

RULES FOR THE “GLOBAL WAR ON TERROR”: IMPLYING CONSENT AND PRESUMING CONDITIONS FOR INTERVENTION

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I.	INTRODUCTION	2
II.	A SEMI-PERIPHERAL ORIENTATION	11
	A. <i>Harboring, Cohabitant, and Innocent States</i>	13
	B. <i>Expansive and Restrictive Approaches at the Semi-Periphery</i>	18
III.	CONFLICT OVER <i>JUS AD BELLUM</i> LEGALITY: A TRIPARTITE FRAMEWORK	20
	A. <i>Force Against a Non-State Actor in a Harboring State</i>	22
	1. <i>Does the Prohibition on Use of Force Extend to an Intervention in a Harboring State?</i>	23
	2. <i>Self-Defense Against a Non-State Actor in a Harboring State</i>	27
	B. <i>Force Against a Non-State Actor in an Innocent State</i>	34
	1. <i>Self-Defense with Attribution of Responsibility, Without Responsibility, and the “Unable or Unwilling” Test</i>	35
	a. <i>The Restrictive View: A High Threshold of State Responsibility</i>	35
	b. <i>The Expansive View: The “Unable or Unwilling” Test and Its Critics</i>	39
	2. <i>Interceptive, Preventive, and Preemptive Self-Defense</i>	47

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3.	<i>Intervention in the Innocent State as Unlawful Preventive Self-Defense</i>	54
C.	<i>Force Against a Non-State Actor in a Cohabitant State</i>	58
1.	<i>Due Diligence: Finding a Gap in International Law</i>	58
2.	<i>The Problem of Jus in Bello Legality in the Cohabitant State</i>	61
IV.	CONFLICT OVER JUS IN BELLO LEGALITY	62
A.	Jus ad Bellum Versus Jus in Bello	64
1.	<i>The Privilege To Kill in War</i>	67
2.	<i>Armed Force Without a Privilege To Kill: A Conflict of Rules</i>	72
B.	<i>Force Neither Prohibited Nor Permitted: A Regime Between War and Peace</i>	76
1.	<i>Intervention with Implied Conditions</i>	78
2.	<i>Consent Versus Implied Conditions</i>	80
3.	<i>The Implied Conditions</i>	85
V.	CONCLUSION: RECONSTRUCTING A REGIME BETWEEN WAR AND PEACE	88
A.	<i>Against the Expansive View</i>	91
B.	<i>Against the Restrictive View</i>	92

I. INTRODUCTION

Over the past few years, the Obama administration has intensified the military offensive against al-Qa'ida and other terrorist organizations.¹ The military campaign has been centered on the targeted killings of suspected terrorists. It has involved not only the launching of drone attacks, but also the deployment of special military forces. So far, the most spectacular episodes of the campaign have been the killing of Osama

1. For example, in Pakistan alone, at least 305 U.S. drone strikes took place between 2004 and 2011; the Obama administration ordered 253 of them, according to the Bureau of Investigative Journalism. Figures of people reported dead range from 2,347 to 2,956. Estimates of civilians killed in the attacks range from 392 to 781, including at least 175 children. Chris Woods, *Drone War Exposed – The Complete Picture of CIA Strikes in Pakistan*, THE BUREAU OF INVESTIGATIVE JOURNALISM (Aug. 10, 2011), <http://www.thebureauinvestigates.com/2011/08/10/most-complete-picture-yet-of-cia-drone-strikes/>. See generally Scott Shane et al., *Secret Assault on Terrorism Widens on Two Continents*, N.Y. TIMES, Aug. 15, 2010, at A1 (discussing the Obama administration's widening offensive against terrorism in Africa and Asia).

Bin Laden by U.S. military forces in Pakistan and the death of Anwar al-Aulaqi, an American citizen killed in Yemen by a missile fired from a U.S. drone aircraft. Whereas in the past this type of military action would have taken the form of a covert operation, in the last decade, these actions have become both a national security and a foreign policy tool to which the United States as well as a number of other Western states have resorted.² Although governments avoid giving detailed accounts about their operations, theories and stories are reported by the media and scrutinized by politicians, military analysts, and the general public. Targeted killings have become the central goal of a war effort against hostile non-state actors.

The legal basis for targeted killings, however, continues to be debated. Is it lawful for a state to use force against a hostile non-state actor located within the territory of another state? If lawful, what rules govern this type of military intervention? Scholars, lawyers, governmental officials, and courts have discussed the legality of U.S. targeted killings under domestic American law.³ But this policy has also an important inter-

2. The United States is not the only state fighting hostile non-state actors within the territory of other states. In the past years, French and Mauritanian troops have carried out attacks within the territory of Mali against al-Qa'ida in the Islamic Maghreb (AQIM). See *Mauritania Strikes at Militants on Mali Border*, BBC NEWS (Sept. 18, 2010), <http://www.bbc.co.uk/news/world-africa-11354029> (discussing a Mauritanian military action and a separate raid in which French and Mauritanian troops attempted to rescue a French citizen kidnapped by AQIM). The Guardian reports that unmanned aerial vehicles of the Royal Air Force fired their weapons in Afghanistan 123 times during the first 10 months of 2010. Owen Bowcott & Paul Lewis, *Attack of the Drones*, THE GUARDIAN (Jan. 16, 2011), <http://www.guardian.co.uk/uk/2011/jan/16/drones-unmanned-aircraft>. This type of transnational conflict is far from novel. For further examples, see *infra* note 21.

3. See, e.g., *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (addressing a lawsuit filed – with assistance from the ACLU and Center for Constitutional Rights (CCR) – by the father of an allegedly targeted individual that challenged the U.S. government's authority to carry out targeted killings of individuals, including U.S. citizens, away from a battlefield); Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, in LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 346 (Benjamin Wittes ed., 2009) (arguing for the legality of targeted killings under certain conditions); Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt ed., forthcoming), available at <http://ssrn.com/abstract=1501144> (arguing against the legality of targeted

national dimension. Bin Laden was killed within the territory of Pakistan. Drone attacks have been launched in Pakistan, Sudan, and Yemen. As use of force outside the territory of the United States and within the jurisdiction of another state, a targeted killing is governed not only by American law and, in the Bin Laden example, Pakistani law, but also by public international law. This article examines existing public international law and proposes an international legal solution that balances the conflicting interests raised by the irruption of non-state actors in modern conflict and, by extension, in the international laws of war.⁴

One would expect the question of the legality of targeted killings under international law to be far less demanding than

killings) [hereinafter O'Connell, *Unlawful Killing*]; Eric Holder, Att'y Gen. of the United States, Speech at Northwestern University School of Law (Mar. 5, 2012), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html> (explaining the Obama administration's view of the legality of targeted killings).

4. This article examines targeted killings using drones and the use of ground forces against non-state actors as part of a particular type of war that is pursued through limited military force. Rather than stand-alone punitive or retaliatory strikes, this article explores the legal dimension of a type of warfare involving continuous, but limited "short of war" hostilities between a state and a hostile non-state actor accompanied by a continuous intervention by such state in the territory of another state where the non-state actor is located. Micah Zenko has coined the term "discrete military operations" to study some of the aforementioned military activities carried out by the United States. *See* MICAH ZENKO, *BETWEEN THREATS AND WAR: U.S. DISCRETE MILITARY OPERATIONS IN THE POST-COLD WAR WORLD 2* (2010). Zenko argues that policymakers, in particular civilian officials, as well as the general public support discrete military operations because they believe that they are expedient instruments for achieving foreign policy goals with military precision and low casualties to both civilians and American military forces. Zenko's study shows, however, that only half of the operations achieve their military objectives and that political objectives have a far lesser rate of success. *Id.* at 114–22. Both the human costs to civilian populations in the areas affected by these operations and their politically counterproductive consequences dispel any doubt that limited military operations, including technologically sophisticated drone attacks, are neither precise nor achieve positive political goals. In relation to U.S. drone practices in Pakistan, these points have been forcefully made in INTERNATIONAL HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC (STANFORD LAW SCHOOL) & GLOBAL JUSTICE CLINIC (NYU SCHOOL OF LAW), *LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN* (2012), *available at* <http://livingunderdrones.org/wp-content/uploads/2012/10/Stanford-NYU-LIVING-UNDER-DRONES.pdf>.

the domestic law problems emerging from an authorization to use armed force against a non-state actor. One would further assume that when the United States deploys armed force "short of war" against a non-state actor within the jurisdiction of another state, the intervened state must have consented.⁵ In fact, U.S. Attorney General Eric Holder has recently stated that "the use of force in foreign territory would be consistent with . . . international legal principles if conducted . . . with the consent of the nation involved."⁶ Moreover, a recently leaked U.S. Department of Justice White Paper on the lawfulness of the "use [of] lethal force in a foreign country" argues that "a lethal operation in a foreign nation would be consistent with international legal principles of sovereignty and neutrality if it were conducted, for example, with the consent of the host nation's government."⁷ However, in relation to the contemporary military campaign against hostile non-state actors, no government has explicitly and openly bestowed such consent, and no intervening state has invoked consent as a legal justification. For example, prior to the killing of Bin Laden, the U.S. government neither sought the consent of Pakistan, nor invoked consent as a justification.⁸ After the killing, Pakistani

5. This is force short of war in the sense that it is neither deployed to overpower the armed forces of another state nor to occupy its territory. It is rather directed against a hostile non-state actor. One may think that consent would be an important justification today, as in the past the United States has invoked (with relative success) this justification. In Vietnam and Nicaragua, the United States claimed that a foreign intervention justified a resort to force under the principle of collective self-defense following a request by the affected government. See, e.g., Oscar Schachter, Editorial Comment, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645, 648 (1984).

6. Holder, *supra* note 3. Holder's statement includes a second justification: preemptive self-defense based on the existence of a threat, rather than an actual or imminent armed attack. *Id.* For additional arguments supporting this justification, see *infra* note 32.

7. White Paper, U.S. Dep't of Justice, Lawfulness of a Lethal Operation Directed against a U.S. Citizen Who Is a Senior Operational Leader of al-Qa'ida or an Associated Force 1 [hereinafter DOJ White Paper], available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

8. On Wednesday, May 4, 2011, only three days after the killing of bin Laden, Attorney General Eric Holder, in testimony to the Senate Judiciary Committee, invoked self-defense rather than consent as justification: "[L]et me make something very clear. The operation in which Osama bin Laden was killed was lawful . . . [It] was justified as an act of national self-defense." *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judi-*

Foreign Secretary Salman Bashir “expressed ‘deep concerns and reservations’ that the U.S. carried out the mission in the city of Abbottabad unilaterally, without Pakistan’s knowledge or permission.”⁹

In the absence of an authorization by the intervened state, is armed force waged by a state against a non-state actor located within the jurisdiction of another state lawful? Contemporary international law, and specifically the law of war, offers no clear and conclusive answer to this question.¹⁰ Conventional international law governs interstate relations. The law of war thus emerged within this framework to prevent and regulate territorial conflict between states. But the image of a battlefield packed with regular combatants in uniform belongs to a bygone era. New military technologies, current states’ propensity to fight hostile or criminal non-state actors militarily, and the proliferation of armed conflicts between states and hostile non-state actors have undermined the pillars of the conventional paradigm. This combination has blurred the boundaries of the battlefield, challenged the distinction

ciary, 112th Cong. 1, 33 (2011) (statement of Eric Holder, Att’y Gen. of the United States). “[Bin Laden was] . . . a lawful military target. And the operation was conducted in a way that is consistent with our law, with our values.” *Id.* at 33–34.

9. Karin Brulliard, *Military Warns against U.S. Raids*, WASH. POST, as reprinted in BOSTON GLOBE (May 6, 2011), http://www.boston.com/news/world/asia/articles/2011/05/06/pakistans_powerful_army_warns_against_us_raids/.

10. Most international lawyers (as well as politicians) in continental Europe and the semi-periphery, I argue, tend to think that the legal basis of a foreign policy should be considered in the decision-making process and should limit – and occasionally – exclude unlawful options. However, it is unnecessary to adopt such a viewpoint for the question posed by this article to be relevant. The question of the legality of action against non-state actors has become part of the war effort itself. The question about the legal justification is relevant because the war effort against a hostile non-state actor (generally manifested in current events as a terrorist organization) is predicated on the idea that a state is legally entitled to wage armed force against a non-state actor which is defined as illegal and has no legal basis to use armed force against a state. This latter aspect distinguishes the non-state actors considered here from non-state actors who enjoy such a justification, like armed groups fighting for self-determination. Arguably, ignoring or disregarding the legal basis for this type of military intervention not only weakens the legitimacy of states’ war effort against hostile non-state actors, but also increases the difficulty of “winning the hearts and minds” of the local populations involved in the conflict.

between combatants and civilians, and weakened the basis for the traditional prohibition on use of force. How should the conventional paradigm be transposed onto situations involving hostile non-state actors? For instance, how should the legality of an intervention in a territorial state be determined when that state is only a third party to the conflict? Should the traditional standard of attribution of responsibility be invoked or old doctrines like the 'unable or unwilling' test retrieved? There is no clear and conclusive answer because there are competing ways to interpret the need and construct means to bring the law of war up to date.¹¹

International lawyers are divided between those who regard conventional understandings of the law of war as outdated and develop new arguments to legalize force against a non-state actor under most circumstances, and those who believe, on the basis of traditional interpretations of the law of war, that this type of violence is mostly unlawful. Some, like Thomas Franck, have argued that this type of force is justified under self-defense,¹² whereas others, such as Ian Brownlie, contend that self-defense is only lawful between states.¹³ Some, like Harold Koh, the legal adviser to the Secretary of State, have argued that drone attacks against al-Qa'ida operatives are lawful because the targeting respects international humanitarian law (IHL) principles, which would include proportionality, necessity, and distinction,¹⁴ while others, like Philip Alston, the former U.N. Special Rapporteur for Extrajudicial Executions, think that a terrorist attack calls primarily for a criminal law and law enforcement response, which would mean that the

11. See Justin Desautels-Stein, *Reaper's Law: Drone Strikes, the Arab Uprisings, and the Law of Killing* (unpublished manuscript) (2012) (on file with author) (proposing such an alternative).

12. See Thomas M. Franck, Editorial Comment, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839 (2001) (rebutting five arguments that the use of force against al-Qa'ida is not justified under the international law governing self-defense).

13. IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 278-79 (1963).

14. See Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm> (discussing the legality of U.S. use of force).

lawful response would be to detain and prosecute, rather than wage war and kill.¹⁵

Like most scholars of international law, these authors discuss the legality of the use of force against hostile non-state actors on the basis of the law of war, invoking both *jus ad bellum*—the laws governing the resort to force—and *jus in bello*—the laws governing the conduct of hostilities. This article shows that international lawyers are divided between those who advance an *expansive* reading of the law of war, which finds armed force against non-state actors generally lawful, and those who support a *restrictive* interpretation, which considers this type of military intervention generally unlawful.¹⁶ I argue that both doctrinal positions interpret relevant international law rules and balance conflicting policy considerations in ways that are too extreme and only reflect the standpoint of lawyers situated at the world's centers of power. In terms of relations between states, the expansive interpretation, which reflects the position of powerful Western states, gives too much weight to the interest of the sovereign state in protecting itself from transnational attacks by hostile non-state actors over the interest of sovereign states not to suffer a foreign intervention against a non-state actor located in its territory. At the international level, it further gives excessive weight to the interest of the international community in preventing transnational terrorism at the expense of that community's interest in limiting the use of armed force. The restrictive interpretation, which reflects the standpoint of the international community as seen from New York or Geneva, strikes a balance in the opposite direction, giving too much weight to international

15. See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Addendum – Study on Targeted Killings*, ¶¶ 2, 3, 48, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) [hereinafter Alston].

16. As this article will explain, the heuristic distinction between a restrictive and an expansive view of the law of war is based on the nature of the legal interpretation each view advances—the former articulates a rule-based method and the latter a policy-oriented approach—as well as the nature of the regime each view construes. The former restricts the autonomy of states to use armed force against another state and the latter expands the privilege of states to use force. For a similar distinction between expansive and restrictive views, see generally OLIVIER CORTEN, *LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW* (2008).

peace and to the sovereign autonomy of the state where the hostile non-state actor is located.

Relying typically on the very important but mostly over-inclusive law of war rules, doctrines, and principles—the prohibition on use of force, self-defense as the central exception, the principles governing targeting (proportionality, necessity, and distinction), and the rules bestowing the privilege to kill in war—the two doctrinal extremes fail to offer a sensible balance between conflicting rules and goals. These extreme positions fail to establish a balance attuned to the specific circumstances of the intervening state, of the “intervened” state, and of the hostile non-state actor. A more nuanced balance is needed. These rules and doctrines are not only rooted in the traditional interstate paradigm, which has now been defied by the presence of non-state actors with military capabilities, but also depend on a series of sharp doctrinal distinctions, most notably those between war and peace and between combatant and civilian. The use of force short of war by states against armed groups whose members are neither privileged combatants nor civilians has eroded such distinctions.

This article provides a more context-specific response, distinguishing and analyzing three categories of states. These categories consist of the *harboring* state, exemplified by Taliban-Afghanistan, the *innocent* state, represented here by Germany, and the *cohabitant* state, which describes countries like Pakistan and Yemen. The article also rejects the *expansive* and *restrictive* interpretations. It offers instead a different solution through balancing conflicting rules and policies from the standpoint of weaker states that are vulnerable to hostile non-state actor presences in their territory and, therefore, more likely subject to interventions.¹⁷ I term this analytical perspective the “semi-peripheral orientation.” The resulting legal framework ultimately finds the use of force in the territory of a harboring state lawful and the use of force against an innocent state unlawful. In relation to the cohabitant state, it argues that

17. A cohabitant state is mostly a semi-peripheral state, a state that occupies a middle position in the world system. It is neither a failed state nor a rogue state, but a developing state that has seen its autonomy and authority compromised by both a hostile non-state actor and a foreign state. The foreign state is generally a Western state pursuing global interests that has brought the fight against the non-state actor to the semi-periphery.

traditional law of war rules and doctrines are not only too vague and contradictory to identify a narrow set of possible legal responses, but also too general and over-inclusive to strike a balance between underlying policy objectives.

In the case of a cohabitant state, traditional law of war rules and doctrines offer poor guidance to solve the conflict between the security of one state versus the territorial autonomy of another and between preventing terrorism versus deterring interstate violence. I move the discussion away from the traditional law of war to explore the regulation of the use of force against a non-state actor in the territory of a cohabitant state based on implied conditions. I argue that without the explicit consent or objection of the cohabitant state with regard to the intervention, the rule of public international law should be a presumption of consent with implied conditions.

This answer not only balances conflicting rules and objectives, but also offers rules to govern the intervention.¹⁸ Considering the interest of the intervening state, for which the United States provides a recent example, this position recognizes the privilege to resort to force and kill in a military campaign against a hostile non-state actor. On the other hand, recognizing the interests of both the intervened state and the international community, the article extracts a series of implied conditions from the intersection of—and conflict between—several established areas of international law. The article proposes these implied conditions could govern such an intervention. This default international legal regime, for example, would allocate decision-making power over targeting to bodies representing the intervening state, the intervened state, and the local communities affected by the intervention. It would impose strict liability on the intervening state and require the establishment of a guarantee fund to compensate for collateral damage. Exploring these and other implied conditions, the article shifts the discussion away from the conventional laws of war and focuses instead on international lawyers' responsibility to mediate, in each scenario, between war and peace.

18. In this regard, if there is consent by the territorial state, the rules argued for in this article may provide a blueprint for an agreement between both states.

* * * *

Part II of the article explains the semi-peripheral position from which I interpret and reconstruct the law of war rules governing the use of force against non-state actors. Part III examines the law governing the resort to force, *jus ad bellum*, arguing for the legality of this type of armed intervention within the territory of a harboring state. It argues that these interventions are always unlawful within the territory of an innocent state. Exploring the debated legality of an intervention in a cohabitant state, I will argue that this use of force is neither prohibited nor permitted. Part IV investigates the legality of an intervention under the law governing the conduct of hostilities, *jus in bello*, and suggests regulation of an intervention in a cohabitant state through implied conditions. I conclude with a discussion about the nature of the proposed regime. I will show that it reflects a distinctive, though forgotten style of internationalist legal thought prevalent among semi-peripheral jurists; a style which accepting the realities of international power, attempts to tinker within existing legal structures to strengthen the position of weaker states. Viewed from a more theoretical angle, the proposed regime recombines elements of the law of war and the law of peace to produce a more nuanced framework, which adapts and refines international law to respond to contemporary challenges to peace and security.

II. A SEMI-PERIPHERAL ORIENTATION

Advocates of the expansive and restrictive views of the law of war certainly each perceive their interpretations to be judicious, rather than, as I will illustrate, unbalanced mediations between conflicting rules and objectives. In fact, if one assumes the "interpretative position" adopted by these international lawyers, their views seem to reflect a sensible balance of conflicting considerations.¹⁹ The expansive view seems to

19. By "interpretative position" I mean the contextual as well as unconscious factors shaping how international lawyers as laypersons see and understand the world. For instance, contingencies of birth, family, ethnicity, nationality, or education may elicit greater empathy either towards the victims of terrorism or towards the victims of state force; either towards the fallen soldier or the collateral casualties inflicted upon a people by a state fighting a hostile non-state actor. Foregrounding international lawyers' dispositions

interpret existing law in light of the position and interests of powerful states, while the restrictive view seems to interpret existing law in light of the position and interests of the international community. One may thus note that international lawyers supporting the expansive view tend to be American, while lawyers defending the restrictive view tend to be from smaller Western states.²⁰ Therefore, it does not come as a surprise that Harold Koh, an American academic and former dean of Yale Law School, advises the U.S. Department of State, whereas Philip Alston, an Australian academic, who has taught in the United States and Europe, advises the United Nations. It is remarkable, however, that in the literature there is no view interpreting rules and balancing policy objectives in light of the interests and the position of weaker states of the semi-periphery,²¹ which are those most commonly and directly affected by the type of military intervention this article investigates.

towards the hostile state and the hostile non-state actor and foregrounding how the relationship between violence, law, and justice is resolved differently depending on the (state/non-state) nature of the hostile actor, I try to illuminate the interrelation between the background, the interpretative position, and the legal solution (whether force is regarded as lawful or unlawful) adopted by the international lawyer. I thus try not only to bring together the professional and layman dimensions of the work of the international lawyer, but also to see how these dimensions interact: How does the expert balancing of conflicting rules and policy objectives stabilize, displace, or affirm the lay dispositions of the lawyer? How does the lawyer develop expert modes of dealing with his lay dispositions?

20. For example, Darby has noted a transatlantic divide in relation to the defense of preemptive self-defense. See Joseph J. Darby, *Self Defense in Public International Law: The Doctrine of Pre-emption and Its Discontents*, in INTERNATIONALE GEMEINSCHAFT UND MENSCHENRECHTE 27 (Jürgen Brömer et al. eds., 2005).

21. The recourse to this type of transnational violence is not new. In the past it was mostly deployed against forces fighting for self-determination. During the 1950s French forces attacked the Algerian FLN (Front pour la Libération Nationale) in Tunisia. GREGOR WETTERBERG, THE INTERNATIONAL LEGALITY OF SELF-DEFENSE AGAINST NON-STATE ACTORS: STATE PRACTICE FROM THE U.N. CHARTER TO THE PRESENT 168–69 (2007). During the 1960s and 1970s South Africa used force against SWAPO (South West Africa People's Organization) in the territory of Angola and Zambia. *Id.* at 126. Southern Rhodesia attacked armed groups in the territory of Mozambique and Botswana. *Id.* at 174–80. Portugal attacked armed groups operating in the territory of Senegal and Zambia. *Id.* at 180–86. For a comprehensive list, see generally *id.*

I have elsewhere used a semi-peripheral orientation to examine and understand the history of international law.²² Here I adopt this orientation to articulate an alternative legal response to the problem of the use of armed force against a hostile non-state actor in the territory of another state.²³

A. *Harboring, Cohabitant, and Innocent States*

The three hypothetical cases I consider, in which a state uses force against a hostile non-state actor in the territory of another state, proceed from the same basic scenario. The state resorting to armed force has been victim of a serious armed attack by a non-state actor located outside its boundaries. The non-state actor, who has become a hostile actor by virtue of carrying out an armed attack against a state, neither fights for self-determination²⁴ nor is internationally recognized as a

22. See ARNULF BECKER LORCA, *MESTIZO INTERNATIONAL LAW: A GLOBAL INTELLECTUAL HISTORY* (forthcoming May 2013).

23. Imagining the interpretative position of the semi-peripheral international lawyer, with the aim of producing an alternative legal answer, may well be relevant if the repertoire of existing legal answers is in fact enlarged. This alternative answer does not simply reflect the interests of semi-peripheral states, but interprets international law, reflecting either the interest of the state or the interest of the international community as experienced from the semi-periphery. Beyond the multiplication of answers, delving into the semi-peripheral interpretative position will be critical if foregrounding the dispositions of lawyers at the semi-periphery interrogates the dispositions of those situated at the core. For a defense of the distinctive analytical and normative value of the semi-peripheral position, see *infra* notes 201–202 and accompanying text.

24. If the non-state actor were fighting for self-determination against the state it attacked, the state in which the non-state actor is located could lawfully harbor members of the non-state actor. The attacked state could not invoke the self-defense exception; thus the resort to force would always be illegal. For example, Manfred Lachs has argued that use of force against the principle or practical implementation of self-determination is prohibited by Article 2(4) of the U.N. Charter since it would be inconsistent with the purposes of the United Nations. Manfred Lachs, *The Development and General Trends of International Law in Our Time*, in *ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS* 9, 161–62 (1980). More specifically, the state fighting the non-state actor acting under the right to self-determination would not be entitled to invoke the right to self-defense because only the former and not the latter right is a *jus cogens* norm. On self-determination as a *jus cogens* norm see, e.g., Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Implementation of United Nations Resolutions Relating to the Right of Peoples Under Colonial and Alien*

belligerent.²⁵ The most obvious example is al-Qa'ida and affiliated organizations like al-Qa'ida in the Arabian Peninsula (AQAP) or al-Qa'ida in the Islamic Maghreb (AQIM). But there are numerous other non-state organizations based in the territory of one state that have carried out attacks in the territory of neighboring states, such as the Lord's Resistance Army (LRA) in Uganda, the Allied Democratic Forces (ADF) based in Congo, and the Fuerzas Armadas Revolucionarias de Colombia (FARC) occasionally based in Ecuador.²⁶ Less obvious but nevertheless worth considering in advance of possible trends in international politics would be the example of criminal organizations, like drug cartels, that are based within the territory of one state but carry out hostile actions in another state. Would it be lawful for the victim state to pursue military

Domination to Self-Determination, ¶ 75, U.N. Doc. E/CN.4/Sub.2/405 (Vol. I) (June 20, 1978) (by Hector Gros Espiell). On the other hand, the state in which the non-state actor is located would have a legal basis to permit or tolerate the presence of a non-state actor within its territory, because of the *erga omnes* character of self-determination. U.N. General Assembly Resolution 2625 (XXV) affirms that “[e]very State has the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination and freedom and independence.” G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/8018, at 121, 123 (Oct. 24, 1970). Moreover, the *erga omnes* character of the right to self-determination was recognized by the International Court of Justice in East Timor (Port. v. Austl.), 1995 I.C.J. 90, ¶ 29 (June 30, 1995).

25. The recognition of belligerence, although in desuetude, would give the hostile non-state actor the legal treatment of a state. See ANTHONY CULLEN, *THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW* 14–23 (2010).

26. It is worth noting that *harboring*, *cohabitant*, and *innocent* states are ideal types, used for analytical, rather than predictive purposes. Thus, not all cases of transnational violence against a hostile non-state actor will neatly follow the center-periphery dynamic. Some cases could be described as “south-south” interventions. For example, during the 1990s, Turkey attacked the Kurdistan’s Workers Party (PKK) in northern Iraq. In 2002, Russia attacked Chechen rebels in Georgia. In other cases of “south-south” intervention, one party is supported by a large power. Over the past decade Ugandan armed forces have fought the Lord’s Resistance Army (LRA) and the Allied Democratic Forces (ADF) within the territory of Congo. In 2008 Colombian forces attacked the Revolutionary Armed Forces of Colombia (FARC) in Ecuador. In both situations the attacking states had informal support from and military cooperation agreements with the United States. Similarly, during the 1980s Israel attacked the Palestine Liberation Organization (PLO) in Lebanon and Syria. The frame proposed by this article may be useful to analyze the legality of these cases.

action in the territory of the state that currently hosts—voluntarily, involuntarily, or even unknowingly—the hostile criminal non-state actor?²⁷

However, seen from the point of view of the territorial, or “intervened,” state, these cases may be significantly different and thus may call for a specific balancing of conflicting rules and objectives. I distinguish between three cases according to the degree of association between the intervened state and the non-state actor.

Consider, first, the case of Taliban Afghanistan, which was a state that gave sanctuary to al-Qa’ida. Although the Taliban did not expressly endorse the latter’s attacks against the United States, neither did it hand over its leaders nor close its camps. I would describe Taliban Afghanistan as a “harboring state.” The presence of al-Qa’ida in Taliban-ruled territory was not a challenge to the Taliban-Afghan state’s control over territory and people, but rather the result of a mutual understanding or invitation. Thus, al-Qa’ida hostile actions could be attributed to Taliban Afghanistan either directly, by reason of exercises of general control over al-Qa’ida, or indirectly, because of breaches of the obligations on states neither to harbor nor to give logistical support to a terrorist organization. More generally, attribution could be argued based on Taliban ex post acquiescence in al-Qa’ida’s hostile acts.

Most international lawyers agree that the United States had the right to use force against al-Qa’ida in Afghanistan.²⁸ With a link of attribution, the military intervention in

27. Developments in military technology and international politics could transform small-scale operations by powerful Western states in the semi-periphery into a common policy tool, not only to fight terrorist threats, but also to combat hostile criminal organizations. A small number of technologically advanced states are already using drones in the context of war; a larger number of states are using them for surveillance. The future of this military option and the future of a “global war on crime and terror,” may depend on, among other factors, the resolution of the legal questions at the center of this article. Micah Zenko, *10 Things You Didn't Know About Drones*, FOREIGN POLICY (Mar./Apr. 2012), available at http://www.foreignpolicy.com/articles/2012/02/27/10_things_you_didnt_know_about_drones.

28. See CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 201 (3d ed. 2004) (describing the reactions of scholars to the use of force in Afghanistan). For an exception, see MYRA WILLIAMSON, TERRORISM, WAR AND INTERNATIONAL LAW: THE LEGALITY OF THE USE OF FORCE AGAINST AFGHANISTAN IN 2001 (2009).

Afghanistan adopted the form of violence between sovereigns and thus could easily fit in the inter-state paradigm of the laws of war.²⁹ Today, in the case of harboring states, international lawyers disagree only about the interpretation of the requirement of the imminence of the attack and about compliance with the principles of proportionality and necessity in concrete situations. Some interpret the doctrine to require an actual or imminent attack, while others accept the legality of preemptive and preventive action. Some believe that force in response to an attack by non-state actors will never be proportional and necessary and others think that these tests can be satisfied.

A second category arises from examining a scenario where members of al-Qa'ida operating in Germany perpetrate an armed attack against the United States. I would describe Germany as an "innocent state" because there is no link of attribution between Germany and al-Qa'ida. Germany has effective control over its territory and people and we may further assume that Germany has done as much as international law requires a state to do to fight and control a hostile non-state actor within its territory to be considered in compliance with a due diligence standard.³⁰

29. For example, the resolution passed by U.N. Security Council after the 9/11 attacks "recognize[s] the inherent right of individual or collective self-defense . . ." S.C. Res. 1368, pmb., U.N. Doc. S/RES/1368 (Sept. 12, 2001).

30. I have chosen Germany as an example not only because some of the 9/11 hijackers resided there, but also because, as a developed Western state, Germany would *prima facie* fulfill the central requirement of characterization as *innocent*: control over territory and people. On the other hand, I argue that a *cohabitant* state is most likely a semi-peripheral state because its capacity to exercise effective control has been challenged. However, the difference between *innocent* and *cohabitant* is not completely based on a factual difference regarding the capacity to exercise "effective control." Remember that even Germany has around one million (and the United States around 11 million) undocumented residents within its territory. See ANNETTE SINN ET AL., *ILLEGALLY RESIDENT THIRD-COUNTRY NATIONALS IN GERMANY* (2005), available at <http://www.bamf.de/SharedDocs/Anlagen/EN/Publikationen/EMN/Nationale-Studien-ohne-WP/emn-study-2005-illegals-germany-en.html>; see also Julia Preston, *Decline Seen in Numbers of People Here Illegally*, N.Y. TIMES, July 31, 2008, available at http://www.nytimes.com/2008/07/31/us/31immig.html?_r=0. Thus, the difference between the two ideal types is political, in the sense that different states would argue to fit under one or the other. More importantly, the difference is political in the sense that Germany is regarded as *innocent* because it occupies a central position in the world system. That is, more than being seen as having "effective control," what counts is having the power to deter any thought of a military interven-

International lawyers who support wide interpretations of self-defense would regard it lawful for the United States to use force in self-defense within the territory Germany after an attack is carried out, or as soon as an attack is imminent. Others, like Anderson and Glennon, would arguably also regard it lawful for the United States to use force preemptively or preventively, even before or even without an attack. Lawyers following a restrictive interpretation would consider the use of force in the territory of an innocent state unlawful. Since they restrict self-defense to interstate violence and the privilege to kill to international conflicts.

Third, consider the cases of Pakistan and Yemen, where the United States has used force in the form of drone attacks and ground operations. Here, there is no direct link of attribution between Yemen and al-Qa'ida. The ability of the government of Yemen to exercise effective control over its territory and people has been eroded, first, by the presence of a hostile non-state actor in its territory, and then by the ensuing foreign pressure to intervene. However, Yemen is not a failed state. I would describe Yemen as a "cohabitant state" because it has only partial control over its territory and people. The cohabitant state might be willing but might be too weak to effectively act against the non-state actor, as in the case of Yemen. Alternatively, the state may have the requisite strength, but remains reluctant to act militarily against the non-state actor, as in Pakistan. Additionally, although the state is not responsible for the hostile acts of the non-state actor in the absence of a link of attribution, the cohabitant state can nevertheless be internationally blameworthy or blameless depending on its observance of the due diligence standard. This distinction will be crucial to determination of the implied conditions. Finally, the cohabitant state, because of its semi-peripheral position, has neither explicitly consented nor explicitly objected to the intervention.

tion. Thus, a semi-peripheral state would most likely be considered *cohabitant* because its relative weakness makes the military option possible (it can neither say "yes" nor "no" to the intervention), more than because it does not really exercise "effective control."

B. *Expansive and Restrictive Approaches at the Semi-Periphery*

When Harold Koh, the legal adviser to the Secretary of State, discusses the U.S. policy of targeted killings, he only refers to the legality of targeting, arguing that the United States complies with IHL regulation. Koh seems to assume that if there is an attack by al-Qa'ida, the United States has the right to act in self-defense even if there is no link of attribution, for instance, between al-Qa'ida and Yemen.³¹ This position, which was later explicitly articulated by U.S. Attorney General Eric Holder, leaves open the question of the legality of preventive or preemptive self-defense.³² The recently leaked Department of Justice White Paper is unambiguous. It supports the legality of preventive self-defense with no link of attribution.³³ On the other hand, lawyers defending a more restrictive doctrine of self-defense have argued that in the absence of a link of attri-

31. See Koh, *supra* note 14.

32. Holder, *supra* note 3 (“[T]he use of force in foreign territory would be [lawful] . . . after a determination that the nation is unable or unwilling to deal effectively with a threat to the United States.”). For arguments expressly supporting a right of self-defense without a link of attribution and a right of self-defense before the occurrence of an attack, see Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, in LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 346, 366–70 (Benjamin Wittes ed., 2009) (making the latter argument); Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L. L. & POL'Y 237, 251–58 (2010) (making the former argument). Furthermore, others have argued for preemptive action beyond the U.N. Charter's right to self-defense. See, e.g., Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J. L. & PUB. POL'Y 539, 539–41 (2002) [hereinafter Glennon, *The Fog of Law*]; Michael J. Glennon, *Preempting Terrorism: The Case for Anticipatory Self-Defense*, WKLY. STANDARD, Jan. 28, 2002, at 24 [hereinafter Glennon, *Preempting Terrorism*].

33. See DOJ White Paper, *supra* note 7, at 1–2 (stating that a drone attack by the U.S. would be lawful if “the host nation is unable or unwilling to suppress the threat posed by the individual targeted” without requiring further links of attribution). Such a drone attack would be justified under preventive self-defense in the absence of actual or imminent armed attack. It would be sufficient that the target (the “operational leader”) “poses an imminent threat of violent attack against the United States.” *Id.* at 3. Moreover, the definition of an “imminent” threat in the White Paper “does not require the United States to have clear evidence that a specific attack . . . will take place in the immediate future.” *Id.* at 7.

bution there is no right to use force in self-defense.³⁴ Moreover, they argue that targeted killings are extrajudicial killings in the absence of an inter-state armed conflict. Since there is no armed conflict between the sovereigns involved—the United States and Pakistan or Yemen—the United States cannot claim the privilege to kill afforded by the laws of war and can therefore only follow the law enforcement paradigm.

Considering the harboring, cohabitant, and innocent states, one observes large disagreement between the international lawyers who follow an expansive view and those who take the opposing restrictive view of the law of war. An expansive interpretation carves out greater legal space for states' unilateral resort to force by combining a narrow reading of the prohibition against the use of force and a broad reading of self-defense.³⁵ A minority within this group believes that the prohibition on use of force concerns only traditional interstate warfare, leaving force against non-state actors untouched by the prohibition. Most lawyers following the expansive view do affirm the validity of the prohibition, but also contend that the doctrine of self-defense includes threats and attacks by non-state actors and conclude that preemptive or preventive military action against non-state actors is legal.³⁶ I will argue that, among other problems, the expansive approach does not pay enough respect to the sovereignty and interests of the intervened state.

34. In addition to Ian Brownlie and Philip Alston, one may think of lawyers like Mary Ellen O'Connell in the United States, Michael Bothe in Germany, or Gilbert Guillaume in France. These authors rely mostly on ICJ decisions, from the *Nicaragua* case to the *Israeli Wall* and the *Congo* cases. See, e.g., Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 EUR. J. INT'L L. 227, 230 (2003); Gilbert Guillaume, *Terrorisme et Droit International*, in ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 287, 405–06 (1989); O'Connell, *Unlawful Killing*, *supra* note 3.

35. One might also see the expansive view as articulating a more policy-oriented interpretation; that is, an interpretation relying less on the text of Articles 2(4) and 51 than on what are believed to be the underlying principles enshrined in those articles. From this point of view, the restrictive interpretation is also a more literal interpretation of the relevant legal texts.

36. See, e.g., Anderson, *supra* note 32, at 389–90; Glennon, *The Fog of Law*, *supra* note 32, at 558; Sean D. Murphy, *The International Legality of U.S. Military Cross-Border Operations from Afghanistan into Pakistan*, 85 INT'L L. STUD. 109, 127 (2009).

A restrictive approach reduces the space for states' lawful use of force by combining a wide interpretation of the prohibition with a narrow interpretation of self-defense. This interpretation includes force short of war, i.e., force not immediately infringing the political independence and territorial integrity of a state, within the prohibition on use of force. A narrow interpretation of self-defense excludes a non-state actor's violence from the type of actions constituting an armed attack and concludes that attacks by non-state actors do not trigger the right to use force in self-defense. A narrow reading also excludes both preemptive and preventive action as well as ex post military measures from self-defense.³⁷ I will criticize this approach, among other reasons, because it leaves too little room for states to act against hostile non-state actors, construing an over-inclusive prohibition on use of force that is difficult to uphold in practice without the risk of utopianism.

Adherents of either interpretation strive to adapt traditional law of war rules and doctrines to answer the problem of transnational non-state violence. They do so by positioning their arguments in relation to the central questions of the law of war: the legality of the resort to force, the legality of the conduct of hostilities, and the relationship between these two regimes. Looking at these questions from a semi-peripheral perspective is relevant, since as mentioned before, the cohabitant state is presumably a semi-peripheral state, most likely the type of state target of the interventions studied in this article. Let us start with the question about the legality under the rules governing the resort to armed force between states, under *jus ad bellum*.

III. CONFLICT OVER *JUS AD BELLUM* LEGALITY: A TRIPARTITE FRAMEWORK

Traditional *jus ad bellum* is quite straightforward. Under U.N. Charter Art. 2(4), the use of force by one state against another state is prohibited.³⁸ This prohibition is subject to two

37. See, e.g., O'Connell, *Unlawful Killing*, *supra* note 3, at 13–21 (discussing the limits of *jus ad bello* with respect to drone strikes in Pakistan); WILLIAMSON, *supra* note 28, at 117–18 (describing the “restrictive interpretation” of Article 51).

38. U.N. Charter art. 2, ¶ 4 (“All members shall refrain in their international relations from the threat or use of force against the territorial integ-

exceptions. First, a state may use force if authorized to do so by the United Nations Security Council under Chapter VII of the U.N. Charter. Second, Article 51 of the Charter authorizes states to use force unilaterally in self-defense.³⁹ The rather conventional conflict between the international community's interest in protecting peace, embodied in the prohibition, and the sovereign states' interest in protecting their existence with military force, embodied in self-defense, has acquired a complexity unforeseen at the time of the drafting of the U.N. Charter. Today, major threats to peace and security stem from non-state actors.

As *jus ad bellum* governs the justifications to resort to military force between *states*, a focus on non-state actors raises numerous interrelated questions. How can an interstate legal regime adapt to confront threats or attacks by non-state actors? Does the right to act in self-defense authorize the use of force when the attacker is a non-state actor? Do states lose the right to sovereign independence when harboring a hostile non-state actor, thus legalizing an armed intervention? What if the state has not harbored, but failed to control or defeat a hostile non-state actor?

International lawyers who sustain an expansive view balance the law of war's conflicting considerations by giving more weight to national security of the state subject to an attack by a non-state actor. They naturally regard self-defense as a lawful response in the face of potential attacks by terrorists. Lawyers with a restrictive view balance the same conflicting considerations, but give greater importance to international peace, thus arriving at the opposite conclusion. They consider transnational military action by the state unlawful.⁴⁰

ity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

39. U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”).

40. Authors following the expansive view believe that transnational terrorism should be dealt with under the war paradigm, that is, by the rules

In contrast to both views, I adopt an intermediate position. In relation to a harboring state, I consider that the expansive view strikes a reasonable balance. In the face of an imminent attack and with a link of attribution, I will claim that this military intervention is lawful. In relation to the innocent state, I contend that the restrictive view strikes a reasonable balance. Therefore, in the absence of an imminent attack and without a link of attribution, I will argue that this use of armed force is unlawful. When there is an imminent attack by a non-state actor located in the territory of a cohabitant state, although without a link of attribution, I argue that *jus ad bellum* does not provide a conclusive answer.

A. *Force Against a Non-State Actor in a Harboring State*

U.N. Charter articles 2(4) and 51, which contain, respectively, the prohibition on use of force and the right to use force in self-defense, offer a basic rule-exception structure to determine the legality of armed conflict between states.⁴¹ Does

governing the use of military force. See, e.g., Anderson, *supra* note 32, at 351 (arguing that terrorism should be addressed under the paradigms of law enforcement, intelligence, and armed conflict); J. Nicholas Kendall, *Israeli Counter-Terrorism: "Targeted Killings" Under International Law*, 80 N.C. L. REV. 1069, 1085–86 (2002) (arguing that terrorist attacks against Israeli civilians constitute "armed attacks" that justify self-defense); Jane E. Stromseth, *Law and Force after Iraq: A Transitional Moment*, 97 AM. J. INT'L L. 628, 634–35 (2003) (arguing that the traditional view of self-defense needs to be updated to address and encompass terrorism); Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328, 330 (2002) (arguing that al-Qa'ida has mounted a "coherent campaign" against the United States that fits the war paradigm). Authors following the restrictive view believe that the law enforcement paradigm offers the best response. See, e.g., Alston, *supra* note 15, at 41–42 (noting a general lack of legal support for applying the principle of self-defense to attacks by non-state actors); NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* 243–44, 427 (2008) (arguing that the paradigm of hostilities may only be resorted to as a method in the conduct of hostilities, that is, only between those defined by IHL as parties to an armed conflict; in consequence, "operations of targeted killing directed against terrorists, hostage takers and other criminals are . . . governed by the paradigm of law enforcement . . ."); O'Connell, *Unlawful Killing*, *supra* note 3, at 14 ("An armed response to a terrorist attack will almost never meet [the] parameters for the lawful exercise of self-defense. Terrorist attacks are generally treated as criminal acts because they have all the hallmarks of crimes . . .").

41. I am leaving aside two additional exceptions to the prohibition to use of force: the collective security regime under Chapter VII of the U.N.

the prohibition include the use of force against a hostile non-state actor in a harboring state? If so, what conditions would justify the use of force as self-defense? Articles 2(4) and 51 are insufficiently specific to answer all questions emerging in a concrete event, especially when warfare involves a non-state actor. International lawyers thus supplement these two rules with analysis of state practice and other international legal documents, discussions of academic writings, and interpretations of the decisions of international courts. Yet, none of these sources offer a univocal or generally accepted interpretation. In fact, each of these supplementary sources corroborates the existence of a general split between an expansive and a restrictive interpretation of both rule and exception.⁴²

1. *Does the Prohibition on Use of Force Extend to an Intervention in a Harboring State?*

A small minority of the authors who articulate an expansive interpretation of the laws of war has claimed that the international rules governing the use of armed force, including the prohibition in Article 2(4), no longer bind states.⁴³ Most

Charter and the highly controversial doctrine of humanitarian intervention. In the first case, with a Security Council authorization to use force against a non-state actor, the legality of the use of force would be generally beyond doubt (with the theoretical exception of a challenge to a Security Council decision based on the abuse of right doctrine). However, the temporal scope of the authorization as well as the inclusion of military action against non-state actors in an authorization to use force in the territory of a state might be contested. In such a case, the debate would most likely revolve around an expansive and restrictive interpretation of the authorization. On the other hand, I will not examine the doctrine of humanitarian intervention because it generally does not include the type of force I am discussing here.

42. State practice can go both ways. In general, states that have the military capacity to deploy force are more prone to frame their action under the expansive interpretation. Conversely, states with weaker militaries or with histories of defeat in war follow a practice consistent with the restrictive interpretation. As Gray has shown, state practice does not settle the question. See GRAY, *supra* note 28, at 11 (noting that because the vast majority of state self-defense since WWII has been against an armed attack by another state, little relevant state practice exists).

43. Glennon argues that states do not regard international rules governing the use of force as obligatory. Although he does not produce empirical data, Glennon claims that these rules, which are "unrealistic in [their] aspirations for state conduct," are ignored in favor of a *de facto* system of actual state practice. Glennon, *The Fog of Law*, *supra* note 32, at 540.

international lawyers, even those who support an expansive view, have not denied the validity of the prohibition in Article 2(4). They have rather pursued narrow readings of Article 2(4), which construe a relative rather than an absolute prohibition on use of force. Accordingly, the U.N. Charter would not proscribe the threat and use of force per se, but only the type of force described in Article 2(4), which is force used “against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.”⁴⁴ Article 2(4) would consequently bestow on states a privilege to resort to force short of war, that is, armed force without the purpose of seizing the territory of another state, but rather directed against a regime violating *jus cogens* norms, such as the right to democratic self-determination. Force short of war would therefore not infringe upon the prohibition on use of force under the expansive view.⁴⁵

Force waged against a non-state actor in a harboring state would not be subsumed under the prohibition as interpreted by the expansive view. According to this view’s narrow reading of Article 2(4), this type of intervention would be consistent with the purposes of the United Nations because it does not aim at overthrowing the government or taking control of the territory of another state. However, only a very small minority of international lawyers has favored such an interpretation of

44. Dinstein, for instance, maintains that the U.N. Charter only proscribes force in the international relations of states, leaving “[i]ntra-states clashes . . . out of reach of the Charter’s provision.” YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 85 (4th ed. 2005).

45. See W. Michael Reisman, Editorial Comment, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT’L L. 642, 642–45 (1984) (arguing that the legality of unilateral use of coercion should be assessed by reference to the core concern of Article 2(4): “to maintain the political independence of territorial communities”). Moreover, Reisman supports an interpretation of the prohibition within the U.N. Charter as a whole. *Id.* at 642. The validity of the prohibition would thus depend on the effective operation of the collective security system instituted in Chapter VII of the Charter. Article 2(4) would not proscribe a state’s resort to unilateral force that was consonant with the purposes of the United Nations, when the Security Council has failed to adopt adequate measures to confront an unlawful threat or breach of international peace and security. In consequence, when coercion enhances world order, that is, when the use of force protects fundamental principles enshrined in the Charter, including self-determination, a state’s unilateral resort to force would be lawful.

the prohibition on use of force.⁴⁶ During the Cold War, American scholars backed a narrow reading of the prohibition as a way to circumvent the Security Council inaction that frequently resulted from the veto of a permanent member.⁴⁷ More recently, a narrow reading of the prohibition has returned to contemporary debate that is advanced in support of the legality of humanitarian intervention.⁴⁸ Advocates for this interpretation continue to be in the minority as most international lawyers find the textual as well as contextual support for such a narrow reading of Article 2(4) to be rather thin and the implications dangerous.

According to the lawyers defending a restrictive view of the laws of war, Article 2(4) not only restated preexisting customary law by clarifying the scope and meaning of the prohibition, but also strengthened the prohibition by giving it a wide scope and a comprehensive character. These authors highlight the comprehensive character of the prohibition by situating Article 2(4) within the broader structure of the U.N. Charter. The prohibition does not linger as an isolated legalistic restraint, but operates in tandem with the obligation to resolve controversies through peaceful means, according to Article 2(3) of the Charter, and with the collective security system established in Chapter VII of the Charter, which empowers the Security Council not only to decide if an aggression has occurred, but also to adopt enforcement measures to ensure peace and security.

In particular, the drafters of Article 2(4) defined the prohibition adopting a comprehensive language to include both the "threat" and "use" of force. Moreover, proscribing the threat and use of "force" rather than "war" has been understood to give Article 2(4) a more factual gloss which widens its scope to include all forms of military action.⁴⁹ The inter-

46. Most authors find this interpretation to lack any textual or contextual support. See *infra* note 50 and accompanying text.

47. See e.g., ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 56–72, 86–97 (2d ed. 1995).

48. For a radical exponent of this idea, see generally FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (3d ed. 2005) (arguing that states are morally permitted to use force in support of humanitarian intervention).

49. Oscar Schachter, *The Right of States To Use Armed Force*, 82 MICH. L. REV. 1620, 1624 (1984) [hereinafter Schachter, *The Right of States*].

national lawyers who defend a restrictive view have strongly criticized readings of the phrase “against the territorial integrity and political independence of any state, or in any other manner inconsistent with the purposes of the United Nations” as qualifying the type of force proscribed by Article 2(4). They have examined the history of the drafting of Article 2(4) and the *travaux préparatoires* to show that the inclusion, in the second part of the article, of this phrase was not intended to be restrictive. On the contrary, the phrase was included to give greater assurances to smaller states that their sovereignty would be protected.⁵⁰ As Ian Brownlie has argued, if there is ambiguity in the language of Article 2(4), recourse to the *travaux préparatoires* unequivocally reveals that the phrase “cannot be interpreted as having a qualifying effect.”⁵¹

In light of these arguments in favor of a wide and strong interpretation of the prohibition, the narrow reading of Article 2(4) has only gathered modest support from scholars and rarely been invoked by states to justify a resort to force.⁵² Con-

50. SIMON CHESTERMAN, *JUST WAR OR JUST PEACE?: HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* 50 (2001) (noting that this view, expressed by Brownlie, is now “the dominant view”). According to Chesterman, the *travaux préparatoires* also support the conclusion that the wording of the article was included as a reassurance to smaller states that sought to make the prohibition stronger rather than restricting its scope. *Id.* at 49. Manfred Lachs, among others, criticizes the narrow reading of the prohibition because although the expression “in any other manner inconsistent with the Purposes of the United Nations” creates a “residual catch-all provision,” it renders the operation of the Article more specific and restrictive, since it prohibits “the substitution of a forcible solution for any process decided upon by the United Nations, in pursuance of its purposes, for the settlement of a particular issue.” Lachs, *supra* note 24, at 161–62. Even some followers of the expansive view reject the attempts to limit the application of Article 2(4). See, e.g., DINSTEIN, *supra* note 44, at 88–91.

51. IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 267 (1963).

52. GRAY, *supra* note 28, at 31–32. Gray also accounts for exceptional cases in which states have used armed force, showing that the ICJ and other states have regarded these instances as violations of Article 2(4). *Id.* at 30–37 (discussing exceptions for unilateral humanitarian intervention). For Schachter it is obvious that the reason the doctrine of lawful use of force for “benign” ends gathers little support from scholars and governments is that it deprives Article 2(4) of its intended effect. Schachter, *The Right of States*, *supra* note 49, at 1626. Moreover, Schachter notes that in the *Corfu Channel* case the International Court of Justice explicitly rejected such an interpretation. *Id.*

sidering the centrality of the prohibition on use of force within the larger international legal structure, its customary law status, and the comprehensive language adopted by Article 2(4), followers of a restrictive view of the laws of war affirm that the prohibition on use of force constitutes a general rule and that self-defense should be treated as an exception. As such, the rule should have a wide scope of application and the exception should be narrowly interpreted.⁵³ Consequently, even though an intervention directed not against a state, but exclusively against a hostile non-state actor would be force short of war, according to the interpretation held by a majority of international lawyers and states, this intervention would violate Article 2(4). For an intervention in a harboring state to be legal, in conclusion, the intervening state will have to look for a justification under self-defense.⁵⁴

2. *Self-Defense Against a Non-State Actor in a Harboring State*

Article 51 of the U.N. Charter recognizes states' inherent right to use force in self-defense. There is ample consensus that in addition to the text of Article 51, a number of other requirements determine the scope of the right of self-defense: (1) the attack should be serious and, at the very least, imminent, and (2) the response necessary and proportionate.⁵⁵

53. BROWNIE, *supra* note 51, at 273 (arguing that given the absolute nature of the Article 2(4) prohibition, any right of self-defense is "exceptional").

54. Schachter suggests that states have turned to self-defense to justify their decision to resort to force. Schachter, *The Right of States*, *supra* note 49, at 1633. As Gray has pointed out, most of the states that resort to force invoke the right to self-defense. GRAY, *supra* note 28, at 122–23. In most cases there is little academic discussion on doctrinal aspects because there is little controversy about the interpretation of the applicable law of self-defense. Discussions therefore are circumscribed to determining relevant facts, such as whether there has been an armed attack, which states attacked, and which state was the victim. *Id.* at 11. According to Gray, the United States and Israel are exceptional in their willingness to tinker with the doctrine of self-defense, invoking the protection of nationals abroad, preemptive self-defense, and self-defense against terrorists. *Id.* at 195–98.

55. The customary rule requiring proportionality and necessity has been repeatedly affirmed by the I.C.J. See *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, ¶ 74 (Nov. 6); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 41 (July 8) [hereinafter *Nuclear Weapons*]; *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 194 (June 27) [hereinafter *Nicaragua*].

Each of these requirements has been interpreted narrowly or broadly. When a state resorts to force under self-defense in response to an attack by a non-state actor, however, in addition to the general requirements of the self-defense doctrine, a particular legal argument is needed to maintain that an attack by a non-state actor is serious enough to trigger the right of self-defense. This additional argument becomes particularly relevant to answering the question of the legality of the victim state's response. An attack by a non-state actor does not fit the clear-cut premise underlying traditional self-defense: an attack carried out by regular military groups of one state crossing into the territory of another state. A narrow definition of attack restricts self-defense to this paradigmatic situation and excludes a right to respond to attacks by irregular forces. A broad definition of armed attack justifies the use of force in self-defense beyond the former situation and justifies force against a non-state actor.

International lawyers who articulate a restrictive view limit the scope of application of the right to use force in self-defense by defining an armed attack narrowly. Ian Brownlie, for instance, has argued that Article 51 "strongly suggests a trespass," so that interventions not against "offensive operations by the forces of a state . . . would . . . seem to fall outside the concept of 'armed attack.'"⁵⁶ Attacks launched by non-state actors are therefore considered insufficiently serious to amount to an armed attack triggering the right to self-defense.⁵⁷

The International Court of Justice (ICJ) in the *Nicaragua* case and subsequent state practice, at least up until the 2000s, has established that the expression "armed attack" in Article 51 imposes a high threshold of gravity.⁵⁸ In *Nicaragua*, the ICJ

56. BROWNIE, *supra* note 51, at 278–79.

57. O'Connell, *Unlawful Killing*, *supra* note 3, at 14 ("An armed response to a terrorist attack will almost never meet [the] parameters for the lawful exercise of self-defense. Terrorist attacks are generally treated as criminal acts because they have the hallmarks of crimes, not armed attacks that can give rise to the right of self-defense.").

58. Christian Tams shows that between the 1970s and the 2000s the right to use force in self-defense against non-state actors experienced a progressive shift from a more restrictive to a more expansive interpretation. Claims made by scholars during the 1970s and 1980s regarding a right to respond in self-defense to attacks carried out by non-state actors were rejected by the

distinguished "the most grave forms of the use of force (those constituting an armed attack) from other less grave forms" and concluded that self-defense is permissible only as a response to the former.⁵⁹ The Court, however, recognized that not only action "by regular armed forces across an international border" constitutes a serious attack, but also "'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to' . . . an actual armed attack conducted by regular forces."⁶⁰

Although recognizing that a non-state actor can carry out an armed attack, the ICJ's high threshold of gravity, which requires the action by irregulars to amount to an attack by regular forces, was widely criticized, most forcefully by American scholars. The United States claimed that it had used force against Nicaragua in purportedly exercising the right to collective self-defense on behalf of El Salvador. The ICJ held that Nicaragua's assistance to rebels by providing weapons and logistic support did not amount to an armed attack.⁶¹ Thomas Franck, for example, criticizes the ICJ's narrow definition of armed attack because it restricts lawful forcible countermeasures by the victimized state to its own territory, thus granting immunity to the state from which the insurgents were directed.⁶²

international community, including Israel's 1985 raid on the PLO Headquarters in Tunisia, the United States' 1986 attack in Libya and South Africa's incursions into neighboring states during the 1980s. Christian J. Tams, *The Use of Force Against Terrorists*, 20 EUR. J. INT'L L. 359, 367 (2009). However, "the international community today is much less likely to deny, as a matter of principle, that states can invoke self-defence against terrorist attacks not imputable to another state." *Id.* at 381.

59. Nicaragua, *supra* note 55, ¶¶ 191, 195.

60. *Id.* ¶ 195. See also BROWNLIE, *supra* note 53, at 278–79 (agreeing that "a co-ordinated and general campaign by powerful bands of irregulars" could constitute an armed attack); accord GRAY, *supra* note 28, at 75–78.

61. See Nicaragua, *supra* note 53, ¶ 195 (holding that "[s]uch assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States," but may not be regarded as an armed attack).

62. Thomas M. Franck, *Some Observations on the ICJ's Procedural and Substantive Innovations*, 81 AM. J. INT'L L. 116, 120–21 (1987) [hereinafter Franck, *Observations*] ("The consequence of this substantive rule appears to be that fire may be fought with water, but not with fire Given the nature of proliferating proxy wars and international terrorist networks, it is incon-

In the *Nicaragua* case the ICJ recognized a right to invoke self-defense in the face of an attack by a non-state actor, but limited it with the imposition of a very high threshold of gravity. An even more restrictive interpretation emerged after the ICJ issued the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. The ICJ circumscribed the right of self-defense to interstate violence, by reading Article 51 as requiring an “armed attack by one State against another State.”⁶³ This opinion by the ICJ is part of a recent turn in the debate on self-defense, in which not only the ICJ but also a considerable number of scholars have supported more restrictive readings of self-defense and the law of war in general. This appears likely to have been a reaction to the expansive legal justifications given by the United States prior to the use of force in Afghanistan and Iraq.⁶⁴

Against the backdrop of this restrictive trend, legal scholars who advocate the expansive view of the law of war have defended a broad definition of armed attack that includes attacks by non-state actors. Some invoke the language of Article 51 to support a definition of armed attack that includes ac-

ceivable that the United States will agree to go along with such a grant of immunity.”).

63. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ¶ 139, 2004 I.C.J. 136 (July 9) [hereinafter *Israeli Wall Case*]. The Court, reducing the scope of self-defense to interstate attacks, notes that Israel has not claimed that “attacks against it are imputable to a foreign State” and concludes that Article 51 (providing the right of self-defense) has no relevance in the case. *Id.*

64. For example, Nils Melzer, a legal adviser to the ICRC, has stated: “The risks and arbitrariness inherent in the doctrine of anticipatory self-defence received incontrovertible proof in the 2003 invasion of Iraq. Invoking a purported right of anticipatory self-defence, the United States and the United Kingdom based their invasion entirely on unsubstantiated, and widely doubted, claims that Iraq possessed and produced WMD.” MELZER, *supra* note 40, at 53. The general trend toward a restrictive interpretation can be seen not only in legal scholarship, but also in the jurisprudence of the ICJ. See *e.g.*, *Oil Platforms*, *supra* note 55, ¶ 64 (requiring a showing of intent on the part of the attacker to trigger the right to self-defense by the victim). It can also be seen in the humanities, where the reaction by the United States against the threat of terrorism is seen as a sort of autoimmune disorder of the body politic, a reaction more dangerous than the terrorist threat itself. See *e.g.*, W.J.T. Mitchell, *Picturing Terror: Derrida’s Autoimmunity*, 27 CARDOZO L. REV. 913 (2005).

tions by irregular forces. Given that Article 51 mentions only states as potential targets of an armed attack while leaving the nature of the attacker unspecified, there is no textual basis to exclude attacks by non-state actors as attacks that could be serious enough to meet the threshold required to trigger the right to self-defense.⁶⁵ Others have specifically tackled the problem of fitting less intensive cross-border incursions by irregular forces under the definition of armed attack by considering an accumulation of events to constitute a pattern that, in its totality, is equivalent to a conventional armed attack and meets the threshold of gravity required to act in self-defense.⁶⁶ While efforts by scholars to broaden the definition of armed attack had been mostly rejected by the international community until recently, today the reception of these interpretations has changed. In light of the multiplication of cases in which a state uses extraterritorial force against a non-state actor, not only have states been much more willing to justify their action through invocation of self-defense, but the international community has also generally accepted these appeals to self-defense. In this scenario, as Christian Tams has pointed out, self-defense in response to an attack from a non-state actor is no longer challenged.⁶⁷ Instead, the discussion has shifted

65. Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT'L L. 62, 64 (2005); see also Tams, *supra* note 58, at 381 ("[T]he international community today is much less likely to deny, as a matter of principle, that states can invoke self-defence against terrorist attacks not imputable to another state.").

66. See DINSTEIN, *supra* note 44, at 202, 230–31 ("A persuasive argument can be made that, should a distinctive pattern of behaviour emerge, a series of pin-prick assaults might be weighed in its totality and count as an armed attack."); see also Norman M. Feder, *Reading the U.N. Charter Connotatively: Toward a New Definition of Armed Attack*, 19 N.Y.U. J. INT'L L. & POL. 395, 429–30 (1987) (noting that the definition of "armed attack" has expanded to include "a sustained series of relatively minor attacks").

67. See Tams, *supra* note 58, at 378–81 (discussing a number of cases, including the use of force by the United States in response to the attacks on its embassies in Kenya and Tanzania in 1998 and the response of the United States and the international community after 9/11); see also THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 64 (2002) [hereinafter FRANCK, *RECOURSE TO FORCE*] (suggesting that invocations of self-defense against non-state attacks "are no longer exceptional claims"). In particular, Franck maintains that the U.N. Security Council Resolution 1368, passed in response to the 9/11 attacks, "confirms the rights of victim states to treat terrorism as an armed attack . . ." *Id.* at 54.

towards defining the scope of self-defense, particularly the issues of proportionality and necessity.⁶⁸

Consequently, reading Article 51 as limiting self-defense to attacks by states seems unwarranted.⁶⁹ First, the text does not indicate that only attacks by state actors can be serious enough to meet the threshold of gravity. Second, the Court in *Nicaragua* accepted the possibility that an attack by irregular forces may trigger the right of self-defense, a view that subsequent state practice has confirmed. Third, the purpose of Article 51 is to excuse the use of armed force when the security of the state is at stake as a result of an external attack, regardless of the nature of the actor. In sum, given that what triggers the right to resort to force is an attack rather than the nature of the attacker, an attack of sufficient gravity by a non-state actor triggers the right to react in self-defense, rendering an intervention carried out in the territory of a harboring state lawful.

What is the threshold of gravity that an attack by a non-state actor has to meet? Most extraterritorial attacks by non-state actors, of lesser scope and intensity than an attack conducted by a regular force, would not meet the threshold of gravity required by the Court in *Nicaragua* and thus would not trigger the right of self-defense.⁷⁰ However, if the question of the possibility of self-defense responding to an attack by a non-state actor has been settled, there is no need to pose the question of gravity in specific relation to non-state actors because the legality of self-defense in front of all types of attacks depends on the proportionality and necessity of the response relative to the attack. The seriousness of the attack should not be assessed in abstract; it is the nature of the response in self-defense that has to be seen in light of the seriousness of the attack. This evaluative method could lower the yardstick estab-

68. Tams, *supra* note 58, at 381 (“[The] debate [regarding self-defense] has shifted towards issues of necessity and proportionality . . .”).

69. A group of British academics and practitioners, for instance, have reached this conclusion in a study undertaken by Chatham House. See Elizabeth Wilmshurst, *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 INT’L & COMP. L.Q. 963, 969–70 (2008).

70. See *Nicaragua*, *supra* note 55, ¶ 211 (indicating that in the absence of an armed attack there is no right to self-defense).

lished in *Nicaragua* and resolve the immunity gap pointed out by Franck and others.⁷¹

If the requirements of self-defense are fulfilled, it is legal for the victim state to resort to force in a harboring state. Two of the requirements are always met because of the nature of this scenario, namely, the link of attribution between the harboring state and the non-state actor and the immediacy of the response to the attack. In this hypothetical the state has effective control over its territory and people, including the hostile non-state actor. Moreover, the harboring state objects to the intervention, having either provided logistic support or assumed ex post the hostile acts of the non-state actor by directly adopting their actions or by acquiescence. Thus, in this hypothetical the link of attribution is established so that the intervention in self-defense against the hostile non-state actor is simultaneously directed against the state. This link distinguishes the harboring state scenario from an intervention directed solely against the non-state actor in the territory of another cohabitant or innocent state.⁷² As for the problem of immediacy, it presumably does not pose a problem in the case of the harboring state because interventions will generally follow an attack rather than be preventive.⁷³

71. See Franck, *Observations*, *supra* note 62, at 120–21 (arguing that a restrictive definition of self-defense will create immunity for the perpetrators of low-level transnational violence); see also Gilbert Guillaume, *supra* note 34, at 406.

72. However, Kimberley Trapp has shown that the specific basis for attribution is far from being clear. In the case of the military operations launched in response to the 9/11 attacks, some established a direct attribution of the terrorist attacks to the Taliban based on their close relation to al-Qa'ida. Others based attribution on acquiescence. Moreover, adoption of al-Qa'ida actions as a basis of ex post attribution is factually weak. KIMBERLEY TRAPP, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM: PROBLEMS AND PROSPECTS 53–54 (2011) [hereinafter TRAPP, STATE RESPONSIBILITY].

73. Interventions will generally follow an attack because attributing responsibility to the territorial state presupposes a non-state actor that has become a hostile actor after launching an attack. If the problem of immediacy comes up, as argued below in relation to the innocent state, preventive action will be unlawful. The problem of immediacy will be discussed in relation to innocent states, because in this case force will be mostly preventive, since the state has done all that it can be asked to do (investigate and prosecute). In such a situation, justifications for intervention will always refer to future attacks.

B. *Force Against a Non-State Actor in an Innocent State*

When an attack by the non-state actor cannot be attributed to the state where the non-state actor is located, extraterritorial armed force waged against a hostile non-state actor will be force waged in an innocent state. The example offered at the beginning of the article, in which the United States uses force in Germany against al-Qa'ida, illustrates this scenario. The attack cannot be attributed to an innocent state, for exercising effective control over its territory and people, the state has neither hosted nor given financial or logistic support to the non-state actor. Before an attack, an innocent state would not have had information about the attack nor would the state endorse the hostile action *ex post*. Before the attack, the innocent state would also have met the due diligence standard required by international law in order to prevent the infliction of transnational harm on other states. After the attack, an innocent state would have fulfilled the obligations that the international regime regulating transnational terrorism imposes on states. That is, the *innocent* state has done as much as international law asks a state to do in the fight against a hostile non-state actor within its borders. It would have cooperated with the victim state and, wherever possible, investigated, prosecuted, or extradited members of the hostile non-state actor.⁷⁴

When force is launched in the territory of a state that has not harbored the hostile non-state actor, two of the general requirements of self-defense acquire special importance. First, a particular legal argument is needed either to link the action by the non-state actor to the territorial state where force in self-defense will be waged, or to affirm that no such link is legally required. The legality of the use of force in a state not internationally responsible for the hostile acts of the non-state actor depends on the legality of self-defense without a link of attribution. Second, for an intervention to be lawful under self-defense it must also respond to an actual or imminent armed attack or, if the doctrine of preventive self-defense is accepted, prevent a future attack. This doctrine is particularly relevant, because, as explained below, where the state has met the due diligence standard and indications of an actual attack

74. For a discussion of the due diligence standard, see *infra* note 147 and accompanying text.

are absent, an intervention in an innocent state will most likely adopt the form of preventive action.

1. *Self-Defense with Attribution of Responsibility, Without Responsibility, and the "Unable or Unwilling" Test*

When irregular forces engage in cross-border military action, the victim state may follow the most immediate and extreme course of action. It may deploy armed force against attackers in the territory of another state, where the non-state actor has its headquarters, has sought refuge, or even wherever its members are located. Traditionally, to justify the legality of this action as an exercise of the right to self-defense, the state has to show not only that it has been victim of a military action amounting to an armed attack, but also some degree of involvement between the non-state actor launching the attack and the state in whose jurisdiction the non-state actor sought refuge or is based. States, international tribunals, and scholars generally demand some connection between the hostile non-state actor and the territorial state, but their opinions vary as to the requisite strength of that connection.⁷⁵

a. *The Restrictive View: A High Threshold of State Responsibility*

The restrictive camp requires a very high level of involvement by the territorial state.⁷⁶ Most international lawyers who adopt this position apply the rules governing the international responsibility of states to establish a link of attribution between the territorial state and the hostile non-state actor and thereby determine the lawfulness of a claim of self-defense.⁷⁷ Whereas

75. See, e.g., GRAY, *supra* note 28, at 129 (defending a restrictive position and noting that today the controversy centers on the degree of involvement required to make actions attributable to the state, thus implying that most states accept the view that actions by irregulars can constitute an armed attack). On the other hand, Dinstein, supporting an expansive position, affirms the opposite view. See DINSTEIN, *supra* note 44, at 206 ("Irrespective of questions of State responsibility, the principal issue is whether acts of violence . . . may amount to an armed attack . . .").

76. Brownlie, for example, requires "proven complicity of the government of a state from which [irregulars] operate." BROWNLIE, *supra* note 53, at 279.

77. For example, O'Connell confidently maintains that "[f]orce can be used in self-defense only against a state legally responsible for the armed attack." Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense* 7 (ASIL Task Force Paper, Aug. 2002) [hereinafter O'Connell, *Preemptive Self-Defense*].

a harboring state becomes responsible *ex post* when adopting the hostile acts of the non-state actor,⁷⁸ for the innocent state to be responsible, the non-state actor must be “in fact acting on the instructions of, or under the direction or control of, [the] State.”⁷⁹

Given that the hostile non-state actors under consideration here are powerful and relatively autonomous and therefore unlikely to act “on the instruction of” a state, the discussion will hinge upon determination of the degree of “direction or control” required for establishing responsibility. It is well known that in the *Nicaragua* Case the ICJ defined the standard as that of “effective control.”⁸⁰ Later the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber, in the *Tadić* Case, lowered that standard, ruling that “overall control” is sufficient for the purposes of attribution.⁸¹ After *Tadić*, the ICJ, however, reaffirmed its own “effective control” test in the *Bosnia Genocide* Case.⁸²

However, as Kimberly Trapp has argued, the ICJ in *Nicaragua* and *Bosnia Genocide* did not have the problem of self-defense against non-state actors in mind when it formulated the “effective control” standard of attribution. Rather, the ICJ focused on other reasons that were absent in the case considered by the ICTY Appeals Chamber.⁸³ In *Nicaragua* and *Bosnia*

78. The state’s subsequent responsibility in such a situation was established by the International Court of Justice. See *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, ¶ 74 (May 24) (finding Iran responsible for the acts of militias because it had endorsed their actions).

79. Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 8, in Rep. of the Int’l Law Comm’n, 53rd sess, Apr. 23–June 1, July 2–Aug. 10, 2011, U.N. Doc. A/56/10 (2001) [hereinafter *Articles on State Responsibility*].

80. *Nicaragua*, *supra* note 55, ¶ 115.

81. See *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 137 (Int’l Crim. Trib. for the Former Yugoslavia, July 15, 1999) (holding that the requisite state control of armed groups can be “of an overall character”).

82. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, 2007 I.C.J. 43, ¶ 406 (Feb. 26) [hereinafter *Bosnia Genocide*] (rejecting overall control because it “has the major drawback of broadening the scope of State responsibility well beyond . . .” the three standards set out by the International Law Commission in Article 8).

83. TRAPP, STATE RESPONSIBILITY, *supra* note 72, at 43–44. Specifically, Trapp has argued that in both the *Nicaragua* and *Congo* cases, the ICJ re-

Genocide, the ICJ looked at the standard for attribution of responsibility for the actions of a non-state actor that are respectively violations of IHL and genocide as opposed to those inherent in a military campaign. The question was to determine responsibility not merely for the military activities of the non-state actor, but rather specifically for their breaches of IHL. A higher standard was applied to ensure that the state is held responsible for violations over which it exercised control. In contrast, the ICTY Appeals Chamber formulated a lower standard of attribution when deciding whether the Bosnian war was a conflict of international character and thus whether the body of IHL applicable.⁸⁴ Trapp argues that in a case in which attribution would be determined in relation to terrorism, it would be difficult to distinguish responsibility for material military support of a terrorist organization from the terrorist offenses themselves because "there is no second layer of activity—the breach of international law is inherent in terrorist operations."⁸⁵ Were the ICJ to confront this question, Trapp also notes, it would probably, in light of the *Bosnia Genocide* decision, reaffirm "effective control," rather than lower the threshold, regardless of the fact that most forms of involvement by the state, such as providing logistic support or sanctuary, would not satisfy the stricter standard, since that standard requires control of the military operations themselves.⁸⁶

quired attribution when considering self-defense that involves the use of force against the host state, not the use of force against non-state actors within the host state. Since the latter situation was not a fact before the Court, it was not considered in the decisions. See Kimberly N. Trapp, *The Use of Force against Terrorists: A Reply to Christian J. Tams*, 20 EUR. J. INT'L L. 1049, 1052 (2009) [hereinafter Trapp, *The Use of Force*]. But when the ICJ did consider whether an armed attack by a non-state actor was attributable to a state in the context of self-defense, it used a standard higher than effective control. The Court invoked article 3 of General Assembly Resolution 3314 (XXIX), requiring that attacks be "sent by . . . or on behalf of" a state. *Armed Activities on the Territory of the Congo (D.R.C. v. Uganda)*, 2005 I.C.J. 168, ¶ 146 (Dec. 19) [hereinafter *Armed Activities*].

84. TRAPP, STATE RESPONSIBILITY, *supra* note 72, at 38.

85. *Id.* at 43.

86. See *id.* at 44 ("[T]he *Bosnia Genocide Case* decision does suggest that the ICJ will . . . [apply the 'effective control' standard] when considering the attributability of non-state conduct to a state."). On the other hand, the "overall control" standard, which requires only organizing, financing or equipping—that is, giving support for military operations rather than exercising control over the operations—is a more flexible and context-specific ap-

Establishing a link of attribution consequently becomes nearly impossible outside the case of a harboring state. Could a resort to force in an innocent state be lawful without attribution? In adjudicating the legality of Ugandan military forces' use of force against the Allied Democratic Forces (ADF), a hostile non-state actor located in the territory of the Democratic Republic of Congo, the ICJ recently considered this question.⁸⁷ Finding no proof that the Congolese government was involved in the attacks launched by the ADF into the territory of Uganda, the ICJ established that "legal and factual circumstances for the exercise of a right of self-defence" were absent.⁸⁸ It decided that Uganda violated the principle of non-use of force when pursuing the ADF militarily in the territory of Congo.⁸⁹ Because of the absence of a link of attribution between the ADF and the Republic of Congo, the Court refused to consider the contentions of the Parties as to "whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces."⁹⁰ Since the Court refused to answer the question of the legality of self-defence against a non-state actor in the absence of responsibility by the territorial state, some ambiguity remains.⁹¹ Scholars who defend a restrictive interpretation of the laws of war support the narrowness of the ICJ ruling. They believe that the mere presence of irregular forces within the territory of a state, even in the face of failure to

proach for establishing attribution when the breach of international law is inherent to the use of force. *Id.* at 61–62 (noting that the "effective control" standard "fails to consider the appropriate standard of control in cases where the breach of international law is inherent in the use of force").

87. *See* *Armed Activities*, *supra* note 83, ¶ 141 (asking, after rejecting DRC responsibility for ADF attacks "whether the use of force by Uganda within the territory of the DRC could be characterized as self-defence").

88. *Id.* ¶ 147.

89. *Id.* ¶¶ 131–35, 141 (considering Uganda's response to ADF attacks, then characterizing them as "use of force"). The Court affirmed that "even if [attacks by the ADF] could be regarded as cumulative in character, they still remained non-attributable to the DRC." *Id.* ¶ 146.

90. *Id.* ¶ 147.

91. *Id.* *But see* *Armed Activities on the Territory of the Congo (D.R.C. v. Uganda)*, 2005 I.C.J. 306, ¶ 30 (Dec. 19) (separate opinion of Judge Kooijmans) (explicitly affirming the right of self-defence in the absence of attribution); *accord* *Armed Activities on the Territory of the Congo (D.R.C. v. Uganda)*, 2005 I.C.J. 334, ¶ 12 (Dec. 19) (separate opinion of Judge Simma).

control the latter's actions, does not automatically make the territorial state responsible for the hostile acts of a non-state actor.⁹² According to this view, self-defense is unavailable to justify use of force, which therefore remains unlawful.

b. *The Expansive View: The "Unable or Unwilling" Test and Its Critics*

Lawyers favoring the expansive position, on the other hand, no longer believe in a strict link of attribution requiring state involvement through direction and control of the non-

92. Some require the state to have violated an international obligation and to have tolerated the presence of terrorists within its jurisdiction. For example, in the immediate aftermath of 9/11, the late Antonio Cassese argued that self-defense against a terrorist organization requires a justification excusing the violation of the sovereignty of the territorial state. Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 997 (2001). The territorial state must have breached the international duty to refrain from assisting or acquiescing in organized terrorist activities within its territory. *Id.* at 997 ("aiding and abetting international terrorism is equated with an 'armed attack' for the purpose of legitimizing the use of force in self-defence."). Cassese, however, swiftly notes that this rule would "lead to a third world war," since the terrorist network behind the 9/11 attacks "sprawls across as many as 60 states." *Id.* To determine which states could be lawfully targeted under self-defense, Cassese distinguishes between operations directed against both the territorial state and the terrorist organization and operations only directed against terrorists. In the first case, Cassese appeals to the traditional rules of attribution of responsibility, requiring the state to have endorsed the action by the terrorist organization. Regarding the second case, Cassese articulates a standard that goes beyond conventional attribution but falls short of strict liability; namely, it is not mere presence of terrorists in a territorial state, but the state's toleration of the presence of terrorists and unwillingness to cooperate with the international community that would render self-defense (*e.g.* the intervention in Afghanistan) lawful. *Id.* at 999. Others affirm that mere tolerance of the presence of terrorists does not give rise to international responsibility. *See, e.g.*, Constantine Antonopoulos, *Force by Armed Groups as Armed Attack and the Broadening of Self-Defence*, 55 NETH. INT'L L. REV. 159, 168 (2008) (arguing that "the existence of substantial or effective control" of a non-state actor by a state must be shown to attribute responsibility to the state); Frédéric Mégret, "War"? *Legal Semantics and the Move to Violence*, 13 EUR. J. INT'L L. 361, 383–84 (2002) (stating that "[t]he mere tolerance of the presence of terrorist groups on a state's territory" is not sufficient to impute responsibility for the group's acts to the state). Other restrictive lawyers, like O'Connell, are rather ambiguous as to establishing responsibility when the state fails to control the attackers. *See* O'Connell, *Preemptive Self-Defense*, *supra* note 77, at 7 (stating that a state is "possibly" legally responsible for an attack where it failed to control the non-state attackers).

state actor. Some believe that self-defense is lawful in response to an attack, regardless of the attribution of responsibility to the territorial state.⁹³ Most however, would not abolish the requirement of responsibility. Some of these lawyers claim that although the territorial state is not the immediate perpetrator, it should be held directly responsible based on acquiescence and causation, rather than indirectly responsible for a breach in the due diligence obligation.⁹⁴ Others establish attribution based on strict liability. The fact of an attack would alone suffice to justify use of force in the territory of the delinquent state.⁹⁵

93. See, e.g., DINSTEIN, *supra* note 44, at 205–06; Paust, *supra* note 32, at 251–52 (arguing that it would be incorrect to conclude that a state has no right to defend itself against attacks by non-state actors in the absence of attribution of responsibility for the attacks to a foreign state); Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 2010 Y.B. INT'L HUMANITARIAN L. 3, 22–23 (quoting a number of scholars who no longer believe that self-defense requires proving that the territorial state is legally responsible for the hostile actions of the non-state actor); NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 37–38, 40–41 (2010) (arguing that when the territorial state is unable to prevent an attack by a non-state actor, the victim state has a right to act in self-defense regardless of responsibility when the victim state acts in self-defense exclusively against the non-state actor responsible for the attack). However, unlike lawyers supporting a restrictive position who require tolerance and unwillingness by the territorial state, see, e.g., Cassese, *supra* note 92, Lubell supports the legality of self-defense when the territorial state does not tolerate but is willing yet unable to prevent the hostile activities of a non-state actor, since the territorial state could avoid the need of the victim state to use of unilateral force by co-operating with the former state. Lubell, *supra*.

94. See, e.g., TAL BECKER, TERRORISM AND THE STATE: RETHINKING THE RULES OF STATE RESPONSIBILITY 258 (2006) (arguing that the conventional agency-based theory of responsibility based on direction and control is inadequate because state involvement in terrorism is rarely a case of “marionette and puppeteer”; it is rather about acquiescence, facilitation, and omission). Becker thus argues for direct state responsibility for private terrorist acts and proposes a four-part test to determine attribution to the state: factual cause of the harm, a breach of an international obligation by the state, causation to assess whether the scope of state responsibility includes failure to prevent or should be extended to cover private terrorist action, and consideration of non-causal policy factors to increase or decrease responsibility. See *id.* at 281, 325.

95. See, e.g., Vincent-Joël Proulx, *Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks?*, 23 BERKELEY J. INT'L L. 615 (2005). Noting that after 9/11 the Security Council distanced itself from

More recently, these discussions by lawyers favoring the expansive position have led to the articulation of a different and less stringent yardstick to determine the legality of self-defense: the "unable or unwilling" test. This new approach would either relax the determination of attribution of responsibility to the territorial state for the purpose of justifying action under self-defense or to establish a new, lower standard to justify self-defense without attribution of responsibility.⁹⁶ In the words of Eric Holder, this yardstick is extremely simple: Self-defense is legal if the territorial state is "unable or unwilling to deal effectively with a threat."⁹⁷ It is less simple, however, to define the parameters of and give more concrete content to this yardstick. It is even more difficult to show that the new approach has *lege lata* grounding, which the proponents of this test claim. Kevin Heller has perspicaciously identified the weaknesses of the new standard in relation to the law of self-defense.⁹⁸

Advocates of the "unable or unwilling" test call upon a strong argument in their favor: a state has a general duty to prevent a hostile non-state actor from using its territory to attack another state. These lawyers fail, however, to specify the concrete obligations a state needs to fulfill to discharge the general duty.⁹⁹ Without reference to these concrete obliga-

a criteria of reasonableness, Proulx favors taking a more radical step in the direction of recognizing strict liability. *Id.* at 637–43.

96. Robert Chesney calls this a "broad state-responsibility position" while noting the two possible readings: a standard for attributing responsibility or for self-defense without attribution. Robert Chesney, *supra* note 93, at 24 n.89.

97. Holder, *supra* note 3; *see also* DOJ White Paper, *supra* note 7, at 2 (stating the same). Using similar wording, the Chatham Principles state that for self-defense to be lawful, "it must be evident that [the territorial state] is unable or unwilling to deal with the non-state actor itself . . ." Wilmshurst, *supra* note 69, at 969.

98. *See* Kevin Jon Heller, *Ashley Deeks' Problematic Defense of the "Unwilling or Unable" Test*, OPINIO JURIS (Dec. 15, 2011, 2:32 PM), <http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/> (arguing that this new standard has no *lege lata* basis; even if there is some state practice there is definitely no *opinio juris* to support that the standard has acquired customary law status).

99. For example, the Chatham Principles talk in general terms about "any failure to take reasonable steps to prevent the use of its territory as a base for attacks on other States" without providing specifics. Wilmshurst, *supra* note 69, at 970. The meaning of the standard will finally depend on

tions, there is no standard of due diligence on the basis of which to recognize incapability or unwillingness by the territorial state. In the absence of a due diligence standard, the test becomes superfluous, for the state becomes strictly liable, which entails invariable responsibility for failing to “control” or “deal” with a threat, or self-defense becomes lawful at any event because the fact of an attack would suffice to trigger the right to use force. However, the legal validity and policy rationale for the strict liability standard implicit in the new test is also weak. Proponents fail to show the *lege lata* basis that would support the new test overruling established law of state responsibility as well as the multilateral conventions on the suppression on terrorism. In the absence of direct attribution, conventional international law imposes only a duty of conduct, that is, a duty to prevent attacks by hostile non-state actors with a due diligence standard to discharge the obligation, rather than a duty of result as implied in strict liability.¹⁰⁰

On the other hand, even the proponents who suggest for more refined rules to determine the legality of self-defense against attacks by non-state actors to flesh out the “unable or unwilling” test fail to back the claim about the legality of this new test in contemporary international law. For example, Robert Chesney relates how Michael Schmitt argues that under the broad view, when responsibility is not attributable, but the territorial state is still unable or unwilling to control the non-state actor, the victim state has an obligation to issue an ultimatum to the territorial state before launching an intervention in self-defense.¹⁰¹ Similarly, Ashley Deeks suggests a series of

the vague expression “control over a terrorist organization.” *See id.* (noting that self-defense would be lawful where the territorial state is unable or unwilling to exercise such control).

100. The obligation to prevent acts of terrorism entails an obligation of conduct with a due diligence standard because it developed as an application of the general obligation that states must not allow the use of their territory for acts contrary to the rights of other states, which imposes an obligation of conduct rather than result. *See* TRAPP, STATE RESPONSIBILITY, *supra* note 72, at 64–65. Moreover, there are good policy reasons to avoid a relaxation of conventional attribution by manipulating secondary rules of responsibility. *See* Derek Jinks, *State Responsibility for the Acts of Private Armed Groups*, 4 CHI. J. INT’L L. 83, 89–94 (2003) (arguing that a new test based on “harbor and support” would risk over-application, extending responsibility too far, and under-application of primary rules regulating terrorist activity).

101. Chesney, *supra* note 96, at 23.

substantive and procedural factors to make the test formally realizable.¹⁰² Both Schmitt and Deeks retrieve the old law of neutrality to locate the origins of the "unable or unwilling" test. This strategy is inadequate for two reasons. First, that scholars invoked the test in the past and that it ultimately became part of the codification of the law of neutrality at the Second Hague Conference of 1907 for the purposes of determining the obligations of neutral states in relation to belligerents neither resolves the question of its contemporary validity nor its validity in the context of self-defense. More important, it is unclear why the "unable or unwilling" test should be understood to take precedence over the established requirement to attribute responsibility. Such a hierarchy would be quite remarkable, particularly considering that the regime of neutrality has arguably fallen into desuetude.¹⁰³ In addition, the use

102. See Ashley Deeks, "Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT'L L. 483, 519–33 (2012) (proposing six factors). Deeks points out that the test, as conventionally understood, has a level of generality that offers insufficient guidance to states. *Id.* at 487–88. She believes that the test's lack of content undermines its legitimacy and finds striking the little attention paid to it by scholars. *Id.* Examining the 1907 Hague Conventions on the Rights and Duties of Neutral Powers, Deeks discovers that the obligations of the neutral state depend on a due diligence standard. *Id.* at 498. Puzzlingly she does not carry this aspect of the neutrality regime through to the analysis of the obligations of the territorial state.

103. With the progressive institution of a regime of collective security and the proscription of war—through the adoption of the Covenant of the League of Nations of 1919, the Kellogg-Briand Pact of 1928, and the Charter of the United Nations of 1945—neutrality has lost its relevance. For example, as early as 1935, Nicolas Politis, the renowned Greek scholar and member of the French sociological school, affirmed that neutrality "underwent a first transformation with the League of Nations, which altered its principle and reduced its application by limiting the law of war. The Pact of Paris delivered the *coup de grâce* by outlawing war as between individual States. In law, neutrality then ceased to be an institution." NICOLAS POLITIS, NEUTRALITY AND PEACE 80 (Francis Crane Macken trans., 1935). It is true Politis recognizes that in relation to neutrality, "the law is far in advance of habits, beliefs, and facts." *Id.* However, while during the interwar period a gap between the law in the books and law in action could have been pointed out, in 2012, the international regime of neutrality seems at least inadequate. Today, when one state invokes self-defense, other states accept or contest the claim, but no state invokes the international rules of neutrality to remain neutral to the conflict. When the Security Council imposes sanctions involving the use of force, states either participate in a coalition under the U.N. mandate or refrain from participating, but no state invokes the international law of neutrality.

of the “unable or unwilling” test can also be found in the history of other international law regimes. One of them is the very same law of state responsibility that has since evolved to require a more stringent standard of attribution.

The origin of the “unable or unwilling” test can also be found in the prehistory of the law of state responsibility, where it functioned as a standard to determine the responsibility of a state in relation to harm suffered by foreign residents. Under international law before the U.N. Charter, especially at the height of Western imperialism during the 19th and early 20th centuries, powerful states invoked this test to justify interventions—by force or diplomatic means—in pursuit of international claims against a state that had purportedly violated an international obligation.¹⁰⁴ In particular, the “unable or unwilling” test was used to determine a denial of justice by the territorial state.¹⁰⁵ The test was also brought up as a direct justification for use of military force in an intervention to protect the life or property interests of nationals residing abroad.¹⁰⁶ This second situation is crucial now that the focus is on responsibility regarding injuries caused not directly by the territorial state, but rather by non-state actors.

Retrieving this history suggests that the due diligence standard was more important than the “unable or unwilling” test in cases where injury had been caused by a non-state actor. This incipient regime of state responsibility did not hold states strictly liable for injuries caused by private individuals. As Borchard argues, the acts of private individuals “do not involve the international responsibility of the state unless the latter by some independent delinquency of its own may be charged with a violation of its international obligations.”¹⁰⁷ Among states’ international obligations, Borchard distinguishes

104. See, e.g., EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD: OR, THE LAW OF INTERNATIONAL CLAIMS* 448–49 (1919).

105. *Id.* at 335–36 (stating that when local courts are unable or unwilling to decide upon the grievances of a foreigner, the state of the foreign resident can exercise diplomatic interposition, excusing the resident’s resort to local remedies).

106. See *id.* at 448 (stating that where a local government was believed to be unable or unwilling to afford adequate protection to foreign persons or their property, the state of the foreign persons could send its military forces to provide protection in what was called “non-belligerent interposition”).

107. *Id.* at 213.

between the institution of an administrative machinery to protect foreign residents and the duty to prevent, according to a due diligence standard, injuries caused to foreigners by private individuals. Accordingly, a complex state practice developed around the determination of state negligence. In this context, states only extraordinarily and controversially invoked the "unable or unwilling" test against states regarded as "poorly organized" or "less civilized," in which liability was found without a showing of negligence and thus forceful interventions were justified regardless of the target state's ability to prevent the original injury.¹⁰⁸ The standard of civilization doctrine, however, was fortunately relegated to the dark annals of history when it was buried by the recognition of the principle of equality in the 1933 Montevideo Convention of the Rights and Duties of States.¹⁰⁹ Moreover, even Borchard, an American scholar generally sympathetic to a broad regime of state responsibility, was skeptical about the validity of the test because it would impose on weaker states the obligation to guarantee the safety of aliens under strict liability.¹¹⁰ The controversy surrounding the legality of interventions under pure strict liability in the past shows the extreme weakness of contemporary

108. *Id.* at 218 ("[O]n several occasions, confined almost exclusively to the weaker countries, the 'due diligence' rule has been disregarded, governmental liability being predicated on the mere *inability* to prevent the act or bring the offenders to justice").

109. See Arnulf Becker Lorca, *Sovereignty Beyond the West: The End of Classical International Law*, 13 J. HIST. INT'L L. 7, 67 (2011) (discussing the "demise of the standard of civilization"). Since the 19th Century, international lawyers from the semi-periphery have contested the legality of interventions to recover damages for injuries suffered by foreign residents, developing the Calvo and Drago doctrines. See *id.* at 18–24 (describing the development of the Drago doctrine). These efforts culminated in the recognition of the principle of non-intervention in the 1933 Montevideo Convention and then in the U.N. Charter. Thus, through semi-peripheral advocacy the law of international claims, to which the "unable and unwilling" test belonged, was effectively abrogated and transformed into the modern law of state responsibility. See Alan Nissel, *The Duality of State Responsibility* 50 (July 19, 2012) (unpublished manuscript) (on file with author) (describing the transformation of the law of international claims).

110. See BORCHARD, *supra* note 104, at 215 ("[Strict liability] overlooks the principle that an alien visiting unstable countries assumes a certain measure of risk, and compels the weaker nations . . . to assume a certain degree of guaranty for the safety of aliens.").

efforts to resuscitate the “unable or unwilling” test in the context of non-state actors and self-defense.

* * * *

Also in relation to the attribution of responsibility are international lawyers divided between those defending a restrictive and an expansive interpretation of the laws of war, between those requiring and not requiring attribution of responsibility of the territorial state to consider action under self-defense lawful. Advocates of the expansive position fail to show the validity of self-defense against a hostile non-state actor under strict liability or the “unable or unwilling” test. Advocates of the restrictive position seem to reflect existing law in requiring a link of attribution to regard self-defense lawful. However, requiring attribution is not all that there is to examine the legality of the use of force against non-state actors. Even if states are not directly responsible when an attack by a hostile non-state is not attributable, states may become indirectly responsible for their own action, for the breach of the obligation to prevent the use of their territory by irregular forces. Considering the indirect responsibility of states in relation to a due diligence standard is particularly important regarding the innocent state. It helpfully clarifies the nature of the hypothetical scenario, which illuminates the reasons for which military intervention is always illegal in an innocent state.

Once a state has met the due diligence standard and exercised control over its territory and people, attaining the status of an innocent state, using force against a non-state actor in that state’s territory will almost certainly constitute preemptive force. If the innocent state has taken adequate measures to prevent transnational violence launched from or organized within its territory and if it has investigated and cooperated with the victim state after an attack has taken place, it would be difficult for the victim state to claim that it must use force to respond to an attack that is imminent. Most likely, when the territorial state cooperates, investigates, and prosecutes, the victim state would only need to act in self-defense to prevent or anticipate an eventual attack by a hostile non-state actor. Consequently, the legality of force in the innocent state will

depend on the legality of self-defense without an actual or imminent attack.

2. *Interceptive, Preventive, and Preemptive Self-Defense*

Conventionally, self-defense justifies a state's use of force to respond to an attack that is at minimum imminent. Followers of the expansive view have challenged this conventional view of the category of lawful force with a broad interpretation of self-defense. Their interpretation would bestow on states ample room to resort unilaterally to lawful force without an actual attack—anticipatory self-defense, including preemptive or preventive action—or before an attack is completed—interceptive self-defense. Only a minority of these authors, however, has defended a doctrine of self-defense so broad that it undercuts the validity of Article 51 of the U.N. Charter. Among them, some have invoked a customary right to self-defense that preexists the drafting of the U.N. Charter, which regards an imminent attack as sufficient to justify use of force as self-defense.¹¹¹ Others in this minority have straightforwardly declared outright that the rule in Article 51 has fallen into desuetude.¹¹² In contrast, most scholars who support a

111. See, e.g., Myres S. McDougal, Editorial Comment, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597, 599 (1963) ("There is not the slightest evidence that the framers of the United Nations Charter, by inserting one provision which expressly reserves a right of self-defense, had the intent of imposing by this provision new limitations upon the traditional right of states."). Under this view, the language of Article 51, referring to the "inherent right" to self-defense would recognize the preexisting rule including the resort to force before an attack (in the case of preemptive action) and without an attack in the territory of the state (in case of the protection of nationals abroad).

112. See Glennon, *The Fog of Law*, *supra* note 32, at 540 ("[T]he Charter's use-of-force regime has all but collapsed."). Glennon argues that only narrow readings of Article 51 are possible, readings that would not allow a state to use force under self-defense against terrorists based in another state for three reasons: because passive support by the state to irregulars would not amount to an armed attack; because using force to overthrow a government harboring terrorists would not be proportional; and because requiring the occurrence of an actual armed attack rather than threat does not allow for anticipatory responses. *Id.* at 541–49. He rejects these implications and believes (without backing the claim empirically) that states have departed from this rule. See *id.* at 549 ("The reality is that Article 51 is grounded upon premises that neither accurately describe nor realistically prescribe state behavior.").

broad doctrine of self-defense continue to recognize the validity of Article 51, but seek instead to widen its scope of application with a broad interpretation of the occurrence of an armed attack. This expansion has operated with the introduction of three modalities of self-defense: interceptive, preemptive, and preventive self-defense.¹¹³

The doctrine of interceptive self-defense has been most forcefully proposed by Yoram Dinstein. Although favoring a restrictive reading of Article 51 that excludes the use of force against pure threats, Dinstein argues that states have a right to intercept an armed attack “as soon as it becomes evident to the victim State . . . that the attack is in the process of being mounted.”¹¹⁴ Thus, for the purpose of identifying the aggressor and the victim entitled to use force, this view claims that an attack does not necessarily start with the firing of the first shot. Rather, according to Dinstein, an attack may begin when the aggressor has “embarked upon an irreversible course of action,” even without the firing of a first shot.¹¹⁵ The victim state might therefore fire the first shot in self-defense provided that the aggressor has already “committed itself to an armed attack in an ostensibly irrevocable way.”¹¹⁶

Where interceptive self-defense reinterprets the beginning of an armed attack, anticipatory doctrines of self-defense justify using force to counter threats of aggression. It legitimates preemptive action responding to an imminent threat and preemptive action averting a potential attack in the future before an attack has been launched.

International lawyers who support the legality of anticipatory self-defense base the claim on customary international law. Some have traced this rule back to the *Caroline* incident.¹¹⁷ Ever since, they have invoked Webster’s definition as

113. I adopt this terminology from TOM RUY, “ARMED ATTACK” AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE, 253–54 (2010) [hereinafter RUY, ARMED ATTACK].

114. DINSTEIN, *supra* note 44, at 187; *see also id.* at 183 (providing further information on the restrictive reading).

115. *Id.* at 191.

116. *Id.*

117. In 1837, U.S. Secretary of State Daniel Webster defined anticipatory self-defense as a right arising only when there is a “necessity of self-defense” that is “instant, overwhelming, leaving no choice of means and no moment for deliberation.” FRANCK, RECOURSE TO FORCE, *supra* note 67, at 97–98.

reflecting customary law, which requires action in self-defense to be necessary, proportionate, and immediate. These requisites are meant to limit the scope of self-defense. However, since the drafting of Article 51 included the expression "armed attack," advocates of the expansive position have invoked the preceding customary rule to expand the scope of self-defense beyond Article 51 and thereby vindicate the legality of force to counter threats rather than attacks.¹¹⁸ Others have highlighted the nature of the international legal order to justify a broader notion of self-defense. Their theory rests on the argument that international law cannot limit states' right to self-preservation because the international legal order is constituted exclusively by states and erected on the basis of their sovereign autonomy. A state would thus not be expected to wait until an attack is initiated, which would undermine its capacity to defend itself and jeopardize its existence, and can instead resort to force preemptively while a threat remains merely imminent.¹¹⁹

Preventive self-defense stretches the scope of the doctrine even further by doing away with the requirement that attack be, at the very least, imminent.¹²⁰ In response to the 9/11 attacks, some American politicians and lawyers advocated for a policy of preemptive action. In a series of public statements, President George W. Bush called for an expansion of self-defense in light of the challenges imposed by the global "war on terror."¹²¹ In particular, facing the prospect of rogue states

118. See, e.g., D. W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 187 (1958); McDougal, *supra* note 111, at 599–600. However, as Dinstein has argued, British action against the *Caroline* steamboat within U.S. territory was not anticipatory because the action of transporting men and materials in support of Canadian rebels was already in progress. See DINSTEIN, *supra* note 44, at 184–85. Moreover, Webster did not have self-defense in mind but rather extra-territorial law enforcement, and the formula precedes the prohibition on the use of force. *Id.* at 249.

119. See e.g., BOWETT, *supra* note 118, at 185–86 (1958) (arguing that action taken to defend a state's political independence, its territorial integrity and the lives and property of its nationals does not constitute a use of force falling within the scope of the prohibition).

120. See ABRAHAM D. SOFAER, *THE BEST DEFENSE? LEGITIMACY AND PREVENTIVE FORCE* 89–90 (2010) (noting that under a traditional imminence requirement, preventive force is not allowed).

121. See President George W. Bush, Address to Congress: State of the Union (Jan. 29, 2003), in H.R. Doc. No. 108-1 (2003) (rejecting the idea that the United States "must not act [against the Saddam Hussein regime]

supplying terrorist organizations with weapons of mass destruction, the “Bush doctrine”—as it was labeled—proclaims the right of the United States to use force in self-defense when the threat is likely to be realized, rather than waiting until a threat materializes into an attack that is at least imminent.¹²² American scholars, as mentioned above, have justified preemptive action in self-defense, either through narrowing the prohibition on use of force or declaring that the U.N. Charter system regulating force is no longer binding.¹²³

On the other hand, international lawyers who defend a restrictive view of the laws of war strenuously resist interpretative efforts to widen the scope of self-defense. They are concerned that a strong and wide prohibition on use of force would become impotent if the self-defense exception were to be permitted to swallow the rule. These lawyers contend that not only the language of Article 51, but also the placement of this article within the U.N. Charter as an exception to the pro-

until the threat is imminent”); President George W. Bush, Address to Congress: State of the Union (Jan. 29, 2002), in H.R. DOC. NO. 107-157 (2002) (describing plans for the global “war on terror”); see also THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (Sept. 2002), available at <http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf> [hereinafter 2002 NATIONAL SECURITY STRATEGY](calling for a reformulation of the imminence requirement).

122. See 2002 NATIONAL SECURITY STRATEGY, *supra* note 121, at 14 (“We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends.”); see also *id.* (“[The United States] must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.”).

123. See *supra* notes 111–112 and accompanying text. Sofaer, for example, pursues a narrow reading of Article 2(4) and bases the legality of self-defense exclusively on meeting necessity and proportionality. Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT’L L. 209, 212–14 (2003). Sofaer relies on the policy-oriented scholarship of McDougal and Feliciano – without mentioning that at the time their views were seen as highly controversial and were met with strong criticism. See *id.* at 212–14, 225 (citing McDougal and Feliciano). For an example of such criticism, see Schachter, *The Right of States*, *supra* note 49, at 1634. For additional justifications of preemptive self-defense, see Glennon, *Fog of Law*, *supra* note 32 (arguing that the article 2(4) prohibition on use of force has collapsed); see also Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or their Commanders as an Act of Self-Defense: Human Rights Versus the State’s Duty To Protect its Citizens*, 15 TEMP. INT’L & COMP. L.J. 195 (2010) (defending targeting killings based on self-defense).

hibition on use of force, together clarify that self-defense requires an actual armed attack.¹²⁴ They believe a series of rulings by the ICJ has confirmed this interpretation.¹²⁵ They affirm that this is the view shared by most scholars¹²⁶ and deem it implausible that rescuing a preexisting and outlasting customary rule sanctioning anticipatory action could truly bypass a narrow interpretation of self-defense.¹²⁷

To support a restrictive interpretation with the language adopted by Article 51, these lawyers claim that the expression "if an armed attack occurs" is an unequivocal indication that the act triggering the right to self-defense must have taken place. Some, like Brownlie, argue that Article 51 is clear enough to render all anticipatory action unlawful, including not only preventive but also preemptive self-defense.¹²⁸ Most international lawyers who articulate a restrictive view, however, interpret Article 51 to preclude preventive action against non-imminent threats but to allow preemptive self-defense. Schachter, for example, recognizes that the danger of an imminent attack might be great enough to render defensive action essential for the self-preservation of a state; in which case self-defense in advance of an attack could be appropriate

124. See, e.g., BROWNIE, *supra* note 51, at 271, 275 (arguing that during the drafting of the U.N. Charter there was a presumption against the use of force and self-help; self-defense is thus an exception to the prohibition, and is subject to control by the Security Council).

125. This line of cases includes: *Oil Platforms*, *supra* note 55; *Nicaragua*, *supra* note 55; *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4 (Apr. 9).

126. For an example of the sense of majority see Bothe, *supra* note 34, at 229–30 ("This conclusion [requiring an actual armed attack] is shared by the overwhelming majority of legal doctrine, which clearly holds 'anticipatory self-defense' to be unlawful."); see also BROWNIE, *supra* note 51, at 275 (citing a large number of sources supporting a reading of Article 51 as precluding preventive action).

127. See, e.g., BROWNIE, *supra* note 51, at 273 (arguing that the right of self-defense as defined in Article 51 restates the customary international law existing in 1945); LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 141 (2d ed. 1979) (rejecting the argument for preemptive self-defense based on an inherent right predating the U.N. Charter). Brownlie criticizes those who invoke a pre-Charter right for assuming that customary law did not develop after the 1920s. BROWNIE, *supra* note 51, at 274. In fact, he argues that even if Article 51 did codify the customary law of self-defense, such custom must be regarded in light of state practice up to 1945. *Id.* at 274–75.

128. BROWNIE, *supra* note 53, at 276–78.

under Article 51.¹²⁹ Therefore, to consider preemptive anticipatory action lawful, these scholars require the threat of an imminent attack to be apparent and serious enough to fit within the scope of Article 51. In other words, in the event of a direct and overwhelming threat, states are not forced to wait until the beginning of the attack, but may lawfully act in self-defense when the threat is of such gravity that it can be considered equivalent to an armed attack. The gravity of the threat would be measured according to the customary international law requirements of necessity and proportionality.¹³⁰

Lawyers following a restrictive view believe that reading preemptive and preventive self-defense into Article 51 runs against recognized canons of legal interpretation. They find these doctrines to be in manifest opposition to Article 51 because the conditionality of the clause “if an armed attack occurs” excludes self-defense before as well as in the absence of an actual attack.¹³¹ Michael Bothe, for example, has criticized the expansive view’s claim that the expression “inherent right” in Article 51 preserved a preexisting customary right including preventive and preemptive action. As a matter of interpreting Article 51, Bothe points out, it can be maintained both that the expression “inherent right” limits the requirement of an “armed attack” and that the expression “armed attack” limits the idea of an “inherent right” to self-defense. Recognizing that both constructions are logically possible Bothe warns, “it is certainly not possible, without betraying basic professional rules of interpretation, to re-interpret the notion of self-defence, understood, according to the ordinary meaning . . . as a proportionate response to an actual attack, as meaning any use of force reasonable under the (threatening) circum-

129. Schachter, *The Right of States*, *supra* note 49, at 1634 (arguing that it is not clear that Article 51 was intended to limit the customary right of self-defense, but warning that such a customary right should not be interpreted as authorizing anticipatory action prior to threats).

130. Bothe, *supra* note 126, at 231. In general, lawyers advancing a narrow interpretation emphasize the customary law elements of necessity and proportionality as limits to the scope of self-defense. See, e.g., GRAY, *supra* note 28, at 148–55.

131. As mentioned above, in light of this difficulty, lawyers articulating the expansive view have tried to read Article 51 as containing the preexisting customary right of self-defense that recognizes anticipatory action. They have done so by arguing that the expression “inherent right,” in Article 51 includes such a customary right. See *supra* note 132 and accompanying text.

stances."¹³² Though not only a strict textual interpretation of Article 51 is enlisted to bolster the restrictive position. Policy arguments are also brought into play to sustain the illegality of preemptive action.¹³³ The customary law nature of Article 51 is affirmed.¹³⁴ In sum, to the international lawyer committed to the restrictive position, there is simply no room for a right to self-defense without an actual or imminent armed attack.¹³⁵

132. Bothe, *supra* note 126, at 232.

133. In the eyes of international lawyers following the restrictive view, the expansive interpretation is much more than an incorrect legal interpretation; in particular the doctrine of preemptive self-defense threatens the modern international system, international rule of law, and poses serious questions regarding the ethical and political responsibility of international lawyers. See, e.g., *id.*

134. Lawyers following the restrictive view, like Gray, maintain that Article 51 embodies customary law to counter the expansive view's argument that a divergent state practice has subsequently transformed Article 51. The restrictive position emphasizes *opinio juris*, the normative element of custom, to defend the rule when met with a possible divergent state practice. Characterizing divergent behavior as a violation of international law, the rule and its normative force is upheld. Moreover, to the extent there is divergent practice, advocates of the restrictive position note that this practice has been limited to a few states (the United States, Israel, or apartheid South Africa) as the overwhelming majority of states recognize Articles 2(4) and 51 as binding law, not only as a matter of principle, but also in their conduct. See Gray, *supra* note 28, at 195–98 and *passim*. Moreover, in the context of the debate on humanitarian intervention, Simon Chesterman has noted a sharp disjunction between the position of scholars following the expansive view and existing state practice. CHESTERMAN, *supra* note 50, at 47. While international lawyers supporting the expansive position understand the prohibition of Article 2(4) to be compatible with humanitarian intervention (affirming that the prohibition includes only force "against the territorial integrity or political independence of any state" or affirming that a preexisting customary rule justifies unilateral humanitarian action), states have never used this doctrine to justify intervention. *Id.*

135. For example, in the context of the debate over the 2003 invasion of Iraq a group of teachers of international law in the United Kingdom affirmed: "The doctrine of pre-emptive self-defence against an attack that might arise at some hypothetical future time has no basis in international law." See *War Would Be Illegal*, THE GUARDIAN, May 17, 2003, <http://www.guardian.co.uk/politics/2003/mar/07/highereducation.iraq>. Tom Ruys offers a survey of similar statements made in the aftermath of the Iraq war; in addition to the letter by U.K. scholars in the run-up to the war, scholars from Canada, Australia and Japan issued similar declarations. A vast majority of international lawyers also strongly denounced the legality of self-defense against non-imminent threats. RUYS, ARMED ATTACK, *supra* note 113, at 322–23. However, Ruys also shows significant state practice supporting pre-

3. *Intervention in the Innocent State as Unlawful Preventive Self-Defense*

An armed intervention against a hostile non-state actor in an innocent state comes either too early, before an actual attack occurs, or too late, when the rationale for self-defense has elapsed.¹³⁶ It therefore always violates the prohibition on use of force. Given that the innocent state, by definition, would have met the due diligence standard, an intervention in the innocent state will inevitably adopt the form of preventive action. Accepting the legality of preventive self-defense in an innocent state represents an inadequate balance of conflicting rules and policies. I have noted above that it is disputed whether the international responsibility of the territorial state is a requirement of self-defense. Independently from this debate, looking at the attitude of the territorial state vis-à-vis the hostile non-state actor is relevant to determine the factual preconditions of self-defense. What is the nature of an armed response in self-defense in the territory of the innocent state?

Consider three different situations in which an attack by irregular forces has occurred. In the first scenario, the innocent state investigates, prosecutes and suppresses the hostile non-state forces.¹³⁷ While pursuing these objectives, the

emptive and preventive self-defense following the U.S. invasion of Iraq. *Id.* at 330–37. Ruys argues that the shift in *opinio juris* has only involved preemptive action against imminent threats and further that it has not been widespread, as Latin American, North African, and Asian states do not accept the legality of preemptive self-defense. *Id.* at 341. In light of this divergence, Ruys concludes that there is no customary international legal basis for preemptive self-defense. *Id.* at 340–41.

136. Force deployed after an attack is considered an unlawful retaliation. GRAY, *supra* note 28, at 150–51 (“Reprisals are generally agreed to be unlawful.”). Let us remember that followers of the restrictive view find unconvincing the doctrine of continuous threat, according to which the cumulative effect of a series of small-scale attacks might constitute an armed attack for the purpose of invoking the right to self-defense. See, e.g., O’Connell, *Unlawful Killing*, *supra* note 3, at 14 (citing the *Oil Platforms* case).

137. Whereas international law imposes on the territorial state the obligation to prevent, investigate, and prosecute or extradite irregular combatants, I will argue below that it does not impose an obligation to launch military force against them. International law does not require a state to wage a civil war. Thus, by suppression I mean the exercise of state violence in the context of preventing, investigating, detaining, and prosecuting members of a hostile non-state actor (*i.e.* law enforcement). See *infra* text accompanying notes 147–148.

innocent state also cooperates with the victim state and could explicitly or implicitly authorize the victim state to use force in its territory.¹³⁸ In the second hypothetical, the innocent state had complied with the due diligence standard to prevent attacks, but, after an attack has occurred, the innocent state remains either unwilling to investigate and suppress the non-state actor or is unable to undertake these actions because it does not exercise sufficient control over its territory and people. In this case the innocent state becomes a cohabitant state. As argued below, an intervention with implicit conditions would be lawful in this case. Third, if willing and capable of complying and in fact complying with the due diligence obligations, not only before but also after an attack, the innocent state may oppose the attempts by the victim state to use armed force in self-defense against irregulars in its territory.

In this third case, military action by the victim state in the territory of the innocent can only take the form of preemptive or preventive self-defense, that is, self-defense averting imminent threats or future attacks. Unlike a cross-border incursion by regular armed forces that can be easily identified and repelled, attacks launched by a non-state actor are less amenable to immediate reaction, since time is required to identify the perpetrators and their whereabouts. If the innocent state has already begun to investigate the attack and suppress the attackers, it would have already responded to the hostile forces' actions.¹³⁹ Could preemptive and preventive self-defense in the innocent state be lawful?

Where, as shown above, the expansive interpretation of the laws of war considers preemptive and even some preventive action lawful, the restrictive view regards this type of self-defense unlawful. It might be tempting to think that it is impossible to compare the advantages and weakness of the two interpretations because they reflect the incommensurability of the expansive and restrictive views. Rather than alternative ways of balancing conflicting considerations, the interpreta-

138. The implied clauses that I propose below applicable to the use of force in a cohabitant state would also apply in case of an implicit authorization. See *infra* Part IV.B.

139. In this situation, the innocent state has done as much as international law asks states to do to prevent and combat transnational violence by non-state actors. Its obligations do not include allowing the victim state to use force in its territory.

tion that justifies preemptive self-defense is informed by the expansive view's policy-oriented understanding of international law. The interpretation opposing preemptive action likewise mirrors the restrictive view's commitment to legal formalism. Considering the conflicting interpretations merely the result of an analytic divide between a formalist and a policy-oriented legal sensibility is tempting. Lawyers adhering to the restrictive view tend to be more optimistic about the capacity of the relevant rules of international law to produce interpretative closure—optimism that lawyers following the expansive view counter with disdain and exasperation.

However, adherents of the restrictive view are not naïve formalists. They rather prioritize literal interpretations of legal texts, but still supplement those readings with arguments of policy and underlying principles.¹⁴⁰ Their counterparts who articulate the expansive view similarly may, at times, defend hyper-textualist readings of black-letter law.¹⁴¹ If the divide between policy analysis and formalism is in part misleading

140. In his path-breaking work *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES*, Ian Brownlie, one of the foremost representatives of the restrictive position, was well aware of the need to avoid both “sterile formalism” and the “political and sociological” approach. BROWNLIE, *supra* note 51, at vii. Brownlie was also aware that both approaches were unavoidable:

If “formalism” be regarded as a synonym for resort to legal method then of course one need not shrink from it. Any study of the *legal* aspects of co-existence must have regard both to form and content. Such an approach is particularly important in a study of the legal aspects of forms of conflict between states, peoples, and classes. It is, after all, the fundamental assumption both of the Charter of the United Nations and of the principles of peaceful co-existence that humanity, without distinction of race or class, has a common interest in avoiding war.”

Id. Moreover, Schachter finds that texts and positions adopted by governments “reveal a coherent body of principles” based on two widely accepted interests: “the sovereignty and independence of nation-states” and “restraints on the unbridled exercise of power.” Schachter, *The Right of States*, *supra* note 49, at 1645.

141. For a textualist reading of Article 51, see *supra* text accompanying note 131. For a textualist reading of Article 2(4), see *supra* text accompanying notes 44–45. However, advocates of the expansive position emphasize the textual openness of the law while at the same time believing in the interpretative closure of the policy goals they find embedded within the legal regime, policy goals that reflect a Hobbesian international world. See, e.g., Schachter, *The Right of States*, *supra* note 49, at 1624 (noting the indefiniteness in the text of article 2(4)); *id.* at 1645 (discussing two policy interests that guide interpretation).

because both views in fact balance conflicting considerations, the attitudes of different international lawyers, particularly towards law and violence and towards the state and the cosmopolitan ideal, might capture more about the difference between the expansive and restrictive views. International lawyers who articulate the expansive view believe that the law of war should be understood in light of the perceived national self-interest of their respective states—states that in fact make use of their armed forces. Most followers of the restrictive view tend, conversely, to foreground the interest of the international community.¹⁴²

I consider a right to preemptive and preventive self-defense unlawful. It is based on a balance of conflicting rules and objectives that assigns too much weight to the sovereignty of the victim state over the sovereignty of the territorial state as well as too much weight to the international community's interest in fighting transnational violence in order to preserve international security over the collective interest to preserve international peace. Holding self-defense in the innocent state illegal attaches more weight to the territorial and political autonomy of the innocent state as well as to the interest of the international community to avoid a serious escalation of force between states. At the same time, it adequately considers the interests articulated by the expansive view: the security of the victim state and the interest of the international community to prevent transnational non-state violence. The territorial state, in meeting the due diligence standard, proves its capability of defending these interests. It can cooperate in the prevention, investigation, and suppression of the hostile non-state actor. However, considering an intervention in an innocent state undoubtedly illegal invokes something in international law that goes beyond balancing conflicting interests. It invokes our discipline's "formalist" tradition, which neither shies away from the possibility of finding a binding rule with relatively determined meaning, such as the Article 51 requirement of an ac-

142. International lawyers generally identify the *expansive* view with the political right and the *restrictive* view with the political left. Nevertheless, several other factors may inform lawyers' dispositions: the perceived national self-interest of their respective nations, the professed interests of the international community, ideological divides between states or between North and South, or more mundane motivations regarding career accomplishments.

tual attack, nor refuses to appeal to the legal form itself as a basis to justify the rule's binding force and its power to constrain behavior of the powerful.

Self-defense in the innocent state is unlawful.¹⁴³ Given that an intervention in an innocent state would be unlawful because it would adopt the form of anticipatory self-defense, is an intervention in a cohabitant state lawful in a scenario where the requirement of an actual or imminent attack is met?

C. *Force Against a Non-State Actor in a Cohabitant State*

Following an actual or imminent armed attack, is it lawful for the victim state to act in self-defense against a non-state actor within the territory of a state in which control over parts of its territory and people have been challenged by the presence of a hostile non-state actor? Self-defense in the cohabitant state, even when that state has fulfilled the due diligence standard, may be force responding an actual or imminent armed attack, since the cohabitant state has lost effective control over part of its territory and the people where the hostile non-state actor has sought refuge or operates. This is the most complex scenario for determination of the legality of an intervention.

There are two fundamental difficulties. Within the law governing the resort to force, there is a conflict between the right to act in self-defense in response to an actual or imminent armed attack by a non-state actor and the requirement of attribution. In relation to the cohabitant state the former but not the latter requirement is met. Secondly, another conflict ensues between the law governing the resort to force, *jus ad bellum*, and the law governing the conduct of hostilities, *jus in bello*.

1. *Due Diligence: Finding a Gap in International Law*

The first difficulty ensues when, as argued above following the expansive position, one considers self-defense to be lawful as a response to a serious and actual or imminent attack by a

143. One should note, however, that even if the use of force is otherwise unlawful, the state suffering an attack might extend an *ex ante* or *ex post* invitation to the state carrying out the attack, legalizing the resort to force within the general limits set out by international law, the law of war and human rights law.

non-state actor. Even if force is used solely against the non-state actor, that force will necessarily be launched within the territory of a state. Following the restrictive position, I have argued that the territorial state is not strictly liable for injuries caused by a non-state actor located within the jurisdiction of the state, the "unable or unwilling" test therefore being an illegitimate justification. Conventionally, followers of the restrictive position additionally require the territorial state to be responsible for the hostile acts of the non-state actor. With a link of attribution the territorial state becomes a harboring state. The cohabitant state, however, is not internationally responsible for the hostile acts of the non-state actor. Nevertheless an armed attack—involving the territory of the state—by the non-state actor occurs. Can the victim state act in self-defense? In this case there is a conflict between the law of war, under which self-defense would authorize the use of force by the victim state, and general international law, under which the law of state responsibility would protect the sovereign autonomy of the territorial state since it is not responsible for the hostile acts of the non-state actor. Which body of law should be privileged?

In view of the extraordinary circumstances involved in this scenario, even some advocates of the restrictive position carve out an exception to the requirement of attribution when the state "cannot control the acts" of the non-state actor. But they thus open a large hole rather than a narrow exception, for they adopt the "unwilling or unable" standard, which as argued above, amounts to instituting strict liability and renders the territorial state a "failed or impotent" state.¹⁴⁴ The due diligence standard provides a middle ground between strict attribution and strict liability. However, the due diligence standard does not fully solve the conflict between the law of self-defense and state responsibility. It rather shows a gap in international law.

International law imposes a general obligation on states to prevent the use of their territory in ways that cause harm in the territory of another state.¹⁴⁵ Moreover, in specific relation

144. See, e.g., Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 901 (2002).

145. This obligation was established by the Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905, 1965–66 (Apr. 16, 1938), and developed in the

to the presence of hostile non-state actors in the territory of states, international law imposes a series of positive obligations for states to act in accordance with the general obligation not to cause trans-boundary harm.¹⁴⁶ These positives obligations include measures intended to prevent transnational terrorism, to investigate, and, when possible, to prosecute or extradite those responsible for terrorist attacks. Additionally, in fulfilling these obligations, international law requires states to cooperate with the victim state and the international community.¹⁴⁷

Accordingly, more is required from states than not exercising control over irregulars in their territory or not adopting their actions. International law requires the territorial state to “combat” the hostile non-state actor. However, international law does not impose an obligation to use military force against the hostile non-state actor. It does not impose an obligation to wage an internal war. It rather requires a level of action limited to the law enforcement paradigm: prevention, investigation, prosecution, and cooperation. Consequently, we can predict a situation in which there is a cohabitant state that is a diligent state but there is also a serious attack by a non-state

context of the use of force by the International Court of Justice in the Corfu Channel case, *supra* note 125, at 18.

146. See, e.g., Pierre-Marie Dupuy & Cristina Hoss, *Trail Smelter and Terrorism: International Mechanisms To Combat Transboundary Harm*, in *TRANSBOUNDARY HARM IN INTERNATIONAL LAW, LESSONS FROM THE TRAIL SMELTER ARBITRATION*, 225, 238–39 (Rebecca M. Bratspies & Russell A. Miller eds., 2006) (tracing the foundations of the due diligence standard); TRAPP, *STATE RESPONSIBILITY*, *supra* note 72, at 63–131 (discussing obligations to prevent terrorism, including the content of the due diligence standard)

147. The content of the positive obligations is determined in various international legal documents. See, e.g., G.A. Res 49/60 art. II, ¶ 5(a), U.N. Doc. A/RES/49/60 (Dec. 9, 1994) (declaring that states shall “refrain from organizing, instigating, facilitating, financing, encouraging or tolerating terrorist activities and . . . take appropriate practical measures to ensure that their respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens”); *id.* art. II, ¶ 5(b) (states must “ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts, in accordance with the relevant provisions of their national law”); G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/8018 (Oct. 24, 1970) (affirming that states have the “duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts”).

actor and, therefore, a rationale to use force in self-defense. A state would be diligent regardless of the occurrence of an attack because the obligation to prevent is an obligation of conduct rather than result.¹⁴⁸ In this scenario, arguing for self-defense would overrule the sovereign independence of a diligent state and the well-established requirement of strict attribution for direct responsibility and due diligence for indirect responsibility. Arguing that self-defense is unlawful, although correct as a matter of *lege lata*, would however overrule the right of the victim state to protect itself from a foreign violence and push international law dangerously into utopianism.¹⁴⁹ To avoid overstressing the law as in the abovementioned interpretations, I suggest filling the gap with an international legal framework for an intervention governed through implied consent and implicit conditions.

2. *The Problem of Jus in Bello Legality in the Cohabitant State*

Another difficulty emerges when trying to apply the traditional IHL rules to govern the conduct of hostilities in an intervention in a cohabitant state. Traditional *jus in bello* regulates the conduct of hostilities between states. In the interest of the international community, it limits states' acceptable wartime conduct by banning certain weapons, prohibiting some battlefield tactics, protecting civilians, and protecting detained combatants. At the same time, *jus in bello* reflects the reality of war and the interests of sovereign states in being able to use armed force. When granting regular combatants immunity from prosecution for their killings in war, the law of war confers combatants a privilege to kill. Traditionally, these conflicting rules and policy objectives are reconciled by recognizing a thick legal structure limiting and regulating deadly military force, leaving a space for immune killings between privileged combatants. How is this balancing compromised by the reality of an armed conflict between a state and a hostile non-state actor? Rather than killings between privileged combatants, this

148. See *supra* text accompanying note 100.

149. If the cohabitant state is negligent, I would distinguish gross negligence that would transform the state into a harboring state (refusing to investigate or prosecute, for instance, can be constructed as adopting the acts of the non-state actor), from lesser levels of negligence that would not alter cohabitant status, but impose less strict rules to govern the intervention.

type of warfare pits regular—thus privileged—combatants, against irregular—thus unprivileged—fighters. Under IHL, there is no international armed conflict between the cohabitant state and the victim state using force in self-defense. Accordingly, war killings in the territory of a cohabitant state do not meet the requisites of validity established by IHL, since, as explained below, the intervening state has no privilege to kill.

In light of these two difficulties, I regard the intervention by the victim state as neither permitted nor prohibited, and thus argue that an intervention in a cohabitant state is governed by implied conditions. This interpretation affirms states' right to protect their national security. Introducing implied conditions that supplement conventional law of war affirms the rights and interests of the intervened state and the international community.

IV. CONFLICT OVER *JUS IN BELLO* LEGALITY

Consider U.S. targeted killings in countries like Sudan, Yemen, or Pakistan, accepting for the moment that there is *jus ad bellum* justification under self-defense to carry out military operations against al-Qa'ida and other hostile non-state actors. Since al-Qa'ida members are irregular fighters, the intervening state does not primarily target privileged combatants. How does the law governing the conduct of hostilities justify and regulate killings? In his well-known speech, Harold Koh based the justification of targeted killings on the legality of American "targeting practices."¹⁵⁰ Koh defended the legality of the targeting of al-Qa'ida members by first, maintaining that, in belonging to an "enemy force," they are "belligerents and, therefore, lawful targets under international law," and second, by assuring that the particular targeting operations comply with the IHL principles of proportionality and distinction.¹⁵¹

The expansive view that Koh articulated strikes a balance between the regulation of warfare and the recognition of a privilege to kill that tips the scale in favor of the latter, recognizing immunity for drone killings as war killings. Koh took issue with the IHL regulation of targeting, reassuring that the United States complies with the principles of proportionality,

150. See Koh, *supra* note 14 ("U.S. targeting practices . . . comply with all applicable law, including the laws of war.").

151. *Id.*

necessity, and distinction. But Koh only obliquely addressed a key predicate question for the discussion of IHL principles: under what circumstances is a killing not a homicide, but rather a lawful killing in war? When Koh affirmed that al-Qa'ida members belong to an "enemy force" he seemed to think that as soon as they take direct participation in hostilities, al-Qa'ida members—who otherwise would be considered civilians—become unprivileged irregular fighters. Moreover, judging from the actual targeting practices of the United States, Koh must assume a very wide definition of "direct participation in hostilities" to include not only foot soldiers and commanders, but also planners, recruiters, and instigators as lawful targets.¹⁵²

On the other hand, lawyers defending a restrictive interpretation balance the tension between regulating armed conduct and recognizing immunity for war killings, giving to the rules and doctrines reflecting the former objective, limiting the horrors of warfare, more weight than to the latter. Some affirm that current targeted killings by the United States do not comply with the IHL principles of proportionality, necessity, and distinction.¹⁵³ Others affirm that since there is no inter-state armed conflict in countries like Pakistan, Sudan, or Yemen, the United States does not enjoy a privilege to kill. Were the United States to pursue its enemies abroad, the law enforcement paradigm would be the only lawful option in the restrictive framework because states have no privilege to kill civilians within the jurisdiction of another state.¹⁵⁴

152. See Scott Shane, *U.S. Approves Targeted Killing of Radical Muslim Cleric Tied to Domestic Terror Suspects*, N.Y. TIMES, Apr. 7, 2010, at A12 (stating that the U.S. government authorized the targeted killing of a cleric and organizer).

153. See, e.g., O'Connell, *Unlawful Killing*, *supra* note 3, at 25 (noting that the U.S. targeted killing program "appears to fall far short of meeting the international law rules governing resort to armed force, and the conduct of armed force"); Chris Downes, "Targeted Killings" in *an Age of Terror: The Legality of the Yemen Strike*, 9 J. CONFLICT & SEC. L. 277, 285–86 (2004) (concluding that there is "considerable doubt about the legality" of a U.S. drone strike in Yemen).

154. See, e.g., O'Connell, *Unlawful Killing*, *supra* note 3, at 21 ("Pakistan is not responsible for an armed attack on the United States and so there is no right to resort to military force under the law of self-defense."); Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the "War on Terror"*, 27 FLETCHER F. WORLD AFF. 55, 65 (2003) (stating that a U.S. drone

I propose that it is the malleable nature of the principles of proportionality, necessity, and distinction that allows international lawyers, depending on their interpretative position, to use them either to limit or validate a state's conduct of hostilities. If more weight is placed on the interest of the international community in limiting warfare suffering, these IHL principles will impose limits on the conduct of hostilities. Conversely, if greater significance is given to states' sovereign autonomy to decide the validity of their own actions in war, the IHL principles will validate state conduct. Similarly, constructing a standard of "direct participation in hostilities" for the purpose of denying or recognizing the privileged targeting of irregular fighters depends on the interpretative position against which the conflicting interests are balanced. Recognizing the plasticity of the IHL principles and the standard of participation in hostilities, I propose below that one of the implied conditions of the legal regime governing a military intervention against a non-state actor in the territory of a cohabitant state establishes that decisions regarding appropriate targets of force should be made not by the intervening state but by a body representing also the intervened state, the local population, and the international community.

A. *Jus ad Bellum Versus Jus in Bello*

The law of war requires states both to invoke a legal justification to resort to military force and to comply with the rules regulating conduct in warfare. Targeted killings by the U.S. military within the territory of another state confront legal advisors and commentators with a difficult problem because this fact pattern raises a conflict between rules governing the resort to force and rules governing the conduct of hostilities. When a state is entitled to resort to force under self-defense but can rarely, if ever, invoke the privilege to kill because of the difficulties of finding a member of a hostile non-state actor directly participating in hostilities, are killings lawful?

International lawyers following the expansive view do not see contradictions between self-defense and IHL regulation of hostilities. Some think that IHL does not apply to targeted kill-

strike in Yemen was of "dubious legality" due to the absence of armed conflict).

ings.¹⁵⁵ Most deem targeted killings compliant with both regimes. As unprivileged combatants, members of al-Qa'ida are lawful targets. A wide standard of direct participation in hostilities defines most members of a hostile non-state organization as lawful targets.

In contrast to the expansive view, I argue that killings in a cohabitant state, including targeted killings, must comply with both the rules governing the resort to force and the rules regulating the conduct of hostilities. In the cases of the harboring state and the innocent state, the rules of both regimes answer the question of legality consistently. According to both *jus ad bellum* and *jus in bello*, an intervention in the former case is lawful and in the latter unlawful. However, when force is waged in the territory of a cohabitant state, because of the absence of an international armed conflict as well as the overstretching of the standard of participation in hostilities to target irregulars, the IHL lawfulness of killings is contested. Illegality under IHL may be in conflict with the legality to resort to force under self-defense.

On the other hand, lawyers who advance a restrictive view affirm that in the absence of an international armed conflict, combatants do not enjoy a privilege to kill. They believe that in a conflict of a non-international nature, only the territorial state may kill irregular fighters directly participating in hostilities. A narrow interpretation of the standard of direct participation in hostilities renders the expansive view's case for a privilege to kill illusory because most targeted killings aim either at non-combatant members of an irregular force or at combatants outside an actual battlefield. Moreover, international lawyers following a restrictive view think that if targeted killings do not comply with IHL regulations, the use of force is unlawful even if there is a legal justification under self-defense.

In contrast to the restrictive interpretation, I argue that when there is a conflict between the rules of both regimes, killings in the cohabitant state should not be considered unlawful. They should be treated as force neither permitted nor prohibited. Following the ICJ ruling in the *Nuclear Weapons* advisory opinion, I recognize that there is a gap in the law. Un-

155. See Anderson, *supra* note 32, at 358–59 (arguing that IHL does not “automatically” apply to targeted killings).

like the opinion delivered by ICJ, I suggest below filling the gap with implied rules.

Treating armed force in the cohabitant state as violence neither permitted nor prohibited preserves a cherished principle defended by most international lawyers: the independent coexistence of *jus ad bellum* and *jus in bello*.¹⁵⁶ To keep the regimes separate, lawyers refrain from letting the rules of one regime override the rules of the other, which may occur in two scenarios. First, in the most common scenario in which IHL imposes limits on the conduct of hostilities, these rules are affirmed independently from the rules determining the legality of the resort to force, so that the party lawfully resorting to force would not be subjected to lesser limitations and the party unlawfully resorting to force would not be subjected to lesser protections.¹⁵⁷ Second, in the case of force legal under self-defense but illegal under IHL, if the resort to force is defined as unlawful, the independent coexistence of the two regimes is infringed, because self-defense would depend not only on its own requirements but also on the IHL regime. I will call this a *reversed* conflation, to distinguish it from the first and most common scenario, and argue that it should be equally avoided. There are reasons beyond the respect of legal formality to defend the principle of independent coexistence. The law of war embodies conflicting goals and rationales – limiting war to secure international peace and reducing the suffering in war assuming the inevitability of interstate violence. The law of war will only be able to mediate between these conflicting goals if both regimes coexist rather than conflate into each other. Moreover, in a situation in which there is a potential collapse of *ad bellum* into *in bello*, if the resort to force is deemed illegal, the possibilities of the law of war to concep-

156. See, e.g., Louise Doswald-Beck, *International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, 316 INT'L REV. RED CROSS 35, 53 (1997). ("For at least two centuries it has been absolute dogma that international humanitarian law applies equally to all parties to a conflict, irrespective of which is acting in self defence; this has been confirmed by very long-standing State practice and universally acknowledged in legal literature.")

157. See Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 67–69 (2009).

tually define a clear space of illegality are weakened, since illegality comes at the cost of conflating the two regimes.

1. *The Privilege to Kill in War*

Unlike the situation of the harboring state, where the attribution of acts of the non-state actor to the state gives rise to an international armed conflict, which creates a legal privilege to kill combatants, in a cohabitant state there is no international armed conflict unless the cohabitant state actively opposes the intervention. The intervening state now lacks the privilege to kill. Thus, for the current American practice of targeted drone killings in countries like Pakistan, Sudan, or Yemen to be lawful, members of a hostile non-state actor have to take direct part in hostilities—they have to become combatants. As argued, absent an international armed conflict, states do not enjoy a privilege to kill members of a hostile non-state actor unless they directly participate in hostilities, and, in the eyes of IHL experts, current U.S. targeting practices stretch the standard of direct participation beyond recognition.

International lawyers following the restrictive view believe that the legality of the resort to force does not exhaust the question of the legality of the use of force against non-state actors.¹⁵⁸ Actually, lawyers invoking IHL have advanced the most forceful critique of the use of force by states against non-state actors in the territory of another state.¹⁵⁹

In their warfare conduct, states have to comply with a series of obligations imposed by IHL. However, prior to finding out which particular limitations IHL imposes on states waging force against non-state actors, lawyers have to determine the

158. That is, these lawyers argue that IHL applies to force against non-state actors. See, e.g., L. Neuman, *Humanitarian Law and Counterterrorist Force*, 14 EUR. J. INT'L L. 283, 289 (2003) ("[E]ven people who perform terrorist acts should sometimes be protected by IHL."); Tom Ruys, *License to Kill? State-Sponsored Assassination Under International Law*, 44 MIL. L. & L. WAR REV. 15, 27–30 (2005) [hereinafter Ruys, *License to Kill?*] (arguing that civilians who commit terrorist acts may nonetheless be protected by IHL).

159. There is a significant number of studies examining the IHL aspects of states' resort to force against non-state actors in general and targeted killings of suspected terrorists in particular. See, e.g., Alston, *supra* note 15; David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171 (2005); MELZER, *supra* note 40; O'Connell, *Unlawful Killing*, *supra* note 3.

nature of this type of conflict in order to establish which specific legal regime is applicable. Certain norms governing the mode in which states wage war, including those governing the manner of lawful killings in war, apply as soon as a state uses armed force and thus are pertinent to the case in which one of the participants is a non-state actor. But the validity of the norms determining the lawfulness of the action of killing—*as distinct from the form of the killing*—of a member of an irregular force depends on the categorization of a conflict between a state and a non-state actor as an armed conflict and the classification of the members of the irregular force as privileged combatants or as non-combatants directly participating in hostilities.

Traditionally, IHL distinguishes between international and non-international armed conflicts. In many aspects this legal distinction has lost relevance, since rules applicable to both types of conflict have converged.¹⁶⁰ However, this is still a meaningful distinction with regard to the rules that regulate the status of combatants and prisoners of war (POW), for they are only applicable to international armed conflicts.¹⁶¹ Confering POW status only on privileged combatants within an international armed conflict, IHL grants immunity to them only and thus only they receive the privilege to kill. At the same time as IHL includes combatants, it excludes civilians from the category of legitimate military targets.¹⁶² Only combatants may kill and only combatants may be killed. Therefore, since an

160. See EMILY CRAWFORD, *THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT* 6 (2010) (describing the convergence of the two concepts in law and practice).

161. Crawford favors the convergence between both regimes in relation to combatant and POW status. *Id.* at 170–73 (describing the lacunae in protections provided by divergent regimes). See also JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 11–17 (2005) (describing the problems of defining “combatants” in non-international armed conflicts).

162. Knut Dörmann, *The Legal Situation of “Unlawful/Unprivileged Combatants”*, 85 INT’L REV. RED CROSS 45, 46 (2003); see also Rona, *supra* note 154, at 68 (noting that civilians have immunity from attack that can be forfeited by taking direct part in hostilities). The Inter-American Commission on Human Rights has defined the combatant’s privilege as “a license to kill or wound enemy combatants and destroy other enemy military objectives. A privileged combatant may also cause incidental civilian casualties.” Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, ¶ 68, OEA/Ser.L/V/II.116, (Oct. 22 2002). Combatants represent the state and

international armed conflict is defined as a conflict between states, including regular combatants and excluding civilians, members of a hostile non-state actor will be considered civilians unless they take direct part in hostilities.¹⁶³ As civilians, non-combatant members of the hostile non-state actor are not legitimate targets in an international armed conflict.¹⁶⁴ If hostilities are conducted within a state that has ratified Additional Protocol I to the Geneva Conventions, some irregular forces might also attain the status of combatants.¹⁶⁵

On the other hand, states may deploy military force against non-state actors in non-international armed conflicts, namely, in a conflict between a state and rebels or insurgents fighting against the state within its territory.¹⁶⁶ In the case of internecine or separatist struggles, international law does not prohibit a state from resorting to military force to assert control over its own territory and people. If insurgents are recognized by other states as belligerents, the legal regime valid for international armed conflict will be in place. Otherwise, when hostilities between a state and a non-state actor have reached a fair level of intensity, IHL imposes on all parties to the conflict

may be thus legally killed. *Id.* ¶ 67. Civilians and detained combatants do not represent the state, thus they are not legitimate targets. *Id.*

163. Dörmann, *supra* note 162, at 46–47; Inter-American Commission on Human Rights, *supra* note 162, ¶ 70; Kretzmer, *supra* note 159, at 189. Moreover, according to followers of the restrictive view, individual killings are unlawful if militarily unnecessary. Thus, even when an irregular has had direct participation in hostilities, it would be unlawful to kill in the absence of military advantage or when the irregular can be captured without risk to the operating force. See MELZER, *supra* note 40, at 57. Irregular forces would enjoy POW status if they were linked to a state and fulfilled the conditions established in Article 4(A)(2) of the Third Geneva Convention: following command, wearing signs, carrying arms openly, and conducting operations in a way that respects laws of war. *Id.* at 149–55.

164. The use of force against non-legitimate military targets is thus prohibited by IHL and in general governed also by human rights law. See MELZER, *supra* note 40, at 58; Ruys, *License to Kill?*, *supra* note 158, at 21, 35 (noting the illegality of such force, and stating that human rights protections apply to suspected terrorists).

165. Irregulars fight in the exercise of self-determination bearing their arms openly while engaging in or preparing for military operations. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1 ¶ 4, art. 44, June 8, 1977, 1125 U.N.T.S. 3.

166. On the concept and regulation of non-international armed conflict see generally CULLEN, *supra* note 25.

a minimum set of obligations. These obligations, contained in common Article 3 of the Geneva Conventions, include, for example, the humane treatment of detainees and the prohibitions on murder and executions.¹⁶⁷ However, since these rules do not grant immunity to captured combatants, the regime does not confer the privilege to kill. Combatants who are captured might therefore be prosecuted for all their hostile acts, including not only violations of the law of war, but also violations of ordinary domestic law. Killings within a non-international armed conflict are homicides.¹⁶⁸

Outside an armed conflict, where hostilities do not reach the threshold of gravity required by IHL, as in the case of riots or internal disturbances, international human rights law (and domestic law) will limit the use of force by the state. In this case, the killing of members of irregular forces fighting the state has to comply with the law enforcement paradigm.¹⁶⁹ According to human rights law, the protection of the right to life against arbitrary deprivation imposes on states the obligation to use lethal force only under absolute necessity and proportionality.¹⁷⁰ Lethal force is necessary when it is the last resort available and is indispensable to prevent a concrete and immi-

167. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter Common Article 3]. Moreover, if the state party to the conflict is party to Additional Protocol II, and if the organized armed group is in control of part of the state's territory the parties involved in the non-international armed conflict should respect a greater number of obligations included in Additional Protocol II.

168. On the absence of immunity, see François Bugnion, *Jus ad Bellum, Jus in Bello and Non-International Armed Conflicts*, 2003 Y.B. INT'L HUMANITARIAN L. 167, 192–93 (arguing that as long as detainees are not executed and minimal procedural guarantees are respected, the prospect of prosecution or release will depend on who wins the civil war).

169. See MELZER, *supra* note 40, at 59 (assessing such a situation under the law enforcement paradigm); Ruys, *License to Kill?*, *supra* note 158, at 16 (“Willful killing of specific individuals within a State’s own territory in times of peace (including in situations of internal disturbance or riots) is a matter of law enforcement, which is not governed by IHL . . .”).

170. This is not the *jus ad bellum* proportionality and necessity of self-defense. See International Covenant on Civil and Political Rights art. 6, ¶ 1, 999 U.N.T.S. 171, Dec. 19, 1966 [hereinafter ICCPR] (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”). According to ICCPR Article 4, states can derogate from some rights in case of emergency; Article 6, however, is non-derogable. *Id.* art. 4.

TABLE 1. LEGAL STATUS OF COMBAT KILLINGS BY MEMBERS OF REGULAR FORCES

Legal status of the killings	International armed conflict	Non-international armed conflict	Peacetime (clashes below armed conflict)
Members of regular forces	Privileged	Unprivileged*	Unprivileged*
Members of irregular forces that meet the Additional Protocol I (AP I) criteria	Privileged	Unprivileged	Unprivileged
Irregular fighters (outside AP I) directly participating in hostilities	Privileged	Unprivileged	Unprivileged
Non-state actor internationally recognized as belligerent	Privileged	Privileged**	Unprivileged
Irregular fighters with no direct participation in hostilities	Unprivileged	Unprivileged	Unprivileged

The table shows the legal status of a killing and does not cover the legality of the targeting which has to comply with other IHL rules.

* These killings are not privileged because in the absence of an international armed conflict, a combatant enjoys no immunity. This might sound absurd because in fact there is an armed conflict as soon as a state uses force against another state. The qualifications of these killings as unprivileged means that before the beginning of a serious resort to armed force, a state has no privilege to kill and that a state has no privilege to kill short of war.

** These are privileged killings because the recognition of belligerence would transform the nature of the conflict making it analogous to an international armed conflict.

ment danger of death or serious bodily injury. Lethal force is proportional if it is justified in relation to the gravity of the threat, measured in terms of the danger that the targeted individual imposes, not in terms of the gravity of the offense.¹⁷¹ Lethal force is legal if strictly and directly necessary to save life. Thus, outside an armed conflict of international or domestic character, the "intentional, premeditated and deliberate killing by law enforcement officials" or other state agents of a member of an irregular force is unlawful.¹⁷²

According to a restrictive view of the law of war and particularly of IHL one may carefully delimit the situations in which regular forces of a state possess a privilege to kill. *Table 1* lists

171. Ruys, *License to Kill?*, *supra* note 158, at 20, MELZER, *supra* note 40, at 59.

172. Alston, *supra* note 15, at 11. Alston maintains that "it is never permissible for killing to be the *sole objective* of an operation. Thus, for example, a 'shoot-to-kill' policy violates human rights law." *Id.*

the cases in which combatants enjoy or do not possess a privilege to kill in combat. In sum, IHL confers only a privilege to kill to combatants within an international armed conflict. Irregular combatants will be lawfully killed only if they have acquired the status of belligerents, directly participated in hostilities, or become regular combatants according to Additional Protocol I. Outside these scenarios, willful killing of combatants constitutes unlawful extrajudicial killings.

2. *Armed Force Without a Privilege To Kill: A Conflict of Rules*

Lawyers adhering to a restrictive view of the law of war believe that the use of force by a state against a non-state actor located in the territory of another state has to conform both to the laws governing the resort to force, which regulates self-defense, and the laws governing the conduct of hostilities, which bestows the privilege to kill. To avoid conflicts between their conflicting rationales, in terms of the goals and scope of application, the regimes are kept apart. The law governing the resort to force—*jus ad bellum*—attempts to limit the use of armed force and secure peace. The law governing the conduct of hostilities—*jus in bello* or IHL—seeks to reduce the suffering of combatants and to protect civilians. International law, at the same time, legalizes the use of force through the *jus ad bellum* exception to the prohibition and grants to privileged combatants immunity to kill lawful targets through IHL regulation.¹⁷³ The former regime governs interstate relations while the latter governs relations between a state and an individual.

What is the relationship between the two regimes when a state has the right to use armed force under self-defense and, according to IHL, members of the armed forces of that state do not enjoy a privilege to kill? What is the relationship when the conflicting validity of both regimes cannot be easily resolved by a temporal—before/after the initiation of hostilities—or a material—general/special law—criterion? When,

173. Berman describes law's involvement in the construction of war as a parallel legal regime in which normal rules, valid during peace time, do not apply. He argues against the idea that law's relationship to war is one of limiting violence, and against the idea of historical progress, namely, that law has developed to limit more state violence. See Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 4–5 (2004).

moreover, there are no conflicts-of-law rules available and conventional legal maxims of interpretation provide no guidance? The *lex specialis* doctrine is unable to indicate which regime should prevail in case of conflict since, in their mutual interaction, both regimes regulate a specific subject matter. A temporal distinction between resort to force (before) and conduct of hostilities (after) is equally inconclusive, since the scope of validity of each regime is independent from the other and thus both regimes temporally coexist.¹⁷⁴ These criteria cannot resolve the conflict between the two regimes because the issue here is not primarily about the regulation of the conduct of hostilities nor about contesting the restrictions IHL imposes on the mode in which armed force is deployed, but is rather about the lack of applicability of this legal regime and, consequently, the absence of a privilege to kill.¹⁷⁵ The question surfaces not after the violation of IHL limitations, but when the factual preconditions do not trigger the application of IHL, when the situation is outside IHL's jurisdictional scope. The absence of rules solving the conflict of laws reflects a deeper contradiction between the conflicting objectives pursued by the law governing the resort to force and IHL.¹⁷⁶

Conventional post-World War II scholarship believes that *jus ad bellum* and *jus in bello* should have independent and parallel validity and therefore strongly opposes any conflation of the two regimes.¹⁷⁷ Conflation can potentially happen when

174. See Christopher Greenwood, *The Relationship between Ius ad bellum and Ius in bello*, 9 REV. INT'L STUD., 221, 221 (1983) (stating that *jus ad bellum* and *jus in bello* "operate simultaneously during a conflict").

175. See Rona, *supra* note 154, at 65 ("Unless the event is part of an armed conflict, humanitarian law does not apply, and its provisions recognizing a privilege to kill may not be invoked.").

176. Therefore, when in the search for a correct legal answer lawyers turn to reasoning about preferred outcomes to support the primacy of one of the regimes (in the restrictive view, IHL), even when goals and rules might be brought into line by identifying underlying principles that "fit" the rules, the answers are always remarkable unstable. Given that the principles underlying the regime governing the resort to force and the regime governing the conduct of hostilities are not only in conflict, but also irreducible, answers are unstable, and the legal operator can destabilize a legal answer foregrounding the *jus in bello* rationale by drawing from the legal background a *jus ad bellum* rule, and vice-versa.

177. BROWNIE, *supra* note 51, at 406–08; YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 4–5 (2004); Greenwood, *supra* note 174, at 232–33 (noting that *jus ad bellum* and

the validity of the rules regulating the conduct of hostilities depend on the legality of the resort to force. There are very good reasons to maintain that all forms of war and all warriors should comply with the same rules regulating the conduct of hostilities, regardless of any qualification rendering a war “just,” in the sense of a lawful resort to armed force upholding the interests of the international community, or “unjust,” in the sense of an illegal aggression pursuing the national self-interests of a state. The reasons to keep both regimes separate have less to do with protecting combatants who may lose the right to be treated humanely because they are fighting an “unjust” war, than with IHL’s “pragmatic” or “skeptical” disposition towards the possibility of a clear *jus ad bellum* distinction between lawful and unlawful use of force.

During the course of the nineteenth century, war progressively became an institution of law, but as a legal regime sharply separated from the state of peace. At the same time, international law began to regulate how war would be waged. It was only later, during the first half of the twentieth century, that international law proscribed the use of armed force, but left the rules regulating the conduct of war intact.¹⁷⁸ Since then, the law of war has contained both a regime governing the resort to force and a regime regulating the conduct of hostilities. This separation of *jus ad bellum* and *jus in bello* has been a building block of the law of war and public international law in general. This is why international lawyers reject the proposition that the rules governing the conduct of hostilities are dependent on the rules governing the resort to force and also why they reject the collapse of the distinction between the two regimes.

Scholars adhering to the restrictive view require the use of force against non-state actors to comply with both regimes. In a situation in which IHL does not confer the privilege to kill, lawyers adhering to the restrictive view could maintain that a

jus in bello remain distinct branches of international law). For a defense of the “dualistic axiom” in contemporary scholarship see Sloane, *supra* note 157. Cf. Berman, *supra* note 173, at 34–37 (showing dynamically how conflations can be strategically avoided or produced by legal operators’ definition of armed conflict and combatant).

178. For an account of this historical development of the law of war, see STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY 177–91* (2005).

state may not exercise the right to use armed force conferred under self-defense. In affirming that this intervention is illegal, these lawyers would blur the distinction between the two regimes by making self-defense depend on IHL and the existence of the privilege to kill. Compared to the conventional and typically rebuffed conflation mentioned above, this would be a *reversed* conflation because the laws governing the resort to force collapse into the rules governing the conduct of hostilities. If an intervention is legal under self-defense but particular killings of irregular combatants are not, is force waged in the cohabitant state unlawful? What should lawyers do in front of a potential reversed conflation?

The question is difficult because if the legal basis of the privilege to kill is clear and the rationale behind the presence or absence of the privilege is important, there are good reasons for giving precedence to IHL and collapsing the distinction between the two regimes. The privilege to kill is constituted by, or is the flip side of POW status: only a warrior who has immunity from prosecution and is entitled to the POW status enjoys the privilege to kill. The privilege to kill is limited to international armed conflicts. The rationale behind the restrictive nature of the privilege responds to the imperative not to extend immunity to kill outside the territorial boundaries of interstate warfare. States have no license to kill around the globe. That is a good thing. Outside war, states should use the law enforcement regime and mechanisms.

However, I argue that if there is a legal rationale to act in self-defense but no privilege to kill, an intervention in a cohabitant state should not be regarded as unlawful. Refraining from considering this type of force illegal maintains the autonomous coexistence of both regimes. It also preserves the possibility of a clear and strong identification of lawful and unlawful cases of intervention in the harboring and innocent states. There are more important reasons for not declaring an intervention in the cohabitant state unlawful than upholding the coherence of the law of war. Abstention from conflating both branches of the law of war preserves the possibility of a clear and strong identification of lawful and unlawful cases of intervention in the harboring and innocent states. More important, if one deems an intervention in a cohabitant state illegal, it amounts to forfeiture of states' right to self-preservation, an assertion that would push international law into utopian irrele-

vance. Keeping both regimes separate and independent from each other, that is, considering this type of intervention as violence neither permitted nor prohibited by conventional law of war, creates a space between war and peace.

B. *Force Neither Prohibited Nor Permitted: A Regime Between War and Peace*

If not prohibited, does international law permit the use of force? In the absence of an express prohibition, under classical international law's *Lotus* principle, the conduct of a state was presumed lawful. Under modern international law, however, the absence of a prohibition is no longer enough to determine the legality of state conduct.¹⁷⁹ Modern international lawyers recognize the possibility of the absence of a clear rule prohibiting or permitting some course of action. When confronting a gap, conflict, or ambiguity, modern international lawyers routinely construe an answer appealing to the nature of sovereignty or the nature of the international community to choose an outcome.

In the case of an intervention in a cohabitant state, the conflict between the rules governing the resort to force and IHL cannot be solved by further rule-application. When international law regulates warfare, it not only limits the basis on which states may justify the resort to force, but also limits the means and modes through which states wage war. Some forms of force are prohibited and some instances in which a state might otherwise resort to force are outlawed. But at the same time, as Nathaniel Berman has shown, within the limits set by legal regulations and prohibitions, the law empowers and legitimizes the use of force and the conduct of warfare. The law of war constructs a right to resort to armed force (under self-defense) and a privilege to kill in war.¹⁸⁰ There is no rule to

179. See, e.g., Fisheries Case (U.K. v. Norway), 1951 I.C.J. 145, ¶ 10 (Dec. 18) (separate opinion of Judge Alvarez) (“[The Lotus Principle], formerly correct, in the days of absolute sovereignty, is *no longer so* at the present day: the sovereignty of States is henceforth limited not only by the rights of other States but also by other factors: . . . the Charter of the United Nations, resolutions passed by the Assembly of the United Nations, the duties of States, the general interests of international society and lastly the prohibition of *abus de droit*.”).

180. These are privileges in the “Hohfeldian” sense because they are accompanied by “no rights” rather than correlative duties; that is, in the ab-

settle the conflict between the laws governing the resort to force and IHL because this conflict derives from an international legal structure that both prohibits and empowers states to use armed force, thus structuring not only two legal regimes (of war and peace) but a third regime between the two.

International law creates a regime of war, which is a legal space where violence is regulated as well as immunized, in contra-distinction to a normal legal regime of peace, applicable in the absence of war, in which interstate violence is prohibited and state violence sanctioned only within the strict limits of the law-enforcement paradigm.¹⁸¹ The boundaries between the regimes of war and peace are mainly drawn by the legal definition of war as well as the legal definition of the "warrior."¹⁸² In light of the range, and at times the contradictory nature of the purposes pursued by the law of war, "warriors" are defined either as lawful targets, for the purpose of lawful killing, or as privileged combatants, for the purpose of granting immunity to kill and granting of POW status. Moreover, war itself is defined as an international armed conflict (for the purpose of IHL analysis), as armed force (for the purpose of the prohibition on use of force), or as an armed attack (for the purpose of self-defense). One might align these divergent definitions of war and warrior and draw a clear yet uneven line separating the regimes of war and peace.

The line between war and peace is uneven and inevitably constructs a space between the two regimes. Here we find a third default regime of unprivileged—but not unlawful—violence. A regime governing violence that does not meet the requirements set by the legal definitions of war and warriors, that is, violence neither permitted nor prohibited. The limits of this default regime fluctuate because the contours of the regimes of law and peace not only diverge but also are unstable. The contours of the regimes are unstable because the legal definitions of war and warriors are both legal categories

sence of the right of a state not to be attacked and a soldier not to be killed, a state has the privilege to harm. See generally Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 Wis. L. REV. 975 (1982).

181. See Richard R. Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 323 (1951) (noting that war suspends the normal law applicable in peacetime).

182. Berman, *supra* note 173, at 4.

and factual yardsticks subjected to reinterpretation on the one hand and manipulation on the other, because the laws governing the resort to force and IHL establish potentially conflicting yardsticks within the law of war.¹⁸³ The question explored in this article is an example of a conflict and a gap in the law. This conflict between the rules of the regimes of war and peace, which emerges from the contradiction between divergent yardsticks, gives rise to lawful force absent a privilege to kill. There is a gap in the law because there is no conflicts-of-law rule to resolve the contradiction.

Confronting a similar gap in the *Nuclear Weapons Advisory Opinion*, the ICJ issued a *non liquet*. The ICJ, deciding on the legality of nuclear weapons, argued that a state might use a nuclear weapon to protect itself under self-defense. It simultaneously found that nuclear weapons do not respect IHL principles of proportionality and distinction. Affirming the validity of both branches of the laws of war by holding that the use of a nuclear weapon in self-defense has to comply with both the rules governing the resort to force and with IHL to be lawful, the Court recognized that resorting to a nuclear attack in self-defense is neither prohibited nor permitted. It thus decided not to choose between the regimes and instead declared a *non liquet*.¹⁸⁴ In the same vein, I do not solve the conflict by choosing one regime over the other. I have recognized the gap, but rather than unregulated, I conceptualize this gap as the space of violence that exists between the regime of war and the regime of peace, which in the case of an intervention in the cohabitant state, should be governed by implied conditions.

1. *Intervention with Implied Conditions*

Some scholars have pointed out that the use of force against, for example, al-Qa'ida in Pakistan or Yemen might have been justified by the invitation to intervene given by these states to the United States. These authors, however, have ei-

183. See *id.* at 5 (noting that recent trends have made “the distinction between the two spheres available for strategic instrumentalization”); see also DAVID KENNEDY, *OF WAR AND LAW* 111–41 (2006) (describing the potential instrumental manipulation of standards).

184. *Nuclear Weapons*, *supra* note 55, ¶ 105(2)(e) (“[T]he Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”)

ther pointed at the political difficulties of issuing an invitation or showed that no such consent has been actually given.¹⁸⁵ There is a significant literature on the doctrine of intervention by invitation, a literature discussing, among other issues, the legality of the doctrine under general public international law and the law of war, the form and requirements to make the expression of consent valid, and the problem of legitimacy of the government issuing the invitation.¹⁸⁶

The cohabitant state does not explicitly consent to the intervention and does not explicitly object to the intervention. As a semi-peripheral state, it can neither say "yes" nor "no" to

185. See, e.g., Michael Byers, *Terrorism, the Use of Force and International Law after 11 September*, 51 INT'L & COMP. L.Q. 401, 403 (2002); GRAY, *supra* note 28, at 57; Murphy, *supra* note 36, at 118–19 (expressing the problem of proving consent in the case of Pakistan); O'Connell, *Unlawful Killing*, *supra* note 3 at 18; Mary Ellen O'Connell, *To Kill or Capture Suspects in the Global War on Terror*, 35 CASE W. RES. J. INT'L L. 325, 326–28 (2003). However, Alston warns that consent is not a cause for full exculpation from human rights and IHL obligation. Alston, *supra* note 15, at 12. Conversely, journalists have reported that Pakistan and Yemen may have consented to targeted drone killings by the United States in their territory. Eric Schmitt & Mark Mazzetti, *In a First, U.S. Provides Pakistan with Drone Data*, N.Y. TIMES, May 14, 2009, at A14; Joby Warrick & Peter Finn, *CIA Director Says Attacks Have Hobbled al-Qaeda*, WASH. POST, Mar. 18, 2010, at A1.

186. Some authors think that an intervention by invitation is unlawful. Nolte has described efforts during the 1970s to support, on the basis of the principle of sovereignty and non-intervention, a clear rule prohibiting invitations. GEORG NOLTE, *EINGREIFEN AUF EINLADUNG*, 114–17 (1999). However as pointed out by Hafner and Doswald-Beck, most authors think that such an intervention is legal, based on the General Assembly Resolution 3314 (XXIX), which includes under the definition of aggression and the use of armed force the phrase: "in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement." Gerhard Hafner, *Present Problems of the Use of Force in International Law*, in *ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL* 225, 232 (2007); Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT'L L. 189, 189 (1985) (mentioning also the ICJ decision in the *Nicaragua* case). Moreover, Le Mon has argued about the legality of an intervention based on the sovereignty of the state issuing the request. Christopher J. Le Mon, Note, *Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested*, 35 N.Y.U. J. INT'L L. & POL. 741, 792 (2003). Therefore, Hafner does not focus the discussion on the legality of the intervention, but on the nature of the request, the author of the request and the limits international law imposes on the invitation. Hafner, *supra*, at 235. Rather than an invitation to intervene, Hafner describes the invitation as "military assistance on request." *Id.* at 237.

the intervening state. The doctrine of intervention by invitation has thus limited relevance, but it is important to consider because it suggests that the use of force by invitation is legal and shows that international law defines the scope and limits of an intervention by invitation. For instance, no invitation can be extended when a non-state actor fights for self-determination. Moreover, rather than a *carte blanche*, an intervention by invitation is an agreement regulating the rights and duties between the intervening and intervened state. Consequently, the state issuing the invitation cannot confer more rights to the intervening power than the rights it would already have under domestic and international law, which would entail the restrictions imposed by IHL and human rights law. Thus, an intervention by invitation will never be a valid source and excuse for abuses of minimum humanitarian standards such as torture or extrajudicial executions.

2. *Consent Versus Implied Conditions*

Because of the difficulty of conceiving of an actual situation in which a legitimate government may with absolute independence, and thus validly, authorize an intervention by the armed forces of another state within its territory, the question of consent in the doctrine of intervention by invitation poses great problems.¹⁸⁷ There are at least three different aspects of the problem of consent that should be distinguished: (1) the legal determination of whom may act as a representative of the state to give consent; (2) the reluctance of smaller states to actually consent; and (3) the situation of the cohabitant state where there is no explicit consent and no explicit objection to

187. For example, exploring the legality of the U.S. policy to kill Anwar al-Awlaki in Yemen, Chesney argues that if there is consent, there is no infringement of the prohibition against the use of force in Article 2(4). Chesney, *supra* note 96, at 15. However, as Chesney indicates, the Yemeni government has not given public consent in order to keep cooperation with the United States out of the public's eyes. Instead, Chesney finds that in the context of the military cooperation between Yemen and the United States, there are considerable reasons to believe that the government of Yemen privately consented. *Id.* Furthermore, although Chesney thinks that requiring publicity would render military cooperation impossible, he also recognizes that the absence of public consent creates evidentiary problems and makes it difficult to determine the temporal scope of the authorization. *Id.* at 18–19.

the intervention. I argue that this third situation calls for international law to presume the conditions of the intervention.

First, the question of who represents the state is relevant not only to establish the validity of consent, but also to determine the legality of an intervention by invitation. While a state may lawfully assist another state to fight against rebels, that state may not lawfully assist rebels in a fight against another state. The latter action would amount either to an unlawful intervention in the domestic affairs of the latter state or to a violation of the prohibition on use of force against the political independence of another state.¹⁸⁸ Traditionally, states and scholars have used a factual criteria to recognize a state: a government exercising control over a people within a territory.¹⁸⁹ However quite frequently, as Baxter has pointed out, it is difficult to affirm on an exclusive legal basis the distinction between governments and insurgents. This renders the distinction subjective or political.¹⁹⁰ Today, scholars are much more willing to engage also in a substantive rather than a merely factual assessment of statehood. Such additional criteria include, for example, some form of the government's democratic legitimacy, transparency, and human rights record, including civil and political as well as social, economic, and cultural rights.¹⁹¹

188. See U.N. Charter art. 2, ¶ 4 (prohibiting the use of force against the territorial integrity of another state); see also Richard R. Baxter, *Ius in Bello Interno: The Present and Future of International Law*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 524–25 (John N. Moore ed., 1974); Hafner, *supra* note 186, at 246; Le Mon, *supra* note 186, at 759; Nicaragua, *supra* note 55, ¶¶ 206–09.

189. See Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 STAT. 3097.

190. Baxter, *supra* note 181, at 525; see also Hafner, *supra* note 186, at 247 (pointing out that effectiveness cannot be the only criterion for distinction because if there is a non-state actor with military capabilities within the state's territory, the state loses effective control over those parts of its territory and thus issues authorizations over parts that it does not control). On the other hand, when a government violently seizes power, even if it gains control over the territory and population, it frequently cannot legally issue an invitation for assistance without first being recognized as a state. In fact, in many cases, it has been the ousted government that can still request assistance to regain control. See generally Berman, *supra* note 173.

191. On the effectiveness of consent, see Hafner, *supra* note 186, at 246–47; see also Doswald-Beck, *supra* note 186, at 195.

Contrary to this trend and for the purpose of this article, I assume a *lege lata* view and maintain that so long as there is no legitimate claim to self-determination on the part of the non-state actor, the distinction between the non-state actor and the state should be based on the traditional concept of statehood.¹⁹² In other words, I refrain from introducing substantive considerations to the determination of statehood and the subsequent determination of the subject who may issue consent. I would rather take these considerations into account in the discussion of the design of a regime of intervention in a cohabitant state based on implied conditions. Improving its human rights record, for example, could be one of the implied conditions imposed on the cohabitant state.

Second, weaker states have been staunch defenders of the formal legal autonomy and equality that international law bestows on them as sovereign states and members of the international community.¹⁹³ Thus small states are reluctant to issue an invitation because they regard such a declaration as a dangerous precedent that may crystallize into a permanent restriction on their sovereign autonomy. This perception might be conceptually misconceived, but it is politically justified. Although legal advisers of semi-peripheral states should not fetishize formal sovereignty as a protection of their substantive autonomy, they seem to be wise not to issue an explicit invitation. The doctrine of intervention by invitation, as it is based on the "will theory" and "freedom of contract," might decrease rather than increase the actual possibility to regulate and limit the military intervention by a powerful state. The consent of the semi-peripheral state may not only be coercively extracted, but the weaker state may also be forced to renounce favorable limitations. As an alternative, I suggest that an intervention authorized by consent should be more beneficial to the territorial state than force justified under self-defense, which would exculpate the intervening state from international responsibility. To accomplish this goal, I believe international law should imply the conditions of the agreement.

192. This is because I want to reserve the use of armed force for the most serious cases, both from the point of view of the state (*e.g.* a restrictive interpretation of self-defense) and of non-state actors (by excluding from intervention insurgents fighting for self determination, but not rebels fighting for other causes).

193. See Lorca, *supra* note 109, at 56–58.

Third, precisely because of the problem of consent, I argue that instead of finding real, autonomous consent, international law should recognize semi-peripheral states' lack of substantive autonomy to give free consent. It must simultaneously acknowledge that these states cannot say no to the powerful state interested in intervening. Furthermore, in some cases, the weaker state may not be interested in saying no.¹⁹⁴ Therefore a regime based on implied conditions might be closer to the actual factual situation than the doctrine of intervention by invitation.

Let us consider the cohabitant state, caught between a non-state actor's defiance of its monopoly on force and a powerful state's challenge to its independence. This powerful state, which has high technological and military capabilities along with wide geopolitical interests, is in conflict with a non-state actor located in the territory of the cohabitant state. It is pointless to pretend that these smaller or weakened states at the periphery of the international order have anything more than formal or marginal autonomy and that they could express any meaningful consent. When a powerful state has an interest in bringing the fight against non-state actors into the territory of another smaller state, there is hardly any room for the latter state to do something other than implicitly consenting.

In theory, when a state intervenes within the territory of another state, even if force is waged against a non-state actor rather than against the state, the territorial state may regard the intervention as an aggression in violation of public international law. The territorial state could thus legally strike back in self-defense. Although legal, acting in self-defense would not be merely unwise, but likely disastrous for the weaker cohabitant state. With both sides claiming legal justification to resort to force under self-defense, military clashes between states would give rise to an international armed conflict and confer the privilege to kill on both parties.

194. This could be true, for instance, when the territorial state wants the powerful state to fight and defeat the hostile non-state actor challenging its authority. I also argue that in this case the best solution is a regime of implied conditions, because the mandatory conditions would, in the interest of the international community, limit the scope of the military intervention.

Alternatively, the state where the intervention is carried out may issue a diplomatic protest of the intervention as a violation of its sovereignty and a violation of the principle of non-intervention. Such a protest must be carefully articulated. If it does not characterize the intervention as an attack serious enough to trigger the right to self-defense nor describe it as an act of force in violation of the prohibition in Article 2 (4), this course of action risks implicitly accepting the intervention. Most commonly, the refusal by small states to acknowledge the occurrence of an intervention is accompanied with some vague and indirect forms of protest, intended either to appease domestic opposition or to communicate discontent to the intervening power. This occurs especially when the military operation goes wrong or when it steps beyond initial understandings regarding the temporal and geographical scope of the intervention. Reluctance to acknowledge an intervention, as opposed to an upfront protest, as well as the veiled character of criticisms indicates *sub rosa* negotiations and, even in the absence of full autonomy, the expression of some form of consent.

As mentioned above, the public international law doctrine of intervention by invitation recognizes the autonomy of states to authorize an intervention and determine its basic elements. Given that international law does not prohibit interventions by invitation and given that international law recognizes states' sovereign autonomy, states are free to define the basic elements of the authorization: consent to intervene, identification of the non-state actor subjected to force, the temporal and geographical limits of the intervention, and the nature of the military operation.¹⁹⁵ Consequently, in a situation like the one described above in which the cohabitant state does not openly claim that the military action is unlawful, one should induce the existence of an agreement not for the purpose of

195. Most of these agreements are implicit and are kept secret because actors in both the intervening and intervened state, I would suggest, mistakenly believe that the legality and political legitimacy of these accords is tenuous and questionable. Let us keep in mind that secret treaties (that is, agreements not submitted to the United Nations Secretariat for registration and publication) are valid only between the parties and cannot be invoked vis-à-vis third states or international organizations. See Vienna Convention of the Law of Treaties art. 80, May 23, 1969, 1155 U.N.T.S. 331; U.N. Charter art. 102.

finding consent, but rather for the purpose of finding implied substantive clauses to govern the conduct of the intervention.

3. *The Implied Conditions*

The implied conditions introduce new rules to the regulation of force against hostile non-state actors in the territory of a cohabitant state. Specifically, unlike action under self-defense, which exculpates the state using force from international responsibility, the implied conditions not only tackle the specific problem of regulating force waged against a non-state actor, but also deal with the related problem of unequal power relations between the intervening state and the cohabitant state. Consider the example of Yemen. According to some, the government of Yemen has consented to U.S. attacks within its borders against al-Qa'ida. However, the lack of candid expression of such consent undermines the potential regulation of military operations by the United States, especially when things do not go as planned.¹⁹⁶ The implied clauses can supplement this regulatory gap.

My proposal that an intervention in a *cohabitant* state should be regarded as force neither permitted, nor prohibited, but governed by implied conditions is founded on a balancing of conflicting rules and objectives. This balance considers both the interest of the victim state in protecting its sovereign existence and security and the interest of the international community in preventing transnational terrorism. The balance struck recognizes the privilege of the intervening state to resort to force and kill in the territory of the cohabitant state. However, it respects the countervailing con-

196. The absence of clear rules might be inferred from the following report by *The New York Times*: "[A U.S. drone strike] left President Saleh privately furious about the death of the provincial official, Jabir al-Shabwani, and scrambling to prevent an anti-American backlash, according to Yemeni officials." Shane et al., *supra* note 1. More recently, after the fall of President Saleh, the newly elected president Abdurabu Hadi seems to have continued to give implicit consent to U.S. interventions. The absence of regulation in the event of errors continues. CNN reported in September 2012 that a U.S. drone mistakenly killed 13 civilians. An anonymous Yemeni official explained that it was an exceptional mistake and the U.S. government would not comment on reports about drone operations. Hakim Almasmari, *Suspected U.S. Drone Strike Kills Civilians in Yemen, Officials Say*, CNN.COM (Sept. 4, 2012), http://edition.cnn.com/2012/09/03/world/meast/yemen-drone-strike/index.html?hpt=hp_t3.

siderations, especially the interests of the intervened state in protecting its sovereign independence and the interest of the international community in limiting the incidence of interstate violence, by presuming a number of implied conditions.

The content of the implied conditions expresses two rationales, the first of which reflects the interest of the cohabitant state while the second represents the interest of the international community. For the cohabitant state, if one considers the burden imposed by the intervention as well as the synalagmatic nature of a legal balancing between conflicting rules, a number of conditions will adopt the form of obligations on the intervening state. One might conceptualize these obligations as part of an implied *quid pro quo* arrangement. The use of force by the intervening state will unavoidably bring death and suffering to the civilian population of the cohabitant state, so what rights and guarantees should the cohabitant state obtain from the intervening state?

We might think of a series of rules specifically tailored to limit and compensate for civilian suffering. International law would presume that decision-making power over the selection of targets—balancing military gains with combatant and civilian casualties—is allocated to bodies that include not only members of the intervening and the intervened states, but also members of the affected communities.¹⁹⁷ Moreover, in imposing strict liability on the intervening state for damages to life and property suffered by civilians, international law might presume that the intervening state has the obligation to establish a sizeable guarantee fund before launching the military intervention and to institute a claims commission, staffed by members of third states, to administer reparations.

Other implied conditions that articulate the interest of the cohabitant state may tackle the wider economic and political problems that created the inability of the cohabitant state to oppose the hostile non-state actor. These issues focus on the absence of a legitimate government providing the minimum civic, social, educational, economic, and cultural means for individuals and communities to flourish, which enabled the non-state actor to appeal to the local population in the first place. For example, international law may presume the obligation of

197. For example, international law could introduce due process rules to the decision-making process.

the intervening state to open its market for primary and agricultural products from the intervened state or perhaps to establish a socio-economic development fund for the cohabitant state. In particular, the intervening state would have the obligation to match the military expenditure of the operations with humanitarian and development aid.¹⁹⁸

An intervention with implied conditions resolves the conflict between *jus ad bellum* and *jus in bello* because the cohabitant state, in facing an internal armed conflict, has the "power" to kill that the foreign state does not have. This "power" can become a full privilege when, if the state is victorious, it gives limited amnesty at the end of the war for strictly defined combat killings, which excludes, among others, war crimes, genocide, crimes against humanity, and gross violations of human rights. Thus, reflecting the interests of the international community, implied conditions may secure compliance with Common Article 3 by requiring the intervening state to give guarantees that it will prosecute crimes committed by its forces. If not already a party to the Rome Statute, the intervening state should recognize the jurisdiction of the International Criminal Court.

Similarly, in the interest of the international community, the implied regime should impose basic obligations on the cohabitant state and obligations on both the cohabitant state and the intervening state vis-à-vis the non-state actor. The cohabitant state should comply with basic requirements of democratic governance and respect for human rights. These rules should be stricter if the cohabitant state is negligent. For example, sanctions, like freezing of financial assets, could be imposed on the government if negligence persists. Finally, in relation to the non-state actor, its members should enjoy more than the basic protections granted by Common Article 3: They should enjoy the status of privileged combatants, entitled to POW status and, consequently, combatants should enjoy immunity and only be responsible for violations of IHL or other international crimes.

198. See generally AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999) (discussing the interconnection between economic development and political, social, and cultural freedoms); JEFFREY SACHS, *THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME* (2005) (specifically linking poverty with the causes of terrorism).

V. CONCLUSION: RECONSTRUCTING A REGIME BETWEEN WAR AND PEACE

The law of war regulates the use of force between states. Its effectiveness depends on states recognizing the normative force of the regime. On the basis of reciprocity, states accept a general prohibition to use armed force and, when the prohibition fails, states agree on limiting how far they can go while waging war. But that effectiveness also depends on a more basic assumption. States are ready to constrain their sovereignty and autonomy to use force because they are understood to be the main actors possessing and controlling military weapons. The reality of non-state actors capable of carrying out armed attacks against states challenges the traditional law of war in defying the assumption of states' monopoly of force, which undercuts the basis for states' reciprocal concessions.¹⁹⁹ The response of states threatened by hostile non-state actors also strains the law of war. Located within the jurisdiction of another state, military action against a non-state actor violates not only the territorial sovereignty of the state where action takes place, but also the prohibition on interstate violence. The problem is not as simple as the potential irrelevance of the law of war.

I have identified contrasting expansive and restrictive interpretations of the law of war, both of which balance conflicting considerations from the standpoint of the center of the international system. The former does so in light of the interests of powerful states while the latter prioritizes the interests of the international community. I have shown that the crucial problem is the need to strike a new balance between the law of war's conflicting rules and objectives to address the challenge of hostile non-state actors attacking from or located in the territory of third states. Rather than framing the question as dichotomous choices between peace and security, between sovereignty autonomy and the limitations imposed on it by inter-

199. As Reisman has put it: "One of the factors that had made the inherited *jus ad bellum* effective was the concentration of weapons in the hands of territorial elites who were subject to the dynamic of reciprocity and retaliation that underlies international law. That dynamic does not operate for nonstate actors, for they are neither beneficiaries of nor hostages to the territorial system." Michael Reisman, Editorial Comment, *Assessing Claims To Revise the Laws of War*, 97 AM. J. INT'L L. 82, 86 (2003).

national law, and between formally realizable rules and flexible standards, the superior approach is to develop a framework that mediates between these two aspects of the international legal order. In other words, both the expansive and restrictive interpretations fail to interpret the law and design legal regimes that take into consideration the binary and conflicting structure of the law of war from the perspective of semi-peripheral states.

The law of war, as explained above, embodies two different—and potentially conflicting—goals and principles. On the one hand, the law of war seeks to secure international peace by prohibiting the use of force and limiting the horrors of war. On the other hand, the law of war protects the integrity of states by legalizing the resort to armed force when their existence is at stake and conferring on their armed forces a privilege to lawfully kill. The nature of the law of war is not exceptional, but rather reflects the binary structure of international law in general. Recognizing the autonomy of sovereign states, international law regulates and, at times, limits state behavior, not only to make the coexistence between states possible, but also to pursue cooperation among states and to advance the interests of the international community.²⁰⁰

There are certainly different rationales on the basis of which to assess a particular balance between the conflicting rules, goals, and principles present in the law of war. I have adopted the standpoint of the international lawyer situated in the semi-periphery, for I have understood this orientation to carve out a distinctive and fresh interpretation of existing international law that speaks to the interests and aspirations of most semi-peripheral polities. Although these interests and aspirations will vary across the globe, in light of their weaker position in the world system, most semi-peripheral polities will have an interest in a strong international legal order capable of protecting their autonomy. Semi-peripheral international lawyers will therefore advance legal interpretations strengthening rather than weakening international law as an institutional

200. This is an expression of the liberal paradox: how does one justify the existence of an international legal order among subjects that are sovereign? See generally DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987); MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2006).

mechanism to resolve international problems. Thus, one may think that the restrictive view arguing for an absolute prohibition to the use of force would be the best rule to defend the autonomy of weaker states.

However, the most stringent rule is not the best rule if the prohibition becomes irrelevant in practice. I therefore believe that an intervention with implied conditions has a better chance to limit the actual conduct of powerful states. This rule is thus more advantageous to the semi-periphery than an absolute prohibition, which may become impractical due to its over-inclusiveness. Yet, why would this rule be the best rule of international law writ large? A semi-peripheral orientation tells us nothing about the reasons why one should consider this rule a universal norm. It says nothing about why this rule would be any better than the rules deriving from other orientations, such as those reflecting the position of the globe's centers of power, as they appear in the expansive and restrictive interpretations. I believe that there are reasons, different from the interests one can extract from a semi-peripheral orientation, to argue that the rules advocated in this article are worth defending. Let me briefly mention three.

First, in some traditions of progressive thinking it is conventionally believed that weaker parties, in their interaction with more powerful social actors, have a better sense of the totality in which domination and the struggle for hegemony and resistance play out. The semi-peripheral position thus offers a better outlook from which to realize the global dimensions of the problem of transnational violence, including its history and political economy.

Second, the language of law, most legal theorists suggest, is a universal language that is committed to logical consistency, generality, impartiality, and justice. These principles are in tension with the idea of particular interests. However, the universal is present in the particularity of the semi-peripheral position in the form of a general precariousness because demands and aspirations based on universal principles remain incomplete. The universal would be part of the semi-peripheral identity, in Ernesto Laclau's terms, if this differential identity is "penetrated by a constitutive lack" or if it "has failed in

its process of constitution."²⁰¹ This theoretical point has practical consequences. Resistance of ingrained patterns of domination by foregrounding the singularity of the semi-peripheral position not only can adopt the form of a struggle striving for a universal, but also a struggle that can invoke the universality of international law without fears of intellectual or political incoherence or delusion.²⁰²

Finally, the semi-peripheral interpretation of the law, expressed in the implied conditions argued above, is not just based on an articulation of a particular position and interest, albeit analytically more general and rendered universal by its "constitutive lack." The rule of intervention with implied conditions can also be supported by a teleological examination of the principles of international law. I believe that there is a substantive match between the rule advocated and the ends of international law as understood in the Grotian tradition of sovereign coexistence and cooperation. This at least asks those sustaining expansive views for an answer about the good of an international order limited to a Hobbesian state of nature. In light of these reasons, let me offer a brief critique of the expansive and restrictive view.

A. *Against the Expansive View*

Affirming that a state may lawfully use armed force in self-defense against a non-state actor in the territory of another state, the expansive view foregrounds rules and doctrines protecting the autonomy and security of individual states. Most lawyers who articulate the expansive view, however, fail to acknowledge the clash between conflicting rights—self-defense versus territorial sovereignty—as well as the conflict between right and duty—self-defense versus the prohibition on use of force.²⁰³

201. Ernesto Laclau, *Universalism, Particularism, and the Question of Identity*, 61 OCTOBER 83, 89 (1992).

202. Following E.P. Thomson, I take seriously the idea that the rule of law offers an arena for social struggle; an arena that unlike other realms of social life is defined by normative commitments constraining rulers and ruled to afford subordinate groups a concrete avenue for resistance. See E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 258–69 (1976).

203. For example, the principle of territorial sovereignty is reflected in G.A. Res. 2625 (XXV), *supra* note 147. Self-defense is an exception to the prohibition on use of force, but it is allowed to override the prohibition. By

The expansive view fails to explain why the right of one state to unilaterally resort to force in self-defense should take precedence, on the one hand, over the territorial independence of the state where the non-state actor is located and where armed force might lawfully be deployed, and on the other hand, over the duty states have not to use force, and the interest of the international community to limit interstate violence as embodied in the prohibition on the use of armed force.

Construing the right of self-defense without recognition of the conflicting rights and correlative duties that coexist in the law of war gives self-defense an extremely wide scope. This includes a right to use force in face of attacks by non-state actors either before these attacks even become imminent or based on the “unable or unwilling” test. According to this interpretation the law of war would accept a greater number of exceptions to the prohibition on use of force. Arguably the doctrine of self-defense becomes over-inclusive if the greater number of accepted exceptions weakens the prohibition to the degree that the law of war loses the normative power to constrain state behavior. Overextending self-defense so that it includes force against non-state actors in relation to non-imminent attacks or in any way based on strict liability presents the danger that the prohibition against more serious interstate violence is weakened. International law loses its purpose as a regime regulating state behavior. When states have greater room unilaterally to use armed force, international security is undermined. The idea of an international community that cooperates to realize common interests is also undermined in favor of a Hobbesian state of nature in which peace and security as a common good breaks down into the individual self-preservation of sovereigns against each other.

B. *Against the Restrictive View*

The restrictive view construes international law to find a narrow right of self-defense and a wide prohibition on use of force. Resorting to preemptive, preventive, or ex post force in self-defense against a non-state actor is consequently unlawful. Narrowing the space for lawful military action reaffirms inter-

failing to acknowledge the tension between right and duty, both rule and exception are rendered equally plausible.

national law as a regime regulating and limiting, rather than simply sanctioning and legitimizing, state behavior. But too wide a prohibition becomes over-inclusive and an overly narrow self-defense doctrine becomes under-inclusive—recall the strict requirement of attribution. Both leave too many cases unresolved, cases in which states resorting to what they perceive to be necessary armed force compromise the effectiveness of the law of war.

The problem emerges when a substantive number of actors—legal advisors serving foreign offices, politicians, and scholars—perceive that the space for unexcused recourse to armed force includes more than a core of unambiguously unlawful cases. This happens, I would argue, for reasons that are both extra-legal and legal, that is, exogenous as well as endogenous to the law of war. On the one hand, the law of war has been strained by instrumentalist lawyers advancing expansive views who aggressively stretch the regime to fit the use of force against non-state actors under the doctrine of self-defense. These lawyers see the restrictive view as conceptualizing international law exclusively as a vehicle to secure peace and restrain violence. In leaving states without the capacity to lawfully resort to armed force, according to followers of the expansive view, the restrictive view is unable to provide a convincing answer to the problem of international security in addition to the security of individual states. The only lawful alternative in the absence of armed force, the domestic law enforcement paradigm (a regime excluding the privilege to kill), is considered insufficient in the fight against well-resourced non-state actors. The problem is that rather than answering this extralegal challenge to the law of war with policy or normative arguments, lawyers following the restrictive view tend to invoke formal legal arguments, which are the very same legal interpretations the expansive lawyers dismissed to support a different policy-oriented outcome.

On the other hand, and more poignantly, the illegality of the recourse to armed force against non-state actors under self-defense is often doubted because of the absence of a clear space of illegality, that is, a clear conceptual classification of unlawful conduct. If the scope of unlawful cases is perceived as being too wide or conceptually uncertain, it becomes easier for states to choose war over other means to confront non-state actors in armed conflict with states. The problem is not

only the grimmer costs of war in comparison to other means of resolving conflicts, but also that of a widespread divergent state practice, which would cause the law of war in general and the prohibition on use of force in particular to lose the normative power to constrain state behavior in more serious cases of interstate conflict. If international law's ability to restrain state power becomes out of touch with the realities of the contemporary world, the prohibition on the use of force becomes utopian.

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In this article I have interpreted public international law from a semi-peripheral position and argued that force waged in the territory of a harboring state is lawful and that in the territory of an innocent state is unlawful. In relation to a cohabitant state, I have argued that armed violence against a non-state actor within a cohabitant state is neither permitted nor prohibited. Specifically, I have identified two conflicts in the laws regulating an intervention in the cohabitant state. The first conflict occurs between self-defense and state responsibility in a cohabitant state that has fulfilled its due diligence obligations. Second, there is a conflict between self-defense and IHL, when the intervening state has a *jus ad bellum* basis for using armed force but no privilege to kill in the territory of the cohabitant state. I have suggested confronting these two conflicts by recognizing a gap in the law, rather than by favoring one regime over the other. However, I have tried to push legal analysis beyond the recognition of an intervention in the cohabitant state as neither lawful nor unlawful violence and have filled the gap with a set of presumed conditions. This regime solves the problem of the absence of responsibility by the cohabitant state and the absence of a privilege to kill by the intervening state by implying consent from the cohabitant state. This regime of presumed conditions has better and more precise rules than an intervention governed by self-defense. It upholds a strict reading of the rules governing the resort to force, securing peace, and preventing the problem of escalating violence. But it also answers the concerns about national security at the base of the expansive view, leaving it up to states and international lawyers to interpret the implicit

agreement authorizing interventions and to presume clauses, giving to the international lawyer in each concrete case the freedom and responsibility to mediate between war and peace.