulf conflict is really an inevitable part of "modern warfare." In a classic, and shockingly anti-environmental, example of the auto-immune disease, this "case

study” would seem to charge the United Nations coalition with causing as much damage to the Gulf’s environment as the eco-terrorism of Saddam Hussein.¹⁹

Incredibly, there are even numerous examples of strenuous governmental efforts to exempt terrorists or others engaged in low-intensity aggressive attacks from normal national criminal justice systems. Neil C. Livingston gives the following account of efforts made by elements within the German government first to prevent the conviction of Mohammed Hamadi for the 1985 hijacking of TWA 847 and the torture murder of U.S. sailor Robert Dean Stethem, and then, to have him released in a hostage exchange after the terrorist was convicted despite their best efforts:

[P]erhaps the greatest focus of attention has been on the Hamadi brothers, Mohammed and Abbas, who are incarcerated in Germany. Mohammed Hamadi was convicted of the 1985 hijacking of TWA flight 847 and the brutal murder, on board the aircraft, of a U.S. Navyman, Robert Dean Stethem, and in 1989 was sentenced by a German court to “life” in prison. In Germany, a life sentence means that Hamadi has to serve a minimum of 15 years before becoming eligible for parole. His brother, Abbas, by contrast, is serving a 13-year sentence for kidnapping two German businessmen (in an unsuccessful plot to trade them for Mohammed).

In the middle of August, reports surfaced that the German government was willing to release the Hamadi brothers as part of any hostage/prisoner exchange. According to the reports, the Hamadis were to be included in a comprehensive hostage/prisoner exchange brokered by United Nations Secretary General Javier Perez de Cuellar. (President Bush subsequently indicated that he probably would be inclined to approve any deal reached by Perez de Cuellar with the kidnappers.)

Senior U.S. officials say that the German government has long been attempting to unload the Hamadis in any case, primarily for political and economic reasons. The continued incarceration of the two brothers complicates German trade with the Arab world. That probably is one of the reasons why, earlier, the then West German government attempted in every way possible to prevent the prosecution of Mohammed Hamadi after he had been located on German territory by U.S. intelligence.

Not only were the Germans reluctant to pick up Hamadi in the first place, U.S. officials pointed out, but the Bonn government demanded, *after* the United States officially requested his extradition, that there be an unprecedented extradition hearing and lineup to establish that the man captured really was Mohammed Hamadi. Incredibly, when the U.S. Attorney for the District of Columbia and U.S. Justice Department representatives arrived in Germany, along with a number of passengers who had been aboard the ill-fated plane, they found that the entire lineup was composed of what one of the terrorized passengers later described as “Hamadi clones.” All were approximately the same height and were dressed in similar clothing. They even wore wigs and makeup designed to further obliterate their individual physical differences.

Remarkably, though, the passengers had no trouble picking Hamadi out of the lineup, much to the chagrin of the German government, apparently. It was Hamadi’s eyes, the passengers said later—“They were like two burning coals.”

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Although it had few equities in the case, the distraught German government took the only action remaining to it to prevent the extradition of Hamadi to the United States: it decided to prosecute him in Germany.

But the tale did not end even there. When it became clear that the evidence against Hamadi was overwhelming, the German government suggested to the United States that Hamadi may not have been an adult when he hijacked TWA 847—that is to say, he was not 21 years of age at the time. This is a crucial distinction in German law, because if he was not 21 at the time of the crime he could have been sentenced as either a juvenile or an adult. Once again, to the dismay of the Germans, the United States easily proved that Hamadi was 21—albeit just 21—when he hijacked the plane. That’s when the German government, grasping at straws, suggested that he might not have been 21 when “he first thought of hijacking the plane.” To make a long story short, Hamadi was convicted of the crime—thanks to a courageous German prosecutor and court composed of three judges and two lay jurors—and sentenced as an adult to the maximum penalty permissible under German law.²⁰

In contrast to this typical “old thinking” among many international lawyers—and governments, I believe that, in reality, when faced with an ongoing pattern of aggressive attack, it is certainly within the right of individual and collective defense to take necessary and proportional actions to effectively end the attack, whether those actions are overt or covert.²¹ This right of defense is classic international law, not the fashionable contemporary inversion of this principle. Indeed, if we are serious about peace in our time, it is as incumbent upon the international system as a whole to *ensure* effective deterrence against the low-intensity spectrum, and, for example, against Libyan terrorism worldwide and a continuing pattern of Iranian-encouraged hostage-taking, as it is to deter Korean War or Gulf conflict style armored invasions.

IV. Recommendations for Strengthening the International Legal System to Deal More Effectively with Low-Intensity Aggression

Recommendations for strengthening the international legal system to deal with low-intensity aggression follow clearly if we have an accurate model of the most serious international conflicts. Thus, all of the following suggestions should be useful, as opposed to approaches that may make us feel virtuous but in the real world have little effect on promoting peace. These recommendations construct, in many respects, a prescription for promoting peace -- in so far as we can -- in our time, and as such, may be thought of as helpful in promoting a “new world order.”

A. While seemingly “weak,” one of the most powerful foreign policy initiatives for the democracies is to systematically “engage” totalitarian regimes with the fundamental principles of the rule of law and democracy. The recent “rule of law” Charter of the Copenhagen round of the CSCE process points the

way.²² This observer, for one, believes that the recent democratic revolution in the Soviet Union probably resulted considerably more from influences stemming from the Helsinki human rights engagement process than from the entire history of U.S.—USSR arms control efforts. “Rule of law engagement” seeking to influence governments to move toward democratic principles will *not* be an overnight process. In this respect, a shift is already under way in U.S. foreign policy to encompass rule of law engagement, but requires even greater emphasis.²³

B. The United States, in coordination with other democratic nations, must seek to *greatly* reinvigorate international condemnation of aggressive attack, whether overt or covert, and simultaneously must work to *greatly* reinvigorate the right of and support for defense against such aggression. These principles, if we make them twin *core* principles of democratic nations’ foreign policy, have considerable ability to add to deterrence against aggression.

C. In connection with strengthening the international system *against aggression* and *in support of defense* against aggression, we must apply these principles clearly to the low- and mid-intensity conflict spectrum. We must redouble efforts to condemn terrorism, hostage-taking, and aggressive indirect warfare and to support the full range of proportional defensive responses, overt and covert, against low-intensity and indirect aggression.

D. A few illustrative initiatives that might be taken internationally in support of the above goals include the following:

(1) The United States should consider creating a rule of law caucusing group within the United Nations system, gathering together nations from all regional groups which are prepared to support the above objectives. The purpose of this group would be to serve as a focal point within the United Nations system to move the UN system, and the whole world, toward recognition of the importance of the rule of law nationally and internationally.

(2) The United States should coordinate with its allies to issue a statement repudiating the upside down majority opinion of the International Court of Justice in the *Nicaragua* case, giving reasons as to why that decision, although well-meaning, actually encourages aggression in the real world.

(3) The United States should seek to coordinate common democratic nation “white papers” exposing radical regime campaigns of low-intensity conflict, including attempted governmental takeovers, hostage seizures, and terrorism that is directed against civil aviation and other targets.

(4) The United States should initiate a serious international effort to explore ways to meaningfully encourage deterrence applied at a personal level to regime elites engaged in international aggression, whether low-intensity or high-intensity. An effort at holding war crimes trials for Saddam Hussein is one example of seeking to apply personal-level deterrence. Deterrence of aggression must include deterrence of *regime elites*, particularly in radical regime settings. We have for too long focused on deterrence against a nation as an undifferentiated totality. To the extent

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that the radical regime syndrome is a major component of the problem, however, it may even be that radical regime elites should be the primary focus of democratic nation deterrence strategies.

(5) Consistent efforts should be made internationally to foster understanding that the low-intensity conflict spectrum, as with the high-intensity spectrum, requires policies that will ensure effective deterrence. Without strategies of effective deterrence, it can be expected that low-intensity, State-sponsored violence will continue and possibly accelerate. I, for one, believe that the generally weak response of democratic nations to such low-intensity attack over the last three decades is a major part of the synergy contributing to the continuation of such attacks.

E. Finally, there is a series of actions that the United States and all democratic nations must undertake when responding to low-intensity aggression if their actions are to foster broad international understanding:

(1) *Before* any defensive response is undertaken to an ongoing pattern of low-intensity attack, the United States should present evidence of the aggressive attack before the Security Council of the United Nations and notify the Council that if the aggression continues, the United States will take appropriate action in response under Article 51 of the Charter. (Note that, consistent with protecting intelligence sources and methods, notification need not include *all* of the evidence of the attack.) This notification requirement is a legal obligation for a defensive response, and if it is neglected, the United States action will be politically harmed. Whether the action to be undertaken in response to aggression is overt or covert, it is not necessary to identify precisely what it will be or when it will take place. The occasion of Security Council notification should be used as a critical opportunity for generating public awareness of the nature of the continuing aggressive attack. If necessary, the evidence should be repeatedly presented before the Security Council.

(2) In cases of defensive response against low-intensity attack, it is particularly important to indicate that the response is in defense against an ongoing and *sustained pattern of attack*, not merely a response to what may have been the latest bombing or other terrorist attack in a series.

(3) It is very important that United States spokesmen clearly and consistently base responsive defensive actions in Article 51 of the United Nations Charter. Such an action should *not* be called a reprisal or anything other than a defensive response against ongoing armed aggression.

(4) Defensive actions should be carefully planned to be consistent with the laws of war and should be proportional, while employing adequate levels of force to quickly prevail and deter for the future. Too little force does not deter and simply discredits the defensive response. The Gulf defensive effort generally provides a good example of an appropriate response. Similarly, it is essential that governmental spokesmen fully respond in detail to the usual disinformation efforts suggesting that such responses are non-proportional or illegal. The defensive effort, if it is to effectively prevail, must also win the associated political struggle.

V. Conclusion

Secret aggression in the low- and mid-intensity conflict spectrum is one of the most serious world order threats of our age. Because of a drumbeat of propaganda concerning political objectives of the attack, coupled with obscure public perceptions of the origins of the attack, and a pervasive mirror-imaging of aggression simply as a “dispute” requiring third-party resolution, the international system tends to ignore the aggressive attack while condemning the more visible defensive response. If, however, we are to discourage the low-intensity portion of the aggressive attack spectrum, then, as with overt aggression, it is essential that we understand the need for effective defense and deterrence against such attack. The international legal system can contribute to such deterrence in a substantial manner if, but only if, we make a strong *distinction* between the treatment of aggression and defense, whether overt or covert. That is, we must strengthen the international legal system to *strongly condemn* aggressive attack, whether such an attack is in the form of low-intensity terrorism, or hostage-taking, or armies on the march. Just as importantly, the system must be strengthened to *strongly support* the defensive response against such aggression, whether such a response is overt or covert.

Notes

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1. A recent example of the tendency of some international legal scholars to ascribe war to the unavailability of dispute settlement machinery is contained in an article on the World Court by Professor Robert E. Lutz II. Professor Lutz writes, in the immediate aftermath of the Gulf conflict, with the best of intentions and within the prevailing myth system of our profession:

Despite the commitment of nations to “settle their disputes by peaceful means,” the drastic and ultimate dispute-settlement method of war has been used once again to resolve an international dispute—this time in the Middle East. One might hope that the hell of war, and the destruction it inflicts upon innocent populations and humanity generally, would have eliminated it as a viable instrument for resolving international disputes at this advanced stage of world history. Yet even with mankind’s vast experience with war’s horrors and waste, the world community has been unable to channel all international disputes into peaceful resolution processes. Because of the concept of sovereignty and the role that States play in the international system, States may give or withhold their consent to the jurisdiction of third-party dispute-settlement regimes or the submission of their interstate conflicts to the variety of intermediary dispute-settlement procedures. Thus, when a State resists in giving its consent, a dispute may either with time go away, fester and possibly escalate, or become the subject and justification for the use of coercive measures by the complainant-State, which, in many cases, would be considered violations of international law.

Lutz, *Perspectives on the World Court, the United States, and International Dispute Resolution in a Changing World*, Int’l Law. 657, 675-76 (Fall 1991) (footnotes omitted). Apparently Professor Lutz is unaware that Kuwait had offered to submit any border issues to the International Court of Justice. Moreover, many other third party dispute settlement techniques were available to Iraq, including conciliation or mediation by regional Arab leaders. The Gulf conflict did not arise from an absence of available third party dispute settlement machinery. Nor did it even arise from any reasonably perceived “dispute.”

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2. See RUMMEL, *LETHAL POLITICS: SOVIET GENOCIDES AND MASS MURDERS SINCE 1917* (1990).
3. House Republican Research Committee Task Force on Terrorism & Unconventional Warfare, *Libyan Terrorism* 5 (Jan. 7, 1992).
4. Henkin, *Use of Force: Law and U.S. Policy*, in *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 37, 50 (1989).
5. *Id.* at 54.
6. *Id.* at 62.
7. Falk, *The Cambodian Operation and International Law*, in *III THE VIETNAM WAR AND INTERNATIONAL LAW: THE WIDENING CONTEXT* 33, 50 (Falk ed. 1972). Compare this view with Moore, *International Law and the United States Role in Vietnam: A Reply to Professor Falk*, reprinted in *MOORE, LAW AND THE INDO-CHINA WAR* 403-457 (1972).
8. See Paust, *The Seizure and Recovery of the Mayaguez*, 83 *Yale L. J.* 774, 774-81, 795-803 (1976).
9. BOYLE, *DEFENDING CIVIL RESISTANCE UNDER INTERNATIONAL LAW* 335 (1987).
10. *Id.* at 332.
11. Chayes, *The Use of Force in the Persian Gulf* (paper prepared for the U.S.-Soviet Conference on the Non-Use of Force, October 4-6, 1990, copy in possession of author).
12. Rubin, *Iraq, Kuwait, the United Nations and World Order*, *Int'l Practitioner's Notebook* 18 (Feb. 1991).
13. Schachter, *United Nations Law in the Gulf Conflict*, 85 *Am. J. Int'l L.* 452 (1991).
14. Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 *Am. J. Int'l L.* 516 (1991). Compare this view with the recent unpublished paper by Professor Inis Claude entitled *Collective Security after the Gulf War*, prepared for the Army War College Conference April 1992, which concludes that great power pressure may even be a requirement for an effective United Nations stand against aggression.
15. See also Yoxall, *Iraq and Article 51: A Correct Use of Limited Authority*, *The Int'l Law.* 967, 985 (1991). "While Article 51 might have supported an offensive counterattack on Iraq in early August, by mid-October that option no longer existed." *Id.*
16. See Ramsey Clark's *Crusade*, *Legal Times* (Sept. 2, 1991) at 3.
17. "Benn blames war on U.S. bid to control Iraqi oil," *The Press Association Limited, Press Association Newsfile*, December 1, 1991.
18. *Anti-War Tribunal Blasts Bush, U.S. Military for Gulf War*, *Reuters News Service*, May 11, 1991.
19. Arkin, Durrant, & Cherni, *On Impact: Modern Warfare and the Environment—A Case Study of the Gulf War* (May 1991). (A Greenpeace Study).
20. Livingston, *Straight Talk About National Principles*, *Sea Power* 21-22 (October 1991).
21. See the authorities collected in MOORE, *THE SECRET WAR IN CENTRAL AMERICA* (1986) and the dissenting opinion of Judge Schwebel in the *Military and Paramilitary Activities Case (Nicar. v. U.S.)*, 1986 *I.C.J.* 14, 259, 334, para. 167. See also, for one of the best general treatments of this subject, MCDUGAL & FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* (1961) and Erickson, *Legitimate Use of Military Force Against State-Sponsored International Terrorism*, *Air Univ. Press*, July 1989.
22. See *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 1990*, U.S. Commission on Security and Cooperation in Europe, Washington, D.C.
23. For the intentional breadth of the concept of "rule of law" here, see Moore, *The Rule of Law: An Overview*, presented to the Seminar on the Rule of Law, Moscow and Leningrad, USSR, March 19-23, 1990. The author presented this paper while serving as Co-Chairman, with the U.S. Deputy Attorney General, of the U.S. Delegation to the Moscow—Leningrad Seminar on the Rule of Law.

The "rule of law," as intended here, explicitly does not mean observing the legal niceties on the way to the Gulag. Rather, the principal fundamentals of the rule of law are:

- government of the people, by the people, and for the people; [for the origin of this phrasing, see Abraham Lincoln, *Gettysburg Address* (Nov. 19, 1863.), See also the French Constitution]
- separation of powers and checks and balances;
- representative democracy and procedural and substantive limits on governmental action against the individual (the protection of human freedom and dignity);
- limited government and federalism; and review by an independent judiciary as a central mechanism for constitutional enforcement. Moore, *The Rule of Law: An Overview, supra*.

For an example of rule of law engagement incorporated into contemporary U.S. foreign policy, see *National Security Strategy of the United States*, August 1991, at 14, col. 1 (U.S. Government Printing Office, 1991).

Recent history has shown how much ideas count. The Cold War was, in its decisive aspect, a war of ideas. But ideas count only when knowledge spreads. In today's evolving political environment, and in the face of the global explosion of information, we must make clear to our friends and potential adversaries what we stand for.

The need for international understanding among different peoples, cultures, religions and forms of government will only grow. In a world without the clear-cut East-West divisions of the past, the flow of ideas and information will take on larger significance as once-isolated countries seek their way toward the international mainstream. Indeed, information access has already achieved global proportions. A truly global community is being formed, vindicating our democratic values.

Through broadcasts, academic and cultural exchanges, press briefings, publications, speakers and conferences, we engage those abroad in a dialogue about who and what we are, to inform foreign audiences about our policies, democratic traditions, pluralistic society and rich academic and cultural diversity. We will increase our efforts to clarify what America has to contribute to the solution of global problems, and to drive home democracy's place in this process. *Id.*