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TE WĀNANGA O NGĀ KAUPAPA TURE Ā IWI O AOTEAROA

The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

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EXPANSIVE APPLICATION OF SELF-DEFENCE: PROTECTING SECURITY AT THE EXPENSE OF LEGALITY

Rachel Buckman*

By 2016, the United States of America, Canada, the United Kingdom, Turkey and France had all engaged in airstrikes targeting the terrorist group ISIS in Syrian territory. In setting out the legal justifications for military action, these five states invoked their right to individual self-defence. However, the international law doctrine of self-defence was codified with the intention of applying to states – it was never envisaged as extending to the non-state actor context. This article assesses how the law has struggled to develop at the same pace as state action against terrorist groups. The current situation lacks firm grounding in legality, and yet no condemnation occurs in response. The divide between what is law and what is accepted in practice appears to grow. Given the centrality and significance of the law on the use of force in international law, this poses a serious threat to the ongoing stability of the international system.

I INTRODUCTION

In the current age, international terrorism is at the forefront of many governments' minds. According to the United States' National Security Strategy, "the primary transnational threats Americans face are from jihadist terrorists and transitional criminal organizations."[1] To counter this threat, the United States of America must take "direct" military action and pursue terrorists "*regardless of where they are*."[2] The United Kingdom takes a similar stance, stating that "the most effective way" to reduce terrorism is to tackle the causes "both at home *and overseas*."[3] When it comes to terrorism, it is easy to get swept away in the inherently emotive discourse and ignore what these

* LLB(Hons)/BA. This article is a revised version of a student paper submitted in 2018 at the University of Auckland. Special thanks to John Ip for his supervision of the original paper.

1 *National Security Strategy of the United States of America* (The White House, Washington DC, December 2017) at 10.

2 At 11 (emphasis added).

3 Cabinet Office *The National Security Strategy of the United Kingdom: Security in an interdependent world* (Cm 7291, March 2008) at 7 (emphasis added).

statements are really suggesting. Both the United States and the United Kingdom imply that they will target terrorist groups, non-state actors, even if it means infringing the sovereignty of a potentially innocent host state.

When military action is used against terrorists, it is portrayed in the media through a political lens. However, the relationships and interactions between states, including the use of force, are governed by international law. Politicians, in appeasing public concern, can say that they will pursue terrorists to their source, but in a world that values stability there needs to be legal justification. Military acts against terrorists in a post-9/11 world are predominately referred to by states as legitimate acts of "self-defence". This article will consider how, from a legal perspective, the current application of self-defence against terrorist groups operating in a host country is problematic. Many of the intricacies of the traditional self-defence model are difficult to reconcile with the terrorism paradigm. The discussion here is limited to the preliminary question of whether generally self-defence can be used against non-state actors such as terrorists.

After 9/11, academics have turned to the subsequent state action to determine how the law on self-defence has changed. However, they may be looking for something that is not there. What we have is a contradictory regime that lacks any sense of legality, which in turn risks fundamentally eroding the international system and the principles of sovereignty and security that underpin it. An understanding of how the law got to this point needs to begin with basic international law context, including the doctrine of self-defence, but also an appreciation of the relationship between international institutions and states. The confusion in self-defence comes from these two parties pulling in separate directions. Institutions resist moving away from traditional restrictive norms, whereas states want increasingly flexible standards. The result is a disparity between what is clearly legally justified by authoritative institutions, such as the International Court of Justice (ICJ), and how states actually respond to terrorist threats. This systematic undermining of international law needs to be remedied. To regain a sense of legality, a middle ground needs to be found that adequately addresses the relevant sovereignty and security concerns. The current confused state of affairs means neither of these concerns are properly being protected.

II SELF-DEFENCE IN INTERNATIONAL LAW

A The Law on Self-Defence

The starting point for any discussion on the doctrine of self-defence should be art 2(4) of the Charter of the United Nations (UN), which establishes an absolute prohibition on "the threat or use of force against the territorial integrity" of another state. The importance of art 2(4) cannot be

understated, with the ICJ referring to it as the "cornerstone" of the Charter.[4] Not only is it a *jus cogens* norm, but it is also the "central rule on the use of force" in the international legal system.[5]

In turn, self-defence is codified in art 51 of the UN Charter, which preserves the "inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations". Given the significance of the general prohibition on the use of force, art 51 can only be seen as an extremely limited exception. A United States delegate present at the signing of the Charter reported that the intention was to create an all-inclusive prohibition with "no loopholes."[6] The various criteria for a lawful use of self-defence demonstrate its controlled scope. Article 51 itself requires there to be an armed attack, a higher threshold than a mere use of force, and for the response to be reported to the Security Council.[7] Any act taken in self-defence must also be necessary and proportionate, meaning force cannot be for "punitive or retaliatory" reasons.[8] The ICJ has upheld the need for a restrictive interpretation, noting that self-defence cannot allow states to use force against "perceived security interests" beyond the wording in art 51.[9] It is this strict application that allows the prohibition on the use of force to remain meaningful.

While regulating force is in itself objectively positive, it also preserves two core aspects of international law. First, the prohibition on the use of force and its exceptions are closely interwoven with the principle of state sovereignty.[10] Sovereignty is "the basic constitutional doctrine of international law" and means that states have absolute control over everything within their own borders.[11] Using force in the territory of another state is clearly breaching this principle.[12] The second aspect is the maintenance of "international peace and security", a key purpose of the UN Charter.[13]

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4 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168 [*Armed Activities*] at 223.

5 Christine Gray *International Law and the Use of Force* (4th ed, Oxford University Press, Oxford, 2018) at 32.

6 Dawood I Ahmed "Defending Weak States against the 'Unwilling or Unable' Doctrine of Self-Defense" (2013) 9 JILIR 1 at 6.

7 On the armed attack standard, see *Oil Platforms (Islamic Republic of Iran v United States of America) (Judgment)* [2003] ICJ Rep 161 at 187.

8 Ian Brownlie *Principles of Public International Law* (7th ed, Oxford University Press, Oxford, 2008) at 749.

9 *Armed Activities*, above n 4, at 223–224.

10 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 [*Nicaragua*] at 111.

11 Brownlie, above n 8, at 289. See also Charter of the United Nations, art 2(1).

12 *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* GA Res 2625 (1970).

13 Charter of the United Nations, art 1(1).

While the ban on the use of force helps achieve this, self-defence is also a part of the "regulatory framework".[14] The Charter emphasises the need to take "collective measures."[15] Nevertheless, states want the flexibility to respond to security threats quickly. Self-defence gives governments some power to act unilaterally, but then contains it within a tightly controlled regime.

B How Have Problems Arisen in Relation to Terrorism?

Arguably, the most consistent threat to peace in the 21st century is terrorism. What has become clear in recent years is that the law on the use of force is not properly equipped to handle the nature of this threat. This should not be surprising if one considers the UN Charter was signed in 1945, essentially as a response to World War II.[16] In this period, the major threat was other states. Non-state actors simply did not have the resources to be a credible risk.[17] The *travaux préparatoires* of the Charter and early litigation show that art 51 was intended to refer only to armed attacks by other states.[18] The attacks on 11 September 2001 forced the world to reconsider this position. International terrorists groups now have worrying similarities to states – "wealth, willing forces, training, organization, and potential access to weapons of mass destruction."[19] Despite these new threats, the Charter remains intrinsically "state-centric".[20] The prohibition on the use of force is only binding on states, which leaves "a gaping hole in the … regulation of the use of force."[21] It is not straightforward how to apply these state-focused norms to independent non-state groups. A divergence of opinions has arisen between those who opt for a restrictive interpretation of art 51, and those who wish to expand it to new circumstances.

Before examining this divergence, it is necessary to recognise how the nature of international law enables a degree of doctrinal discord. Hakimi and Cogan propose a useful way to understand the "combined resilience and disharmony" in the law on the use of force.[22] They describe two separate

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14 TD Gill "When Does Self-Defence End?" in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, Oxford, 2015) 737 at 747.

15 Charter of the United Nations, art 1(1).

16 Jutta Brunnée and Stephen J Toope "Self-Defence Against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?" (2018) 67 ICLQ 263 at 267.

17 Michael P Scharf "How the War Against ISIS Changed International Law" (2016) 48 Case W Res J Intl L 15 at 38.

18 Tom Ruys and Sten Verhoeven "Attacks by Private Actors and the Right of Self-Defence" (2005) 10 JC&SL 289 at 291.

19 Scharf, above n 17, at 40.

20 Gareth D Williams "Piercing the Shield of Sovereignty: An assessment of the Legal Status of the 'Unwilling or Unable' Test" (2013) 36 UNSWLJ 619 at 622.

21 Jan Klabbers *International Law* (2nd ed, Cambridge University Press, Cambridge, 2017) at 215.

22 Monica Hakimi and Jacob Katz Cogan "The Two Codes on the Use of Force" (2016) 27 EJIL 257 at 258.

visions, or codes, in the legal order. One is the institutional code: this comes from international institutions, such as the ICJ or the Security Council, and aims to "restrict unilateral uses of force" and reinforce institutional processes.[23] The second is the state code: the vision of powerful states who favour a deregulated regime that gives them decision-making power in times of crises.[24] These two codes co-exist as each has a characteristic that the other lacks. The institutional code has "inherent authority", it is where academics look for authoritative statements of law, and yet cannot ensure its words are followed.[25] Comparatively, states have operational control, but their actions have limited legal influence. The two codes working together – either by sharing the same policy or accommodating differences – create stability in the international system.[26] Confusion comes when institutions and states visibly disagree. This is what has happened with self-defence against non-states actors, with tension having arisen between the ICJ and the acts of certain states.

III SELF-DEFENCE AGAINST NON-STATE ACTORS ACCORDING TO LEGAL AUTHORITY

Prior to 9/11, it was accepted that self-defence against a non-state actor was only allowed within a narrow limit. For an attack by a non-state actor to qualify as an armed attack that triggered art 51, it had to be attributable to the host state.[27] The test for attribution is found in the ICJ's 1984 *Nicaragua* decision.[28] The state must have had "effective control" over the unlawful act by the non-state actor.[29] The facts of the case make it clear how high of a standard this is. The United States of America's assistance to the Contras, the armed rebel group, was considered "crucial" and included "financing, organizing, training, supplying and equipping" them, and yet was insufficient to meet the effective control threshold.[30] This test has been confirmed as recently as 2007.[31]

The result of the effective control test is to restrict "self-defence to the inter-state context."[32] It cannot include any independent action by non-state groups. Yet terrorists are, by their very nature,

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23 At 261.

24 At 258.

25 At 263.

26 At 266.

27 Christian J Tams "The Use of Force Against Terrorists" (2009) 20 EJIL 359 at 368.

28 *Nicaragua*, above n 10.

29 At 65.

30 At 62 and 65.

31 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43 at 208.

32 Tams, above n 27, at 369.

independent. In a world where terrorist organisations pose a genuine threat to lives, it seems "naïve and unrealistic to espouse a threshold of attribution … as high as the *Nicaragua* test."[33]

A Post-9/11 ICJ Rulings on Self-Defence Against Non-State Actors

A shift has occurred since 9/11 such that it is now "widely accepted" that states can respond to attacks by terrorists.[34] However, there is a difference between tolerating force on a political level and endorsing its legality.[35] Conflating the two does not give an accurate picture of the state of the law.

The ICJ is the UN's "principal judicial organ",[36] or "the guardian of legality for the international community".[37] It is the place to look for authoritative statements of the law.[38] If the law had changed, one would expect the ICJ to rule accordingly. Instead, the opposite has occurred. Two ICJ judgments since 2001 have held that self-defence is limited to armed attacks by states.[39]

First, in 2004 the ICJ considered art 51 in the *Wall* advisory opinion.[40] The judgment stated that art 51 "recognizes the … inherent right of self-defence *in the case of armed attack by one State against another State.*"[41] Tams argues that the Court's brevity and lack of discussion of recent practice "weighs negatively" on the authority of this statement.[42] While Tams is not alone in his critique of the ICJ, it is difficult to say that the Court's finding lacks authority. The wording was clear and aligns with *Nicaragua* judgment.[43] Moreover, one year later, a similar logic was again applied by the ICJ.

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33 Brent Michael "Responding to Attacks by Non-State Actors: The Attribution Requirement of Self-Defence" (2009) 16 Aust ILJ 133 at 159.

34 Brunnée and Toope, above n 16, at 282.

35 Monica Hakimi "Defensive Force against Non-State Actors: The State of Play" (2015) 91 Intl L Stud Ser US Naval War Col 1 at 20.

36 Charter of the United Nations, art 92.

37 *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom) (Provisional Measures)* [1992] ICJ Rep 3 at 26.

38 See Malcolm N Shaw "The International Court of Justice: A Practical Perspective" (1997) 46 ICLQ 831 at 843.

39 This would include any act attributable to the state: see International Law Commission *Draft Articles on Responsibility of States for International Wrongful Acts* UN Doc A/Res/56/10 (2001), art 2(a).

40 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136.

41 At 194 (emphasis added).

42 Christian J Tams "Light Treatment of a Complex Problem: The Law of Self-Defence in the *Wall* Case" (2006) 16 EJIL 963 at 974.

43 Michael, above n 33, at 142.

In *Armed Activities*, Uganda defended their presence in the Democratic Republic of the Congo (DRC) by arguing they were acting in self-defence against a rebel group.[44] The ICJ held that the attacks were "non-attributable to the DRC", and so "the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present."[45] Tams calls this judgment "equivocal", emphasising that the Court expressly left open the question of whether self-defence could apply to "large-scale attacks by irregular forces".[46] However, that comment needs to be read in legal context. The Court had gone through the attribution test and found it was not met, but there are other self-defence criteria. The better reading is that the Court left open the question of whether 'irregular attacks' could meet these criteria if the attacks were attributable to the state.[47] Moreover, Judges Kooijmans and Simma both criticised the ICJ's restrictive stance in their separate opinions. Koojimans specifically calls it "unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State."[48] The implication of his comment is that the majority judgment, even if not express, leaves no right to self-defence against independent non-state actors. Criticising these judgments is a valuable endeavour for academics. Ignoring ICJ's authority, or arguing the cases represent something they do not, is unhelpful and does nothing to constructively progress the issues at stake.

B Why Has the ICJ Remained Restrictive?

Barbour and Salzman argue that the ICJ has "refused to engage" with the increasing importance of non-state actors.[49] Why then would the highly educated judges of the ICJ refuse to even engage with the problem? Clear examples of contrary state practice and relevant legal tension received no mentioned in either the *Wall* or *Armed Activities* judgments.

Without knowing what goes through the mind of each Judge, their actions can be explained by the general reason why the use of force norms are kept restrictive – to ensure the integrity of the system. Starski argues that in the face of general confusion "a strict interpretation" of self-defence would "yield less severe repercussions for the preservation of international peace than its nonreflective expansion."[50] The specific concern with non-state actors is that self-defence undermines the host

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44 *Armed Activities*, above n 4, at 223.

45 At 223.

46 Tams, above n 27, at 384.

47 Hakimi, above n 35, at 5.

48 *Armed Activities*, above n 4, at 314.

49 Stephanie A Barbour and Zoe A Salzman "The Tangled Web: The Right of Self-Defence against Non-State Actors in the Armed Activities Case" (2008) 40 NYU J Intl L & Pol 53 at 56.

50 Paulina Starski "Right to Self-Defence, Attribution and the Non-State Actor: Birth of the 'Unable or Unwilling' Standard?" (2015) 75 Heidelberg J Intl L 455 at 500.

state's sovereignty rights. In 1985, three Israelis were killed by the Palestine Liberation Organization (PLO). In response, Israel attacked the PLO headquarters in Tunisia.[51] The international community condemned this, with the Security Council stating that Israel was acting against the "sovereignty and territorial integrity of Tunisia."[52] Many things may have changed in the modern world, but the importance of sovereignty has not. Even in an age of globalisation, states continue to put significant emphasis on their territorial integrity. In 2014, Iraq consented to foreign airstrikes in their territory to target ISIS, but stressed the maintenance of their own sovereignty. Their letter to the Security Council stated that they attach "great importance" to preserving their sovereignty.[53] It appears the ICJ takes sovereignty seriously, and in the face of uncertainty is not prepared to endanger the host state's rights.

IV SELF-DEFENCE AGAINST NON-STATE ACTORS ACCORDING TO STATES

The above restrictive reading may seem confusing to anyone who has paid attention to current affairs in the last few decades. This is where Hakimi and Cogan's explanation must be applied. The authors call the issue of non-state actors an area of "confrontation" between the institutional and state codes' visions.[54] While a legal confrontation may be occurring, there is no visible friction taking place outside the academic realm. States who act contrary to the ICJ judgments discussed above face little condemnation. Accordingly, careful scrutiny of states' actions and their legal implications is required.

A Military Action Against Non-State Actors

The 9/11 attacks, conducted by Al-Qaeda, left approximately 3,000 casualties, destroyed the World Trade Centre, and severely damaged the Pentagon.[55] In October 2001, the United States of America, with support from the United Kingdom, responded by initiating military force in Afghanistan. The United States' letter to the Security Council expressly stated the justification for this as self-defence.[56] The United Kingdom issued a similar letter, mirroring the United States' rhetoric.[57]

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51 Williams, above n 20, at 624.

52 SC Resolution 573 (1985), preamble.

53 *Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council* UN Doc S/2014/691 (22 September 2014).

54 Hakimi and Cogan, above n 22, at 278.

55 Sean D Murphy "Protean Jus Ad Bellum" (2009) 27 Berkeley J Intl L 22 at 34.

56 *Letter dated 7 October 2001 from the Permanent Representative of the United State of America to the United Nations addressed to the President of the Security Council* UN Doc S/2001/946 (7 October 2001).

57 *Letter dated 7 October 2001 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council* UN Doc S/2001/947 (7 October 2001).

This immediately seems contrary to the law as upheld by the ICJ. Al-Qaeda's attack could not have been attributable to Afghanistan. Allowing the use of their territory and providing some support, allegations made by the United States and United Kingdom, does not amount to effective control.[58] Yet there was no thorough questioning of the legality of *Operation Enduring Freedom.* Only Iraq and Iran openly challenged the legality of the resort to force.[59] Many nations even militarily supported this "war". The positive response is relatively unsurprising given the tragedy that had unfolded. Williamson proposes that the level of sympathy felt by the international community meant that even if the Security Council had reservations, they would not have voiced them.[60] If they had, it would have appeared "anti-American rather than pro-international law."[61] Her suggestion highlights the importance that emotions play in states' willingness to depart from clear legal norms. Regardless, emotion is not enough to change the law. While academics have extensively discussed the matter retrospectively, what state reaction in 2001 lacks is any real discussion about how the invasion of Afghanistan was justified by the traditionally state-centric self-defence doctrine.

A more recent example is the use of force against ISIS in Syrian territory. By 2014, ISIS controlled large amounts of territory in Iraq and Syria, leading to Iraq consenting to foreign airstrikes within their borders. In September 2014, the United States of America and various coalition partners extended this to include airstrikes in Syria, a state that never consented to foreign military action.[62] By 2016, a range of nations had joined in collective self-defence of Iraq, including Australia, Germany and Belgium.[63] The United States, along with Canada, the United Kingdom, Turkey, and France, also claimed they were acting in individual self-defence.

Despite this broad support, there was no consensus by participating states on how this was justified as self-defence. The original Arab nations who began with the United States – Bahrain, Jordan, Qatar, Saudi Arabia and the United Arab Emirates – refrained from making any legal justifications to the UN.[64] The relevance of this is that the ICJ has previously held that the absence of a Security Council report may indicate that the state itself was not "convinced that it was acting in self-defence."[65] Within

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58 Myra Williamson *Terrorism, War and International Law: The Legality of the Use of Force Against Afghanistan in 2001* (Routledge, Abingdon (UK), 2012) at 203.

59 Antonio Cassese *International Law* (2nd ed, Oxford University Press, Oxford, 2005) at 474.

60 Williamson, above n 58, at 183.

61 At 184.

62 Marja Lehto "The Fight against ISIL in Syria. Comments on the Recent Discussion of the Right of Self-defence against Non-state Actors" (2018) 87 Nordic J Intl L 1 at 3.

63 At 8.

64 Olivier Corten "The 'Unwilling or Unable' Test: Has it Been, and Could it be, Accepted?" (2016) 29 LJIL 777 at 783.

65 *Nicaragua*, above n 10, at 105.

the states who did formally invoke art 51, there were divided explanations. France simply stated they were acting in self-defence, without giving any further details.[66] The United Kingdom stated they were taking actions of individual and collective self-defence "as called for" by Security Council Resolution 2249 (2015).[67] The fact all these states went into Syria with such disagreement on what the law required of them implies a willingness to use force "no matter what the law required."[68]

These examples had extensive participation and large media coverage, but they are not the only uses of self-defence against non-state actors post-9/11. As with the invasion of Afghanistan, these less publicised incidents are characterised by minimal doctrinal discussion and vague support by the international community.

In 2006, Israel entered Lebanon after border attacks and kidnapping by Hezbollah. Israel stated that this was a justified use of art 51 due to the "ineptitude and inaction of the Government of Lebanon."[69] There was little express condemnation of Israel's actions.[70] However, there was also no express support for its legality. In a Security Council meeting discussing the conflict, the United Kingdom, Peru, Denmark, Slovakia and Greece all highlighted a state's "right" to self-defence, but caveated it with the requirement that such a right may only be exercised in accordance with international law and the UN Charter.[71] They avoided engaging with the obvious next question of whether this situation fits within the self-defence doctrine. Moreover, the need to respect Lebanon's territorial integrity was raised by Russia, Tanzania, Greece and France.[72] There was no discussion on Lebanon's responsibility for Hezbollah's acts.[73] A mixture of sympathy and vagueness leaves both the acceptance and legitimacy of Israel's acts unclear.

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66 *Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council* UN Doc S/2015/745 (9 September 2015).

67 *Letter dated 3 December 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council* UN Doc S/2015/928 (3 December 2015).

68 Hakimi and Cogan, above n 22, at 283.

69 *Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council* UN Doc S/2006/515 (12 July 2006).

70 Theresa Reinold "State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11" (2011) 105 AJIL 244 at 265.

71 *United Nations Security Council, Sixty-first year: 5489th meeting* UN Doc S/PV.5489 (14 July 2006) at 12 and 14–17.

72 At 7, 16–18.

73 Reinold, above n 70, at 265.

2008 saw Colombia using military force to attack a guerrilla group located in Ecuador's territory. Ecuador wrote to the Security Council following this, describing it as a violation of their "sovereignty and territorial integrity."[74] What makes this incident significant is that although the UN was silent on the matter, South America was not. Nicaragua broke diplomatic relations with Colombia.[75] More broadly, the Organization of American States adopted a resolution that considered the acts breached "principles of international law" and resolved to reaffirm that "inviolable" territorial integrity of the state that may not be subjected to military force.[76] This suggests that although some powerful states dominating international discussion may be willing to expand self-defence to accept non-state actors, they do not necessarily have the entire world unequivocally on their side.

Finally, Turkey has a long-standing conflict with the Kurdish militants, the Kurdistan People's Party (PKK). In 2008, Turkey used military action in Iraq to target the PKK. Although it was not reported, Prime Minister Erdogan expressly stated this was justified under the "international laws governing self-defence."[77] While a handful of states expressly condemned or supported the attack, most remained silent. Van Steenberghe interprets this silence as states "condon[ing] this operation."[78] However, more likely Van Steenberghe is using the lack of contrary comments to read in the explanation that fits with his article (which argues that state practice demonstrates a tendency to allow self-defence against non-state actors).[79] The better approach is to acknowledge the vagueness of the international reaction.[80] Responses tended to invoke politics rather than law: for instance, the European Union warned about how this action could further destabilise Iraq.[81] This suggests no real engagement with the legal issues at hand.

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74 *Letter dated 3 March 2008 from the Chargé d'affaires a.i. of the Permanent Mission of Ecuador to the United Nations addressed to the President of the Security Council* UN Doc S/2008/146 (3 March 2008).

75 James C McKinley Jr "Nicaragua Breaks Ties With Bogotá Over Crisis" *The New York Times* (online ed, New York, 7 March 2008).

76 *Convocation of the Meeting of Consultation of Ministers of Foreign Affairs and Appointment of a Commission* OAS Doc OAS/CP/RES/930 (1632/08) (5 March 2008).

77 Raphaël van Steenberghe "Self-Defence in Response to Attacks by Non-state Actors in the Light of Recent State Practice: A Step Forward?" (2010) 23 LJIL 183 at 188.

78 At 194.

79 At 207.

80 Tom Ruys "*Quo Vadit Jus ad Bellum?* A Legal Analysis of Turkey's Military Operations Against the PKK in Northern Iraq" (2008) 9 Melb J Intl L 334 at 345.

81 Reinold, above n 70, at 270.

B Does this Fit Within the Current Law?

While the acceptability of resorting to force against terrorists "crystalized in the aftermath of 9/11", this acceptance appears tightly connected with political and emotive factors.[82] For example, the Paris terrorist attacks in 2015 led to a surge of states joining the airstrikes against ISIS in Syria.[83] The issue is whether, putting emotion to one side, there is clear legal justification.

Some academics have argued that the plain meaning of art 51 means states are entitled to use self-defence against non-state actors. Article 51 requires an armed attack. According to Dinstein, 9/11 confirmed that this could refer to an attack by a non-state actor.[84] Those who agree with him argue that there is nothing in the language that requires the armed attack to be conducted by a state.[85]

Assessing the legality of initiating force in Afghanistan, Franck argues that the Security Council affirmed this interpretation.[86] The Security Council is another international institution whose statements wield legal authority.[87] Resolutions passed on 12 and 28 September 2001 both recognised the "inherent right" to self-defence in accordance with the Charter, and referred to the acts of terrorism as "a threat to international peace and security."[88] However, while these resolutions support a changing perspective on terrorism, they do not expressly state that self-defence would be lawful. Article 51 requires an armed attack and the Security Council choose not to use those words, with "armed attack" or "self-defence" not even being referred to in the meetings preceding voting.[89] Cassese suggests these resolutions show the Security Council wavering between wanting to take matters into their own hands, and resignation to the politics at play.[90] The link Franck is trying to

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82 Michael N Schmitt "Responding to Transnational Terrorism under the *Jus ad Bellum:* A Normative Framework" in Michael Schmitt and Jelena Pejic (eds) *International Law and Armed Conflict: Exploring the Faultlines* (Martinus Nijhoff, Leiden, 2007) 157 at 165.

83 Gray, above n 5, at 239.

84 Yoram Dinstein *War, Aggression and Self-Defence* (4th ed, Cambridge University Press, Cambridge, 2005) at 205–206.

85 Jordan J Paust "Self-Defense Targeting of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan" (2010) 19 J Transnatl L & Poly 237 at 241.

86 Thomas M Franck "Terrorism and the Right of Self-Defense" (2001) 95 AJIL 839 at 840.

87 Hakimi and Cogan, above n 22, at 261.

88 SC Resolution 1368 (2001) at [1]; and SC Resolution 1373 (2001), preamble.

89 *United Nations Security Council, Fifty-sixth year: 4370th meeting* UN Doc S/PV.4370 (12 September 2001); and *United Nations Security Council, Fifty-sixth year: 4385th meeting* UN Doc S/PV.4385 (28 September 2001).

90 Antonio Cassese "Terrorism is Also Disrupting Some Crucial Legal Categories of International Law" (2001) 12 EJIL 993 at 996.

highlight is, in reality, ambiguous, and claiming otherwise appears to be a retrospective attempt to legitimise *Operation Enduring Freedom*.

Similar trends can be seen in later resolutions regarding ISIS. Resolution 2249 demonstrated support, but refused to make any express authorisation.[91] Despite the United Kingdom relying on it to justify their actions in Syria, the language was clearly ambiguous: it referred to ISIS as an "unprecedented threat to international peace and security", and called for "all necessary measures, *in compliance with international law*" to prevent and suppress ISIS.[92] While this may seem like strong rhetoric, self-defence is a legal test that requires certain criteria to be met. The resolution fails to take the step of spelling out how force could be legitimate, making this closer to an empty political response.

Regardless, this art 51 interpretation argument remains prevalent. Paust claims the "vast majority of writers agree that an armed attack by a non-state actor … can trigger the right of self-defence" even if the response is directed into a foreign country.[93] He is correct in that non-state actors are now generally accepted to be capable of meeting the required intensity threshold for an armed attack. What is wrong with his rationale is that it is too simplistic. He isolates art 51 from the broader legal framework and ignores the reasons the ICJ refused to accept this position. Non-state actors do not operate in a "vacuum devoid of sovereignty."[94] When a state is behind an armed attack, the armed attack alone is justification for breaching their sovereignty.[95] This cannot be the case if a non-state actor conducts the attack. Paust and Franck's argument lacks an explanation of why attacks by non-state actors can "incidentally affect the host state's territorial sovereignty."[96] In the current international legal system, this is an integral part of any justification for the use of force.

C Has a New Legal Doctrine Emerged?

In a world where terrorist threats are so prevalent, states seek to "pierce this shield of sovereignty" and find an explanation for invading the host state's territory.[97] Subsequent practice by states can change the interpretation of treaties, including the UN Charter.[98] However, the norms regarding the

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91 See SC Resolution 2249 (2015) and discussion above in Part IV.(A). See also Brunnée and Toope, above n 16, at 271.

92 SC Resolution 2249 (2015), preamble and [5] (emphasis added).

93 Paust, above n 85, at 238-239.

94 Williams, above n 20, at 624.

95 Kimberley N Trapp "Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Terrorist Actors" (2007) 56 ICLQ 141 at 146.

96 Tams, above n 42, at 973.

97 Williams, above n 20, at 619.

98 Lehto, above n 62, at 25.

use of force are *jus cogens*, and can only be modified by a subsequent norm of the same status "accepted and recognized by the international community of States."[99] Any new rationale for using force needs firm legal footing.

While academics can put forward normative arguments for new self-defence regulations that address non-state actors, all struggle to be demonstrably legal standards. Brunnée and Toope propose criteria for legality that require "generality" and "clarity".[100] It is impossible to discern either of these criteria from the state practice discussed above. The justification for using force in Afghanistan has retrospectively been considered to be due to some level of blameworthiness on the part of the Taliban.[101] At the time, though, the Bush Administration asserted that it saw no difference between terrorists and the states that harboured them.[102] The broadness of this claim, making no distinction between harbouring a handful of terrorists and serving as the organisational headquarters, has no level of clarity.[103] Moreover, it has not been so generally applied by other states as to justify overturning the norms of self-defence.

A contender for a new self-defence doctrine that is gaining traction in academia is the "unwilling or unable" test. The Chatham House Principles see this as the applicable standard for whether force can be used against a non-state actor, stating self-defence can be exercised in the host state's territory if it is "evident that that State is unable or unwilling to deal with the non-state actors itself."[104] This language was used in state practice as early as 2002. After attacking Chechen rebels in Georgia, Russia's letter to the Security Council reported the use of self-defence and referred to the Georgian government as "unable or unwilling to counteract the terrorist threat."[105] At the time, the United States

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99 Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 53. Treaties may also have evolving meaning: see *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua) (Judgment)* [2009] ICJ Rep 213.

100 Jutta Brunnée and Stephen J Toope *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, Cambridge, 2010) at 6.

101 Dire Tladi "The Nonconsenting Innocent State: The Problem with Bethlehem's Principle 12" (2013) 107 AJIL 570 at 575.

102 *The National Security Strategy of the United States of America* (The White House, Washington DC, September 2002) at 4.

103 Scharf, above n 17, at 53.

104 Elizabeth Wilmshust "The Chatham House Principles of International Law on the Use of Force in Self-Defence" (2006) 55 ICLQ 963 at 969.

105 *Letter dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General* UN Doc S/2002/1012 (12 September 2002) at 2.

of America condemned Russia's actions, calling it a "violation of Georgia's sovereignty."[106] Today, the United States is the strongest supporter of the unwilling or unable test, suggesting a level of fluctuation and instability in this doctrine from its inception. The same year, in the aftermath of the Bali bombings Australian Prime Minister John Howard stated: "Where a country were unable or unwilling and the only way to protect Australia was to take action, that … action would be taken."[107] This was negatively received from neighbouring countries, including Malaysia, Thailand, Indonesia and the Philippines. There was clearly no consensus at this point, with some states obviously disagreeing with a more liberal approach to the use of force.

A decade later, the law has not found any stability. Deeks wrote in 2012 that there had "been virtually no discussion" of what the unwilling or unable standard really meant, suggesting at this point that the legality standard could not be met.[108] However, since then, we have had the operations against ISIS in Syria. In their letter to the Security Council, the United States of America wrote that states must be able to act in self-defence when "the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks."[109] Scharf sees this as determinative. He argues that 9/11 was not enough to shift the law, but the wide support for the military action against ISIS changed this.[110] Scharf views this support, including by the Security Council, as confirming the United States' unwilling or unable claim.[111]

However, what Scharf fails to acknowledge is the "scarcity and ambiguity" of state practice with regard to Syria.[112] Of the states who claimed self-defence, four mentioned the unwilling or unable justification – the United States of America, Australia, Canada and Turkey.[113] This is by no means a firm consensus on which to build a new norm. The actions of other states also undermine the test's claim to legality. In the United Kingdom, Prime Minister David Cameron on two occasions personally

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106 Daniel Fried, Assistant Secretary of State for European and Eurasian Affairs "U.S.-Russia Relations in the Aftermath of the Georgia Crisis" (Testimony before the House Committee on Foreign Affairs, Washington DC, 9 September 2008) at 18.

107 Williams, above n 20, at 637.

108 Ashley S Deeks "Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense" (2012) Va J Intl L 463 at 486.

109 *Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General* UN Doc S/2014/695 (23 September 2014).

110 Scharf, above n 17.

111 At 65.

112 Kinga Tiboria-Szabó "The 'Unwilling or Unable' Test and the Law of Self-defence" in Christophe Paulussen and others (eds) *Fundamental Rights in International and European Law* (TMC Asser Press, The Hague, 2016) 73 at 86.

113 Corten, above n 64, at 780.

invoked the unwilling or unable standard.[114] Yet, their official report included no such statement, suggesting the United Kingdom as a whole did not see it as legally relevant. The Netherlands' actions also contradict the emergence of a new legal test. When airstrikes began in Syria, the Deputy Prime Minister in the Netherlands noted that "there is currently no international agreement on an internationally legal mandate" for military force.[115] Yet in 2016, the Netherlands wrote to the Security Council stating they would be acting in accordance with art 51.[116] This was after the Paris terror attacks, implying the changes in the political sphere swayed the Netherlands, not the fact that they suddenly agreed with the United States' original justifications. Despite what Scharf claims, the words of only four states cannot be enough to change one of the most fundamental areas of international law.

A different perspective is placing the unwilling or unable test within the already established necessity requirement. Put simply, if a host state is either unwilling or unable to help, it is necessary to breach their sovereignty to target the non-state actor in question.[117] Analysing this approach highlights the key normative problem with the unwilling or unable test in general – it leaves host states with little ability to meaningfully protect their sovereignty. Deeks links an unwilling or unable test with necessity, but also emphasises that an attempt to obtain consent should first be required.[118] When the necessity argument is made, consent is often tied to it. This applies even to "unable" states, with Akande and Liefländer writing that "at the core" of necessity is the "defending state's obligation to seek an unable host state's consent to military action."[119] Yet, the relationship between consent and necessity seems paradoxical. If a state does not consent, they are unwilling, and thus it can be argued it is necessary to breach their sovereignty. The host state has no real power to refuse, and consent becomes a mere box-checking exercise.

Scharf argues that the ICJ decisions did not prevent a change in the law, they only slowed it down.[120] Yet, in the face of these judgments, only clear and practically unanimous state support would

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114 Brunnée and Toope, above n 16, at 271.

115 Emma Rapaport "Dutch Parliament Commits Soldiers, F-16s to Fight ISIS in Iraq" (24 September 2014) NL Times <www.nltimes.nl>.

116 *Letter dated 10 February 2016 from the Chargé d'affaires a.i. of the Permanent Mission of the Netherlands to the United Nations addressed to the President of the Security Council* UN Doc S/2016/132 (10 September 2016).

117 Lindsay Moir "Action Against Host States of Terrorist Groups" in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, Oxford, 2015) 720 at 735.

118 Deeks, above 108, at 495 and 520.

119 Dapo Akande and Thomas Liefländer "Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense" (2013) 104 AJIL 563 at 566.

120 Scharf, above n 17, at 54.

suggest the law has developed contrary to the ICJ's position. The idea of blameworthiness lacks sufficient clarity, whereas unwilling or unable only appears to have support from a minority of nations.

V WHY IS THE CURRENT STATE OF SELF-DEFENCE PROBLEMATIC?

Even if no new legal test has arisen, powerful nations are conducting airstrikes in host countries with no significant international opposition. With this contradiction taking place, it becomes difficult to say what the law really is.

There are some academics who argue that self-defence can legally be directed at non-state actors, it is just that the parameters where it is justifiable that remain uncertain. Williams accepts that 9/11 led to the potential application of self-defence against terrorists.[121] Yet, he proposes that, in light of the issue of sovereignty, there remains a question of when a victim state can "legally deploy" force.[122] Gray has argued this as recently as 2018, stating that "it seems … there could, under certain conditions, be a right of self-defence", but there remain "difficulties in establishing the exact scope of the right."[123] Apart from the concerning lack of clarity such a rule would have, this argument also does not fit within the Charter framework. Force is only justified by art 51 if it somehow "'excuses' the violation of territorial integrity" protected by art 2(4).[124] The excuse element, the rationale for breaching sovereignty, is crucial, and we should not accept a legal formulation that ignores it.

However, taking the extreme approach is unrealistic. Tladi argues that, in light of the relevant ICJ cases, using force against a non-state actor for non-attributable acts cannot be considered proper within the law of self-defence.[125] The truth is, though, this is an unworkable standard in today's society. The traditional attribution idea is "too rigid" and leaves states unable to protect themselves from private attacks.[126] Therefore, even though the strict attribution test is the most likely to have legal status, it is not reflected in what is actually occurring. In this situation, even if the law on paper is authoritative, the lack of adherence to its standard makes it feel meaningless.

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121 Williams, above n 20.

122 At 624.

123 Gray, above n 5, at 206–207.

124 Trapp, above n 95, at 146.

125 Tladi, above n 101, at 576. See also Scott M Malzahn "State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility" (2002) 26 Hastings Intl & Comp L Rev 83 at 96; and Lewis Mills "Bereft of Life: The Character Prohibition on the Use of Force, Non-State Actors and the Place of the International Court of Justice" (2011) 9 NZYBIL 35.

126 Ruys and Verhoeven, above n 18, at 313.

A Lack of Legality

It is better to acknowledge the uncertain state of the law than brush past and ignore the confusion taking place. Reinold describes the law as currently being "in flux".[127] This implies a process of constructive change, which in reality is lacking. Currently, the authoritative law does not reflect practice, but generally accepted operational practice is not accepted as law.[128] There is a substantial gap forming between the law and state action that is leaving legal principles appearing artificial. Glennon proposes that "excessive violation of a rule" causes it to be replaced by "another rule that permits unrestricted freedom of action."[129] It might be exaggerating to suggest we now have a state where anything goes, but if the laws as written are not being followed, and no adequate alternative is being raised, can we really consider ourselves bound by any laws?[130] The real issue of concern is not what the law of self-defence is, but rather the lawlessness that we are entering into. Lawlessness not defined by chaos or disaster, but by quiet acceptance of unilateral decisions with inadequate legal authority.

The missing sense of legality can be seen first in the way states invoke self-defence. Gray suggests that states invoke art 51 "even when this seems entirely implausible" and stretch the definition of self-defence.[131] She suggests that this can be seen as "just a ritual incantation of a magic formula."[132] The point is that when it is invoked – despite the fact it is out of tune with the surrounding legal authorities – it, almost magically, works to legitimise their actions. Such a system indicates "degeneration" of the legal pillars.[133] If claims of self-defence are accepted that do not meet the legal tests, what does that say about the resilience of the law? There is a genuine global fear of terrorism, meaning there are political and social explanations why claims are not questioned. When a state claims that they are acting against a terrorist group – especially global ones such as Al Qaeda or ISIS – no other nation is likely to criticise them. However, these political considerations are superseding the requisite legal considerations.

The second factor showing an erosion on legality is that there is minimal potential for accountability. In 2018, Turkey began military action in the Kurdish-populated region of Afrin in northern Syria. Turkey wrote to the Security Council stating that they had engaged in military action

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127 Reinold, above n 70, at 252.

128 Hakimi, above n 35, at 31.

129 Michael J Glennon "How International Rules Die" (2005) 93 Geo LJ 939 at 940.

130 See Hakimi and Cogan, above n 22, at 286.

131 Gray, above n 5, at 125.

132 At 125.

133 Tams, above n 27, at 383.

in northern Syria in response to border attacks by the PKK.[134] Countries clearly expressed their unease. The United States of America said it was "concerned about the situation" while recognising Turkey's "legitimate security concerns."[135] These concerns were echoed by Germany,[136] whereas Egypt expressly condemned the "violation of Syria's sovereignty."[137] The Turkish offensive in Afrin could be described as "an aberrant invocation of the inherent right to self-defence."[138] Yet, regardless of the concerns raised by other states, there is no answerability imposed on Turkey. Political considerations likely have a role in this, but so does the lack of a principled basis to hold them to account. Since no state would enforce an absolute ban on using self-defence against terrorists, it becomes impossible to draw a reasonable line to impose accountability. Vague principles "[weaken] the law's power to impose meaningful restraints in this area."[139] Potentially, we are unsympathetic to Syria's territorial integrity, but taken abstractly, these are host states that have done nothing to make themselves liable. When there are no means to take concerns further, problematic incidents simply fade from the public consciousness over time.

B Consequences

The constant undermining of self-defence makes the regime "seem hollow."[140] Given the lack of practical enforcement mechanisms, there is always likely to be a level of discord in international law. Yet, the disparity in the law of self-defence against non-state actors is noticeably and consistently large. Moreover, the friction in this area is particularly concerning as the stability of self-defence ensures the integrity of the prohibition on the use of force. This "is one of the bedrocks of modern day international order," and thus interwoven with core principles of the international system.[141] When the law here is failing, these principles come under threat.

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134 *Identical letters dated 20 January 2018 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the Secretary-General and the President of the Security Council* UN Doc S/2018/53 (22 January 2018).

135 Heather Nauert "The Situation in Northwest Syria" (press release, 21 January 2018).

136 Sigmar Gabriel "Außenminister Gabriel zur Lage in Nord-Syrien" (press release, 21 January 2018) (translation: Foreign Minister Gabriel on the Situation in northern Syria).

137 "Egypt Rejects Military Operations in Afrin, Considers Them New Violation of Syrian Sovereignty" (21 January 2018) State Information Service <www.sis.gov.eg>.

138 Anne Peters "The Turkish Operation in Afrin (Syria) and the silence of the Lambs" (30 January 2018) EJIL: Talk! <www.ejiltalk.org>.

139 Akande and Liefländer, above n 119, at 563.

140 Hakimi and Cogan, above n 22, at 281.

141 Noam Lubell *Extraterritorial Use of Force against Non-State Actors* (Oxford University Press, Oxford, 2010) at 26. See also Stephan Wittich "The Use of Force, Self-Defence and the Unrealism in International Law" (2009) 14 ARIEL 79 at 81.

It is clear that the ICJ's position does not protect the maintenance of international peace and security. Transnational terrorists are fundamentally different than the Contras in the *Nicaragua* case.[142] If nations cannot respond to their threats, national security can be put at risk. This principle is more than just dealing with threats; it is about doing so in a way that in itself maintains a peaceful system with defined rules. The UN Charter intended to limit unilateral decisions to use force as much as possible; that is why the Security Council was given "primary responsibility for the maintenance of international peace and security."[143] Self-defence is an exception to this, but the purpose of art 51 is "to provide an objective threshold."[144] There can be no objective threshold without a clear legal test. Current practice has similarities with the pre-Charter world where "states used force freely against their enemies (perceived or real)."[145] That is not a characteristic that is reconcilable with the idea of a peaceful and secure society.

Additionally, state sovereignty is being undermined. The entire purpose of the ICJ's restrictive approach was to protect sovereignty, but that is clearly not happening when states apply abstract and undefined standards to justify intervention. The focus in our modern discourse is on the victim states, those that are the targets of terrorist attacks. While their security is a genuine concern, "host states too need protection from the use of force by powerful victim states."[146] Ahmed maps the use of force against non-state actors in the decade following 9/11, and all but one involved "significant power inequalities between the victim and host state."[147] As he points out, it would be "inconceivable" to imagine Somalia, Yemen or Pakistan being able to punish the United States for making "bogus" claims.[148] Their political weakness should not make their claim to sovereignty any less significant.

What makes this topic so difficult is that most reasonable people agree that Al Qaeda, the Taliban, ISIS and the Syrian government are negative forces in the world. Therefore, it is very easy to want to justify acting against them. It is easy "for states to think that their novel self-serving interpretations provide them mostly with important advantages, and at minimal cost."[149] However, there is a cost – the stability of the international legal regime. In the words of once UN Secretary-General Kofi Annan, "[t]errorists are accountable to no one. We, on the other hand, must never lose sight of our

142 Barbour and Salzman, above n 49, at 56.

143 Charter of the United Nations, art 24(1).

144 Brunnée and Toope, above n 16, at 265.

145 Williamson, above n 58, at 238.

146 Ahmed, above n 6, at 4.

147 At 18.

148 At 18.

149 Jonathan Horowitz "The Internationalists Mini-Forum: The Next World Order – Non-State Armed Groups and International Law" (31 January 2018) Just Security <www.justsecurity.org>.

accountability to citizens all around the world."[150] Allegedly civilised nations should not fight back blindly against terrorists without remembering our responsibility to preserve legal standards.

VI WHAT IS THE SOLUTION?

A How to Regain a Sense of Legality?

In 1970, in the midst of the Cold War, Franck wrote an article about the death of art 2(4).[151] He proposed that what killed it "was the wide disparity between the norms it sought to establish and the practical goals" nations were pursuing to protect "their national interest."[152] Forty years later, Mills proposes that a similar occurrence is taking place. The tension is no longer with Cold War preoccupations, but with the "spectre of terrorist groups harboured within states".[153] Terrorism is a legitimate concern that international law should address, but of equal concern is the waning strength of the prohibition on the use of force. In order to avoid the death of art 2(4), legality needs to come back to the forefront of considerations. To do this, one needs to consider how legality was lost in the first place. Why did states choose to break from legal norms?

This comes back to a point touched on throughout this article, that the restrictive approach taken by the ICJ is not functional. Believing that the traditional self-defence position can carry on in the 21st century is engaging in a form of "unrealism."[154] It is idealistic, but can never translate perfectly into reality. The effect is placing a "legal straightjacket on states", whose response will be to circumvent the law.[155] It is the "unrealism" of the ICJ that has pushed states to deviate so far from legal norms. Writing in response to the *Wall* advisory opinion, Tams predicts this as the likely result of the ICJ's judgment. He argues that while on first glance restriction will limit unilateral force, the reality is that states will more likely just rely on what he calls "non-written justifications."[156] This is what we have seen happening – looking at the justifications for Syria, they are all non-legal explanations proposed to fill the void. The "linchpin" of a legitimate and stable international system is that the law is realistic to the necessities of the moment.[157] At the moment, the linchpin is missing.

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150 Kofi Annan *In Larger Freedom: towards development, security and human rights for all* UN Doc A/59/2005 (21 March 2005) at [94].

151 Thomas M Franck "Who Killed Article2(4)? or: Changing Norms Governing the Use of Force by States" (1970) 64 AJIL 809.

152 At 837.

153 Mills, above n 125, at 37.

154 Wittich, above n 141.

155 At 99.

156 Tams, above n 42, at 976.

157 Wittich, above n 141, at 99.

We cannot ignore the issue of terrorism. At the same time, the concerns of the ICJ – protecting sovereignty and strictly enforcing the UN Charter – are equally important. When two aspects of international law collide, "one need not prevail over the other", but an accommodation can be found that "best maximizes and balances their respective underlying purposes."[158] This echoes Hakimi and Cogan's discussion, as they believe the institutional and state codes can have "contending normative visions", while still acknowledging that each is the "lesser when it acts alone."[159] A stable regime is one where disagreements are managed.[160] A compromise in this topic would need to satisfy the interests at stake – the host state's right to sovereignty and the victim state's right to security. If a self-defence doctrine considers both of these, it becomes tenable from both perspectives, even if a level of compromise is involved. If both states and institutions are willing to follow it, the third, perhaps more important, stakeholder will also benefit – the integrity of the international legal order.

B What Could a New Doctrine Look Like?

The biggest barrier to changing the law of self-defence is sovereignty, and the law must meaningfully recognise the host states' general right to territorial integrity. There are two potential options available – first, excluding situations where sovereignty concerns have little weight; and secondly, where there is a justification to breach a state's sovereignty.

The first possible compromise is allowing acts of self-defence to be used when that host state does not control the area in question. How this could work in practice mirrors Germany and Belgium's justifications for using force in Syria. Germany's art 51 report to the Security Council stated:[161]

> ISIL has occupied a certain part of Syrian territory over which the Government of the Syrian Arab Republic *does not at this time exercise effective control.* States that have been subjected to armed attack by ISIL *originating in this part of Syrian territory,* are therefore justified under Article 51 of the Charter of the United Nations to take necessary measures of self-defence, even without the consent of the Government of the Syrian Arab Republic.

Belgium used almost identical rhetoric, as well as labelling it an "exceptional situation."[162] Brunnée and Toope call this the "most promising" option for legal change.[163] They are drawn to this

158 Schmitt, above n 82, at 176.

159 Hakimi and Cogan, above n 22, at 287 and 289.

160 At 287.

161 *Letter dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council* UN Doc S/2015/946 (10 December 2015) (emphasis added).

162 *Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed of the President of the Security Council* UN Doc S/2016/523 (9 June 2016).

163 Brunnée and Toope, above n 16, at 286.

standard as it gives clarity that the unwilling and unable test does not. It also has the advantage of balancing the relevant interests. It creates an avenue for victim states to target terrorists. Potentially from a traditional view of sovereignty, which gives absolute control, this test may seem inappropriate. Sovereignty needs to be defined in its modern context, as "while states remain the fundamental building blocks of the international legal system", they are no longer the only powerful actor in the international sphere.[164] If we want a practical system to address these new actors, sovereignty must cede at some point, and this is the reasonable place to do it. There is no strong logic to claim the right not to be interfered with in an area that the state itself does not control. Additionally, Germany and Belgium's standard provides a way to limit the actions of victim states. Both Germany and Belgium referred to Security Council Resolution 2249, which states that ISIS controlled territory in Syria.[165] A proper balance is, therefore, created by requiring a state to have a credible external source, ideally the UN, affirming the lack of control before self-defence can be used.

The second option is to provide a rationale for breaching sovereignty, meaning that the host state's own actions justify it due to a level of blameworthiness. Lanovoy argues that this should be done by lowering the attribution standard to a "complicity standard arising from the state's knowing aid or assistance to the wrongdoing."[166] This position seems to be a reaction to the "accountability gap" that exists because of the strict attribution threshold.[167] However, the test is strict because the outcome is saying that a state is responsible for the action – we would be saying that the host state was responsible, and potentially financially liable, for the terrorist attack.[168] A complicity standard is not specifically about holding states accountable for the actual attack itself, therefore, it would make more sense as a new primary obligation for states.[169] This could include the type of actions states and academics have frequently highlighted – harbouring of terrorists or providing substantive support. How it would differ from the current situation is that new norms need clear, agreed upon norms that ensure that a host state's sovereignty is only infringed if it is legitimately deserving. We can only hold states, either the victim state or the host state, accountable if it is "identifiable when [they are] cheating a rule."[170]

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164 Kristen E Boon "Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines" (2014) 15 Melb J Intl L 330 at 376.

165 SC Resolution 2249 (2015), at [5].

166 Vladyslav Lanovoy "The Use of Force by Non-State Actors and the Limits of Attribution of Conduct" (2017) 28 EJIL 563 at 566. See also Michael, above n 33, at 155.

167 Boon, above n 164, at 332.

168 At 373–374.

169 Ilias Plakokefalos "The Use of Force by Non-State Actors and the Limits of Attribution of Conduct: A Reply to Vladyslav Lanovoy" (2017) 28 EJIL 587 at 590.

170 Ahmed, above n 6, at 19.

C How to Properly Change the Law?

The final issue is how change may come about. Hakimi and Cogan see the most likely end to confrontation is with the "institutional code" becoming more lenient.[171] Mills' position is that the ICJ should be in control of any evolution in the law on the use of force.[172] The other option is discussion within the Security Council. The authority that comes from these institutions would create faster and clearer change. However, asking change to take place this way ignores structural problems. The ICJ can only write judgments if a case comes before it, which seems unlikely to happen in the near future. The Security Council is continually proving to be dominated by politics and disagreement, meaning it is also an unlikely driver of change.[173]

That leaves states. Their practice can change the traditional law if it is both clear and generally agreed upon. At the moment, governments appear to have "given up on the language of law."[174] States need to start taking initiative and engaging thoughtfully in the legal debate, rather than letting powerful nations like the United States of America dominate discussion. It seems likely many states "are not yet ready to push the law in a particular direction" potentially as they are conflicted or uncertain.[175] They can take this position knowing that they are able to act without their actions being overly scrutinised. However, all states should be invested in the stability of the legal order. While no one country can change the law overnight, "frank justification" is preferable to leaving "commentators and other States to read tea leaves."[176] If states give more detail and engage in more transparency, a productive discourse regarding the future of self-defence can take place.

VII CONCLUSION

The post-Charter world has been defined by a level of peace and security unknown in the 19th century. The reason this is the case is because the international community established a strict regime on the use of force through an absolute prohibition with minimal exceptions. However, while "the strict letter" of the UN Charter still purports to uphold the virtue of peace, "militarily powerful states seem quite able to resort to force … whenever they deem it in their security interests to do so."[177] The contradiction taking place is fundamentally damaging to the stability of the international legal order. The ICJ has explicitly stated that self-defence is limited to the inter-state context, and while the Security Council has addressed the threat of terrorism, its statements are not clear enough to be seen

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171 Hakimi and Cogan, above n 22, at 290.

172 Mills, above n 125, at 67.

173 Tams, above n 27, at 392.

174 Mills, above n 125, at 65. See also Gray, above n 5, at 125.

175 Hakimi, above n 35, at 28.

176 Brunnée and Toope, above n 16, at 275.

177 Williamson, above n 58, at 238.

as overriding this. Yet, we cannot ignore the use of force in Afghanistan, Syria, Iraq or Lebanon that all faced no ramifications. When authoritative law is not being followed, credibility is lost. The law on the use of force is at the heart of the modern world, and so instability in this area is deeply problematic. State sovereignty is not something that should so easily be disregarded, and peace and security can only be maintained if all nations are willing to abide by certain constraints.

The purpose of this article is not to suggest self-defence should never be used against non-state actors. Terrorism is a problem that needs to be addressed, but it needs to be addressed through legal channels. At the moment, influential states quietly accept the anarchic order knowing it largely serves their interests. It is these states who should be engaged in trying to frame a suitable solution that integrates the relevant consideration. The initial code name the United States of America chose for military action in Afghanistan was "infinite justice".[178] However, there is no righteousness in protecting security at the expense of legality. Real justice can only be guided by law.

178 Cassese, above n 90, at 998.

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