

SELF-DEFENSE ON BEHALF OF NON-STATE ACTORS

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ABSTRACT

This Comment argues that it is unlawful for a United Nations (UN) member state (“State A”) to invoke the UN Charter’s Article 51 to justify the use of force against State B *in defense of* a non-state actor unless State A takes complete responsibility for the non-state actor as if it were part of its own armed forces.

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I. INTRODUCTION

In June 2017, the United States shot down a manned enemy aircraft for the first time in nearly twenty years.¹ The aircraft belonged to Syria's Assad regime and reportedly was dropping bombs near the United States-backed Syrian Democratic Forces (SDF) south of Tabqah, Syria.² The United States intervened to protect the SDF—a non-state actor partner in the war against the Islamic State—claiming “collective self-defense.”³ This was the first time any UN Member State openly invoked collective self-defense, which is generally understood as the right of states to defend *other states* under international law, to justify an attack on another state *in defense of* a non-state actor.⁴ In February 2018, the United States did so again, conducting strikes against Syria in the name of collective

¹ The last time the United States shot down a manned aircraft was during the Kosovo campaign in 1999. See Ryan Browne, *New details on US shoot down of Syrian jet*, CNN (June 21, 2017, 10:17 PM), <https://www.cnn.com/2017/06/21/politics/us-syria-russia-dogfight/index.html> [<https://perma.cc/KPD9-ZKS5>]; *US coalition downs first Syria government jet*, BBC (June 19, 2017), <https://www.bbc.com/news/world-middle-east-40322666> [<https://perma.cc/66EP-6VVM>].

² CJTF-OIR, *Coalition Defends Partner Forces from Syrian Fighter Jet Attack*, U.S. CENTRAL COMMAND (June 19, 2017), <https://www.centcom.mil/MEDIA/NEWS-ARTICLES/News-Article-View/Article/1217917/coalition-defends-partner-forces-from-syrian-fighter-jet-attack> [<https://perma.cc/5F6L-KHPA>] [hereinafter Central Command News Article]; see also Oona Hathaway, *Turkey is violating international law. It took lessons from the U.S.*, WASH. POST (Oct. 22, 2019), <https://www.washingtonpost.com/outlook/2019/10/22/turkey-is-violating-international-law-it-took-lessons-us> [<https://perma.cc/B5MG-HNA6>] (stating that the Trump administration claimed “collective self-defense of Coalition partnered forces” to justify the downing of the Syrian aircraft in June 2017).

³ See CJTF-OIR, *Coalition Defends Partner Forces from Syrian Fighter Jet Attack*, U.S. CENTRAL COMMAND (June 18, 2017), <https://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1217892/coalition-defends-partner-forces-from-syrian-fighter-jet-attack> [<https://perma.cc/EB9H-N9BV>] [hereinafter Central Command Press Release].

⁴ See Elvina Pothelet, *U.S. Military's “Collective Self-Defense” of Non-State Partner Forces: What Does International Law Say?*, JUST SECURITY (Oct. 26, 2018), <https://www.justsecurity.org/61232/collective-self-defense-partner-forces-international-law-say> [<https://perma.cc/5KAA-P6XF>]. To be sure, this is not the first time a state has sponsored non-state actors in foreign states. Nor would this be the first time a state has attacked another state in self-defense. But this is the first time a state has openly attacked another state in self-defense of a non-state partner.

self-defense of the SDF.⁵ This latest twist in the state practice of self-defense under international law has largely escaped scholarly attention, despite its far-reaching consequences for the UN Charter and the future of war itself.⁶

The scope of self-defense under international law has continued to expand since the UN Charter was ratified in 1945. Article 2(4) of the UN Charter prohibits states from using military force, but the Charter also provides an exception for self-defense in the event of an armed attack.⁷ The self-defense exception to the use-of-force prohibition, codified at Article 51 of the UN Charter, is narrow by design.⁸ But it has grown over time to include more proactive

⁵ See Jeffrey Harrigian, *Department of Defense Press Briefing by Lieutenant General Harrigian via teleconference from Al Udeid Airbase, Qatar*, U.S. DEP'T OF DEF. (Feb. 13, 2018), <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/1441080> [<https://perma.cc/P9PA-TRL8>]; Thomas Gribbons-Neff, *How a 4-Hour Battle Between Russian Mercenaries and U.S. Commandos Unfolded in Syria*, N.Y. TIMES (May 24, 2018), <https://www.nytimes.com/2018/05/24/world/middleeast/american-commandos-russian-mercenaries-syria.html> [<https://perma.cc/VWG4-UJVK>]; Terri Moon Cronk, *Pentagon Official Describes Response to Attack by Pro-Regime Syrian Forces*, U.S. DEP'T OF DEF. (Feb. 8, 2018), <https://www.defense.gov/Explore/News/Article/Article/1436435/pentagon-official-describes-response-to-attack-by-pro-regime-syrian-forces> [<https://perma.cc/HZ2E-8QC2>]; Dana W. White, *Department of Defense Press Briefing by Pentagon Chief Spokesperson Dana W. White in the Pentagon Briefing Room*, U.S. DEP'T OF DEF. (Feb. 8, 2018), <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/1436566/department-of-defense-press-briefing-by-pentagon-chief-spokesperson-dana-w-whit> [<https://perma.cc/US2G-9ADC>] (“Yesterday, Syrian Democratic Forces acted in self-defense with support from the coalition to defeat an unprovoked attack by Syrian pro-regime forces in eastern Syria.”).

⁶ See Pothelet, *supra* note 4 (explaining that given the participatory nature of international law, states must share their interpretation of relevant treaty provisions and *opinio juris* regarding possible customary rules in the area of self-defense, else militarily active states will continue to take “life-and-death decisions on the basis of unchallenged legal views.”).

⁷ See U.N. Charter art. 2, ¶ 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations”); see also Oona A. Hathaway & Scott J. Shapiro, *On Syria, a U.N. Vote Isn't Optional*, N.Y. TIMES (Sept. 3, 2013), <https://www.nytimes.com/2013/09/04/opinion/on-syria-a-un-vote-isnt-optional.html> [<https://perma.cc/VQJ6-99YL>] (calling the prohibition and its exception “the most fundamental international rule of all.”).

⁸ U.N. Charter art. 51; see also Hathaway, *supra* note 2 (noting the self-defense exception applies only where there has been an “armed attack” and not merely an arms buildup).

interpretations of “defense,” including preemptive and anticipatory self-defense.⁹

The rise of non-state actors has enabled states to strain and stretch the interpretation of self-defense under Article 51.¹⁰ In the post-September 11 world, some states – chiefly the United States – argue that self-defense is a legitimate justification for military action *against* non-state actors like al-Qaeda and the Islamic State. The “Bush Doctrine” was a policy of preemptive self-defense that explicitly declared that the “the war on terror will not be won on the defensive,”¹¹ and the “Bethlehem Principles,” penned by then Legal Adviser to the UK Foreign and Commonwealth Office Daniel Bethlehem, have become a template for justifying military action against non-state actors.¹² But these legal arguments concern Article 51 action *against* non-state actors. At issue in the June 2017 shutdown is use of force by a UN member state against a state actor *in defense of* a non-state actor.

The refashioning of Article 51 self-defense as a doctrinal vehicle for military action by states on behalf of non-state partners *against other states* constitutes a major development that warrants serious scholarly debate. Left alone and taken to its logical conclusion, this development would allow any state to justify military action against another state – even in the absence of a direct threat to the former state’s territory, personnel, or assets – by merely designating a non-state group as a “partner force” and then acting to protect said group.¹³ The rationale undercuts the Charter’s bedrock prohibition

⁹ See Hathaway, *supra* note 2. In 1984, following the bombings of the United States’ Embassy in Beirut, President Ronald Reagan issued a national security directive claiming that “[w]henever we have evidence that a state is mounting or intends to conduct an act of terrorism against us, we have a responsibility to take measures to protect our citizens, property, and interests.” *Id.*

¹⁰ See *id.*

¹¹ *Id.*

¹² See Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT’L L. 770, 773 (2012):

There is little intersection between the academic debate and the operational realities . . . The reality of the threats, the consequences of inaction, and the challenges of both strategic appreciation and operational decision making in the face of such threats frequently trump a doctrinal debate that has yet to produce a clear set of principles that effectively address the specific operational circumstances faced by states.

¹³ See generally Letter from Tim Kaine, U.S. Sen., to James Mattis, Sec’y of Def., U.S. Dep’t of Def. (Oct. 2, 2018), <https://www.scribd.com/document/390037794/Kaine-Presses-Trump->

on the use of force and, with it, the stability of the international system itself.

This Comment takes seriously the threat that such a development presents to the international system and argues that it is unlawful for a UN Member State to invoke Article 51 to justify the use of force against another state in defense of a non-state actor. The Comment proceeds in four parts. Part II offers an overview of the expansion of self-defense under international law over time, focusing on the ways self-defense against non-state actors has pushed Article 51's limits in the post-9/11 era. Part III critiques the possible legal pathways that might provide justification for a UN member state acting on behalf of non-state actor partners, and Part IV then addresses the sole lawful path available to a UN member state that seeks to act in self-defense of a non-state actor. Finally, Part V concludes by exploring the dangerous implications of non-state actor collective self-defense for the UN system and, by extension, the international order.

II. SELF-DEFENSE UNDER THE UN CHARTER

The United Nations is an organization of states, by states, and for states. Although non-state actors have long been a feature of the international system, the UN Charter regulates only States and, by extension, state-sponsored force. However, non-state actors—such as terrorist organizations, transnational criminal networks, and revolutionary movements—employ force free from the Charter's constraints and thus complicate the Charter's state-centric approach. In response to the divide between the Charter's legal fiction and reality, some UN member states have expansively read Article 51 to allow use of force against non-state actors. After the September 11 attacks, the United States argued that it could act in Article 51 self-defense against a non-state actor located inside another state without that state's consent—an argument now known as the “unable or unwilling” doctrine because it is predicated on a finding that the state harboring the non-state actor is unable or unwilling to neutralize the threat. Though the “unable or unwilling” doctrine remains hotly contested among states and international law scholars alike, the United States has now built another strained legal

Administration-on-the-Expansive-Use-of-Collective-Self-Defense-to-Justify-Military-Action-That-Bypasses-Congress [<https://perma.cc/X3SX-MART>].

argument atop its shaky foundation by arguing that it may act in collective self-defense of the SDF in Syria. This argument amounts to an assertion that a non-state actor may act in its own self-defense under international law and, therefore, a UN member state may act in *collective* self-defense of that non-state actor under Article 51 of the UN Charter. Such an argument had never been invoked until the June 2017 shutdown near Raqqa, and it threatens to further unravel the UN Charter's prohibition on the use of force. This Part contextualizes this latest development in Article 51 self-defense by exploring the ongoing effort to insert non-state actors into the international legal regime governing the use of force, highlighting just how controversial such efforts remain.

a. Self-Defense Under the UN Charter

Two provisions in the UN Charter govern self-defense: Articles 2(4) and 51. Article 2(4) prohibits the "threat or use of force in international relations," and creates only a narrow set of exceptions to this prohibition.¹⁴ The most often invoked exception to Article 2(4) is self-defense, which is codified at Article 51 of the UN Charter.¹⁵ The UN Charter's drafters included an *explicit* self-defense exception¹⁶ in order to circumscribe the right of self-defense. Thus, Article 51 creates a narrow exception for individual and collective self-defense where a UN member state has suffered an "armed attack" – in other words, a *grave* violation of Article 2(4)'s prohibition on the use of force.¹⁷ But not all uses of force in violation of Article 2(4) rise to the level of an "armed attack" and thus enable a state to properly invoke Article 51 self-defense. In this and other

¹⁴ U.N. Charter art. 2, ¶ 4.

¹⁵ U.N. Charter art. 51.

¹⁶ *Id.* The documents establishing the League of Nations only reassured states of an implicit exception for the inherent right of self-defense under customary international law, which proved insufficient.

¹⁷ See Adil Ahmad Haque, *The United Nations Charter at 75: Between Force and Self-Defense – Part One*, JUST SECURITY (June 24, 2020), <https://www.justsecurity.org/70985/the-united-nations-charter-at-75-between-force-and-self-defense-part-one/> [https://perma.cc/V5RJ-UPNV].

ways, Article 51 recognizes a restricted right of self-defense under international law.¹⁸

There are numerous contexts in which a state may act in self-defense against a non-state actor, but Articles 2(4) and 51 of the UN Charter do not apply with equal force in all such scenarios. This Comment focuses narrowly on instances where State A uses force in self-defense against a non-state actor located inside State B without State B's consent.¹⁹ When State A uses force in self-defense against a non-state actor located inside State B without State B's consent, State A has attacked State B *even if* State A claims the target of its attack was the non-state actor group within State B and not State B itself. Furthermore, this scenario is most akin to the reality in Syria, where the United States employs force without the Syrian regime's consent.²⁰

¹⁸ Article 51 broke with the right of self-defense as it existed under customary international law (i.e., the standard set forth in the *Caroline* incident). The 1837 *Caroline* incident has long been understood as the "*locus classicus*" of the right of self-defense. See D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 58 (2d prtg. 2009); see also ALBERT B. COREY, THE CRISIS OF 1830-1842 IN CANADIAN-AMERICAN RELATIONS 61-69 (1941) (describing tensions between the United States, Great Britain, and rebels from "the Canadas" following British forces' destruction of the Canadian ship *Caroline*); CRAIG FORCESSE, DESTROYING THE CAROLINE: THE FRONTIER RAID THAT RESHAPED THE RIGHT TO WAR 7-56 (2018) (providing further historical context to the conflict); Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT'L L. 493, 496-500 (1990) (explaining that the diplomatic response to the *Caroline* incident precipitated refinement and elaboration of the meaning of self-defense); R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 82-92 (1938) (recounting the legal and diplomatic repercussions following the *Caroline* incident that prompted critical evaluation of self-defense and attempts to define its contours).

¹⁹ Thus, instances where (1) State A attacks a non-state actor inside its own territory (what has at been referred to as "internal *jus ad bellum*," see Eliav Lieblich, *What Law Applies to the Resort to Force Against Non-State Actors? Filling the Void of "Internal Jus Ad Bellum*," JUST SECURITY (Oct. 18, 2016), <https://www.justsecurity.org/33664/law-applies-resort-force-non-state-actors-filling-void-internal-jus-ad-bellum> [<https://perma.cc/NV66-QNLZ>]; (2) State A obtains State B's consent to attack a non-state actor located in State B, and (3) non-state actors act from territory uncontrolled by a sovereign state (e.g., terra nullius or the high seas) are beyond this Comment's scope. See Michael J. Adams & Ryan Goodman, *Category Mistake: There Is No Jus ad Bellum for Use of Force Against Non-State Actors*, JUST SECURITY (Dec. 13, 2016), <https://www.justsecurity.org/35482/category-mistake-jus-ad-bellum-force-non-state-actors> [<https://perma.cc/PS2B-HF42>] (arguing that in these three instances, *jus ad bellum* simply does not apply).

²⁰ See Reuters Staff, *Syrian government: U.S. military presence in Syria is act of aggression*, REUTERS (Jan. 18, 2018, 4:51 AM), <https://www.reuters.com/article/mideast-crisis-syria-usa/syrian-government-u>

b. The Narrow View of Self-Defense

The scope of Article 51 self-defense is open to narrow and broad interpretation. The narrow (consensus) view emphasizes states' centrality to the international order and is marked by a reluctance to bring non-state actors into the international legal fold.

Article 2(4)'s prohibition on the use of force binds only UN Member states.²¹ Furthermore, this prohibition is "universally accepted as a norm of customary international law."²² Because an "armed attack" under Article 51 is understood to be a particularly grave use of force in violation of Article 2(4),²³ the widely held view is that only states bound by Article 2(4) can carry out an "armed attack" sufficient to trigger the right to self-defense under Article 51.²⁴ Thus, attribution of an attack to a state becomes central to state-based self-defense claims under international law.

The UN's principal judicial organ, the International Court of Justice (ICJ), has continually sought to attribute attacks by armed, non-state actor groups to a state because only then can the harmed state legally respond with force.²⁵ However, the ICJ has been

s-military-presence-in-syria-is-act-of-aggression-idINKBN1F713Y
[<https://perma.cc/JL5J-YCY7>].

²¹ See Marko Milanovic, *Self-Defense and Non-State Actors: Indeterminacy and the Jus ad Bellum*, EJIL: TALK! (Feb. 21, 2010), <https://www.ejiltalk.org/self-defense-and-non-state-actors-indeterminacy-and-the-jus-ad-bellum> [<https://perma.cc/7AZD-A6D7>]. This is no surprise, as it is also the plain meaning of the provision's text. See U.N. Charter art. 2, ¶ 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

²² Oliver Dörr, *Use of Force, Prohibition of*, in MAX PLANCK ENCYCLOPEDIAS OF PUB. INT'L L. ¶ 1 (Anne Peters ed., 2019).

²³ This is the view that the ICJ adopted in the 1986 Nicaragua Case. See *infra* note 25.

²⁴ Adil Ahmad Haque has most recently furthered this argument in a two-part post on Just Security. Haque, *supra* note 17 ("Non-State actors cannot 'use force' within the meaning of Article 2(4), and so cannot carry out an 'armed attack' within the meaning of article [sic] 51."); Adil Ahmad Haque, *The United Nations Charter at 75: Between Force and Self-Defense – Part Two*, JUST SECURITY (June 24, 2020), <https://www.justsecurity.org/70987/the-united-nations-charter-at-75-between-force-and-self-defense-part-two> [<https://perma.cc/N8FA-CX34>].

²⁵ See, e.g., *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 195 (June 27); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9); *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶¶ 146-47 (Dec. 19).

hesitant to draw bright-line rules and has “expressly reserved its position on whether Article 51 requires attribution of the armed attack to a state.”²⁶

In keeping with the UN Charter’s vision that the right of self-defense should be a narrow exception to the prohibition on the use of force, the ICJ has sought to constrain the expansion of self-defense under international law both before and after the September 11 attacks.²⁷ In the seminal case *Nicaragua v. United States*, the ICJ relied on Article 3(g) of the 1974 Resolution on the Definition of Aggression to hold that an “armed attack” could include aggression by “armed bands, groups, irregulars, or mercenaries” only if they were sent “by or on behalf of a state” (i.e., attributable to a state).²⁸ After the September 11 attacks, the ICJ, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, maintained its position in *Nicaragua* that self-defense could only be invoked in response to an armed attack “by one State against another State.”²⁹ In the most recent ICJ case concerning the use of force against non-state actors, *Democratic Republic of the Congo v. Uganda*, Uganda claimed it had an Article 51 right of self-defense against a non-state group within the DRC because the group’s activities were attributable to the DRC.³⁰ Here, the ICJ re-affirmed that, in order for aggression by a non-state actor to qualify as an “armed attack” under the meaning of Articles 2(4) and 51, the non-state actor had to show ties to a sovereign state recognized under the UN system for its actions to trigger Article 51.³¹ Even in the post-9/11 world, the ICJ has continued to evaluate aggression by non-state actors through the state-centric lens and vocabulary of Article 2(4).

²⁶ Milanovic, *supra* note 21.

²⁷ See Wee Yen Jean, *Juris Illuminae* Entry, *The Use of Force Against Non-State Actors: Justifying and Delimiting the Exercise of the Right of Self-Defence*, 9 SING. L. REV. at 1, 3 (2017).

²⁸ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 195 (June 27); Wee, *supra* note 27, at 3.

²⁹ Wee, *supra* note 27, at 3 (quoting *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9), at 139).

³⁰ *Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168 (Dec. 19).

³¹ Stephanie A. Barbour & Zoe A. Salzman, “*The Tangled Web*”: *The Right of Self-Defense Against Non-State Actors in the Armed Activities Case*, 40 INT’L L & POL. 53, 61-62, 64-65, 78 (2008).

Many scholars and states have coalesced around the ICJ's authoritative view that self-defense under the UN Charter requires state attribution of the armed attack. Thus, it is widely held among scholars and UN member states that states cannot legally invoke the "unable or unwilling" doctrine to justify use of force against a non-state actor under Article 51.³² Adil Haque argues that the UN Charter's text, context, and purpose indicate that it does not permit "one State (say, the United States or Turkey) to use armed force on the territory of another State (say, Syria), without the territorial State's consent, targeting a non-State actor."³³ Numerous Latin American states, including Brazil and Mexico, have voiced opposition to the "unable or unwilling" doctrine, but the vast majority of states have remained silent on the issue.³⁴

c. The Expansive Approach to Self-Defense Against Non-State Actors

Over time, some UN member states—namely the United States—have pushed the limits of the Charter's prohibition on the

³² "Restrictivists" like Dire Tladi maintain that even in the post-9/11 order, self-defense must remain an exceptional right, limited in scope:

There are those arguing vociferously for an expansion of this right to such an extent that States would be free to use force in the territory of that State, without that State's consent or without attribution of the conduct of the non-State actors to that State. Terrorism, as heinous as it certainly is, does not offer sufficient reason to depart from the constraints placed by international law.

Dire Tladi, *The Use of Force in Self-Defence against Non-State Actors, Decline of Collective Security and the Rise of Unilateralism: Whither International Law?*, in *SELF-DEFENCE AGAINST NON-STATE ACTORS* 14, 89 (Mary Ellen O'Connell, Christian J. Tams & Dire Tladi eds., 2019).

³³ Adil Ahmad Haque, "Clearly of Latin American Origin": *Armed Attack by Non-State Actors and the UN Charter*, *JUST SECURITY* (Nov. 5, 2019), <https://www.justsecurity.org/66956/clearly-of-latin-american-origin-armed-attack-by-non-state-actors-and-the-un-charter> [<https://perma.cc/3FSU-3EZ8>].

³⁴ Pablo Arrocha Olabuenaga, *An Insider's View of the Life-Cycle of Self-Defense Reports by U.N. Member States*, *JUST SECURITY* (Apr. 2, 2019), <https://www.justsecurity.org/63415/an-insiders-view-of-the-life-cycle-of-self-defense-reports-by-u-n-member-states/> [<https://perma.cc/6N7F-5LME>]; Measures to Eliminate International Terrorism, Statement by the Permanent Mission of the El Salvador to the United Nations on Behalf of the Community of Latin American and Caribbean States (CELAC) (Oct. 3, 2018), <http://statements.unmeetings.org/media2/19408950/el-salvador-on-behalf-of-celac-e.pdf> [<https://perma.cc/E6MH-SADW>].

use of force and sought to expand the self-defense exception.³⁵ Proponents of an expansive definition argue that a non-state actor can commit an armed attack that triggers Article 51, thereby allowing the victim-state and its allies to lawfully use force against the non-state actor. To justify such a position, the link between Articles 2(4) and 51 must be more ambiguous.³⁶ As Marko Milanovic argues:

[T]hat Article 51 operates as an exception to the ban on the use of inter-state force, does not logically and conceptually entail that the 'armed attack' within the meaning of Article 51 must be attributable to a state. Such a conclusion may follow from an examination of state practice, but it simply does not follow from the text of the Charter or from some broader legal principle, nor from the fact that Article 2(4) itself is inter-state in operation.³⁷

Under this view, it is not necessary that an armed attack be attributable to a state to trigger the Article 51 self-defense exception. Following the September 11 attacks, this approach to self-defense has gained prominence in large part thanks to the United States' advocacy.

d. Self-Defense Post-9/11

The September 11 attacks awakened the UN system to the growing role of non-state actors in international conflict. The rise of terrorist violence in the twenty-first century has spelled an urgent problem for the international system because, in its orthodox interpretation, Article 51 self-defense was thought to apply only "in the case of an armed attack by *one State against another State*."³⁸ Further erosion of Article 51 self-defense became the pivotal and

³⁵ See DEP'T OF DEF., OFF. OF THE GEN. COUNSEL, DEP'T OF DEF. LAW OF WAR MANUAL ¶ 1.11.5.4 (updated Dec. 2016); Brian Egan, *International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations*, 92 INT'L L. STUD. 235, 239-40 (2016). The United Kingdom—via Daniel Bethlehem, former Legal Adviser to the Foreign and Commonwealth Office—has adopted a similarly expansive view of self-defense against non-state actors. See Bethlehem, *supra* note 12.

³⁶ See Milanovic, *supra* note 21.

³⁷ *Id.*

³⁸ Monica Hakimi, *Defensive Force Against Non-State Actors: The State of Play*, 91 INT'L L. STUD. 1, 4-5 (2015) (citing 2004 I.C.J. 136, at 139); Wee, *supra* note 27 at 1, 3.

controversial tool in the campaign to establish non-state aggressors as legitimate *targets* of force.

The September 11 attacks appeared to produce the unofficial acceptance in state practice of defensive force against non-state actors with clear links to another state. The United States and United Kingdom, in their letters notifying the UN Security Council of their self-defense operations in Afghanistan, emphasized the Taliban's support of al-Qaeda to justify its use of force against the non-state group on the basis of its sponsorship by another territorial, sovereign state.³⁹ Meanwhile, UN Security Council Resolutions 1368 and 1373, calling on "all States to work together urgently to bring justice to the [9/11] perpetrators," gave a tacit nod to the United States' invocation of self-defense against al-Qaeda.⁴⁰ The majority of UN member states, including Russia and China, also supported *Operation Enduring Freedom* against al-Qaeda and the Taliban in Afghanistan as a legitimate exercise of the right to self-defense.⁴¹

The exact parameters of defensive force against non-state actors were hotly contested from the outset.⁴² The United States and some of its allies openly endorsed the "unwilling or unable" doctrine, which argues that action against a non-state threat is justified so long as the state in which the non-state actor resides is "unwilling or unable" to suppress the threat.⁴³ The list of states either explicitly or implicitly endorsing the "unwilling or unable" doctrine continues to grow,⁴⁴ but the doctrine remains far from the consensus view.

Meanwhile in academia and among policymakers, debates about the legitimacy of military force against non-state aggressors rage on.⁴⁵ Then-legal adviser to the UK Foreign and

³⁹ Jutta Brunnée & Stephen J. Toope, *Self-Defence Against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?*, 67 INT'L & COMP. L. Q. 263, 269 (2018).

⁴⁰ S.C. Res. 1368, ¶ 3 (Sept. 12, 2001); S.C. Res. 1373 (Sept. 28, 2001).

⁴¹ See S.C. Res. 1368, ¶ 3 (Sept. 12, 2001).

⁴² Brunnée & Toope, *supra* note 39, at 264.

⁴³ See Elena Chachko & Ashley Deeks, *Which States Support the 'Unwilling and Unable' Test?*, LAWFARE (Oct. 10, 2016, 1:55 PM), <https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test> [<https://perma.cc/NR7H-R5E8>].

⁴⁴ *Id.*

⁴⁵ See Christian J. Tams, *Making Sense of the 'Armed Attack' Requirement*, in SELF-DEFENCE AGAINST NON-STATE ACTORS 90, 90 (Mary Ellen O'Connell, Christian J. Tams & Dire Tladi eds., 2019):

Commonwealth Office Daniel Bethlehem, in laying out his eponymous principles justifying defensive force against non-state actors, took an expansionist position, emphasizing the disconnect between the academy and the battlefield:

There is little intersection between the academic debate and the operational realities The reality of the threats, the consequences of inaction, and the challenges of both strategic appreciation and operational decision making in the face of such threats frequently trump a doctrinal debate that has yet to produce a clear set of principles that effectively address the specific operational circumstances faced by states.⁴⁶

The emergence of the Islamic State (IS) complicated matters further. With transnational operations and de facto territorial control over existing sovereign states like Iraq and Syria, IS evaded straightforward connections to any single state as conventionally understood in the context of Article 2(4). In 2014, the United States asserted in an Article 51 letter to the Security Council that states have the “inherent right of individual and collective self-defense . . . when . . . the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for

‘[T]wo main camps’ are said to face each other in what is now frequently (if simplistically) portrayed as an epic argument opposing ‘restrictivists’ and ‘expansionists’ . . . [P]ositions are clearly articulated; academics take sides—where do you stand on the ‘unwilling or unable’ test; what’s your view on the ‘Bethlehem Principles’; have you signed the ‘Plea against the Abusive Invocation of Self-Defence’?

⁴⁶ Bethlehem, *supra* note 12. Expansionists like Themis Tzimas echo Bethlehem and have acknowledged that:

while on the one hand self-defense constitutes a state-centric right, on the other hand, and given that it is part of the collective security system, we cannot fail to take into account the ongoing transformations in relation to the incursion . . . of non-state actors in the wider framework of collective security. . . .

Themis Tzimas, *Self-Defense by Non-State Actors in States of Fragmented Authority*, 24 J. CONFLICT & SEC. L. 175, 179 (2019). See also *id.* at 185:

In other words, the legal personality of non-state actors, especially in the framework of Areas of Limited Sovereignty or Statehood (ALSs) due to NIACs and INIACs, is the outcome of the need of state sovereignty to adjust, normatively speaking, to its own deficiencies and is determined on the basis of the dialectic relationship between the capacities of the non-state actor and the defects of the fragmented sovereignty of the state. The latter necessitate and justify the former.

[terrorist] attacks.”⁴⁷ The United States’ argument asserted a scope of Article 51 self-defense broader than the ICJ’s holding in *Nicaragua*, the Definition of Aggression, and the subsequent ICJ cases upholding the need for substantial ties between a non-state actor and its sponsoring state. Canada and Australia followed the United States’ lead with similarly worded Article 51 letters.⁴⁸

With this proclamation, the “unwilling or unable” doctrine appeared to bypass the need to establish that there had been an “armed attack” by showing ties to a sponsoring sovereign state. The IS attacks in Paris in November 2015 further entrenched the feeling among some states that self-defense against non-state actors like IS could be lawful even in the absence of clear ties to a state. Following the attacks, France stated that its military action in Syria, previously justified as collective self-defense, could “now also be characterized as individual self-defence, in accordance with Article 51.”⁴⁹ UN Resolution 2249, calling upon all member states to “redouble and coordinate their efforts” to “prevent and suppress” IS and other terrorist groups in the aftermath of the attacks in France, was unanimously adopted by Security Council members, including Russia and China.⁵⁰

Recently, scholars and practitioners alike have introduced new rationales for defensive force against non-state actors, including the Chatham House principles,⁵¹ the Leiden Policy Recommendations,⁵² and the Bethlehem Principles,⁵³ all of which assume that self-defense against non-state actors can be lawful under certain conditions.⁵⁴

⁴⁷ Letter from Samantha J. Power, Rep. of the U.S. to the United Nations, to Ban Ki-moon, Sec’y-Gen. of the United Nations (Sept. 23, 2014), <https://www.justsecurity.org/wp-content/uploads/2015/12/US-Article-51-Letter-Syria-09232014.pdf> [<https://perma.cc/X9DR-CVYF>].

⁴⁸ Brunnée & Toope, *supra* note 39, at 270.

⁴⁹ U.N. SCOR, 70th Sess., 7565th mtg. at 2, U.N. Doc. S/PV.7565 (Nov. 15, 2015).

⁵⁰ S.C. Res. 2249 (Nov. 20, 2015); Press Release, Security Council, Security Council ‘Unequivocally’ Condemns ISIL Terrorist Attacks, Unanimously Adopting Text and Determines Extremist Group Poses ‘Unprecedented’ Threat, U.N. Press Release SC/12132 (Nov. 20, 2015).

⁵¹ *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 INT’L & COMPAR. L. Q. 963 (2006).

⁵² *Leiden Policy Recommendations on Counter-terrorism and International Law*, 57 NETH. INT’L L. REV. 531, 531-50 (2010).

⁵³ Bethlehem, *supra* note 12.

⁵⁴ See Christian Marxsen & Anne Peters, *Dilution of Self-Defence and its Discontents*, in SELF-DEFENCE AGAINST NON-STATE ACTORS 1, 5-6 (Mary E. O’Connell et al. eds., 2019).

According to the first Bethlehem Principle, “states have a right of self-defense against an imminent or actual armed attack by nonstate actors.”⁵⁵ Elizabeth Wilmshurst and Michael Wood argue that, under the Chatham and Leiden recommendations, the attack must be “large-scale” to trigger the right of self-defense if it is by a non-state group not attributable to a state.⁵⁶ Another prominent criterion in determining attribution is the effective control standard, whereby a “State may take necessary and proportionate action against the State from whose territory the non-State actors operate, because the acts of the non-State actors are – from a legal perspective – those of the State.”⁵⁷ The terms of self-defense against non-state actors remain far from settled.

* * *

Non-state actors do not exist in a legal black hole; they have certain obligations under international law. Although the UN Charter does not directly regulate non-state actors⁵⁸ – specifically, armed groups – customary international law (CIL) and international humanitarian law (IHL) recognize the presence and influence of such groups on the international system.⁵⁹ The application of such bodies of law to non-state actors, however, does not alter their legal status. For example, Common Article 3 specifies that its application “shall not affect the legal status of the Parties to the conflict.”⁶⁰ Thus,

⁵⁵ Daniel Bethlehem, *Principles Relevant to the Scope of a State’s Right of Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT’L L. 1 (2012), <https://www.un.org/law/counsel/Bethlehem%20-%20Self-Defense%20Article.pdf> [<https://perma.cc/86NR-V7Q2>].

⁵⁶ Elizabeth Wilmshurst & Michael Wood, *Self-Defense Against Nonstate Actors: Reflections on the ‘Bethlehem Principles’*, 107 AM. J. INT’L L. 386, 393 (2013).

⁵⁷ Marxsen, *supra* note 54, at 2.

⁵⁸ Michael Adams and Ryan Goodman have called attempts to apply *jus ad bellum* to non-state actors as a “category mistake.” Adams, *supra* note 19. They argue that “non-State actors do not possess legal rights like States do and they are not the relevant subjects of the so-called *jus ad bellum*” and “conduct by non-State actors is not regulated by established *jus ad bellum*.” *Id.*

⁵⁹ See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War art 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (acknowledging the existence of “armed conflict not of an international character”); see also International Committee of the Red Cross, *Commentary of 2016, Article 3: Conflicts Not of an International Nature*, ¶¶ 393-94 (“Accordingly, armed conflicts not of an international character are first of all armed conflicts which oppose the government of a State Party and one or more non-State Parties.”). Moreover, non-state actor groups are regulated by the domestic law of the state in which they operate.

⁶⁰ See, e.g., Article 3 of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949,

the international law that applies to non-state actors is lopsided: it places burdens on them while not offering any privileges under international law. Such an imbalance is necessary to preserve the state-centric international system.

The doctrinal expansions of the past two decades attest to the immense legal firepower that has been mobilized toward justifying non-state actors as lawful targets of force under international law. In the aftermath of September 11 and the rise of IS, new legal interpretations emerged to authorize the use of state power against non-state power. These justifications hinged on the self-defense right of a state actor against an aggressor non-state actor. But even in the midst of these expansions, the reverse was never true: not a single state had yet attempted to invoke the self-defense of a *non-state actor* to justify force against a *state actor*. The remainder of this Comment is dedicated to exploring this latest twist in the expansion of self-defense doctrine: the United States' move to justify the use of force against another sovereign state *on behalf of* a non-state actor.

III. THE CONUNDRUM OF SELF-DEFENSE ON BEHALF OF NON-STATE ACTORS

In June 2017, the United States government took an unprecedented step when it justified military force against another sovereign state, the Assad regime in Syria, by invoking the collective self-defense of a non-state partner, the United States-backed Syrian Democratic Forces (SDF).⁶¹ There are two precarious legal arguments that might justify this United States action in Syria: (1) The SDF has a right to *individual* self-defense under international law that can then justify the United States' *collective* self-defense of the SDF under Article 51; or (2) the United States can act based on its own inherent right to *individual* self-defense under Article 51, which is triggered because an attack on the SDF is akin to an attack on the

https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.32_GC-III-EN.pdf [<https://perma.cc/SH34-KVBM>] (acknowledging the existence of "armed conflict not of an international character"); *see also* 2016 Commentary on the Geneva Convention, 393-94, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC> [<https://perma.cc/L755-UFME>] ("Accordingly, armed conflicts not of an international character are first of all armed conflicts which oppose the government of a State Party and one or more non-State Parties.").

⁶¹ Central Command Press Release, *supra* note 3.

United States. Both arguments are deeply flawed. This Part first paints a detailed picture of the June 2017 shutdown before explaining why this shutdown was illegal under international law.

a. What Happened in Syria?

The Syrian battleground is notoriously chaotic due to the sheer number of players and interests at stake. It is within this hectic context that the United States shot down a manned Syrian regime SU-22 fighter jet on June 18, 2017. The fighter jet had reportedly “dropped bombs near SDF fighters south of Tabqah,” a city in north-central Syria near Raqqa.⁶² It is unclear if the Syrian regime’s attacks placed any United States servicemembers in danger, but the United States Department of Defense press release on the strike did not reference their presence. Instead, it stated: “At 6:43 p.m., a Syrian regime SU-22 dropped bombs near SDF fighters south of Tabqah and, in accordance with rules of engagement and *in collective self-defense of Coalition partnered forces*, was immediately shot down by a United States’ F/A-18E Super Hornet.”⁶³ Because similar Intelligence Community press releases explaining United States use of force usually note when United States servicemembers are in harm’s way,⁶⁴ this omission in the DoD press release following the

⁶² *Id.* A news report issued the next day was identical. See Central Command News Article, *supra* note 2.

⁶³ Central Command Press Release, *supra* note 3 (emphasis added).

⁶⁴ For example, in early February 2018, a group of more than 500 “Russian-speaking fighters, Syrian government soldiers, and pro-regime militia fighters attacked a United States-SDF outpost at a former Conoco facility in Deir Ezzor.” Andrew S. Weiss & Nicole Ng, *Collision Avoidance: The Lessons of U.S. and Russian Operations in Syria*, CARNEGIE ENDOWMENT INT’L PEACE (Mar. 20, 2019), <https://carnegieendowment.org/2019/03/20/collision-avoidance-lessons-of-u.s.-and-russian-operations-in-syria-pub-78571> [<https://perma.cc/Y6KE-Q8QV>]. The Pentagon made clear that American lives were at risk in another attack in Syria on February 7, 2018. See Dep’t. of Def. Press Briefing by Lieutenant Gen. Harrigian via Teleconference from Al Udeid Airbase, Qatar, U.S. DEP’T OF DEF. (Feb. 13, 2018) <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/1441080> [<https://perma.cc/AZ5L-F7N4>].

So, I think the first thing I’d remind you of, you know, is this is executed from self-defense and we’re going to defend ourselves. And as was reported, there was incoming fire and we were with the SDF hunkered down, not provoking, and a force is massing and coming at us. So we’re going to defend ourselves and we all need to be crystal clear about that, just as Secretary Mattis said. So, we’re going to do that first, defend

shootdown suggests that only members of the SDF were in danger on June 18.

The Pentagon press release went on to connect the United States' attack to the ongoing self-defense mission in Syria: "The Coalition's mission is to defeat ISIS in Iraq and Syria. The Coalition does not seek to fight Syrian regime, Russian, or pro-regime forces partnered with them, but will not hesitate to defend Coalition or partner forces from any threat."⁶⁵ It further argued that "[t]he Coalition presence in Syria addresses the imminent threat ISIS in Syria poses globally. The demonstrated hostile intent and actions of pro-regime forces toward Coalition and partner forces in Syria conducting legitimate counter-ISIS operations will not be tolerated."⁶⁶

However, the United States simply could not hang its hat on the broader war against ISIS in justifying the June 2017 shootdown. In 2014, the United States filed an Article 51 letter with the United Nations, justifying its involvement in Syria to counter the rise of ISIS citing both the individual self-defense of the United States and the collective self-defense of Iraq.⁶⁷ This justification amounted to the "classical" version of collective self-defense – invoked in defense of another state, Iraq. However, the United States' attack on a Syrian jet in collective self-defense of the SDF, a non-state actor, marks a departure from its war against ISIS and constitutes a distinct moment from its initial decision to enter Syria in 2014, requiring a separate legal justification under *jus ad bellum*. Thus, the United States could not simply point to its 2014 Article 51 letter to justify the shootdown.

The June 18 incident was a major inflection point in the Syrian conflict, and international reactions confirmed that this use of force could not neatly fit into the category of classical collective self-defense. The Russian Ministry of Defense swiftly and dramatically responded to the shootdown, suspending its use of the United States-Russia deconfliction line – a critical means of communication to avoid direct conflict in Syria – and calling the United States' strike "a blatant breach of the international law" and "military aggression"

ourselves appropriately. And then as you highlight, we've got to work through exactly who it was to understand that.

⁶⁵ Central Command Press Release, *supra* note 3.

⁶⁶ *Id.*

⁶⁷ Letter from Samantha J. Power, *supra* note 47

against the Syrian regime.⁶⁸ Russian Deputy Foreign Minister Sergei Ryabkov said the United States' strike "has to be seen as a continuation of America's line to disregard the norms of international law" and suggested that it was an "act of aggression."⁶⁹ Australia even suspended air strikes in Syria in response to what appeared to be a very real threat of escalation.⁷⁰

The June 18 shutdown was in fact unprecedented. It marked the first time a United States "warplane has downed a manned aircraft since 1999,"⁷¹ and it was the first time the United States justified force under international law as "collective self-defense of Coalition partnered forces" where that partner was a non-state actor and no United States servicemembers were at risk.⁷²

In early August 2017, the State Department offered a more detailed legal justification for the June 18 incident in a letter to Senator Bob Corker.⁷³ The State Department justified the use of

⁶⁸ Russian Ministry of Defense, *Statement of the Russian Defence Ministry Concerning Downing of the Syrian Su-22 near the Town of Resafa*, FACEBOOK (June 19, 2017), <https://www.facebook.com/mod.mil.rus/posts/1943173689258711:0> [<https://perma.cc/E7ZW-5XGH>]; see Michael R. Gordon & Ivan Nechepurenko, *Russia Warns U.S. After Downing of Syrian Warplane*, N.Y. TIMES (June 19, 2017), <https://www.nytimes.com/2017/06/19/world/middleeast/russia-syria.html> [<https://perma.cc/8MH2-QXJS>]; U.S. *Aviation Actions Against Syrian Armed Forces are Gross Violation of Int'l Law, Military Aggression – Russian Defense Ministry*, INTERFAX (June 19, 2017, 4:21 PM), <https://interfax.com/newsroom/top-stories/27770/> [<https://perma.cc/66JN-F8UC>].

⁶⁹ Patrick Wintour & Julian Borger, *Russia Warns US its Fighter Jets are now Potential Target in Syria*, GUARDIAN (June 19, 2017, 2:41 PM), <https://www.theguardian.com/world/2017/jun/19/russia-target-us-led-coalition-warplanes-over-syria> [<https://perma.cc/YL4T-WUKZ>].

⁷⁰ See *Australia suspends air strikes in Syria-government*, REUTERS (June 20, 2017, 7:08 AM), <https://www.reuters.com/article/mideast-crisis-syria-australia-idUSS9N1J304U> [<https://perma.cc/Z58B-LS74>].

⁷¹ Ryan Browne, *New details on US shoot down of Syrian jet*, CNN (June 21, 2017, 10:17 PM), <https://www.cnn.com/2017/06/21/politics/us-syria-russia-dogfight/index.html> [<https://perma.cc/7CKX-4ZN5>].

⁷² See Central Command Press Release, *supra* note 3.

⁷³ See Letter from Charles Faulkner, Bureau of Legis. Affs., U.S. Dep't of State, to Bob Corker, Chairman, U.S. Senate Comm. on Foreign Rels. (Aug. 2, 2017), <https://www.politico.com/f/?id=0000015d-a3bf-d43a-a3dd-b3bf14170000> [<https://perma.cc/5KFT-RR6K>]. Note that Charles Faulkner, the author of this State Department letter, came under scrutiny in summer 2019 for his background as an arms-industry lobbyist and his role in the Trump administration decision to "sell weapons to Saudi Arabia and the United Arab Emirates without seeking legislative approval." Edward Wong & Catie Edmondson, *Democrats to Scrutinize Ex-Lobbyist's Role in Trump's Arms Sales to Gulf Nations*, N.Y. TIMES (June 11, 2019), <https://www.nytimes.com/2019/06/11/us/politics/democrats-charles-faulkner-arms-sales.html> [<https://perma.cc/FE4P-3NAY>].

force under international law, explaining that the United States “is using force in Syria against al-Qa’ida and associated forces, including ISIS, and is providing support to Syrian partners fighting ISIS, such as the Syrian Democratic Forces, in the *collective self-defense of Iraq (and other States)* and in United States’ national self-defense.”⁷⁴

These justifications are notable because they indicate the United States government believed it could employ circuitous legal arguments to take action against Syria in self-defense of the SDF.

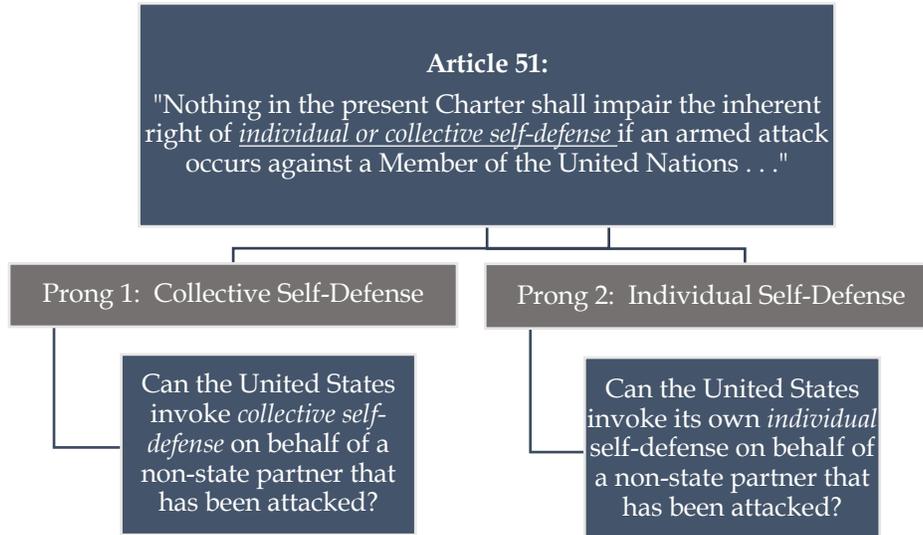
b. Applying International Law to United States Action in Syria

The June 2017 shutdown raises thorny questions about the application of self-defense doctrine to non-state actors. Article 51 of the UN Charter guarantees the “inherent right of *individual* or *collective* self-defense if an armed attack occurs against a Member of the United Nations.”⁷⁵ Evaluating the international legal basis for United States action in Syria therefore requires assessing both the individual and collective self-defense prongs for self-defense. Figure 1 provides a visual representation of this analytic scheme:

⁷⁴ Faulkner, *supra* note 71, at 1 (emphasis added).

⁷⁵ See U.N. Charter art. 51.

Figure 1: Can the United States Invoke Collective Self-Defense to Protect the SDF?



First, does the SDF have a right to self-defense under international law that can serve as a valid legal basis for United States action in collective self-defense of the SDF? Second, can the United States invoke its own right to individual self-defense to justify its defense of the SDF? The answer to this question is more nuanced than the first, but equally critical to understanding self-defense of non-state actor groups. In short, United States action to protect the SDF rests on shaky legal ground.

- i. *Does a Non-State Actor Possess an Individual Right of Self-Defense that Allows a State to Act in Its Collective Self-Defense?*

The text of Article 51 *prima facie* grants the inherent right of collective and individual self-defense *only* to states. The UN Charter binds only UN Member States, and thus "the inherent right of individual or collective self-defence" recognized by Article 51 is a

right only of UN Member States.⁷⁶ Non-state actors are not UN member states, and therefore they are not granted the kind of legal personality under the Charter that would entitle them to an inherent right to self-defense. This is the uncontroversial view held by international legal scholars.⁷⁷ To be sure, nothing in the UN Charter negates the right of self-defense of non-UN Member States, and a *state* actor that is not a UN member state can still assert an inherent right to self-defense in the event of an armed attack under customary international law.⁷⁸ This conclusion is supported by Article 51's reference to the right of self-defense as "inherent," thereby suggesting it emanates from natural law rather than positive law and confirming that all states have an inherent right to self-defense irrespective of their relationship to the UN. Writing in the late 1950s, D.W. Bowett argued that this reference to an "inherent" right in Article 51 indicates that self-defense "is an existing right, independent of the Charter and not the subject of an express grant . . ." ⁷⁹ But non-state actors are still not granted legal personality under customary international law.

Understanding the right of self-defense as one that belongs only to states is further confirmed by the drafting history of the UN Charter, specifically Article 51, which Adil Haque has taken great pains to excavate. The first draft of Article 51 read:

⁷⁶ U.N. Charter art. 51.

⁷⁷ See Georg Nolte & Albrecht Randelzhofer, *Action with Respect to Threats, Breaches of the Peace, and Acts of Aggression, Article 51*, in 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1397, 1420 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte & Andreas Paulus eds., 3d ed. 2012) ("It is generally accepted that the right of collective self-defence also authorizes a non-attacked State to lend its assistance to an attacked State."); Pothelet, *supra* note 4 ("[T]he Art. 51 right to collective self-defense is only a right to defend other States, not non-State entities. This flows from the nature of the UN Charter which is a treaty amongst States. This reading of Art. 51 is uncontroversial in academic commentary.") (internal hyperlink omitted); Kinga Tibori-Szabó, *The Downing of the Syrian Fighter Jet and Collective Self-Defence*, OPINIO JURIS (June 23, 2017), <http://opiniojuris.org/2017/06/23/the-downing-of-the-syrian-fighter-jet-and-collective-self-defence/> [<https://perma.cc/5BCL-BZ7U>]:

The question thus arises whether there is room for an expansive view on the right of self-defence permitting a state to invoke 'collective' self-defence on behalf of an armed group and assist the group on that basis. The wording of Article 51 of the UN Charter leads to a *prima facie* negative answer.

⁷⁸ "Art. 51 cannot take away non-members' rights of self-defence." BOWETT, *supra* note 18, at 193.

⁷⁹ BOWETT, *supra* note 18, at 187.

Should the Security Council not succeed in preventing aggression, and should aggression occur by *any state against any member state*, such *member state* possesses the inherent right to take necessary measures for self-defense. The right to take such measures for self-defense against armed attack shall also apply to understandings or arrangements like those embodied in the Act of Chapultepec, under which all members of a group of states agree to consider an attack against any one of them as an attack against all of them.⁸⁰

This text makes clear that the drafters of the UN Charter understood the right of self-defense as a right of states only. Article 51's first iteration acknowledges that (1) aggression that leads to an invocation of self-defense can only be committed by states, and (2) an invocation of self-defense in such an instance can only be made by a fellow state. Moreover, this first draft of Article 51 confirms that collective self-defense was meant to recognize existing collective defense regimes among states. Collective self-defense, as enshrined in the UN Charter, was part of a compromise meant to reassure Latin American states that the recently signed Act of Chapultepec, a collective defense agreement among American states, would remain permissible under international law.⁸¹

Due in large part to the global "War on Terror," state practice has morphed understandings of who can carry out an "armed attack" under Article 51 to include non-state actors like al-Qaeda and the Islamic State. This shift to acknowledge that non-state actors might carry out an armed attack is in harmony with an understanding of self-defense that preceded the UN Charter as embodied in the *Caroline Incident* of 1837 when British Canadian authorities attacked a steamer that was supporting Canadian rebels in their fight for independence from colonial British rule.⁸² However, there has been no similar shift in common understanding

⁸⁰ Minutes of the Third Five-Power Informal Consultative Meeting on Proposed Amendments (Part I), Held at San Francisco, Saturday, May 12, 1945, 2:30 p.m., in 1 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS, 1945, GENERAL: THE UNITED NATIONS, <https://history.state.gov/historicaldocuments/frus1945v01/d224> [<https://perma.cc/8LLF-BFDW>]; see also Haque, *supra* note 33 (arguing that the UN Charter's preparatory documents indicate there is no right to self-defense against an armed attack by a non-state actor).

⁸¹ See Haque, *supra* note 33.

⁸² See generally FORCESSE, *supra* note 18 (recounting the facts of the *Caroline Incident* and the American legal and diplomatic response to citizens armed activities against nations with which the United States was at peace).

of who has an inherent right to self-defense under international law. The consensus is that only states have such a right to self-defense. Thus, the United States' argument that it acted in collective self-defense of the SDF to repel attacks by the Syrian regime has no grounding in international law or the UN Charter.⁸³

In addition to the text and drafting history of the UN Charter, proper functioning of the international order precludes a non-state actor from asserting an inherent right of self-defense under international law. Since the 1990s, there has been a marked shift from international armed conflict to non-international armed conflict (NIACs, or civil wars).⁸⁴ In the decade before 2014, the "number of groups involved in civil conflicts [] quadrupled, most dramatically in East and South Asia."⁸⁵ The rise of non-state actors is already complicating the post-WWII international order, making it harder to negotiate the resolution of ongoing conflicts, deliver humanitarian aid, administer development programs, and address countless other challenges.⁸⁶

If a non-state group could assert self-defense under international law, it would have debilitating consequences for the international system. For example, if the Islamic State had an inherent right of self-defense recognized under international law, the consequences would be far-reaching. Such legal personality would enable the Islamic State to lawfully wage war against states. But one need not look at the extreme example of the Islamic State to understand the

⁸³ Insofar as the SDF's sole goal is to fight ISIS (and not regime change), at least one international law scholar has cautiously argued United States collective self-defense of the SDF in the global fight against the Islamic State might be lawful under international law. Adil Ahmad Haque, *On the Precipice: The U.S. and Russia in Syria*, JUST SECURITY (June 19, 2017), <https://www.justsecurity.org/42297/precipice-u-s-russia-syria> [<https://perma.cc/Y4GL-GSUJ>] ("In plain terms, the U.S. may have a legal right to protect non-state partner forces who are exclusively 'conducting legitimate counter-ISIS operations,' but has no legal right to protect non-state partner forces who are pursuing regime change or other political objectives.").

⁸⁴ See generally Tzimas, *supra* note 46.

⁸⁵ See Brian Quinn & Fabio Oliva, *Preliminary Scoping Report: Analyzing and Engaging Non-State Armed Groups in the Field*, United Nations System Staff College, https://www.unssc.org/sites/unssc.org/files/unssc_report_final_0.pdf [<https://perma.cc/E6G9-YQPG>]; THOMAS S. SZAYNA, STEPHEN WATTS, ANGELA O'MAHONY, BRYAN FREDERICK & JENNIFER KAVANAGH, WHAT ARE THE TRENDS IN ARMED CONFLICTS, AND WHAT DO THEY MEAN FOR U.S. DEFENSE POLICY?, RAND CORP. 1, https://www.rand.org/content/dam/rand/pubs/research_reports/RR1900/RR1904/RAND_RR1904.pdf [<https://perma.cc/94FY-ZJVB>].

⁸⁶ See Quinn & Oliva, *supra* note 82, at 1-3.

concerning result of elevating the legal status of non-state actors under international law. If non-state armed groups had an inherent right to self-defense, this would also fundamentally alter the status of ongoing secessionist stalemates from Northern Ireland, to Scotland, Cataluña, the Basque Country, Crimea, Nagorno-Karabakh, Republika Srpska, and more. In fact, "non-state" groups and insurrection movements across the world would gain the legal character they need to lawfully overthrow whole state systems.

In sum, a state cannot invoke collective self-defense as legal justification to protect a non-state actor threatened by an armed attack because neither customary international law nor Article 51 of the UN Charter can be understood to apply to the defense of a non-state actor. The right to self-defense under international law is a right of states *only*.

ii. *Can the United States Invoke its Own Individual Self-Defense to Protect the SDF?*

Although a state cannot use force in *collective* self-defense of a non-state actor partner, may the state still lawfully invoke its own *individual* self-defense on behalf of a non-state actor partner under Article 51? One could argue that the State Department asserted as much when it claimed "U.S. national self-defense" justified the 2017 shootdown of the manned Syrian aircraft to protect the SDF.⁸⁷ The United States asserted that the "use of force to defend U.S., Coalition, and U.S.-supported partner forces from threats by Syrian Government and pro-Syrian Government forces" was lawful given the United States' "inherent right of *individual* and collective self-defense."⁸⁸ Thus, the United States appeared to believe that an attack on the SDF was akin to an attack on the United States capable of triggering its own right to individual self-defense.

1. The Scope of Individual Self-Defense

Individual self-defense under Article 51 is triggered when a UN member state directly suffers an "armed attack." Whether an attack

⁸⁷ Faulkner, *supra* note 71.

⁸⁸ Faulkner, *supra* note 71 (emphasis added).

triggers individual self-defense hinges on what constitutes the “individual” or “self” in the first place, and more specifically, whether a non-state partner could possibly be included within the umbrella of a partner state’s individual self-defense. The United States’ legal argument in support of the 2017 shutdown of the Syrian regime plane suggests the United States government understands the SDF to be a critical part of its counter-ISIS operation. But what if the SDF were essentially one and the same as United States forces in Syria? Taking this line of thinking to its extreme, an attack on the SDF would then be an attack on the United States, and the United States could use force in *individual* self-defense in such an event. The legitimacy of the United States’ claim of individual self-defense on behalf of the SDF depends on whether the United States can mount a convincing legal argument that the SDF is part of the United States’ “self.”

The context of self-defense may also be crucial in determining whether individual self-defense applies, specifically at a time when counterterrorism operations dominate world affairs. The United States has employed its right to individual self-defense against the backdrop of the War on Terror, in which it sees itself as the ultimate target of aggression. One could thus argue that an attack on a key United States partner in counterterrorism operations could conceivably threaten the individual safety of the United States. Under this logic, an attack on the SDF is a direct attack on the United States, and the United States can use force in individual self-defense in such an event. The legitimacy of the United States’ claim of individual self-defense on behalf of the SDF depends on whether the United States can mount a convincing legal argument that an attack on the SDF was indeed an attack on the United States.

Under international law, the scope of individual self-defense tracks territoriality—consistent with the role of sovereignty in the modern state system.⁸⁹ Article 2(4) specifically prohibits the use of force when it is directed against another state’s “territorial integrity.”⁹⁰ This understanding informs the meaning of “armed attack” in Article 51, which is primarily conceived in terms of an

⁸⁹ See LUNG-CHU CHEN, *Control over Territory*, in AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY ORIENTED PERSPECTIVE 149, 149–54 (3d ed. 2015) (describing the traditional conception of territorial sovereignty as constraining the permissible assertions of self-defense).

⁹⁰ See U.N. Charter art. 2, ¶ 4.

incursion of territorial integrity.⁹¹ The Syrian regime's attack on the SDF, thousands of miles from the United States mainland, could not immediately trigger American individual self-defense in a strict territorial sense. Thus, under Article 51, an attack on the SDF could not possibly be construed as an "armed attack" on the United States just on the basis of a partnership in the war on terror. Recall, moreover, that in the American shootdown of the manned Syrian aircraft in 2017, no American lives were at risk. Even under the United States' own definition of national self-defense, an attack on the SDF in which no American lives were immediately at stake would fail to trigger United States' individual self-defense.⁹²

But even if American nationals had been at risk in the 2017 shootdown, the right to individual self-defense by the United States would still be far from guaranteed. The *abstract* target—not the *material* target—often settles questions of individual self-defense under international law.⁹³ Even if an American national were killed in an armed attack, it matters whether the death was simply collateral to an attack aimed at another. The term "armed attack" within the meaning of Article 51 requires the aggressor to have the *intention* to attack the party purporting to be attacked. In the *Oil Platforms* case, which concerned a United States warship that was destroyed after striking a mine, the ICJ emphasized this requirement by asking the United States to prove that Iran's actions were "aimed specifically" at the United States and that Iran had "the specific intention" of harming United States vessels.⁹⁴ That the security of the United States was conceptually threatened by a Syrian regime strike on the SDF would not suffice to trigger an *American* individual self-defense right under Article 51.

⁹¹ Andrew W.R. Thomson, *Doctrine of the Protection of Nationals Abroad: Rise of the Non-Combatant Evacuation Operation*, 11 WASH. U. GLOB. STUD. L. REV. 627, 636 (2012).

⁹² CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTR., 3121.01B, STANDING RULES OF ENGAGEMENT (SROE)/STANDING RULES FOR THE USE OF FORCE (SRUF) FOR U.S. FORCES 81, 83 (2005).

⁹³ Öykü Irmakkesen, *The Notion of Armed Attack under the UN Charter and the Notion of International Armed Conflict—Interrelated or Distinct?* 18 (Aug., 2014) (LL.M. paper, Geneva Academy of International Humanitarian Law & Human Rights).

⁹⁴ *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, ¶ 64 (Nov. 6).

2. The SDF as a State Organ of the United States?

Only if the SDF were deemed part of the United States—in other words, an extension of the United States whose defense could legitimately be equated to the United States' own self-defense—could the United States properly invoke individual self-defense to justify the June 2017 shutdown. Whether an attack triggers individual self-defense hinges on what constitutes the “individual” or “self,” and more specifically, whether a non-state partner could possibly be included within the umbrella of a partner state's individual self-defense. The nature of the relationship between the United States and SDF, including the level of United States control over the SDF, then, becomes critical to determining whether the United States could legitimately conflate defense of the SDF with its own. Nothing in the relationship between the two indicates that the SDF is a state organ of the United States.

For one, neither party believes it is in a state organ relationship with the other. The United States has only employed the term “partner forces”⁹⁵ to refer to the SDF, while the SDF, in its declaration of establishment,⁹⁶ considers itself to be a multiethnic coalition among thirteen regional signatories, none of which is the United States. Under Article 4(2) of the International Law Commission (ILC)'s 2001 Draft Articles on State Responsibility, a state organ is defined as “any person or entity which has that status in accordance with the internal law of the state.”⁹⁷ The SDF clearly does not meet this standard, by virtue of its founding document. A party may also be a *de facto* organ of a state in “exceptional” circumstances in which it acts in “complete dependence on the State, of which [it is] ultimately merely the instrument.”⁹⁸ The SDF does

⁹⁵ Faulkner, *supra* note 71.

⁹⁶ *Declaration of Establishment by Democratic Syria Forces*, KURDISH QUESTION (Oct. 15, 2015), <https://web.archive.org/web/20160224085811/http://kurdishquestion.com/index.php/kurdistan/west-kurdistan/declaration-of-establishment-by-democratic-syria-forces/1179-declaration-of-establishment-by-democratic-syria-forces.html> [https://perma.cc/7Z9X-DACV].

⁹⁷ Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 26 (2001).

⁹⁸ Application of the Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶¶ 392–93 (Feb. 26). The language of ‘complete dependence’ is taken from Military and Paramilitary Activities in and against Nicaragua (Nicar. v U.S.), Judgment, 1986 I.C.J. 14, ¶ 110 (June 27).

not meet this exceptional standard either. In fact, it has an alleged relationship with the Kurdistan Workers' Party (PKK), deemed by the European Union as a terrorist organization.⁹⁹ In the absence of an armed attack or the threat of an armed attack against the United States, the only conceivable path through which the United States could lawfully invoke its own individual self-defense on behalf of the SDF is if the SDF were a part of the United States, but such a relationship does not exist.

Individual self-defense has undoubtedly expanded beyond geographic demarcations to include nationals, properties, and forces abroad. Under customary international law, a state's individual self-defense may be triggered when its nationals, including its soldiers, come in harm's way abroad.¹⁰⁰ Take, for instance, Canada's military operation in July 2006 to evacuate 14,000 of its citizens amid the armed conflict between Israel and Hezbollah, or the more controversial Russian invocation of self-defense to protect its citizens abroad in 2008 when Moscow sent troops, tanks, and aircraft into Georgia.¹⁰¹ The United States' Standing Rules of Engagement (SROE) specifically define "national self-defense" as the "act of defending the United States, United States forces, and in certain circumstances, United States citizens and their property and/or United States commercial assets, from a hostile act, demonstrated hostile intent, or declared hostile force."¹⁰² But these expansions — themselves controversial under treaty law¹⁰³ — have never reached the extent of subsuming the defense of another entity into a state's own individual self-defense. In no way has the scope of individual self-defense grown to include the protection of entities completely separate from the individual state, like non-state partnered forces.

The upshot of this analysis is that there is no room in Article 51 for member UN states, like the United States, to invoke self-defense on behalf of non-state partners to violate the Article 2(4) prohibition

⁹⁹ Wladimir van Wilgenburg, *Syrian Democratic Forces (Syria)*, EUROPEAN COUNCIL ON FOREIGN RELS., <https://ecfr.eu/special/mena-armed-groups/syrian-democratic-forces-syria/> [<https://perma.cc/S4HG-BUYX>].

¹⁰⁰ Thomson, *supra* note 88, at 639.

¹⁰¹ See *id.* at 628 (offering these two cases as examples of states launching military operations to assist their citizens in foreign states and that such operations are legally justified).

¹⁰² CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTR., 3121.01B, STANDING RULES OF ENGAGEMENT (SROE)/STANDING RULES FOR THE USE OF FORCE (SRUF) FOR U.S. FORCES 81, 83 (2005).

¹⁰³ See Thomson, *supra* note 88, at 645 ("Attempts to firmly establish the doctrine of protection in treaty law have not been successful.").

on the use of force. An invocation of *collective* self-defense by the United States would depend on the non-state actor's *own* right of individual self-defense, which does not exist under the UN system. The remaining Article 51 alternative—the invocation of *individual* self-defense by the United States—also fails unless the armed attack in the meaning of Article 51 occurs against the United States, or the SDF is to be considered a state organ of the United States. Neither argument is likely to succeed under international law.

IV. STATE RESPONSIBILITY

Invoking individual self-defense to protect a non-state actor partner is problematic for another reason: if any state could lawfully claim individual self-defense as the basis for its use force on behalf of a non-state partner, the state would necessarily assume responsibility for the actions of its non-state partner under international law. This Part knits together the literature on individual self-defense and state responsibility to argue that when a state invokes individual self-defense of a non-state partner as its state organ, that state must also assume responsibility for that non-state partner under international law. Thus, this Part furthers the novel legal argument that a state must take legal responsibility for a non-state partner's conduct if it simultaneously seeks to equate its own self-defense to the defense of its organ.

As discussed in Part III, in the absence of an armed attack against a state, the only legitimate way a state can invoke individual self-defense on behalf of another entity would imply a state organ relationship such that the self-defense of the state becomes equated with that of its non-state partner. By invoking individual self-defense in this manner, the state essentially exports its umbrella of sovereignty to the non-state partner, which cannot access such sovereignty-derived rights on its own. The invocation is, in effect, a denial of the status of the non-state partner as a legally distinct entity.¹⁰⁴ More importantly, the invocation denotes that the state

¹⁰⁴ Note that in *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States*), the United States relied on its inherent right of collective self-defense, not of individual self-defense. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v U.S.), Judgment, 1986 I.C.J. 14, ¶ 24 (June 27) (noting that while the United States did not formally file a pleading on the merits, “it claim[ed] to be acting in reliance on the inherent right of self-defence

exercises a level of control over the non-state partner that itself would trigger a new set of responsibilities. Figure 2 captures this line of reasoning, involving the dialectic between self-defense and control and the role of “control” as the gateway to state responsibility.

Figure 2: How Individual Self-Defense Implicates Control and State Responsibility



Although the issue of control has not been explicitly discussed in the literature with respect to self-defense *on behalf of* non-state partners, the link between individual self-defense and control is one repeatedly emphasized in scholarship on non-state actors more generally, especially regarding self-defense *against* non-state aggressors.¹⁰⁵ Christian Tams notes that self-defense involving non-state actors always implicates issues of control because all non-state actors operate from a “foreign (host) state” and the state-centric UN regime is, at its core, written in the vocabulary of state sovereignty.¹⁰⁶ Since the beginning of the UN Charter, debates regarding armed non-state groups have always centered on the role of their “sponsoring States” and on how best to ascertain the degree of control of these states over non-state actors, for attribution purposes.¹⁰⁷ Writing in 1958, Ian Brownlie also noted that the problem of non-state actors was fundamentally one of “[s]tate complicity in, or toleration of, the activities of armed bands directed against other [s]tates.”¹⁰⁸ Themis Tzimas also describes non-state

‘guaranteed . . . by Article 51 of the Charter’ of the United Nations, that is to say the right of collective self-defence.”).

¹⁰⁵ See Marxsen, *supra* note 54, at 2 (noting that under the standard of effective control, an “attacked State may take necessary and proportionate action against the State from whose territory the non-State actors operate, because the acts of the non-State actors are – from a legal perspective – those of the State.”).

¹⁰⁶ Tams, *supra* note 45, at 130, 172.

¹⁰⁷ See Tams, *supra* note 45, at 130 (“From 1946 until around the late 1980s, . . . from Burma/China (1953) to the French raids on Tunisia in the late 1950s and the manifold Israeli strikes against Palestinian targets in Jordan, Lebanon, and elsewhere – the focus was squarely on the respective host States.”).

¹⁰⁸ Ian Brownlie, *International Law and the Activities of Armed Bands*, 7 INT’L & COMP. L.Q. 712, 734 (1958).

actors in terms of their relationship to sovereignty, arguing that a non-state group, by definition, fragments the authority of the territorial state it occupies, triggering questions of sovereignty, control, and authority.¹⁰⁹ Both the “unwilling and unable” and “effective control” doctrines, which figure prominently in current international legal debates around non-state actors,¹¹⁰ are ultimately an exercise in squeezing non-state conflict into the sovereignty-based equation of Article 51 self-defense.¹¹¹ Against this backdrop, claiming “individual” self-defense over another entity (as opposed to collective self-defense) indicates that the state exercises a level of control over a non-state partner, without which self-defense over that entity could not be deemed “individual.”

a. State Organ Standard

The 2001 Draft Articles on State Responsibility (“Draft Articles”) promulgated by the International Law Commission (ILC) serve as the most established authority on state responsibility and control.¹¹² The ICJ accepted both Articles 4 and 8 of the Draft Articles as customary international law as of 2007.¹¹³ Under Draft Article 4, the “conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any functions, whatever position it holds in the organization of the State and whatever its character as an organ of the central Government or of a territorial unit of the State.”¹¹⁴ Under Draft Article 8, the “conduct of a person or group of persons shall be

¹⁰⁹ Tzimas, *supra* note 46, at 185.

¹¹⁰ Marxsen, *supra* note 54, at 2, 6.

¹¹¹ See Tzimas, *supra* note 46, at 185:

In other words, the legal personality of non-state actors, especially in the framework of Areas of Limited Sovereignty or Statehood (ALSs) due to NIACs and INIACs, is the outcome of the need of state sovereignty to adjust, normatively speaking, to its own deficiencies and is determined on the basis of the dialectic relationship between the capacities of the non-state actor and the defects of the fragmented sovereignty of the state. The latter necessitate and justify the former.

¹¹² Oona A. Hathaway, Emily Chertoff, Lara Dominguez, Zachary Manfredi & Peter Tzeng, *Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors*, 95 TEX. L. REV. 539, 546 (2017).

¹¹³ *Id.*

¹¹⁴ *Id.* at 546-47 (quoting Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/1., at 26-30 (2011)).

considered an act of a State under international law, if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”¹¹⁵ In other words, a non-state actor’s act could be attributable to a state if the state has connections with the actor (Draft Article 4) or with the operation itself (Draft Article 8).¹¹⁶

The ILC, in its commentary to Draft Article 4, adds that a “[s]tate cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law.”¹¹⁷ This indicates that once control has been established, international law “pierces the veil” in the proxy relationship between a state and a non-state actor, holding the sponsoring state liable for the acts of the latter. Because the only legitimate pathway for the United States to claim its right of individual self-defense on behalf of the SDF is by acknowledging it as a state organ, the United States would be responsible for the conduct of the SDF under international law.

b. Effective Control Standard

In addition to the ILC Draft Articles, international tribunals have relied on a range of “control tests” to deduce the scope of state responsibility for non-state actor conduct. But courts have rarely found states liable for the conduct of non-state actors under these control tests. In *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua)*, the ICJ established in 1984 that for a state to be held responsible for the actions of a non-state actor, “it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed.”¹¹⁸ Notably, the ICJ ruled that, even though the United States financed, organized, trained, supplied, equipped, and provided reconnaissance aircraft, intelligence, and surveillance to the paramilitaries, its involvement was insufficient for a finding of “substantial involvement” required

¹¹⁵ See *id.* at 547 (quoting Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/1., art. 8 (2011)).

¹¹⁶ *Id.* at 546.

¹¹⁷ See *id.* at 547 (quoting Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/1., art. 4 cmt. 11 (2011)).

¹¹⁸ See *id.* at 549 (quoting *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 115 (June 27)).

for state responsibility.¹¹⁹ As Oona Hathaway notes, the effective control test in *Nicaragua* set a high evidentiary bar for demonstrating control, requiring “proof of control over a *specific operation* . . . directly connecting a state’s funding . . . to the execution of a discrete internationally wrongful act” for a finding of attribution.¹²⁰

The 2007 ICJ judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnian Genocide)*¹²¹ further entrenched the high evidentiary burden for control. The case concerned whether acts of genocide committed by members of the Bosnian Serb Army (VRS)—a non-state actor—could be attributed to the Federal Republic of Yugoslavia (FRY), which had sponsored the VRS. Despite evidence demonstrating “substantial economic integration” between the FRY and VRS, as well as a major transfer of arms and equipment to the VRS, the ICJ did not find attribution absent evidence of “explicit instructions to commit the massacre,” including evidence of genocidal intent.¹²² Moreover, *even with* a finding of effective control, the International Law Commission (ILC), which has endorsed the ICJ’s effective control standard, further narrows state liability to cover only acts that are “an integral part” of the operation, so that the sponsoring state is not responsible for ultra vires acts that are “incidentally or peripherally” associated with an operation.¹²³

c. The Application of State Responsibility to the United States-SDF Relationship

The high threshold for control makes it difficult to attribute violations of international law by non-state actors to their

¹¹⁹ See *id.* at 550; Tams, *supra* note 45, at 133.

¹²⁰ Hathaway et al., *supra* note 109, at 550 (“The opinion implied that this was because Nicaragua had failed to prove a direct link between these forms of support and the execution of any particular operation, i.e., the United States had not specifically *instructed* the commission of unlawful acts.”).

¹²¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, 2007 I.C.J. 43 (Feb. 26).

¹²² See Hathaway et al., *supra* note 109, at 551. Another standard, the overall control test, was created by the International Criminal Tribunal for the former Yugoslavia, with a lower threshold for establishing “control” between a sponsoring state and a non-state organ. See Hathaway et al., *supra* note 109, at 546.

¹²³ Hathaway et al., *supra* note 109, at 553.

sponsoring states. Against the backdrop of states increasingly¹²⁴ using non-state actors as proxies to accomplish their military and political objectives, this high threshold for control creates an accountability gap that renders attribution of non-state violations to their state sponsors without extremely specific evidence practically impossible.¹²⁵ It also reinforces perverse incentives for states to engage via their non-state proxies in conduct they themselves could not lawfully pursue.

But for purposes of Article 51 self-defense, the high threshold for control is precisely what makes it difficult to characterize the self-defense of non-state partners as “individual” self-defense. In order to legitimate a claim of individual self-defense, a state would have to demonstrate such a level of control over a non-state partner as could be recognized under international law.

In 2015, the United States supported the SDF with more than forty-five tons of weapons and ammunition, in addition to special operations forces and precision U.S. combat airpower that led to key victories in Manbij, Raqqa, and the final ISIS holdout of Baghouz.¹²⁶ Even then, the actual control exercised by the United States over the SDF falls short of both the ILC Draft Articles’ state organ standard and the *Nicaragua* effective control standard. This lack of control undermines the United States’ rationale for a claim of individual self-defense over a non-state partner. Moreover, a legitimate invocation of individual self-defense on behalf of a non-state partner would be possible, but only after it has opened a Pandora’s box of

¹²⁴ A.B.A. CENTER FOR HUMAN RIGHTS AND RULE OF LAW INITIATIVE, REPORT ON THE LEGAL FRAMEWORK REGULATING PROXY WARFARE (Dec. 2019). See generally PROXY WARFARE PROJECT, https://www.americanbar.org/groups/human_rights/reports/report-legal-framework-regulating-proxy-warfare-2019/ [https://perma.cc/25D4-333C] (“Global and regional powers increasingly rely on state and non-state partners in the course of ongoing hostilities.”).

¹²⁵ Hathaway et al., *supra* note 109, at 540-41:

States frequently work with and through non-state actors, sometimes in cases where direct state action would have been politically or legally suspect. During the past few years, for example, the United States has financed, armed, and trained opposition forces in Syria. Russia has assisted and supplied separatist forces in eastern Ukraine. Iran continues to arm and fund Hezbollah in Lebanon.

¹²⁶ See Mick Mulroy & Eric Oehlerich, *A tale of two partners: Comparing two approaches for partner force operations*, MIDDLE EAST INST. (Jan. 29, 2020), <https://www.mei.edu/publications/tale-two-partners-comparing-two-approaches-partner-force-operations> [https://perma.cc/9HEU-9K6G].

state responsibility which a sponsoring state like the United States would not seek out in the first place.

A strange dialectic thus emerges: control becomes something that a State must simultaneously *avoid* to escape responsibility for the non-state body and *embrace* to legitimate its own claim of individual self-defense over that body. A valid claim of individual self-defense on behalf of the SDF would thus force the United States to be legally responsible for SDF actions. For the United States, it becomes impossible to rent its right of individual self-defense to the SDF without also acknowledging a state organ relationship that would open it to liability for illegal conduct of the SDF.

V. CONCLUSION

Just over seventy-five years ago, the world came together and inked the most fundamental international rule of all: the prohibition on the use of military force for anything but self-defense.¹²⁷ That self-defense exception, codified at Article 51 of the UN Charter, was extremely narrow by design.¹²⁸ But over the years, and especially since September 11, the scope of this exception, originally conceived as applying to states only, has morphed beyond recognition to include non-state actors. Largely overlooked, the emergence of self-defense on *behalf* of non-state partners in Syria is a novel twist that threatens the existence of the global system by reducing its most foundational rule to a technical speedbump.

Two factors explain why this recent doctrinal expansion has evaded meaningful attention, much less resistance, despite the outsized consequences. For one, it is subtle. Non-state actors like al-Qaeda, especially in a post-9/11 world, already appear to be legitimate targets of force under international law. What is one more twist in seeking to make them legitimate *beneficiaries* of defense? Second, the latest expansion of self-defense has the luxury of political expedience. Both liberal internationalists repulsed by Syria's Assad regime and neoconservative realists in favor of America's military supremacy have had no particular reason to be more vocal against the unlawful expansion of self-defense by the United States.¹²⁹

¹²⁷ See Hathaway & Shapiro, *supra* note 7.

¹²⁸ See Hathaway, *supra* note 2.

¹²⁹ Hathaway & Shapiro, *supra* note 7.

But the 2017 shutdown of a Syrian plane by the United States is a clear violation of international law. The legal justification provided—self-defense of the SDF—has no basis in Article 51 jurisprudence. The SDF, as a non-state actor, has no right to self-defense that could provide the legal basis for the United States' strike on Syria in collective self-defense. Nor can the United States claim that the Syrian attack on the SDF constituted an "armed attack" capable of triggering its own right of individual self-defense within the meaning of Article 51. The only remaining potential alternative—that the SDF was embedded in American counterterrorism operations as a state organ—is not only factually inaccurate, but would also trigger specific legal obligations under the state responsibility doctrine that the United States has failed to fulfill.

The 2017 invocation of self-defense by the United States on behalf of the SDF was the first of its kind, but certainly not the last. In 2018, the United States would again invoke the self-defense of its non-state partner to justify the use of military force against Syria.¹³⁰ There are no additional documented instances of self-defense on behalf of non-state partners since 2018, but history shows that when the United States bends the law, it often sets a dangerous precedent that other states follow.¹³¹

What the United States did in Syria threatens to trigger the beginning of the end of the global system. It indicates that by simply designating an aggrieved non-state group in any conflict in any region of the world as a "partner," any willing state may invoke the collective self-defense of that partner to lawfully use military force against another sovereign state that poses no direct threat to its counterpart(s). Left unchecked, this expansion of Article 51 self-defense effectively voids the Charter's Article 2(4) ban on force by turning self-defense precisely into a generous vehicle—rather than a narrow exception—through which to justify military action.

Article 2(4) is central to the modern international order as we know it—a world where war is outlawed and force can be used in only a small number of instances. Efforts to weaken Article 2(4)'s

¹³⁰ CJTF-OIR, *Unprovoked Attack by Syrian Pro-regime Forces Prompts Coalition Defensive Strikes*, U.S. CENTRAL COMMAND (Feb 7, 2018), <https://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1435188/unprovoked-attack-by-syrian-pro-regime-forces-prompts-coalition-defensive-strik/> [https://perma.cc/FK8F-F8YM].

¹³¹ See Hathaway, *supra* note 2.

prohibition on the use of force must be met with fierce opposition to prevent its death by a thousand cuts.