

# THE DOCTRINAL DECAY OF *JUS AD BELLUM*

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## I. INTRODUCTION

At around 1 am, on January 3, 2020, a sedan and a minivan were on an access road departing from the Baghdad International Airport. The streets were characteristically silent, when an MQ-9 Reaper drone struck the vehicles several times, killing all ten individuals inside the two cars. Among them, was Iranian major general Qasem Soleimani.<sup>1</sup> What followed over the coming days, were standard incantations of ‘future attacks’, ‘imminent’, ‘threat’, and of course, ‘Article 51’, which every government official across the US, and indeed the world, knows *must* be invoked in such situations.

The modern armed conflict today is a ‘complex battlespace’<sup>2</sup>, with multiple actors interacting simultaneously,<sup>3</sup> to produce an image of surgical precision, an in-and-out, swift and sudden blitzkrieg. Drones are at the centre of this battlespace.<sup>4</sup> Between January 2019 and March 2020 alone, the Bureau of Investigative Journalism recorded more than 6900 (minimum confirmed) US drone strikes in Afghanistan, Yemen and Somalia.<sup>5</sup> The numbers

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- 1 Ken Dilanian and Courtney Kube, ‘Airport informants, overhead drones: How the U.S. killed Soleimani’ (*NBC News*, 10 January 2020) <<https://www.nbcnews.com/news/mideast/airport-informants-overhead-drones-how-u-s-killed-soleimani-n1113726>> accessed May 30, 2020; Michael Crowley, Falih Hassan & Eric Schmitt, ‘U.S. Strike in Iraq Kills Qasim Suleimani, Commander of Iranian Forces’ *The New York Times* (2 January 2020) <<https://www.nytimes.com/2020/01/02/world/middleeast/qassem-soleimani-iraq-iran-attack.html>> accessed May 27, 2020.
- 2 Winston Williams & Christopher Ford (eds), *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare* (Oxford Scholarship Online 2019).
- 3 David Kennedy, *Of War and Law* (Princeton University Press 2006) 19 (Kennedy - Of War and Law).
- 4 Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Advance Unedited Version* (44<sup>th</sup> Session, 29 June 2020) [5] <<https://www.statewatch.org/media/1216/un-sr-extrajudicial-kilings-drones-report-29-6-20.pdf>> accessed July 14 2020 (Agnès Callamard Report).
- 5 The Bureau of Investigative Journalism, *Drone Warfare*, <<https://www.thebureauinvestigates.com/projects/drone-war>> accessed May 27 2020.

in Syria are suspected to be astoundingly high.<sup>6</sup> The US is also, by no means, alone in conducting drone strikes. Sometimes the victims are ‘high value’ targets like Qasem Soleimani. In others, however unintentionally, they are often civilians like Mayada Razzo; sleeping in their houses, along with many others who are ‘uncounted’.<sup>7</sup>

It is entirely hackneyed to point out the oddity in the fact that a sudden strike in a western country would be classified as murder or extra-judicial execution, but that a similar occurrence in Syria or Yemen (even in areas outside active conflict zones), would trigger conversations on ‘NIAC’, ‘unable or unwilling’, ‘PPG’ or ‘collateral civilian casualty’. Modern wars are as intensely fought on the ground as they are on the legal terrain and legal justifications are central to the war effort.<sup>8</sup> Yet, these ‘legal’ justifications today, so far as the resort to force is concerned, are primarily *law-like* – they have legal jargon and law-sounding characteristics. However, they are entirely unfaithful and inaccurate insofar as *real* international law doctrine is concerned. In Modirzadeh’s words, they are ‘folk international law’.<sup>9</sup> Folk international law in the realm of *jus ad bellum* is pliant and elastic. It is at once modern and legitimate but also rooted in the traditional. Remarkably too, it is all claimed to derived from a combined reading of Article 2(4) and Article 51 of the United Nations Charter.

This paper seeks to make sense of doctrinally inaccurate *jus ad bellum* justifications, in respect of one situation – the use of force by a state in the territory of another state, against a non-state armed group, when the latter state is not responsible for an armed attack on the former (in other words, when the latter is an ‘innocent’ state because the acts of the armed group are not attributable to it<sup>10</sup>). Part II of the paper recaps the correct *jus ad bellum* position on such uses of force. In doing so, it briefly summarises and refutes the arguments made by ‘expansionists’<sup>11</sup> who suggest that such uses of force are legal. Here, I must clarify what I mean by the ‘correct’ *jus ad bellum* or the ‘real’ international law doctrine. It is not my claim that *all* doctrinal questions concerning *jus ad bellum* (much less all international

6 Azmat Khan and Anand Gopal, ‘The Uncounted’ *The New York Times* (16 November 2017) <<https://www.nytimes.com/interactive/2017/11/16/magazine/uncounted-civilian-casualties-iraqairstrikes.html>>(The Uncounted).

7 The Uncounted (n 6).

8 Kennedy - Of War and Law (n 3) 33-37.

9 I borrow this term from Naz K Modirzadeh as a shorthand to refer to these ‘law-sounding’ arguments surrounding modern *jus ad bellum*. Naz K Modirzadeh, ‘Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance’ in Jens David Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (CUP 2016) 192–231 (Modirzadeh); Agnès Callamard terms such arguments as legal ‘distortions’ – See, Agnès Callamard Report (n 4) [53], [62].

10 Dire Tladi, ‘The Nonconsenting Innocent State: The Problem with Bethlehem’s Principle 12’ (2013) 107 *Am J Int’l L* 570 (Tladi - Nonconsenting State).

11 Like others who have previously written on the question of self-defence, I use this term as a shorthand for scholars who take an expansive view of the right to use force in self-defence against non-state actors. In other words, they argue that such a right exists (in some or all circumstances).

law) can necessarily have only one correct answer and that an interpretation of the rules cannot lead to different conclusions. It is my position, however, that contemporary *jus ad bellum* arguments in the context of the ‘war on terror’<sup>12</sup> and self-defence against terrorist groups are more than just incorrect. Rather, they are *implausible*, since they attempt to fundamentally revise (and ultimately render otiose) the UN Charter’s regime governing the use of force. If the Charter exists (as it does), then such arguments are unrecognizable as international law doctrine. In that regard, the move to muddy *jus ad bellum* waters is an attempt to ensure that *some* powerful states can use international law-sounding vocabulary to shield their political decision to continue fighting an endless war.

With that background premise, Part III of the paper then analyses how such doctrinally implausible *jus ad bellum* arguments have come to be made routinely, looking at the current international law moment. I must also clarify here that it is not my argument that such *jus ad bellum* justifications are made by a majority of states or scholars. In fact, in subsequent parts of the paper, I illustrate how these arguments are not backed by widespread state practice and a substantial number of scholars do not ascribe to these views either. It is my claim, however, that a group of powerful minority states, assisted by (some) international law scholars, now routinely seem to be espousing such problematic legal justifications. Part IV looks at why, despite such evident doctrinal inaccuracy, these *jus ad bellum* arguments seem to be progressively gaining traction in broader conversations about war today. Finally, Part V proffers some general conclusions, looking at why a mushy *jus ad bellum* facilitates the continuation of the seemingly endless ‘war on terror’ and how reclaiming the doctrinal space may serve *some* (albeit limited) function in arresting this.

## II. LAW GOVERNING RESORT TO FORCE AGAINST NON-STATE ACTORS

### 1. The ‘Traditional’ Use of Force Doctrine

There has been a massive volume of scholarship since 9/11 discussing the legality of the use of force against non-state actors where their acts are not attributable to any state, adopting a whole range of views.<sup>13</sup> In some cases, scholars frame legality in a *less-more*

12 I use the term ‘war on terror’ as a convenient way of referring to extraterritorial uses of force post 9/11 aimed at countering the terrorism threat and not because I agree with the nomenclature. For a critique of the term, see, Frédéric Mégret, ‘War? Legal Semantics and the Move to Violence’ (2002) 13(2) *Eur J Int’l L* 361.

13 See for instance, Daniel Bethlehem, ‘Principles Relevant to the Scope of a State’s Right of Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors’ (2012) 106 *Am J Int’l L* 769 (Bethlehem); Jutta Brunnée & Stephen J Toope, ‘Self-Defence Against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?’ (2018) 67 *ICLQ* 263; Sean D Murphy, ‘Terrorism and the Concept of Armed Attack in Article 51 of the U.N. Charter’ (2002) 43 *Harv Int’l L J* 41; Mary O’Connell, Christian Tams and Dire Tladi (eds) *Self-Defence against Non-State Actors* (CUP 2019); Irène Couzigou, ‘The Right to Self-Defence against Non-State Actors – Criteria of the “Unwilling or Unable” Test’ (2017) 77 *ZaöRV* 53; Monica Hakimi, ‘Defensive Force against Non-State Actors: The State of Play’ (2015) 91 *Int’l L Stud* 1; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010); Federica I Paddeu, ‘Use of Force against Non-State Actors and the Circumstance Precluding Wrongfulness of Self-

binary, rather than the usual *on-off* (where it is either illegal or legal) one.<sup>14</sup> Here, instead of entering a detailed analysis that deals with each instance of state practice or state any novel hypothesis regarding the doctrine, I summarise the key issues concerning this question. In doing so, I do not attempt to be exhaustive; instead, I seek to capture and refute the main arguments made by those advocating for an expansive right of self-defence. The problem is simple: does a state have the right to use force in the territory of another state against a non-state actor, when the latter state is not responsible for an armed attack on the former? This problem arises where the actions of the non-state group are not attributable to the state from whose territory the group operates. Any attacks on a foreign state committed by the non-state group would therefore not be attributable to the territorial state. If such groups were to operate only from the high seas, for instance, states would be able to use force against them without concomitantly using force against any other state. However, these groups operate from the territory of states; therefore, any use of force directed against the group, without the consent of the state on whose territory force is used, would violate Article 2(4) of the UN Charter (as against the territorial state).<sup>15</sup> As a result, there arises the need for some justification.

The UN Charter provides that ‘all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.’<sup>16</sup> An argument often made is that some uses of force do not violate this prohibition since they are not inconsistent with the purposes of the UN or are not against the territorial integrity or political independence of any state.<sup>17</sup> In the context of non-state armed groups, this argument suggests that force directed at a militant group operating from a state’s territory is in reality not aimed against that state and hence does not violate its territorial integrity or political independence.<sup>18</sup> However, a reference to the *travaux* shows us that this argument

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Defence’ (2017) 30(1) LJIL 93.

- 14 See for instance, Arnulf Becker Lorca, ‘Rules for the “Global War On Terror”: Implying Consent and Presuming Conditions for Intervention’ (2012) 45 NYU J Int’l L & Pol. 1, 76 (Lorca); See also, Tom Ruys & Sten Verhoeven, ‘Attacks by Private Actors and the Right of Self-Defence’ (2005) 10(3) Journal of Conflict and Security Law 289 (Tom Ruys & Sten Verhoeven).
- 15 Alexander Orakhelashvili, ‘Undesired, Yet Omnipresent: Jus ad Bellum in its Relation to other Areas of International Law’ (2015) 2 Journal on the Use of Force and International Law 238, 251. (*Force directed only against non-state group targets, without the territorial state’s consent, still violates Article 2(4). This also leads to a situation where the territorial state may actually claim that the attack on its territory (even if targeting the non-state group alone) was an armed attack, in response to which it could claim the right of self-defence against the attacking state, leading to the kind of escalation in a conflict that the Charter sought to prevent.*) See, Dire Tladi, ‘The Use of Force in Self-Defence against Non-State Actors, Decline of Collective Security and the Rise of Unilateralism: Whither International Law?’ in Anne Peters & Christian Marxsen (eds) *Self-Defence against Non-State Actors* (CUP 2019) (Tladi-Use of Force).
- 16 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 2(4).
- 17 Derek Bowett, *Self-Defence in International Law* (Manchester University Press 1958) 152.
- 18 Committee on Use of Force, *Final Report on Aggression and the Use of Force* (International

is incorrect. The Charter's drafters intended the widest possible prohibition on the use of force and the phrases 'territorial integrity or political independence' and 'or in any other manner inconsistent with the purposes of the United Nations' were inserted to assure weaker states that force could not be used against them for any purpose whatsoever and that their sovereignty was inviolable.<sup>19</sup> Since *any* non-consensual use of force violates the Charter's prohibition, we must then look to the realm of defences to use of force to find an answer.

The Charter provides for two exceptions to the prohibition on the use of force. The first is when the Security Council authorises the use of forcible measures under Chapter VII and the other, at the centre of this paper's discussion, is the right of self-defence under Article 51. Article 51, in its relevant part, provides – '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.'

Proponents of the right of self-defence against non-state armed groups highlight that the provision does not mention who the author of an armed attack must be, and hence, one may conclude that it need not emanate from another state.<sup>20</sup> Yet, this argument is inconsistent with ordinary canons of treaty interpretation that require one to consider the treaty as a whole. The prohibition on the use of force codified in Article 2(4) is doubtlessly inter-state in character ("all *members* shall refrain"). The fact that Article 51 is intended to operate as an exception to the prohibition under Article 2(4) means that it covers self-defence only against an armed attack by a state. Moreover, it is also irreproachable that only states may commit an act of aggression.<sup>21</sup> Therefore, if the arguments of expansionists are to be believed, only states may commit an act of force (as under Article 2(4)) and an act of aggression (as under Resolution 3314), but somehow non-state actors may commit an armed attack (as under Article 51) – which is nothing but a grave form of the use of force.<sup>22</sup> Finally, invoking Article 51 against non-state actors is misconceived for the reason that

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Law Association, Sydney 2018) 5.

19 Ian Brownlie, *International Law and the Use of Force by States* (OUP 1963) 265-67; The delegate of the United States confirmed this understanding of Article 2(4) at the San Francisco conference during the drafting of the UN Charter. See, UN Information Organization, *Documents of the United Nations Organizations, San Francisco* (UNX.341.13 U51, 1945) 335 .

20 Karl Zemanek, 'Armed Attack' in Rudiger Wolfrum (ed), *Max Planck Encyclopedia of International Law* (OUP 2013) 16; See also, Karin Oellers-Frahm, 'Article 51 — What Matters is the Armed Attack, not the Attacker' (2019) 77 *ZaöRV* 49.

21 UNGA, 'Definition of Aggression' U.N.G.A. Res. 3314 (XXIX) (14 December 1947) art 1; See also, ILC's commentary to the crime of aggression: 'Therefore, only a State is capable of committing aggression by violating this rule of international law which prohibits such conduct.' ILC 'Report of the Committee to the General Assembly on the work of its forty-eighth session' (1996) A/CN.4/SER.A/1996/Add.I (Part 2) 44, [4].

22 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Judgment) [1986] ICJ Rep 14 [191].

there exists no prohibition on the use of force against non-state actors in the first place.<sup>23</sup> Rather, the prohibition is against states.<sup>24</sup> The opposite argument – that Article 51 could be invoked against a non-state actor – would mean that international legal personality would be bestowed upon terrorist groups. This could also lead to the rather strange conclusion that a terrorist group could be able to claim a right of self-defence against an armed attack by a state.<sup>25</sup> Hence, Article 2(4) and Article 51 together, only apply to inter-state uses of force.

The prohibition on the use of force is a peremptory norm of international law, as recognised by the ILC<sup>26</sup> and the ICJ.<sup>27</sup> This means that the prohibition in Article 2(4), along with the rule on self-defence in Article 51, constitutes a *jus cogens* norm.<sup>28</sup> *Au contraire*, it has also been suggested that the prohibition enshrined in Article 2(4) is a peremptory norm of itself, with self-defence and the Security Council's authorisation under Chapter VII constituting the only two recognised exceptions to this norm.<sup>29</sup> For some though, the entire *jus ad bellum* regime is a peremptory norm.<sup>30</sup> However, irrespective of how one views the structure of the peremptory norm, at a minimum, it is irreproachable that a new exception to the prohibition on the use of force cannot be created (without that exception itself achieving *jus cogens* status).<sup>31</sup> Insofar as expansionists advocate for a right of self-defence against non-state actors, the *jus cogens* nature of the norm mandates a conservative, rather than a force-permissive interpretation to Article 51.<sup>32</sup> The presumption of the *jus cogens* norm militates towards a situation of peace rather than war.<sup>33</sup>

Another consequence of a norm having *jus cogens* character is that none of the circumstances precluding wrongfulness can be used as a justification for the violation of such a norm.<sup>34</sup> In the context of the use of force, this conclusion is important, since some

23 As mentioned earlier, if there was a way of attacking a non-state armed group, without using force on any portion of a state's territory, there would be no *jus ad bellum* violation.

24 Olivier Corten, 'The 'Unwilling or Unable' Test: Has it Been, and Could it be, Accepted?' (2016) 29 *Leiden Journal of International Law* 777, 795 (Corten-Unwilling or Unable).

25 See, Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Bloomsbury Publishing 2010) 173 (Corten-Law Against War).

26 International Law Commission 'Draft Articles on the Law of Treaties with commentaries' (1966) 2 *YILC* 247.

27 *Nicaragua* (n 22) [190].

28 Mary Ellen O'Connell, 'Self-Defence, Pernicious Doctrines, Peremptory Norms' in Anne Peters & Christian Marxsen (eds), *Self-Defence against Non-State Actors* (CUP 2019) 232 (O'Connell).

29 Ian Sinclair, *The Vienna Convention on the Law of Treaties* (CUP 1984) 222-23.

30 See for instance, Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 51.

31 The VCLT defines a peremptory norm as one from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 51.

32 O'Connell (n 28) 244.

33 *ibid* 247.

34 'Responsibility of States for Internationally Wrongful Acts' *Yearbook of the International Law*

authors advocating for an expansive right argue that force can be used in situations of necessity.<sup>35</sup> Where necessity is invoked as a circumstance precluding the wrongfulness of the use of force, the ILC Articles on State Responsibility themselves render such an argument untenable.<sup>36</sup> In the war on terror context, however, expansionists often use necessity as understood within the law of self-defence to justify resort to force.<sup>37</sup> That argument is also fundamentally misconceived since it puts the cart before the horse. Necessity and proportionality are additional requirements that every force used in self-defence must adhere to, to be legal. However, necessity cannot justify recourse to self-defence in the first place, which remains conditioned, according to Article 51, on the existence of an armed attack. The argument is also incorrect because it in effect splits self-defence under Article 51, invoking the armed attack requirement against the non-state actor while evaluating the necessity requirement against the territorial state.<sup>38</sup>

Expansionists place reliance on the *Caroline* incident to argue that a right of self-defence against non-state actors has always been recognised in international law and is protected by Article 51, which recognises self-defence as an “inherent” right.<sup>39</sup> The *Caroline* is an incident which is more than a century and a half old and yet its continuous invocation to justify modern uses of force proves that it is the *jus ad bellum* gift that just keeps giving. Incidentally, the *unable or unwilling* phrase was also first used in diplomatic exchanges after the *Caroline* incident.<sup>40</sup> Without getting into details regarding the facts, there are several reasons why the references to *Caroline* as a justification for force against non-state actors today, is inapposite. The *Caroline* incident happened at a time when the use of force (or making war) was perfectly legal, and Britain advanced self-defence as a justification

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*Commission* (vol 2, 2001) art 26.

- 35 See for instance, W Wengler, ‘L’interdiction du recours à la force. Problèmes et tendances’ (1971) 7 RBDI 417 cited in Corten-Law Against War (n 25) 198; RA Friedlander ‘Retaliation as an Antiterrorist Weapon: The Israeli Lebanon Incursion and International Law’ (1978) 8 Israel Ybk Human Rts 77 cited in Peter Malanczuk, ‘Countermeasures and Self-Defense as Circumstances Precluding Wrongfulness in the International Law Commission’s Draft Articles on State Responsibility’ (1983) 43 ZaöRV 705, 732.
- 36 Article 25(2)(a) of the ILC Articles of State Responsibility states that necessity cannot be invoked as a ground for precluding wrongfulness if the international obligation in question excludes this possibility. The UN Charter can be said to impliedly exclude the possibility of invoking any circumstance other than self-defence to justify a resort to force. See, Corten-Law Against War (n 24) 200. The ILC Articles on this point are representative of customary international law. *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ 7 [50]-[52].
- 37 See for instance, Ashley S. Deeks, ‘Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense’ (2011) 52 Va. J. Int’l L. 483, 495 (Deeks).
- 38 Corten-Unwilling or Unable (n 24) 796.
- 39 See for instance, Sean D. Murphy, ‘Terrorism and the Concept of Armed Attack in Article 51 of the U.N. Charter’ (2002) 43 Harv Int’l LJ 41, 50.
- 40 Craig Forcece, *Destroying the Caroline: The Frontier Raid that Reshaped the Right to War* (Irwin Law 2018) 74 (Forcece) - ‘The authorities were either unwilling or unable to prevent aggression against Canada’, citing Sir George Arthur to Lord Glenelg (17 December 1838), Doc 575, in Sir George Arthur, *The Arthur Papers Vol. I* (University of Toronto Press 1957) 456.

only for political optics. Forcese, in his detailed historical analysis of the incident, shows how *Caroline* was incapable of generating any sound legal principle that could live on even today. First, contemporaneous exchanges from the time show that contrary to popular belief, the UK and the US were not *ad idem* on the applicable rules or the lawfulness of the incident.<sup>41</sup> Second, all the relevant actors in the diplomatic exchanges (which purportedly laid down the law concerning self-defence) had conflated the concept of self-defence with that of ‘self-preservation’, the latter having no place in international law today.<sup>42</sup> Instead, the positions advanced by both states were a ‘muddled mix’ of political justifications and legal arguments.<sup>43</sup> However, in contemporary *jus ad bellum*, *Caroline* has been ‘shorn of its facts’<sup>44</sup> and has become a ‘pliable tool that can be shaped according to the political needs’<sup>45</sup> of states using force.

## 2. Post 9/11 practice and ‘Modern’ Law Governing Resort to Force

The other most common argument made to justify the permissibility of an expansive self-defence norm bases itself on post 9/11 practice. Referring to subsequent practice is an admissible mode of treaty interpretation, but the threshold of practice required is high.<sup>46</sup> The post 9/11 practice on the question is not unequivocal, clear and extensive, by any metric, for self-defence against non-state actors to be considered a permissible exception to the prohibition in Article 2(4). In fact, most post-9/11 uses of force were based on arguing attribution of the non-state actor’s conduct to the territorial state, or consent, or were unclear as to the legal justification advanced.<sup>47</sup> The US in Afghanistan and Israel in Lebanon made some variation of the attribution argument, rather than claim self-defence against the non-state actor alone.<sup>48</sup> The US in Pakistan (Abbottabad) seemed to have argued that the latter consented to Operation Neptune Spear (either *ex-ante* or *ex-post*).<sup>49</sup> Other instances of

41 See generally, Forcese (n 40) 103-115. The US in fact seemed to indicate that in the absence of attribution there could not be a lawful attack on US territory – see, Forcese (n 40) 87.

42 *ibid* 190.

43 *ibid* 126.

44 *ibid* 190.

45 *ibid* 212.

46 *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* (Judgment) 2014 ICJ 226 [83] – ‘Article VIII expressly contemplates the use of lethal methods, and the Court is of the view that Australia and New Zealand overstate the legal significance of the recommendatory resolutions and Guidelines on which they rely. First, many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement to an interpretation of Article VIII, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of subparagraphs (a) and (b), respectively, of paragraph (3) of Article 31 of the Vienna Convention on the Law of Treaties.’

47 Christine Gray, *International Law and the Use of Force* (OUP 2018) 208-10 (Gray); Tladi-Use of Force (n 15) 80.

48 Tladi-Nonconsenting State (n 10) 575; Gray (n 47) 210.

49 Christian Schaller, ‘Using Force Against Terrorists ‘Outside Areas of Active Hostilities’—The Obama Approach and the Bin Laden Raid Revisited’ (2015) 20 *Journal of Conflict Security Law*



Colombia in Ecuador, Turkey in Iraq and Israel in Gaza, remain unclear as to their legal justifications.<sup>50</sup>

Some authors also argue that the Security Council has recognised such a right through its resolutions adopted in the aftermath of 9/11.<sup>51</sup> Specifically, Resolutions 1368 and 1373 mention the ‘inherent’ right of self-defence in their preambles.<sup>52</sup> However, neither state any more than that. There is no reference to non-state actors at all, much less any indication that such a right could be exercised in the absence of attribution. In any case, the Council’s interpretive powers, so far as the Charter is concerned, are not considered to be legal.<sup>53</sup> That apart, as a body that is less representative than the General Assembly, it is doubtful how useful the Council’s resolutions are in evidencing practice of states concerning the interpretation of Article 51.

Given the sparsity of actual state practice in favour of the doctrine, proponents of an expansive view often rely on the silence of other states in response to invocations of self-defence against non-state actors to argue acquiescence in favour of the rule.<sup>54</sup> The silence argument, however, does not hold merit for two reasons. First, as a factual claim, it is incorrect to say that the majority of states have remained silent to such self-defence claims. The Non-Aligned bloc of countries have, for instance, expressly opposed such claims.<sup>55</sup> Second, and more importantly, only *deliberate* inaction where a response is called for can give rise to legally significant silence.<sup>56</sup> States choose to remain silent for a multitude of

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195, 219 (Schaller); Since the legal justification for this operation was unclear, it has been argued that this operation could also be characterised as an application of the unable or unwilling rule – See, David Kretzmer, ‘US Extra-Territorial Actions Against Individuals: Bin-Laden, Al Awlaki, and Abu Khattalah – 2011 and 2014’ in Tom Ruys & Olivier Corten (eds), *The Use of Force in International Law: A Case-Based Approach* 770 (OUP 2018) (Kretzmer).

50 Gray (n 47) 216-17, 223-25.

51 See for instance, Christian Tams, ‘Self-Defence against Non-State Actors: Making Sense of the ‘Armed Attack’ ‘Requirement’ in Anne Peters & Christian Marxsen (eds), *Self-Defence against Non-State Actors* (CUP 2019) 149 (Tams); Tom Ruys & Sten Verhoeven (n 14) 297; Thomas Franck, ‘Terrorism and the Right of Self-Defence’ (2001) 95 Am J Int’l L 839, 840-41.

52 UN SC Res. 1368, S/Res/1368 (2001); UN SC Res. 1373, S/Res/1373 (2001).

53 Dustin A Lewis, Naz K Modirzadeh & Gabriella Blum, ‘Quantum of Silence: Inaction and Jus ad Bellum’ (2019) Harvard Law School Program on International Law and Armed Conflict 43-45 (Quantum of Silence).

54 *ibid* 4 – ‘Though not a universal practice, over the years several scholars have expressly invoked silence in relation to jus ad bellum. The bulk of these writers have relied on the purported silence of States (and other international actors, such as the Security Council) as proof of support for particular legal positions. These invocations by scholars of silence are, by and large, most often made in support of relatively wide claims to resort to force, not least in purported exercise of the right of self-defense.’

55 See, Tladi-Use of Force (n 15) 88.

56 The International Law Commission, for instance, has refused to give much weight to ‘silence’ under Art 31(3)(b) of the Vienna Convention on the Law of Treaties, which considers subsequent practice of states in the application of a treaty as an interpretative tool. See, Draft Conclusion, 10, [2], Draft Conclusion, 13, [3], Commentary to Draft Conclusion 13, [18], p.113, Draft

reasons other than evidencing their belief that a particular action was legal (*opinio juris*). Specifically, in the context of *jus ad bellum*, the role of silence in producing legal effects is all the more questionable, since as the recent Harvard Law School Program on International Law and Armed Conflict study demonstrates, other states are rarely made aware of Article 51 communications made to the Security Council by a state.<sup>57</sup> Silence or acquiescence in *jus ad bellum* questions must therefore not ‘be lightly presumed’.<sup>58</sup>

The ICJ has also had the chance on some occasions to weigh in on the requirement of attribution in an armed attack under Article 51. In *Nicaragua*, the Court proceeded on the assumption that attribution of acts of ‘armed bands, groups, irregulars or mercenaries’ to the state was necessary for there to be an armed attack.<sup>59</sup> The Court is widely understood to have set a high attribution threshold.<sup>60</sup> More important, however, are three other decisions of the ICJ, which have required that an armed attack under Article 51 be attributable to a state to claim self-defence – all decided after 9/11. In *Oil Platforms*, the Court noted that to claim self-defence, the US would have to ‘show that attacks had been made upon it for which Iran was responsible’.<sup>61</sup> In its reasoning, the Court proceeded ‘[o]n the hypothesis that all the incidents complained of are to be attributed to Iran.’<sup>62</sup> In its *Wall Advisory Opinion*, the Court was more assertive. It noted that Article 51 recognised an inherent right of self-defence in case of an armed attack by one state against another.<sup>63</sup> Since Israel did not

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conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, Yearbook of the International Law Commission, 2018, vol. II, Part Two. See also, Quantum of Silence (n 53) 32.

57 Quantum of Silence (n 53) 52.

58 *ibid* 8.

59 “There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, 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” (inter alia) an actual armed attack conducted by regular forces, “or its substantial involvement therein”. This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law.” *Nicaragua* (n 22) [195].

60 The Court applied the *effective control* test for attribution of acts of non-state actors to a state in the context of the law on state responsibility. *Nicaragua* (n 22) [115]. It has been noted however, that the ICJ used a different attribution threshold — whether the state was ‘substantially involved’ in the operations of the non-state actor — insofar as the right of self-defence was concerned. Craig Martin, ‘Challenging and Refining the “Unwilling or Unable” Doctrine’ (2019) 52 *Vanderbilt Journal of Transnational Law* 387, 432 (Martin). See, *Nicaragua* (n 22) [195]. In either case, the threshold required by the Court is a high one.

61 *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Judgment) [2003] ICJ 161 [51] (*Oil Platforms*).

62 *Oil Platforms* (n 61) [64].

63 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ [136] - [139] (*Wall Opinion*).

claim that the attacks against it were attributable to any state, Article 51 was inapplicable.<sup>64</sup> Finally, in *Armed Activities*, the Court found that Uganda's self-defence claim had to be rejected since there was 'no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC.'<sup>65</sup> The Court also noted that 'even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.'<sup>66</sup> Expansionists can thus claim no support from the jurisprudence of the principal judicial organ of the UN before or after the 9/11 'watershed' moment.

### 3. The 'Unable or Unwilling' State

Syria, in 2014, presented the need for the US to make an argument based on the 'unable or unwilling state' doctrine.<sup>67</sup> Unlike Taliban and Afghanistan, or Hezbollah and Lebanon, no attribution (however loose a standard set) case could be made. Bashar al-Assad's government was itself fighting the *ad-Dawlah al-Islamiyah* (or Da'ish). Unlike in Yemen or even Abbottabad, no consent argument (again however loosely defined) could be plausibly attempted either, given that Assad's government had rejected any attempt to intervene in the civil war without its consent. As a consequence, some new weapon had to be deployed from the legal arsenal. The answer came in the form of the unable or unwilling doctrine, an old foot-soldier used first a century and a half ago, ironically against the US itself.<sup>68</sup> Deeks' work on the doctrine in 2012 in the context of the war on terror had sufficiently laid the legal groundwork.<sup>69</sup> In September 2014, in its Article 51 letter to the Security Council, the US claimed that Syria was unable or unwilling to act against the ISIL and hence the US' use of force in Syrian territory was lawful.<sup>70</sup> Next year, Australia, Canada and Turkey in their Article 51 letters to the Council also claimed that Syria was unable or unwilling to prevent attacks from ISIL.<sup>71</sup> In its 2016 Report on the Legal and Policy Frameworks Guiding the Use of Military Force, the US government stated that the unable or unwilling rule is a part of customary international law.<sup>72</sup>

64 *Wall Opinion* (n 63) [139].

65 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment) [2005] ICJ [168], [146] (*Armed Activities*).

66 *Armed Activities* (n 65) [146].

67 Corten-*Unwilling or Unable* (n 24) 778.

68 Forcese (n 40) 74.

69 Deeks (n 37).

70 Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, S/2014/695 (23 Sept 2014).

71 Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, S/2015/221 (31 Mar 2015); Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, S/2015/693 (9 Sept 2015); Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, S/2015/563 (24 July 2015).

72 The White House, *Report on the Legal and Policy Framework Guiding the United States' Use*

To some, the ‘unable or unwilling’ rule is a facet of the *necessity* requirement of self-defence.<sup>73</sup> It has also been suggested that the rule is intended as a principle of attribution of conduct of terrorist groups to states.<sup>74</sup> Insofar as the necessity argument is concerned, I have previously addressed how it misconceives the requirement for self-defence to be legal.<sup>75</sup> Inasmuch that the rule purports to be one of attribution, the claim is either that the rule lowers the threshold of state involvement required by the ICJ in *Nicaragua*, or that it establishes attribution through the violation of a state’s due diligence obligations to ensure that its territory is not used by terrorist groups.<sup>76</sup> However, the doctrine cannot be made sense of through either prisms. It cannot be classified as an attempt to set an attribution threshold, because it plainly seeks to do away with attribution altogether. Whereas the ICJ has set the threshold of “effective control” or “substantial involvement” in *Nicaragua*, this doctrine tries to bring it down to *no* involvement. This is precisely the opposite of the logic underlying the ILC Articles of State Responsibility as well. Apart from the exceptional situation in Article 10, at all times, the Articles require *some* degree of direct state involvement and control for attribution, based on the notion that all acts that take place within a state’s territory cannot be vicariously attributed to it.<sup>77</sup> On the “unable or unwilling” standard, crucially, no direct state involvement in the conduct of the non-state actor is required whatsoever. If a state does not act (or acts insufficiently) against a terrorist group (for whatever reason), this doctrine deems the conduct of the group attributable to the state.<sup>78</sup> This would be an exercise in radical revisionism of the rules of attribution. In fact, even post 9/11, the ICJ has impliedly rejected the proposition that mere tolerance of armed groups by a state within its territory is sufficient attribution for the other state to claim the right of self-defence.<sup>79</sup> The argument with respect to due diligence,

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*of Military Force and Related National Security Operations* (2016) 10 (US Legal and Policy Framework).

73 US Legal and Policy Framework (n 72) 10; Noam Lubell, ‘Fragmented Wars: Multi-Territorial Military Operations against Armed Groups’ (2017) 93 *Int’l L Stud* 215, 219-220.

74 Erika de Wet, ‘The Invocation of the Right to Self-Defence in Response to Armed Attacks Conducted by Armed Groups: Implications for Attribution’ (2019) 32 *LJIL* 91, 103-104 (Erika de Wet); Bethlehem (n 13) 7; Olivia Flasch, ‘The Legality of the Air Strikes Against ISIL in Syria: New Insights on the Extraterritorial Use of Force Against Non-State Actors’ (2016) 3 *Journal on Use of Force and International Law* 37, 54-57.

75 See page 5-6.

76 Erika De Wet (n 74) 103-104.

77 Paulina Starski, ‘Right to Self-Defense, Attribution and the Non-State Actor’ (2015) 75 *ZaöRV* 455, 466 (Starski).

78 In the context of Syria, which was deemed by the US and other countries to be unable or unwilling, this would have the bizarre consequence that despite the Syrian government being in an armed conflict against the ISIL, the latter’s actions would be attributable to Syria.

79 ‘During the period under consideration both anti-Ugandan and anti- Zairean rebel groups operated in this area. Neither Zaire nor Uganda were in a position to put an end to their activities. However, in the light of the evidence before it, the Court cannot conclude that the absence of action by Zaire’s Government against the rebel groups in the border area is tantamount to “tolerating” or “acquiescing” in their activities. Thus, the part of Uganda’s first counter-claim alleging Congolese responsibility for tolerating the rebel groups prior to May 1997 cannot be

while attractive at first blush, is equally flawed. Undoubtedly, a state has a due diligence obligation of not knowingly allowing its territory to be used in a manner (by a private actor/terrorist group) that causes harm to other states.<sup>80</sup> However, this is an obligation on the state and a violation of this rule leads to state responsibility by itself. Importantly, it does not *attribute* the private actor's conduct to the state.<sup>81</sup> Since Article 51 requires the attribution of an 'armed attack' to a state,<sup>82</sup> a violation of due diligence obligations by a state cannot give rise to the right of self-defence.

Finally, it has been suggested that the doctrine has its basis in the laws of neutrality, whereby a state is allowed to use force against the enemy's armed forces in a third (neutral) state, if that state knowingly allows the use of its territory by the enemy armed forces.<sup>83</sup> In that situation, the third state by its lack of due diligence, loses its claim to neutrality. However, after the UN Charter, this aspect of the law of neutrality has become obsolete and no longer reflects *jus ad bellum*.<sup>84</sup> In any case, the law of neutrality applies in an international armed conflict between states.<sup>85</sup> However, the US has consistently maintained that it is in a boundary-less 'global NIAC' with terrorist groups.<sup>86</sup> That classification may itself be problematic (and doctrinally incorrect), but it simultaneously renders the invocation of the law of neutrality inapposite.

In the manner that this rule has been given content to, it would also be plausible to argue that a state which does not consent to the US' military intervention (or any other state willing to use this doctrine) may be considered *unwilling* on that ground alone.<sup>87</sup> The rule

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upheld.' *Armed Activities* (n 65) [301].

80 *Corfu Channel case* (Judgment) [1949] ICJ 4 [22]; Starski (n 77) 479; Liability for due diligence obligations are fault-based. This means that if the state, given its situation and capabilities, has taken reasonably appropriate measures, then it has discharged this obligation. See, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment) [2010] ICJ 14 [197]. Therefore, due diligence obligations consider a state's capacity to take measures against terrorist groups. For a state that is *unable* to act, owing to its circumstances, there is no violation of this obligation. Holding otherwise, would transform due diligence to a standard of strict liability, which has been rejected, even in the terrorism context. See, Starski (n 77) 482.

81 Martin (n 60) 429-432.

82 *ibid* 5.

83 Deeks (n 37) 498, 499.

84 'This is because the Charter regime prohibits the use of force unless a state has suffered an armed attack from another state.' Kretzmer (n 49) 778.

85 Kevin Jon Heller, 'Ashley Deeks' Problematic Defense of the "Unwilling or Unable" Test' (Opinio Juris, 2011) <<http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/>> accessed 10 June 2020.

86 US Legal and Policy Framework (n 72) 19.

87 For instance, Daniel Bethlehem, one of the key proponents of the unable or unwilling doctrine, notes – "The seeking of consent must provide an opportunity for the reluctant host to agree to a reasonable and effective plan of action, and to take such action, to address the armed activities of the nonstate actor operating in its territory or within its jurisdiction. The failure or refusal to agree to a reasonable and effective plan of action, and to take such action, may support a conclusion that the state in question is to be regarded as a colluding or a harboring state." Bethlehem (n 13)

would then operate as a catch-all; it is difficult to think of a situation where one could not at least attempt to make an unable or unwilling argument (with some degree of success), where other *traditional* justifications for the resort to force cannot be plausibly argued. Resultantly, this rule sounds the death knell for the Charter's regime for prohibiting the use of force, unravelling the collective security system.<sup>88</sup>

#### 4. *The Soleimani Incident and the 'Unable or Unwilling' Rule*

With the US and other intervening states in Syria relying on some variant of the 'unable or unwilling' test, it became easier for subsequent interventions to use this law-like justification while referencing Article 51 of the Charter. Already by 2015, it was considered a popular argument.<sup>89</sup> Importantly, thus far, the 'unable or unwilling' argument was made only in the context of non-state actors. But folk international law is almost like an 'unruly horse'<sup>90</sup>; if reiterated often enough, such arguments can go down a slippery slope or assume a life of their own, which then are available for ready deployment as justifications for *any* use of force.<sup>91</sup> This is illustrated in the Soleimani incident.

Let us take the US' case at its highest. Let us believe that Soleimani was 'plotting imminent and sinister attacks'<sup>92</sup> on US territory. Let us also assume that international law allows an exercise of anticipatory self-defence at the stage of *plotting* an armed attack. As against Iran, the self-defence argument works because there is attribution - Soleimani was one of the most influential people in the Iranian government.<sup>93</sup> Given these assumptions then, the self-defence claim passes the Article 51 test (necessity and proportionality would ostensibly also be satisfied).

Crucially, however, Soleimani was killed on Iraqi territory. His killing by the drone strike would meet the Article 2(4) threshold as a use of force by the US against Iraq.<sup>94</sup> It was,

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7; See also Dawood I Ahmed, 'Defending Weak States against the Unwilling or Unable Doctrine of Self-Defense' (2013) 9 J Int'l L & Int'l Rel 1, 18.

88 Gray (n 47) 246; Corten-Unwilling or Unable (n 24) 797-98.

89 Schaller (n 49) 202.

90 I borrow this term from the famous decision in *Richardson v Mellish* (1824) 2 Bing 229 – 'I, for one, protest, as my Lord has done, against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where it will carry you.'

91 The recent report of the Special Rapporteur on Extrajudicial Executions goes one step ahead in this regard – 'In other words, the targeted killing of General Soleimani, coming in the wake of 20 years of distortions of international law, and repeated massive violations of humanitarian law, is not just a slippery slope. It is a cliff.' Agnès Callamard Report (n 4) [64].

92 Mark Hosenball, 'Trump says Soleimani plotted "imminent" attacks, but critics question just how soon' (*Reuters*, 2020) <<https://www.reuters.com/article/us-iraq-security-blast-intelligence/trump-says-soleimani-plotted-imminent-attacks-but-critics-question-just-how-soon-idUSKBN1Z228N>> accessed 31 May 2020.

93 Nectar Gan, 'Who was Qasem Soleimani, the Iranian commander killed by a US airstrike?' (*CNN*, 2020) <<https://edition.cnn.com/2020/01/03/asia/soleimani-profile-intl-hnk/index.html>> accessed 31 May 2020.

94 Agnès Callamard Report (n 4) Annex [68].

after all, a non-consensual drone attack on Iraqi territory. Hence, the self-defence argument must work with respect to Iraq too.<sup>95</sup> While the US' Article 51 report to the UN does not include any justification as against Iraq, it has been suggested that this was an extension of the unable or unwilling doctrine.<sup>96</sup> That would be, of course, immensely problematic. Even if one assumes that a state must act against terrorist groups within its territory and if it does not, it opens itself up to the unable or unwilling argument, Soleimani was a major general in the Iranian military. Therefore, this was not a case of a state harbouring or being unable to act against a designated terrorist (Bin-Laden in Pakistan) or terrorist group (Da'ish in Syria). Soleimani was most likely visiting Iraq on state/diplomatic work. The application of the unable or unwilling doctrine in this context would imply that a state that welcomes a state official from another country (which the US has hostile relations with and considers to be 'plotting attacks' against it) opens itself up to a use of force from the US.<sup>97</sup> Ostensibly then, military personnel, high ranking government officials, or even heads of states from such countries can be targeted on the territory of *any* state in the world. An unreasonable proposition needless to say, yet a necessary consequence of the burgeoning of folk international law.

### III. HOW DID WE GET HERE?

The question then is why such doctrinally incorrect arguments are being made routinely, and with impunity, in modern armed conflicts. One answer could be to blame it on the lawyer – government lawyers in liberal democracies that fight the war on terror can be credited with finding, reiterating and ultimately 'making legal' such doctrinally unsound propositions. For instance, government lawyers in the Bush administration post-9/11 felt compelled to advance dubious legal justifications so as to not be seen as inhibiting the war on terror.<sup>98</sup> The law was repeatedly manipulated to provide the arsenal needed by the administration.<sup>99</sup> There are also scholars, overwhelmingly from the west who have

95 Marko Milanovic, 'The Soleimani Strike and Self-Defence Against an Imminent Armed Attack' (*EJIL: Talk!*, 2020) <<https://www.ejiltalk.org/the-soleimani-strike-and-self-defence-against-an-imminent-armed-attack/>> accessed 31 May 2020.

96 Charlie Dunlap, 'The killing of General Soleimani was lawful self-defense, not 'assassination'' (*Lawfire*, 2020) <<https://sites.duke.edu/lawfire/2020/01/03/the-killing-of-general-soleimani-was-lawful-self-defense-not-assassination/>> accessed 31 May 2020; *See also*, the January 02, 2020 statement of the US Secretary of Defense, where he states that he has asked Iraqi leadership 'multiple times over recent months, urging them to do more.' <<https://www.defense.gov/Newsroom/Releases/Release/Article/2049227/statement-by-secretary-of-defense-dr-mark-t-esper-as-prepared/>> accessed 15 July 2020; *See also*, Agnès Callamard Report (n 4) Annex [71]-[72].

97 *See*, Agnès Callamard Report (n 4) [63] – 'The international community must now confront the very real prospect that States may opt to "strategically" eliminate high ranking military officials outside the context of a "known" war, and seek to justify the killing on the grounds of the target's classification as a "terrorist" who posed a potential future threat.'

98 Gabriella Blum, 'The Role of the Client: The President's Role in Government Lawyering' (2009) 32(2) *Boston College Int'l & Comp L Rev* 275-287 (Blum-Role of Client).

99 *ibid* 286.

participated in that endeavour, pushing such problematic justifications as *legal*. Many of them have often held, or continue to hold crucial advisory positions in the governments of their home states. Academic studies by organisations like the Chatham House Principles<sup>100</sup> and the Leiden Policy Recommendations<sup>101</sup> have also assisted this move. These studies, conducted by academics largely from the west, profess to lay down the law governing self-defence in international law. As with the work of many scholars, these studies make a familiar move – to claim that an expansive right of self-defence is now doubtlessly accepted and settled. This, despite the fact that such academic studies cannot change international law in the absence of widespread state practice (particularly for *jus cogens* norms).<sup>102</sup> What is also interesting about the argument of expansionist scholars and studies is that many of them seem to use similar phrasing on the lines of – ‘it is *now* well accepted’ (that self-defence applies to armed attacks by non-state actors).<sup>103</sup> Being written at different points of time after 9/11, it becomes difficult to glean when the “now” exactly happened, in the

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100 Chatham House, *Principles of International Law on the Use of Force in Self-Defence* (ILP WP 2005) (Chatham House Principles). Principle 6 of the Chatham House Principles state – ‘Article 51 is not confined to self-defence in response to attacks by states. The right of self-defence applies also to attacks by non-state actors.’ ‘If the right of self-defence in such a case is to be exercised in the territory of another state, it must be evident that that state is unable or unwilling to deal with the non-state actors itself, and that it is necessary to use force from outside to deal with the threat in circumstances where the consent of the territorial state cannot be obtained.’

101 Nico Schrijver & Larissa van den Herik, *Leiden Policy Recommendations on Counter-terrorism and International Law* (CUP 2010) (Leiden Policy Recommendations). Paragraph 38 of the Leiden Policy Recommendations states – ‘The recognition in Article 51 of the inherent right of individual or collective self-defence in the event of an armed attack makes no reference to the source of the armed attack. It is now well accepted that attacks by non-state actors, even when not acting on behalf of a state, can trigger a state’s right of individual and collective (upon request of the victim state) self-defence.’

102 Gray analyses previous instances to show how state practice in support of an expansive right of self-defence against non-state actors is insufficient and inconsistent. Gray (n 47) at 226; *Tladi-Use of Force* (n 15) 86 – ‘[S]uch a shift, even if desirable, cannot be achieved by separate and dissenting opinions of the judges of the International Court of Justice or the writings of commentators based on acts that either do not receive the acceptance of other States or that may be explained in terms of the Nicaragua test of attribution.’

103 *See for instance*, Jutta Brunnée & Stephen J Toope, ‘Self-Defence against Non-State Actors: Are Powerful States Willing But Unable to Change International Law?’ (2018) 67 ICLQ 263, 282 – ‘It is now widely accepted that States can exercise the right against attacks or threats posed by non-State actors.’; Christian Henderson, ‘Non-State Actors and the Use of Force’ in M. Noortmann *et al.* (eds), *Non-State Actors in International Law* (Hart Publishing 2014) 6 – ‘Furthermore, state practice since 9/11 would now seem to suggest that – if indeed it ever was the case that the law required state involvement in an ‘armed attack’ before self-defence could be invoked – international law has now developed to allow for self-defence against ‘armed attacks’ perpetrated by NSAs’; Leiden Policy Recommendation (n 101) 13 – ‘It is now well accepted that attacks by non-state actors, even when not acting on behalf of a state, can trigger a state’s right of individual and collective (upon request of the victim state) self-defence.’; Bethlehem (n 13) 5 – ‘It is by now reasonably clear and accepted that states have a right of self-defence against attacks by nonstate actors—as reflected, for example, in UN Security Council Resolutions 1368 and 1373 of 2001, adopted following the 9/11 attacks in the United States.’



absence of requisite state practice decidedly pointing that way.<sup>104</sup>

One must also understand the international law moment we are currently in: wars are being fought in an intensely legal space.<sup>105</sup> Law affords a universal vocabulary for debating the legitimacy of wars today.<sup>106</sup> Yet this has not always been the case – examples even in the recent past show that international law was not necessarily the bank which minted the legitimacy currency. Take, for instance, NATO's intervention in Kosovo in 1999, which several international law scholars<sup>107</sup> as well as the Kosovo Commission<sup>108</sup> argued was probably *illegal* but was *legitimate*. Doubtlessly, there are many problems with that move. Orford highlights the politics of such anti-legalism and how it advances the interests of power.<sup>109</sup> Roberts points out how such exceptionally 'legitimate' instances of practice could nonetheless provide handy precedents for future interventions.<sup>110</sup> In the early days of the war on terror, the Bush administration and some scholars seemed to have been making a similar move. They based their arguments on the *legitimacy* of such a war, removed from questions of its *legality* in international law.<sup>111</sup> International law was viewed

104 See Part II above. See also, Martin (n 60) 414 where the author analyses how self-defence claims against non-state actors rely on sparse practice overwhelmingly from a few western states – 'Thus, those who assert these claims of custom tend to overly privilege and weight the practice of a handful of Western First-World states, and to either ignore or discount the inconsistent practice and explicit objections emanating from the Global South.'

105 Kennedy - Of War and Law (n 3) 24.

106 David Kennedy, 'Lawfare and Warfare' in James Crawford & Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) (Kennedy-Lawfare and Warfare).

107 Thomas Franck, *Recourse to Force, State Action against Threats and Armed Attacks* (CUP 2004) 172 (Franck); Louis Henkin, 'Kosovo and the Law of "Humanitarian Intervention"' (1999) 93 *Am J Int'l L* 824, 826 See, Anthea Roberts, 'Legality vs Legitimacy: Can Uses of Force be Illegal but Justified?' in Philip Alston & Euan Macdonald (eds.) *Human Rights, Intervention, and the Use of Force* (CUP 2008) 179, 182 (Roberts) – 'Many commentators ended up adopting the ambivalent position that NATO's use of force was formally illegal but morally justified.'

108 Independent International Commission on Kosovo, *The Kosovo Report* (2000) 4.

109 Anne Orford, 'The Politics of Anti-Legalism in the Intervention Debate' in David Held and Kyle McNally (eds), *Lessons from Intervention in the 21st Century: Legality, Feasibility and Legitimacy* (GPe Books 2014) (Orford).

110 Roberts (n 107) 205, 211.

111 For instance, Glennon argues in 2002 that – 'The international system has come to subsist in a parallel universe of two systems, one de jure, the other de facto. The de jure system consists of illusory rules that would govern the use of force among states in a platonic world of forms, a world that does not exist. The de facto system consists of actual state practice in the real world, a world in which states weigh costs against benefits in regular disregard of the rules solemnly proclaimed in the all-but ignored de jure system. The decaying de jure catechism is overly schematized and scholastic, disconnected from state behavior, and unrealistic in its aspirations for state conduct. The upshot is that the Charter's use-of-force regime has all but collapsed. This includes, most prominently, the restraints of the general rule banning use of force among states, set out in Article 2(4). The same must be said, I argue here, with respect to the supposed restraints of Article 51 limiting the use of force in self-defense. Therefore, I suggest that Article 51, as authoritatively interpreted by the International Court of Justice, cannot guide responsible U.S. policy-makers in the U.S. war against terrorism in Afghanistan or elsewhere.' Michael J Glennon, 'The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United

far less as a companion, rather much more as a hindrance, or even dangerous, in the Bush administration's initial war on terror.<sup>112</sup>

To be sure though, we are no longer in that moment now. Slaughter called for a new international law where what was legitimate would also be legal, and we seem to have arrived at that stage.<sup>113</sup> Since the Obama administration made express its position on international law concerning the war on terror,<sup>114</sup> it has been increasingly sold to the 'court of world public opinion'<sup>115</sup> as being *legal*, which necessarily makes its *legitimacy* a given. NATO's intervention was characterised as 'technically' or 'formally' illegal by many scholars, but morally legitimate.<sup>116</sup> In that view, legality was seen as pedantic, doctrinaire and inflexible, while legitimacy was considered the exact opposite; the latter therefore being more suitable for judging conduct in contemporary security challenges.<sup>117</sup> A similar move is seen when scholars advocating for a right of self-defence against non-state actors consider 'traditional' *jus ad bellum* insufficient in addressing the more pressing 'modern' security issues.<sup>118</sup> International law's credibility and relevance is presented as being dependent on whether it accommodates such uses of force in response to new challenges. Those adhering to the restrictive view on self-defence are dismissed as being narrow and

Nations Charter' (2002) 25 Harv JL & Pub Pol'y 539, 540-41.

112 Melissa Kim, 'Applying International Law to the War on Terrorism' (2006) 8(2) Int'l Stud Rev 309, citing the 2005 National Defense Strategy of the United States of America, US Department of Defense; *See also*, Modirzadeh (n 9) 227 – 'Many in IHL and IHRL, by that point, had struggled for years with the U.S. government against the claim that international law was "quaint," with the Bush Administration seeming to reject the idea that international law—as law—had any place in this new war.'

113 Anne-Marie Slaughter, 'Good Reasons for Going Around the U.N.' *The New York Times* (18 March 2003) <<https://www.nytimes.com/2003/03/18/opinion/good-reasons-for-going-around-the-un.html>> accessed 2 Jun 2020.

114 Modirzadeh (n 9) 226-27 - Modirzadeh identifies this moment as Harold Koh's 2010 address at the American Society of International Law's Annual Meeting.

115 Kennedy - Of War and Law (n 3) 96.

116 Roberts (n 107) 184-85. Roberts highlights – 'A number of scholars insert a qualifying word before the term 'illegal', such as 'formally' or 'technically' illegal, in order to soften the problem of illegality or to suggest that it is merely a formal issue. However, the notion that the use of force, even for a good cause, may be merely 'technically' or 'formally' illegal is highly suspect.'. However, 'unilateral uses of force are not illegal because they breach a technical rule; they are illegal because they breach a fundamental Charter obligation.' Roberts (n 107) 185-86.

117 Orford (n 109) 1,4.

118 *See for instance*, Tams (n 51) 95 – 'While general and comprehensive, the ban on force is purposefully limited: it prohibits the use of force by States 'in their international relations'. This was traditionally read to refer to 'the international relations between States'; Tams (n 51) 119 – 'First, it proceeds from a traditional understanding of the Charter's peace and security scheme, which emphasises the absence of military conflict between States. This traditional understanding remains prominent, but is no longer dominant.' *See also*, The Rt Hon Jeremy Wright QC MP, 'The Modern Law of Self-Defence' (*EJIL: Talk!*, 2020) <<https://www.ejiltalk.org/the-modern-law-of-self-defence/>> accessed 2 June 2020.

dogmatic.<sup>119</sup> They are the ‘theorists’ as against the “practitioners” of international law<sup>120</sup> — no prizes for guessing which international lawyer is à la mode. This move from *legitimacy* to *legality* has been assisted by growing folk international law. The modern, pragmatic and flexible view of international law thus presents the same advantages which *legitimacy* did in the late 1990s and early 2000s. This folk international law is, therefore, legality fused with legitimacy.

To understand why this conversational shift in the war on terror has happened — from arguing it is *legitimate* (even if not legal) to it is *legal* — perhaps we must look at the broader neoliberal moment in which we find ourselves. Law is fundamental to the neoliberal project, and arguing based on law is central to the state’s actions.<sup>121</sup> The neoliberal preoccupation with *legality* makes it the only criterion on which to evaluate legitimacy, particularly in the US.<sup>122</sup> Additionally, legal arguments increasingly have great weight in the ‘ideological marketing’ that liberal democracies engage in while fighting their wars.<sup>123</sup> Hence, a conversation on the law is vital for gaining the currency of legitimacy. However, in that endeavour, doctrinal fealty is inessential; so long as the arguments are ‘law-sounding’, the perception or legitimacy battle has already been won. The growth of law as a shared elite vocabulary of expertise has meant that guns and law are deployed simultaneously in war.<sup>124</sup> In that view, law obviates the need to advance political justifications or address political costs — the decision to go to or continue war can be outsourced to law.<sup>125</sup> As law becomes *the* “global vernacular of legitimacy”,<sup>126</sup> it becomes vital for states to soften doctrinal rigours and keep a handy set of legal justifications available to persuade, whoever needs to

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119 Franck (n 107) 67.

120 See for instance, Kenneth Watkin, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict* (OUP 2016) - ‘The disconnect between traditional theorists and practitioners of international law continues to be problematic.’

121 Kenneth Vietch, ‘Law, Social Policy, and the Neoliberal State’ in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (OUP 2017); See, David Singh Grewal & Jedediah Purdy, ‘Introduction: Law and Neoliberalism’ (2014) 77 *Law & Contemporary Problems* 1, 8— ‘Neoliberalism is always mediated through law.’ In some ways, modern war too (like law) may be considered central to the neoliberal project. See for instance, Gordon Lafer, ‘Neoliberalism by other Means: The “War on Terror” at Home and Abroad’ (2004) 26(3) *New Political Science* 323, 324 — ‘I believe that, in its broadest logic, the war must be understood as a means of advancing the neoliberal agenda of global economic transformation.’

122 On legality and legitimacy in the US context, see generally, Blum-Role of Client (n 98) at 278 - ‘For Americans, both past and present, the law is a metonymy for the line that separates right from wrong, inviting wrongdoers to justify their immoral behavior by arguing they have done nothing illegal, and making it difficult to justify illegal behavior as nonetheless morally just.’ .....’Hence, we arrive at a confluence of legality and legitimacy, of what is permissible and what is desirable, a confluence which is often questionable both pragmatically and ethically.’

123 Gabriella Blum, ‘The Paradox of Power: The Changing Norms of the Modern Battlefield’ (2019) 56 *Hous L Rev* 745, 778 (Blum-Paradox of Power).

124 See generally, Kennedy-Lawfare and Warfare (n 106) 160-62.

125 Kennedy - Of War and Law (n 3) 141-43.

126 *ibid* 163.

be persuaded (Parliament, citizenry, other states, global audience), that their war is a just one, as opposed to that of their opponents.<sup>127</sup>

#### IV. HOW ARE THESE ARGUMENTS PASSING MUSTER?

What remains to be understood is why such dubious *jus ad bellum* arguments like unable or unwilling are made regularly and are in some senses, passing muster before the world audience. One reason could be the securitisation discourse that has steadily been built across liberal democracies, particularly after 9/11. The fixation of modern democracies with ‘security’ is ever-expanding.<sup>128</sup> The global war on terror has created an all-encompassing narrative of conflict which ‘supersedes other ‘securitisations’ between regions and states and frames the international security discourse.’<sup>129</sup> Its framing as a ‘war’ is meant to evoke a visceral fear among the public, allowing governments to claim that *any* extraordinary measures necessary to tackle the threat are justified. Military responses are justifiable because it is a *war* and a security issue.<sup>130</sup> Moreover, consistently, the public has been reminded of the novelty of the war that it currently finds itself in, one where the ‘traditional’ rules could not apply.<sup>131</sup>

Using this securitisation discourse as the background enables governments ‘to move beyond the politicisation of the concept, through the legalisation of responses, and to persuade their respective citizenries to accept previously unconscionable measures’<sup>132</sup> to combat the terrorism threat. Simultaneously, the terrorist is painted as the ‘universal enemy’ who is ‘rootless, fanatical and brutal.’<sup>133</sup> All of this ensures that *jus ad bellum* concerns have receded to the far background in this war. The framing of the securitisation discourse ensures delegitimation of other possible responses to terrorism.<sup>134</sup> In that conversation, first-order *ad bellum* questions are hardly relevant. If they are to be, the *traditional* view must necessarily be abandoned for a flexible, *modern* one which keeps international law on the use of force (and the United Nations) relevant in contemporary times.<sup>135</sup> The restrictive

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127 *ibid* 95-116.

128 Talal Asad, ‘Thinking about Terrorism and Just War’ (2010) 23 *Cambridge Review of International Affairs* 3, 8 (Talal Asad).

129 Lydia Davies-Bright, ‘Terrorism: A Threat to Security?’ in Mary Footer (ed), *Security and International Law* 220 (Bloomsbury 2016) (Davies-Bright).

130 *ibid* 223.

131 Robert G Patman, ‘Globalisation, the New US Exceptionalism and the War on Terror’ 27 (2006) *Third World Quarterly*; Helen Duffy, *The ‘War on Terror’ and the Framework of International Law* (Cambridge University Press 2005) 249.

132 Davies-Bright (n 129) 222.

133 Darryl Li, ‘A Universal Enemy?: “Foreign Fighters” and Legal Regimes of Exclusion and Exemption under the “Global War on Terror”’ (2010) 41(2) *Columbia Human Rts L Rev* 355, 356.

134 Davies-Bright (n 129) 247.

135 This kind of framing ignores what it means to keep international law “relevant” in modern times. One could as well argue that insisting on a strict prohibition on the use of force with narrow

view is not merely incorrect; it is absurd in its insistence on preserving a legal order that is out of step with the security challenges that terrorism poses. The conundrum is framed in binary terms - either adhere to restrictive rules and do nothing while being relentlessly attacked by terrorists, or use force to combat this grave threat.<sup>136</sup> The UN Charter cannot be a suicide pact.<sup>137</sup>

Additionally, one must consider the vital role that international humanitarian law (IHL) plays in modern armed conflicts. Liberal democracies are more IHL-compliant in their military operations today, than ever before.<sup>138</sup> IHL has had tremendous success in constraining how states deploy force and has managed to bring down civilian casualties significantly.<sup>139</sup> There are examples of states going even beyond what IHL requires during military operations. Israel warning people in Gaza by sending text messages to their phones or distributing leaflets before conducting an attack is one such example.<sup>140</sup> However, the minimisation of civilian deaths serves to obfuscate focus from the illegality of resort to war (the *ad bellum* question) and makes it harder to criticise the use of force.<sup>141</sup> A ‘war without civilian deaths’ is likelier, therefore, to continue longer without popular resistance.<sup>142</sup> Strict IHL compliance takes care of the optics problem with the domestic citizenry, and the ‘CNN effect’ becomes less pronounced. In some ways then, IHL serves to shift the conversation around armed conflict away from *jus ad bellum*.

For instance, this is most evidently the case in the context of drone strikes by the US. In the controversial Anwar Al-Aulaqi memorandum, the Office of the Assistant Attorney General in the US looks only at *jus in bello* justifications for targeted killing in Yemen,

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exceptions, is precisely what would keep international law the most relevant at a time when the use of force globally is ever increasing. Existing international law in restricting the situations where force can be used, may be equally incorporating values of legitimacy. *See for instance*, Roberts (n 107) 207.

136 In the context of the NATO intervention in Kosovo, for instance, Roberts discusses how a false dichotomy was created between either conducting air strikes, or doing nothing, excluding all other possible actions. Roberts (n 1) 188.

137 George Shultz used this expression in a speech at the National Defense University in 1986, drawing from a famous US constitutional law decision. Geoffrey M Levitt, ‘Intervention to Combat Terrorism and Drug Trafficking’ in Lori Fisler Damrosch & David J Scheffer (eds), *Law and Force in the New International Order* 225 (OUP 2018).

138 Blum-Paradox of Power (n 123) 747. I am thankful to Prof Gabriella Blum for previous discussions on this point generally.

139 Blum-Paradox of Power (n 123) 747, 752-53.

140 Steven Erlanger & Fares Akram, *Israel Warns Gaza Targets by Phone and Leaflet*, *The New York Times* (8 July 2014) < <https://www.nytimes.com/2014/07/09/world/middleeast/by-phone-and-leaflet-israeli-attackers-warn-gazans.html>> accessed 3 June 2020.

141 Samuel Moyn, ‘A War Without Civilian Deaths?’ (*The New Republic*, 23 October 2018) <<https://newrepublic.com/article/151560/damage-control-book-review-nick-mcdonnell-bodies-person>> accessed 3 June 2020 (Moyn); Blum-Paradox of Power (n 123) 785.

142 Moyn (n 141).

completely ignoring the *jus ad bellum* questions.<sup>143</sup> Similarly, the 2016 Legal Framework Report states that once the US has lawfully used force against a non-state actor in one country, the *jus ad bellum* analysis need not be made continuously for subsequent uses of force against the same actor.<sup>144</sup> This shift away from the *jus ad bellum* conversation is perhaps both due to the optics value that IHL compliance adds and the way that IHL doctrine is itself structured. IHL application does not depend on *jus ad bellum* legality; hence, a state may be in flagrant violation and impeccable compliance of either side of the law governing armed conflict at the same time. Arguably, in certain situations, IHL is structured in a manner that *enables* violations of *jus ad bellum* to continue.<sup>145</sup> In this view, IHL may be one of the accomplices in allowing doctrinally unsound *jus ad bellum* arguments to pass muster in important conversations (before the global audience) regarding modern armed conflicts.<sup>146</sup>

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143 US Department of Justice, Office of Legal Counsel, Memorandum for the Attorney General, *Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi* (July 16, 2010).

144 US Legal and Policy Framework (n 72) 11.

145 An example of this could be the way IHL deals with a situation of occupation. A situation of occupation is meant to be temporary and in most cases is a continuous *jus ad bellum* violation (especially for prolonged occupations – it is nearly impossible to argue that a prolonged occupation would be justified for reasons of self-defence under Article 51) and a violation of the self-determination principle. However, the rules of IHL on occupation are of such detail that one would not be mistaken in thinking that IHL envisages, and perhaps implicitly condones, prolonged occupation. For instance, one interpretation of Article 43 of the French text of the Hague Regulations (“*la vie publics*”) postulates that the occupier is obliged to maintain conditions conducive to ‘social functions and ordinary transactions which constitute daily life’ or maintain ‘public life and order in modern and civilized State at the end of the twentieth century.’ See, UNCTAD, *The Economic Costs of the Israeli Occupation for the Palestinian People and their Human Right to Development: Legal Dimensions* (UNCTAD/GDS/APP/2017/2, 2018) 10. However, a situation of occupation is anything but the idea of ‘daily life’ and imposing obligations of maintaining normalcy on the occupier serves to obfuscate the fact that occupation itself is grossly illegal and has a profound impact on the population of the occupied territory (by the fact of occupation itself, irrespective of the occupier’s level of IHL compliance). Similarly, some IHL rules may have the effect of facilitating prolonged occupation. For example, the rule that if the population of an occupied territory is inadequately supplied, the occupying power shall agree to relief actions by humanitarian organizations (Article 59 GC IV; Articles 69–71 AP I) could practically ensure that the costs of the occupation are defrayed to some extent by a humanitarian organization, making the continuation of the occupation less expensive for the occupying power. See also, Gabriella Blum, ‘The Fog of Victory’ (2013) 24 *Eur. J. Int’l. L.* 391, 402, noting that – ‘The Geneva conception of occupation seemed, however, more tolerant toward lengthy, even transformative occupations than the more restrictive Hague Convention regime.’ Finally, there is also the optics issue with IHL compliance in an occupation. Better IHL compliance reduces the ‘CNN effect’ and makes it easier for the wider international audience to ignore the fact that an occupation is continuously illegal. See for instance, Orna Ben-Naftali, Aeyal M Gross & Keren Michaeli, ‘Illegal Occupation: Framing the Occupied Palestinian Territory’ (2005) 23 *Berkeley J Int’l L* 551, 552, where the authors note that most of the international legal scholarship (till the time of writing) overwhelmingly focussed on obligations of Israel as an occupier and almost none on the legality of occupation itself. I am thankful to Prof Naz K Modirzadeh for general conversations on this issue.

146 Blum-Paradox of Power (n 123) 786. This is not to say however that all IHL arguments made in

The preoccupation with, and the centrality of IHL discourse in the law governing armed conflict is problematic in some ways. Doubtlessly, IHL rules on targeting and conduct of hostilities, such as proportionality and distinction, have served to reduce the number of civilian casualties in armed conflicts drastically. Yet, the strictest IHL regime still admits of *some* civilian casualties,<sup>147</sup> not to mention the entirely permissible killing of all combatants at all times (other than when they are *hors de combat*).<sup>148</sup> IHL does not prohibit taking lives; instead, it legally privileges certain kinds of killing in particular places and particular manners, also serving to shift the political or moral choice to kill someone into a legal question.<sup>149</sup> Therefore, if the project is to minimise death and suffering in the world (which is incidentally IHL's avowed project), then *jus ad bellum* may be a more effective terrain on which to have the armed conflict conversation.

Finally, arguments like unable or unwilling catch on in broader *ad bellum* conversations when states with diverse power quotients make such arguments – creating the illusion that the argument commands the backing of a wide range of states across the world. The power implications of this doctrine have been discussed elsewhere,<sup>150</sup> but it is safe to say that such a principle will majorly be used to justify interventions in weaker states in the global south by the more powerful.<sup>151</sup> Recently, India seems to have invoked this doctrine in its military operation in Balakot in Pakistan. The precise facts concerning this strike are unclear – but India claimed to have attacked Jaish-e-Mohammad training camps in Balakot in response to the group's suicide bombing in Pulwama (in Kashmir) a week earlier.<sup>152</sup> While not expressly using the phrase, India's official statement did seem to rely

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the context of the war on terror are doctrinally sound. Far from so. Modirzadeh notes how the Bush administration's arguments in the initial war on terror were considered serious perversions of IHL. Modirzadeh (n 9) 238 – 'The concern was not only that the United States would walk away from IHL in carrying out its own global war on terror, but that it would burn down the house on its way out the door.' Similarly, the Obama administration's use of the "global NIAC" idea was also a distortion of IHL rules on classification of armed conflicts. See, Naz K Modirzadeh, 'A Reply to Marty Lederman' (*Lawfare*, 2020) <<https://www.lawfareblog.com/reply-marty-lederman>> accessed 4 Jun 2020.

147 In the context of drone strikes by the US, the number of civilian casualties is often much more significant than what the administration admits. Many civilian casualties remain 'unaccounted'. See, *The Unaccounted* (n 6); See also, Agnès Callamard Report (n 4) [19].

148 See generally, Gabriella Blum, 'The Dispensable Lives of Soldiers' (2010) 2 *Journal of Legal Analysis* 69 where Blum argues that the legal regime on conduct of hostilities should not consider all combatants at all times as 'fair game'.

149 Kennedy - *Of War and Law* (n 3) 141, 163.

150 See for instance, Ntina Tzouvala, 'TWAAIL and the "Unwilling or Unable" Doctrine: Continuities and Ruptures' (2015) 109 *AJIL Unbound* 266 (Tzouvala).

151 Tzouvala (n 150) 267 – '[I]n virtually all cases the state deemed "unwilling or unable" is a state of the Global South, confirming the argument that the doctrine is not even nominally neutral but targets certain forms of statehood and specific counterterrorism policies.'

152 Maria Abi-Habib, 'After India's Strike on Pakistan, Both Sides Leave Room for De-escalation' *The New York Times* (26 February 2019) <<https://www.nytimes.com/2019/02/26/world/asia/india-pakistan-kashmir-airstrikes.html>> accessed 7 June 2020.

on the unable or unwilling argument in justifying its use of force.<sup>153</sup> The fact that India would choose to invoke this expansive doctrine to justify its use of force is interesting, although not altogether surprising, given its *sui generis* international standing.<sup>154</sup> It is at once a global power to reckon with and a postcolonial state still resisting many imperialist doctrines of international law. However, postcolonial or global south states do not necessarily always advance distinctly third world arguments to justify their actions under international law. Instead, their approach is more issue-specific, interest-based and *ad hoc*. States will deploy arguments that win them this round, without necessarily considering where those arguments independently fall in the north-south divide.<sup>155</sup> However, India's invocation may give currency to the view that a doctrine like unable or unwilling is backed by representative state practice. To be clear, such sparse invocations do not come close to the threshold of state practice that international law requires for it to constitute a norm of customary international law.<sup>156</sup> Yet, when states with diverse positioning in the global order make use of such arguments to justify their questionable uses of force, the terrain for resistance gets somewhat weakened.

## V. CONCLUSION

Something is grossly amiss with the *jus ad bellum* arguments made today. Legal arguments in the context of the war on terror are routinely a confusing mishmash of IHL, IHRL and domestic law propositions.<sup>157</sup> Further, as this paper has recounted, they misconceive and mischaracterise the *jus ad bellum* regime under the United Nations Charter. In some situations, the *jus ad bellum* arguments are not even considered relevant

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153 Statement by Foreign Secretary, 'On the Strike on JeM training camp at Balakot' (26 February 2019) <[https://www.mea.gov.in/pressreleases.htm?dtl/31091/Statement\\_by\\_Foreign\\_Secretary\\_on\\_26\\_February\\_2019\\_on\\_the\\_Strike\\_on\\_JeM\\_training\\_camp\\_at\\_Balakot](https://www.mea.gov.in/pressreleases.htm?dtl/31091/Statement_by_Foreign_Secretary_on_26_February_2019_on_the_Strike_on_JeM_training_camp_at_Balakot)> accessed 3 June 2020 – 'Information regarding the location of training camps in Pakistan and PoJK has been provided to Pakistan from time to time. Pakistan, however, denies their existence. The existence of such massive training facilities capable of training hundreds of jihadis could not have functioned without the knowledge of Pakistan authorities. India has been repeatedly urging Pakistan to take action against the JeM to prevent jihadis from being trained and armed inside Pakistan. Pakistan has taken no concrete actions to dismantle the infrastructure of terrorism on its soil.' See also, Christian Henderson, 'Tit-for-Tat-for-Tit: The Indian and Pakistani Airstrikes and the Jus ad Bellum' (*EJIL: TALK!*) <<https://www.ejiltalk.org/tit-for-tat-for-tit-the-indian-and-pakistani-airstrikes-and-the-jus-ad-bellum/>> accessed 3 June 2020.

154 Tharoor notes, 'Our foreign policy today has also outgrown much of its earlier post-colonial rhetoric.' Shashi Tharoor, *Pax Indica: India and the World in the Twenty-First Century* (Penguin 2012) 16.

155 See generally, Michelle L Burgis, *Boundaries of Discourse in the International Court of Justice: Mapping Arguments in Arab Territorial Disputes* (Brill 2009) where the author maps arguments made by states in certain territorial disputes at the ICJ and shows how third world/postcolonial states do not hesitate in raising arguments with clear colonial overtones so long as it helps them win the dispute.

156 *North Sea Continental Shelf* (Judgment) [1969] ICJ 3 [74] required state practice to be 'extensive and virtually uniform' for a norm to constitute custom.

157 Modirzadeh (n 9) 229; Agnès Callamard Report (n 4) Annex [63].



– this is often the case with targeted killing and drone operations, where the justifications focus instead on IHL and IHRL. Where there is a *jus ad bellum* justification, the doctrinal arguments are far from what good-faith interpretations of the Charter would allow. Aided by an overarching security discourse, the result is that this ‘modern’ law on the use of force effectively softens the distinction between war and peace.<sup>158</sup> States can use force at any time and any place even outside ‘hot battlefields’<sup>159</sup>. We are now in a permanent ‘state of exception’<sup>160</sup>.

Notably, the unable or unwilling argument makes the Charter’s regime governing the use of force increasingly irrelevant. It is not my (naive) argument in this paper, however, that rejecting the incorrect doctrinal position and the misguided broad reading of the right of self-defence will constrain *all* uses of force by states. Since 1945, states have used force unilaterally on countless occasions despite what the Charter says. It is unlikely that in the war on terror, powerful states will automatically (and immediately) stop using force against non-state actors in another state’s territory if the unable or unwilling doctrine is suddenly emphatically rejected by international law scholars. However, setting the law right helps in somewhat reclaiming the legal terrain for resisting the unending, ever-expanding war on terror.<sup>161</sup> It provides a vocabulary through which an alternate conversation can be had – one which does not assume that the *only* possible response to threats of terrorism can be the use of armed force, effectively delegitimising all other options. It helps in problematising the binaries – it is not exactly a choice between suffering relentless attacks with no recourse and the use of unilateral armed force.<sup>162</sup> There were terrorist attacks before 9/11 as well. International law itself permits a series of alternative actions short of the use of force, and where the attribution requirement is satisfied, then force in self-defence as well.<sup>163</sup> Making

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158 Kennedy - *Of War and Law* (n 3) 9, 45, 166; Talal Asad (n 128) 16.

159 US Legal and Policy Framework (n 72) 11.

160 Giorgio Agamben, *State of Exception* (University of Chicago Press 2005).

161 As an aside, the question of ‘who’ the most effective actor(s) is/are to reclaim the *jus ad bellum* doctrinal space is an interesting one, although beyond the scope of this paper. Renowned scholars have, and are trying to do so. The recent report of the Special Rapporteur on Extrajudicial Executions (Agnès Callamard), submitted for the 44<sup>th</sup> session of the Human Rights Council, is an excellent example of an attempt to set out clearly what *jus ad bellum* mandates and point out how some powerful states have been ‘distorting’ the legal regime. The role of such scholars is crucial – given that Article 38 of the ICJ Statute expressly considers their work to be a subsidiary source of international law. Perhaps also, the International Court of Justice in a future dispute could be more explicit if such a question arises. Or states that consider such uses of force as illegal, could be more emphatic in their condemnation of these arguments.

162 See for instance, Roberts (n 107) 188.

163 Apart from the range of non-forcible alternatives, obtaining the authorisation of the Security Council for using force remains an option. The collective security system of the UN is designed to prevent, as far as possible, the use of unilateral force. If the Council is unable to act at a particular time owing to the absence of political consensus, that in itself is not sufficient to argue for a wider right of self-defence. See, Tladi-Use of Force (n 15) 35. The General Assembly at the World Summit Outcome also stated that threats of terrorism must be dealt with within the framework of the UN Charter A/RES/60/1 (24 October 2005) [85]. Additionally, there

something as problematic as unable or unwilling legal, risks justifying the use of force as the first and default option in all cases.<sup>164</sup> A force-permissive view also assumes a universal moral consensus that the use of force is justified in such situations and hence, necessarily, the law must catch up (or as is claimed, has caught up) to allow for this.<sup>165</sup>

Setting the doctrine right may also serve a symbolic function – that there exists the idea of an international rule of law which meaningfully regulates when states may use force. Additionally, it may mean that while states may continue to use force, at least their arguments will have to be firmly grounded in correct (or plausibly correct) interpretations of the UN Charter. States will have to adjust their arguments before the ‘court of world public opinion’<sup>166</sup> according to the Charter, rather than the Charter expanding to accommodate their arguments, which is where we are now. A squishy *jus ad bellum* however, makes it harder to call out states on their violations.<sup>167</sup> Clarifying the *jus ad bellum* position may, more optimistically, aid in nudging the ‘transnational legal process’ in a way which ensures that even the most powerful states will someday not resort to (or at a minimum, think twice before) the use of armed force as the most obvious response to a terrorism threat.<sup>168</sup> International law matters in various interactions between diverse actors. It could matter in conversations in Parliament/Congress, before one’s citizenry, in domestic courts etc.<sup>169</sup> If states nonetheless decide to use force unilaterally, they must sell it to the relevant audiences as being necessary despite being illegal – a task which would be decidedly harder for

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is the possibility of addressing threats of terrorism through the domestic criminal law and transnational law enforcement framework. For instance, for terrorist acts before 9/11, the US applied its domestic criminal law framework, rather than characterising it as a war. *See*, Mary Ellen O’Connell, ‘The Choice of Law Against Terrorism’ (2010) 4 J Nat’l Sec L & Pol’y 343, 347. *See also*, Corten-Law Against War, (n 25) 174.

164 *See generally*, Davies-Bright (n 129) 241.

165 *See for instance*, Orford (n 109) 3.

166 Kennedy - Of War and Law (n 3) 139, 159.

167 This is precisely what the Special Rapporteur on Extrajudicial Executions asks States to do in her recent report – ‘Call out any use of force not in compliance with the UN Charter and reject their purported legal underpinnings.’ Agnès Callamard Report (n 4) [85].

168 Harold Koh’s idea of a transnational legal process is broadly, that in a globalized world with continuous interactions between multiple actors, no state, from the most powerful to the most deviant, can afford to remain in non-compliance with its international legal obligations. When states interact, as they must, international legal norms seep in and are internalized. Harold Hongju Koh, ‘Transnational Legal Process: The 1994 Roscoe Pound Lecture’ (1996) 75 Neb L Rev 181, 199.

169 As one example of how the transnational legal process in the ‘war on terror’ can work, in March 2019, a German Administrative Court expressed serious doubt as to whether US drone strikes in Yemen, using the Ramstein Air Base in Germany, complied with international law. The Court also noted that German authorities have an independent obligation to review their own compliance with international law even if other states violate it using German territory. The Court also entered into a *jus ad bellum* analysis of the legality of US’ drone strikes in Yemen. On this decision, *see*, Leander Beinlich, ‘Drones, Discretion, and the Duty to Protect the Right to Life: Germany and its Role in the US Drone Programme Before the Higher Administrative Court of Münster, (2019) MPIL Research Paper Series No. 2019-22.

them.<sup>170</sup> The operation of this transnational legal process could then create *some* constraints on the state deciding to resort to force. That is what the UN Charter is meant to do - to make harder (even if it is unable to prohibit) the decision to use force. It is not, at any rate, meant to be a pliant companion in that decision.

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<sup>170</sup> This has the advantage of preserving the sanctity of law (not just as a reified concept, but as a tool of resistance in other cases) and ensuring that states must take on the harder task of having to argue that a certain action while illegal, *had* to be undertaken. In the *jus ad bellum* context, this approach, to my mind, would be useful in restricting the situations in which force is used by states. *See generally*, Blum-Role of Client (n 98) 284-286.