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# Defensive Force against Non-State Actors: The State of Play

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# Defensive Force against Non-State Actors: The State of Play

*Monica Hakimi\**

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## I. INTRODUCTION

On September 22, 2014, a U.S.-led coalition began airstrikes against the so-called Islamic State in Syria. At the same time, the United States started targeting the Khorasan group in Syria. These two operations raise (again) the question of when States may use defensive force against non-State actors in other States.<sup>1</sup> The text of the United Nations Charter does not resolve the question. Article 2(4) prohibits States from using force “against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>2</sup> Article 51 then recognizes “the inherent right to individual or collective self-defense if an armed attack occurs.”<sup>3</sup> The proper interpretation of those provisions for cases involving non-State actors is uncertain and contested.

The response in the secondary literature has been to try to resolve the uncertainty—to identify the interpretation that is or should be correct.<sup>4</sup> For example, two prominent expert reports on the topic, the *Chatham House Principles of International Law on the Use of Force in Self-Defence* and the *Leiden Policy Recommendations on Counter-Terrorism and International Law*, recognize

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1. Some readers might ask whether these operations should instead be characterized as humanitarian interventions. The operations arguably have a humanitarian angle, but none of the participating States has chosen to advance that angle as a justification for the use of force. See *infra* Part II. Further, the focus of the operations has been to repel the Islamic State and Khorasan group, not to alleviate the broader humanitarian crisis in Syria. See Louise Arimatsu & Michael N. Schmitt, *Attacking “Islamic State” and the Khorasan Group: Surveying the International Law Landscape*, 53 COLUMBIA JOURNAL OF TRANSNATIONAL LAW BULLETIN 1, 24–27 (2014).

2. UN Charter art. 2(4).

3. *Id.*, art. 51.

4. For efforts to clarify the law as it applies to the Syria operations, see, e.g., Louise Arimatsu & Michael N. Schmitt, *supra* note 1, at 6; Ranj Alaaldin & Bilal Khan, *Airstrikes on ISIS Targets in Syria and Iraq are Legal under International Law*, LSE BLOG (Oct. 1, 2014), <http://bit.ly/10kgN5t>; Jennifer Daskal, Ashley Deeks & Ryan Goodman, *Strikes in Syria: The International Law Framework*, JUST SECURITY (Sept. 24, 2014), <http://justsecurity.org/15479/strikes-syria-international-law-framework-daskal-deeks-goodman/>; Mary Ellen O’Connell, *Obama’s Illegal War: The Islamic State Never Attacked Us, So Why Are We Attacking Them?*, POLITICO (Sept. 11, 2014), <http://www.politico.com/magazine/story/2014/09/obamas-illegal-war-110863.html#VIBEkIe5ZkV>; Marc Weller, *Islamic State Crisis: What Force Does International Law Allow?*, BBC NEWS (Sept. 25, 2014), <http://www.bbc.com/news/world-middle-east-29283286>.

that the law in this area is uncertain and controversial.<sup>5</sup> Each report then aims to clarify the law's substantive content.<sup>6</sup> Similarly, Sir Daniel Bethlehem's recent piece in the *American Journal of International Law* argues that much of the scholarly literature on the topic is far removed from the operational practice.<sup>7</sup> Bethlehem offers a set of principles that he hopes will "attract a measure of agreement about the contours of the law."<sup>8</sup> His principles instead generated more debate. Others argued that the law is *not* as he articulated.<sup>9</sup>

Efforts to clarify the law on the use of defensive force against non-State actors are premature. The evident ambiguities and inconsistencies in the practice reflect an ongoing struggle over the law's proper content. This struggle cannot neatly be resolved because the international legal system is, at bottom, decentralized. No actor is charged with settling competing claims on the law or dismissing invalid claims. Unless and until States gravitate toward the same claim, multiple claims will continue to circulate simultaneously. Any one of these claims might be treated as law by only some actors and not others, or in only certain respects and not others. Trying to clarify the law in the face of this contestation thus elides more than it reveals. It suppresses the underlying tensions that shape how global actors engage with the law in concrete cases.

This article takes a different approach. Rather than try to distill the best or most accurate interpretation of the law, I map the positions that were plausibly available when the Syria operations began. I do so precisely because the law in this area has been unsettled. A broad range of legal positions might reasonably be invoked or applied in any given case. After mapping the legal terrain, I argue that the current operations in Syria accentuate

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5. Elizabeth Wilmshurst, *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 963, 964 (2006) [hereinafter *Chatham House Principles*]; NICO SCHRIJVER & LARISSA VAN DEN HERIK, LEIDEN POLICY RECOMMENDATIONS ON COUNTER-TERRORISM AND INTERNATIONAL LAW, ¶ 29 (2010) [hereinafter LEIDEN POLICY RECOMMENDATIONS], available at <http://www.grotiuscentre.org/resources/1/Leiden%20Policy%20Recommendations%201%20April%202010.pdf>.

6. *Chatham House Principles*, *supra* note 5, at 963; LEIDEN POLICY RECOMMENDATIONS, *supra* note 5, ¶ 29.

7. Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AMERICAN JOURNAL OF INTERNATIONAL LAW 770, 773 (2012).

8. *Id.*

9. Notes and Comments, *Self-Defense Against Nonstate Actors (Continuation of the Debate)*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW 563 (2013).

three preexisting trends. First, the claim that international law absolutely prohibits the use of defensive force against non-State actors is losing legal traction. That claim is increasingly difficult to sustain. Second, States have not coalesced around a legal standard on *when* such force is lawful. Most States seem conflicted or uncertain on that question, and have declined to advance a particular legal position. Third, this ambivalence has contributed to a sizeable gap between the norms that are widely articulated as law and the ones that reflect the operational practice. States regularly tolerate operations that they are not yet willing to legitimize with legal language.

## II. MAPPING THE LEGAL TERRAIN

When the Syria operations began, several positions on the use of defensive force against non-State actors were in play. Each of these positions had some support in the practice and secondary literature. But none was widely accepted as *the* correct interpretation of the law. As a result, States and other global actors could plausibly invoke or apply any of these positions in the Syria case.

### *A. An Absolute Prohibition*

The most restrictive position in the literature would permit defensive force only if the initial attack were attributable to a State—and thus would prohibit such force against non-State actors. Conceptually, those who advance this position posit that operating *in* another State without its consent is the same as operating *against* that other State; the State has a right to its own territorial integrity. So, the reasoning goes, permitting defensive force in that State would mean holding it accountable for acts that are not its own. Instead of using defensive force, the victim State may lawfully address the problem by: (1) asking the territorial State to prevent the violence, (2) obtaining the territorial State's consent to use force, or (3) seeking relief from the UN Security Council.

An absolute prohibition of the use of defensive force against non-State actors finds solid support in the jurisprudence of the International Court of Justice (ICJ). Two post-9/11 cases are directly on point. In the 2004 advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ plainly stated that Article 51 applies “in the case

of an armed attack *by one State against another State*.”<sup>10</sup> The Court then determined that Article 51 did not excuse Israel’s security barrier on the Palestinian territories, in part because Israel did not claim that it had been victimized by another State.<sup>11</sup> A similar logic appears in the 2005 *Armed Activities* case between Uganda and the Democratic Republic of the Congo (DRC). The Court found that “there [was] no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC.”<sup>12</sup> In other words, any attack was “non-attributable to the DRC.”<sup>13</sup> The Court then determined that “the legal and factual circumstances for the exercise of the right of self-defense by Uganda against the DRC were not present.”<sup>14</sup>

Some have suggested that the *Armed Activities* judgment does not support an absolute prohibition of defensive force against non-State actors.<sup>15</sup> Indeed, the judgment avoids the issue of whether defensive force is ever lawful in response to “large-scale attacks by irregular forces.”<sup>16</sup> This language arguably preserves the possibility that States may use defensive force against irregular groups whose conduct is not attributable to a State—in other words, that such force can be lawful, even if a group does not act on behalf of a State, as a State agent. However, the better interpretation is that the Court meant to leave open the question of whether States may use defensive force against irregular groups that *are* State agents. This latter interpretation would make *Armed Activities* both internally consistent and consistent with the Court’s earlier judgment in *Military and Paramilitary Activities*

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10. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9) (emphasis added). See also Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AMERICAN JOURNAL OF INTERNATIONAL LAW 62 (2005); but cf. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 136 (3d ed. 2008) (arguing that this language can be interpreted narrowly, to permit defensive force against non-State actors in other States).

11. *Wall*, 2004 I.C.J. 136, ¶ 139.

12. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, ¶ 146 (Dec. 19).

13. *Id.*

14. *Id.*, ¶ 147.

15. *Id.*, separate opinion of Simma, J., ¶ 7 (claiming that the judgment is ambiguous); Christian J. Tams, *The Use of Force Against Terrorists*, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW 359, 384 (2009) (describing the judgment as “far more equivocal” than the *Wall* opinion).

16. *Armed Activities*, 2005 I.C.J. 168, ¶ 147.

in and against Nicaragua.<sup>17</sup> The Nicaragua Court recognized that “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries” might trigger Article 51.<sup>18</sup> Given the *Nicaragua* and *Wall* precedents, and the logic of the *Armed Activities* judgment itself, the case strongly suggests that Uganda could not lawfully use defensive force in the DRC because the initial attacks were not attributable to the DRC.<sup>19</sup>

As I explain below, many international lawyers disagree with the ICJ’s position or argue that this position has been superseded by events. But in the *jus ad bellum*,<sup>20</sup> as in other areas of international law,<sup>21</sup> ICJ decisions are treated as highly authoritative and given considerable deference. Thus, other international lawyers continue to cite the ICJ’s decisions to support an absolute prohibition.<sup>22</sup> For example, Dire Tladi argued in 2013 that, “[g]iven the very clear line of reasoning by the [ICJ],” any contrary position “must be properly probed.”<sup>23</sup> Tladi concluded that “[t]he use of force by a state against nonstate actors for acts not attributable at all to another state

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17. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

18. *Id.*, ¶ 195 (emphasis added).

19. See Albrecht Randelzhofer & Oliver Dörr, *Article 2(4)*, in THE CHARTER OF THE UNITED NATIONS 200, 213 (Bruno Simma et al. eds., 3d ed. 2012) [hereinafter CHARTER COMMENTARY] (“In its recent jurisprudence the ICJ made it clear that acts of violence by non-State actors can only become relevant as amounting to an armed attack, if they are attributable to a State . . .”).

20. See, e.g., TOM RUYTS, “ARMED ATTACK” AND ARTICLE 51 OF THE UN CHARTER 52 (2010) (“It stands beyond doubt that the case law of the ICJ dealing with the law on the use of force . . . carries considerable authority.”); Mary Ellen O’Connell, *The Choice of Law Against Terrorism*, 4 JOURNAL OF NATIONAL SECURITY LAW & POLICY 343, 359 (2010) (“[T]he ICJ and other international tribunals have clarified the general principles and the rules of state responsibility applicable to lawful uses of force.”).

21. See, e.g., Christian J. Tams, *The ICJ as a “Law-Formative Agency”: Summary and Synthesis*, in THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE 377, 379 (Christian J. Tams & James Sloan eds., 2013) (“ICJ decisions are accorded ‘a truly astonishing deference in international law.’”).

22. See, e.g., RUYTS, *supra* note 20, at 486–89; Constantine Antonopoulos, *Force by Armed Groups as Armed Attack and the Broadening of Self-Defence*, 55 NETHERLANDS INTERNATIONAL LAW REVIEW 159, 169–71 (2008); cf. Albrecht Randelzhofer & Georg Nolte, *Article 51*, in CHARTER COMMENTARY, *supra* note 19, at 1397, 1417 (“[T]he preferable view still seems to be that attacks by organized armed groups need to be attributed to a State in order to enable the effected State to exercise its right of self-defence, albeit under special [looser than normal] rules of attribution.”).

23. Dire Tladi, *The Nonconsenting Innocent State: The Problem with Bethlehem’s Principle*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW 570, 572 (2013).

falls to be considered under the paradigm of law enforcement (in which consent of the territorial state would be required) and not the law of self-defense.”<sup>24</sup> Mary Ellen O’Connell argued the same: “[a]ttacking [non-State actors] on the territory of another state is attacking that state.”<sup>25</sup>

In addition, the absolute prohibition has had some traction in institutions other than the ICJ. Most notably, Latin American States collectively seemed to endorse this prohibition in response to Colombia’s 2008 incursion against non-State actors in Ecuador. A commission of the Organization of American States (OAS) labeled the incursion “a violation of the sovereignty and territorial integrity of Ecuador and of principles of international law.”<sup>26</sup> The OAS Permanent Council then reaffirmed the “principle that the territory of a State is inviolable and may not be the object, even temporarily, of . . . measures of force taken by another State, directly or indirectly, on any grounds whatsoever.”<sup>27</sup> The Rio Group of Latin American States issued a very similar statement on the incident.<sup>28</sup>

### B. *Grounds for Defensive Action*

Although the absolute prohibition is still in play, it is no longer the dominant position in the literature. Many international lawyers now cite the contrary practice as evidence that defensive force against non-State actors is at least sometimes lawful.<sup>29</sup> Conceptually, these lawyers balance the compet-

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24. *Id.* at 576.

25. Mary Ellen O’Connell, *Dangerous Departures*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW 380, 380, 383 (2013).

26. Organization of American States [OAS] Commission, *Report of the OAS Commission that Visited Ecuador and Colombia* 10, OEA/Ser.F/II.25 RC.25/doc. 7/08 (Mar. 16, 2008).

27. Res. CP/RES/930, ¶ 1 (Mar. 5, 2008), *reprinted in id.*, Annex 1 [hereinafter OAS Commission].

28. OAS Commission, *supra* note 26, Annex 2 (reprinting Rio Group Declaration), at 1. Claus Kreß argues that this episode “need not . . . be interpreted as the rejection of the possibility of a non-state armed attack. . . . It might simply suggest that the non-state violence . . . was not significant enough to pass the threshold of a non-state armed attack.” Claus Kreß, *Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force*, 1 JOURNAL ON THE USE OF FORCE AND INTERNATIONAL LAW 11, 45 (2014). That interpretation is plausible but minimizes the language in the relevant texts. The texts suggest an absolute prohibition and do not address the idea of an armed-attack threshold. I discuss the armed-attack threshold at *infra* notes 65–72 and accompanying text.

29. *See, e.g.*, Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AMERICAN JOURNAL OF INTERNATIONAL LAW 244, 285 (2011) (concluding



ing sovereignty interests of the territorial State and the victim State. As for how to strike that balance—and when to permit defensive force—the literature is conflicted. Essentially three grounds for permitting such force are plausibly available: (1) the territorial State actively harbors or supports the non-State actors, or lacks governance authority in the area from which they operate, (2) the territorial State is unable or unwilling to address the threat that the non-State actors pose, and (3) the threat is located in the territorial State. To be clear, each of these grounds for permitting defensive force has some interpretive space and overlaps with the others. The three are best conceived as concentric circles; as one moves from the first ground to the third, the scope of permissible defensive actions expands. Treating the three as distinct is analytically useful, then, because it exposes the variations in the practice as the application of Article 51 broadens. As I explain in the next Section, any of these grounds for permitting defensive force might be further restricted by other conditions that attach to Article 51.

#### 1. An Attack from an Ungoverned Space or from a Harboring or Supporting State

The narrowest ground for permitting defensive force would require that the territorial State actively harbor or support the non-State actors, or lack control over the area in which they operate. The justification for permitting defensive force in these circumstances, but not necessarily in others, is that the victim State cannot plausibly rely on the territorial State to contain the threat. The territorial State is objectively part of the problem. Indeed, States on the whole have endorsed the use of defensive force in several cases involving a harboring or supporting State, or an ungoverned space.

The global reaction to the 9/11 terrorist attacks is the most significant example of States applying a harbor or support standard. The UN Security Council and OAS Permanent Council both recognized the Article 51 right in the context of condemning those attacks.<sup>30</sup> Moreover, NATO asserted that if the attacks were “directed from abroad,” it would treat them as

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that States increasingly accept “that private armed attacks can occur in which no state is substantially involved”); Tams, *supra* note 15, at 360 (“[T]he international community during the last two decades has increasingly recognized a right of states to use unilateral force against terrorists.”).

30. S.C. Res. 1368, ¶ 3, U.N. Doc. S/RES/1368 (Sept. 12, 2001); OAS, Convocation of the Twenty-Third Meeting of Consultation of Ministers or Foreign Affairs, OEA/Ser.G CP/Res. 796 (1293/01) (Sept. 19, 2001).

“armed attacks”—the triggering language for Article 51.<sup>31</sup> These decisions reflect the widespread view that the United States could lawfully use defensive force in Afghanistan, which had harbored al Qaeda.<sup>32</sup> Separately, the African Union adopted a harbor or support standard in its 2005 defense pact. The pact defines “aggression,” which generally triggers Article 51, to include “the encouragement, support, harbouring, or provision of any assistance for the commission of terrorist acts and other violent transnational organized crimes against a Member State.”<sup>33</sup>

The harbor or support standard was also arguably in play in the case of Israel’s 2006 operation against Hezbollah—although here, that standard bleeds into the ungoverned space standard. At the time of the Israeli operation, Hezbollah participated in Lebanon’s central government and controlled much of Lebanon’s territory. As Theresa Reinold explains, “Hezbollah [had] erected a state within a state and . . . had emancipated itself entirely from the central government’s writ.”<sup>34</sup> Because Hezbollah was well represented in Lebanon’s central government, it could influence that government to bolster its own violent policies. The government might be described as supporting Hezbollah. Alternatively, the government could be said to lack control over the areas in which the militant wing of Hezbollah operated.<sup>35</sup> The Security Council had repeatedly called on the government to extend its authority and control to Hezbollah’s strongholds.<sup>36</sup> In either

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31. Press Release, NATO, Statement by NATO Secretary General Lord Robertson (Oct. 8, 2001), *available at* [www.nato.int/docu/pr/2001/p01-138e.htm](http://www.nato.int/docu/pr/2001/p01-138e.htm).

32. Some commentators have interpreted the decisions more broadly—not to be limited to harbor or support scenarios. *See, e.g.*, Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 839, 840 (2001); Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INTERNATIONAL LAW JOURNAL 7, 17 (2003). That interpretation is plausible, but it extends the decisions beyond their immediate texts and contexts.

33. African Union, African Union Non-Aggression and Common Defence Pact art. 1(c)(xi), Jan. 31, 2005, *available at* [http://www.african-court.org/en/images/documents/Other\\_Relevant\\_Instruments/AU%20Non%20Aggression%20and%20Common%20Defence%20Pact.pdf](http://www.african-court.org/en/images/documents/Other_Relevant_Instruments/AU%20Non%20Aggression%20and%20Common%20Defence%20Pact.pdf).

34. Reinold, *supra* note 29, at 266.

35. *Id.* at 263; Andreas Zimmerman, *The Second Lebanon War: Jus ad Bellum, Jus in Bello, and the Issue of Proportionality*, 11 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 99, 115 (2007).

36. *See, e.g.*, S.C. Res., 1655, U.N. Doc. S/RES/1655 (Jan. 31, 2006); S.C. Res. 1614, U.N. Doc. S/RES/1614 (July 29, 2005).

event, many third States responded to Israel's 2006 operation by expressly recognizing Israel's right to use defensive force against Hezbollah.<sup>37</sup>

Other support for the ungoverned space standard is more scattered. In *Armed Activities*, Judges Kooijmans and Simma wrote separate opinions that endorsed this standard. Kooijmans and Simma bemoaned "the almost complete absence of governmental authority in the whole or part of the territory of certain States."<sup>38</sup> The two judges then asserted that, "if armed attacks are carried out by irregular forces from such territory against a neighboring State, these activities are still armed attacks even if they cannot be attributed to the territorial State."<sup>39</sup> The Institut de Droit International took a similar position in 2007. The Institut recognized that States may "in principle" use defensive force against non-State actors; it then identified only one scenario in which such force would be lawful: if the attack "is launched from an area beyond the jurisdiction of any state."<sup>40</sup>

Finally, several incidents involving the territorial State's ambiguous or imperfect consent are probably better described as defensive operations in ungoverned spaces. Consider three examples. First, the United States has repeatedly struck non-State militants in Pakistan. The extent to which the Pakistani government has consented to these strikes is unclear. Pakistan has publicly condemned some U.S. strikes, but reports indicate that it has also, covertly, consented to these strikes.<sup>41</sup> In any event, the U.S. strikes occur primarily in areas that are beyond the Pakistani government's juris-

37. See, e.g., U.N. SCOR, 61st Sess., 5489th mtg., U.N. Doc. S/PV.5489 (July 14, 2006); U.N. SCOR, 61st Sess., 5488th mtg., U.N. Doc. S/PV.5488 (July 13, 2006).

38. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, separate opinion of Simma, J., ¶ 12 (Dec. 19). See also *id.*, separate opinion of Kooijmans, J., ¶ 30 (using almost identical language).

39. *Id.*, separate opinion of Simma, J., ¶ 12. See also *id.*, separate opinion of Kooijmans, J., ¶ 30 (using almost identical language).

40. Institut de Droit International, *Present Problems of the Use of Armed Force in International Law*, Resolution 10A, ¶ 10(ii) (Oct. 27, 2007), available at [http://www.idi-il.org/idiE/resolutionsE/2007\\_san\\_02\\_en.pdf](http://www.idi-il.org/idiE/resolutionsE/2007_san_02_en.pdf).

41. See, e.g., Greg Miller & Bob Woodward, *Secret Memos Reveal Explicit Nature of U.S., Pakistan Agreement on Drones*, WASHINGTON POST (Oct. 24, 2013), [http://www.washingtonpost.com/world/national-security/top-pakistani-leaders-secretly-backed-cia-drone-campaign-secret-documents-show/2013/10/23/15e6b0d8-3beb-11e3-b6a9-da62c264f40e\\_story.html](http://www.washingtonpost.com/world/national-security/top-pakistani-leaders-secretly-backed-cia-drone-campaign-secret-documents-show/2013/10/23/15e6b0d8-3beb-11e3-b6a9-da62c264f40e_story.html); Bill Roggio, *US Launches Drone Strike in North Waziristan*, LONG WAR JOURNAL (Nov. 20, 2014), [http://www.longwarjournal.org/archives/2014/11/us\\_launches\\_drone\\_st.php](http://www.longwarjournal.org/archives/2014/11/us_launches_drone_st.php).

diction or control.<sup>42</sup> Although the strikes have been criticized on human dignity grounds, most third States have remained quiet about the potential intrusions on Pakistani sovereignty.<sup>43</sup> Second, most States were muted or mildly supportive when Ethiopia invaded Somalia in 2006.<sup>44</sup> The stated purpose of the invasion was to defend against the threat posed by Islamist groups that controlled considerable portions of Somali territory.<sup>45</sup> Ethiopia also hinted that the transitional Somali government had invited the incursion, but invitations to intervene that are issued by only one side to an internal conflict—especially by a side that lacks control over much of the territory—are commonly viewed as suspect.<sup>46</sup> Third, France reportedly justified its 2013 operation against al Qaeda-affiliated militants in Mali “on the grounds of maintaining stability in the region and reducing the risk of ter-

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42. See Sean D. Murphy, *The International Legality of U.S. Military Cross-Border Operations from Afghanistan into Pakistan*, in *THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS* 109, 114 (Michael N. Schmitt ed., 2009) (Vol. 85, U.S. Naval War College International Law Studies); Saeed Shah, *Pakistan Operation Targets Waziristan Militants*, *WALL STREET JOURNAL* (June 15, 2014), <http://online.wsj.com/articles/pakistan-operation-targets-waziristan-militants-1402844572>.

43. See Reinold, *supra* note 29, at 280 (reviewing incidents and concluding that “the strikes in Pakistan did not trigger much of an international response”); see generally Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 *HARVARD NATIONAL SECURITY JOURNAL* 283, 434 (2011) (noting “the silence of other countries” about U.S. drone strikes).

44. GRAY, *supra* note 10, at 244 (describing a “reluctance of other states to enter into legal debate” on the action and explaining that “[t]he public silence of China, Russia and the NAM was striking”); Zeray W. Yihdego, *Ethiopia’s Military Action Against the Union of Islamic Courts and Others in Somalia: Some Legal Implications*, 56 *INTERNATIONAL LAW & COMPARATIVE LAW QUARTERLY* 666, 673 (2007) (“The prevalent view of the international community does seem impliedly to approve the Ethiopian action . . .”).

45. Jonathan Clayton, *Ethiopia Confronts Somali Warlords*, *TIMES* (London), Nov. 24, 2006, at 53 (quoting the Ethiopian Prime Minister as asserting that his country had to defend itself against the threat posed by Islamists in Somalia); Monitoring Group on Somalia, Report, transmitted by letter dated Nov. 22, 2006 from the Chairman of the Security Council Committee established pursuant to resolution 751 (1992) concerning Somalia addressed to the President of the Security Council, ¶¶ 200–11, U.N. Doc. S/2006/913 (Nov. 22, 2006) (documenting that the transitional Somali government lacked control over large portions of Somali territory).

46. See GRAY, *supra* note 10, at 81; Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 *BRITISH YEARBOOK OF INTERNATIONAL LAW* 189, 251 (1985).

rorist attacks elsewhere, including France.”<sup>47</sup> France also claimed to have the consent of the transitional Malian government, but here again, any consent by a domestic authority was imperfect: rebel groups already controlled much Malian territory.<sup>48</sup> The global reaction to France’s operation was positive. Several States affirmatively supported France,<sup>49</sup> and a few months later, the UN Security Council “welcom[ed] the swift action by the French forces.”<sup>50</sup>

## 2. An Attack from an Unable or Unwilling State

A territorial State that actively harbors or supports the relevant non-State actors, or lacks control over the area from which they operate, is demonstrably unable or unwilling to contain the threat. Such situations would also be covered by an unable or unwilling standard. But the unable or unwilling standard is broader. It would permit defensive force against non-State ac-

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47. Afua Hirsch & Kim Willsher, *Mali Conflict: France Has Opened Gates of Hell, Says Rebels*, GUARDIAN (London) (Jan. 14, 2013), <http://www.theguardian.com/world/2013/jan/14/mali-conflict-france-gates-hell>.

48. See John R. Crook, *Contemporary Practice of the United States: United States Provides Military Support to French Operations against Militants in Mali*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW 466, 466–67 (2013); *France Confirms Mali Military Intervention*, BBC NEWS (Jan. 11, 2013), <http://www.bbc.com/news/world-africa-20991719>.

49. See Crook, *supra* note 48; Hirsch & Willsher, *supra* note 47; *France Confirms Mali Military Intervention*, *supra* note 48; Adam Nossiter & Neil MacFarquhar, *On the Ground in Mali, French and Local Troops Confront Islamist Forces*, NEW YORK TIMES (Jan. 17, 2013), [http://www.nytimes.com/2013/01/17/world/africa/france-mali-intervention.html?\\_r=0](http://www.nytimes.com/2013/01/17/world/africa/france-mali-intervention.html?_r=0).

50. S.C. Res. 2100, U.N. Doc. S/RES/2100 (Apr. 25, 2013). Some readers might question my characterization of this operation as defensive, rather than consent-based or Council-authorized. When the Council endorsed France’s action, it described France as having acted with the consent of the transitional Malian government. As I explain in the text, this consent was imperfect. Indeed, the Council itself seemed to recognize as much when, in December 2012, it authorized an African-led mission to support the transitional government. S.C. Res. 2085, U.N. Doc. S/RES/2085 (Dec. 20, 2012). The Council’s authorizing resolution invoked Chapter VII, even though the transitional government had requested the mission. The Council need not use Chapter VII when it acts with the territorial State’s consent. Moreover, although the December 2012 resolution authorized an African-led mission, it did not authorize a French one. Subsequent Council resolutions corrected that deficiency by specifically authorizing French troops to intervene in Mali. S.C. Res. 2100, ¶ 18, U.N. Doc. S/RES/2100 (Apr. 25, 2013); S.C. Res. 2164, ¶ 26, U.N. Doc. S/RES/2164 (June 25, 2014). My point in the text is that the alternative justifications for France’s intervention are insufficient. The intervention is most accurately described as a defensive operation in an ungoverned space.

tors even when the territorial State exercises governance authority and actively tries to suppress the violence—but is, simply, ineffective. The standard is controversial because it risks tipping the balance too far in favor of the victim State, without sufficient regard for the interests of the territorial State or the broader prospects for peace and security. Nevertheless, a number of States—including the United States, Israel, Russia and Turkey—have expressly invoked the standard to justify defensive operations.<sup>51</sup> The standard also finds support in some of the secondary literature.<sup>52</sup>

States have, in effect, applied the unable or unwilling standard in concrete cases. For example, Turkey's 2008 ground incursion into Iraq to incapacitate Kurdish rebels does not fit neatly within the harbor or support, or the ungoverned space standard. Iraq's Kurdish region had considerable autonomy from the central government but was not in any meaningful sense ungoverned.<sup>53</sup> Moreover, although some Iraqi officials were probably sympathetic to the rebels, the evidence that these officials actively harbored or supported the rebels is weak. Iraqi officials in the Kurdish region had dissociated themselves from the rebels,<sup>54</sup> and the central Iraqi government was working with Turkey to address the violence.<sup>55</sup> The government was, however, unable to prevent the violence.<sup>56</sup> The incident sounds in the unable or unwilling standard. And the global reaction was notably muted.<sup>57</sup>

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51. See Ashley S. Deeks, "Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense, 52 VIRGINIA JOURNAL OF INTERNATIONAL LAW 483, app. I (2012). See also W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW 525, 540 (2006) (noting that Australia has invoked this standard).

52. See, e.g., *Chatham House Principles*, *supra* note 5, at 969; LEIDEN POLICY RECOMMENDATIONS, *supra* note 5, ¶ 32.

53. See Sebnem Arsu & Stephen Farrell, *Turkey Says Its Raids in Iraq Killed 150 Rebels*, NEW YORK TIMES (Dec. 26, 2007), <http://www.nytimes.com/2007/12/26/world/europe/26turkey.html>.

54. Tom Ruys, *Quo Vadit Jus ad Bellum?: A Legal Analysis of Turkey's Military Operations against the PKK in Northern Iraq*, 9 MELBOURNE JOURNAL OF INTERNATIONAL LAW 334, 338, 342, 353 (2008). See also *Turkey Invades Northern Iraq*, ECONOMIST (Feb. 28, 2008), <http://www.economist.com/node/10766808> ("Iraq's Kurds have little love for the PKK, and insist that they do not help it with logistics or weapons.").

55. Reinold, *supra* note 29, at 272; Ruys, *supra* note 54, at 342.

56. *Europe Again Warns Against Turkish Intervention in Iraq*, DEUTSCHE WELLE (Oct. 22, 2007), <http://www.dw-world.de/dw/article/0,,2834888,00.html>.

57. Reinold, *supra* note 29, at 272; Ruys, *supra* note 54, 340–41, 345.

Most third States tolerated the operation without endorsing or rejecting Turkey's Article 51 claim.<sup>58</sup>

Similarly, most States effectively applied the unable or unwilling standard to Russia's 2002 and 2007 incursions against Chechen rebels in Georgia. Although Georgia was actively taking measures to suppress the rebels' violence, these measures were not yet effective.<sup>59</sup> When Russia responded with force, the vast majority of third States stayed quiet.<sup>60</sup> The most notable exception was the Council of Europe's Parliamentary Assembly, which declared in 2002 that "Article 51 . . . do[es] not authorise the use of military force by the Russian Federation or any other state on Georgian territory."<sup>61</sup>

The Turkey-Iraq and Russia-Georgia cases show that the unable or unwilling standard is sometimes implemented in practice. In each of these cases, the acting State specifically invoked the unable or unwilling standard as law. Third States, for the most part, did not endorse the legal claim, but they tacitly condoned the actual operations. They stood by as the unable or unwilling standard was applied. This reaction differs from the reaction to at least some operations involving a harboring or supporting State, or an un-governed space. Recall that third States affirmatively endorsed the U.S.-Afghanistan, Israel-Lebanon and France-Mali operations. The difference suggests that many States might tolerate operations under an unable or unwilling standard without actively supporting these operations or legitimizing them with legal language.

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58. Raphaël van Steenberghe, *Self-Defense in response to Attacks by Non-State Actors in Light of Recent State Practice: A Step Forward?*, 23 LEIDEN JOURNAL OF INTERNATIONAL LAW 183, 193 (2010).

59. Reinold, *supra* note 29, at 255–57 (reviewing incident); Deeks, *supra* note 51, at 527–29 (same). *See also* Permanent Representative of Georgia to the United Nations, Letter dated Sept. 13, 2002 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General transmitting a statement by Russian Federation President V. V. Putin dated Sept. 12, 2002, U.N. Doc. A/57/409-S/2002/1035, Annex (Sept. 16, 2002) (claiming that Georgian authorities have planned and taken several measures to address the terrorism problem, and that these measures "are entering a decisive phase").

60. Reinold, *supra* note 29, at 256 ("The international reaction to the Russian raids in the Pankisi Gorge was muted, with only a few states taking an explicit stand."); Tams, *supra* note 15, at 380 ("Responses were mixed, but again there was no principled condemnation that would have denied Russia's right to use force extraterritorially.").

61. Parliamentary Assembly, Council of Europe, Recommendation 1580, The Situation in Georgia and Its Consequences for the Stability of the Caucasus Region (2002), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta02/ER EC1580.htm>.

### 3. An Attack that is Sourced to Another State

Taken to its extreme, the unable or unwilling standard might permit defensive force once an attack has emanated from the territorial State. The mere fact of the attack might be said to show that the territorial State is unable or unwilling to suppress the violence. After all, the State actually failed to prevent an attack. Yet no State has expressly advanced such an expansive interpretation of the unable or unwilling standard. The standard is generally thought to turn on the territorial State's actual conduct and capabilities. Still, States sometimes use defensive force without making a claim or showing about the territorial State. These operations suggest a standard that is even broader: that defensive force is permissible if the source of the attack is located in another State.

Consider Israel's reported attacks on weapons caches in Sudan and Syria; the weapons allegedly were headed to Hamas or Hezbollah.<sup>62</sup> The operations targeting these weapons reflect expansive applications of Article 51 for three reasons. First, the operations were intended not to prevent an immediately imminent attack but rather to nip in the bud a latent threat. The dominant view in the literature is that anticipatory self-defense is lawful only if the attack is actually imminent.<sup>63</sup> Second, Sudan and Syria were, at best, indirect sources of an attack. The weapons almost certainly would have been used from Gaza or Lebanon. Third, as Israel has not publicly acknowledged its role in these operations, it has not even tried to show that the relevant territorial States were unable or unwilling to prevent the attacks. Such a claim is plausible but not a slam dunk, especially as it concerns Hamas. Because Israel itself controls Gaza's borders, it might have had other reasonable opportunities to prevent Hamas from receiving or

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62. See, e.g., Karl Vick & Aaron J. Klein, *Israel Bombs Hizballah Missile Convoy on Syria-Lebanon Border*, TIME (Feb. 24, 2014), <http://world.time.com/2014/02/25/israel-bombs-hizballah-missile-convoy-on-syria-lebanon-border/>; Isabel Kershner, *Official Silence in Israel Over Sudan's Accusations of Air Attack*, NEW YORK TIMES (Oct. 25, 2012), [http://www.nytimes.com/2012/10/26/world/africa/official-silence-in-israel-over-sudan-accusations-of-air-attack.html?\\_r=1&](http://www.nytimes.com/2012/10/26/world/africa/official-silence-in-israel-over-sudan-accusations-of-air-attack.html?_r=1&); Michael R. Gordon & Jeffrey Gettleman, *U.S. Officials Say Israel Struck in Sudan*, NEW YORK TIMES, Mar. 27, 2009, at A7. See also *Niger: French Strike a Qaeda Convoy*, NEW YORK TIMES (Oct. 10, 2014), <http://www.nytimes.com/2014/10/11/world/africa/niger-french-strike-a-qaeda-convoy.html> (reporting on French attack against a weapons convoy in Niger that was headed to militants in Mali).

63. See, e.g., Ranzelzhofer & Nolte, *supra* note 22, at 1423.



using the weapons. Yet despite the expansive nature of these operations, the global reaction has been largely silent. A few States have verbally condemned some of the operations, but most States have looked the other way.<sup>64</sup> These incidents show that the majority of States silently tolerates even operations that reflect very expansive interpretations of Article 51.

### C. Enhanced Limitations

Any of the above grounds for permitting defensive force against non-State actors might be further limited by other requirements that attach to Article 51. Two possibilities appear in the secondary literature. One is to permit defensive force only if the initial attack is especially severe. The second is to permit such force only after the territorial State is given a meaningful opportunity to cooperate with the operation. Each of these limitations has some seeds in the practice, but the support for it is equivocal.

First, the ICJ has long taken the view that, although Article 2(4) of the UN Charter prohibits even low levels of force, such force does not necessarily trigger Article 51. According to the Court, defensive force is permissible only if the initial incursion is sufficiently severe to qualify as an “armed attack.”<sup>65</sup> In practice, any severity threshold for an armed attack appears to be marginal. States sometimes use defensive force, without repercussion, in response to very low levels of force.<sup>66</sup> Some experts argue,

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64. Most news reports on these incidents are sparse and silent about any international reaction. On the negative reactions, see Sam Webb, *Iran Threatens to Retaliate after Israel Bombs ‘Russian Weapons Convoy’ in Syria*, DAILY MAIL (London) (Jan. 31, 2013), <http://www.dailymail.co.uk/news/article-2271125/Iran-threatens-retaliate-Israel-bombs-Russian-weapons-convoy-Syria.html>; *Israeli Airstrikes on Syria Bring Swift and Strong Reactions*, DW (Neth.) (May 5, 2013), <http://www.dw.de/israeli-airstrikes-on-syria-bring-swift-and-strong-reactions/a-16792903>.

65. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 191, 195, 210–11, 247–49 (June 27). *See also* *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, ¶¶ 51–64 (Nov. 6).

66. *See, e.g.*, TARCISIO GAZZINI, *THE CHANGING RULES ON THE USE OF FORCE* 138 (2005) (“State practice offers enough evidence to refute the existence of a threshold . . .”); Constantine Antonopoulos, *Force by Armed Groups as Armed Attack and the Broadening of Self-Defence*, 55 NETHERLANDS INTERNATIONAL LAW REVIEW 159, 166 (2008) (“[S]tate practice does not make a distinction between armed attack and a use of force short of an armed attack . . .”); Christopher Greenwood, *The International Court of Justice and the Use of Force, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS* 373, 380–81 (Vaughan Lowe & Malgosia Fitzmaurice eds.,

however, that no matter how the threshold applies in State-to-State conflicts, it should be taken seriously and even heightened in cases involving non-State actors.<sup>67</sup> For example, the *Chatham House Principles* and *Leiden Policy Recommendations* both endorse the unable or unwilling standard but posit that the initial attack must be especially severe to trigger that standard.<sup>68</sup> In 2013, the UN Special Rapporteur on Extrajudicial Executions cited those reports to assert that “[t]here is an emerging view that the level of violence necessary to justify a resort to self-defence ought to be set higher when it is in response to an attack by non-State actors than to an attack by another State.”<sup>69</sup>

A heightened armed-attack threshold lacks precision but would probably prohibit defensive force unless the victim State is hit severely or repeatedly. (Under the so-called “pinprick” or “accumulation of events” theory of an armed attack, multiple small-scale attacks could together satisfy the threshold, even if none of the attacks on its own could satisfy the threshold. This theory has gained considerable legal traction over the past two decades.<sup>70</sup>) The advantage of a heightened threshold is that it would give the territorial State some room to deal with its internal problem before being subjected to defensive force. However, States have not themselves advocated for lifting the threshold in cases involving non-State actors. Moreover, although defending States sometimes wait for a hard hit before responding with defensive force,<sup>71</sup> they do not always.<sup>72</sup>

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1996) (“There is not the slightest indication that states have regarded themselves as subject to [the threshold].”)

67. See, e.g., Kreß, *supra* note 28, at 48 (“[I]t is widely believed that a non-state armed attack must pass a significant gravity threshold.”).

68. LEIDEN POLICY RECOMMENDATIONS, *supra* note 5, ¶ 39; *Chatham House Principles*, *supra* note 5, at 969.

69. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, *Report*, ¶ 89, U.N. Doc. A/68/382 (Sept. 13, 2013) (by Christof Heyns) [hereinafter Heyns].

70. See, e.g., GRAY, *supra* note 10, at 130, 155; Tams, *supra* note 15, at 388 (“[S]tates seem to have shown a new willingness to accept the ‘accumulation of events’ doctrine which previously had received little support.”); Steenberghe, *supra* note 58, at 184 (“[A]ny armed attack must reach some level of gravity—which may be evaluated by accumulating minor uses of force—in order to trigger the right of self-defense.”).

71. See, e.g., *Europe Again Warns Against Turkish Intervention in Iraq*, *supra* note 56 (“For the past several months, PKK guerilla fighters have been actively attacking Turkish military interests from within northern Iraq. A total of around 100 Turkish soldiers have died since the beginning of the year . . .”).

The second possible limitation lies in the necessity requirement. This requirement attaches to Article 51 as a matter of customary international law and generally demands that defensive force be the option of last resort; the victim State must exhaust the feasible alternatives for addressing a problem before resorting to defensive force.<sup>73</sup> Some experts have argued that defensive force is unnecessary if the territorial State would meaningfully cooperate to suppress the violence, whether by using its law enforcement tools or by consenting to a forcible operation.<sup>74</sup> This interpretation would essentially impose on the victim State the burden of trying to work with the territorial State before using defensive force.

The support for that interpretation is equivocal. Victim States commonly *do* try to work with territorial States before resorting to defensive force.<sup>75</sup> But even when a victim State makes this effort, the territorial State's consent might be attenuated, and its participation in any operation to deal with the problem might be limited. The U.S.-Pakistan, Ethiopia-Somalia, and France-Mali operations are illustrative. Moreover, in practice, the burden to cooperate to address the violence seems to fall not on the victim State but on the territorial State.<sup>76</sup> Claims to use defensive force against non-State actors typically focus on the territorial State's own failings, not on the victim State's efforts to address the problem through less intrusive means.<sup>77</sup> And third States rarely push back on this point. To be

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72. See, e.g., *Israel Opens Fire after 'Shooting from Inside Syria,'* BBC NEWS (Mar. 24, 2013), <http://www.bbc.com/news/world-middle-east-21917351> (reporting that Israel used force in Syria, after Israeli soldiers were targeted but not hit from Syria).

73. See YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENSE* 209–10 (4th ed. 2005).

74. See, e.g., LEIDEN POLICY RECOMMENDATIONS, *supra* note 5, ¶ 41; *Chatham House Principles*, *supra* note 5, at 971. See also Dapo Akande & Thomas Liefänder, *Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW 563, 566 (2013) (“The central consideration is again one of necessity: would seeking consent deprive the defending state of the possibility to act effectively?”).

75. See Deeks, *supra* note 51, at 519–21.

76. Cf. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (obligating States to take measures against violent non-State actors in their territories).

77. See Reinold, *supra* note 29, at 285 (reviewing practice and concluding that defending States tended to claim that territorial States either contributed to the violence or “failed to meet their due diligence obligations and had therefore forfeited their right to noninterference”); see also, e.g., Permanent Representative of the Russian Federation to the United Nations, Letter dated Sept. 11, 2002 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General transmitting a Statement by Russian Federation President V.V. Putin dated Sept. 11, 2002, U.N. Doc. S/2002/1012, Annex at

clear, a victim State that does *not* try to work with the territorial State might weaken its claim under one of the other standards—especially, the unable or unwilling standard.<sup>78</sup> A territorial State that had been unable to suppress the violence on its own might be more effective if it works with the victim. A territorial State that had been unwilling to suppress the violence might be more invested once it realizes that the alternative is defensive force.<sup>79</sup> Still, the unable or unwilling standard puts on the territorial State the burden to cooperate or otherwise address the problem.

#### D. *The State of Play before the Syria Operation*

When the Syria operations began, then, States and other relevant actors had not yet coalesced around a legal standard to regulate the use of defensive force against non-State actors. Of the plausibly available legal standards, the most restrictive one—the absolute prohibition—was still occasionally invoked but increasingly out of touch with the operational practice. Over the past fifteen years, States have regularly conducted and tolerated defensive actions against non-State actors in other States. Some of these actions, like the Israeli ones in Sudan and Syria, reflect extremely expansive applica-

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4 (2002) (asserting that Russia tried to work with Georgia but that Georgia has not satisfied its obligations to address the terrorism emanating from its territory); S.C. Res. 1655, U.N. Doc. S/RES/1655 (Jan. 31, 2006) (urging “the Lebanese Government to do more to assert its authority in the South, to exert control and monopoly over the use of force and to maintain law and order on its entire territory and to prevent attacks from Lebanon”); John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Program on Law and Security, Harvard Law School: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), *transcript available at* <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> (“[W]e reserve the right to take unilateral action if or when other governments are unwilling or unable to take the necessary action themselves.”).

78. See Deeks, *supra* note 51, at 519–25; Ryan Goodman, *International Law—and the Unwilling and Unable Test—for US Military Operations in Syria*, JUST SECURITY (Sept. 12, 2014), <http://justsecurity.org/14949/international-law-unwilling-unable-test-military-operations-syria/>; but cf. Michael Lewis, *What Does the “Unwilling or Unable” Standard Mean in the Context of Syria?*, JUST SECURITY (Sept. 12, 2014), <http://justsecurity.org/14903/unwilling-unable-standard-context-syria/#more-14903> (arguing that requiring the victim State to work with the territorial State enables the territorial State to prevent the victim from effectively dealing with the threat).

79. See Jonathan Horowitz, *Does the Unwilling/Unable Test Hang on Territorial Control?: A Response to Michael Lewis*, JUST SECURITY (Sept. 12, 2014), <http://justsecurity.org/14953/unwillingunable-test-hang-territorial-control-response-michael-lewis/>.

tions of Article 51. But using or tolerating defensive force is not quite the same as endorsing or advocating for its legality. The norms that are operational in practice are looser than the ones that are widely invoked and articulated as law. The majority of States has affirmatively supported defensive operations and validated Article 51 claims in only a handful of cases involving non-State actors.

The discrepancy between what States tolerate in practice and what they endorse as law might be explained by any number of factors. Because ICJ pronouncements are generally treated as authoritative, some States might hesitate to accept or advance alternative interpretations that are still controversial. Other States might favor a restrictive legal position in principle but find that position too constraining in concrete cases. Still other States might lack the incentive to defend or promote a particular legal position. Or they might be conflicted on how to balance the competing interests at stake. The point here is that, when the Syria operations began, the field was still fairly open. Multiple positions were in play, so actors seeking to push the law in a particular direction could plausibly invoke or apply any one of them. I turn, then, to the question of how States have engaged with the law in the Syria case.

### III. THE SYRIA OPERATIONS

Two defensive operations are occurring simultaneously in Syria: one against the Islamic State and the other against the Khorasan group. The Islamic State emerged in Syria in 2013, in the midst of the ongoing civil war.<sup>80</sup> In January 2014, the Islamic State crossed into Iraq and seized the Iraqi cities of Fallujah and Ramadi.<sup>81</sup> By June, the Islamic State had swept across northern Iraq and captured Mosul, Iraq's second largest city.<sup>82</sup> In August, the United States began airstrikes against the Islamic State in Iraq, at the Iraqi government's request.<sup>83</sup> Yet even as the United States acted in Iraq, the Islamic State was seizing more territory in Syria. By some accounts, the

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80. See Peter Baker & Eric Schmitt, *Many Missteps in Assessment of ISIS Threat*, NEW YORK TIMES (Sept. 29, 2014), [http://www.nytimes.com/2014/09/30/world/middleeast/obama-fault-is-shared-in-misjudging-of-isis-threat.html?\\_r=0](http://www.nytimes.com/2014/09/30/world/middleeast/obama-fault-is-shared-in-misjudging-of-isis-threat.html?_r=0).

81. *Id.*

82. *Id.*

83. *Id.*

group controlled about 35 percent of Syria's territory.<sup>84</sup> In September, a U.S.-led coalition began striking the Islamic State in Syria. At the same time, the United States began hitting the Khorasan group in Syria. U.S. officials describe this group as a small but extremely dangerous unit of "seasoned al Qaeda veterans" who are plotting attacks against the United States and other Western targets.<sup>85</sup>

The operations in Syria have accentuated three preexisting trends on the use of defensive force against non-State actors. First, the claim that international law absolutely prohibits such force is losing ground. The reaction to the operation against the Islamic State in Syria has been positive. Second, States are still floundering on *when* to permit such force. Many States seem unsure about the correct legal standard or uncommitted to advancing a particular legal standard. Third, there is still a significant gap between the norms that are actually implemented and the ones that are legitimized as law. Most States tolerate operations that they are not yet willing to validate with legal language.

#### *A. Supporting Some Defensive Force against Non-State Actors*

The global reaction to the defensive operation against the Islamic State has been positive. According to the United States, more than forty countries have helped fight the Islamic State in Iraq or Syria.<sup>86</sup> The nature of this participation varies. Five Arab countries are themselves using force in Syria: Bahrain, Jordan, Saudi Arabia, Qatar, and the United Arab Emirates.<sup>87</sup> Other States—Australia, Belgium, the United Kingdom, Canada, Denmark, France, and the Netherlands—are attacking the Islamic State in Iraq but

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84. Zeina Karam, *A Look at the Islamic State Militants in Syria*, ASSOC. PRESS (Aug. 28, 2014) [http://bigstory.ap.org/article/look-islamic-state-militants-syria?utm\\_source=Sailthru&utm\\_medium=email&utm\\_term=%252ASituation%20Report&utm\\_campaign=SITREP%20AUG%2028](http://bigstory.ap.org/article/look-islamic-state-militants-syria?utm_source=Sailthru&utm_medium=email&utm_term=%252ASituation%20Report&utm_campaign=SITREP%20AUG%2028). See also *A Visual Guide to the Crisis in Iraq and Syria: Areas Under ISIS Control*, NEW YORK TIMES, <http://www.nytimes.com/interactive/2014/06/12/world/middleeast/the-iraq-isis-conflict-in-maps-photos-and-video.html> (updated Nov. 7, 2014).

85. *Id.*

86. David Brunnstrom & Randy Fabi, *U.S. Seeks More from China, Asian Muslim Nations, on Islamic State*, REUTERS (Oct. 16, 2014), <http://www.reuters.com/article/2014/10/16/us-mideast-crisis-kerry-asia-idUSKCN0I527920141016>.

87. Peter Baker, *In Airstrikes, U.S. Targets Militant Cell Said to Plot an Attack Against the West*, NEW YORK TIMES (Sept. 23, 2014), <http://www.nytimes.com/2014/09/24/world/middleeast/us-isis-syria.html>.

not in Syria.<sup>88</sup> Still other States are providing military or logistical support for the general campaign against the Islamic State.<sup>89</sup> All of these countries presumably support the operation against the Islamic State in Syria; the Syria strikes are an integral part of the broader mission to suppress the Islamic State.

In fact, several States that are not themselves using force in Syria have expressly endorsed that part of the campaign. Shortly before the coalition began hitting targets in Syria, ten Arab countries issued a joint statement to support the military operation. The signatory States said that they had “discussed a strategy to destroy [the Islamic State] wherever it is, including in both Iraq and Syria,” and that they would “do their share in the comprehensive fight against [the Islamic State],” including, “as appropriate, joining in the many aspects of a coordinated military campaign.”<sup>90</sup> Separately, Turkey announced that it might provide military or logistical support for the operation.<sup>91</sup> And the United Kingdom made clear that it “support[ed] the latest airstrikes against [Islamic State] terrorists which have been carried out by the U.S. and five other countries.”<sup>92</sup> Significantly, a few States have also suggested that attacking the Islamic State in Syria is internationally lawful.<sup>93</sup>

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88. Eric Schmitt, *Obstacles Limit Targets and Pace of Strikes on ISIS*, NEW YORK TIMES (Nov. 9, 2014), <http://www.nytimes.com/2014/11/10/world/middleeast/trouble-pinning-down-isis-targets-impedes-airstrikes.html>.

89. See Ashley Fantz, *Who’s Doing What in the Coalition Battle Against ISIS*, CNN (Oct. 9, 2014), <http://www.cnn.com/2014/10/09/world/meast/isis-coalition-nations/>.

90. Office of the Spokesperson, U.S. Department of State, Jeddah Communiqué, (Sept. 11, 2014), available at <http://www.state.gov/r/pa/prs/ps/2014/09/231496.htm> (posting the text of the joint statement); Anne Barnard & David D. Kirkpatrick, *Arabs Give Tepid Support to U.S. Fight Against ISIS*, NEW YORK TIMES, Sept. 11, 2014, at A1 (reporting on the joint statement).

91. *U.S. and Allies Unleash Airstrikes on ISIS in Syria*, AL ARABIYA NEWS (Sept. 23, 2014), <http://english.alarabiya.net/en/News/middle-east/2014/09/23/U-S-strikes-ISIS-targets-in-Syria-.html>.

92. Carol Morello & Anne Gearan, *Around World, Mixed Reactions to U.S.-Led Airstrikes in Syria*, WASHINGTON POST (Sept. 23, 2014), [http://www.washingtonpost.com/world/national-security/around-world-mixed-reaction-to-us-led-airstrikes-in-syria/2014/09/23/16985bb6-4352-11e4-9a15-137aa0153527\\_story.html](http://www.washingtonpost.com/world/national-security/around-world-mixed-reaction-to-us-led-airstrikes-in-syria/2014/09/23/16985bb6-4352-11e4-9a15-137aa0153527_story.html) (quoting spokesperson for Prime Minister Cameron).

93. See, e.g., Identical Letters dated 25 November 2014 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2014/851 (Nov. 26, 2014) (“[T]he United Kingdom of Great Britain and Northern Ireland is taking measures in support of the collective self-defence of Iraq as part of international efforts led by the United States.”); Daniel Bases, *France Rules Out Air*

Even UN officials appear to have condoned the operation. In August 2014, the Security Council adopted Resolution 2170, which did not authorize force but called on States to take various measures to suppress the Islamic State.<sup>94</sup> On October 10, the UN Special Envoy for Syria described the U.S.-led coalition as having “been created on the basis of resolution 2170,” and then asked countries to do “what [they] can in order to control and hopefully stop this atrocious terrorist movement.”<sup>95</sup> To be sure, the Special Envoy also said that any action against the Islamic State in Syria should respect “the broad parameters of international law and integrity and sovereignty of Syria,” but that language is noncommittal, and the Special Envoy was almost apologetic about using it: “the UN cannot say otherwise.”<sup>96</sup> He clearly was not trying to condemn the operation. Neither was the UN Secretary-General when he said, on September 23, that it was “undeniable—and the subject of broad international consensus—that these extremist groups pose an immediate threat to international peace and security.”<sup>97</sup>

In addition, some States that might be expected to condemn the operation have not done so. For example, China has sided with Russia in resisting a number of U.S.-led military operations. But in this case, China’s posi-

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*Strikes in Syria*, REUTERS (Sept. 22, 2014), <http://www.reuters.com/article/2014/09/22/us-france-fabius-airstrikes-idUSKCN0HH28920140922> (quoting French Foreign Minister Laurent Fabius as explaining that “the question [of whether to use force in Syria] is not a question of legality, international legality”); Stephen Brown, *Berlin Voices Support for Air Strikes on Islamic State in Syria*, REUTERS (Sept. 26, 2014), <http://www.reuters.com/article/2014/09/26/us-mideast-crisis-germany-idUSKCN0HL1BU20140926> (quoting a spokesperson for German Chancellor Angela Merkel as saying that “[t]he attacks in northern Syria are . . . about helping the Iraqi government to defend Iraq against attacks carried out by [the Islamic State] from Syria”); cf. Interview by Fran Kelly with Australian Prime Minister Tony Abbott, ABC RADIO NATIONAL (Aus.) (Sept. 16, 2014), <https://www.pm.gov.au/media/2014-09-16/interview-fran-kelly-abc-radio-national> (noting that Australia had not ruled out operating in Syria).

94. S.C. Res. 2170, UN. Doc. S/RES/2170 (Aug. 15, 2014).

95. U.N. Special Envoy for Syria Staffen de Mistura, Remarks at Press Conference in Geneva, Switzerland (Oct. 10, 2014), *transcript available at* <http://www.un.org/sg/offthecuff/index.asp?nid=3674>.

96. *Id.*

97. U.N. Secretary-General Ban Ki-moon, Remarks at the Climate Summit Press Conference (Including Comments on Syria) at U.N. Headquarters (Sept. 23, 2014), *transcript available at* [http://www.un.org/apps/news/infocus/sgspeeches/statments\\_full.asp?statID=2356#.VGsw8Oe5ZkV](http://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=2356#.VGsw8Oe5ZkV).



tion was ambivalent or even mildly supportive.<sup>98</sup> The day after the Syria strikes began, a spokesperson for the Chinese Foreign Ministry explained that “China always supports the counter-terrorism efforts made by the international community.”<sup>99</sup> The spokesperson then hinted at China’s lingering discomfort: “international law, the sovereignty, independence and territorial integrity of relevant countries should be respected.”<sup>100</sup> India, which has resisted other international interventions,<sup>101</sup> has been noticeably quiet about the Syria strikes. Indeed, even the Assad regime in Syria has communicated a mixed message. Before the operation began, the regime said that “[a]ny action of any kind without the consent of the Syrian government would be an attack on Syria.”<sup>102</sup> Yet once the operation was under way, the regime moderated its tone, noting that it supports “any international effort that contributes to the fight against terrorists.”<sup>103</sup> In the end, the regime has not resisted the defensive operation; it has instead suggested that it and the U.S.-led coalition are fighting the same enemy.<sup>104</sup>

Still, some States have objected to the operation. The most vocal objections have come from Russia and Iran—two States with longstanding ties to the current Syrian regime and a direct stake in the outcome of the Syrian civil war. Both States condemned the operation and hinted toward an abso-

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98. For additional evidence of China’s conflicted stance, see Shannon Tiezzi, *US Air Strikes in Syria: China’s Conundrum*, THE DIPLOMAT (Sept. 24, 2014), <http://thediplomat.com/2014/09/us-air-strikes-in-syria-chinas-conundrum/>; *China Calls for Respect of Sovereignty as U.S. Widens Airstrikes in Iraq, Syria*, XINHUANET (Sept. 11, 2014), [http://news.xinhuanet.com/english/china/2014-09/11/c\\_133636369.htm](http://news.xinhuanet.com/english/china/2014-09/11/c_133636369.htm).

99. People’s Republic of China Foreign Ministry Spokesperson Hua Chunying, Remarks at Regular Press Conference (Sept. 23, 2014), transcript available at <http://losangeles.china-consulate.org/eng/conference/t1194096.htm>.

100. *Id.*

101. See Dipankar Banerjee, *India and R2P: Reconciling the Tension Between Intervention and State Sovereignty*, in THE RESPONSIBILITY TO PROTECT: FROM EVASIVE TO RELUCTANT ACTION? 91 (Malte Brosig ed., 2012).

102. Ian Black & Dan Roberts, *ISIS Air Strikes: Obama’s Plan Condemned by Syria, Russia and Iran*, GUARDIAN (London) (Sept. 12, 2014), <http://www.theguardian.com/world/2014/sep/11/assad-moscow-tehran-condemn-obama-isis-air-strike-plan>.

103. Baker, *supra* note 87. See also *Syria’s Assad Backs Efforts to Fight Terrorism*, ARMY TIMES (Sept. 23, 2014), <http://www.armytimes.com/article/20140923/NEWS08/309230063> (reporting on Syria’s reaction).

104. See Ryan Goodman, *Taking the Weight Off of International Law: Has Syria Consented to US Airstrikes?*, JUST SECURITY (Dec. 23, 2014), <http://justsecurity.org/18665/weight-international-law-syria-consented-airstrikes/#more-18665>.

lute prohibition of defensive force against non-State actors.<sup>105</sup> However, that position appears to reflect the particular interests in this case, not a principled stance on the law. Russia and Iran have both claimed the right to use defensive force against non-State actors in other contexts.<sup>106</sup> A handful of other States have been more mildly negative. For example, Argentine President Cristina Fernandez de Kirchner seemed to criticize the operation when she asserted that, “if the UN General Assembly is actually allowed to serve its mandate, despite the lack of observance by some nations, . . . we could actually have international law and order built on dialogue and peace instead of military intervention.”<sup>107</sup>

Those negative reactions are outliers. The States that support the defensive operation against the Islamic State far outnumber the ones that resist it. This broad and affirmative support suggests that most States have moved past any norm that absolutely prohibits the use of defensive force against non-State actors. Most States seem to accept—and even endorse—the idea that such force is sometimes permissible.

#### B. *Floundering on the Applicable Legal Standard*

However, States have not coalesced around a legal standard for when such force is permissible. Unsurprisingly, the United States invoked the unable or unwilling standard to justify the defensive operation against the Islamic State in Syria. The U.S. report to the Security Council explained that Iraq was “facing a serious threat of continuing attacks from the Islamic State . . . coming out of safe havens in Syria,” and that, as “[t]he Syrian regime has shown that it cannot and will not confront these safe havens effectively

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105. Black & Roberts, *supra* note 102; Heather Saul, *Syria Air Strikes: Iran Says US Attacks on ISIS are Illegal*, INDEPENDENT (U.K.) (Sept. 23, 2014), <http://www.independent.co.uk/news/world/middle-east/syria-air-strikes-iran-says-us-attacks-on-isis-are-illegal-9751245.html>.

106. *See supra* notes 59–61 and accompanying text (Russia); Deeks, *supra* note 51, at App. I (Iran); Tams, *supra* note 15, at 380 (both).

107. Whitney Eulich, *No ‘Devil’ at UN Summit, but Latin American Leaders have Lots to Say*, CHRISTIAN SCIENCE MONITOR (Sept. 25, 2014), <http://www.csmonitor.com/World/Americas/Latin-America-Monitor/2014/0925/No-devil-at-UN-summit-but-Latin-American-leaders-have-lots-to-say-video>; *cf.* Julia Leite & Raymond Colitt, *Brazil’s Rousseff Tells UN that Force No Solution in Middle East*, BLOOMBERG NEWS (Sept. 24, 2014), <http://www.bloomberg.com/news/2014-09-24/brazil-s-rousseff-tells-un-that-force-no-solution-in-middle-east.html> (reporting on Brazilian President Rousseff’s statement that the situation in Syria cannot be resolved with force).

itself,” the United States and its partners were acting collectively on Iraq’s behalf.<sup>108</sup>

Other States have declined to use unable or unwilling language in this case. Most States seem unsure of the correct legal standard or reluctant to advance any particular legal standard. For example, although a few States have suggested that the operation against the Islamic State is internationally lawful, these States have not presented a coherent theory of the case: they have not explained precisely why the operation is lawful or under what standard the operation should be assessed.<sup>109</sup> The Deputy Prime Minister of the Netherlands specifically noted that, “[f]or military operations in Syria, there is currently no international agreement on an internationally legal mandate.”<sup>110</sup> And the fact that several States have used force against the Islamic State in Iraq but have declined to do so in Syria suggests a certain discomfort with the Syria part of the campaign.

This lack of legal conviction is all the more remarkable because the defensive operation against the Islamic State could be justified on three relatively narrow grounds. First, the operation fits squarely in the ungoverned space standard. The airstrikes against the Islamic State are being conducted almost exclusively in areas that are beyond the authority or control of any recognized government.<sup>111</sup> A few States have hinted that this factor is legally relevant but have not articulated it as the governing legal standard.<sup>112</sup>

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108. U.N. Security Council, Permanent Representative of the United States to the United Nations, Letter dated Sept. 23, 2014 from the Permanent Representative of the United States to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014) [hereinafter U.S. Permanent Representative Letter dated Sept. 23, 2014].

109. See sources cited *supra* note 93.

110. Emma Rapport, *Dutch Parliament Commits Soldiers, F-16s to Fight ISIS in Iraq*, NL TIMES (Neth.) (Sept. 24, 2014), <http://www.nltimes.nl/2014/09/24/parliament-commits-troops-isis-fight/>.

111. For evidence that the airstrikes against the Islamic State have been conducted almost exclusively in areas outside the Syrian government’s control or authority, see *A Visual Guide to the Crisis in Iraq and Syria: Areas Under ISIS Control*, *supra* note 84. For similar evidence relating to the strikes against the Khorasan group, see Ben Hubbard & Eric Schmitt, *American Fighter Jets Carry Out Series of Airstrikes Against Qaeda Cell in Syria*, NEW YORK TIMES, Nov. 7, 2014, at A4; Nabih Bulos & Patrick J. McDonnell, *U.S. Says It Has Targeted Khorasan Group Again in Syria with Airstrike*, LOS ANGELES TIMES (Nov. 14, 2014), <http://www.latimes.com/world/middleeast/la-fg-syria-airstrikes-20141114-story.html>.

112. See, e.g., Interview by Fran Kelly, *supra* note 93 (quoting Australian Prime Minister Abbott in addressing “the legalities of operating inside Syria which is ungoverned space with a regime we don’t actually recognize”) (emphasis added); Patrick Wintour, *David Cameron Over-*

Secretary-General Ban Ki-moon did the same, when he “note[d] that the strikes took place in areas no longer under the effective control of that Government.”<sup>113</sup>

Second, the Assad regime seems to have acquiesced in the operation. Of course, acquiescence is not the same as consent.<sup>114</sup> And the United States has gone out of its way to underscore that it did *not* obtain Assad’s consent or otherwise coordinate with his government.<sup>115</sup> But States have previously supported defensive operations in ungoverned spaces, with minimal “buy in” from the territorial State. Recall the U.S.-Pakistan, Ethiopia-Somalia, and France-Mali precedents. As in the U.S.-Pakistan case, the extent to which a relevant domestic authority has consented to the operation in Syria is unclear. As in the Ethiopia-Somalia and France-Mali cases, splintered control over Syria’s territory calls into question the validity of such consent.<sup>116</sup> Still, the United States apparently gave the regime advance notice of the impending operation, and the regime chose not to protest. The regime even suggested that this notice somehow mitigated the intrusion.<sup>117</sup> China and the UN Secretary-General suggested the same.<sup>118</sup>

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*rules Philip Hammond on Air Strikes in Syria*, GUARDIAN (London) (Sept. 11, 2014), <http://www.theguardian.com/politics/2014/sep/11/uk-rules-out-air-strikes-isis-syria> (reporting on U.K. Prime Minister Cameron’s suggestion that Syria’s consent was not legally required because the current Syrian regime is not recognized); *cf. Jordan Confirms Its Planes Joined Strikes on IS in Syria*, JORDANIAN TIMES (Sept. 23, 2014), <http://jordantimes.com/jordan-confirms-its-planes-joined-strikes-on-is-in-syria> (quoting Jordanian official on the effort “to defeat terrorism *in its strongholds*”) (emphasis added).

113. U.N. Secretary-General Ban Ki-moon, *supra* note 97.

114. *See* Draft Article on Responsibility of States for Internationally Wrongful Acts, cmt. to art. 20, ¶ 6, Report of the International Law Commission, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10, GAOR 56th Sess., Supp. No. 10 (2001), *reprinted in* [2001] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (“Consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked.”). *See also* Arimatsu & Schmitt, *supra* note 1, at 9.

115. *See* Carol Morello & Anne Gearan, *Around World, Mixed Reactions to U.S.-Led Air strikes in Syria*, WASHINGTON POST (Sept. 23, 2014), [http://www.washingtonpost.com/world/national-security/around-world-mixed-reaction-to-us-led-airstrikes-in-syria/2014/09/23/16985bb6-4352-11e4-9a15-137aa0153527\\_story.html](http://www.washingtonpost.com/world/national-security/around-world-mixed-reaction-to-us-led-airstrikes-in-syria/2014/09/23/16985bb6-4352-11e4-9a15-137aa0153527_story.html).

116. *See supra* notes 46, 48 and accompanying text.

117. *See* Morello & Gearan, *supra* note 115.

118. U.N. Secretary-General Ban Ki-moon, *supra* note 97 (“I note that the Syrian Government was informed beforehand”); Tiezzi, *supra* note 98 (reporting on China’s reaction).

Third, the operation against the Islamic State responded to a massive armed attack. By the time the coalition began using force in Syria, the Islamic State had already seized several Iraqi cities. Moreover, the Security Council had determined that this conduct posed a serious threat not only to Iraq but to international peace and security more generally.<sup>119</sup> Any heightened threshold for an armed attack would surely have been satisfied in this case.

These three grounds for limiting the right to use defensive force—the ungoverned space standard, the modest buy-in of a domestic authority, and a heightened armed-attack threshold—were available to States in the Syria case. Each ground had support in the relevant precedents or in high-profile documents in the secondary literature. And yet, States that undoubtedly supported the operation against the Islamic State declined to invoke these grounds to justify the operation under international law or to delimit the scope of Article 51 more generally. This behavioral pattern—States’ reluctance to articulate a legal justification even for an operation that they support—suggests that many States are not yet ready to push the law in a particular direction. They presumably are conflicted or uncertain about how this area of law is or should be developing.

### *C. Tolerating a Broad Range of Defensive Operations*

The reluctance to advance even a narrow legal position on the operation against the Islamic State does not reflect a concerted effort to prevent much more expansive applications of Article 51. States have generally been lax about policing defensive operations against non-State actors. The reaction to the operation against the Khorasan group is indicative. Even the United States has been somewhat opaque about the legal justification for this operation. The U.S. report to the Security Council noted, almost as an aside, that in addition to attacking the Islamic State in Syria, the United States would target “al-Qaida elements in Syria known as the Khorasan Group to address terrorist threats that they pose to the United States and our partners and allies.”<sup>120</sup> However, the United States has declined to elaborate on this Article 51 claim.

Two justifications for using defensive force against the Khorasan group are plausible, but each is contingent on facts that are not publicly available and on legal positions that are contested. First, the U.S. strikes might be

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119. S.C. Res. 2170, U.N. Doc. S/RES/2170 (Aug. 15, 2014).

120. U.S. Permanent Representative Letter dated Sept. 23, 2014, *supra* note 108.

justified on the ground that the Khorasan group is part of al Qaeda. The precise nature of the relationship between those two groups is not publicly known. If the groups are meaningfully distinct, al Qaeda's attacks would not trigger the right to use defensive force against the Khorasan group. If the groups are intermingled, the extent to which the United States may still use defensive force against al Qaeda—especially against al Qaeda outposts in States from which al Qaeda has not itself attacked—is unclear. The dominant position among international lawyers would probably be that the United States may *not* use defensive force in this context.<sup>121</sup>

Alternatively, the strikes against the Khorasan group might be justified in anticipatory self-defense. A Pentagon official hinted at this justification when he explained that the strikes “were undertaken to disrupt *imminent attack plotting* against the United States and western targets” and that “intelligence reports indicated that the Khorasan Group was *in the final stages of plans* to execute major attacks.”<sup>122</sup> As discussed, the use of force in anticipatory self-defense is widely understood to be unlawful, unless an attack is truly imminent.<sup>123</sup> The United States has not publicly addressed how close the Khorasan group was to committing an attack. Yet the above-quoted language suggests that the group was still planning its attacks and not quite ready to strike.<sup>124</sup>

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121. Compare, e.g., Heyns, *supra* note 69, ¶ 89 (asserting that an “emerging view” is that the heightened armed-attack threshold “must be met vis-à-vis each host state on whose territory action in self-defence is taken”), and Sean D. Murphy, *The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan*, in *THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS*, *supra* note 42, at 109, 129–30 (expressing doubts about the justification for using defensive force against al Qaeda in States from which al Qaeda has not attacked), with, e.g., Brennan, *supra* note 77 (“The United States does not view our authority to use military force against al-Qa’ida as being restricted solely to ‘hot’ battlefields like Afghanistan. Because we are engaged in an armed conflict with al-Qa’ida, . . . we have the authority to take action against al-Qa’ida and its associated forces without doing a separate self-defense analysis each time.”).

122. Lieutenant General William Mayville, Director of Operations J3, & Rear Admiral John Kirby, Press Secretary, Department of Defense Press Briefing in the Pentagon Briefing Room (Sept. 23, 2014), *transcript available at* <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5505> (emphasis added).

123. See *supra* note 63 and accompanying text.

124. For evidence that the strikes are motivated by factors other than the imminence of any attack, see Mitchell Prothero, *Sources: U.S. Air Strikes in Syria Targeted French Agent who Defected to Al Qaida*, MCCLATCHY DC (Oct. 5, 2014), [http://www.mcclatchydc.com/2014/10/05/242218\\_sources-us-air-strikes-in-syria.html?rh=1](http://www.mcclatchydc.com/2014/10/05/242218_sources-us-air-strikes-in-syria.html?rh=1).

In short, any legal theory to justify the operation against the Khorasan group is contingent on facts that are not publicly available and on legal claims that are controversial. Yet the global reaction to this operation has been remarkably muted. The vast majority of States has neither condemned nor supported the operation. Almost all of them have simply looked the other way. The gap between the norms that are articulated as law and the ones that are operational persists.

#### IV. CONCLUSION

The law on the use of defensive force against non-State actors is unsettled. The Syria operations have not resolved but rather accentuated the ambiguities and inconsistencies in this area. For many international lawyers, the instinctive response will be to sift through the practice and try to distill the best or most accurate interpretation of the law. This response is not especially useful so long as States are still struggling over the law's proper content. Because States have not coalesced around a legal standard for regulating such force, each of the legal positions described above is still in play and could plausibly be invoked or applied in future cases.

The claim that international law absolutely prohibits defensive force against non-State actors is losing legal traction but not yet dead. After all, Article 2(4) of the UN Charter is widely regarded as a *jus cogens* norm<sup>125</sup>—meaning that a practice that chips away at the norm qualifies as law only if the practice is as robust and supported as Article 2(4) itself.<sup>126</sup> Many States that have strategic reasons for supporting the operation against the Islamic State have not themselves participated in or advanced a legal justification for that operation. For some lawyers, this pattern of behavior does not

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125. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 190 (June 27); Report of the International Law Commission to the General Assembly, 18th Sess., May 4–July 19, 1966, U.N. Doc. A/6309/Rev.1, GAOR 21st Sess., Supp. No. 9 (1966), reprinted in [1966] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 169, 247, U.N. Doc. A/CN.4/SER/A/1966/Add.1.

126. See Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331. See also, e.g., Alexander Orakhelashvili, *Changing Jus Cogens Through State Practice?—The Case of the Prohibition of the Use of Force*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW (Marc Weller ed., forthcoming 2015), manuscript at 6–7, available at <http://ssrn.com/abstract=2084829> (arguing that, because of its *jus cogens* status, “the burden of proof is heavy on those who consider that [the Article 2(4) prohibition] can be changed through state practice”); Ranzelzhofer & Nolte, *supra* note 22, at 1400 (“[T]he conditions for the recognition of any significant reinterpretation of, or superseding exception to, Art. 51 are strict.”).

evinced a sufficiently robust practice and *opinio juris* to stray from the ICJ's pronouncements.

At the other extreme, some lawyers will underscore that the majority of States repeatedly conducts or tolerates operations that reflect very expansive applications of Article 51. Although most States have declined to advance a particular legal standard for regulating defensive force against non-State actors, most have also refrained from policing such force. In many cases, the territorial State has not itself used defensive force or taken other measures against the acting State, and third States have remained silent. Some lawyers will argue, then, that even operations that push or exceed the bounds of the unable or unwilling standard are lawful—in other words, that such operations have effectively reshaped the law in their image.<sup>127</sup>

In fact, no one position by itself represents the current state of the law. With multiple positions in play, each is, simultaneously, legally relevant and legally deficient. A position will be legally relevant so long as it continues to resonate with enough States or other global actors—such that it might reasonably be invoked or applied in specific incidents. The position will be legally deficient so long as it competes with the others for preeminence—and thus is not widely accepted and treated as law. For now, the position that best captures the operational practice seems not to be generally accepted as law. And whatever position is most widely accepted as an authoritative statement of law seems not to reflect the operational practice. The Syrian case suggests that this struggle within the law will continue for some time; most States appear conflicted or uncertain about how this area of law is or should be developing.

Nevertheless, a few basic guidelines can be distilled from the practice: the majority of States has affirmatively endorsed defensive operations against non-State actors in States that actively harbor or support those actors, or lack control over the areas from which they operate. Further, most States passively tolerate defensive operations in a much broader range of circumstances. These latter operations are unlikely to be legitimized or validated as lawful, but they also are unlikely to be condemned or treated as unlawful.

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127. See, e.g., Bethlehem, *supra* note 7; Michael J. Glennon, *How International Rules Die*, 93 GEORGETOWN LAW JOURNAL 939, 960 (2005) (arguing that restrictive norms on the use of force have fallen into desuetude and no longer qualify as law); cf., MALCOLM N. SHAW, INTERNATIONAL LAW 89 (6th ed. 2008) (“Generally, where states are seen to acquiesce in the behaviour of other states without protesting against them, the assumption must be that such behaviour is accepted as legitimate.”).