

COMMENTARY

MULTI-PART TESTS IN THE *JUS AD BELLUM*

*Ashley Deeks**

ABSTRACT

As the U.N. Charter's drafters might have predicted, various categories of cases have arisen since 1945 in which states have sought to use force in situations not expressly contemplated by the treaty text. Those who view the Charter as a "living instrument" urge flexibility in interpretation when approaching these nonstandard cases. But they also recognize that allowing excessive flexibility will destabilize the Charter. As a result, some states and scholars seek to promote constrained flexibility by proposing multi-part tests to guide state decision-making in these nontraditional cases. The MPTs propound on the meaning of sparse texts by articulating specific, legalistic elements or factors against which states may evaluate their contemplated actions.

This Article identifies the common use of MPTs in the *jus ad bellum* to structure and assess state uses of force in nontraditional contexts. Analytically, it explores why states and scholars turn to MPTs, arguing that MPTs emerge where treaty amendments or Security Council authorization are unlikely. Although not binding on states that have not adopted them, MPTs promote law specification and development and offer a way to reduce interstate conflict. The Article also argues that an MPT will garner more support when it is more rule-like and when it closely tracks the underlying Charter or customary rule on which the MPT expounds. Using that analysis, it predicts that MPTs in the area of humanitarian intervention are likely to encounter continued skepticism, at least in the near term.

* Associate Professor of Law, University of Virginia Law School. Thanks to Michael Gilbert, Thomas Nachbar, George Rutherglen, and Pierre Verdier for very helpful comments.

TABLE OF CONTENTS

I.	INTRODUCTION	1036
II.	MULTI-PART TESTS: WHAT ARE THEY GOOD FOR?	1039
	A. <i>Defining MPTs</i>	1039
	B. <i>Authors and Functions of MPTs in U.S. Law</i>	1041
	C. <i>Authors and Functions of MPTs in International Law</i>	1043
	D. <i>Critiques of MPTs</i>	1047
III.	MULTI-PART TESTS IN THE <i>JUS AD BELLUM</i>	1050
	A. <i>Preemptive Self-Defense</i>	1050
	B. <i>Cyber Uses of Force</i>	1053
	C. <i>Defense of Nationals</i>	1054
	D. <i>The “Unwilling or Unable” Test</i>	1056
	E. <i>Humanitarian Intervention</i>	1057
IV.	EVALUATING MULTI-PART TESTS IN THE <i>JUS AD BELLUM</i>	1061

I. INTRODUCTION

Seventy years after states crafted the U.N. Charter, two lone sentences in the Charter—plus the customary rules of necessity and proportionality—guide states’ use of force abroad.¹ Collectively, these rules make up the body of international law known as the *jus ad bellum*, and regulate states’ resort to armed force in and against other states. In many cases, the rules are clear: Article 2(4) prohibits the use of force against another state and Article 51 creates an exception to that rule “if an armed attack occurs.”² At the same time, as the Charter drafters might have predicted in 1945, various categories of cases have arisen in which states have sought to use force in situations not explicitly captured by those two sentences. For instance, states have used force inside other states to rescue their nationals, stave off

1. U.N. Charter arts. 2(4), 51. For purposes of this Commentary, it is not necessary to resolve whether the customary principles of necessity and proportionality derive from the reference in Article 51 to the “inherent” right of self-defense or stand as independent customary norms. In either case, the relevant MPTs attempt to amplify and specify the terms contained in treaty or customary rules.

2. *Id.* A state also may use force lawfully if the Security Council authorizes it to do so, *id.* arts. 39–42, or if it has the consent of the state in which it acts forcibly. See Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT’L L.J. 1 (2013).

2016] *MULTI-PART TESTS IN THE JUS AD BELLUM* 1037

looming armed attacks, and halt ongoing crimes against humanity.³

In these circumstances and others, states and scholars have debated how to interpret the existing *jus ad bellum* rules.⁴ Those who believe that the Charter is a “living instrument” have tended to argue for a relatively flexible interpretation of that treaty.⁵ But even those who advocate for flexibility tend to worry that unduly permissive interpretations will undermine the entire edifice on which international peace and security rests. Flexible interpretations, then, must be cabined. One common method by which to achieve “constrained flexibility” is to employ a multi-part test (MPT) that articulates specific elements or factors (often spanning various types of evidentiary questions) against which a state can and must evaluate its contemplated action to assess its legality.⁶

This goal of preserving the traditional *jus ad bellum* framework while ensuring that the Charter retains contemporary relevance explains why MPTs proliferate in the use of force area. States and scholars have proposed MPTs to guide decision-making about when it is permissible to use force in anticipation of an armed attack; when a state may use force inside another state to rescue its nationals; when a given cyber

3. See THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 76, 99, 139 (2002).

4. See, e.g., William K. Lietzau, *Old Laws, New Wars: Jus ad Bellum in an Age of Terrorism*, 8 Max Planck Y.B. U.N. L. 383, 448 (2004); Nico J. Schrijver, *The Future of the Charter of the United Nations*, 10 Max Planck Y.B. U.N. L. 1, 2 (2006) (“[The formulations in the Charter] are of a fairly general nature, but were carefully chosen, albeit sometimes deliberately ambiguous because of the character of compromise. In a number of fields this has created room for additional and dynamic interpretations in the light of new needs and changing circumstances.”).

5. Remarks on Accepting the Nobel Peace Prize in Oslo, 2 PUB. PAPERS 1799, 1800 (Dec. 10, 2009), <https://www.whitehouse.gov/the-press-office/remarks-president-accept-ance-nobel-peace-prize> (“And yet, a decade into a new century, this old architecture [of the U.N. Charter] is buckling under the weight of new threats.”); Schrijver, *supra* note 4, at 21 (“Obviously, the right of self-defence as codified in Article 51 stems from a different period.”). See generally Sean D. Murphy, *Protean Jus Ad Bellum*, 27 BERKELEY J. INT’L L. 22 (2009). For other treaties that have been described as “living instruments,” see the International Covenant on Civil and Political Rights, the 1951 Refugee Convention, and the European Convention on Human Rights. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. For a discussion of the 1951 Refugee Convention as a “living instrument,” see *R (European Roma Rights Ctr.) v. Immigration Officer at Prague Airport*, [2004] UKHL 55 (appeal taken from Eng.).

6. See, e.g., Lietzau, *supra* note 4, at 449 (arguing for a factors-based approach to self-defense law); Murphy, *supra* note 5, at 23 (noting that a protean approach to *jus ad bellum* “favors an approach that calibrates a range of factors that are important in predicting the likely response of the global community to a coercive act”).

activity rises to the level of a use of force; when a state may use force inside another state against an organized armed group of nonstate actors; and—particularly relevant to Professor Koh’s Article—when a state may use nonconsensual force inside another state to suppress ongoing genocide or crimes against humanity. Koh proposes an MPT by which states would assess the circumstances in which they lawfully could use military force to end such crises. Most of these MPTs have their detractors, to be sure, including those who take a strict textualist approach to the Charter and those who highlight that MPTs lack formal status in international law. But at least some MPTs influence and reflect how states assess their proposed or actual forcible courses of action today.⁷

The creation and use of MPTs is not unique to the context of international uses of force. In many areas of law, including U.S. constitutional law, those tasked with adjudicating or interpreting the law often must propound on the meaning of sparse texts or apply older texts to more recent circumstances or technologies not envisioned by the drafters.⁸ At the same time, it may be too costly to legislate new, explicit, detailed rules to address those new contexts. MPTs are a less costly way to serve that purpose, though they face some persuasive critiques. Notwithstanding their frequent appearance in the *jus ad bellum* sphere, there is very little scholarship identifying the use of MPTs in this area (or in international law generally) or analyzing why relevant actors resort to this form.⁹

This Article has descriptive, analytical, and predictive goals. Descriptively, it identifies the common use of MPTs in the *jus ad*

7. See, e.g., U.N. SCOR, 31st Sess., 1939th mtg. at 4–5, 10–13, U.N. Doc. S/PV.1939 (July 9, 1976) (discussing Israel’s rescue of its nationals in Entebbe, Uganda and citing the imminence of the threat; the fact that force was not directed against Uganda; and amount of armed forces was only as much as necessary to rescue its nationals); Robin Cook, Speech to the American Bar Association Meeting in London: Guiding Humanitarian Intervention (July 19, 2000), <https://web.archive.org/web/20001028203431/http://www.fco.gov.uk/news/speechtext.asp?3989>.

8. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 954 (1987) (describing how the Court shifted to a balancing approach because, as Justice Holmes argued, “the absolutes of the past had to yield to experience and the social facts of the day”); Richard H. Fallon, Jr., The Supreme Court, 1996 Term, *Foreward: Implementing the Constitution*, 111 HARV. L. REV. 54, 62 (1997) (“[S]ome constitutional norms may be too vague to serve directly as effective rules of law. In addition, in shaping constitutional tests, the Supreme Court must take account of empirical, predictive, and institutional considerations that may vary from time to time.” (footnotes omitted)).

9. Daniel Bodansky has explored the related topic of the choice of rules or standards in international law. Daniel Bodansky, Rules and Standards in International Law (Mar. 31, 2003) (unpublished manuscript), <http://www.iilj.org/courses/documents/hc2003.bodansky.pdf>.

2016] *MULTI-PART TESTS IN THE JUS AD BELLUM* 1039

bellum to structure and defend state uses of force in nontraditional contexts while preserving the relevance of the U.N. Charter. Analytically, it explores why states and scholars turn to MPTs and evaluates when MPTs may garner more or less support from states and scholars. Using that analysis, it predicts that MPTs in the area of humanitarian intervention—such as the test proposed by Professor Koh—are likely to encounter continued skepticism, at least in the near term.

II. MULTI-PART TESTS: WHAT ARE THEY GOOD FOR?

This Part defines what the Article means by a “multi-part test.” It then explores some MPTs in U.S. law to tease out their functions in a domestic setting. Using that discussion as a springboard, it shows how the functions MPTs serve in international law are both similar to and different from domestic MPTs and explores why states and scholars frequently propose MPTs in the *jus ad bellum*. It concludes by examining common critiques of MPTs.

A. *Defining MPTs*

For purposes of this Article, MPTs include two basic types of multi-pronged tests. In both cases, the tests derive from and explicate or supplement a primary rule (whether constitutional, statutory, treaty-based, or customary). In one type of test, a state must meet all of the listed elements before its action is deemed lawful (a “necessary elements” test). Further, in these necessary elements tests, the elements are generally crafted to have binary (yes/no) answers. Notwithstanding the relative specificity of necessary elements test, each element may require a decision-maker to interpret terms within that element while evaluating whether the facts before her meet the requisite elements. As discussed below, the tests that states and scholars have proposed for humanitarian intervention often are, at their core, necessary elements tests, where the elements are conducive to yes/no answers and a state would have to find that each element was met before it could act.

A second type of MPT is a test in which the decision-maker must analyze the extent to which the facts meet each factor, but the factors themselves are not amenable to binary yes/no answers (a “multi-factor” test). If a factor asks the decision-maker to test the level of threat a state faces, the answer is qualitative. Across factors, strong facts within one factor (a severe threat to a state, for instance) might compensate for weak facts around another factor (lack of certainty about the

quality of the state's intelligence, say). MPTs related to pre-emptive self-defense, defense of nationals, and cyber uses of force generally constitute multi-factor tests.

Because the MPTs considered herein contain a limited number of specific items that states must evaluate, they are generally distinct from "totality of the circumstances" tests.¹⁰ These MPTs also seem to be—at least on their face—distinct from "balancing" tests because they do not overtly require the decision-maker to balance two competing equities. However, some multi-factor tests may require implicit balancing among the factors, asking states to evaluate when security interests are sufficiently real and severe that they warrant interpreting more flexibly the background rules of non-use of force, sovereignty, and territorial integrity.¹¹

At times it is difficult to identify an MPT as falling neatly into the necessary elements category or the multi-factor category. For instance, one might phrase the various parts of the test in more or less definite terms. Perhaps the MPT contemplates that a state may forcibly intervene to respond to a cyber incident when it is confident that the actor who undertook the cyber operation is a state, where the cyber operator had hostile intent, and where the operation targeted a military facility. This necessary elements MPT is more "rule-like," in that it attempts to give greater content to the law *ex ante*.¹² Alternatively, the MPT might provide that a state may intervene depending on the identity of the actor who undertook the operation, that actor's intent, and the actor's target. This multi-factor MPT is more "standard-like," in that it leaves more of the law to be created *ex post*, after the forcible act of intervention has transpired.¹³ Some MPTs contain elements that states must meet as well as factors that would increase or decrease the legality of their actions.¹⁴ Many of the MPTs discussed in Part III are multi-factor tests,

10. For an example of a "totality of the circumstances" test in U.S. domestic law, see *Illinois v. Gates*, 462 U.S. 213 (1983).

11. See Aleinikoff, *supra* note 8, at 946 (arguing that constitutional balancing tests share a conception of constitutional law as a battleground of competing interests and claim an ability to identify and place a value on those interests).

12. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560, 601 (1992).

13. *Id.* at 560, 601; see also Bodansky, *supra* note 9, at 2 ("[A] standard is less precise about what facts lead to what legal results.").

14. See, e.g., Ashley S. Deeks, "Unwilling or Unable": *Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 506 (2012); Harold Koh, *Humanitarian Intervention*, 53 HOUS. L. REV. 971, 1010–11 (2016); see also THE INDEP. INT'L COMM'N ON KOS., *THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED* 172 (2000) [hereinafter KOSOVO REPORT] (discussing legality of Kosovo intervention as "a matter of degree").

2016] *MULTI-PART TESTS IN THE JUS AD BELLUM* 1041

which generally are more standard-like, though Harold Koh's (and others') proposed necessary elements test for humanitarian intervention is more rule-like. The reasons why this latter set of drafters may have formulated their tests to be more rule-like are discussed below in Part IV.

B. Authors and Functions of MPTs in U.S. Law

MPTs are relatively common in U.S. legal doctrine. As Professor Richard Fallon has argued, the language and norms of the U.S. Constitution “are too vague to serve as rules of law; their effective implementation requires the crafting of doctrine by courts. The Supreme Court has responded accordingly. By no means illegitimately, it has developed a complex, increasingly code-like sprawl of two-, three-, and four-part tests, each with its limited domain.”¹⁵

In general, the Supreme Court crafts MPTs to help lower courts interpret laws that are written at a high level of generality or that are insufficiently specific about how the drafters intended courts to apply certain terms.¹⁶ The Court has done so, for example, in identifying the geographic reach of the right of constitutional habeas,¹⁷ the threshold for the “case or controversy” requirement,¹⁸ what constitutes cruel and unusual punishment,¹⁹ and the contexts in which governments may regulate commercial speech.²⁰ Lower courts themselves may create MPTs to help individuals (who may one day become litigants) structure their behavior.²¹ Even the Executive Branch establishes MPTs in the form of regulations to guide the behavior of those the agency regulates. It has established multi-factor tests, for instance, when the variety of fact patterns that may arise under a law is wide and no one rule will sufficiently capture the behavior that the Executive seeks to cover.²²

15. Fallon, *supra* note 8, at 57 (footnote omitted); *see also* Frederick Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 SUP. CT. REV. 285, 308–09.

16. *See* Frederick Schauer, *Opinions as Rules*, 53 U. CHI. L. REV. 682, 683 (1986) (book review) (“For in the lower courts, application of a . . . three-part test is likely to look very much like application of a statute.”).

17. *Boumediene v. Bush*, 553 U.S. 723, 766 (2008).

18. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471–72 (1982) (citations and footnote omitted).

19. *Solem v. Helm*, 463 U.S. 277, 290–92 (1983).

20. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

21. Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581, 1587–92 (2006).

22. *See, e.g.*, Rev. Rul. 87-41, 1987-1 C.B. 296, 298–99 (setting forth a 20-factor test to assess whether someone is an independent contractor or an employee).

Writing about balancing tests, Fallon argues that courts create multi-prong balancing tests when multi-judge panels are unable to agree to a new “rule” (in the “rules versus standards” sense). This is so because rules require more advanced consensus about the law’s content than standards do.²³ As Fallon notes:

[R]ules, which aspire to determine multiple outcomes in advance, are typically harder to formulate than standards or balancing tests. Moreover, because more determinate doctrines attempt to resolve more questions in advance than do less determinate doctrines, it may sometimes prove more difficult for a multimember [body] to come to agreement about the appropriate rule . . . than about how the balance of considerations tips in a particular case.²⁴

The same might be said about the difference between necessary elements tests and multi-factor tests. The former requires more advance consensus about what set of criteria must be met than do multi-factor tests. Multi-factor tests only require their creators to agree on what considerations are relevant, not what the specific outcome of each consideration must be before the test is met.

Relatedly, a diversity of activities and governmental concerns within a field of doctrine (such as the First Amendment) can make it implausible to apply the same test to the entire range of problems within that doctrinal area.²⁵ As the various categories of problems are revealed over time, courts develop MPTs to manage those diverse categories. Even the more standard-like multi-factor tests offer actors a more objective ability to predict whether they are acting lawfully and how others will view the legality of their actions, against a baseline of even broader or less nuanced texts.²⁶

Although not the primary goal of MPTs, court-created MPTs often serve as a springboard for subsequent legal codification. In a number of cases, Congress later has incorporated MPTs into statute. Congress might do so either because it agrees with the Court that a particular judicially-created MPT captures the proper constitutional or statutory analysis, or because the factors that the Court established have proven workable and sensible in

23. Kaplow, *supra* note 12, at 562–63, 569.

24. Fallon, *supra* note 8, at 82 (footnotes omitted).

25. Schauer, *supra* note 15, at 287.

26. Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 197 (1985) (“Current practice is too sophisticated to rely on the capacity of the judge to find a single, authoritative interpretation of constitutional text, yet it is too wedded to the ideal of the rule of law to permit judges to operate beyond legal constraint. Therefore, the formulaic style is designed to extract the maximum possible force from objectivity.”).

practice. Congress has codified judicially-created MPTs, for example, regarding the obviousness of a patent,²⁷ the admissibility of scientific evidence,²⁸ what constitutes “fair use” of a copyrighted work,²⁹ the constitutionality of a particular redistricting effort,³⁰ and whether a disabled person is otherwise qualified under the Rehabilitation Act.³¹

C. *Authors and Functions of MPTs in International Law*

Some of the basic reasons for crafting MPTs in domestic law—the need to clarify vague or indefinite baseline texts or a high degree of difficulty in reaching agreement among law-makers on a precise rule—resonate in international contexts as well. The U.N. Charter provisions and customary rules regulating the *jus ad bellum* are sparse and leave open a wide variety of recurring interpretive questions.³² MPTs can serve as an exercise in translation and updating. Further, the 194 states that are parties to the Charter stand in dramatically different political, economic, and military postures. A state’s military capacity often guides that state’s perspective on the ideal content of the rules regulating the use of military force. There is therefore a high likelihood of disagreement among those who would craft additional, more specific primary rules to supplement existing Charter provisions.

There are important differences, however, between MPTs in domestic and international law, particularly regarding the identity of the actors who craft MPTs and to whom the MPTs are directed. Unlike in the domestic context, where there is a supreme adjudicator, the international sphere lacks a single

27. *Graham v. John Deere Co.*, 383 U.S. 1, 3–4 (1966) (discussing how Congress incorporated patent obviousness factors into the Patent Act of 1952).

28. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–93 (1993). Congress later incorporated Daubert’s four factors into FED. R. EVID. 702.

29. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576–77 (1994) (describing origins of section 107 of the 1976 Copyright Act as rooted in Justice Story’s factors in *Folsom v. Marsh*).

30. The Voting Rights Act’s section 2 “results” test was imported from *White v. Regester*. See *White v. Regester*, 412 U.S. 755, 766–67 (1973) (discussing factors such as past history of official racial discrimination affecting right to vote; racially polarized voting; use of majority vote requirement; anti-single-shot voting provision; racial campaigning; and absence of minority elected officials); Frank R. Parker, *The “Results” Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 750–52 (1983).

31. *Sch. Bd. v. Arline*, 480 U.S. 273 (1987). This test was later incorporated into the Americans with Disabilities Act. See Americans with Disabilities Act of 1990, §§ 101(3), (9), 103(a)–(b), Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12111(3), (9), 12113(a)–(b) (2012)); see also 29 C.F.R. § 1630.2(r) (2015).

32. See Murphy, *supra* note 5, at 25.

actor who determines what the law is. (The U.N. Security Council can craft and impose new rules of international law on states, but it has not done so in the *jus ad bellum* context, and the International Court of Justice, which can adjudicate disputes between states, only infrequently grapples with *jus ad bellum* questions.³³) As a result, states and scholars, rather than courts or litigants, propose or create MPTs.³⁴ The targets of these tests are not lower or peer courts, but rather states. When states themselves author MPTs, the authoring state signals to other states how it will analyze its own uses of force in that context and, implicitly, those of other states. At the same time, those authoring states signal to actors within the state's internal institutional structure how to analyze future similar situations. Finally, unlike domestic court- or executive-created MPTs, the MPTs proffered to date in international contexts are not formally binding.

Why, then, might international actors view MPTs as a useful tool? A core struggle in the *jus ad bellum* is between crafting a system that allows states to resort to force too readily, on the one hand, and creating a system that prohibits the use of force too comprehensively on the other. One way to view this struggle is between peace and justice,³⁵ with the Charter trying to strike a balance between the two by mandating a ban on the use of force in Article 2(4) (to advance peace) while preserving the right of states to respond in self-defense to armed attacks (to ensure some minimum level of justice). Put differently, the *jus ad bellum* writ largely reflects the need to balance the sovereignty and territorial integrity of each state against the security of a state that has been, or shortly will become, a victim of an armed attack. Most MPTs attempt to import those core values and the respective weight given to them in the Charter into the more novel situations in which a victim state is contemplating forcible action.

The MPTs themselves serve several more pragmatic functions as well. First, they offer an opportunity for law specification.³⁶ As discussed above, the Charter contains a single

33. See *id.* at 38, 50.

34. State-proposed MPTs are particularly worthy of attention because states are the primary players in international relations and their practice can contribute to the formation of customary law. Even when scholars propose MPTs, however, they often derive the factors from prior state practice and third state reactions to bolster their pedigree. See, e.g., Deeks, *supra* note 14; Murphy, *supra* note 5.

35. FRANCK, *supra* note 3, at 16.

36. See *supra* notes 15–22 and accompanying text (describing how MPTs are used to increase the specificity of general laws in the domestic context).

sentence articulating when a state may use force in self-defense. Article 51 states, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.”³⁷ For strict textualists, this establishes a clear rule: One state may act in self-defense against another state if and only if that latter state completes its attack against it. For others, this language establishes a far more ambiguous proposition that fails to answer with clarity several important questions: May a state use force before an armed attack against it is complete? Can actors other than states undertake actions of such violence that the victim may treat those acts as armed attacks? What if those nonstate actors operate from within a neighboring state that won’t or can’t stop them? Does a victim state have a right of self-defense if another state inflicts significant damage on it using cyber tools? The first four MPTs discussed in Part III reflect efforts to translate and further specify the rules regulating victim responses in those situations, in light of the existing international rules on the use of force. While MPTs are not the only way to achieve this goal—negotiating new treaty rules is the most obvious alternative—MPTs appear to be the most pragmatic way to pursue this objective.

Second, and relatedly, MPTs provide a means for law development. An MPT may serve like a grain of sand in an oyster, providing a set of concrete ideas and standards around which states may coalesce and ultimately create customary international law. It provides a focal point for state discussions, organizes states’ arguments, stimulates reactions (positive or negative), and facilitates horizontal adoption by other states. Similarly, just as Congress has translated several U.S. Supreme Court MPTs into statutes,³⁸ international MPTs may serve as the basis for developing new treaty rules. At the same time, proposing an MPT is less threatening than a formal proposal to amend an existing treaty or negotiate a new treaty. Given its softer, nonbinding status, states evaluating proposed MPTs may be more comfortable accepting the elements or factors than they would be in the face of black and white treaty rules. Amending the U.N. Charter is about as likely as amending the U.S.

37. U.N. Charter art. 51.

38. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (fair use); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (admissibility of scientific evidence in the Federal Rules of Evidence); *Graham v. John Deere Co.*, 383 U.S. 1 (1966) (patent obviousness in the Patent Act).

Constitution—maybe even less so.³⁹ MPTs thus offer a way to develop rules in the interstices of the Charter in a way that avoids formal Charter amendments.

Third, MPTs may reduce the likelihood of interstate conflict. The most obvious way they do this is by putting an intervening state on notice about how some other states may interpret that state's actions. An intervening state may use the MPT to evaluate how other states may perceive its action and, if its proposed use of force fails to meet a particular MPT, may choose not to act.⁴⁰ A somewhat less obvious way MPTs do this is by offering a tool for a state to self-constrain.⁴¹ When a state proffers an MPT, it signals that it intends to comply with the announced elements or factors and that it generally will treat the MPT as foreclosing actions that fail to meet those elements or factors.⁴² The state has thus put certain acts off limits for itself—forcible acts that might have otherwise triggered conflicts with other states.

Fourth, MPTs can reduce transaction costs for states. If a state proffers or accepts an MPT as a reasonable articulation of the balance between over- and under-permissiveness of force, that state facilitates its own future internal decision-making. When the state faces a situation to which the MPT would apply, it has a legal framework for analysis already in place. Likewise, when the state faces a situation in which another state has acted in a situation to which the MPT would potentially apply, it is easier for the state to assess whether that other state has acted lawfully. It only needs to gather the newly arisen facts; it need not reinvent the legal wheel against which to assess those facts.

For all of these reasons, MPTs commonly appear in the *jus ad bellum* context. States and scholars confront a highly contentious area of international law where the texts and

39. States have amended the Charter five times since 1945, but only to reflect the significant increase in the number of states that are parties to the United Nations. The amendments expanded the number of states on the Security Council and the Economic and Social Council (twice) and made other ministerial amendments to reflect those changes. See *Introductory Note*, U.N., <http://www.un.org/en/sections/un-charter/introductory-note/index.html> (last visited Apr. 20, 2016). States have never enacted substantive amendments to the Charter.

40. The likelihood that a state would treat an MPT as a constraint depends on how widely accepted the MPT is among states generally, and on whether the MPT clearly consists of necessary elements or allows an assessment of multiple factors. Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 953–61 (2005) (arguing that the line between law and nonlaw is very thin).

41. Nagel, *supra* note 26, at 197 (“The apparent definiteness of the formulae does help to convey a promise of impersonal constraint.”).

42. Where an MPT uses factors that are overly indeterminate, the MPT may appear to constrain but actually impose few limits on a state's options.

2016] *MULTI-PART TESTS IN THE JUS AD BELLUM* 1047

customary rules offer only limited guidance to navigate recurring factual situations. At the same time, reaching consensus on formal amendments or supplements to the Charter would be extremely costly and very challenging. Proposing MPTs that derive from, attempt to strike the same balance as, and further specify the existing legal rules on the use of force in subcategories of activity is an obvious alternative way to attempt to advance the law.

D. Critiques of MPTs

Because few scholars have identified and analyzed the existence of MPTs as a mode of international legal discourse and development, there is correspondingly little discussion of the merits and shortfalls of the use of MPTs in that context. Judges and scholars evaluating MPTs in U.S. domestic law, however, have raised a number of concerns about their use.

First, critics argue that MPTs—particularly those that involve multiple factors rather than necessary elements—are too indeterminate to offer real guidance to future litigants. Judge Posner, for example, has written in the context of a tax case about what constituted reasonable compensation:

It is apparent that this test . . . leaves much to be desired—being, like many other multi-factor tests, “redundant, incomplete, and unclear.” To begin with, it is nondirective. No indication is given of how the factors are to be weighed in the event they don’t all line up on one side. And many of the factors, such as the type and extent of services rendered, the scarcity of qualified employees, and the peculiar characteristics of the employer’s business, are vague.⁴³

Likewise, Judge Easterbrook has shown “reluctan[ce] to accept an approach that calls on the district judge to throw a heap of factors on a table and then slice and dice to taste.”⁴⁴ MPTs containing factors that are fixed at a very high level of generality or that are particularly malleable may not allow future litigants to predict with accuracy how future adjudicators

43. *Exacto Spring Corp. v. Comm’r*, 196 F.3d 833, 834–35 (7th Cir. 1999) (citations omitted).

44. *Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1283 (7th Cir. 1990) (Easterbrook, J., concurring). *But see* C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 115 (“Doctrinal tests often permit quick and easy application of constitutional mandates. Doctrinal analysis identifies factors that in the most familiar cases lead to the ‘right’ constitutional result. Courts can then use these factors within tests and announced levels of scrutiny to enhance predictability and to guide their audiences.”).

will review their chosen action (or review the action of a potential defendant they hope to sue).⁴⁵ This is a potential concern for international MPTs as well, though a common alternative—turning to a legislature to codify the appropriate factors and how to weigh them—is virtually nonexistent in the international context.

Second, in light of the limited guidance that MPTs may offer decision-makers, some worry that MPTs facilitate unequal application of the law to similarly situated individuals. This can produce both a sense of unfairness among those operating within the system and a lack of uniformity in applying the rules.⁴⁶ Justice Scalia, for instance, argued that predictability is a virtue for both judges and litigants: “Only by announcing rules do we hedge ourselves in.”⁴⁷ MPTs that contain standard-like factors are particularly liable to producing different outcomes in relatively similar cases.

Unequal application of the law is a critical concern in international law, particularly because states often stand as the first and ultimate judges of how the law applies. States with robust military and intelligence capacities are far more likely to find themselves in situations in which the application of MPTs is relevant and to interpret those MPTs in a manner that leads them to their desired results.⁴⁸ MPTs that contain ill-defined factors (rather than well-defined elements) will be particularly susceptible to manipulation by policy-makers.⁴⁹ In the

45. As Richard Fallon puts it, MPTs may foster too many “reasonable disagreements.” Fallon, *supra* note 8, at 80–81. Fallon identifies two concerns about “reasonable disagreements” in the domestic context. The first is that such disagreements raise questions about whether courts actually have better expertise than political branches to decide these questions. A different question of political power would arise in the international context: whether MPTs are “unfair” because we might expect them to trigger reasonable disagreements between groups of powerful states on one side and less powerful states on the other. Fallon’s second concern relates to how MPTs may foster uncertainty, an issue this Commentary discusses. *Id.* at 81.

46. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–80 (1989) (“[W]hen we decide a case on the basis of what we have come to call the ‘totality of the circumstances’ test, it is not *we* who will be ‘closing in on the law’ in the foreseeable future, but rather thirteen different courts of appeals To adopt such an approach, in other words, is effectively to conclude that uniformity is not a particularly important objective with respect to the legal question at issue.”).

47. *Id.* at 1180; *see also Exacto Spring*, 196 F.3d at 835 (criticizing an MPT because it invited “the making of arbitrary decisions based on uncanalized discretion or unprincipled rules of thumb”).

48. While states with limited military capabilities are just as prone to interpret MPTs to favor their own policy outcomes, they usually will be in a less-empowered, second-mover posture compared to the states choosing whether to employ force.

49. *See* Bodansky, *supra* note 9, at 2 (“[A standard] thereby provides the law-applier with more discretion both in determining the relevant facts and in applying the law to those facts.”).

2016] *MULTI-PART TESTS IN THE JUS AD BELLUM* 1049

international context, where there is no single adjudicator *ex post*, those states and other actors that assess whether a particular set of facts meet a multi-factor test may possess different facts, may take different views of those facts, and may be unable to assess the facts they have objectively because of their strong political interests in the outcome. Again, though, the existence of certain familiar MPTs may foster more equal and predictable behavior than would exist without any MPTs, as long as states insist on acting in the gray penumbra surrounding the Charter text.

A third critique of MPTs, one that stands in some tension with the concern about insufficient predictability, is that they represent the equivalent of judge-made legislation. In most systems, legislatures make the law and judges interpret it; MPTs may elide that distinction. As Professor Vincent Blasi writes, “One of the complaints raised by conservatives . . . was that the Justices indulged in essentially ‘legislative’ modes of reasoning, reaching decisions . . . by inventing and applying elaborate, multifactor tests that bore the stamp of subjectivity and arbitrariness.”⁵⁰ In the international context, the only “legislatures” are the Security Council, states negotiating new treaty provisions, or states developing (through their practice and *opinio juris*) new customary rules. MPTs lack a formal status (though when proposed by states may reflect *opinio juris*), and thus bind no particular actor other than, possibly, the states that proposed them. Although the MPTs discussed in the next Part generally have been proposed in similar form by multiple scholars and, in several cases, states, they still carry far less formal weight in their respective spheres than the MPTs crafted by domestic courts.

A final critique of MPTs is that they give the illusion of being precise and complex elucidations of the underlying law, even though they often are difficult to apply and can obscure as much as they reveal.⁵¹ Indeed, one reason to employ MPTs is deliberately to convey the impression that the tests are objective and constrain their creators. In the international context, states and their international lawyers (and scholars who propose them) surely intend the MPTs they offer to do much the same thing. The *jus ad bellum* MPTs appear to be a careful, lawyerly, and

50. Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 WM. & MARY L. REV. 611, 623 (1992); see also Scalia, *supra* note 46, at 1185 (“[W]hen one does not have a solid textual anchor or an established social norm from which to derive the general rule, its pronouncement appears uncomfortably like legislation.”).

51. See Nagel, *supra* note 26, at 177, 180.

impersonal set of constraints that take a “rule of law” approach to an area of international law that is laden with political concerns. But that appearance can obscure the creators’ self-interest.

In short, many of these critiques seem fair, at least when the MPT at issue consists of highly malleable factors and little guidance about which factors are more important than others. MPTs nevertheless may be the best worst option in many cases, when the other choices are a detailed but virtually unobtainable rule or a “totality of the circumstances” mode of analysis.⁵²

III. MULTI-PART TESTS IN THE *JUS AD BELLUM*

This Part explores several contexts where states have sought to use force; where the Charter and customary *jus ad bellum* rules are ambiguous about whether such force would be permissible; and where states, scholars, or both have offered MPTs to guide states’ analyses of how the Charter should apply in these areas of ambiguity.⁵³

A. *Preemptive Self-Defense*

The U.N. Charter provides that states may use force in self-defense when “an armed attack occurs.”⁵⁴ This language has prompted a long-running debate about whether and when a state may use force against the attacker before the armed attack is completed. The debate took on particular salience in the Bush Administration, when it put forward a National Security Strategy that stated:

52. Beebe, *supra* note 21, at 1649 (“[M]ultifactor tests appear to be the least worst alternative, if not the only alternative, to a wide-open ‘totality of the circumstances’ or ‘rule of reason’ type of analysis.” (footnotes omitted)).

53. One scholar has proposed a set of “meta-factors” that states could use to predict whether coercive behavior in any given context would be deemed acceptable. *See* Murphy, *supra* note 5, at 45 (considering the degree of coercion inflicted by State A on State B; the gravity of coercion State A fears from State B; the extent to which other states condone State A’s coercion; the pedigree of State B in the international community; the degree to which State A’s coercion is tailored to address threat posed by State B; and the degree to which State A’s coercion adversely affects other states or people). Another has proposed factors by which to assess whether a use of force rises to the level of an “armed attack.” Steven R. Ratner, *Self-Defence Against Terrorists: The Meaning of Armed Attack*, in COUNTER-TERRORISM STRATEGIES IN A FRAGMENTED INTERNATIONAL LEGAL ORDER: MEETING THE CHALLENGES 334, 335 (Larissa van den Herik & Nico Schrijver eds., 2013) (citing scale of force, target of the attack, identity of the attacker, military nature of the attack, and attribution of the attack to state against which self-defense would be employed).

54. U.N. Charter art. 51.

2016] *MULTI-PART TESTS IN THE JUS AD BELLUM* 1051

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack.⁵⁵

Then-Secretary of State Rice amplified this statement, noting that preemptive self-defense does not authorize a state to act without exhausting other means. She stated, “Preemptive action does not come at the beginning of a long chain of effort. The threat must be very grave. And the risks of waiting must far outweigh the risks of action.”⁵⁶

Many states and scholars accept that the standard first set forth in the 1837 *Caroline* case permits certain forcible pre-attack responses. In that situation, the United States and United Kingdom agreed that a state may use force in advance of an armed attack when that attack is imminent and the need for defensive action is “instant, overwhelming, leaving no choice of means, and no moment for deliberation.”⁵⁷ A smaller number of states and scholars have adopted the view that the principle of imminence captured in that 1837 exchange must adapt in a world in which cyber weapons and weapons of mass destruction proliferate, and in which nonstate actors seek to inflict catastrophic damage on states.⁵⁸ Rather than force a state to wait until the attack is underway, or is about to commence, this school would deem lawful a use of force that “takes place in the last window of opportunity in which a state may act effectively to defend itself against an entity that has both the intent and capacity to attack.”⁵⁹

Notwithstanding this interest in providing states with greater flexibility to adapt the *Caroline*’s “imminent” test to contemporary circumstances, this school generally recognizes

55. WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), <http://www.state.gov/documents/organization/63562.pdf>.

56. Press Release, Condoleezza Rice, Sec’y of State, Dr. Condoleezza Rice Discusses President’s National Security Strategy (Oct. 1, 2002), <http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021001-6.html>.

57. Letter from Daniel Webster to Henry S. Fox (Apr. 24, 1841), *in* 7 CONG. GLOBE, 27th Cong., 3d Sess. 26 (1843); Letter from Lord Ashburton to Daniel Webster (July 28, 1842), *in* 7 CONG. GLOBE, 27th Cong., 3d Sess. 27 (1843) (accepting the terms suggested by Daniel Webster, the U.S. Secretary of State).

58. States that adopt this rationale include Australia, Japan, the United Kingdom, and the United States. Ashley S. Deeks, *Taming the Doctrine of Pre-Emption*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 661, 666–67 (Marc Weller ed., 2015).

59. *Id.* at 666 (footnote omitted).

that decoupling the right to self-defense from the trigger of a concrete armed attack or imminent threat thereof could open a Pandora's box of forcible actions. As a result, scholars in this camp have proposed factors and elements by which to cabin a preemptive self-defense justification. For instance, Christopher Greenwood, now a judge on the International Court of Justice, has argued that a state must take into account the gravity and method of delivery of the threat, and he would demand evidence that the state or nonstate actor possesses weapons and intends to use them.⁶⁰ Former State Department Legal Adviser Abraham Sofaer offers four factors that a potential victim state would need to consider: the magnitude of the threat faced by that state; the probability that the threatened attack will occur; the exhaustion of peaceful alternatives; and the consistency of that state's action with the purposes underlying the U.N. Charter.⁶¹ Similarly, Professor Michael Doyle would require that states assess four factors before using force: the lethality of the threat the potential victim state would suffer; the likelihood that the threatened attack will materialize; the legitimacy of the victim state's proposed action (assessed using just war principles); and the legality of the target state's domestic and international behavior and the victim state's response.⁶²

These scholars are attempting to adapt the concept of self-defense contained in the U.N. Charter to deal with the changed circumstances that states now face, seventy years after states drafted the Charter. Whether or not one supports the factors, these scholars are offering a way for states to translate Charter norms to address the actual threats that they face in a cabined way, building on a use of force edifice that includes the right to respond to imminent threats.

60. Christopher Greenwood, *International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L L.J. 7, 16 (2003); see also Lietzau, *supra* note 4, at 450 (listing eight factors relevant to assessing propriety of anticipatory self-defense); Michael N. Schmitt, *Responding to Transnational Terrorism Under the Jus Ad Bellum: A Normative Framework*, 56 NAVAL L. REV. 1, 19 (2008) (accepting pre-attack self-defense "when a terrorist group harbors both the intent and means to carry out attacks, there is no effective alternative for preventing them, and the State must act now or risk missing the opportunity to thwart the attacks"); Elizabeth Wilmshurst, *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 INT'L & COMP. L.Q. 963, 967 (2006) ("In [interpreting the criterion of imminence in the face of current threats], reference may be made to the gravity of the attack, the capability of the attacker, and the nature of the threat, for example if the attack is likely to come without warning.").

61. Abraham D. Sofaer, *On the Necessity of Pre-Emption*, 14 EUR. J. INT'L L. 209, 220 (2003).

62. MICHAEL W. DOYLE, STRIKING FIRST: PREEMPTION AND PREVENTION IN INTERNATIONAL CONFLICT 46 (Stephen Macedo ed., 2008).

B. Cyber Uses of Force

Many states now have the capacity to conduct computer network attacks, which are operations to disrupt, deny, degrade, or destroy information in computers and networks, or those computers and networks themselves.⁶³ The conduct of operations in cyberspace highlights another area in which the language of the U.N. Charter, developed decades before the Internet, does not translate seamlessly to regulate those operations. In particular, states and scholars have had to determine when a particular cyber operation would rise to the level of an armed attack, such that the victim state would have a right of self-defense pursuant to Article 51 of the Charter. States and scholars have generally argued that a cyber operation constitutes an armed attack when it produces physical consequences equivalent to those of a kinetic armed attack.⁶⁴ What has proven a harder question is which cyber operations constitute uses of force that would violate Article 2(4), even though those operations might not trigger a victim state's right of self-defense.

In a speech by then-State Department Legal Adviser Harold Koh at the U.S. Cyber Command Legal Conference in 2012, Koh articulated when the United States would deem a particular cyber operation to be a use of force, such that the act would violate Article 2(4).⁶⁵ Koh stated:

In assessing whether an event constituted a use of force in or through cyberspace, we must evaluate factors: including the context of the event, the actor perpetrating the action (recognizing challenging issues of attribution in cyberspace), the target and location, effects and intent, among other possible issues.⁶⁶

He then gave three examples of cyber uses of force: “(1) operations that trigger a nuclear plant meltdown; (2) operations that open a dam above a populated area causing

63. Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT'L L. 885, 888 (1999); Matthew C. Waxman, *Self-Defensive Force Against Cyber Attacks: Legal, Strategic and Political Dimensions*, 89 INT'L L. STUD. 109, 111 (2013) (listing adherents to this view).

64. See, e.g., Schmitt, *supra* note 63, at 929 (computer network attack intended to directly cause physical destruction or injury is an armed attack); Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Remarks at the USCYBERCOM Inter-Agency Legal Conference: International Law in Cyberspace (Sept. 18, 2012), <http://www.state.gov/s//releases/remarks/197924.htm>.

65. Koh, *supra* note 64.

66. *Id.*

destruction; or (3) operations that disable air traffic control resulting in airplane crashes.”⁶⁷

Professor Michael Schmitt has offered a different set of factors that states might use to assess whether any given coercive activity, including a cyber operation, would violate Article 2(4): the severity of the act (including the extent to which the act threatens physical injury or destruction); the immediacy with which the negative consequences result; the directness of the consequences of the coercion; the invasiveness of the act (that is, whether it occurs within the victim state’s borders); the measurability of the adverse consequences; and the presumptive illegitimacy of violence.⁶⁸

In the U.S. cyber MPT, a state is proffering the factors by which it will judge a given cyber operation against the text of Article 2(4) and the penumbral understandings that have grown up around that article. This type of speech puts other states on notice of how the United States will interpret and evaluate actions against it (as well as its own actions). As Koh stated, “[T]he U.S. Government has been regularly sharing these thoughts with our international partners. Most of the points that follow we have not just agreed upon internally, but made diplomatically, in our submissions to the UN Group of Governmental Experts (GGE) that deals with information technology issues.”⁶⁹ The MPT discussed in the speech also provides a focal point for interstate conversations, organizes U.S. and foreign states’ arguments, and potentially stimulates horizontal adoption. Finally, it initiates the development of customary international law in the cyber area, as it reflects one state’s practice and *opinio juris*.

C. Defense of Nationals

Another common situation that implicates the *jus ad bellum* is when a state’s diplomats or other nationals are taken hostage or threatened with bodily harm abroad. The U.N. Charter does not explicitly address the legality of using force in this context. Some argue that, because it was widely understood before 1945 that states could use force to rescue their nationals, the reference in Article 51 to the “inherent” right of self-defense brought that right forward into the Charter era.⁷⁰ Others treat the defense of

67. *Id.*

68. Schmitt, *supra* note 63, at 914–15.

69. Koh, *supra* note 64.

70. Kristen E. Eichensehr, Note, *Defending Nationals Abroad: Assessing the Lawfulness of Forcible Hostage Rescues*, 48 VA. J. INT’L L. 451, 465 (2008) (citing Derek W.

2016] *MULTI-PART TESTS IN THE JUS AD BELLUM* 1055

nationals abroad as a subset of national self-defense, because attacks on a state's representatives (including diplomats) constitute attacks on the state itself. Other states reject such a right to protect nationals abroad or do not explicitly support it.⁷¹

Both states and nongovernmental actors have developed possible elements or factors by which to evaluate when the defense or rescue of nationals abroad should be deemed lawful. In 1956, when the United Kingdom intervened in Suez in part to defend its nationals, it stated that the relevant necessary conditions for intervention were an imminent threat of injury to its nationals; a failure or inability of the territorial state to protect the nationals in question; and the fact that the forcible measures of protection were strictly confined to the goal of protecting those nationals.⁷² The United States has asserted nearly identical elements for the legality of rescue of nationals overseas.⁷³

Subsequent tests have tracked the essence of these elements. For example, John Dugard, the Special Rapporteur for the International Law Commission's work on diplomatic protection, proposed the following elements by which to assess when states may use force to rescue nationals:

- (a) The protecting State has failed to secure the safety of its nationals by peaceful means;
- (b) The injuring State is unwilling or unable to secure the safety of the nationals of the protecting State;
- (c) The nationals of the protecting State are exposed to immediate danger to their persons;
- (d) The use of force is proportionate in the circumstances of the situation; [and]
- (e) The use of force is terminated, and the protecting State withdraws its forces, as soon as the nationals are rescued.⁷⁴

Bowett, *The Use of Force for the Protection of Nationals Abroad*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 39, 40 (A. Cassese ed., 1986)).

71. Mathias Forteau, *Rescuing Nationals Abroad*, in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW*, *supra* note 58, at 947, 961.

72. Geoffrey Marston, *Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government*, 37 *INT'L & COMP. L.Q.* 773, 795, 800 (1988).

73. NATALINO RONZITTI, *RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY* 57 (1985) (describing a U.S. State Department Memorandum from the Legal Adviser requiring an imminent threat to nationals abroad; a local sovereign unwilling or unable to defend them; and limitation of the use of force to force that is "necessary and appropriate" to protect nationals from injury).

74. John Dugard (Special Rapporteur on Diplomatic Protection), *First Rep. on Diplomatic Protection*, ¶ 46, U.N. Doc. A/CN.4/506 (Mar. 7, 2000).

The Rapporteur justified these elements as follows:

[The elements] reflect State practice more accurately than an absolute prohibition on the use of force (which is impossible to reconcile with actual State practice) or a broad right to intervene (which is impossible to reconcile with the protests that have been made by the injured State and third States on the occasion of such interventions). From a policy perspective it is wiser to recognize the existence of such a right, but to prescribe severe limits, than to ignore its existence, which will permit States to invoke the traditional arguments in support of a broad right of intervention and lead to further abuse.⁷⁵

Various scholars have developed similar elements. In 1952, Sir Humphrey Waldock argued that the rescue of nationals is permitted when those nationals face an imminent threat of injury; the territorial sovereign is unwilling or unable to protect them; and the intervening state takes “measures of protection strictly confined to the object of protecting them against injury.”⁷⁶ Kristen Eichensehr identifies the relevant MPT as requiring an armed attack of a certain magnitude against a state’s nationals; certainty of the threat of irreparable harm; lack of nonforcible options to prevent that harm; an immediate threat to the nationals; and the use of the least amount of force necessary to secure the nationals’ safety or freedom.⁷⁷

These MPTs closely approximate but amplify the general requirements for a use of force in self-defense under Article 51: an armed attack, the necessity of using force in response, and the requirement that the force be proportionate to the threat and be directed toward the narrow goal of rescue.

D. *The “Unwilling or Unable” Test*

Elsewhere, I have proposed an MPT for another aspect of the *jus ad bellum*: a test to assess when a state is “unwilling or unable” to suppress transnational armed attacks by nonstate actors.⁷⁸ Some states have concluded that they may use force in self-defense in the wake of an armed attack by nonstate actors

75. *Id.* ¶ 59.

76. C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 455, 467 (1952); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1629–30 (1984) (citing Waldock’s factors with approval); see also Derek W. Bowett, *The Interrelation of Theories of Intervention and Self-Defense*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 38, 44 (John Norton Moore ed., 1974).

77. Eichensehr, *supra* note 70, at 470–79.

78. Deeks, *supra* note 14, at 491.

2016] *MULTI-PART TESTS IN THE JUS AD BELLUM* 1057

operating from another state's territory.⁷⁹ In this view, a state may use force within that other state's territorial boundaries where it is necessary to do so. The way to assess necessity is to ask whether the territorial state is unwilling or unable to suppress the threat posed by those nonstate actors.⁸⁰

One concern about the "unwilling or unable" test is that states could use it pretextually, particularly because the test as it currently stands lacks sufficient detail about how a state should assess another's "unwillingness" or "inability." The proposed MPT, which is based on centuries of past state practice, urges that states employ several elements to determine when another state is unwilling or unable. The victim state should (1) prioritize consent or cooperation with the territorial state; (2) ask the territorial state to address the threat and give it time to respond; (3) reasonably assess the territorial state's control and capacity over the region where the nonstate actors operate; (4) reasonably assess the territorial state's proposed means to address the threat; and (5) evaluate its previous interactions with the territorial state.⁸¹

Like the other MPTs discussed above, this MPT teases out how to evaluate existing texts and customary rules—in this case, necessity—in a particular factual situation. Prioritizing consent ensures that any unilateral use of force is actually necessary. Likewise, requiring a victim state to evaluate the level of control and capacity the territorial state has to manage the threat and the past history of the territorial state's responses further tests whether it truly is necessary for the victim state to use force unilaterally. The MPT thus provides process and texture to the requisite "necessity" inquiry.

E. Humanitarian Intervention

As Professor Koh's Article makes clear, the legal permissibility of humanitarian intervention is hotly contested. In

79. Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 770, 772 (2012).

80. See, e.g., U.N. Security Council, Letter dated 31 Mar. 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/221 (Mar. 31, 2015); U.N. Security Council, Letter dated 9 Sept. 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/693 (Sept. 9, 2015).

81. Deeks, *supra* note 14, at 506; see also Lietzau, *supra* note 4, at 450 (urging states to evaluate whether there is evidence that the target terrorist group is present in the host state; whether the host state is aware of the presence and nature of the group; whether the host state is genuinely unwilling or unable to take remedial action against the group; whether the host state has authorized outside actors to assist or been warned that failure to act will result in intervention; and how strong the evidence is).

the context of these debates, a number of actors have proffered elements by which to assess when intervention would or should be lawful (or, perhaps, not illegal). More so than in most of the other MPTs discussed above, which contain a variety of standard-like assessments for states to make, states and scholars have proposed a series of elements, *each* of which must be met in order for the humanitarian intervention to be lawful.

In Professor Koh's view, for example, eight elements must be present: (a) disruptive consequences within a state that are likely to lead to an imminent threat to the acting states; (b) exhaustion of alternatives; (c) the use of limited force for (d) genuinely humanitarian purposes that is (e) necessary and (f) proportionate to address the threat; (g) where the force would demonstrably improve the humanitarian situation; and (h) would terminate as soon as the threat abates.⁸² In Koh's view, these elements are strengthened if (i) a group of states is acting collectively; and (j) those states are preventing the use of illegal means of force (such as chemical weapons) or preventing the use of force for illegal ends (such as the commission of genocide).⁸³

The United Kingdom has set forth its own necessary elements for determining when humanitarian intervention would be lawful. In the United Kingdom's view, "[I]ntervention may be permitted under international law in exceptional circumstances where the UN Security Council is unwilling or unable to act in order to avert a humanitarian catastrophe subject to the three conditions . . ."⁸⁴ First, there must be "convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief."⁸⁵ Second, "it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved."⁸⁶ Third, "the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose)."⁸⁷

82. Koh, *supra* note 14, at 1011.

83. *Id.*

84. Letter from the Rt. Hon. Hugh Robertson MP, U.K. Minister of State, Foreign & Commonwealth Office, to the Rt. Hon. Sir Richard Ottaway MP, U.K. House of Commons (Jan. 14, 2014), <https://www.justsecurity.org/wp-content/uploads/2014/01/Letter-from-UK-Foreign-Commonwealth-Office-to-the-House-of-Commons-Foreign-Affairs-Committee-on-Humanitarian-Intervention-and-the-Responsibility-to-Protect.pdf>.

85. *Id.*

86. *Id.*

87. The United Kingdom asserts that it has relied on this doctrine three times—to protect Kurds in Iraq in 1991; to maintain no fly zones in northern and southern Iraq from 1991 to 2003; and in Kosovo in 1999. *Id.*

2016] *MULTI-PART TESTS IN THE JUS AD BELLUM* 1059

Several other groups have offered MPTs that would authorize the use of force for humanitarian purposes, while using a long list of elements to sharply constrain that authorization. The Independent International Commission on Kosovo, for instance, offered eleven elements to be met—arguably setting the bar so high that no situation ever would meet that test.⁸⁸ The Danish Institute of International Affairs proffered a more modest set of elements,⁸⁹ and the International Commission on Intervention and State Sovereignty (ICISS) reverted to just war principles to evaluate when intervention would be lawful.⁹⁰ As the ICISS framed it,

Our purpose [in proposing factors] is not to license aggression with fine words, or to provide strong states with new rationales for doubtful strategic designs, but to strengthen the order of states by providing for clear

88. In *The Kosovo Report*, the Independent International Commission on Kosovo established the following factors: (a) there must be severe violations of international human rights law or international humanitarian law on a sustained basis, or subsection of civilian society to great suffering and risk due to state failure; (b) the overriding aim of force must be direct protection of the victimized population; (c) the method of intervention must be reasonably calculated to end the humanitarian catastrophe as soon as possible, and must take measures to protect all civilians, avoid collateral damage, and preclude secondary punitive or retaliatory action against the target government; (d) there must be a serious attempt to find peaceful solutions to conflict, which must ensure that the pattern of abuse is terminated in a reliable, sustained fashion; (e) the lack of resort to Security Council action is not conclusive; (f) military action must be necessary (that is, lesser action such as sanctions, embargoes, and the like must have failed, and further delay must be reasonably deemed to significantly increase the prospect of humanitarian catastrophe); (g) the use of force should enjoy established collective support; (h) no other body such as the International Court of Justice or the Security Council may have censured or condemned intervention; (i) the intervening states must maintain even stricter adherence to international humanitarian law than in standard military operations; (j) the action must not be pretextual; and (k) after the force ends, the intervening state(s) must commit resources to sustain the victim population and reconstruct society. KOSOVO REPORT, *supra* note 14, at 193–95.

89. DANISH INST. OF INT'L AFFAIRS, HUMANITARIAN INTERVENTION: LEGAL AND POLITICAL ASPECTS 106–11 (1999), http://www.diis.dk/files/media/publications/import/extra/humanitarian_intervention_199.pdf (establishing that humanitarian intervention is lawful when there are serious violations of human rights or international humanitarian law, the Security Council fails to act, intervening states act on a multilateral basis, and the interveners are disinterested—that is, are not intervening to accomplish something other than a humanitarian goal).

90. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT, at XII–XIII (Dec. 2001) (proposing (a) a just cause; (b) right intention; (c) last resort; (d) proportional means; (e) reasonable prospects of success; (f) right authority; (g) clear objectives; (h) acceptance of gradualism in applying force; (i) strict adherence to international humanitarian law and proportionality; (j) acceptance that force protection cannot be a primary objective; and (k) maximum possible coordination with humanitarian organizations).

guidelines to guide concerted international action in those exceptional circumstances when violence within a state menaces all peoples.⁹¹

The United States took a different approach to defending its intervention in Kosovo. Rather than cite elements and assert the legality of intervention, the United States set out political facts that supported the legitimacy of the intervention.⁹² Indeed, the United States declined to state that a humanitarian intervention would be lawful if a specific set of elements or factors were met.⁹³ Nevertheless, one *could* extrapolate an inclusive set of elements from the facts—including that a situation posed a risk to a state's (or region's) vital interests; that the wrongdoer state was committing serious and widespread violations of international law, including international humanitarian law violations; that there was a risk that the conflict would spread; that the wrongdoer state failed to comply with specific agreements related to the conflict (including U.N. Security Council Resolutions and other international agreements); and that multilateral support existed for the action.⁹⁴ This long list of facts clearly reflected the U.S. interest in limiting the precedent it was setting by using force in Kosovo without a legal basis to do so. Like MPTs, then, the U.S. effort sought to cabin the cases in which other states might engage in humanitarian intervention in the future, though it did so not by positing an MPT by which to navigate the lawful/unlawful line but by assembling a long list of facts to limit the precedential value of the intervention.

In each of the humanitarian intervention MPTs, the elements do not represent efforts to directly translate underlying treaty text, though they do incorporate concepts that are well-recognized in the *jus ad bellum*, such as proportionality and necessity. These proposed elements thus invoke familiar use of force concepts, largely as a way to render the MPTs more palatable, but they are particularly controversial because they do so to advance an exception to the Charter that it patently lacks.

91. *Id.* at 35, ¶ 4.32.

92. *See* Press Briefing by James P. Rubin, Assistant Sec'y of State for Pub. Affairs (Mar. 23, 1999), <http://www.hri.org/news/usa/std/1999/99-03-23.std.html>; David Kaye, *Harold Koh's Case for Humanitarian Intervention*, JUST SECURITY (Oct. 7, 2013, 1:45 PM), <https://www.justsecurity.org/1730/kaye-kohs-case/> (noting that the United States did not attempt to claim that its intervention was lawful).

93. Press Briefing by James P. Rubin, *supra* note 92.

94. *Id.*

IV. EVALUATING MULTI-PART TESTS IN THE *JUS AD BELLUM*

Ideally, we would live in a world in which the permanent members of the Security Council agreed in every instance that a particular situation did or did not threaten the peace and, where it did, crafted a Chapter VII resolution authorizing the use of force to reestablish peace. We do not live in that world. Disagreements frequently arise among the permanent and nonpermanent members of the Council, and Chapter VII resolutions authorizing force are relatively rare.⁹⁵ A second-best outcome would be to amend the Charter to clarify the meaning and permissible applications of Article 51 and the customary rules of necessity and proportionality, and, if adequate support existed, to add humanitarian intervention as a new exception to Article 2(4)'s ban on the use of force. This outcome remains out of reach, however, both because of the difficulty of reaching consensus on the content of those amendments and because of an underlying fear of opening up these provisions of the Charter for amendment at all.

This leaves us with a third-best world, in which states face serious situations that threaten their national security but the Charter provides only ambiguous guidance. In this third-best world, states and scholars periodically attempt to offer clearer guidance in the form of MPTs.⁹⁶ It is possible to measure the integrity and value of the MPTs along two axes: (1) how rule-like the MPT is, and (2) how closely the MPT tracks the underlying Charter or customary rule on which it expounds. On the first axis, the more the MPT shifts toward a necessary elements format, the more easily it can overcome the most potent critique of MPTs: their excessively discretionary nature.⁹⁷ As Daniel Bodansky puts it, "Because rules exert a stronger constraint on those who interpret and apply the law, lawmakers will tend to prefer rules when they distrust those charged with interpretation and enforcement and wish to control their decisions."⁹⁸ Rule-like

95. See, e.g., Murphy, *supra* note 5, at 43–44 (stating that states have fundamental disagreements about *jus ad bellum* rules today).

96. There are a few other methods by which to clarify the Charter's applicability to various situations, including by bringing cases before the International Court of Justice or having the Security Council or General Assembly opine on the meaning of certain Charter terms. See *id.* at 29–30. Even those methods are difficult to trigger and, in the case of the ICJ, allow only a limited set of states to provide input on the law in question.

97. Kathleen M. Sullivan, The Supreme Court, 1991 Term, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57–62 (1992) ("A rule may be understood as simply the crystalline precipitate of prior fluid balancing that has repeatedly come out the same way On this view, a rule is a standard that has reached epistemological maturity.").

98. Bodansky, *supra* note 9, at 8–9.

MPTs, when employed by states to defend uses of force that are not squarely contemplated by the Charter, ultimately constrain both the present and future actions of those states.⁹⁹ Additionally, in the *jus ad bellum* context, where states rarely trust other states to discharge their interpretive duties in an objective way, more rule-like MPTs seem more likely to gain traction in the development of international law.

On the second axis, the more closely particular factors in an MPT are drawn from or flesh out well-accepted *jus ad bellum* rules (such as Article 51 or necessity), the more likely the international community will accept the use of the test.¹⁰⁰ The elements or factors will feel both more credible and more familiar. The further the elements or factors drift from text (or the further the overall enterprise drifts from the Charter), the more opportunistic the exercise feels.

With regard to the first axis, the first four of the five MPTs discussed in Part III exist at different points along a continuum. The MPTs for defense of nationals are closer to necessary elements. The MPTs for cyber uses of force are clearly multi-factor tests, with the U.S. government's test the closest MPT to a "totality of the circumstances" test. The others fall between those two outer points. States and scholars that support one or more of the MPTs that currently exist in a multi-factor form should consider whether it is possible to introduce greater rigor into those factors to shift the test toward a necessary elements form. This might garner additional adherents to the MPT, particularly among those states that infrequently find themselves using force in the international arena and are skeptical of the more flexible multi-factor approach that some of these tests currently take.

On the second axis, the first four MPTs are rooted in the existing *jus ad bellum*. Those MPTs try to balance the same equities the Charter itself balances in Articles 2(4) and 51: one state's right to sovereignty and territorial integrity against another state's right to security. The defense of nationals, cyber use of force, the unwilling/unable test, and preemptive

99. Although none of the MPTs discussed herein constitutes customary law, the reasons that states may announce and then comply with an MPT presumably are similar to the reasons that states develop and comply with customary rules. See Pierre-Hugues Verdier & Erik Voeten, *Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory*, 108 AM. J. INT'L L. 389, 390–91 (2014) (arguing that a state may comply with a customary rule that it values because a decision to defect from the rule creates a precedent that undermines the rule).

100. Nagel, *supra* note 26, at 180 ("In insisting that its 'tests' have the Constitution as their ultimate referent the Court seeks to avoid the threat to its legitimacy inherent in some of the radically subjectivist proposals of the realists and other skeptics.").

2016] *MULTI-PART TESTS IN THE JUS AD BELLUM* 1063

self-defense all attempt to explicate rules and steer state behavior using doctrines that already exist in the Charter or customary law. Specifically, the MPTs for preemptive self-defense translate the meaning of “if an armed attack occurs.” The MPTs for cyber uses of force translate “the use of force” in Article 2(4). The MPTs for defense of nationals interpret “if an armed attack occurs against a Member of the United Nations.” Finally, the MPT for the unwilling or unable test interprets the customary rule of “necessity.”

What about the fifth set of MPTs, which are intended to regulate humanitarian intervention? The humanitarian intervention MPTs share some common features with the other MPTs. They attempt to “flexibly constrain” states, and their elements include the familiar concepts of necessity and proportionality (and maybe even preemptive self-defense, as when Koh suggests that the humanitarian crisis must create consequences that would “soon create an imminent threat to the acting nations (which would give rise to an urgent need to act in individual and collective self-defense under Article 51”).¹⁰¹ Indeed, with regard to the first axis, one might argue that the humanitarian intervention MPTs are more rule-like than the other MPTs discussed herein, because they include elements *each* of which must be met before action would be lawful, and those elements are both numerous and likely to occur in combination in very few cases. That seems to reflect an understanding by their proponents that an MPT in this context must offer particularly high thresholds before allowing states to conclude that force would be legal.

The problem with the humanitarian intervention approach arises when evaluating the second axis. In contrast to the other MPTs, the humanitarian intervention MPTs balance something different than what the other four MPTs balance. The humanitarian intervention MPTs balance one state’s right to sovereignty and territorial integrity against individual human rights, a concept or value not captured in Articles 2(4) and 51.¹⁰²

101. Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)*, JUST SECURITY (Oct. 2, 2013, 9:00 AM), <https://www.justsecurity.org/1506/koh-syria-part2/>; see also Koh, *supra* note 14, at 1011.

102. Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part III—A Reply)*, JUST SECURITY (Oct. 10, 2013, 11:45 AM), <https://www.justsecurity.org/1863/syria-law-humanitarian-intervention-part-iii-reply/> (“A better answer [to the question of whether the Charter authorizes humanitarian intervention] would clearly be one that would give due respect to territorial sovereignty, while in the meantime, helping to prevent further deliberate slaughter of innocent civilians by chemical weapons.”); see Schrijver, *supra* note 4, at 23–25 (noting that adopting the idea of a responsibility to protect “could herald the start of a fundamental reorientation in international law: after all, its starting point is the security and fate of *citizens*, and not, in the first place,

This, then, is overt law-making rather than law clarification; it is an effort to use an MPT to create a new exception to the Charter's prohibition on the use of force rather than an effort to interpret or translate existing exceptions.¹⁰³ Koh himself frames the project as international law development.¹⁰⁴

To the extent that Koh's true goal here is to foster more coherent and thoughtful debates about humanitarian intervention by proffering a potential test and letting it serve as a focal point for discussion,¹⁰⁵ that is something that his MPT, along with the other MPTs set forth herein, may well achieve. Alternatively, a humanitarian intervention MPT that relies more heavily on links to preemptive self-defense might gain increased traction because it implicates concepts contained in the existing Charter. Though I suspect Koh would view this approach as unsatisfactory,¹⁰⁶ it ultimately might bring him closer to his goal.

In general, one's perception of the utility of MPTs will be driven by one's view of how much guidance the Charter's text and customary *jus ad bellum* rules already provide and how completely they cover the landscape. For those who think the Charter is relatively clear in rejecting the use of force in all but the most narrow circumstances, MPTs are useless at best and harmful at worst. Even this camp presumably would concede, though, that MPTs are preferable to "totality of the circumstances" tests or arguments that the Charter simply does not regulate a particular use of force. For those who think that the Charter contains a fair amount of ambiguity and must evolve, at least modestly, to keep pace with modern developments, MPTs may serve as focal points, self-constraints, and conflict-minimizing tools—perhaps the best we have as long as we live in this third-best world.

national security and the sovereignty of states"). *But see* Murphy, *supra* note 5, at 32–33 (describing textual arguments in favor of finding humanitarian intervention consistent with Charter).

103. Koh, *supra* note 14, at 1010–1011; Koh, *supra* note 101 (suggesting that the United States and other states treat Syria as a "lawmaking moment").

104. Koh, *supra* note 14, at 1032; Koh, *supra* note 101 ("In essence, such an absolutist position amounts to saying that international law has not progressed since Kosovo.").

105. Koh, *supra* note 101 ("One need not accept my proposed rule to agree that we urgently need the debate."); Koh, *supra* note 102 ("[M]y proposed legal test was designed to invite lawyers and policymakers to work together to clarify both the limited contours of their discretion to use force in humanitarian crises, while stating limiting principles to guide and constrain future actors.").

106. Koh, *supra* note 102 ("[O]ne reason that nations may have more liberally invoked the self-defense rationale in such humanitarian crises as India–Pakistan and Tanzania–Uganda is because states have not worked hard enough to state a legal principle governing humanitarian use of force that better fits those pressing factual circumstances.").