FICTITIOUS STATES, EFFECTIVE CONTROL, AND THE USE OF FORCE

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This Article examines state practice relating to violent non-state actors operating from “fictitious” states. Fictitious states are entities that possess international legal personality but not effective control over their territories and populations. As the Article explains, many of the world’s states are legal fictions. Although the problem is most vividly illustrated by the United States’ recent military strikes in Pakistan, Yemen and Somalia, the problem is far broader.

This Article shows that the security threat posed by non-state actors operating from ungoverned territory is not new. Lapses in state control have been common throughout history and violent non-state actors have long exploited these voids. This Article examines a number of international incidents from the past two centuries involving the defensive use of force against non-state actors in ungoverned territory.

These incidents reveal that despite a formally state-centric world order, governments have long recognized (if not always acknowledged) the danger posed by fictitious states and non-state actors. As a result there is a well developed customary right of self-defense vis-à-vis these non-state actors. This right to self-defense was already entrenched prior to 9/11 and is not contingent upon the consent of the host state. From state practice and legal claims, the Article draws a set of principles according to which the lawfulness of military actions has historically been assessed. These principles of customary law supplement the formal regime of the U.N. Charter.

The Article draws upon the customary principles of necessity and proportionality to sketch a framework for regulating the use of force against non-state actors. A central contribution of this framework is the delimitation of the battlefield in a conflict with a non-state actor such as Al Qa’ida which operates from the ungoverned spaces of multiple countries.

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INTRODUCTION
The targeted killing of al Qa’ida fighters in the ungoverned regions of Pakistan, Yemen, and Somalia occurs within a lacuna of the treaty based regime governing the use of force.\(^1\) If as the International Court of Justice claims, the U.N. Charter’s prohibition on the use of force is the “cornerstone” of the modern international system then this cornerstone rests on a foundation of sand.\(^2\) The Charter embodies a security framework intended to regulate relations between states possessing effective control over people and territory.

Taken by itself, such a state-centric regime is incomplete. However, this treaty based regime is supplemented by a body of customary law regulating the use of force against non-state actors operating from ungoverned territory.

This Article examines this body of customary law. These customary principles define, in part, the inherent right of self-defense.

This Article proceeds from the observation that the effective state is not the natural form of political organization. Effective states exercising “positive sovereignty”, that is control over their nominal territories and populations are the exception rather than the rule in much of the world.\(^3\) The statehood of many of the world’s territorial entities amounts to a legal fiction. What I term “fictitious

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\(^1\) U.N. Charter art. 2(4) (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”)


\(^3\) GEORGSCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 38 (1950)(describing positive sovereignty as the “claim to have control over persons, things and territory.”); ROBERT JACKSON, QUASI-STATES, SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD 11, 29 (1990) (discussing the concept of positive sovereignty and its relationship with negative sovereignty.)
states” lack central authority capable of exercising effective control over a substantial fraction of the territory and population within their internationally recognized boundaries. Nonetheless, fictitious states at entitled to “negative sovereignty”, that is the right to exclude. These fictitious states are geographical expressions which possess international legal personality, but not the empirical domestic indicia of statehood.

Fictitious states include most of the post-colonial entities of sub-Saharan Africa (e.g. the Democratic Republic of Congo) as well as many countries in Latin America (e.g. Peru) and South and Central Asia (e.g. Pakistan). In extreme cases fictitious states, such as Somalia, are states in law but not fact. The ideal of the Westphalian state-system composed of adjacent territorial entities each ruled by central authorities exercising effective control over populations and territories within defined borders, may exist (most of the time) in most of northern Eurasia and in neo-European settlement colonies such as the United States, Australia and Canada. However, this model is the exception, rather the rule in much of the rest of the world.

In contrast to much of the existing literature analyzing the use of force vis-à-vis contemporary threats, this Article recognizes that the problem is more fundamental than terrorism and failed states. First, to analyze the security

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4 This term overlaps with the Jacksons term “quasi-state”, but is broader. See JACKSON, supra note 2, at 1. I use the term fictitious state to emphasis that their reality is a legal fiction.

5 GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 38 (1950)(“In its negative aspect State sovereignty means independence from outside interference”.)

The dilemma facing governments as one of “terrorism” misdiagnoses the problem. The problem is not limit to a specific tactic, whether employed by state or non-state actors. Second, the global security problem is broader than the exceptional case of completely “failed” states, such as Somalia. Indeed, the notion of a “failed” state presupposes, usually incorrectly, that an effective state existed in the first place. Instead, the fundamental challenge to international order is that the constitutive unit of the international system is in many parts of the world a fiction. Perhaps a majority of the entities with seats at the U.N. do not control some or all of their territory and population. The effective state and the monopoly of the state over internationally significant violence cannot be taken for granted.

The disjunction between positive and negative sovereignty that characterizes fictitious statehood represents a persistent and growing threat to world public order. As recognized in the United States 2002 National Security Strategy emphasizes that “America is now threatened less by conquering states than we are by failing ones.” Secretary of Defense Robert Gates reiterates this conclusion by noting that “[i]n the decades to come, the most lethal threats to the United States’ safety and security… are likely to emanate from states that cannot adequately govern themselves or secure their own territory. Dealing with such fractured or failing states is, in many ways, the main security challenge of our

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9 See, infra 14-16.
This threat has only increased with the disintegration of the Saleh regime in Yemen. Violent non-state actors, such as Yemeni militants, take advantage of the ungoverned areas of the world which exist in the lacuna between positive and negative sovereignty, between the ideal and reality of statehood. The collision between the legal fiction and reality of statehood reveals that taken by itself, the treaty based regime governing the use of force is incomplete. Such a framework does not adequately promote international security, because the underlying logic of this framework is inapplicable to fictitious states and non-state actors. Fictitious states are incapable of binding through international agreements the territory and people over whom they exercise legal, but not effective control. The security threats posed to the United States and other states by weak territorial entities and non-state actors demonstrate the need for another, less rigid and more nuanced framework governing the use of force than that contained in treaty. As this Article explains, such an effective, complementary regime of self-defense already exists in customary international law.

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12 ANGEL RABASA, ET AL., UNGOVERNED TERRITORIES: UNDERSTANDING AND REDUCING TERRORISM RISKS (2007) (a RAND Corporation analysis of the security threats present in several ungoverned areas for the United States Air Force); see also A Lonely Master of a Divided House, THE ECONOMIST, April 24, 2010, at 45 (describing Yemen in the context of Al Qu’ida activity and multiple insurgencies as “famously hard to govern. Yet even if the power of Mr. Saleh’s state has seldom extended beyond Yemen’s main towns, roads and oilfields, it is remarkable he has maintained even a semblance of control.”)

13 Associated Press, Obama: Al-Qaida Would Use Nuke if It Could, N.Y. TIMES, Apr. 11, 2010, at 5 (quoting President Obama as observing that the “[t]he single biggest threat to U.S. security, both short-term, medium-term and long-term, would be the possibility of a terrorist organization obtaining a nuclear weapon.”)
This Article proceeds in four parts. Part I briefly analyzes the state-centric use of force principles embodied in the U.N. Charter and examines the concepts of the state and sovereignty upon which the U.N. Charter rests. This Part explains that the U.N. Charter rests upon the traditional conceptions of statehood in international law which is premised first and foremost upon effective control of people and territory.

Part II explains why a strict state-centric regime has never been tenable. Drawing upon empirical insights from comparative politics and anthropology, it explains that effective statehood, the traditional statehood of international law, is a nothing more than a legal fiction in much of the world. Part II argues that the disjunction between the state-centric security regime and the current threat environment has been exacerbated by the redefinition of statehood during decolonization, when statehood became an entitlement rather than a factual condition. This Part concludes with an analysis of the International Court of Justice’s decision in the Armed Activities case. Armed Activities serves as a case study of the inadequacy of a state-centric security paradigm in a world of fictitious states and non-state actors.

In order to put contemporary security threats in historical perspective Part III shows that the use of force against non-state is nothing new. This Part examines the extensive and under-appreciated history in international law of transborder defensive measures premised upon state ineffectiveness. This Part shows that notwithstanding the state-centric regime of the U.N. Charter, many such interventions against non-state actors were accepted as lawful by the governments
of many states even before 9/11. It examines in detail the legal claims made by statesmen that invoke both explicitly and implicitly state weakness as a basis for intervention.

Part IV proposes a framework governing the use of force which balances the danger posed by inter-state conflict and opportunist intervention with the growing threat posed by non-state actors and ungoverned territory. Drawing upon pre-Charter state practice and *opinio juris*, Part IV shows the ways in which the customary principles of necessity and proportionality should structure a framework for the use of force against non-state actors in the future. It explains how these principles establish the geographic restrictions upon the recourse to force, why differentiation between state and non-state actors is necessary, and proposes a reconsideration of the armed attack requirement of Article 51.

With this Article I hope to achieve four goals. First, I intend to stimulate a critical examination of the existence and extent of statehood of many of the world’s polities. Second, I attempt to place current security threats in a historic perspective. Third, I attempt to illustrate the applicability of customary principles to contemporary problems posed by fictitious states and non-state actors. Fourth, and most importantly, I aim to promote a serious consideration of how force should be regulated in the future in order to minimize international violence and maximize international order in a world of fictitious states and non-state actors.

I. **THE ASSUMPTION: THE STATE-CENTRIC REGIME**
The victorious Allies created the United Nations to “maintain international peace and security” that is peace and security between states.\(^{14}\) To this end the U.N. Charter imposes a general prohibition in Article 2(4) on the use of force by Members against other states.\(^{15}\)

Both explicitly and implicitly the Charters of the United Nations and of NATO\(^{16}\) embody a state-centered use of force paradigm. These treaties were compacts between states. Drafted in the final months of the inter-state conflict of the Second World War, the U.N. Charter reflects international efforts to prevent a repeat of the then–ongoing war. The interstate focus of the Charter is clear in its Preamble which emphasis the horrors of the World Wars.\(^{17}\) The peace and security to be maintained are international, that is between two or more states.\(^{18}\)

A narrow exception to the prohibition on the unilateral use of force in “international” relations is explicitly preserved in Article 51. “Nothing in the present Charter shall impair the inherent right of individual or collective self-

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\(^{14}\) UN Charter art. 1, para 1 (“WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind...”)

\(^{15}\) UN Charter art. 2, para 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”)


\(^{17}\) UN Charter, preamble; Ann-Marie Slaughter & Bill Burke-White, An International Constitutional Moment, 43 HARV. INT’L L. J. 1,1 (2002) (“The framers of the U.N. Charter were responding to two worlds wars, countless interstate wars, and indeed centuries in which the primary threat to international peace and security was the aggressive use of force by one state against another.”)

\(^{18}\) IAN BROWNLEE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 279 (1963)( arguing that even if a non-state actor could mount an armed attack, “[t]he incursions of armed bands can be countered by measures of defence which do not involve military operations across frontiers”
defence if an armed attack occurs against a Member of the United Nations…”19

The scope of this exception has been vigorously contested ever since.20

One of the most contentious questions concerns the right of self-defense against whom the right may be invoked. This article argues that the customary right of self-defense preserved by Article 51 unequivocally encompasses defensive action taken against non-state actors. These customary principles of self-defense supplement and complement the state-centric regime embodied in the U.N. Charter.

However, before turning to the scope of the customary right preserved by the exception in Article 51, it is first necessary to explain the logic of the general prohibition. The logic of the use of force principles embodied in the Charter rests upon a very specific understanding of the nature of the state. In order to understand the deficiency of the state-centric \textit{jus ad bellum} framework of the Charter, it is first necessary to understand the underlying conception of the state upon which it is based, specifically the state’s monopoly on force and then contrast that ideal with the reality of contemporary statehood.

\section*{A. Effectiveness: The Essence of Statehood in International Law}

Underlying the Charter’s state-centric security framework is the assumption that within each internationally recognized state exists some central authority in control of all internationally significant armed forces within that territory. Such an assumption stems from the traditional conception of statehood.

\begin{footnotes}
\item[19] U.N. Charter art 51 (emphasis added).
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During the late 19th and early 20th centuries, statehood was first and foremost a matter of fact. The critical quality of a state from the standpoint of internal and external security was effectiveness.

With respect to security, state effectiveness has two related elements: (1) the effective control of territory and; (2) the effective control of people. The effective control of territory and the exclusion of external private armed groups is primarily a function of a state’s coercive capability. Such capability is measured by the strength of its police and military forces vis-à-vis non-state actors seeking a safe haven on the state’s territory. The effective control of people implies “social control” and “effective authority” and is also in part a function of a state’s coercive capabilities, but in all but the most authoritarian entities is also contingent upon legitimacy and shared identity.

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21 J.L. Briery, The Law of Nations 102-103 (2nd ed 1936) (“Whether or not a new state has actually begun to exist is a pure question fact.”)
22 James Crawford, The Creation of States in International Law 77 (1979) (“The traditional criteria for statehood were based almost entirely on the principle of effectiveness. The proposition that statehood is a question of fact derives strong support from this equation of effectiveness and statehood. In other words, although it is admitted that effectiveness in this context is a legal requirement, it is denied that there can exist legal criteria for statehood not based on effectiveness.”)
23 Crawford, supra note 25, at 42 (Explaining that traditionally “international law defines ‘territory’ not by adopting private law analogies of real property, but by reference to the extent of governmental power exercised, or capable of being exercised, with respect to some area and population.”)
24 Joel Migdal, Weak States, Strong Societies 22-23 (1988) (“State social control involves the successful subordination of peoples own inclinations of social behavior or behavior sought by other social organizations in favor of the behavior prescribed by state rules…Getting the population to obey the rules of the state rather than the rules of the local manor, clan or other organization.”)
25 H. Lauterpacht, Recognition of States in International Law, 53 Yale L. J. 385, 410 (1943-1944)(“The second essential requirement of statehood is a sufficient degree of internal stability as expressed through the functioning of a government enjoying the habitual obedience of the bulk of the population.”)
people prevents the indigenous development of independent armed groups. Effective control of people and territory are mutually reinforcing as a state’s legitimacy enhances its coercive capabilities and vice-versa.

The emphasis upon effectiveness as the signature element of statehood is readily apparent in the words and deeds of the statesmen, jurists and legal scholars of the late 19th and early 20th centuries.

During the 19th century governments contemplating the recognition of aspirant entities emphasized effectiveness as the crucial empirical prerequisite for statehood. In determining whether newly independent Mexico qualified as a state, British Foreign Secretary Canning considered the dispositive facts to be whether the Mexican Government is 1) “in military possession of the country, and also in a respectable condition of military defence against any probable attack from Europe”, (e.g. territorial control), and 2) whether it has “acquired a reasonable degree of consistency, and to enjoy the confidence and goodwill of the several orders of the people” (e.g. control over people.)27 President Grant also emphasized control over the population when he refused to recognize the independent of statehood of Cuba, until there was “some known and defined form of government, acknowledged by those subject thereto, in which the functions of government are administered by usual methods, competent to mete out justice to citizens and strangers, to afford remedies for public and for private wrongs, and able to assume the correlative international obligations and capable of performing

the corresponding international duties resulting from its acquisition of the rights of sovereignty.”

Effectiveness is also implicit and explicit in the understanding of statehood prevalent among pre-U.N. international organizations. In assessing when a mandatory territory qualified as a state, the League of Nations identified the following criteria in 1931: 1) a settled government and an administration capable of maintaining the regular operation of essential government services; 2) capacity to maintain its territorial integrity and political independence; 3) capacity to maintain peace throughout the territory. The standard definition of statehood is found in Article 1 of the Montevideo Convention of 1933. “The State as a person of international law should possess the following qualifications, a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other states.”

Jurists of the early 20th century also considered effectiveness the sine qua non of statehood. In attempting to determine when the Finnish state came into existence following Finland’s independence from Russia in 1917, a Commission of Jurist appointed by the League of Nations observed that:

For a considerable time, the conditions required for the formation of a sovereign State did not exist. In the midst of revolution and anarchy, certain elements essential to the existence of a State, even some elements of fact, were lacking for a considerable

28  J.B. MOORE, DIGEST OF INTERNATIONAL LAW 107-108 (1906).
30 Convention on Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19; see also Restatement (Third) of Foreign Relations Law of the United States § 201 (1987)(defining a state as “a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.”); Crawford, supra note 26, at 36 (“It is a characteristic of these criteria…that they are based on the effectiveness among territorial units.”)
period of time. Political and social life was disorganized; the authorities were not strong enough to assert themselves...the Government has been chased from the capital and forcibly prevented from carrying out its duties...It is therefore difficult to say at what exact date the Finnish Republic, in the legal sense of the term, actually became a definitely constituted sovereign State. This certainly did not take place until a stable political organization had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops.31

Similar criteria are enumerated by the leading treatises of international law from the 19th and early 20th century. Phillimore defines a state as a “a people permanently occupying a fixed territory, bound together by common laws, habits and customs in one body politic, exercising, through the medium of an organized Government, independent sovereignty and control over all persons and things within its boundaries.”32 According to Wheaton, the “legal idea of a State necessarily implies that of the habitual obedience of its members to those persons in whom the superiority is vested.”33 Lauterpacht states that “the requirements of statehood as laid down by international law and as uniformly expressed in textbooks, [are] namely, the existence of an independent government exercising effective authority within a defined area.”34 According to Lawrence, a state is “political community, the members of which are bound together by the ties of a common subjection to some central authority, whose commands the bulk of them habitually obey.” 35 Noting that the “sovereign state is the typical subject of

31 Aaland Island Dispute, LEAGUE OF NATIONS OFFICIAL JOURNAL, Special Supplement, No. 4, 8-9 (1920)(emphasis added).
32 J ROBERT PHILLMORE, COMMENTARIES UPON INTERNATIONAL LAW 94 (1854).
33 HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 26 (8th ed. 1866).
35 T.J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 48 (7th ed. 1928)(emphasis added.)
international law,” 36 Schwarzenberger states that “[i]t has become customary to assume a subject of international law must have a stable government, which does not recognize any outside superior authority, that is it must rule supreme within a territory.” 37

With respect to effectiveness and the traditional definition of statehood, two additional points should be noted. First, the temporary loss of effective control by a government due to insurgency or belligerent occupation did not necessary compromise an entity’s statehood in the eyes of other statesmen. As Part III illustrates such temporary lapses of control were common and such imperfections of statehood were tolerated by other governments out of comity. However, chronic ineffectiveness was a different matter. When effective control was the exception rather than the rule within a territory the existence of a state could not be taken for granted.

Second, though statesmen may have promoted policy aims by conditioning the recognition of states upon additional normative consideration, such as religion, degree of civilization, or the democratic character of the entity’s government, such criteria supplemented and did not substitute for the factual prerequisite of effective control. As Part III shows, the traditional priority of the factual contrasts sharply with state practice during decolonization, when the normative cart was place before the empirical horse.

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36 GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 25 (1950); see also J.L. BRIERLY, LAW OF NATIONS 122 (1949)( Brierly lists the essential characteristics of the state as “an organized government, a defined territory, and such as degree of independence of control by any other state as to be capable of conducting its own international relations.”)
37 Id. 31. See also HANS Kelsen, PRINCIPLES OF INTERNATIONAL LAW, 100-102, 108 (1952)(describing the state as a centralized coercive legal order possessing a monopoly on force.)
To recap, from the standpoint of international law the key element of effective, factual statehood was not the existence of an impersonal technocratic bureaucracy, the character of its legal order, or other components of Weber’s classic formulation *per se* but control and in particular control over violence within a defined territory. These other elements are relevant only to the extent they enable a state to exercise effective control over people and territory. As summarized by Fukiyama, “[t]he essence of stateness is, in other words, *enforcement*: the ultimate ability to send someone with a uniform and a gun to force people to comply with the state’s laws.” This ultimate enforcement capacity of the Leviathan is also known as sovereignty.

**B. Sovereignty: Positive vs. Negative**

The *sine qua non* of traditional effective statehood in international law is effective control or *positive* sovereignty. An entity’s positive sovereignty is a function of the “capabilities which enable governments to be their own masters: it is a substantive rather than a formal condition.” Secretary of State Lansing considered such positive sovereignty, to have the following attributes.

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40 See Jackson, *supra* note 2, (describing the related concept of empirical statehood.) I employ the term effective state to emphasis the key attribute of statehood, effective control of people and territory.

41 *Jackson, supra* note 2, at 29; *Theodore Dwight Woolsey, International Law* 35 (6th ed., 1897) (“By sovereignty we intend the uncontrolled exclusive exercise of powers of the state; that is…the power of governing its own subjects.”) see also *Stephen D. Krasner, Sovereignty: Organized Hypocrisy* (1999) 3-4 (distinguishing between different forms of sovereignty);

Crawford, *supra* note 26, at 42 (Explaining that traditionally “international law defines *‘territory’* not by adopting private law analogies of real property, but by reference to the extent of governmental power exercised, or capable of being exercised, with respect to some area and population. Territorial sovereignty is not ownership of, but governing power with respect to, territory.”)
1) Sovereignty is real (or actual) only when the possessor can compel the obedience to the sovereign will of every individual composing the political state and within the territorial state.

2) Such complete power to compel obedience necessarily arises from the possession of physical force superior to any other such force in the state.

3) The exercise of sovereignty in a state does not involve reasonableness, justice or morality, but is simply the application or the menace of brute force.\(^\text{42}\)

Positive sovereignty, the sovereignty of Bodin and Hobbes, is a political fact.

Such factual positive sovereignty exists in contradistinction to negative sovereignty which is a legal right to non-intervention and non-interference.\(^\text{43}\)

Negative sovereignty is both a political courtesy and a *modus vivendi*.

The state-centric security paradigm embodied in the U.N. Charter came into existence at a time when normative principles, such as non-intervention flowed from, but did not precede the existence of their factual precedents.

“Independence and territorial as well as personal supremacy are not rights, but recognized and therefore protected qualities of states as International Persons.”\(^\text{44}\)

Negative sovereignty, that is the “[r]espect for the inviolability of the territory of a State rests on the theory that it possess the power and will to exercise control therein.”\(^\text{45}\) Thus the internal might of positive sovereignty entitled one set of governing elites to the external right of non-intervention vis-à-vis other external governing elites.

C. The One Army Rule of Statehood


\(^{43}\) JACkSON, *supra* note 2, at 1, 50-53.

\(^{44}\) OPPENHEIM, *INTERNATIONAL LAW* 234 (1935).

\(^{45}\) 1 CHARLES CHENEY HYDE, *INTERNATIONAL LAW* 646 (1945).
From the traditional indicia of sovereign statehood I derive what I term the “one army rule” of sovereign statehood. A sovereign state is characterized by a single, supreme military force within a defined territory. A state cannot enjoy a monopoly on force if it shares a territory with another, independent armed force. If a state shares its territory with an independent armed group, whether voluntarily or involuntarily, its positive sovereignty is compromised.

The logic of the U.N. Charter’s use of force regime is contingent upon the one army rule. A state-centric regime is tenable so long as the putative state authorities exercise effective control over their nominal territory and effective control any military forces within this territory. If territorial rulers can bind all the significant armed groups in a regime of non-aggression and non-intervention vis-à-vis other states, then a state-centric framework is viable. Violation of the one army rule not only compromises an entity’s empirical status as a sovereign state, but also undermines a state-centric security regime.

As described in the next Part, the ideal of sovereign statehood is rarely realized and the one army rule is often violated in practice. This gap between the ideal and reality of statehood is a longstanding and persistent fact. Rather than a world divided between contiguous states each containing a single armed force, we have long lived in a world of states, fictitious states and violent non-state actors.

46 See W. Michael Reisman, Private Armies in a Global War System, in LAW AND CIVIL WAR IN THE MODERN WORLD 256-269 (John Norton Moore, ed., 1974) Professor Reisman discusses the related concept of the “private army rule”, that is the traditional intolerance by the international community for private armed groups and the strict attribution of their violence to their territorial host. My use of the term “one army rule” is used to highlight the implications for sovereignty and the ideal of statehood posed by the presence of non-state armed groups.

47 This is a necessary, but not sufficient condition for statehood.
II. A GROWING PROBLEM: FICTITIOUS STATEHOOD

Taken by itself, a state-centric security regime is inadequate to regulate the use of force and preserve minimal public order. The two assumptions upon which the regime is premised are invalid. Weak states are the norm rather than the exception in much of the world. Moreover, violent non-state actors possess significant military capabilities often comparable to those of state militaries and thus represent internationally significant security threats. The inadequacy of the state-centric regime is illustrated by the number of conflicts involving weak states and trans-national non-state actors.48

In this Part I explain how and why the predicate conditions for an exclusively state-centric security regime have never existed and why state-centrism became even less tenable in the wake of decolonization. I then use the case study of the Democratic Republic of the Congo (“DRC”) to illustrate both the security threat resulting from the absence of effective central authority and the response of the one major international body, the International Court of Justice, to the problem of fictitious statehood.

A. Effective Statehood is Anomalous

In the global perspective, states exercising effective control over the territory and people within their internationally recognized territory are anomalous. This fact, long appreciated by social scientists if often neglected or intentionally ignored by legal scholars and policymakers.49 Even though there is

48 James D. Fearon & David D. Laitin, Ethnicity, Insurgency and Civil War, 97 AMER. POL. SCI. REV. 75 (2003).
49 See e.g. David Nugent, Building the State and Making the Nation: The Bases and Limits of State Centralization in Modern Peru, 96 AMERICAN ANTHROPOLOGIST 333, 335 (1994).
now awareness of the problem of “failed states”, the term “failed state” itself presupposes the prior existence a state and thus reflects a fundamental misunderstanding of the realities of political power around the globe.50 For the most part, the world’s ungoverned territories are not states that failed, but rather regions where effective states never existed.

The effective state is not a universal or default entity that exists “over and above the human individuals that make up society.”51 States, of any type, are not natural functions of territory, but are instead a form of political organization and therefore aspects of human culture. The state is a set of relationships and understandings relating to authority, compliance, loyalty and identity. As Edmund Burke observed in the 18th century, “[c]ommonwealths are not physical,

(reviewing the social science literature discussing differences between contemporary Western and non-Western states.); Thomas Blom Hansen and Finn Stepputat, Introduction, 2 in STATES OF IMAGINATION: ETHNOGRAPHIC EXPLORATION OF THE POSTCOLONIAL STATE (Thomas Blom Hansen & Finn Stepputat, eds., 2001)(noting that the “myth of the state seems to persist in the face of everyday experiences of the often profoundly violent and ineffective practices of government or outright collapse of states. It persists because the state, or institutional sovereign government, remains pivotal in our very imagination of what a society is.”); JAMES C. SCOTT, THE ART OF NOT BEING GOVERNED: AN ANARCHIST HISTORY OF UPLAND SOUTHEAST ASIA 3-4 (2010); see generally ROBERT JACKSON, QUASI-STATES: SOVEREIGNTY INTERNATIONAL RELATIONS AND THE THIRD WORLD (1990); JEFFERY HERBST, STATES AND POWER IN AFRICA (2000); Christopher Clapham, The Global-Local Politics of State Decay, in WHEN STATES FAIL (Robert I. Rothberg, ed. 2004) 77; MIGUEL ANGEL CENTENO, BLOOD AND DEBT: WAR AND THE NATION-STATE IN LATIN AMERICA (2002).


but moral essences. They are artificial combinations…arbitrary productions of the human mind.”

The political relationships which characterize the state are historically contingent. There is no reason to assume that the complex historical processes leading to the formation of the relationships characterizing the effective state, the state of international law, played out the same everywhere in the world. Extensive scholarship in the social sciences indicates that the environmental and demographic factors as well as the resulting prehistoric and historic processes leading to the in situ development of effective states in parts of Eurasia did not occur in all regions of the world, particularly Latin America and Africa. The development of the effective state, the state of Charter-era international law, was far from universal. Moreover future development towards the Euro-centric model of effective statehood is unlikely. The different conditions and developmental

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53 See Thomas Blom Hansen and Finn Stepputat, Introduction, in States of Imagination: Ethnographic Exploration of the Postcolonial State 7 (Thomas Blom Hansen & Finn Stepputat, eds. 2001)(noting the historical contingency of “features, functions and forms of governance” characterizing the state.)
54 Charles Tilly, Coercion, Capital, and European State, A.D. 990-1992; Jackson, supra note 2, at 7 (“Far from being natural entities, modern sovereign states are entirely historical artifacts the oldest of which have been in existence in their present shape and alignment only for the past three or four centuries. Prior to that time human populations in Europe where the modern state was invented and elsewhere organized themselves politically along rather different institutional lines…”)
55 See Jared Diamond, Guns, Germs and Steel (1997); Thomas Barfield, Afghanistan: A Cultural and Political History 67-70 (2010); Scott, supra note 53.
57 Clifford Geertz, What is a State If It is Not a Sovereign: Reflections of the Politics of Complicated Places, 45 Current Anthropology 577, 578 (2004) (“[S]o far as state formation is concerned, whatever has already happened in supposedly better-organized places is less prologue than chapters in a different sort of story not to be reenacted. Whatever directions what is called “nation building” may take in Africa, the Middle East, Asia, or Latin America, a mere
trajectories of different areas of the world resulted and will result in different
forms of political organization, not all of which can be characterized as effective
states.

This is not to say that states do not exist outside of Europe and its
settlement colonies. Rather it is the case that even where states exist, they often
do not exercise effective control over all of the territory within their borders. As
in Afghanistan, the governments of many countries have employed the “Swiss
cheese approach” to governance. Under this model the state only controls the
most populated and economically valuable areas and leaves autonomous the
populations of the economically/environmentally marginal and difficult to control
regions, such as mountains and deserts, so long as they do not challenge the
(contrasting the “American cheese” approach of homogenous control within international borders
with the “Swiss cheese” approach on internally heterogeneous control.)} Put differently, the writ of the state is not congruent with the
international border of the country it occupies. These cases might be called states
within territorial expressions. Sometimes the states within such territories are
little more than city-states.

Such territorial entities are fictitious states.\footnote{This term overlaps with the Jacksons term “quasi-state”, but is broader. See Jackson, supra note XX, at 1. I use the term fictitious state to emphasis that their reality is a legal fiction.} They are fictitious because
the extent of their statehood is a legal fiction.

Such fictions abound. “Many other regions of the world share the African
experience of having significant outlying territories that are difficult for the state
to control because of relatively low populations densities and difficult physical geographies.”

In Latin America

[t]he state’s capacity to maintain monopoly over the use of violence or territoriality has also always been suspect. With a couple of exceptions, few national capitals could be said to have ruled the hinterlands of the nineteenth or even early twentieth century. Even today, Peru, Ecuador, and Bolivia still lack the ability to control the Sierra. Mexico continues to fight rebels in at least two provinces; Brazil cannot enforce federal policies on regions; and Colombia is quickly disintegrating.

Fictitious states span a broad range of capabilities. Fictitious states include entities such as Somalia which lack any central authority. However even territorial entities such as India and Russia which contain strong states are fictitious to the extent that their borders are not coterminous with the writ of their central governments. The extent of an entity’s statehood is fictitious to some degree whenever the central government is unwilling or unable to establish control over some portion of its territory.

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61 Miguel Centeno, Blood and Debt 6 (2002). Although written in 2002, Centeno’s general observations regarding state weakness remain accurate despite the fact that state control has deteriorated further in Mexico and improved in Colombia.
63 Not a Dinner Party, The Economist, Feb. 27, 2010, at 46, 48 (describing the 40-year-old Maoist Naxalite insurgency among India’s which claims “to be fighting for better treatment of marginalized tribes, but deny the government access to areas they control.”); Politics with Bloodshed, The Economist, Apr. 10, 2010, at 45 (describing the Naxalites was having “an estimated 14,000 full-time fighters and loosely control of a swathe of central and eastern India, albeit in jungle areas where the state is hardly present.”)
I emphasize that a state may be formidable in terms of its military
capabilities and its own ability to project force, but incapable of exercising
effective control over its own territory. The quintessential example is Pakistan,
which possesses a nuclear arsenal capable of producing a ten year global nuclear
winter, but which has never controlled the Federally Administered Tribal
Areas. The al-Bashir government in Khartoum is capable of committing
atrocities in Darfur, but incapable of compelling compliance with its commands
throughout most of Sudan’s territory. The ability of territorial elites to destroy is

not the ability to control. The central authorities of fictitious states may be
dangerous internally and externally yet remain ineffective. Prior to the 20th
century even the United States faced difficulty in suppressing violent non-state
incursions from its territory into Canada, Mexico, and Central America.

To summarize many of the territorial communities recognized as states are
legal fictions to some degree. Effective states exercising direct, relatively
homogenous effective control throughout their internationally recognized borders
are anomalous in much of the world. The next section describes how the
primarily European phenomenon of effective statehood was universalized into a
principle of justice.

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64 Alan Robock & Owen Brian Toon, Local Nuclear War, Global Suffering, SCIENTIFIC
AMERICAN, Jan, 2010, at 74.
65 Iftikhar A. Khan, Taliban’s Bajaur Base Falls, Army Eyes Tirah, Orakzai, THE DAWN, March,
library/dawn/news/pakistan/04-army-bajaur-qas-10 (“Maj-Gen Tariq said the Pakistan flag had
been raised in the region for the first time since independence.”)
66 Roy Emerson Curtis, The Law of Hostile Military Expeditions as Applied by the United States, 8
AM. J. INT’L L. 224 (1914) (describing the United States often ineffective response to “filibusters”
and other violent non-state actors based on American soil.)
B. Statehood as Norm, Not Fact: Reification of Fictitious Statehood

The reality of statehood is not universal. However, the ideal of—indeed the right to—statehood gained widespread valence in the mid-20th century. This Section examines the transformation of statehood from an empirical fact into a principle of justice.

i. The Delegitimization of Formal Political Inequality

Principles of self-determination and human equality gained ascendance following the Second World War. The industrial extermination of untermenschen by the Third Reich had delegitimized racial, ethnic, and religious inequality in the eyes of the Western governing elite. “[D]omestic ideologies promoting enfranchisement of racial and ethnic minorities in Western states” reinforced such international equality norms. Western statesmen generalized liberalism among individuals to liberalism among societies. If all peoples were equal, then they must all have the same capabilities with respect to political organization.

ii. Decolonization

The transformation of statehood and sovereignty from empirical realities into international norms is largely a product of decolonization. In the decades following the Second World War major powers recognized that colonial peoples were entitled to statehood as a right. Adherence to and enforcement of principles

67 Jackson, supra note 2, at 16.
68 Jackson, supra note 2, at 14 (“The constitutional leveling that occurred within Western domestic societies has taken place internationally and for most of the same reasons which have to do with the doctrine of equal rights and equal dignity of all mankind.”)
of “equal rights and self determination of peoples”\textsuperscript{69} as well as territorial integrity\textsuperscript{70}, uti possidetis, and non-intervention by key international actors resulted in the creation of entities with international legal personalities irrespective of their internal capabilities.

During decolonization, indigenous elites, particularly those educated in the metropolis, embraced the ideal of European-style statehood both because it was “modern” but also because it was the only means by which they could enjoy formal equality vis-à-vis European elites.\textsuperscript{71} If states were the principal entities of the world community, then indigenous elites needed states to stand on equal footing with European colonial powers. It was through the process of decolonization that the European Westphalian state system was globalized.

However, most of these soon to be independent colonial entities had never been states prior to colonization or at least not states defined by their external colonial frontiers. Nor in most cases did European colonial rule result in the formation of effective states. The exogenous creation of effective states, even if possible, had not been the program of most European colonial powers.\textsuperscript{72} Yet, during decolonization it was “assumed that the new, young countries would ultimately develop into carbon copies of the European and North American states.”\textsuperscript{73} This assumption has proven to be generally unfounded.\textsuperscript{74} Herbst’s

\textsuperscript{69} U.N. Charter art. 1, para 2.
\textsuperscript{70} U.N. Charter art. 2, para 4.
\textsuperscript{71} Herbst, supra note 6, at 99-101.
\textsuperscript{72} See generally, Crawford Young, The African Colonial State in Contemporary Perspective (1994).
\textsuperscript{73} Holsti, supra note 63, 101.
\textsuperscript{74} Holsti, supra note 63, at 79 (“The universalization of the territorial state format does not mean that all states share the same characteristics. In particular, artificial states- the creation of colonial authorities and international organizations- are in many ways fundamentally different from states
observation relating to Africa is germane to many other areas of the world, particularly the Middle East and South and Central Asia, from which contemporary threats emanate.\textsuperscript{75} “[I]nternational society, by dint of the granting of sovereignty, still assumes that all African countries are able to control all of the territory within their boundaries. The gap between how power is exercised in Africa and international assumptions is significant and in some cases, growing.”\textsuperscript{76}

Nonetheless, Western governments were willing to suspend disbelief due to a convergence of interests and disinterests among global governing elites. In the societies traditionally characterized by effective states, statehood and positive sovereignty were taken for granted. Many Western policymakers assumed that if all peoples were equal, then that equality must be on Western terms.\textsuperscript{77} In addition, the governments of European colonial empires tired of their colonial projects in the face of rising costs, growing condemnation at home and abroad, and in some cases successful indigenous rebellions. Finally, the leaders of the major Communist powers (and to a lesser extent the United States) sought Cold War advantage in backing the independence and hence statehood ambitions of Europe’s overseas colonies.

The leaders of these post-colonial entities were entitled to exercise negative sovereignty, even in the absence of demonstrated positive sovereignty. Like statehood more generally, sovereignty has been transformed from a fact into

\textsuperscript{75} See ANGEL RABASA, ET AL., UNGOVERNED TERRITORIES: UNDERSTANDING AND REDUCING TERRORISM RISKS (2007).
\textsuperscript{76} Herbst, supra note 6, at 3.
\textsuperscript{77} Jackson, supra note 2, at 15-17.
a norm. Traditionally the non-intervention norm of negative sovereignty flowed from the empirical reality of positive sovereignty (e.g. ultimate control over some delimited territory). From the mid-twentieth century negative sovereignty became a right of all states, irrespective of whether their capabilities to exercise effective control over their territory. This normative shift redefined statehood.

iii. 1960 and the Redefinition of Statehood

1960 stands as the watershed year for the acceptance of fictitious statehood in international law. Traditional criteria for statehood were unequivocally rejected in words and deeds by many governments and international institutions. The Declaration on the Granting of Independence to Colonial Countries and Peoples proclaimed that “[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”78 The General Assembly rejected empirical capability as a precondition for statehood. “Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.”79 The Declaration called on all states to observe its provisions “as the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.”80 Irrespective of their capabilities, colonial peoples were entitled to independent statehood and the right to negative sovereignty that accompanied it. The central authorities of these post-colonial entities were

79 Id. ¶ 2 (emphasis added).
80 Id. ¶ 7.
entitled to exclude others from their nominal territory regardless of whether they themselves exercised effective control over it.

As the archetypal fictitious state, the status of the Democratic Republic of Congo (“the DRC”) in international law illustrates both the changed understanding of statehood and the ramifications of this redefinition for global security. In 1960, the same year as the Declaration on the Granting of Independence to Colonial Countries and Peoples, the DRC was admitted to the United Nations. Following the Belgian withdrawal the DRC had descended into anarchy as the minimal control exerted by the territory’s colonial authorities dissolved. The DRC lacked any semblance of a government exercising effective control over the area or population of its nominal territory. Thus the DRC failed the crucial traditional test for statehood under international law.

Notwithstanding the ostensible limitation of U.N. membership to states, the geographical expression of the DRC was admitted to the United Nations without dissent.

Despite the continued absence of a government exercising anything approaching effective control, there continues to be a formal commitment by the international community to the sanctity of DRC’s territorial integrity and negative

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81 JAMES CRAWFORD, THE CREATION OF STATES 42-44 (1979) (“Anything less like effective government it would be hard to imagine.”)

82 Id. at 43-44 (noting that DRC’s admission to the U.N. signaled a relaxation of the criteria of effective government.)

83 U.N. Charter, art. 4, para 1 (“Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.”)

Thus the attempted secession of the DRC’s Katanga province was condemned as illegal. U.N. forces intervened on behalf of the authorities in Kinshasa and were instrumental in suppressing Katanga’s attempted independence. Even though less than a failed state, the fiction of the DRC’s statehood has consistently been maintained. A slew of Security Council resolutions have reaffirmed the commitment of governments to the “to the sovereignty, territorial integrity and political independence of the Democratic Republic of the Congo”\(^87\) and even expressed a somewhat magical expectation that the “Government of the Democratic Republic of the Congo” was capable of “ensuring security in its territory and protecting its civilians with respect for the rule of law, human rights and international humanitarian law.”\(^88\) The continuing formal commitment to the fiction of Congolese statehood and sovereignty and its collision with state practice is clearly illustrated in the ICJ’s *Armed Activities Case*, discussed in Section D.

The case of Rhodesia illustrates the other side of statehood’s transformation from a fact into a normative legal fiction. Whereas the DRC was recognized as a state despite the inability of the central authorities to exercise effective control, Rhodesia was denied the status of statehood by the U.N. notwithstanding the central (white) government’s effective control over the

\(^85\) Actual state practice however, is a different story, see infra.


country.\textsuperscript{89} Principles of equality and self-determination dictated that DRC’s indigenous elites \textit{deserved} statehood, whereas these same principles rendered Rhodesia minority white elites \textit{undeserving} claimants for statehood. After 1960, “deserve” had everything to do with statehood\textsuperscript{90} and effective control was irrelevant.

The equation of a territory’s independence with statehood is evident in the recent admission of South Sudan into the United Nations as a member state.\textsuperscript{91} This recognition followed close on the heels of South Sudan’s declaration of independence from the north, despite the extremely rudimentary character of the South’s central institutions.\textsuperscript{92}

\textbf{iv. Suspending Disbelief in Fictitious States}

As the DRC’s persistence illustrates, once born, the fictitious states of the post-colonial era retain their international legal personality, irrespective of their internal capabilities. Governments have been loath to fully and expressly acknowledge the gulf between the theory and reality of statehood in much of the world. Such acknowledgement would result in the “derecognition” of such


\textsuperscript{90} Unforgiven (Warner Bros. 1992).

\textsuperscript{91} \textit{See} http://www.un.org/apps/news/story.asp?NewsID=39034&Cr=Sudan&Cr1=

completely fictitious states as the DRC or Somalia. The continuing commitment of western governments to fictitious states is a function of a number of factors. Foremost among them is a “domino theory” of derecognition. The derecognition of a completely fictitious state such as Somalia might destabilize other marginal entities such as Chad. Second, there is the problem of what to do with stateless territories. A lack of imagination, resources, interest and adequate attention spans militate against external elites exploring alternative forms political organization such as protectorates or trusteeships. Third, the abolition of a territory’s de jure statehood and hence claims to negative sovereignty, raises the prospect of predatory interventions and territorial competition by other states. The current international system, as expressed in the doctrine of uti posseditis, exists in large measure to prevent this very evil of wars of territorial conquest. Fourth, derecognition would render the territory’s population stateless and thus deprive them of both status and protection under international law. Thus, there are significant reasons to maintain the current statehood charade and to continue suspending disbelief.

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93 See Jeffery Herbst, Let them Fail: State Failure in Theory and Practice, in WHEN STATES FAIL: CAUSES AND CONSEQUENCES 301-16 (Robert I. Rotberg ed., 2004)(exploring the possibility of “decertifying” the existence of failed states and as well as recognizing new states.)
95 Id. 149-150.
96 This is particularly true in light of the United States’ experiences in state building in Iraq and Afghanistan.
97 Case Concerning the Frontier Dispute (Burk. Faso v. Mali) 1986 I.C.J. 554 ¶20 (Dec. 22) (noting that the purpose of uti possidentis in the context of decolonization of Spanish America and Africa was “to prevent the independence and stability of new States being endangered by fractricidal struggles provoked by the challenging of frontiers.”)
Despite these policy considerations militating against derecognition, the ubiquity of fictitious states and the exceptional nature of effective statehood has serious implications for a global security regime premised upon a system of states. The U.N. Charter’s state-centric use of force regime is predicated upon states exercising a monopoly over force within their territorial boundaries.

International law, like international relations has focused almost exclusively on the European model of statehood, “despite the presence of state systems elsewhere in the world that have radically different operating assumptions.”

Weak states unable to control the populations and territories over which they claimed negative sovereignty could not be relied upon to fulfill their international obligations. These obligations include at a minimum “the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.”

Territorial entities incapable of fulfilling these barebones obligations are inappropriate building blocks for a global security regime intended to promote minimal public order. Samuel Huntington’s observation that “[t]he most important political distinction among countries concerns not their form of government, but their degree of

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98 Herbst, supra note 6, at 22-23.
government” is particularly germane to international security and regime
governing the use of force.\textsuperscript{100} Whereas in the 19\textsuperscript{th} and early 20\textsuperscript{th} century the gaps
between the theory and fact of statehood were generally exceptional, after the
mid-20\textsuperscript{th} century such gaps between legal identity and political reality became the
norm throughout much of the world. Decolonization exacerbated the challenges
posed by fictitious statehood by transforming the gap between the ideal and
reality of statehood from a marginal and usually temporary condition into a
permanent state of affairs.

The gap between the ideal of effective statehood and reality of fictitious
statehood provides a habitat for violent non-state actors.\textsuperscript{101} The next section
briefly examines some of the characteristics of the non-state entities which
occupy the lacunae between the fact and fiction of statehood and threaten
international order.

\textbf{C. Violent Non-State Actors}

Under a variety of labels, terrorists, marauders, mafias, filibusters, pirates,
armed bands, warlords, militias, mercenaries, private armies, insurgents, bandits,
free-companies, \textit{narco-trafficantes}, and the militaries of \textit{de facto} states, violent
non-state have been a longstanding fact of international relations.\textsuperscript{102} They
preceded and have continuously co-existed alongside modern sovereign states.

\textsuperscript{100} \textsc{Samuel Huntington}, \textit{Political Order in Changing Societies} 1 (1968).
\textsuperscript{101} See \textsc{Angel Rabasa, Steven Boraz, et al.}, \textit{Ungoverned Territories: Understanding
and Reducing Terrorism Risks} (2007) (a RAND Corporation analysis of the security threats
present in several ungoverned areas for the United States Air Force).
\textsuperscript{102} For typologies and indices of violent non-state actors of international consequence, see \textsc{The
International Institute for Strategic Studies}, \textit{The Military Balance} 465-474 (2009);
\textsc{Gregor Wettberg}, \textit{International Legality of Self-Defense Against Non-State Actors}
48-60 (2007); \textsc{Ulrich Schneckener}, \textit{Fragile Statehood, Armed Non-State Actors and Security
Governance, in Private Actors and Security Governance} 24 (Alan Bryden & Marina
Caparini eds., 2006).
The existence of independent non-state actors is the corollary to the anomalous nature of effective statehood and their persistence is a reminder that the ideal of statehood is often unrealized in reality. To the extent that non-state actors exercise independent decision making and control of their members, their existence violates the one army rule of sovereign statehood. Yet, with the reification of fictitious statehood during decolonization, the significance and strength of independent non-state actors was downplayed if not willfully ignored by those who could afford to. The international legal regime that developed to support fictitious states could not formally accommodate the existence of violent non-state actors. Such explicit acknowledgment would expose the often yawning gulf between the reality and ideal of statehood of many of the world community’s newest members.

This Article focuses on independent violent non-state actors which are groups that do not satisfy the ICJ’s “effective control” test and that do not function as de facto agents of state authorities. Though such independent actors may receive safe-harbor, financial and logistical support from states, such relationships between state and non-state actors are alliances and not agency. The relation of independent non-state actors to state authorities is horizontal, rather than vertical.

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103 James D. Fearon & David D. Laitin, Ethnicity, Insurgency and Civil War, 97 AM. POL. SCI. REV. 75, 88 (2003) (finding that state weakness favoring the development of insurgency to be the best predictor of civil war.)

104 Reisman, supra note 49, at 258 (noting that “the traditional private-army rule seems to be have been explicitly rejected by Communist states in association with a number of nations in the Third World.”), 259 (“If the private-army rule of international law were strictly applied and reprisals were undertaken, these nominal states might crumble.”)

This Article does not restrict its analysis based on the organizational structure of the non-state actor. From the standpoint of international security and the legal framework governing the recourse to force, the internal organization of a non-state actor, whether in a quasi-military hierarchy or diffuses network of cells or individuals is irrelevant. Organizational structure may be relevant to the applicability of some provisions of the law of armed conflict (jus in bello)\textsuperscript{106} but is irrelevant to rules of jus ad bellum. The only relevant factors with respect to recourse to force (jus ad bellum) are: (1) that the non-state actor operates across an international frontier; and (2) the magnitude of the security threat posed by the non-state actor.\textsuperscript{107} Non-state actors lacking the traditional military-style command structures may nonetheless pose serious threats to international security.

Although some non-state actors, such as Somaliland, Kurdistan, Hamas controlled Gaza, or Hezbollah occupied southern Lebanon may function as de facto states, many significant violent non-state actors organize themselves according to principles radically different from sovereign statehood. Such actors include those dubbed by ibn Khaldu’s “desert peoples,” tribal societies occupying

\textsuperscript{106} Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 4(2), Aug. 12, 1949, 75 U.N.T.S. 135 (providing that those eligible for prisoner of war status include: (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.)

\textsuperscript{107} See GREGOR WETTBERG, INTERNATIONAL LEGALITY OF SELF-DEFENSE AGAINST NON-STATE ACTORS 65-66 (2007)(also arguing that the organizational structure is irrelevant to the issue of recourse to force against non-state actors.)
environmentally marginal regions who resist control by central authorities.\textsuperscript{108} Other such entities include the Islamic Emirate of Afghanistan (e.g. Afghan Taliban or Quetta Shura). Whatever else may be said of a polity organized according to the precepts of 7\textsuperscript{th} century Arabian religious doctrine, it is not the state envisioned by the Montevideo Convention or Weber.

Though less ideologically interesting than al Qa’ida, predatory armed groups, particularly those active in central Africa, pose perhaps the greatest threat to human security. Militias such as the Lord’s Resistance Army, the Mai Mai, the Forces Démocratiques pour la Libération du Rwanda, and the Congres National pour la Defense du Peuple are among the rotating cast of dozens of independent armed groups killing, raping and pillaging in the DRC and neighboring countries. These groups have played key roles in a complex series of interconnected regional armed conflicts in central Africa that have killed millions, all the while paying little heed to such niceties as international borders. The challenge posed by these groups to a state-centric security regime is illustrated by the ICJ’s opinions in the \textit{Armed Activities Case}.

The security threat posed by non-state actors is more general than that represented by al Qa’ida or the tactics of terrorism. The threat results from a reallocation of resources and power globally and the development of new transnational communities, both real and virtual stemming from innovations in communications and transportation.\textsuperscript{109} Unlike an earlier generation of Maoist insurgents who depended upon local populations for sustenance, many


\textsuperscript{109} See Rabasa et al., supra note 105, at 9-12, 16.
contemporary violent non-state actors are creatures of the global economy who
fund themselves through the trade in high value, low bulk commodities such as
cocaine, opium, alluvial diamonds, and coltan, as well moneys transferred via
remittances and *hawala*. These groups in turn are able to acquire arms on the
global black market including potentially weapons of mass destruction. Some
groups, such as Hezbollah, exhibit military capabilities which were formerly the
exclusive province of states.\(^{111}\)

The independent violent non-state actors surveyed above are the
complement to the fictitious states discussed in the previous section. Such groups
flourish where states have failed to consolidate control over society, where states
have failed to co-opt domestic competitors and where people have looked to
alternative models of political organization.\(^{112}\) The existence of such independent
armed forces on the territory of a state compromises its positive sovereignty
because their presence violates the one army rule. Whether by consent or
ineptitude, the state has failed to maintain its monopoly on the use of force.

Taken together such non-state actors illustrate the inadequacy of a strictly
state-centric security regime and the persistent gap between the ideal of statehood

\(^{110}\) See *The International Institute for Strategic Studies, The Military Balance* (2009)
464-467.

8, 2006, at A01 (quoting the former director of analysis for the Israeli military intelligence as
saying that “[Hezbollah has] some of the most advanced antitank missiles in the world” and
summarizing the experience of IDF soldiers who characterize the Hezbollah’s military capabilities
as being similar to state armed forces).

\(^{112}\) See Sheri Berman, *From the Sun King to Karzai: Lessons for State Building in Afghanistan*, 89
Afghanistan through combinations of coercion and cooption applied by central elites against
regional warlords.)
upon which the state-centric security regime rests and reality of statehood in many parts of the world. Moreover, the persistence of such entities represents an international constitutional challenge because these armed groups belie the formal constitutional leveling that accompanied decolonization.\footnote{See Jackson, supra note 2, at 14.} Formal equality has not resulted in substantive equality, even with respect to the most fundamental attributes of statehood. An international system premised upon the formal equality of states fails doubly, both by failing to account for fictitious statehood and by failing to account for the power wielded by and the threat posed by non-state actors.

The disjuncture between state-centric paradigm and the reality of fictitious statehood and violent non-state actors is illustrated in the opinions of the International Court of Justice in \textit{Armed Activities on the Territory of the Congo}.

\textbf{D. Armed Activities: The State-Centric Paradigm vs. Reality}

The International Court of Justice’s opinion in \textit{Armed Activities on the Territory of the Congo} epitomizes both the commitment to fictitious statehood and an adherence to a rigidly state-centric interpretation of the right of self-defense. The hallmarks of this paradigm are: (1) the primacy of the central authorities, no matter how feckless and; (2) the dispositive nature of the consent of these authorities with respect to lawful military intervention.

The background to the \textit{Armed Activities} was the complex, multi-party conflict on the territory of DRC. Prior to the fall of Mobuto Sese Seko in 1996, the environment in eastern DRC was one in which “rebel groups were able to
operate ‘unimpeded’ in the border region between the DRC and Uganda ‘because of its mountainous terrain, its remoteness from Kinshasa (more than 1,500 km), and the almost complete absence of central government presence or authority in the region during President Mobutu’s 32-year term in office’. After the fall of Mobuto Sese Seko in 1996 the security situation deteriorated even further. By 2001 six states and a number of militias were involved in a fluid, multisided conflict characterized by the opportunistic spoliation of DRC’s natural resources, widespread atrocities against civilians, and the deaths of millions.115

It was in this context that Uganda claimed it could lawfully intervene to counter the threat posed by one militia, the Allied Democratic Forces (ADF), which was operating from Congolese territory. Uganda claimed intervention was lawful both on the basis of: (1) the consent of the authorities in Kinshasa; and (2) on the basis of self-defense. Uganda contended that the presence of its military in the eastern DRC was lawful because of the prior consent of Kinshasa. As a matter of self-defense, Uganda justified its participation in the Congolese conflagration on the grounds that its “security situation had become untenable” due to the fact “the successive governments of the DRC have not been in effective control of all the territory of the DRC” and as “political and administrative vacuum” of the eastern DRC.116 Uganda observed that “[t]he fissiparous tendencies of the dysfunctional Congolese state inherited from President Mobutu,
which President Kabila’s government had barely papered over, were set loose by the rebellion, and the central government soon lost effective control over the eastern half of the country.”

In light of the lawlessness in the eastern DRC Uganda argued it was necessary to resort to the transborder use of force in order to prevent further attacks by ADF fighters, who had previously attacked civilian targets inside Uganda. Although invoking the DRC’s lack of effective control, Uganda, relying upon the Corfu Channel Case, (United Kingdom v. Albania), premised its right to self-defense upon the fact that the DRC had “not only a duty to refrain from providing any support to groups carrying out subversive or terrorist activities against another State, but also a duty of vigilance to ensure that such activities are not tolerated.” In Uganda’s view, the DRC’s failure to discharge this duty rendered the DRC responsible for the attacks of the ADF. Thus Uganda relied upon the DRC’s lack of effective control as evidence of DRC’s negligence, rather than the DRC’s compromised sovereignty.

The Court’s rigid adherence to a state-centric regime is evident in its consideration of the issue of consent. Uganda claimed that its intervention was rendered lawful by Congolese consent. The Court considered the existence, duration and scope of such consent, which served as a qualified waiver of negative sovereignty, to be dispositive in determining the lawfulness of Uganda’s use of force on Congolese territory. If the government of the DRC had consented

117 Id. at 36.
118 1949 I.C.J. 4
120 Id at 7, at ¶¶ 42-54
to the presence of Ugandan military personal, then wrongfulness was precluded\textsuperscript{121} and the ICJ need not consider Uganda’s alternative claim that it was acting in self-defense on its own behalf.\textsuperscript{122} The Court found that Uganda had exceeded the geographic and temporal bounds of the DRC’s consent. The Court considered consent and thus the waiver of negative sovereignty to be dispositive despite the complete lack of effective control of the Congolese authorities over the eastern DRC. Moreover, the DRC’s consent to Ugandan military intervention against the ADF served as a tacit admission by the DRC that it lacked effective control over its nominal territory.\textsuperscript{123} Thus the right to exclude was completely independent of the ability to control.

Next, having established that certain aspects of Uganda’s presence was non-consensual and that it had violated the DRC’s negative sovereignty, the Court then considered whether such a violation could be justified on the grounds of self-defense. The ICJ rejected Uganda’s claim of self-defense and in so doing implicitly rejected a reading of Article 51 accommodating the right to use transborder force against non-state actors in self-defence. The Court observed

\textsuperscript{121} International Law Commission, \textit{Articles on Responsibility of States for Internationally Wrongful Acts}, art. 20, \textit{in Report of the International Law Commission, Fifty third Session}, U.N. Doc. A/56/10 (2001) ("Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.") \textit{See also} \textit{Oppenheim’s International Law}, 435 (9\textsuperscript{th} ed. R. Jennings & A. Watts, eds. 1992) (As a result military assistance may be “rendered by one State to another at the latter’s request and with its consent, which may be given \textit{ad hoc} or in advance by treaty.”)


\textsuperscript{123} Such consensual military interventions against violent non-state actors have been common in central Africa, reflecting the weakness of the regions states and strength of private armed groups. The Ugandan military has pursued the Lord’s Resistance Army into southern Sudan, DRC, and the Central African Republic with the permission of these states. \textit{See} Jeffery Gettleman, \textit{Uganda Enlists Former Rebels to End War}, \textit{N.Y. Times}, April 10, 2010, \textit{available at http://www.nytimes.com/2010/04/11/world/africa/11lra.html?ref=world}. 
that “in order to ascertain whether Uganda was entitled to engage in military action on Congolese territory in self-defence, it is first necessary to examine” the connection between the militias and the Congolese state (such as it was).\textsuperscript{124} That is Uganda’s right to self-defense was contingent upon the responsibility of the DRC. Absent such a connection “the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present.”\textsuperscript{125}

Thus the Court only addressed the issue of Uganda’s right to self-defense vis-à-vis the DRC. The Court refused to consider the issue of whether Uganda enjoyed a right to self-defense vis-à-vis the ADF or other armed groups operating independently in the anarchic environment of eastern DRC.\textsuperscript{126} The Court was “uncomfortable being confronted with certain questions of utmost importance in contemporary international relations”, e.g. the inadequacy of a state-centric regime governing the use of force.\textsuperscript{127}

Though a majority of the Court rigidly adhered to a state-centric paradigm for the use of force, two of the judges criticized the ICJ’s unwillingness to confront reality. The separate opinions of judges Koojiman and Simma reflect an

\begin{itemize}
\item \textsuperscript{125} Id. at ¶ 147.
\item \textsuperscript{126} See Armed Activities on the Territory of the DRC (Dem. Rep. DRC v. Uganda), 2005 I.C.J. 116, ¶ 148 (Dec. 19) (Separate Opinion of Judge Koojiman) (“The Court only deals with the question whether Uganda was entitled to act in self-defence \textit{against the DRC} and replies in the negative since the activities of the rebel movements could not be attributed to the DRC. By doing so, the Court does not answer the question as to the kind of action a victim State is entitled to take if the armed operation by irregulars, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces but no involvement of the host government can be proved.”)(internal quotations omitted).
\end{itemize}
appreciation for the reality of violent non-state actors and the role of state practice and *opinio juris* in shaping international law. Judge Koojiman observed that

The Parties to the present dispute share a hapless post-decolonization history. . . . In this respect the Parties shared the plight which seems to have become endemic in much of the African continent: régimes under constant threat from armed movements often operating from the territory of neighbouring States, whose governments sometimes support such movements but often merely tolerate them since they do not have the means to control or repel them. The latter case is one where a government lacks power and consequently fails to exercise effectively its territorial authority; in short, there is a partial failure of State authority and such failure is badly concealed by the formal performance of State functions on the international level. *Commitments entered into by governments unable to implement them are unworthy of reliance from the very start and hardly contribute to the creation of more stability.*

Koojiman observed that the Judgment of the Court “inadequately reflects the structural instability and insecurity in the region, the overall pattern of lawlessness and disorder.”

Koojiman observed that

Article 51 merely conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years. I also observed that this [state-centric] interpretation no longer seems to be shared by the Security Council, since in resolutions 1368 (2001) and 1373 (2001) it recognizes the inherent right of individual or collective self-defence without making any reference to an armed attack by a State. In these resolutions the Council called acts of international terrorism, without any further qualification and without ascribing them to a particular State, a threat to international peace and security.

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128 *Id.* at ¶5
129 *Id.* at ¶14.
130 *Id.* at ¶ 28.
The case arose in a context “which in present-day international relations has unfortunately become as familiar as terrorism, viz. the almost complete absence of government authority in the whole or part of the territory of a State. If armed attacks are carried out by irregular bands from such territory against a neighbouring State, they are still armed attacks even if they cannot be attributed to the territorial State.” That is the security threat posed by non-state actor can be equal to that traditionally posed by states.

Therefore “[t]he lawfulness of the conduct of the attacked State must be put to the same test as that applied in the case of a claim of self-defence against a State: does the armed action by the irregulars amount to an armed attack and, if so, is the armed action by the attacked State in conformity with the requirements of necessity and proportionality.”

Judge Simma also criticized the restrictive reading of Article 51 as being inconsistent with the current state of international law.

Such a restrictive reading of Article 51 might well have reflected the state, or rather the prevailing interpretation, of the international law on self-defence for a long time. However, in the light of more recent developments not only in State practice but also with regard to accompanying opinio juris, it ought urgently to be reconsidered, also by the Court. As is well known, these developments were triggered by the terrorist attacks of September 11, in the wake of which claims that Article 51 also covers defensive measures against terrorist groups have been received far more favourably by the international community than other extensive re-readings of the relevant Charter provisions, particularly the “Bush doctrine” justifying the pre-emptive use of force. Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as “armed attacks” within the meaning of Article 51.

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131 Id. at 30.
Judges Koojiman and Simma acknowledge the reality of a world of fictitious states and non-state actors and interpret the Charter accordingly. The judges recognized the right of self defense extended to actions taken against non-state actors as well as states. However, they erred by suggesting that 9/11 expanded the scope of this customary right.

As the next part illustrates, the customary right of self-defense has encompassed actions against non-state actors for two centuries. Violent non-state actors operating from fictitious states have long threatened the security of states. Unsurprising, states have often responded to this threat through the use of military force across international borders. The next Part examines international incidents involving the use of force against non-state actors in ungoverned territory and analyzes the legal claims made by states in justification of such actions. These incidents serve to place the current security threats posed by groups like al Qa’ida in Yemen or Pakistan in historical perspective. Moreover, the legal claims reveal a consistent set of principles which serve as justification for military action. Customary international law has long accommodated the need to respond to the threat posed by violent non-state actors through a right of self-defense.

III. STATE RESPONSE: THE OTHER FACE OF EFFECTIVE CONTROL

The customary right of self-defense against non-state actors has a long pedigree. Governments have historically been unwilling to tolerate the security threats posed by independent violent non-state actors who exploit the gap between
the law and fact of statehood. Consequently there is a long history of the use of force against non-state actors and a correspondingly long history of justifications premised upon self-defense in the face of state ineffectiveness.

This body of state practice, *opinio juris* and the reactions of other states clarify the status of self-defense against non-state actors at the time of the Charter’s drafting. This practice also demonstrate continuity between the pre and post-Charter eras in the nature of the legal justifications. This history illustrates an awareness by statesmen of the gap between the ideal and reality of statehood and a willingness to resort to self-help to enforce the international legal obligations of states unwilling or unable to deal with non-state threats on their territory.

With respect to statehood and security, inability and unwillingness claims amount to the same outcome. Whether a state is unwilling or unable to evict independent violent non-state actors, their presence compromises the state’s sovereignty by violating the one army rule. A state can no longer claim a monopoly on violence if an independent armed force is present on its nominal territory. Forceful intervention by the defending state amounts to “extraterritorial law enforcement”132 that is the enforcement of a fictitious state’s international obligations by the defending state.

In this Part, I examine in detail state practice and claims relating to numerous incidents involving the defensive use of force against non-state actors. Where possible, I analyze the responses of other governments to such claims of self-

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defense. Specifically, I focus upon that subset of incidents involving independent non-state actors in which the defending state implicitly or explicitly invoke state ineffectiveness or otherwise emphasize the gap between the ideal and reality of statehood. The tacit acknowledgement of the fictitious nature of statehood generally serves one of two purposes. First, state incapacity or unwillingness may justify the necessity for the use of defensive force. Second, state ineffectiveness may be cited by the defending state as a waiver of the host state’s negative sovereignty.

Claims premised upon state ineffectiveness invert the ICJ’s “effective control” test for state responsibility. Rather than justifying military action on basis of the effective control of a state over a violent non-state actor, states justify the defensive use of force based on the host state’s lack of effective control over its nominal territory. From the post-colonial perspective these claims are radical because they re-connect positive and negative sovereignty and imply that the right to exclude is premised upon the ability to control.

A. Pre-Charter Era

During the 19th and early 20th century the United States repeatedly resorted was defensive force in response to threats posed by violent non-state actors operating from lawless regions across its borders. Whether justified as defensive, preventative, precautionary, or punitive these actions all had the same (at least

133 See W. Michael Reisman, International Incidents: Introduction to a New Genre in International Law, 10 YALE J. INT’L L. 1,9 (1984-1985)(describing the methodology of incident based analysis, which seeks to identify the “operational code” from elite behavior.) See also GREGOR WETTBERG, INTERNATIONAL LEGALITY OF SELF-DEFENSE AGAINST NON-STATE ACTORS (2007) (providing a more general incident based analysis of states recourses to force against non-state actors since 1945).
stated) end, abating the threat posed by non-state actors. These interventions established a pattern of state response to lawlessness and international terrorism and legal claims which persists to this day.

i. United States and Spanish Florida

One of the first such defensive actions took place during the War of 1812, when U.S. military forces under the command of Andrew Jackson launched an expedition into Spanish Florida. This action was directed against armed bands of Seminole Indians instigated by British military officers. Commenting on the legal basis for the use of force by the United States on Spanish territory, Jackson made the following observation to Secretary of War Calhoun. “The Spanish Government is bound by treaty to keep her Indians at peace with us. They have acknowledged their incompetency to do this, and are consequently bound by the law of nations, to yield us all facilities to reduce them.”

Secretary of State Adams later described the legal basis for U.S. action in a similar fashion.

He [General Jackson] took possession therefore, of [Spanish territory]…not in the spirit of hostility to Spain, but as a necessary measure of self-defense; giving notice that they should be restored whenever Spain should place commanders and a force there able and willing to fulfill the engagements of Spain towards the United States, or of restraining by force the Florida Indians from hostilities against the United States.

The notable features of the legal claims advanced by the United States are their emphasis upon: (1) Spanish “incompetence”; (2) the distinction between the armed bands and Spain; and (3) an expressed good faith willingness to cooperate

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135 J.B. MOORE, DIGEST OF INTERNATIONAL LAW, 403 (1906) (emphasis added).
136 Id. at 406.
with Spanish authorities to restore Spain’s effective control over the affected area. Spain’s protests to the United States focused on the plundering and destruction of Spanish property and not on the lawfulness of the incursion itself, which it did not explicitly contest.\textsuperscript{137} In short Spain contested the \textit{jus in bello}, rather than the \textit{jus ad bellum} of the American action.

In 1817, American forces once again launched an incursion into nominally Spanish territory off the eastern coast of Florida. Amelia Island had fallen under the control of one McGregor and a band of “adventurers from different countries, with very few, if any of the native inhabitants of the Spanish colonies.”\textsuperscript{138} Secretary of State Adams justified the United States use of force against Amelia Island arguing that:

\begin{quote}
When an island is occupied by a nest of pirates, harassing the commerce of the United States, they may be pursued and driven from it, by authority of the United States, even though such island were nominally under the jurisdiction of Spain, Spain not exercising over it any control.\textsuperscript{139}
\end{quote}

Once again the United States’ claim emphasized the threat to which the United States was responding and the necessity of force, but in this case Spain’s lack of control appears to mitigate any violation of its negative sovereignty. The action was protested by Spain as well as the putative representative of Spain’s then renegade colonies.\textsuperscript{140} However, diplomatic correspondence reveals that the

\textsuperscript{137} Id. at 404. \\
\textsuperscript{138} II J.B. MOORE, DIGEST OF INTERNATIONAL LAW 408 (1906). \\
\textsuperscript{139} Id. at 408. \\
\textsuperscript{140} Id. at 408.
United Kingdom and other major powers expressed “no dissatisfaction” with the U.S. occupation of the island.\textsuperscript{141}

ii. *The Caroline Incident: The United States of Ineffectiveness*

The United States has not always been the defending state in international incidents involving military response to violent non-state actors. The *Caroline* incident is oft-cited as establishing the principles of necessity and proportionality of self-defense in customary international law. However, a neglected and particularly salient aspect of the incident is that it represents a force against an independent non-state actors based on the territory of a state unable to exercise effective control over its own territory and population: the United States. The facts of the incident illustrate that the United States has itself been characterized in the past by the loss of effective control over its territory and the concomitant presence of violent independent armed groups. The incident also exemplifies a common type of intervention stemming from the spillover of civil strife across international borders.

During the British suppression of an 1837 insurrection in southern Canada, Canadian rebels sought refuge across the border in New York State. The rebels recruited American sympathizers to their cause who gathered private arms and pillaged the armory at Batavia, NY making off with several hundred weapons including two field artillery pieces.\textsuperscript{142} In a letter to the President, the Mayor of

\textsuperscript{141} Id. at 408; see also Michael Reisman, *Private Armies in a Global War System, in Law and Civil War in the Modern World* (John Norton Moore, ed.) (1974), 252, 256.

\textsuperscript{142} R.Y. Jennings, *The Caroline and McLeod Cases*, 32 Am. J. Int’l L. 82, 82 (1938) (citing H. Ex. Doc. No. 74, 25\textsuperscript{th} Cong., 2\textsuperscript{nd} Sess.)
Buffalo complained that “[t]he civil authorities have no adequate force to control these men, and unless the General Government should interfere, there is no way to prevent serious disturbances.”¹⁴³

The “General Government” did not interfere and the Canadian-American insurrectionist forces went onto occupy Navy Island, Canadian territory in the Niagara River. From the island these forces repeatedly engaged in “Acts of Warlike aggression on the Canadian shore, and also on British Boats passing the Island.”¹⁴⁴ The insurrectionists also manned a steamer, the *Caroline*, to provision (especially with munitions) the forces encamped on the island.¹⁴⁵ British authorities alerted the Governor of New York of the threat posed to British territory and subjects by the lawlessness in New York, but received no reply.¹⁴⁶

With the local authorities unable to control their territory and population and the state and federal authorities uninterested in asserting control, British forces resorted to force to prevent future “warlike” acts. On the night of December 29, 1837, while the *Caroline* was docked on the American bank of the river, British forces assaulted the vessel. They killed and wounded several of the pro-insurrectionist Americans and sent the *Caroline* over Niagara Falls in flames.¹⁴⁷

During the ensuing diplomatic row over the British incursion, the governments of the United States and Britain established what would become the defining principles of lawful self-defense in customary international law, both

¹⁴⁵ *Id.*
¹⁴⁶ *Id.*
¹⁴⁷ II. J.B. Moore, *Digest of International Law* 409 (1906).
against non-state and state actors. The British justified their incursion into American territory on the basis of: (1) the threat posed by the Caroline; (2) the Caroline’s status as an independent armed force; and (3) the United States lack of effective control over its own territory and populace. Replying to a complaint by the U.S. Secretary of State, Fox, the British Minister in Washington cited both the “piratical character of the steam boat ‘Caroline’ and the necessity of self-defence and self-preservation.” Moreover, Fox noted that:

[A]t the time when the event happened, the ordinary laws of the United States were not enforced within the frontier district of the State of New York. The authority of the law was overborne, publickly (sic) by piratical violence…This extraordinary state of things appears, naturally and necessarily, to have impelled them [Canadian armed forces] to consult their own security, by pursuing and destroying the vessel of their piratical enemy wheresoever they might find her.”

Thus, the United State’ lack of effective control necessitated Britain’s resort to defensive force.

In a report to the Foreign Minister, the legal officers of the Foreign Office emphasized both prevention and necessity. “We feel bound to suggest to your Lordship that the grounds on which we consider the conduct of the British Authorities to be justified is that it was absolutely necessary as a measure of precaution for the future and not as a measure of retaliation for the past. What has been done previously is only important as affording irresistible evidence of

149 Id.
what would occur afterwards.” That is the lawfulness of British action hinged upon the prevention of future harm, not revenge for prior injury.

In a letter to Lord Ashburton, U.S. Secretary of State Webster acknowledged the potential lawfulness of transborder defensive measures against non-state actors. However in his famous formulation, Webster established a high bar for the legitimacy of such action. Hostile acts “within the territory of a party at Peace” could only be justified by “clear and absolute necessity.” Moreover, the “necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment of deliberation.”

“[E]ven supposing the necessity of the moment authorized [Canada’s authorities] to enter the United States, their actions were only lawful if they “did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity and kept clearly within it.”

In his reply, Ashburton accepted Webster’s framework for lawful self-defense. He argued that the necessity prong was satisfied due to the lack effective control by the American authorities and that given this lack of control, appeal to the American authorities would have been futile. “I might put it to any candid man, acquainted with the existing state of things, to say whether the military commander in Canada had the remotest reason…to expect to be relieved from this state of suffering by the protective intervention of any American

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151 Id.
152 Id.
153 Id. at 89.
authority.”\footnote{154} The lack of alternative means necessitated the use of military force. Moreover, the British nighttime raid and destruction of the vessel was a proportional response to the threat. The timing of the raid as well as the loosing of the flaming vessel over the falls were calculated to minimize both the loss of life and damage to other property.\footnote{155}

Webster noted that this narrow “exception” to the “inviolable character of the territory of independent states…grew out of the great law of self-defense.”\footnote{156} Webster observed that the governments of the United States and the United Kingdom agreed on the legal standard, but disagreed as to whether the “facts in the case of the \textit{Caroline} make out a case of such necessity for the purposes of self-defense.”\footnote{157}

With respect to the law of non-state actors the \textit{Caroline} incident is particularly significant. No attempt was made by the British to justify intervention on the basis of American responsibility for the \textit{Caroline}. Rather the necessity of the intervention was premised largely upon New York State’s (admitted) lack of effective control over its own territory. Necessity was the principle justifying the use of force against a non-state actor on the territory of a “party at Peace.” Both state agreed in principle to the existence of a right to self-defense against non-state actors and such a right could justify the violation of another state’s negative sovereignty. Moreover, such self-defense was forward looking. A prior armed attack was merely additional evidence of the existence of

\footnote{154} Id. at 90 (citing Parliamentary Papers (1843), Vol. LXI; British & Foreign State Papers, Vol. 30, p. 195.) \footnote{155} Id. \footnote{156} Moore, \textit{supra} note 136, at 412. \footnote{157} Id.
a real security threat and therefore necessity for the use of force. The defensive use of force was aimed at preventing future harm, not retaliating for past wrongs.

iii. *United States and Mexico: Ungoverned Space on the Border*

During the nineteenth century, the United States repeatedly resorted to transborder incursion into Mexico in response to threats posed by “predatory Indians and other marauders.” In 1836, Secretary of State Forsyth wrote to his Mexican counterpart explaining that any U.S. military incursion into Mexico was entirely on the basis of self-defense and emphasis that force was not directed towards the Mexican state.

Should the [American] troops in the performance of their duty, be advanced beyond the point Mexico might suppose was within the United States, the occupation of this position was not to be taken as an indication of any hostile feeling, or of a desire to establish a possession or claim not justified by the treaty of limits, [but only as] precautionary and provisional [to be] abandoned whenever the disturbance in that region should cease, they being the only motive for it.

Forsyth elaborated upon the United States’ legal position in a letter to the American ambassador to Mexico. Intervention into Mexico “[r]ests upon principles of the law of nations, *entirely distinct from those on which war is justified* - upon the immutable principles of self-defense- upon the principles which justify decisive measures of precaution to prevent irreparable evil to our own or to neighboring people.”

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158 *Id.* at 418.
159 *Id.* at 418.
160 *Id.* at 420 (emphasis added.)
The United States’ right to self-defense against the non-state threat entailed preemptive action. In justifying proactive action, Forsyth argued that:

[our fellow-citizens…are exposed to massacre…and the whole frontier to laid waste by those savages Mexico is bound to control. Until these evils happen, on Mr. Gorostiza’s theory, we have no right to take a position which will enable us to act with effect; and before we do act…after the frontier has been desolated, we must demand redress of Mexico, wait for it to be refused and then make war upon Mexico. We are quietly to suffer injuries we might prevent in the expectation of redress- redress from irreparable injuries from Mexico, who did not inflict them, but who was, from circumstance, without the power to prevent…To make war upon Mexico for this involuntary failure to comply with her obligations would be an attempt to convert her misfortunes into crimes- inability into guilt.\(^{161}\)

The United States legal claim: (1) differentiated between the Mexican state and non-state actors; (2) premised self-defense upon the necessity arising from Mexico’s lack of effective control; and (3) emphasized that American action was preventative/precautionary.

This American legal claim was not well received by Mexico.\(^{162}\) In light of the subsequent admission of Texas into the United States and the Mexican Session following the Mexican-American War, Mexico may have had real concerns over the sincerity of any American disavowal of territory designs. In short the United States legal claims were rejected because they were deemed pretextual and its recourse to force unnecessary.

Twenty years later a company of Texas Rangers pursued into Mexico a band of Mexican Indians who had launched a raid into Texas. In a letter to his

\(^{161}\) *Id.* at 420-421.

\(^{162}\) *Id.* at 418-420.
Mexican counterpart, Secretary of State Marcy asserted that international law allowed such hot pursuit in self-defense and that the United States would not complain if Mexico launched, out of necessity, similar proportionate incursions into the United States.

If Indians whom the United States are bound to restrain shall, under the same circumstances, make a hostile incursion into Mexico, this Government will not complain if the Mexican forces who may be sent to repel them shall cross to this side of the line for that purpose, provided that in so doing they abstain from injuring the persons and property of the citizens of the United States.\textsuperscript{163}

It is thus clear that the United States was not claiming for itself a right it was unwilling to grant other states. As a subsequent Secretary of State observed to the Secretary of War, “[a]n incursion into the territory of Mexico for the purpose of dispersing a band of Indian marauders is, if necessary, not a violation of the law of nations.”\textsuperscript{164}

President Buchanan went a step further and proposed a temporary protectorate be established in areas of “anarchy and violence” of northern Mexico.\textsuperscript{165} American forces would be “withdrawn as soon as local government shall be established in these Mexican States capable of performing their duties to the United States, restraining the lawless, and preserving peace along the border.”\textsuperscript{166} Again, the United States based its claim of necessity upon Mexico’s lack of effective control over its nominal territory.

\begin{footnotes}
\item[163] Id.
\item[164] Id. at 421.
\item[165] Id. at 421.
\item[166] Id. at 421.
\end{footnotes}
Lawlessness in Mexico was also the basis for the United States’ most famous incursion into Mexico, Pershing’s pursuit of Francisco “Pancho” Villa, following Villa’s attack upon Columbus, New Mexico in 1916. Pershing’s expedition was initially justified on the basis of both defensive reprisal and the consent of the Mexican state. President Wilson publicly announced that “the expedition into Mexico was ordered under an agreement with the de facto government of Mexico for the single purpose of taking the bandit Villa…and is in no sense intended as an invasion of that republic or as an infringement of its sovereignty.”

Wilson also asserted that “[t]he expedition is simply a necessary punitive measure, aimed solely at the elimination of the marauders who raided Columbus and who infest an unprotect district near the border which they use as a base in making attacks upon the lives and property of our citizens with our own territory.”

Punitive in this sense is best understood to mean deterrent or precautionary, rather than retaliatory.

The general consent of the de facto government of Mexico for the U.S. military expedition was based on the prior reciprocal agreement between the two countries permitting hot pursuit of “bandits” across the international border into the United States. The United States renewed its commitment to this agreement in the hopes of “suppressing this state of lawlessness…in the regions contiguous to the boundary between the two Republics.” In a parallel to the current United States involvement in Pakistan, the Mexican state subsequently

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168 *Id.* at 400.
170 *Id.* at 293.
publicly denied consenting to the presence of the U.S. military on its territory. The United States replied by “vigorously defending its action in protecting its border by patrolling a portion of Mexico” which the Mexican state “was obviously unable to exert any semblance of authority” and refused to withdraw until Mexico “gave evidence of some ability to fulfill his international obligations to his neighbor on the north.”

Writing to his Mexican counter-part, Secretary of State Lansing decried the inability of the Mexican state to repress the “marauding attacks” across the international border. Such ineffectiveness “may excuse the failure to check the outrages complained of, but it only makes stronger the duty of the United States to prevent them.”

A bi-lateral commission eventually negotiated the withdrawal of American forces, contingent on their immediate replacement by Mexican troops and the “occupation and protection of territory evacuated by the American forces.” The American members of the commission also insisted that the United States reserved “the right to pursue marauders coming from Mexico into the United States so long as conditions in northern Mexico are in their present abnormal condition. Such pursuit is not however, to be regarded by Mexico as in any way hostile to the Carranza Government, for these marauders are our common enemies.”

Despite the poor reception of the agreement by the Mexican authorities, U.S. forces were evacuated by early 1917.

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171 Id. at 400.
172 2 Green Haywood Hackworth, Digest of International Law 297 (1940).
173 Id.
174 Id. at 403.
175 Id. at 404.
176 Id. at 405.
Pershing’s expedition is notable because the United States legal claim was premised upon the necessity of self-defense arising from Mexico’s lack of effective control over the territory of northern Mexico. In such a vacuum the United States was entitled to fulfill the international legal obligations Mexico was unwilling or unable to. Nonetheless, the United State took pains to distinguish between Pancho Villa and the Mexican state and did not justify the expedition on the grounds of Mexican responsibility. Like his predecessor, Secretary of State Forsyth, Lansing distinguished between Mexican wrongfulness (failure to control its nominal territory) and the threat posed by the non-state actor necessitating preventative defensive action by the United States.

iv. **Soviet Union: Civil War Spillover**

Typical of many ostensibly internal conflicts, the Russian Civil War spilled over Russia’s borders and into the territories of neighboring countries. The Soviet Union repeatedly resorted to transborder force against White Guard forces in order to prevent “acts of aggression.”177 In a 1921 note to the Romanian Foreign Minister, the Soviet Government wrote that:

In its desire to assist the Rumanian authorities to disperse the bands organized in Bessarabia and Rumania for the purposes of carrying out acts of aggression against the Soviet Republics, the allied Soviet Government consider it necessary that if such bands, when pursued by Soviet troops, should cross into territory occupied by the Rumanian authorities, they should be followed into this latter territory, the Rumanian authorities being informed

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177 Note from Chicherin and Rakovsky to the Rumanian Foreign Minister on Anti-Soviet Organizations in Rumania, Aug 13, 1921, *in 1 Soviet Documents on Foreign Policy* (Jane Degras, ed.) 253, 254 (1951).
in time so that the operations...shall not be interpreted as acts directed...against the Rumanian Government and people.\textsuperscript{178}

Thus the Soviet Government implied that recourse to force was necessitated because Romania itself was incapable of dispersing the White Guards on its territory. As with the earlier U.S. incursions into Mexico, the Soviet Union took pains to differentiate between the target non-state actor and the Romanian state and population and to emphasize that force was directed against the former and not the latter.

In 1921, the Red Army also attacked White Russian forces based in Outer Mongolia, which was under the nominal sovereignty of the post-Qing, Chinese Republic. The anti-Bolshevik forces had established themselves in Mongolia at a time when central authority in China was non-existent and local power was held by Chinese warlords.\textsuperscript{179} In a 1925 note to the Chinese Foreign Minister, the Soviet Government argued in tones reminiscent of the earlier diplomatic exchanges involving the United States, Britain and Mexico, that it had resorted to force after exhausting other remedies.

Repeated requests addressed to the Chinese Government for the liquidation of White Guard bands of Semenov, Ungern, and others freely operating and organizing on the territory of Mongolia, led to no positive result, as the Chinese Government was indifferent to these urgent appeals by the Soviet Government. In view of this in the interest of the safety of its frontiers the Soviet Government was constrained to conduct part of the Red Army into Mongolian territory and liquidate all the White Guard bands and organizations which, organized and supported by foreign imperialism, were preparing to invade the Soviet Republic once more from Mongolia. After the liquidation of the White Guard armies part of the Red Army remained in Mongolia in the interest

\textsuperscript{178} Id.
of the preservation of order and for the purpose of preventing the organization of White bands as a new menace to the safety of the USSR.\textsuperscript{180}

As with the United States and Britain, the Soviet Union was willing to resort force when its neighbors were unwilling or unable to control their own territories and defended such actions on the basis of self-defense.

\section*{B. 1945-2001}

Notwithstanding the reification of fictitious statehood during decolonization, the gap between ideal and reality of statehood persisted and states continued to resort to force against non-state actors. In emphasizing a state’s lack of control as a factor necessitating self-help, the post-Charter justifications for such uses of force echo many of the claims made in the pre-Charter era. These claims indicate that while the governments of defending states may have been willing to tolerate fictional statehood and negative sovereignty in general, when push came to shove they often justified defensive measure upon the lack of effective control.

These recourses to defensive force against violent non-state actors were often accepted as lawful, at least in principle, by many major powers. The acceptance or at least acquiescence of critical states to such measure reflects the survival of the customary right of self-defense against non-state actors in the post-Charter era. However, some governments, particularly those of the post-colonial world and their communist backers generally rejected any claim of self-defense against non-state actors, whether or not premised upon state ineffectiveness. Such

\textsuperscript{180} Note from Karakhan, Soviet Ambassador in Peking, to the Chinese Foreign Minister on the Withdrawal of Soviet Troops from Outer Mongolia, \textit{in} 2 Soviet Documents on Foreign Policy (Jane Degras, ed.) 17,17-18 (1952).
generalized disapproval was compounded by heighten international opprobrium in many of the specific cases in which self-defense was claimed. As a perennial target, a disproportionate number of claims regarding self-defense against non-state actors have been advanced by Israel. Israel, like South Africa and Rhodesia, was regarded by many members of the international community, especially post-colonial entities and their communist backers, as a pariah. As a result most claims of self-defense were rendered per se invalid.\textsuperscript{181} Given the perceived a priori illegitimacy of any Israeli military action, an incident based analysis of international reaction to Israel may overstate the rejection of the pre-Charter regime for the defensive use of force.

i. \textit{Israel}

Israel has repeatedly invoked the absence of positive sovereignty as a justification for the violation of host state’s negative sovereignty.\textsuperscript{182} In 1976 Israel staged a successful commando raid on Entebe, Uganda to rescue Israeli hostages held by Palestinian hijackers. In the aftermath of the assault, Israel wrote to the U.N. Secretary General justifying its use of force as the self-defense on behalf of its nationals.\textsuperscript{183} Israel argued that its incursion into Ugandan territory was lawful because Uganda “does not exercise sovereignty over its territory and

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{181}] Elimination of All Forms of Racial Discrimination, G.A. Res. 3379 (XXX), A/RES/3379 (Nov. 10, 1975) (stating “that the racist regime in occupied Palestine and the racist regime in Zimbabwe and South Africa have a common imperialist origin, forming a whole and having the same racist structure and being organically linked in their policy aimed at repression of the dignity and integrity of the human being.”)
\item[\textsuperscript{182}] The majority of Israeli recourses to force in self-defense against non-state actors fall outside the scope of this article. For a more complete study, see GREGOR WETTBERG, INTERNATIONAL LEGALITY OF SELF-DEFENSE AGAINST NON-STATE ACTORS 73-122, 164-165 (2007).
\item[\textsuperscript{183}] S/12123, Letter dated July 4, 1979 from the representative of Israel to the Secretary General.
\end{itemize}
\end{footnotesize}
was incapable of dealing with half a dozen terrorists.”

Thus Israel’s violation of Uganda’s sovereignty by right was justified because Uganda did not exercise sovereignty in fact and such state weakness posed a real and immediate threat to Israeli citizens. The reaction to Israel’s use of force was mixed, but ultimately efforts to condemn Israel in the U.N. Security Council failed and Uganda made no attempt to convene the General Assembly under the “Uniting for Peace” procedure.

In 1981 Israel launched airstrikes on PLO targets in Lebanon, which it justified by reference to its right to self-defense “a right also preserved under Article 51 of the Charter of the United Nations.” Israel drew attention to the “PLO domination over large parts of Lebanon and the anarchy it has created there” as well as the fact that the Lebanese state lacked “effective authority” over “large parts of its territory controlled by foreign elements.” Israel explicitly invoked both the Caroline incident and the Pershing’s expedition into Mexico as legal precedents for Israel’s defense use of force against the PLO. The absence of control necessitated Israel’s recourse to force. Israel’s justification of self-defense was not well received as Israel’s military measures

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185 THOMAS FRANCK, RECURSE TO FORCE 83-85 (2002).
187 Id. at 5.
188 Id. at 6.
were deemed to be both preemptive actions outside of the scope of Article 51 and because they were disproportionate in any case.\footnote{S.C.O.R. 36th Sess., 2293rd mtg. at 4, U.N. Doc. S/PV.2293 (July 21, 1981) (France criticizing Israel’s action as preemptive); Id. at 5 (the United Kingdom criticizing the scale of Israeli action); Id. at 7 (Egypt criticizing any action that “fails to be proportionate)}

Israel also cited the gap between positive and negative sovereignty when it justified its 1982 invasion of Lebanon. Israel first cited the necessity of defending itself against attacks by the Palestinian Liberation Organization (PLO).\footnote{S.C.O.R. 37th Sess., 2375th mtg., at 3, U.N. Doc. S/PV.2375 (June 6, 1982).} The invasion of Lebanese territory was a lawful defensive response because Lebanon had “lost much of its sovereignty over its own territory to the terrorist PLO.”\footnote{Id. at 5.}

Israel’s 1982 invasion was deemed unlawful. The U.N. Security Council unanimously adopted a resolution demanding that “Israel withdraw its forces forthwith.”\footnote{S.C. Res. 509, U.N. Doc. S/RES 509 (June 6, 1982).} The General Assembly, convened under the “Uniting for Peace” procedure expressed alarmed in a vote of 127 to 2 (with Israel and the United State opposed) at “Israel’s acts of aggression.”\footnote{G.A. Res. ES-7/5, U.N. Doc. A/ES-7/PV.24 (June 26, 1982).} The resolution also reaffirmed the fundamental principles of Lebanese “sovereignty, territorial integrity, unity and political independence.”\footnote{Id.} President Reagan deplored Israel’s actions as disproportionate, a sentiment shared by many leaders.\footnote{Memorandum of conversation between President Reagan and Prime Minister Begin (June 21, 1982); see also Bradley Graham, West Germans Speaking Out on Beirut Siege, WASH. POST. Aug. 15, 1982, at A23 (quoting German Chancellor Schmidt criticism of Israel’s indiscriminate attacks”); S.C.O.R. 37th Sess., 2377th mtg. at 1,2 U.N. Doc. S/PV.2377 (Spain criticizing the magnitude of Israel’s response); Id. at 4 (Ireland noting the lack of and “sense of proportion” in Israel’s military measures).}
The contrasting international reactions to the Entebbe incident and the 1982 invasion of Lebanon can in part be understood in terms of proportionality.\textsuperscript{197} Whereas Israel’s pinpoint and brief incursion into Uganda was tolerated and considered lawful by many key international actors because it was a proportionate defensive response, its full scale invasion of Lebanon was clearly a disproportionate response to the PLO’s cross-border raids. Israel invaded territory beyond that from which the PLO had launched its attacks. Israel resorted to force not only in the ungoverned territory of Lebanon’s south, but also in territory under the effective control of the Lebanese state. Thus Israel violated both Lebanon’s positive and negative sovereignty.

In 1988, Israel launched airstrikes against PLO targets in the Lebanese city of Sidon in response to rocket attacks by the PLO from southern Lebanon. Citing self-defense as the basis for its actions, Israel argued that Lebanon’s lack of effective control over its territory, Israel action was necessary. “[I]n the absence of a Lebanese Government capable of assuming its responsibilities, we have no option but to take necessary measures for our security.”\textsuperscript{198} Moreover Israel argued that its “ongoing measures for self-defence…are restrained, they are temporary, but they are necessary. A proposed Security Council resolution condemning was vetoed by the United States.”\textsuperscript{199}

Israel’s claim of necessity for its 1996 Operation Grapes of Wrath against Hezbollah targets in southern Lebanon was also premised upon the fecklessness

\textsuperscript{197} As well as the fact that Uganda’s then dictator, Idi Amin, was himself an international pariah.
\textsuperscript{198} U.N. SCOR 43\textsuperscript{rd} Sess., 2783\textsuperscript{rd} mtg., at 36 U.N. Doc. S/PV.2783 (Jan. 18, 1988).
\textsuperscript{199} U.N. SCOR 43\textsuperscript{rd} Sess., 2784\textsuperscript{th} mtg., at 49-50 U.N. Doc. S/PV.2784 (Jan. 18, 1988).
of the “so called sovereign Government of the State of Lebanon.” The Lebanese Government does not have the ability — or the will — to control Hezbollah activities. Therefore, Israel must defend the security of its north by all necessary measures… The Lebanese Government was told time and again: control the Hezbollah. If you are, as you claim, the sovereign Government of Lebanon, then this is your obligation.” Once again state weakness necessitated Israel’s recourse to force in self-defense.

Israel also highlighted the hypocrisy of sovereignty. “It was very strange to hear from the Prime Minister of Lebanon, just last night, ‘It is not within our ability to do this’. Please decide: either his is the sovereign Government, or it is not within its ability.” Israel’s actions were criticized by both Germany and Russia as being disproportionate. Egypt rejected Israel’s claim of self-defense and in doing so explicitly invoked the Caroline formulation. Israel, Egypt contended, had not exhausted other means of achieving its security objectives and its actions were therefore unnecessary. Moreover, Israel’s response to the threat was disproportionate.

ii. Russia-Afghanistan

In 1993, Russia claimed to be acting in self-defense with respect to non-state armed actors on Afghan territory. Russian and Tajik forces repulsed an incursion by “armed formations of Tajik opposition and Afghan Mujahadin”

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201 Id.
202 Id. at 9-10.
203 Id. at 14-15.
204 Id.
205 Id.
206 Id.
launched from Afghan territory into Tajikistan.\textsuperscript{207} Russia alleged that “responsibility for this act of banditry lies squarely with those extremist groups in Afghanistan”, but did not attribute the incursion to the Afghan state.\textsuperscript{208} Indeed the authorities in Kabul denied any involvement in the border incident.\textsuperscript{209} Russia and Tajikistan justified their subsequent artillery assault against targets within Afghan territory on the basis of the right of collective self-defense under Article 51 of the Charter.\textsuperscript{210} Russia concluded by noting that “the moment has come when the international community as a whole must adopt a responsible and realistic approach towards those forces which flagrantly violate the norms of international law.”\textsuperscript{211} Russia deemed its right to self-defense against non-state actors on Afghan territory to be valid independent of any responsibility of the Afghan state.

The response by major powers to these defensive actions was tepid. None of the U.N. political organs specifically objected to the joint Russian-Tajik military operations on Afghan territory. The Security Council called “for the cessation of all hostile actions on the Tajik-Afghan border,” but also reaffirmed the “necessity to respect the sovereignty and territorial integrity of Tajikistan.”\textsuperscript{212} The European Community merely issued a statement calling for “moderation” by

\begin{itemize}
\item \textsuperscript{207} Letter from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary General, U.N. Doc. S/261100 (July 15, 1993).
\item \textsuperscript{208} Id.
\item \textsuperscript{209} Id.
\item \textsuperscript{210} Letter from the Permanent Representative of Afghanistan to the United Nations Address to the Secretary General, U.N. Doc. S/26145 (July 22, 1993).
\item \textsuperscript{211} Id.
\item \textsuperscript{212} Note by the President of the Security Council, S/26341 (Aug. 23, 1993).
\end{itemize}
The general acquiescence of key states to the Russian-Tajik action contrasts sharply with the international response to the Soviet Union’s 1979 invasion of Afghanistan and suggests that the 1993 action was lawful both in principle and practice.

iii. Turkey-Iran-Iraq

The authorities in Baghdad have rarely, if ever, exercised effective control over the mountainous, Kurdish occupied territory of northern Iraq, notwithstanding their repeated, brutal military campaigns in the region. Armed Kurdish nationalist groups, in particular the Kurdish Workers Party (PKK) have exploited this absence of control to establish bases of operation from which to launch attacks into Turkey and Iran. Prior to the 1991 Gulf War, the government of Saddam Hussein tacitly admitted its lack of control over northern Iraq and the threat this posed to its neighbors, by creating of a six mile wide joint Iraqi-Turkish security zone straddling the border and consenting to repeated incursion by the Turkish military.

Following the Gulf War, Iraq withdrew its consent to external intervention and reasserted negative sovereignty. This claim sovereignty was particularly striking, given that Baghdad’s control over the region had become even weaker

215 Robert Olson, The Kurdish Question in the Aftermath of the Gulf War, 13 THIRD WORLD QUARTERLY 475, 477-478, 489 (1993); Loren Jenkins, Turkish Kurds Fight Unheralded; Ankara Soft-Pedals War but Recent Clashes Hint at Wider Scope, Wash. Post., Oct. 12, 1986, at A22 (referring to confirmation by “Turkish officials” that Turkish military action in Iraq was conducted with the “approval of the Iraqi government.”); Turkey Says Its Planes Raided Kurdish Guerilla Bases in Iraq, N.Y. Times, March 5, 1987, at A9 (referring to a 1984 agreement between Turkey and Iraq permitting hot pursuit of Turkish forces into Iraqi territory.)
following the establishment of the “no-fly” zone. Despite lack of consent by the authorities in Baghdad, Turkey and Iran continued to resorted to force against Kurdish targets in northern Iraq. Both state invoked the Baghdad government’s absence of control as a basis for its intervention in northern Iraq.

In 1995 Turkey launched Operation Steel its most comprehensive military assault upon PKK targets located in the “no-fly” zone of northern Iraq. Turkey argued that it had resorted to legitimate measures of self-defense intended to prevent “the use of [Iraqi] territory for the staging of terrorist acts against Turkey.”\(^{217}\) Turkey’s resort to force was necessary and hence lawful because Iraq had “not been able to exercise its authority over the northern part of its country since 1991.”\(^{218}\) Moreover, Turkey emphasized that its operations were “of limited time and scope”, that is proportional.\(^{219}\) Despite Iraq’s complaints of Turkish aggression to the Secretary-General and the Security Council, neither the General Assembly, nor the Security Council met to discuss the issue, much less to take action on it.\(^{220}\) The United States expressed understanding for Turkish measures in self-defense,\(^{221}\) though the United Kingdom and Germany questioned the proportionality of Turkish military actions and called for Turkey to “practice restraint.”\(^{222}\)

\(^{218}\) Id.
\(^{220}\) Franck, supra note 174 at 63; Christine Gray, International Law and the Use of Force 117 (2008).
\(^{221}\) U.S. Backs Turkish Troop Move, N.Y. Times, Sep. 8, 1996, at 14 (citing remarks by Secretary of State Warren Christopher.)
In 1996 Iran advanced a similar justification for its own attacks on Kurdish targets in northern Iraq. In fulfilling its Article 51 reporting requirement, Iran argued that its use of force on Iraqi soil was “[i]n response to these encroachments by terrorist armed groups and in accordance with its inherent right of self-defence enshrined in Article 51 of the Charter.”\(^{223}\) Iran noted the “Government of Iraq is not in a position to exercise effective control over its territory in the northern part of that country.”\(^{224}\) As a consequence “transborder armed attacks and sabotage operations by terrorist groups against Iranian border towns, originating from Iraqi territory, have been intensified and escalated.”\(^{225}\) The necessity for “immediate and proportional measures” arose from Iraq’s lack of control over its territory.\(^{226}\)

As with the Turkish incursions, the U.N. took no action against Iran for these actions despite Iraq’s protests.\(^ {227}\) The silence of the U.N. organs and other critical actors suggests a continued acceptance of transnational force against non-state actors.

**C. Post 9/11: Continuity and Formalization**

i. *United States-Afghanistan*

Al Qa’ida’s September 11, 2001 attacks upon the United States and the subsequent U.S. invasion of Afghanistan confirmed the post-Charter vitality of an internationally recognized right to self-defense against non-state actors. Although some have argued that the attacks and their aftermath represent an “international

\(^{223}\) *Id.*


\(^{225}\) *Id.*

\(^{226}\) *Id.*

constitutional moment”, with respect to the use of force against non-state actors, 9/11 merely marked a more explicit recognition of a right that had long been tacitly acknowledged.228

Whereas prior defensive action against non-state actors may have been occasionally acquiesced to by governments ex post, defensive action by the United States was legitimized ex ante. The U.N. Security Council immediately condemned the atrocities of 9/11 as “attacks” which represented a “threat to international peace and security” and recognized the “inherent right of individual or collective self-defence in accordance with the Charter.”229 Notably the threat to international peace and security was not attributed to any state, indicating that non-state actors were capable of wielding internationally significant force. Moreover, the resolution recognized a right to self-defense without reference to any state.230 Put bluntly, members of the U.N. were hard pressed to ignore the atrocities of 9/11 given their magnitude, drama and proximity to the U.N. Headquarters.

In reporting its subsequent military response to the Security Council, the United States invoked its “inherent right…to self-defense” against both

230 See Armed Activities on the Territory of the DRC (Dem. Rep. DRC v. Uganda), 2005 I.C.J. 116, 28 (Dec. 19) (separate opinion of Judge Koojiman (“I also observed that this interpretation no longer seems to be shared by the Security Council, since in resolutions 1368 (2001) and 1373 (2001) it recognizes the inherent right of individual or collective self-defence without making any reference to an armed attack by a State. In these resolutions the Council called acts of international terrorism, without any further qualification and without ascribing them to a particular State, a threat to international peace and security.”))
“organizations and states.” 231 Although the United States alleged that Al Qa’ida was supported by the “Taliban regime,” the United States did not claim that the Afghan state (if it even existed) was responsible for the 9/11 attacks. Instead the United States was taking action against the “Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan” but not against the Afghan state as such. 232 Faced with the lethal threat of Al Qa’ida, the fact or fiction of the Afghan state and its responsibility were simply irrelevant to the issue of self-defense. 233 Subsequent U.S. military action in Afghanistan met with near universal approval.

ii. Russia-Georgia

Invoking the 9/11 attacks, Russia argued before the Security Council in 2002 that the U.N. Charter must be applied in such a way as to accommodate the existence of ungoverned territories and transnational terrorists. 234 In the context of its ongoing campaign against Chechen separatist and allied Islamist fighters, Russia cited the threat posed by “[t]he continued existence in separate parts of the world of territorial enclaves outside the control of national governments, which, owing to the most diverse circumstances, are unable or unwilling to counteract the terrorist threat is one of the reasons that complicate efforts to combat terrorism.

232 Id.
234 It should be noted that over a year before the attacks of September 11, 2001, Russia warned the Taliban it was willing to take “preventative measures if necessary” if the Taliban did not cease sheltering and supporting Islamic rebels from Chechnya and the former Soviet Republics of Central Asia. See MICHAEL R. GORDON, N.Y. TIMES, May 25, 2000, at A7.
2010] Fictitious States, Effective Control, and the Use of Force 73

effectively.” Russia cited the Georgia’s Pankisi Gorge as one such ungoverned territory and argued that it could lawfully use force against non-state actors operating from this region. “If the Georgian leadership is unable to establish a security zone in the area of the Georgian-Russian border… and does not put an end to the bandit sorties and attacks on adjoining areas in the Russian Federation, we reserve the right to act in accordance with Article 51 of the Charter of the United Nations, which lays down every Member States inalienable right of individual or collective self defence.” Georgia’s fecklessness necessitated force by Russia.

The United States responded by condemning Russian incursions into Georgia. However, the United States position should be viewed as a rejection of Russia’s proffered justification as pretextual, rather than a rejection of the underlying legal claim. The United States acknowledged that the Georgian government’s lack effective control over the Pankisi Gorge had permitted the presence of “foreign militants and international terrorists” who represented a threat to regional security. Nonetheless, unilateral Russian action was not justified because Georgia was making (with U.S. military assistance) good faith efforts to “root out Chechen fighters and criminal and international terrorist

236 Id.
237 Contra Christine Gray, International Law and the Use of Force 231 (2008). Gray incorrectly claims that the United States claimed for itself the right of self-defense against non-state actors, but denied this right to the Russians. This is incorrect. As evident from subsequent statements by U.S. officials, the United States rejected the necessity for Russian military action and hence its lawfulness.
elements. These efforts signal Georgia's commitment to restoring Georgian authority in the Pankisi Gorge, and dealing seriously with international terrorists linked to al-Qa'ida.”239 In contrast to Georgia’s good faith efforts to “reassert control in the Pankisi Gorge” the United States suggested Russia acted in bad faith and that Russia’s intervention was prompted in part by “Russia's displeasure with Georgia's commitment to the East-West energy transportation corridor” and “the fact that some in Russia viscerally dislike [then Georgian President Eduard] Shevardnadze.”240 Russia’s prior pattern of conduct towards Georgia also undermined Russia’s legal claims. Such conduct included “Russia's periodic cutting off of Georgia's winter gas supply, Russia's stalling of negotiations on political settlement in the break-away Georgian region of Abkhazia, and its delaying of negotiations to meet CFE Istanbul commitments for the withdrawal of Russian military forces still on Georgian territory.”241 Thus, the United States and Russia appear to agree with respect to the legal principle, but disagree as to its application.

iii. Israel-Lebanon

The legal arguments in response to Israel’s 2006 invasion of southern Lebanon suggests further formal recognition of the security threat posed by state weakness and independent non-state actors. During July and August 2006, Israel engaged in a sustained aerial and ground assault upon targets in southern Lebanon in response to a transborder raid launched by Hezbollah. In complying with its Article 51 reporting requirement, Israel attributed responsibility for Hezbollah’s

239 Id.
240 Id.
241 Id.
raid to the Government of Lebanon. However, Lebanon’s responsibility arose not from any affirmative act on its part, but due to the “ineptitude and inaction of the Government of Lebanon has led to a situation in which it has not exercised jurisdiction over its own territory for many years.” Therefore “Israel thus reserves the right to act in accordance with Article 51 of the Charter of the United Nations and exercise its right of self-defence when an armed attack is launched against a Member of the United Nations.” The necessity for self-defense arose from Lebanon’s “ineptitude and inaction.”

In response Lebanon conceded that it lacked effective control over the territory in southern Lebanon in which Hezbollah was based, but argued that such lack control absolved it of responsibility. “The Lebanese Government was not aware of the events that occurred and are occurring on the international Lebanese border. The Lebanese Government is not responsible for these events and does not endorse them.” The Lebanese Government called upon the Security Council to take up the situation.

The resolution ultimately issued by the Security Council in response to the conflict in Lebanon is significant for several reasons. The resolution acknowledged Israel’s jus belli claim, implicitly accepting the basis for hostilities. The Security Council emphasized the “need to address urgently the causes that

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243 Id.
244 Id.
have given rise to the current crisis." Amongst these causes, was the weakness of the Lebanese state and the strength of Hezbollah. The Security Council therefore called for the “Government of Lebanon…to extend its authority over its territory, through its own legitimate armed forces, such that there will be no weapons without the consent of the Government of Lebanon and no authority other than that of the Government of Lebanon.” The Security Council emphasized the need for “the extension of the control of the Government of Lebanon over all Lebanese territory…[and] for it to exercise its full sovereignty, so that there will be no weapons without the consent of the Government of Lebanon and no authority other than that of the Government of Lebanon.” The resolution called for “the disarmament of all armed groups in Lebanon, so that …there will be no weapons or authority in Lebanon other than that of the Lebanese State.” Though the scope of Israel’s military action was deemed disproportionate, the crucial point is that most of the key actors involved (Israel, Lebanon and the Security Council) acknowledged the significant threat to

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247 Id.
248 Id.
249 Id.
security posed by state weakness and independent non-state actors such as Hezbollah who exploit the lacuna between positive and negative sovereignty.

iv. Colombia-Ecuador

As with the debate over Israel’s strikes against Hezbollah, the international reaction to Colombia’s raid upon targets in Ecuador signals at least a tacit acceptance by many major powers of transborder defensive action against independent non-state actors. Colombia’s resorted to force in the context of a once internal armed conflict that had spilled over the country’s borders as the government’s non-state adversaries sought refuge neighboring countries.251 As with the Soviet Union’s incursion into Mongolia and Britain’s raid into the United States, Colombia’s raid into Ecuador targeted insurgent forces exploiting the ungoverned territory of a neighbor to mount attacks into Colombia. On March 1, 2008 Colombian military forces responded by launching an aerial and ground assault upon a FARC base located on the Ecuadorian side of their mutual border. The assault resulted in the death of Raul Reyes, a FARC commander, among others.252

Colombia justified its incursion into Ecuadorian territory on the grounds that Ecuador “violated international norms which prohibit countries from harboring terrorists.”253 Colombian officials argued that the ‘‘the real issue is not that ‘Raul Reyes’ was in his pajamas and not in his military fatigues when he was

251 ANGEL RABASA, ET AL., UNGOVERNED TERRITORIES: UNDERSTANDING AND REDUCING TERRORISM RISKS 244 (2007)(describing the FARC’s refuges in border regions.)
252 PLAYING WITH FIRE: COLOMBIA, ECUADOR, AND VENEZUELA REPORT TO MEMBERS OF THE COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE ONE HUNDRED TENTH CONGRESS SECOND SESSION APRIL 28, 2008, at 5.
253 http://web.presidencia.gov.co/sp/2008/marzo/03/01032008.html
killed; the issue is that he felt comfortable enough in his Ecuadorean base to feel that he could sleep in his pajamas.”

Ecuadorian officials conceded that their state was incapable of exercising sufficient control over its border region to exclude the FARC. Subsequent information released by Colombia (and substantiated by Interpol) indicated that the FARC’s presence on Ecuadorian territory was not only the result of lack of state capacity, but of active collusion. A document captured during the military raid contained an offer by an Ecuadorian official “to transfer police and army commanders in the area who proved hostile to the FARC.” Despite outrage by Ecuador and its ally Venezuela and condemnation by the OAS, neither the Security Council nor the General Assembly took any action regarding the attack.

D. Summary of State Responses and International Reaction

In summary, the response (or lack thereof) to defensive actions against non-state actors reflect an acceptance if not endorsement of such measures. Interventions against non-state actors have been deemed lawful by many though not all of the major powers, when such transborder uses of force are proportional and necessary. It appears to be irrelevant whether a host state is unwilling or unable to exclude violent transnational actors. Rather than lowering the bar for state attribution to negligence or strict liability standards (e.g. responsibility for

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254 PLAYING WITH FIRE: COLOMBIA, ECUADOR, AND VENEZUELA REPORT TO MEMBERS OF THE COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE ONE HUNDRED TENTH CONGRESS SECOND SESSION APRIL 28, 2008, at 5.
255 Id. at 8.
257 The ICJ has recognized that necessity and proportionality are customary limitations upon the use of defensive force. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J 14, ¶ 194 (June 27).
harboring), many states recognize a right to self-defense vis-à-vis non-state actors irrespective of state responsibility.

The hostility of many states during decolonization to such defensive uses of force, particularly by the post-colonial entities and Communist states supporting non-state actors in the context of “wars of national liberations,” has waned as both these post-colonial entities and Russia have themselves become the targets of independent armed groups acting across international borders. This shift in the perceived security interest of post-colonial entities has occasioned a changed understanding of the use of force, as illustrated by Uganda’s arguments in the Armed Activities Case.

IV. OPERATIONALIZING CUSTOMARY PRINCIPLES

A narrow, state-centric interpretation of the law of self-defense fails as a matter of policy and law. A state-centric regime does not strike the proper balance between providing for legitimate security threats and restricting pretextual, bad faith uses of force.

Nor is it international law. In practice many governments recognize power and threats as they actually exist. As demonstrated in Part III, for centuries governments have been confronted by the security threat posed by non-state actors exploiting the lacuna between the positive and negative sovereignty. In order to respond to the threat posed by the gap between the ideal and reality of

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258 W. Michael Reisman, Private Armies in a Global War System, in LAW AND CIVIL WAR IN THE MODERN WORLD (John Norton Moore, ed.) (1974), 252, 258 (discussing the embrace by Communist powers and Third World states of “private armies” as instruments of policy in wars of national liberation.)
statehood, states long ago developed principles of regulating the transborder
defensive use of force against non-state actors. The set of principles that emerged
from the Caroline and similar incidents, namely necessity and proportionality,
strike the proper balance between responding to legitimate security threats and
restraining illegitimate and excessive force.\textsuperscript{259} State practice and \textit{opinio juris}
demonstrate that the right of self-defense exists against non-state actors in
customary law irrespective of state involvement.

In what follows, I show how the principles derived from these historic
incidents should regulate future uses of force against non-state actors. This
framework draws upon the traditional customary principles of necessity and
proportionality to vindicate the central policy aim of minimizing violence and
promoting stability.

The key parameters of this framework are:

1) The (ir)relevance of consent
2) Establishing necessity
3) The geographic restrictions upon resort to force against a non-state actor
4) Differentiation between state and non-state actors
5) The temporal scope of recourse to force against non-state actors

A. Consent: Desirable, Not Dispositive

As a matter of policy, the consent of a host state may be desirable prior to
the recourse to force against a non-state actor on its territory. As a matter of law,
such consent is not dispositive as to whether a state may resort to defensive force.
Despite suggestions in \textit{Armed Activities} to the contrary, the right of self-defense
against a non-state actor is not contingent upon host state consent.

\textsuperscript{259} See Kooijman, \textit{supra} note XX, at XX
i. Policy

From a policy perspective, the consent of the host state to defensive measures against non-state actors on its territory is desirable. The United States targeted killing program in Pakistan illustrates the benefits of such consensual intervention. First, the host state may provide logistical and intelligence support for defensive action. For example, Pakistan allows the United States to dispatch UAVs from its Shamsi airbase in Baluchistan against targets in the Federally Administered Tribal Areas. Pakistan also provides the CIA with human intelligence that drives at least some of the targeting by these UAVs.

Second, consensual intervention avoids the possible escalation of a conflict between the defending state and the non-state actor into an international armed conflict between the defending state and the host state.

260 Although Pakistan has not publicly consented to United States use of force on its territory, there is compelling evidence that lethal operations are undertaken on Pakistani territory with consent from the highest levels of the Pakistani government. In the fall of 2008, the New York Times reported that an Obama administration official said that “no tacit agreement had been reached to allow increased drone strikes [in Pakistan] in exchange for a backing off from additional American ground raids” referring to a September 3, 2009, raid by United States Special Operations personnel into Pakistan. Mark Mazzetti & Eric Schmitt, U.S. Takes to Air to Hit Militants Inside Pakistan, N.Y. TIMES, Oct. 27, 2008, available at http://www.nytimes.com/2008/10/27/washington/27intel.html. According to the story, “Pakistani officials have made clear in public statements that they regard the drone attacks as a less objectionable violation of Pakistani sovereignty.” Id. Subsequent media reports claim that many of the American drone strikes originate from a base in Pakistan and that their increased frequency is the result of a March 2009 deal between the United States and Pakistan, which provides Pakistanis greater control of the targets. James Kitfield, Wanted: Dead, NAT’L J., Jan. 9, 2010, at 6. According to Kitfield, “[f]or domestic political consumption, Pakistan’s leaders promote the image of CIA agents flying drones from its American headquarters, but the program clearly involves a high degree of involvement by Americans inside Pakistan, and by the Pakistani government.” Id.


262 Kitfield, supra note XX.
As desirable as consent may be, the consent of the host state may not always be forthcoming. Once again, the example of Pakistan is illustrative. The interests of the United States and the authorities in Islamabad are not congruent for at least two reasons. Consequently, the scope of Pakistan’s consent is restrictive.

First, the domestic legitimacy of the regime in Islamabad is undermined by foreign military intervention on Pakistani territory. The most obvious consequence of this legitimacy concern is the failure of Islamabad to officially acknowledge that UAV strikes are conducted with its consent. Instead, Pakistani authorities continue to issue increasing implausible denials and pro forma protests over violations of Pakistani “sovereignty.” Pakistani concern over domestic legitimacy limits the scope of U.S. action, by restricting UAV strikes to “boxes” which include the Tribal Areas but exclude cities such as Quetta, Mullah Omar’s base in Pakistan. Concerns over plausible deniability also appear to underlie Pakistan’s refusal to allow actions by U.S. Special Operations forces against Al Qaeda fighters on its territory.

Second, because Pakistan’s strategic interests diverge from those of the United States, Pakistan views as assets some of the same non-state actors that

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United States considers threats. For example, Pakistan views both the Quetta Shura and the Haqqani Network as assets for achieving strategic depth in Afghanistan vis-à-vis its archrival India, notwithstanding their ties to al Qaeda and continued attacks upon American and Afghan forces.\textsuperscript{266} For this reason, Pakistani cooperation with U.S. efforts against these groups is less than complete.

\textbf{ii. Law}

As a matter of international law, the consent of the Pakistani government is not dispositive. The United States may resort to force against al Qaeda and associated non-state actors on Pakistani territory whether or not Pakistan consents.

Two of the incidents analyzed in Part III illustrate that under customary international law, states enjoy a right of self-defense vis-à-vis non-state actors irrespective of the consent of the host state. Both the United States’ 1916 expedition into Mexico against Pancho Villa and Turkey’s 1995 intervention against Kurdish militias in northern Iraq were initially premised upon the consent of the host state. However when the host states withdrew their consent, both the United States and Turkey continued to take defensive measures against the non-state actors.\textsuperscript{267}

The lawfulness of Turkey’s defensive measures in Iraq is particularly clear. Despite Iraq’s protests, international reaction ranged from understanding to muted concern over proportionality.


\textsuperscript{267} Supra note XX
In the context of the United States’ use of force in Pakistan, the lawfulness of UAV strikes, Special Operations missions, or other measures against al Qa’ida or associated groups is not contingent upon the existence or scope of the consent of the Pakistani government. The United States may lawfully resort to force against non-state actors in Pakistan—or Yemen or Somalia—on the independent basis of self-defense.

B. Establishing Necessity

Having established that consent is not required for lawful self-defense, the next question becomes what is required for lawful self-defense. The threshold inquiry regarding the unilateral use of force against a non-state actor is one of necessity. Such force is lawful only when it is necessary, leaving “no choice of means.” Necessity exists when alternative means of neutralizing a security threat are inadequate.

The necessity of self-defense turns on the reality of the threat posed by independent non-state actors, as well as the ability and willingness of their host states to take action against them. The ability of a host state to abate the threat posed by non-state actors on its territory hinges upon effective control. In a fictitious state, where the central authorities have relinquished or simply failed to consolidate their monopoly upon violence, recourse to transborder force may be the only means of abetting the threat. As the British authorities observed in the *Caroline* incident, recourse to feckless or indifferent authorities in such circumstances would be futile.

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268 Jennings, supra note XX.
Thus when the territorial state hosting a violent non-state actor is willing and able to adequately address the threat, the unilateral use of force will be unnecessary and hence unlawful. The availability of alternative means such as diplomatic entreaty or extradition would thus render self-defense unlawful. The willingness and ability of central authorities to close the gap between positive and negative sovereignty establishes where recourse to force is lawful. If the host state is unable to address the threat, as with Al Qa’ida in the FATA, or unwilling, as with Osama Bin Laden in Abottabad, the use of defensive force is necessary and hence lawful.\footnote{See Ashley S. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extra-Territorial Self-Defense, 52 Va. J. Int’l L. (forthcoming 2012).}

The burden is upon the intervening state to establish that alternative remedies such as diplomatic entreaties and law enforcement measures were insufficient to abate the threat posed by non-state actors on the territory of another state thus. Absent such a showing, the unilateral recourse to transborder force is presumptively unlawful.

A few examples illustrate. The Russian incursions into Georgia’s Pankisi Gorge in 2002 were unnecessary and hence unlawful. As described above, the United States military was at the time assisting Georgian authorities in abating the very Chechen threat which Moscow claimed to reacting to. Notwithstanding Russian protests, Georgia had shown itself willing and able to confront actors based on its own poorly controlled territory.

In contrast, necessity exists when entreaties to the authorities of the host state would be counterproductive to the abatement of the security threat. In the
case of Colombia’s raid against Raul Reyes’s camp in Ecuador, Colombia presented evidence of collusion between Ecuadorian authorities and the FARC. In light of these contacts, requests to the Ecuadorian authorities would only have resulted in advance warning to the FARC.

C. The Geographic Scope of the Use of Force against a Non-State Actor

Necessity not only establishes when a defending state may resort to force against a non-state actor but also where it may act. Put differently it is necessity that defines the legal limits of the battlefield in a non-international armed conflict. Establishing the boundaries of this battlefield is especially crucial in conflicts involving diffuse and loosely organized entities such as Al Qa’ida or highly mobile actors such as Lord’s Resistance Army which operate in the ungoverned territories of multiple countries. As illustrated by the controversy over the “Global War on Terror” and especially the United States ongoing program of targeted killings of via missile strikes from unmanned aerial vehicles, such boundaries are needed.270

Armed conflict is not football. Both with respect to fact and law, the boundaries of the playing field are not permanently fixed prior to the onset of action. Contrary, to the assertion of the U.N.’s Special Rapporteur on Extrajudicial Killings the boundaries on an armed conflict are not determined by the law of armed conflict or the prior occurrence of hostilities in a given region.271

Instead of conflict being confined and defined by some metaphysical battlefield, the boundaries of where a state may resort to force are defined by long-standing principles of *jus ad bellum* and the location of hostilities.

What defines the lawful geographic region of conflict is the principle of necessity. The *region of conflict* is that area where a state may lawfully resort to force against a state or non-state actors. Only in the region of conflict may a state lawfully violate the sovereignty of other states.\(^{272}\)

Defining the region of conflict on the basis of necessity comports with the traditional rules regulating the belligerency or neutrality of states during interstate conflict. During interstate armed conflict neutral states enjoy a right of territorial inviolability vis-à-vis belligerent states.\(^{273}\) However, respect by the belligerents of the neutral’s negative sovereignty is contingent upon the fulfillment of corresponding duties. Neutral states must not allow the movement of belligerent troops or military materiel across its territory.\(^{274}\) Should belligerent troops enter the territory of a neutral state, that state is required to intern them.\(^{275}\) Neutral states are also under an obligation to prevent the formation or recruiting of belligerent military units upon its territory.\(^{276}\)

The logic of these well-established rules of interstate conflict applies equally to conflicts involving non-state actors. The lawfulness of a belligerent

\(^{272}\) *See* L. Oppenheim, *International Law*, Vol. 2 *War and Neutrality* 92-93 (Ronald F. Roxburgh, ed. 1921) (deriving from Article 39 of the Hague Regulations and Article 11 of the Hague Convention (V) the concept of theater of war as “that part of the territory or the open sea, on which hostilities actually take place” in contradistinction to “region of war” where hostilities may lawfully be undertaken.  

\(^{273}\) *Hague Convention (V)* Respecting the Rights and Duties of Neutral Powers and Persons during War on Land, art. 1. Oct 18, 1907.  

\(^{274}\) *Id.* arts 2, 5.  

\(^{275}\) *Id.* art. 10. *See also* 2 Royal Institute of International Affairs 1013, 1024.  

\(^{276}\) *Id.* arts. 4,5.
state’s violation of a neutral’s territory hinges upon the reality of the threat and whether the neutral has or will take adequate measures to abate this threat. When a neutral state fails due to incompetence or connivance to incapacitate a violent non-state actor on its territory, it jeopardizes its negative sovereignty. The neutral state’s territory may become part of the lawful region of the conflict.

Applying this rule to the United States current conflict with Al Qa’ida imposes limits upon the scope of the “Global War on Terror.” With respect to the United States’ targeted killing program, killings are lawful on the territory of a host state where the central authorities are on notice and have failed to “disarm and intern” Al Qa’ida fighters. Therefore in Pakistan’s Federally Administered Tribal Areas, Somalia or the Yemeni hinterland, the use of force in violation of the host state’s negative sovereignty would be lawful. In contrast a missile strike from a UAV against an Al Qa’ida member on the streets of London (even with zero collateral casualties) would be unlawful because such action would be an unnecessary violation of the United Kingdom’s negative sovereignty. The Tribal Areas are within the region of conflict, but London is not.

277 See AL QAEDA IN YEMEN AND SOMALIA: A TICKING TIME BOMB, A REPORT TO THE COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE 3,8 Jan. 21, 2010 (“Both Yemen and Somalia have weak central governments that exercise little or no control over vast swaths of their own territory and forbidding, harsh terrains that would make it virtually impossible for U.S. forces to operate freely. They have abundant weapons and experience using them on the battlefield…As Al Qaeda members continue to resist U.S. and Pakistani forces along the Afghanistan-Pakistan border, some of their comrades appear to be moving to Yemen and Somalia, where the political climate allows them to seek safe haven, recruit new members, and train for future operations… There are parallels between Pakistan and Yemen, according to U.S. counter-terrorism officials, military leaders, and policymakers. Both have become havens for significant numbers of Al Qaeda fighters formerly active in Afghanistan. Both have weak central governments that have difficulty controlling vast swaths of their own territory and populations that are often hostile to the United States.”)
In summary, necessity defines the outer boundaries of the region of conflict. If a defending state can abate a non-state threat in a given area by means other than unilateral force, then that area lies outside the region of conflict. Thus necessity establishes the legal limit of the war on terror.

D. Differentiation vs. Attenuated State Responsibility

The principles of necessity and proportionality dictate not only if and where a state may resort to force against non-state actors, but also how. These principles favor differentiating between non-state actors and the personnel and infrastructure of their host states. Necessity and proportionality militate against premising the defensive use of force premised upon an expanded scope of state responsibility for the acts of private armed groups.278 Such expanded responsibility takes the form of negligence279 or even strict liability.280 Self-defense premised upon expanded state responsibility is a function of a state-centric view that fails to account for the reality of how power and control actually exist. While a fictitious state may be wrongful and breach an international duty for which it is liable for restitution, as a matter of law and policy a distinction should be drawn being wrongful and dangerous conduct.

When a truly independent non-state actor poses a threat, then the necessity of the use of force relates solely to the non-state actor. Targeting the infrastructure or personnel of the territorial host state is unlawful because it would

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279 See National Security Strategy of the United States 2002, 5. (“We make no distinction between terrorists and those who knowingly harbor or provide aid to them.”)
ordinarily be unnecessary. Moreover, such targeting would also ordinarily be disproportionate.

Therefore the failure to differentiate between the state and the non-state actor will usually render unilateral defensive action unlawful. For example, in its 2006 military campaign in Lebanon, Israel failed to differentiate between its putative non-state adversary, Hezbollah, and the Lebanese state, as evidenced by the Israeli destruction of the Beirut airport and extensive civilian casualties.\(^{281}\)

The use of force unrelated to the security threat posed by Hezbollah and disproportionate to this threat rendered the Israeli invasion unlawful as a matter of *jus ad bellum*.\(^{282}\)

There should be a strong presumption that necessity and proportionality necessitate differentiation between state and non-state personnel and infrastructure and that the occupation of territory is presumptively unlawful. Nonetheless abating some persistent security threats may necessitate expansive intervention and territorial occupation. Where violent non-state actors represent a chronic threat a fundamental reordering of local conditions may be necessary in order to deny these groups sanctuary. Such interventions could take the form of a temporary protectorate, of the sort proposed by President Buchanan for lawless

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\(^{282}\) Qatar characterized Israel’s use of force as beyond its stated objective, given the civilian nature of the Israeli targets. UN Doc S/PV.5493 (2006) 14. Lebanon clearly rejected Israel’s contention to be acting primarily against non-State terrorist targets. It has been very clear from the beginning that it was not Hezbollah that was the target. It was Lebanon that was the target. Infrastructure was targeted and hundreds of civilians were killed before Israel even took up any campaign against Hezbollah and its positions. S/PV5498 (2006) 6. The Secretary General also characterized Israel’s use of force as collective punishment of the Lebanese people, S/PV.5492 (2006) 3. Argentina qualified Israel’s use of force as collective punishment. S/PV.5489(2006) 9.
northern Mexico or by the Soviet Government for ungoverned northern Mongolia. In extreme cases, changing the regime in the capital of the fictitious state may be necessary to prevent the return of the threatening non-state actor. Thus, the installation of the Northern Alliance in Kabul after 9/11 was necessary in order to establish a local ally willing to suppress the persistent threat posed by Al Qa’ida on the territory of Afghanistan. The dictates of necessity and proportionality are highly fact specific and “can ultimately be subjected only to that most comprehensive and fundamental test of law, reasonableness in a particular context.”

Differentiation based on necessity and proportionality, in contrast to attenuated state responsibility, also serves to promote global stability more generally. Although it is not the default form of political organization, the effective state is still the best entity to provide basic public goods especially domestic security. Whereas the gap between the ideal and reality of statehood may occasionally imperil the neighbors of fictitious states through spillover, state weakness poses a much greater and continuing threat to the inhabitants of the fictitious state’s territory. This reality is illustrated by the situation in the DRC, where millions Congolese civilians have died in the violence and disruption resulting from their state’s weakness. By differentiating between whatever weak, inchoate, or embryonic state may exist within a territory and the threatening non-state actor, responding states can preserve incipient order within a territory. The failure to distinguish, but instead to enforce what Professor Reisman dubs the

“private-army rule” through the strict attribution of the military actions to the territorial state followed by retributive measures undermines domestic and international public order.\textsuperscript{284} By differentiating between the infrastructure and personal of the nominal state and the non-state actor incipient order is preserved while real security threats are addressed. Such differentiation would precede the distinction between lawful and unlawful targets undertaken in accord with principles of \textit{jus in bello}.

Underlying differentiation is an analytical distinction between \textit{wrongful} conduct and \textit{dangerousness}. Although a fictitious state may act wrongfully and breach a duty under international law by failing to suppress independent armed forces based on its territory, it is not the state itself which poses the threat. Prior to the U.N. Charter, a victim state might resort to war to redress wrongs it had suffered as a consequence of the fictitious state’s breach.\textsuperscript{285} Yet, such retributive war was distinct from self-defense which focused exclusively upon the threat posed by the non-state actor. This distinction is seen clearly in the 19\textsuperscript{th} century diplomatic correspondence of the United States. As Secretary of State Forsyth observed, American military intervention against marauders in Mexico, “[r]ests upon principles of the law of nations, entirely distinct from those on which war is justified- upon the immutable principles of self-defense- upon the principles which justify decisive measures of precaution to prevent irreparable evil to our

\textsuperscript{284} Reisman, \textit{supra} note 50, at 259 (“If the private –army rule of international law were strictly applied and reprisals were undertaken, these nominal states might crumble.”)

\textsuperscript{285} Oppenheim, \textit{supra} note 48, at 67 (stressing recourse to war to vindicate rights. “A State may be driven into war because it cannot otherwise get reparations for an international delinquency, and may then maintain that it exercised by war nothing else than legally recognized self-help.); Ian Brownlie, \textit{International Law and the Use of Force by States}, (1963) 20-22 (describing war as a “means of obtaining redress in the absence of a system of international justice and sanctions.”)
own or to neighboring people.”

Forsyth argued that such “decisive measures of precaution” targeted solely against the marauders was to be preferred over war against Mexico premised upon Mexico’s irresponsibility.

The great contribution of the U.N. Charter regime to world public order was the proscription of *casus belli* other than self-defense. As a matter of both treaty and customary international law, any recourse to force apart from self-defense is now unlawful. Recourses to force premised upon attenuated state responsibility are responses to wrongful conduct and not necessarily an imminent threat. The use of force premised upon the breach of an international duty, rather than in response to a direct threat erodes the restriction of *jus ad bellum* to self-defense.

**E. Temporal Scope: Armed Attack as Evidentiary Standard**

The principle of necessity should also inform the much debated “armed attack” requirement of Article 51. The armed attack requirement (if it exists) has particular significance with respect to violent non-state actors, such as Al Qa’ida, who are not susceptible to the traditional logic of deterrence. Precisely what uses of force constitute an “armed attack” and whether or not such an attack is the

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286 *Id.* at 420.
287 *Id.* at 420-421; see also Oppenheim, *supra* note 48, at 67 (stressing recourse to war to vindicate rights. “A State may be driven into war because it cannot otherwise get reparations for an international delinquency, and may then maintain that it exercised by war nothing else than legally recognized self-help.”)
288 Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J 14 (June 27) ¶¶187-191. (The United States represented to the Court that Article 2(4) had the status of “universal norm”, a “universal international law”, a “universally recognized principle of international law.”)
289 Some groups, such as Hezbollah which function as unrecognized *de facto* states may be more amenable to the territorial logic of deterrence. See Nadim Ladiki, *Hezbollah Gives Israel More Clues in Strategy*, Reuters, Nov. 5, 2007, available at [http://www.reuters.com/article/idUSL05623345](http://www.reuters.com/article/idUSL05623345) (noting that Hezbollah leader Hassan Nasrallah “said shortly after the [2006] war that he would not have ordered the attack had he known the Israeli retaliation would be so fierce.”)
sine quo non of self-defense are hotly contested with respect to a number of issues including whether the right to self-defense applies against independent non-state actors and whether actions variously termed preventative, precautionary, preemptive, anticipatory, or interceptive self-defense are lawful. However, because wrongfulness is no longer a causus belli, an armed attack should be read not to represent a requirement of prior trespass, but rather as an evidentiary standard for the reality of the threat to which a defending state is responding.

In order to harmonize Article 51 with customary law, the provision should be interpreted in light of the motivating purpose of the U.N. Charter, in such a way as to reconcile it with the prior and subsequent customary law of self-defense, and in a manner which continues to both restrain the use of force while allowing for legitimate security measures. Read in this fashion, the armed attack requirement of Article 51 should be considered a means of providing an objective basis for the determining the validity of a claim of self-defense.

Prior attack, as illustrated by 19th incidents, merely serves an evidentiary purpose. As noted in 1838 by the legal officers of the British Foreign Office with respect to the Caroline incident, the defensive use of force in response to an attack is justified not by the attacks wrongfulness, but by the threat it evinces. Such a response is “necessary as a measure of precaution for the future and not as

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a measure of retaliation for the past. What has been done previously is only important as affording irresistible evidence of what would occur afterwards.”

By focusing upon the necessity of defense against future attacks, rather than the wrongfulness of prior injury it is possible to suggest a general standard which fulfills the evidentiary function of an armed attack. An objective reasonableness standard premised upon propensity and capability is the most promising substitute that balances the dangers of false positives and false negatives. Such a standard provides for good faith security measures while restricting pretextual intervention. The workability of such a standard with respect to either state or non-state actors is completely contingent upon the quality of intelligence regarding the intentions and capabilities of violent actors, a fact painfully illustrated by the 2003 invasion of Iraq.

CONCLUSION

This Article has described the reality of fictitious statehood, the persistent security threat posed by non-state actors exploiting this fiction, and the forceful response of states to this threat. I have attempted to illustrate the continued relevance and utility of the pre-Charter principles governing the use of force against non-state actors and show how these principles should structure future defensive measures.

293 But see, IAN BROWNlie, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES at 275-80 (arguing Article 51 to require prior trespass).
Although this Article has focused on one aspect of fictitious statehood, the problem posed by the gap between the theory and practice of statehood is of course much broader. Feckless polities fail to provide not only international public goods, but also domestic public goods. Most of the instability and violence resulting from fictitious statehood is internal and does not implicate the right to transborder self-defense.\textsuperscript{295}

The problem of persistent fictitious states is a “nomogenic pathology” which results from intentional legal arrangements.\textsuperscript{296} The problem stems from the commitment of governments to a set of norms and principles such as self-determination, non-aggression, uti-posse desetis, and anti-secession which seek to accommodate both concerns regarding human equality and dignity as well as pragmatic considerations for the maintenance of minimum public order. The post-colonial bloodshed and instability of the Third World should make one pause and consider whether the right balance has been struck. The constitutional leveling and universalization of sovereign statehood combined with the prescription of unilateral succession and territorial conquest has frozen the map in such a way that the gap between the theory and practice of power will persist. Unfortunately, geographic stability is not political stability.

\textsuperscript{295} Holsti, \textit{supra} note 64, at 21, 24, Table 2.3 (noting that between 1945 and 1995, seventy-seven percent of conflicts have been internal and that most of these have occurred in Africa).