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International Law and American Foreign Policy: Revisiting the Law-Versus-Policy Debate

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INTERNATIONAL LAW AND AMERICAN FOREIGN POLICY: REVISITING THE LAW VERSUS POLICY DEBATE

Abstract:

When addressing controversial foreign policy questions, international law scholars in the U.S. persistently frame the debate as a conflict between law and policy. From Vietnam to Afghanistan and beyond, this opposition has dominated and defined the way U.S. legal scholars have used international law to engage with significant foreign affairs at least since the Second World War. In this paper, I argue that the law-versus-policy opposition often leads the debates to a deadlock, constraining and neutralizing the best potential of international law to be both a problem-solving and political tool to respond to novel challenges of international relations. Once the notion of a false opposition between legal and policy reasoning is cleared away, the paper suggests, we will be in a position to appreciate the pragmatist potential and problem-solving possibilities of policy thinking in international law.

By examining exemplary debates through the Cold War and in the aftermath of September 11, the paper demonstrates that pitting law against policy and associating the former with formalism and the latter with pragmatism is misguided. In fact, the post-Realist U.S. international law scholarship freely moves between legal and policy reasoning and abundantly evinces both flexibility in rule-oriented reasoning and rigidity in policy arguments all the while as it reinforces a phony war between law and policy.

I. Introduction

The violence of September 11 awoke a series of conflicting sentiments among international lawyers. Was there already too much of 'lawyering' in the administration of the war against terrorism? Might international law be elastic enough to provide right answers to the hard cases of organized, non-state threats, or should it be justifiably bypassed in the interest of further security that governments owe their citizens in the face of new threats? The concern over the role of international law in the new millennium was well illustrated by the term 'lawfare' and by the reactions it provoked.[1] Was law suited to the task? Should we applaud or decry the use of law as a weapon? In some ways the term, and the practice to which it referred, seemed to confound the assumption that law, as the embodiment of peaceful ideals, was sharply distinct from interests, policy, and strategic considerations. The idealism embedded in this assumption

[1] Charles Dunlap, who popularized the term in 2001, states that the term goes back to 1975 when it appeared first in a manuscript by John Carlson and Neville Yeomans, 'Whither Goeth the Law-Humanity or Barbarity', in M. Smith & D. Crossley (eds), *The Way Out: Radical Alternatives in Australia* (1975) 155. Dunlap, Jr., 'Law and Military Interventions: Preserving Humanitarian Values in 21ST Century Conflicts', *WORKSHOP PAPER CARR CENTER FOR HUM RTS* (2001) 5, available at: http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf.

unsettled devotees of realpolitik and power politics, as its agnosticism disturbed the champions of the international rule of law.

At stake in the war over 'lawfare' was precisely a binary and inherent opposition between law and policy. This opposition, however, is much older than 'lawfare' and has in fact animated discussions of the relationship between international law and American foreign policy at least since the WWII. In this picture, American international lawyers are either rule-oriented and formalist or policy-oriented and pragmatist. Rule-oriented scholars rely on rules and principles with no or minimal strategic concerns, defend internationalism, and find compliance with international law to be either in the interest of the U.S. or a legitimate and advantageous restraint on it. Policy-oriented international lawyers, in contrast, are conscious of strategic interests, resort to flexible and creative arguments, and put U.S. national interest before international norms.

I argue that this perception of the American encounter with international law is distorted and misleading for two reasons. First, it disregards the nuances and dynamism of the ways international lawyers tackle various legal questions. Across different subject matters, scholars who might be pigeonholed into methodological and ideological camps as either legal formalists or policy pragmatists in fact often navigate fluidly between law and policy arguments.[2]

Second, the equation of rule-oriented decision-making with formalism and policy thinking with pragmatism ignores the tendency for the interdisciplinary tools often assumed to facilitate creative and problem-solving approaches in international law to be deployed in ways which are, in fact, as formulaic and rigid as any formalist or positivist legal interpretation. This results from the particular method of policy reasoning which has come to dominate American international legal argumentation, underappreciating that policies and purposes are just as susceptible to deduction and rigid application as legal rules, standards and principles.[3]

By reconstructing the dominant argumentative style adopted by a selective number of U.S. international law scholars while responding to legal questions of grave foreign policy implications in their scholarly outfit, I aim to expose the fluidity and dynamism of the use of law and policy in the post-Realist American international legal jurisprudence. Not only does an appreciation of this dynamism question the veracity of law-versus-policy opposition, but it also takes the first step toward addressing the internal impediments to a more creative use of international law in foreign affairs.

To understand the puzzles, potentials and dynamics of law and policy reasoning, it is necessary to surpass dismissive accounts that equate policy thinking with American imperialism,[4] and those which conveniently rely on 'American exceptionalism' to explain (or justify) U.S. international legal behavior, but are in fact, descriptively, no more than obtuse literalism, and normatively, a plea for sympathy with an imagined historical archetype.[5] Once

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[2] *Compare* J. Goldsmith and E. Posner, *The Limits of International Law* (2005), *with* Bradley & Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position', 110 *HARV L REV* (1997) 815.

[3] A classic example of high conceptualism and rigid application of policy considerations to legal cases is in the New Haven School, the pioneer of policy thinking in American international law. (Self-identifying reference removed).

[4] See, e.g., Crawford, 'Remarks', 97 *AM SOC'Y INT'L L PROCEEDINGS* (2003) 321; Dupuy, 'The Place and Role of Unilateralism in Contemporary International Law', 11 *EJIL* (2000) 19; Gowland-Debbas, 'The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance', 11 *EJIL* (2000) 361, at 380.

[5] See e.g., Bradley, 'International Delegations, The Structural Constitution, and Non-Self-Execution', 55 *STAN L REV* (2003) 557; Slaughter, 'International Law in a World of Liberal States', 6 *EJIL* (1995) 503; Kahn, 'Popular Sovereignty, Human Rights and the New International Order', 1 *CHI J INT'L L* (2000) 1, at 3–4.

liberated from the accusation of American imperialism, policy thinking and its role in legal interpretation ought to claim their deserved place in international legal theory for further reflection. In response to this lacuna – scant theoretical attention to policy reasoning in international law, this essay offers a preliminary opening into the complex relationship between law and policy.

In an under-theorized understanding, policy could be taken to stand against deduction. Yet, as will become clear, not unlike legal maxims, deduction from policy principles toward particular conclusions is not rare in international legal arguments. More homegrown to international law literature is the policy-oriented approach of the New Haven School (NHS), in which the ancient and transcendental ways of legal analysis should give place to policy thinking, that is, a method whose application requires a sophisticated scientific and interdisciplinary mechanism.[6] In a third, broader reading, policy is what is so ubiquitously present in any act of legal interpretation (of which all but the strictest of positivists – who are in any event rare in international law – avail themselves in various degrees) in search of objects and purposes of particular provisions and their plausible and coherent fit with other relevant legal sources.[7]

Evidently, the list above is not meant to be exhaustive. Nor does the argument here hinge on a clear definition of policy. In fact, by exposing the imaginary opposition between law and policy in different contexts with different forms of policy reasoning present, I hope to draw attention to the need for a deeper study of policy and its normative significance for a creative and problem-solving approach to international law.

The sections below will revisit two exemplary historical moments to illustrate the dominant mode of argumentation among U.S. international lawyers. Part II examines the Vietnam War that, according to the conventional picture, brought international lawyers into a fervent confrontation over policy and rule-oriented reasoning. By replaying some of the debates over Vietnam, I demonstrate that although the ongoing professional war had all the appearance of a legal-formalism-versus-policy-pragmatism opposition, neither side could accurately be described in such terms. Elements of both legal and policy reasoning, with their many nuances, comprised the opposing arguments. Yet the perception of speaking in two different languages often led to an inflammatory tone, foreclosing the possibility of a productive (dis)agreement over the underlying legal interpretations or policy preferences. The paper's stronger emphasis on this period derives from my supposition – one which I do not examine here – that the mistaken law-versus-policy war in U.S. international legal thought began with the formal introduction of the policy-oriented approach to international law by the NHS.

Part III will consider another instance of crisis before international lawyers and revisit the war in Afghanistan and lawyers' reasoning about its nature. My reading of the debates here continues to expose the false conflict between legal and policy reasoning, yet it does so in a somewhat different way from the previous section. While the New Haven story is filled with arm-wrestling over the heresy of policy and the orthodoxy of law, here the intention is more modest. It is to display the often-discounted cohabitation of legal and policy reasoning across seemingly opposing positions that are conveniently but erroneously associated with sharply divided ideological (and methodological) commitments. The narrative here is one in which

[6] See e.g., McDougal, 'The Impact of International Law upon National Law: A Policy-Oriented Perspective', in McDougal et al., *Studies in World Public Order* (1964) 157; Lasswell & McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (1992) 71.

[7] Vienna Convention on the Law of Treaties, 23 May 1969, UNTS 1155 (1969) 331, Art. 31, 32.

policy reasoning is not absent from legal argumentation, but it is accommodated in a way as though it belonged to a separate domain from the law.

II. The War on Stage, the Quibbles Behind the Scene: The Law-versus-Policy Hyperbole in Vietnam

In the heyday of the NHS's career, there was no shortage of space for legal wrestling over questions of legality of war and its means and ends. From Korea, to Cuba, Dominican Republic, and Vietnam, the complexity of the use of military force, self-defense, characterization of war, and international law's response fueled Yale's policy-oriented machinery to pronounce the futility of international law's formalism forcefully. The NHS in fact flourished on a war against what it described as international law's stark oppositions between legality and illegality, war and peace, international and civil, and so on.

In its stead, it introduced a complex contextual framework and normative vision that evaluate the permissibility of coercion through its impact on the distribution of values in the world public order, the extent to which the contested values are inclusive, and to what degree the act of coercion is intended to, or in practice does, change or reinforce the existing distribution of values.[8] This degree of context-sensitivity, the NHS believed, was diametrically opposed to the rigidity of international law rules on the use of force and self-defense as reflected in the U.N. Charter.

In practice, however, the application of New Haven's contextualist approach to the questions of coercion over two decades barely delivered what it promised. On one occasion, when faced with critiques of the Cuban Quarantine on the basis of lack of any prior 'armed attack,'[9] McDougal comfortably leaned on a new interpretation of Article 51 of the U.N. Charter, by virtue of which self-defense would not be limited to cases when a prior 'armed attack' had occurred. In this by now tedious point of contention, McDougal rejected all the interpretations of Article 51 as merely 'world juggling,' only to resort to the very language of Article 51 himself in defense of the right to anticipatory self-defense.[10] His analysis of geopolitical interests in Cuba, regional ties, the Soviet threat, and the proportionality of the U.S. countermeasure framed a factual scenario that only needed to be rounded up with a permissive interpretation of Article 51 for anticipatory self-defense.[11] In crafting this factual scenario – in which the U.S. and the free world were under eminent threat, McDougal showed no interest to engage with different presentations of the facts, for he conveniently accused his opponents of disregard for the significance of context and infatuation with the language of legal rules.

The use of force and self-defense were hardly the only contestation avenues where the NHS's promise of flexibility in policy thinking and its imaginary hostility among the mainstream international lawyers to policy in favor of dogmatic fidelity to the rule of law were tested. In the mid-1950s debates over the legality of hydrogen bomb tests in the Pacific, for instance, there is a telling example of opposing voices who constructed the debate as one over the rule of law versus extra-legal policy considerations.

[8] M.S. McDougal & F.P. Feliciano, *The International Law of War: Transnational Coercion and World Public Order* (1994), at 16–20.
[9] See *e.g.*, Wright, 'The Cuban Quarantine', 57 *AJIL* (1963) 546.
[10] McDougal, 'The Soviet-Cuban Quarantine and Self-Defense', 57 *AJIL* (1963) 597, at 600.
[11] *Ibid.* at 601-03.

McDougal invoked a complementarity thesis to argue that opposing principles of freedom in the high seas and exclusive control fail to yield a definite legal answer to the permissibility of nuclear testing in the South Pacific. He also emphasized the originality of the question and lack of precedent in international law on the subject and proposed 'reasonableness' as the standard by which one ought to evaluate the U.S. claim to exclusive access in consideration of 'the deeply vital importance of the tests to the security of the United States, and indeed of all free peoples, as contrasted with the minimal and temporary interference with shared interests in navigation and fishing.'[12]

The opposing argument was Stanley Anderson's, who began with a critical stance against McDougal's legal realist usage of 'extra-legal sources.'[13] Yet he quickly proceeded to outline some of the considerations that an analytical or sociological investigation would take into account to determine the permissibility of exclusive control and went so far as to admit that not 'all important questions relating to the bomb tests are legal ones.'[14] Rather than dwell on violation of international law rules, Anderson specifically questioned the concept of 'reasonableness' in McDougal's scheme to be devoid of any normativity.[15]

Perhaps in Anderson's view, the New Haven Jurisprudence, although coherent and not just 'the intrusion of advocacy into scholarship,'[16] eventually fell short of affording consistent and normative constraints. It is more likely that Anderson simply equated 'normativity' with 'juristic' – a character that he denied to McDougal's approach. Regardless, he clearly threw the ball of formalism and inflexibility in McDougal's court when he asked: 'Is inelastic dogmatism the only alternative to the argument from necessity?'[17] Stating how traditional legal doctrines would address the nuances of the particular case of hydrogen bomb test in free waters, he concluded that in the face of similar nuclear claims by the Soviets or fishing claims of some third country, the U.S.'s hands would be tied by the knots of its precedent: 'An unequivocal asseveration of the legality of exclusive appropriation, such as Professor McDougal's, *would provide no flexibility*.'[18]

Yet instead of taking his opponent's call for flexibility seriously, McDougal's retort echoed his cynicism about legal rules in general terms and overemphasized Anderson's position about the capacity of rules beyond the context of the specific case in dispute:

> The Principal assumptions of Professor Anderson are that international law is properly conceived as a body of inherited rules, relatively unaffected by the power and other social processes in which they are prescribed and applied; that these rules have a meaning or "normative character" largely independent of the purposes of the people who make use of them; and that those rules admit, apparently without aid of criteria of interpretation, of practically automatic application in particular instances.[19]

It is rather fantastic to read that Anderson's specific questions provoked such an overblown response. He certainly was agitated over McDougal's substitution of 'reasonableness'

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[12] McDougal & Feliciano, *supra* note 8, at 217 n.209.
[13] Anderson, 'A Critique of Professor Myres S. McDougal's Doctrine of Interpretation by Major Purposes', 57 *AJIL* (1963) 378, at 378.
[14] *Ibid.*
[15] *Ibid.* at 379.
[16] *Ibid.* at 382.
[17] *Ibid.* at 380.
[18] *Ibid.* (emphasis added).
[19] McDougal, 'A Footnote', 57 *AJIL* (1963) 383, at 383.

for familiar juridical standards and confident about the power of rules to bear on a case as unprecedented as the nuclear tests in high seas. Still, McDougal's reaction, ignoring Anderson's challenge to the concept of 'reasonableness' as applied in this particular case, targeted international lawyers in general as incapable of acknowledging the vices of law and virtues of policy and instead longing after 'illusory certainty and false security.'[20] In doing so, he laid yet another brick on the solid wall the NHS had imagined between law and policy and foreclosed any possibility of further engagement on the (in)compatibility of 'reasonableness' with existing international law regime of the high seas. It would be in vain to speculate to what extent Anderson would in fact have allowed for policy considerations of the security of the U.S. as a weighty factor in legal interpretation. But McDougal's accusatory tone closed the conversation long before that could become part of the debate in any meaningful way. The result was an accusatory stance with hyperbole which muddied the water in the case in question and misdirected the debate as one between law and policy.

To understand this dynamic, in which the common but erroneous perception of the law-versus-policy dichotomy determined the tone and direction of most of the debates between the NHS's advocates and the mainstream discipline, let us revisit the legal questions of the war in Vietnam in a small, exemplary sample of debates among some prominent international lawyers of the time. I offer a reading of the interaction between a disciple of the New Haven Jurisprudence, John Norton Moore and two opponents: Richard Falk, also a student of McDougal's but one who approached his policy-oriented pedigree with nuance and much sophistication, and Wolfgang Friedmann, a representative carrier of the NHS's legalist label.

Schematically, in dispute was: the status of North and South Vietnam, the existence of an armed attack, the right to collective self-defense, the level of permissible intervention, the proportionality of countermeasures, and the implications of all of this for foreign policy interests of the U.S.

A. JOHN NORTON MOORE DEBATES RICHARD FALK

Moore principally relied on the concepts of 'minimum world public order' and 'genuine self-determination' as two community policies to argue that the unilateral use of coercion by the Democratic Republic of Vietnam (D.R.V.) against the Republic of Vietnam (R.V.N.) was unlawful.[21] First, for the sake of assessing the legality of the use of force, the D.R.V. and R.V.N. are separate entities under international law. Evidenced by General Assembly's record of action and about sixty states' recognition, the two have at least been separate *de facto* international entities since the 1954 Geneva Accords. Any contrary inference from the language of the Accords, which were in principle military cease-fire agreements and which denied a permanent status to provisional military demarcations, to characterize the use of force as civil strife in a unified state merely stands the Accords on their head. Since the international status of the D.R.V. and R.V.N. does not hinge on the Geneva Accords, the nullity of the Accords once the elections did not occur in 1956 would not change the facts in question.[22] To allow political grievance over the unfulfilled promise of elections and the question of the validity of the Accords to justify unilateral use of force by the D.R.V. violates the principal structure of

[20] McDougal, 'International Law, Power, and Policy: A Contemporary Conception', 82 *RECUEIL DES COURS* (1953) 133, at 156.
[21] Moore, 'The Lawfulness of Military Assistance to the Republic of Vietnam', 61 *AJIL* (1967) 1, at 2 [hereinafter *Lawfulness of Military Assistance to Vietnam*].
[22] *Ibid.* at 3–6.

contemporary international law as embodied in the U.N. Charter. 'Any justification of unilateral action because of asserted political grievances would substantially destroy the present structure of world public order.'[23]

Second, in addition to the fundamental community prescription prohibiting unilateral resort to coercion for major change, a strong community interest in restricting coercion limits the lawful use of force to individual or collective defense when there is no reasonable alternative for the protection of the major values. The manifestation of this principle is in Article 51 of the U.N. Charter, but the right of defense and level of coercion are not limited to the Charter and to armed attack and have to be determined in context. Regardless, there is sufficient evidence that there has been an unquestionable armed attack by the D.R.V. against R.V.N. justifying the right to individual and collective self-defense.[24]

Third, nothing in the Charter limits the right of the U.S. to partake in an act of collective self-defense, in particular because the Security Council has been unable or unwilling to take necessary measures against the D.R.V.'s unlawful use of force. The 'inherent' right to individual and collective self-defense derives from both the limited expectations of the community about available policing measures in a decentralized international community and the interdependence of the 'world community' where states have real interest in what transpires in other parts of the world.[25]

Fourth, the scope of the U.S. assistance and military force has been proportionate to the initial coercion. Permissibility of coercion cannot be determined either by the general principle of proportionality or by military necessity. The specific details of the particular case including the incremental increase of the force used by the U.S. before and after 1961 satisfied the requirements of proportionality.[26]

Moore continues with a warning about losing sight of what fundamentally matters in the Vietnam conflict in the maze of legalistic arguments or ambiguities of the case. Claims of the legality of the initial coercion and subsequent defense must be assessed in light of the total context. 'Relevant features [of context] include the strategies employed, the arena of the conflict, and particularly the outcomes sought and objectives of the participants. So appraised, United States assistance is lawful and the attack of the D.R.V. is unlawful.'[27] The D.R.V.'s objective is incursion into the R.V.N. with eyes on unification and thus forceful extension of its values. The U.S. assistance, on the contrary, has no expansionist territorial or political ambitions and is to preserve rather than extend values through proportionate military action.[28] Besides, although some features of a civil war are present in Vietnam, to determine the lawfulness of the use of force, one must consider the specific contextual features of the case such as: 'an international military demarcation line between the D.R.V. and the R.V.N., substantial international recognition of both entities, prolonged separate development, division between major contending ideological systems of the world, and substantial outside influence and assistance to the rebels in the R.V.N.'[29]

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[23] *Ibid.* at 6–7.
[24] *Ibid.* at 7–13.
[25] *Ibid.* at 13–18.
[26] *Ibid.* at 14–21.
[27] *Ibid.* at 21.
[28] *Ibid.*
[29] *Ibid.* at 29.

On the other side, Falk begins with a consequential assumption about an ongoing civil war in Vietnam and the responsibility of other states to take neutralizing, rather than provocative, measures in their interaction with the state bereft of peace.[30] The justification of foreign intervention is related to the principle of self-determination. In the countries where Communist or Communist-leaning elites have taken control without significant external support, Western intervention to neutralize Communism's expansion is hardly vindicated. The conflict in such cases is between two policies: the policy of minimizing violence and localizing conflict and the policy of fighting Communism; the former outweighs the latter.[31]

Falk suggests an analytical model with three categories of civil strife to discriminate between various degrees of foreign intervention and their implications for counter-intervention by other states.[32] The U.S. intervention in Vietnam, on that analytical model, fell on the limited permissibility end of the spectrum. A relevant question is legitimacy of supporting counter-elites against the incumbent. Discrimination in favor of counter-elites in the context of anti-colonialism policy is neither clearly established in international law nor undisputedly relevant to the Vietnam conflict. But nevertheless connecting the 1946-1954 anti-colonial war in Vietnam and its relevance to the current conflict would give a different meaning to the sixty-state recognition of the South Vietnam – it is only nominal sovereignty. It would also legitimize the Soviet-China-North Vietnam support of National Liberation Front (N.L.F.).[33] The question of permissibility of support for the incumbent elites or counter-elites obviously complicates the legal issues in question and adds to the indeterminacy of legal analysis.

Having already taken into account a few policy considerations pursued – minimizing violence, anti-Communism, anti-colonialism, Falk adds another layer of variables. The Department of State Legal Adviser's Memorandum (which was framed in response to the Memorandum of Law by Lawyers Committee on American Policy Toward Vietnam),[34] with which Moore's conclusions strikingly correspond, considers the North Vietnam's presence as an armed attack, frames the question as aggression and self-defense, all the while as it implies that international law rules on aggression and self-defense are absolutely clear. In Falk's view, this is far from the truth. Except in very overt acts of international aggression, there are gray zones of indeterminacy all over in the law. But '[t]o conclude that international law is indefinite is not to suggest that it is irrelevant, on the contrary, if rules are indefinite and procedures for their interpretation unavailable, prevailing national practice sets a precedent for the future.'[35]

The focal points here are the inconclusive legal nature of self-defense, aggression, and violence in general and the future implications of any decision-making for the policy of the U.S. Falk draws attention to the highly ideological character of legal assessment of the use of force: the Communist camp favors support for wars of national liberation, the West for anti-Communist measures, and the third world for anti-colonial and anti-racist resistance movements.[36] For Falk, characterizing the nature of North Vietnam's presence in South Vietnam amidst that legal

[30] Falk, 'International Law and the United States Role in the Viet Nam War', 75 *YALE LJ* (1965) 1122, at 1125 [hereinafter *International Law and the United States Role in Vietnam*].
[31] *Ibid.* at 1125.
[32] *Ibid.* at 1126.
[33] *Ibid.* at 1128.
[34] Lawyers Committee on American Policy Toward Vietnam, American Policy Vis-à-Vis Vietnam, Memorandum of Law, in Vietnam Hearings 687–713, cited in Falk, *International Law and the United States Role in Vietnam, supra note* 23, at 1134.
[35] Falk, *supra* note 30, at 1134.
[36] *Ibid.* at 1136.

uncertainty is part of the question rather than a clear-cut assumption that could determine the legal status of the U.S. assistance. The Legal Adviser's Memorandum also mistakenly assumes, in a dogmatic fashion, that military assistance to the insurgent factions is unlawful under any circumstances in international law without taking into account the diverging ideological-driven practices of states with regards to incumbent governments and civil insurgence.[37] Likewise, the proportionality of the U.S. military force depends on whether it is fighting a guerrilla war or a foreign nation – the appropriate quantum and modality of military force depend on the scale and facts of the hostility on the ground and not defined by international law rules.[38] The relevant question to ask is whether the objectives against the belligerent action are subject to any legal restriction in duration, intensity, and destruction.

Falk's international lawyer, conscious of the overall legal uncertainty and difficulty of unraveling relevant facts,

> has the crucial task of demonstrating the intractability of many, although not of all, the legal issues. Such an undertaking defeats, or calls into serious question, the dogmatic over-clarification of legal issues that arises in the more popular discussions of foreign policy questions. The international lawyer writing in the spirit of scholarly inquiry may have more to contribute by raising the appropriate questions than by purporting to give authoritative answers. He may enable public debate to adopt a more constructive and sophisticated approach to the legal issues.[39]

But the over-clarification is not limited to public discourse. Falk equally finds fault with Moore's portrayal of the question as one of deduction from a universal normative source with the same process of assessment. Moore posits a certain conception of world order that he views as crucial to human welfare and then proceeds to assess whether the use of force in Vietnam is compatible with the essential constituents of that conception. 'Every national decision-maker is expected to engage in the same process of assessment … [which is reminiscent of] the natural law tradition in which the purported deference to the normative restraints operative upon the behavior of a Christian prince turned out in practice to be little more than a technique of *post hoc* rationalization on the part of a government and its supporters.'[40] Moore derives clear conclusions from a single normative framework, and Falk attempts a plausible, but not absolute, resolution through a three-pronged analytical distinction between different types of civil strife to display the nuances of facts and their consequences. Moore views this as imposing arbitrary restrictions on states' discretion to use force and a conflation of what international law ought to be with what it in fact is. In defense of his analytical attempt, Falk characterizes his categorization of conflicts as a merely preliminary tool to sort through relevant questions of context to determine the decisive legal consequences of each. Beyond that primary task, more categories and subcategories could be added or eliminated, and many more rules and exceptions could be included or excluded – this is no rigid classification.[41] Falk further finds Moore's emphasis on the importance of considering the total context of the Geneva Accords inconsistent

[37] *Ibid.* at 1136–37.
[38] *Ibid.* at 1145.
[39] *Ibid.* at 1156.
[40] Falk, 'International Law and the United States Role in Viet Nam: A Response to Professor Moore', 76 *YALE LJ* (1976) 1095, at 1097 [hereinafter *A Response to Professor Moore*].
[41] *Ibid.* at 1145.

with his abrupt dismissal of the Accords' bindingness on the U.S. and their impact on the presentation of the factual state in Vietnam.[42]

Falk agrees with Moore's 'central policy test' applied to the Vietnam, that is, 'the prohibition by international law of coercion as a strategy of major change.'[43] That policy is indeed central to maintaining peace in a nuclear age. But the maintenance of peace is also tied to respect for the minimum 'shared expectations' about related matters. The Geneva Accords, for the Vietnamese, are the result of long-pursued hopes for independence. 'The achievement of national independence is a goal of such importance in the Afro-Asian world that it clearly takes precedence for these countries over generalized prohibition on force or rules about non-intervention.'[44]

That Moore accuses Falk of conflating 'is' with 'ought' on the one hand, and then asserts that in light of the ambiguity of the factual and legal setting in Vietnam the rights and duties of the parties must be assessed against the 'world order policies at stake,' on the other, is at best peculiar. The voices in this dialogue are both sympathetic to Yale's policy-oriented approach – Moore is a close associate and Falk an astute student. Both voices echo their preferred policies or 'contending world order positions'[45] – Moore espouses anti-Communism and Falk self-determination and people's struggles for independence. Neither rummages through old doctrines or their recent codification in the Charter to find a description of the Vietnam setting or a prescription for the way forward. Except that Moore, similar to McDougal's treatment of the Cuban Quarantine,[46] reverts to the text of Article 51 to justify the right of a member state to assist a non-member state:

> It should … be pointed out that … a restrictive interpretation of Article 51 is merely one interpretation, and is not logically required by the text of that article. If Article 51 is to be interpreted to prohibit the right of a Member state to assist a non-Member state, the phrase "if an armed attack occurs against a member of the United Nations" must be interpreted as meaning "if *and only if* an armed attack occurs against a member of the United Nations." Syntactically these interpretations are quite different. No plausible policy rationale has as yet been offered—much less any policies offered by the framers of Article 51—as to why Members should be permitted to assist in the collective defense of other Members but not of non-Members.[47]

Equally curious is Moore's invocation of authorities of no less stature than Ian Brownlie and the positivist Hans Kelsen to establish the meaning of Article 51 and, quite ironically, launch a policy-oriented or sociological critique of international law's treatment of Vietnam.[48] Falk is wary of this uncalled reference, but spends more time poking holes in the loose contextualist analysis of Moore. In addition to his disregard of the Geneva Accords, Moore apparently does not find the relationship between the U.S. and the Saigon regime a relevant contextual element to be considered in the appraisal of the role of Hanoi.[49]

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[42] *Ibid.* at 1113–14.
[43] *Ibid.* at 1118.
[44] *Ibid.* at 1118–19.
[45] *Ibid.* at 1095.
[46] See *supra* notes 9-11 and accompanying text.
[47] Moore, *supra* note 21, at 16.
[48] See *Ibid.* at 12.
[49] Falk, *supra* note 40, at 1134.

The bones of contention in the Falk-Moore Vietnam debate are of course much thicker – internal versus international conflict, the role of international institutions and the will of organized international community, constitutional limitations on executive power, and more. My interest in this abridged account here is to draw attention to the basic modes of argumentation, how they are sustained throughout the discourse, and what they mean for international law as a vocation. As Falk also suggests, though the two international lawyers differ on the legality of the U.S. military role in Vietnam, 'the main center of intellectual gravity in this debate is less passing judgment on the grand legal issue of American presence (at this stage, a legalistic exercise), than it is assessing the policy implications of the Vietnam Precedent for the future of international legal order.'[50]

In this debate, the language everyone knows how to speak appears to be policy, and legalism, if that means toying with either pure textual or conceptual formalism by which specific outcomes are miraculously expected to flow from the law, is nowhere to be found. There are diverging policies, but nevertheless policies, commitments, ideals, and extra-legal goals, passionately followed to their conclusion. The interesting point is exactly in how they are followed to their conclusion. Moore, despite starting with a premise that the conflict cannot be meaningfully generalized in black and white terms, in fact precisely does so by his selective focus on contextual factors to move from a general normative framework of envisioned world public order to specific results for Vietnam and the U.S., whereas Falk invests hope in some ideals outside the constrictions of the Cold War mentality and sets out on a multi-dimensional legal labor, unreservedly moving between legal rules and principles and extra-legal additions toward satisfaction of those goals.

In Falk's account, legal rules and language are present by clear admission when they are called for, but they only unexpectedly sneak in Moore's account, in a contrived linguistic form of interpretation. In this conversation, the pendulum does not swing between law and policy, but rather between Moore's and Falk's opposing ways of arguing from policy (and law when viewed as helpful) toward desired outcomes: the rigid deduction 'that comes from endorsing an ideological interpretation of contemporary international conflict,'[51] against the practical consideration of the desired policy objectives in relationship to, and measured against, their human and political cost.[52]

B. JOHN NORTON MOORE SPEAKS WITH WOLFGANG FRIEDMANN

Illustrative as Moore's engagement with Falk is, the two scholars in principle share allegiance to policy thinking and are different only in the way they envision a policy-oriented international law. To hear from one who received the badge of legalism from the Yale associates, it is apt to listen to Wolfgang Friedmann in his conversation with Moore on the same controversy.

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[50] *Ibid.* at 1095.
[51] *Ibid.* at 1154.
[52] Falk writes:

> One trouble with fighting for an idea is that there is no way to measure how much sacrifice its defense is worth. An absolutism sets in. The image of the enemy that justifies his destruction is held secure against prudence, reason, and morality. Only clear inferences of Communism, of aggression, and of good intentions vindicate the death and destruction inflicted upon Viet Nam.

Ibid. at 1157.

Friedmann has no illusions about the normative determinacy of international law in Vietnam and instead echoes the familiar gaze-at-the vacuum of international lawyers in the legal universe facing putatively newly-emerging complex questions. Concurring with Quincy Wright, he takes the 'candid truth' to be 'that international law has neither motivated nor controlled the mutual interventions in Vietnam, the war—which is not called a war—moves in a legal vacuum.'[53] Discrepancy of scholarly positions over Vietnam is not a matter of diverging legal interpretations – contrary to domestic law, international law, not by nature but because of its present structure, has miles to go to claim authority and control. Rather, the opposing views on Vietnam specifically arise from two sources: selectivity of factual presentation and the relationship between international law and national interest.[54]

Moore's arbitrary selection of facts is in his invocation of *ex parte* statements of the State Department and otherwise U.S. pronouncements to delineate a factual case, leaving out the North Vietnamese contentions as mere 'political grievances . . . legitimate or illegitimate';[55] his selective treatment of the findings of the relevant international fact-finding authority, International Control Commission, based on their implications for U.S. interest and South Vietnam; and in ignoring the U.S. record of military, economic and political interference since 1954 in support of a sovereign and independent state of South Vietnam and its consequences for unfulfilled promise of elections and the validity of the Geneva Accords.[56] Friedmann makes no absolute or explicit claim about the legal consequences of these facts. On the contrary, he barely shies away from pushing the uncertainty of the law on the question to its limits when he states that a rejection of U.S. claim to be acting in Vietnam in conformity with international law and the U.N. Charter does not necessarily lead to the conclusion that the U.S. is an aggressor.[57] Friedmann's contention is more fundamental; it is '*the method of thinking*, the ambiguous use of terminology and the bias in the selection of facts that … expose Professor Moore's thesis to serious criticism.'[58]

Moore's response to what Friedmann attributes to him as an 'indefensible scholarly' practice,[59] is further arguments justifying his selection as well as a counter-accusation of Friedmann's selective reading of his original position.[60] But most importantly, Moore asserts that Friedmann did not appreciate the more salient aspect of the argument regarding the fundamental limitation on the use of force as 'a modality of major change.'[61] The question of who struck first or who violated the agreement is only so much important as it relates to the grievances impelling, and the severity of, those actions. The grievances of Hanoi, even if valid, could not justify an armed attack in violation of the U.N. Charter.

Note that here Moore is not appreciating the thrust of Friedmann's argument either. Having candidly stated that international law neither permits nor prohibits much of the happenings in Vietnam, Friedmann is not searching for the answer in the Charter or otherwise in custom. He is rather taking his interlocutor to task to acknowledge a wider array of facts before

[53] Friedmann, 'Law and Politics in the Vietnamese War: A Comment', 61 *AJIL* (1967) 776, at 785.
[54] *Ibid.* at 778.
[55] Moore, *supra* note 21, at 6.
[56] Friedmann, *supra* note 53, at 779–81.
[57] *Ibid.* at 779.
[58] *Ibid.* (emphasis added).
[59] *Ibid.* at 782.
[60] Moore, 'Law and Politics in the Vietnamese War: A Response To Professor Friedmann', 61 *AJIL* (1967) 1039, at 1043–44 [hereinafter *A Response to Professor Friedmann*].
[61] *Ibid.* at 1044.

the inquiry has assumed a direction. Collective security outside the U.N. framework does not appear to Friedmann to have been a recognized and undisputed practice. But if the Vietnam record of the U.S. begins to erect a practice, third-party military assistance will have gained legitimacy through the process of balance and counterbalance of national interests and not the Charter or 'minimum world public order.' So what Friedmann in effect finds troublesome is Moore's ironic fallback on the Charter or authorities while he has already started with a directional selection of facts 'relevant' to the 'context' and also disclaimed deference to authority.

Moore is not in the least ambiguous about the directional nature of the inquiry. The most salient point on the normative front is a 'careful analysis of goals to be served, greater breakdown of the diverse types of intrastate conflict with more precise recommendation for each major type, and exploration of a range of alternatives to total prohibition of assistance.'[62] So any legal assessment of third-party assistance turns on a 'careful analysis of goals' and their compatibility with minimum world public order. Here the tentative goals that Moore postulates are 'genuine self-determination' and 'the requirements of minimum world public order'. Not only may outside assistance to one or another faction adversely impact the goals of self-determination in some cases, but the more important objectives of minimum world public order may trump a desire for self-determination in some cases too. The only determining factor is the specific context and most importantly the objective of the participants. In this particular context, Moore concludes that these policies support defensive aid to South Vietnam more than they support defensive assistance of the North Vietnam to the insurgents in the South. This is in fact intended as a strike against the traditional approaches with 'blind reliance on black-letter rules as to which side, if any, can be aided in a civil war and sometimes suggesting an Alice-in-Wonderland search for neutral principles.'[63]

Friedmann, however, does not appear to be a fair target for this attack. He primarily contests the implications of the priority of the requirements of minimum world public order over self-determination, once those requirements have been defined to correspond with the U.S. Cold War ideology. No less crucial to Friedmann's analysis are further ramifications of what he calls 'Professor Moore's legitimacy doctrine,' suggesting 'that civil wars and revolutions are instruments of change, that international law is hostile to change by force in civil as well as in international war, and that therefore governments may 'in most contexts' legitimately request assistance from outside, but insurgents may not.'[64] This 'Metternich doctrine of legitimacy' is inconsistent with past precedent in the U.S. foreign policy – the Holy Alliance and the Monroe Doctrine, to name two examples – and 'an anachronism in the turbulent world of the 1960's.'[65] So if Friedmann is disturbed by any incongruence, it is inconsistency in the policy itself rather than inconsistency between law and policy. Yet upon further probing, it is in fact not even consistency of policy that preoccupies Friedmann. Friedmann is, bluntly if not dogmatically, in pursuit of a policy of his own: 'the use of international law as a progressive instrument of co-operation among nations.'[66]

Just like his rebuttal with Falk, Moore's quarrel with Friedmann does not end here. But we have heard enough of the phony law-versus-policy debate to now wish to leave the scene with a last memorable point of (mis)communication between the two. To quote Friedmann:

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[62] *Ibid.* at 1050.
[63] Moore, *supra* note 21, at 31.
[64] Friedmann, s*upra* note 53, at 782.
[65] *Ibid.*
[66] *Ibid.* at 783.

> Time and again Professor Moore invokes 'minimum world public order,' a formula made familiar by Professor McDougal's many writings. This goes together with the rejection of 'black letter rules . . . . The reference to 'neutral principles,' if it means anything, means that policy objectives decide what is right and wrong. And in the absence of third-party determination, 'minimum world public order' means, Humpty-Dumpty-like, what the policy-maker wants it to mean, a catch-all phrase to justify whatever action the writer wishes to justify. U.S. action in Viet-Nam is in the interest of 'minimum world public order,' if you share all the assumptions of Professor Moore . . . .[67]

Despite his reference to 'third-party determination' and possibly alluding to adjudication, it would be unpersuasive to read Friedmann as reminiscing about adjudication and international law in contradistinction to policy. Recall that Friedmann has already shown a great deal of realism when speaking about what international law does (or mostly, does not) have to say on Vietnam, and that how in the absence of a centralized structure in international law discrepancy between opinions of international lawyers ought to be distinguished from diverging legal interpretations in domestic courts. To be sure, he might fancy a more institutionally robust judicial setting where he could compete with his domestic law peers, but that does not guide his conversation with Moore over Vietnam. Moore is of a different view, however:

> No formula or approach, whether policy-oriented or the most pedantic search for "black and white" rules, guarantees "correct" results in analysis of complex issues of international law or the same result when applied by different scholars. All suffer alike from the absence of third party determination. Yet Professor Friedmann's suspicion of policy analysis suggests both that he believes that a search for "black and white" rules offers greater certainty of "correct" results and that he thinks consciously or unconsciously that policy justification is unnecessary and even dangerous. But there are strong reasons for suggesting that the available range of complementary norms of international law makes a simplistic rule application a more dangerous exercise (dangerous in the sense of ease of manipulation of result) when dealing with complex major issues than the conscious application of norms in the light of their function.[68]

Unless Moore is in possession of some mysteriously perceptive tools to establish a 'consciously or unconsciously' pursued hostility against policy in Friedmann, or a faith in certainty of the black-letter law, nothing in the above-quoted text or in the remaining pages of Friedmann's comment on Vietnam suggests a principled preference for law over policy. Elsewhere, it was this same Friedmann after all, who wrote, '[a]fter the work of Lasswell, McDougal, and their associates, it will be less excusable than ever to approach the rapidly multiplying problems of international order purely in terms of conceptual analysis.'[69] But Moore, in the great company of McDougal reacting against opponents, is vigilant not to miss this conversation as an opportunity to oppose what he views as two nemeses – rule and policy oriented approaches. To him, the rhetorical move by which the adversary's position is reduced to mere tenacity in preserving the tradition, rather than in fact an opposing set of policy preferences and an invitation to a more inclusive 'method of thinking,' appears to serve as an effective shortcut to arrive at desired outcomes consonant with the world public order of human dignity. Little did he appreciate the possibility that tenacity was closer to home than he thought – 'the

[67] *Ibid.*
[68] Moore, *supra* note 60, at 1051–52.
[69] Friedmann, 'Law and Minimum World Public Order and the Public Order of the Oceans', 64 *COLUM L REV* (1964) 606, at 615.

rigid shoe [was] on the other foot.'[70] Nor did he know that, with every step in the argument, tenacity also raised the imaginary law-versus-policy barrier one inch higher.

Let us give the last word to Friedmann in his specific reference to 'world public order' immediately after his reference to policy and his view of the ideological interpretation of the former in the hands of the New Haven machinery. All that altercation about the presentation of facts was to draw attention to different policy objectives at work, which could potentially have had significant ramifications for the question of Vietnam, but which were practically disregarded in Moore's 'method of thinking.' It is this 'method of thinking,' this confidence in the process of postulating a set of normative goals and then deducing the particular from the general arbitrarily in disregard of a balancing test between policies, that Friedmann opposed. Perhaps the real difference between our two protagonists was in their confidence in the international lawyer's position and potential to find the right answer. Moore moved daringly in an uncertain world with avowedly clarified goals and ideals and found himself in possession of the key to bring about consensus – even if that was only 'incantations of "minimum world public order" or "fundamental community prescriptions."'[71] Friedmann, in contrast, appreciated the complexity of the question, not to suggest that there is 'a legal vacuum' and evade the question altogether, but rather to admit that against each policy there is a counter-policy, and for the international law scholar, besides the virtue of humility, it is also a matter of practical necessity to admit and sift through facts and policies as comprehensively as possible to reach a solution that the greatest number of addressees would find authoritative and controlling.

III. In the Name of Coercion: Law and Policy in Afghanistan

Besides its magnitude and extraordinary symbolic impact on American national identity, 9/11 induced considerable global sympathy with retaliatory use of force for the U.S. Of the roster of conceivable legal justifications, Washington chose self-defense as the most effective and least costly option. Before the month's end, the Security Council passed Resolutions 1368, which nearly encouraged a comeback to the Council to seek military authorization,[72] and Resolution 1373 which could cautiously but plausibly be construed to authorize the use of force against Afghanistan.[73] Some regarded the U.S. reluctance to rely on a broad reading of Resolution 1373 as a conservative measure against setting precedent for others to invoke its mandate in using force against terrorism.[74] Worse, intervention by invitation in a context as structurally fragmented as Afghanistan would have entangled the U.S. in complications of recognition of the Northern Alliance as the legitimate government.[75] Humanitarian intervention was also a quite far-fetched justification given the victim status of the retaliator. Self-defense, therefore, was the most readily available retaliatory ground for the American invasion of Afghanistan.

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[70] Anderson, *supra* note 13, at 380.
[71] Friedmann, *supra* note 53, at 783.
[72] SC Res. 1368, 12 September 2001.
[73] SC Res. 1373, 28 September, 2001.
[74] Byers, 'Terrorism, the Use of Force in International Law after September 11', 51 *INT'L & COMP LQ* (2002) 401, at 403.
[75] *Ibid.* at 404.

Yet as the next decade testified, legal justification of a military response in the immediate aftermath of 9/11 was by no means the sole or most vexing question in the American handling of Al-Qaeda's transnational terrorism. Nor was self-defense, in any satisfactory degree, to be determinative of the existence and delimitation of an armed conflict for years to come. As Ryan Goodman in a recent reflection usefully takes stock, opinions about the very existence of a war have constantly vacillated depending on what has been at stake: militarization, Determination of combatant status, military detention and military commissions, fair trial and humane treatment of detainees, and targeted killings.[76] The only consistency in legal determination of a state of war has been inconsistency in the interest of various policy objectives. Goodman does not seem to attribute this inconsistency to bad faith, but he nevertheless urges against it in pursuit of higher respect for the rule of law.[77]

Notwithstanding the implausibility and otherwise disadvantages of a war-no war binary opposition and consistent fidelity to one position or to the other in contexts where legal definitions are highly fact-sensitive and those facts constantly evolving, what Goodman objects to as 'flip-flop[ping]'[78] differs from the argument advanced here. The former refers to the vacillation of expert opinions on whether there has been a state of war between the U.S. and Al-Qaeda (the outcome of a legal determination), whereas I aim to demonstrate that the U.S. international legal scholarship's response to significant questions of foreign policy predominantly and fluidly vacillates between arguments from law and policy (the argumentative process toward various outcomes). Not only is this dynamism *per* se unobjectionable, but it might in fact have great potential to address the evolving needs of the international legal order in a problem-solving manner if it is not encumbered with a false and imaginary opposition between the two types of argument.

While the previous section's reconstruction of the debates around Vietnam uncovered a false perception of law-versus-policy opposition together with its accompanying inflammatory pitch about the orthodoxy of law and heresy of policy, here the intention is much more modest. It is to expose the often-discounted cohabitation of legal and policy reasoning across seemingly opposing positions that are conveniently but erroneously associated with sharply divided ideological (and methodological) commitments. From amongst perplex questions that Al-Qaeda's status as a transnational terrorists group and the available options for the U.S. in response raised, I will merely focus on the definition of the incident and its corresponding countermeasures. The analysis here, more than the previous section's, is selective in authorship, thematic coverage, and scope, merely recounting some of the immediate and exemplary reactions in the U.S. international law community. The tale told by below examples is one in which policy reasoning is not absent from legal argumentation, but it is accommodated in a way as though it belonged to a separate domain from the law: moving between a policy-conscious and textual interpretation of the Charter in the first; relying on policy justification but ultimately seeking the approving stamp of a strict textual interpretation of the relevant law in the second; and finally, dissatisfied with inadequacy of the law, replacing the complexities of doctrinal interpretation with general policy principles altogether in the third.

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[76] Goodman, 'Flip Flops?: The Conflict with Al Qaeda Is (Not) a War,' *Just Security*, available at: http://justsecurity.org/2013/09/23/flip-flops-conflict-al-qaeda-not-war/ (last accessed 25 September, 2013).
[77] *Ibid.*
[78] *Ibid.*

A. Target Al-Qaeda but not Taliban

This position, best elucidated by Jordan Paust, in fact drew up the problem without proposing any viable alternatives.[79] Paust in essence relies on the narrow Nicaragua test, by virtue of which unless Taliban were 'organizing, fomenting, directing, or otherwise directly participating in armed attacks' by al-Qaeda, a military attack against the Taliban regime would be impermissible.[80] Any other form of support below this threshold would merely lead to state responsibility.[81] The U.S. lawful military measures would be limited to selective self-defense against Taliban's attacks on its personnel or aircraft during its presence in Afghanistan to target the Al-Qaeda objectives selectively.[82]

While Paust's objection to the U.S. massive aerial bombardments with the purpose of contributing to the destruction of the Taliban regime is clear and on target, it is difficult to know how he thinks the U.S. could tactically fight Al-Qaeda in Afghanistan in the absence of Taliban's cooperation or the Northern Alliance's invitation to intervene without getting involved with the former militarily.

More important, however, is Paust's reasoning to this end. Recognizing the application of the right to self-defense as articulated by Article 51 of the Charter against non-state actors, he goes on to suggest that of the three categories of the prohibition against the threat or use of force in Article 2(4) of the Charter (against the territorial integrity or political independence of another state, or in any other manner inconsistent with the U.N. Purposes), a military action against non-state actors may not violate the first two categories in cases where there is no impact on the political independence or territorial boundaries of a state. It is also theoretically conceivable that on balance, in a given case, a retaliatory or preemptive use of force against non-state terrorist attacks may not contravene the Charter's purposes (peace, security, equal rights and self-determination, and justice). The retaliatory or preemptive use of force in such a case, tested contextually and in consideration of the Charter's purposes, therefore, should be justified regardless of whether or not a state can claim a right to self-defense under Article 51.[83]

To reject such an interpretation, from this purposive reading of the Charter Paust takes a turn into a policy-oriented counter-argument:

> [P]redominat trends demonstrate widespread expectation and intense demand that the use of armed force for merely retaliatory or preemptive purposes is inconsistent with the purposes of the Charter, is prescribed under Article 2(4), and is not authorized under Article 51 of the Charter. Moreover, from a policy-oriented viewpoint, the strict limitation in Article 51, set forth in the phrase 'if an armed attack occurs' will, in many contexts, also serve various policies at stake including peace, security, equal rights and self-determination of peoples, the need for peaceful resolution of disputes, and the need to assure that force will not be used save in the common interest, and will at least prohibit unilateral preemptive attacks that might be made under various sorts of pretext when military force is not strictly necessary even to serve legitimate self-defense interests.[84]

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[79] Paust, 'Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond', 35 *CORNELL INT'L LJ* (2002) 533 [hereinafter *Use of Armed Force*].
[80] *Ibid.* at 541.
[81] *Ibid.* at *542.*
[82] *Ibid.* at 543.
[83] *Ibid.* at 537.
[84] *Ibid.* at 537-38.

Speaking in a language reminiscent of Yale, Paust diverges from the homegrown policies of McDougal and disciples to test the full potential of a policy-oriented approach for legal interpretation. Against preemptive use of force, however, just one step after a lucid policy-oriented reading of the Charter's use of force regime, Paust reverts to the text of the Charter's Article 39 which mandates the Security Council to determine the existence of a threat and authorize appropriate measures in response.[85] Paust's distinction between Al-Qaeda and Taliban and his approving account of U.S. position against the former and reproach of it against the latter ultimately move smoothly between a rather straightforward reading and a more policy-conscious construction of the treaty and customary regimes of the use of force.

B. An Armed Attack Is an Armed Attack Is an Armed Attack

A fast-track and simple argument justifying the right to self-defense for the U.S. in Afghanistan in response to an instance of terrorism that was plainly taken to be an armed attack was Sean Murphy's.[86] Under this account, the factual circumstances all unequivocally confirm the presence of an armed attack. Murphy begins by singing to the tune of the Nicaragua test, stating that falling below the threshold, Al-Qaeda's acts would be mere conventional crimes. Without proof beyond any reasonable doubt about the linkage of the terrorist acts to Al-Qaeda and Al-Qaeda to Taliban, and considering the Security Council's and General Assembly's lack of recognition of the acts of terrorism as 'attack,' it could be argued that the September 11 incident was a wrongful use of force inadequate to reach the Nicaragua threshold.[87] The global community has generally shown cold reception to a characterization of terrorist acts as 'armed attacks.' Israel's 1982 incursion into Lebanon, its 1985 bombardment of Tunisia in response to PLO's prior terrorists acts, and the U.S. bombing of Libya in 1986 in response to a terrorist explosion in Berlin that killed and injured American citizens none met approval by the international community.[88]

The factual context in this case is nevertheless different. The grand scale of the attacks, right at the heart of the U.S. financial center, their impact on the American psyche, and the resulting death toll in just one day all push the severity of the incident to a different level.[89] Moreover, the U.S. government – both the President and Congress – perceived the act as an armed attack and this perception, although not confirmed by the Security Council or General Assembly resolutions, received support from a number of states.[90] More recent episodes of terrorist attacks in the late 1990s also triggered self-defense by the U.S. without considerable resistance in the international community. Regardless, it is not even necessary to view the Al-Qaeda's attack in a binary light as either an armed attack or an international crime. Contemporary international law allows for co-existence of international criminal responsibility and state responsibility in a single incident.[91]

The unequal weight of Murphy's contextual factors is striking. That the U.S. sole perception of an armed attack and its invocation of that perception to strike back are counted as a

[85] *Ibid.* at 538.
[86] Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter', 43 *HARV INT'L LJ* (2002) 41.
[87] *Ibid.* at 46.
[88] *Ibid.* at 46-47.
[89] *Ibid.*
[90] *Ibid.* at 48-49.
[91] *Ibid.* at 49.

distinctive feature of this context can hardly be taken seriously. Likewise, the arbitrariness of his treatment of state practice, whereby the international community's unfavorable reactions against self-defense triggered by acts of non-state terrorism are ultimately discounted, further weakens his conclusion.

Yet a most interesting turn in tone occurs in Murphy's last step of reasoning where he reads the language of Articles 2(4) and 51 so faithfully as to suggest that nothing in the latter requires that self-defense be limited to cases where the original 'armed attack' has been carried out by a state as opposed to a non-state actor.[92] While Article 2(4) refers to a use of force by one 'member' against 'any state,' Article 51 is impartial about the identity of the original perpetrator. This textual reading, he then suggests, is confirmed by the Caroline incident – the customary source of self-defense – too which concerned U.S. national's support for a rebellion in Canada.[93] Even though the textual reading of the Charter adequately supports the legality of self-defense, given Taliban's refusal to surrender bin Laden after his indictment for the East Africa bombings, one could present a 'respectable argument' to impute Al-Qaeda's attack to the *de facto* government in Afghanistan.[94]

Read against Paust's reasoning, Murphy relies on extra-legal or contextual factors, but without an express commitment to policy thinking. While Paust seemed to integrate law and policy in the labor of legal interpretation, Murphy presents a comprehensive laundry list of all environmental (and dispositional) factors and then, as though the argument still calls for further justification, adds a safety net of strictly textual reading of the relevant law too.

C. Its name is 'Armed Conflict'

In their exposition on 'legal response to Terror', Anne-Marie Slaughter and William Burke-White move away from the doctrinal questions around the U.S. countermeasure in Afghanistan and seize the opportunity born by the 9/11 crisis to re-imagine a constitutional change.[95] As a constitutional moment, they believe that September 11 calls for a rearrangement of the international legal structure to explicitly include civilian individuals in the legal regime of the use of force. Article 2(4)(a) of the U.N. Charter, therefore, must read: 'All states and individuals shall refrain from the deliberate targeting or killing of civilians in armed conflict of any kind, for any purpose.'[96] This is the principle of 'civilian inviolability,' which can serve the dual purposes of justice and peace, if integrated in the fabric of the law of armed conflict, international criminal law, and state responsibility.[97]

Just as the Charter's paradigmatic prohibition on the use of force replaced war with alternative modes of dispute resolution, the changing character of the use of armed force requires yet another paradigm shift from war to 'armed conflict.' Under this more expansive paradigm, the law will address all kinds of the use of force from traditional wars of international and non-international character, various kinds of insurgency, and domestic and international terrorism.[98] The new paradigm of armed conflict is broad enough to cover a wide array of contemporary use of armed force that threatens international peace and security regardless of the identity of the

[92] *Ibid.* at 50.
[93] *Ibid.*
[94] *Ibid.* at 51.
[95] Slaughter & Burke-White, 'An International Constitutional Moment', 43 *HARV INT'L LJ* (2002) 1.
[96] *Ibid.* at 2.
[97] Ibi*d.* at 3.
[98] *Ibid.* at 5.

attacker or the territorial scope of the attacks. It also shifts the focus away from the attacker onto the attacked, regulating civilian protection more effectively.

Civilian inviolability is ingrained in the laws of war, expanding from a limited understanding in the 1907 Hague Conventions to the subject of a separate Convention (the Fourth Geneva Convention) in 1949 whose common Article 3 brought a minimum of protection to non-international armed conflicts. The Second Additional Protocol of 1977 on civil armed conflicts and subsequently the jurisprudence of *ad hoc* international criminal tribunals in the 1990s continued to trivialize the territorial distinction between armed conflicts insofar as civilian protection was concerned. As a result of this evolution, the 2001 terrorist attacks comfortably fall within the formal definition of 'armed conflict' as presented in the International Criminal Tribunal for the Former Yugoslavia (ICTY): they are an incident of 'protracted armed violence between governmental authorities and [and] organized armed group.'[99]

Under this account, the new paradigm of 'armed conflict' is not merely of semantic importance,[100] but rather it avoids the ambiguity and 'lack of definitional orientation'[101] embedded in the concept of terrorism. By shifting the emphasis from prevention to protection, it also draws attention to identifying the victim rather than the terrorist. Instead of the 'rhetorically expedient' but 'analytically constraining' concept of terror, the principle of civilian inviolability centers on the far less ideologically-laden concept of 'civilian.'[102]

A 'corollary of individual dignity',[103] the principle of civilian inviolability pierces through the fog of armed conflict with rays of protection for innocent targets. It places great confidence in a global criminal system with the complementarity principle similar to the relationship between domestic and international criminal tribunals.[104]

The practical difficulties of the operationalization of this scheme aside, it is unclear how such an abstract policy goal animated as a principle could define the legitimate means used in an armed conflict. Would it change the parameters of proportionality and necessity? How would such a regime sanction the use of counter-terrorism and intelligence measures that do not necessarily or directly harm the civilian population? Would its application be so broad as to regulate indirect harm to the civilian population too? What are the substantive and procedural laws governing the treatment of the 'non-privileged combatants' who are neither dignified soldiers nor civilians? What does the principle of civilian inviolability say about the duration of the armed conflict in response to September 11?

Bypassing the tiresome but at times guiding doctrinal questions and analytical distinctions in favor of an abstract and general policy principle is a road to utopia. Yet of interest here is the structure of this utopian scheme. Slaughter and co find the existing doctrinal establishment inadequate for the post-2001 world and propose a constitutional amendment of sorts. Their proposal for a fundamental policy principle is sanctioned through international criminal institutions, but their constitutional principle leaves out a whole array of questions prior to the conduct of armed conflict unanswered. From the world of law, they trust international (criminal) institutions but not rules and doctrines, and from the world of policy, their proposal

[99] Case No. IT-94-1-A, *Prosecutor v. Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995), at para. 70, cited in Slaughter & Burke-White, *supra* note 95, at 8.
[100] *Ibid.* at 5.
[101] Paust, 'Legal Responses to International Terrorism', 22 *HOUS J INT'L L* (1999) 1, cited in Slaughter & Burke-White, *supra* note 95, at 12.
[102] Slaughter & Burke-White, *supra* note 95, at 12.
[103] *Ibid.* at 16.
[104] *Ibid.* at 15.

remains largely limited to *jus in bello*, leaving out the intricacies preceding and following coercion. The principle of civilian inviolability and its criminal enforcement bear the identifying marks of a universal faith in individual dignity and international institutions, but the Slaughter-Burke scheme conspicuously finds the doctrinal structure of the international legal system inadequate to reflect the policy ideals of a civilian-centered, as opposed to terrorist-centered, legal regime. Their legal institutional hope thus remains zealous idealism unable to face anti-internationalist misgivings, as their policy principles fail to meet the intricacies and devil-in-the-details of doctrinal questions of regulating *jus ad bellum* and war's aftermath so far as they impact civilian lives.

IV. Conclusion

What came before was a reading of a fraction of reactions to questions of U.S. foreign policy in international law scholarship in two historical moments. Empirical expectations would challenge the value of this reconstruction, for a sociological survey of international law discourse would have to reflect a wider range of voices and topics across different junctures to draw a pattern. Yet no empirical evidence can test the veracity of interpretive reconstruction; further empirical evidence would merely corroborate the continuity of the thesis across numerous subject matters, participants, and circumstances.

To be sure, the pattern of opposition between law and policy in international legal debates examined here did not have a uniform application throughout. The NHS found itself in an unwinnable war over the good of policy and the evil of law. The post-September 11 climate impelled a good measure of agreement about the urgency of a countermeasure by the U.S., and the interplay of law and policy in various proposals to this effect seemed to be less hostile. Yet, the imagined separation between law and policy continued.

Different as the details of this imaginary opposition might be in each performance, it is still a classic reenacted on most scenes where international law meets U.S. foreign policy. Take, for instance, Jack Goldsmith's skepticism about the U.S. Government's legal justification of individualized self-defense for targeted killings in places such as Yemen and Somalia and pointing out a tension in State Department Legal Adviser Harold Koh's position on self-defense.[105] Koh read the justification of self-defense narrowly in the cases of targeted killing, yet a broad interpretation of self-defense became the U.S. primary justification of the use of force in Libya to topple the government beyond the original mandate of protecting civilians.[106] Goldsmith appears to have expected a level of coherence in an international law principle that Koh's elastic interpretation clearly failed to sustain. He acknowledged that political or diplomatic reasons or mere prudence may rule against targeting terrorist groups even when the government is legally authorized to do so under domestic law, but believed that in relying on individualized self-defense, Koh "couch[ed] a policy argument as a legal [one]."[107]

This position received a scathing critique from a loyal voice in the human rights community, as Gabor Rona aimed at Goldsmith's comparison between Koh's positions on self-

[105] See Goldsmith, 'Thoughts on the Latest Round of *Johnson v. Koh*', *LAWFARE*, available at: http://www.lawfareblog.com/2011/09/thoughts-on-the-latest-round-of-johnson-v-koh/ (last accessed 16 September 2011).
[106] *Ibid.*
[107] *Ibid.*

defense in Libya and targeted killings.[108] This comparison, in Rona's view, was wrong on two grounds: comparing Koh's position on *jus in bello* in Libya pursuant to the Security Council authorization with his position on a matter of *jus ad bellum* in targeted killings was like comparing apples and oranges; and Goldsmith disregarded the distinction between an international armed conflict in which any member of the enemy's armed forces could be targeted and a non-international armed conflict where "direct participation in hostilities is the key to targetability."[109]

It is the finale to this monologue, however, that says a volume about a felt need to 'defend' law from the decay of those who contaminate it with policy to the point of obliteration: "[Goldsmith's] accusation that Koh is clothing policy arguments in the fabric of law is wrong. Koh is doing nothing more than applying [the] long-established principles of IHL that are reflected in [the] well-established rules of IHL."[110]

That Goldsmith's reservation about bending the justificatory force of self-defense appears to his interlocutor to mean one thing, and only that – a blow to international law in general – betrays lack of confidence about the adaptability of legal interpretation. A stronger defense of the usefulness of the principle of self-defense in constraining or directing military force would draw on contextual variables – legal, policy, and factual – that may call for elasticity in its interpretation and application without the blemish of inconsistency. A defensive reaction to the possibility of incoherence in Koh's application of self-defense also fails to take advantage of an apt occasion to question the nature and importance of coherence. Does Goldsmith's inconsistency objection for instance, stem from a jurisprudential concern about legal coherence? Is his requirement of coherence particular to legal interpretation or universal and determinative of validity in policy justification too? What are the benefits or problems of particular or universal coherence? Evidently, the defending voice of human rights here is uninterested in any such engagement but instead as convinced about the enchanting charm of the U.S. adherence to the rule of law as Moore was about "incantations of 'minimum world public order.'"[111] That was a zealous defense of policy against an adversary whose legal argument built on a great deal of tangible policy considerations, and this is an equally passionate preaching for the rule of law to an opponent whose argument does not necessarily foreclose the possibility of weighing the limits and potential of international law rules and principles.

Where to go from here? Wars will be waged, combatants will be killed or detained and civilians threatened, warfare technology will get ahead of our imagination, territories will be divided, and legal commotion will also catch up all the while as it tries to test lawyers' secular faith in the rule of law or certitude about preferred policies. As this paper's *tour d'horizon* suggests, the "invisible college" of international lawyers in the U.S., ever since its encounter with Yale's policy-oriented approach, has continued to faithfully guard its tradition of discourse. This style, in defiance of great potential for creativity rooted in American cultural and philosophical milieu, has persistently sacrificed meaningful problem-solving contestation in

[108] See Goldsmith, 'Gabor Rona's Response to My Post on *Johnson v. Koh*, with a Note on Ideological Opposition to Working with Congress', *LAWFARE*, available at: http://www.lawfareblog.com/2011/09/gabor-rona%e2%80%99s-response-to-my-post-on-johnson-v-koh-with-a-note-on-ideological-opposition-to-working-with-congress/ (last accessed 18 September 2011).
[109] *Ibid.*
[110] *Ibid.*
[111] See *supra* note 71 and accompanying text.

favor of professionally self-righteous defense of either law or policy. The fate of a problem-solving international law ought to be sought outside this vicious opposition.