COMMENTARY

"IF I HAD A ROCKET LAUNCHER": SELF-DEFENSE AND FOREVER WAR IN INTERNATIONAL LAW

Ian Hurd[*]

Here comes the helicopter, second time today.
Everybody scatters and hopes it goes away.
How many kids they've murdered only God can say.
If I had a rocket launcher . . . I'd make somebody pay.

– Bruce Cockburn[1]

ABSTRACT

The ban on war in the U.N. Charter has, under pressure from state practice, developed into an authorization for "forever war." Since 1945 international war has been regulated to the effect that governments may use force only as needed in self-defense. The rule is almost universally accepted even though the content of "self-defense" remains contested. It is widely hailed as limiting the recourse to war and contributing to a more stable, progressive, and peaceful world. Over the years state practice has produced an operative understanding of the rule's content that is more expansive than the black-letter of the Charter indicates. The rule has grown more permissive across both time and space, pushed by strong states' interests to use force against perceived threats in the name

* Ian Hurd, http://www.ianhurd.com [https://perma.cc/6AXZ-Y7RM] (last visited Mar. 19, 2019) (Ian Hurd is Professor of Political Science and the Director of the International Studies program at Northwestern University. His research and teaching are on international law and politics in theory and in practice, and political science research methods).

1. BRUCE COCKBURN, *If I Had a Rocket Launcher*, *on* STEALING FIRE (Golden Mountain Music Corp. 1984).

of national security. This Commentary charts the shift in self-defense law from armed attack to national security and connects it to the rise of "forever war"—i.e., geographically dispersed, low-intensity military operations aimed at individuals and non-state groups. New legal understandings of war, battlefield, and victory have evolved to match.

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I. INTRODUCTION

In 1983, as Bruce Cockburn sat on a Mexican hilltop watching incoming aircraft attack people who had fled from Guatemala, he was experiencing international law on self-defense in full force. The helicopters were sent by the United States to bolster the Guatemalan government—to assist in its self-defense—by making life impossible for anyone who might oppose it. This was continuous with the U.S. strategy in Central America at the time to defend some governments (El Salvador, Honduras) and undermine others (Nicaragua) while justifying both under the rules of self-defense in international law.[2]

The song that Cockburn wrote about this scene evokes both the practical effects and the conceptual dilemmas of self-defense: by authorizing the use of force in response to unauthorized uses of force, self-defense is an endorsement of war in the pursuit of outlawing war. The political effects of the concept depend on whose

2. *See* Counter-Memorial of the United States of America (Questions of Jurisdiction and Admissibility), Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. Pleadings 1, ¶ 202, 61 n.1 (Aug. 17, 1984) (describing the assistance the United States provided to El Salvador and Honduras to defend against Nicaragua). For a more general statement on the self-defense justification, see President Ronald Reagan, Address Before a Joint Session of the Congress on the State of the Union (Feb. 6, 1985), https://www.presidency.ucsb.edu/documents/address-before-joint-session-the-congress-the-state-the-union-5 [https://perma.cc/5HW4-HCTH]. In his address, President Reagan asserted, "Support for freedom fighters is self-defense and totally consistent with the OAS and U.N. Charters." *Id.*

interests are eligible for defense. As the gatekeeper to legitimate war in international law, its interpretation and application are consequential both for governments seeking to use force and for populations forced to endure it. Cockburn's song reverses the traditional state-centric perspective by instead centering the story on the people on the ground. This leads him to suggest taking up arms in defense of the people being attacked: "If I had a rocket launcher . . . I would retaliate."

Cockburn's song hints at key questions about self-defense in international law which I explore in this Commentary. What are the boundaries that delimit self-defense? How do these rules shape U.S. foreign policy? And what effects does it have on the lives of people? I address these issues in sequence to set out how the formal rules of self-defense are defined, have changed, and have shaped world politics. This Commentary adds to the wave of scholarship that is interested in the lived-experience of international law, which interacts with people's interests, needs, and choices in the real world to produce circumstances that shape their welfare.

I begin by setting aside two kinds of contestation to focus on a third. First, it is to be expected that every legal text is open to different interpretations, and therefore all treaties have some margin for reinterpretation. Second, it is to be expected that self-interested parties will search for the most favorable interpretation within that margin—and indeed outside of it as well—to avoid being seen as breaking the rule. These are frequently noted patterns in international law that are accentuated by the absence of an international judicial system with automatic jurisdiction, but neither of these is my focus in this Commentary.

Instead, I examine how the content of the rule has changed over time in light of how it has been used by governments. The rule has evolved under the influence of state practice, and its change has made the rule more permissive of the use of force. Self-defense as a legal category has tracked with the changing interests of the strongest states such that it remains a consistently useful resource, as they seek to legitimize the use of force against perceived foreign enemies—even as it has come directly to contradict its black-letter origins.

I argue that the slow erosion of material and temporal limits on self-defense has turned self-defense law into a legal foundation for the "forever war" that has come to characterize the U.S. military in the past decade.[3] As its terms have expanded, it has grown

3. *See* HAROLD HONGJU KOH, THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW 91 (2019).

ever more permissive and consequently ever more useful to strong states. In conclusion, I note the irony that rules that were once understood to radically restrict the use of force instead radically expand it. The rules' ability to do both at once suggest a new paradigm for conceiving of international law in the political context.

II. SELF-DEFENSE

The twentieth century saw a dramatic spread of international law, both its ideas and its implementation, and many writers have noted how thoroughly the global legal system has infused modern life. Krisch and Kingsbury cite the spread of global rules across social and economic issues, from "government procurement, international investment, supervision of commercial banks, markets for forest products, urban water services, and export garment industries . . . ."[4] Hathaway and Shapiro say that "[n]early everything you buy today costs less thanks to the increase in free trade enabled by the [General Agreement on Tariffs and Trade] and . . . the WTO."[5] Block-Lieb and Halliday write of "the vast complexity and dynamism of multilayered social spaces in international lawmaking and global governance,"[6] and Crawford and Koskenniemi call international law "a ubiquitous presence in global policy-making . . . ."[7] Hans Kelsen took the growing scope of international legalization to its logical limit: "There is no subject matter that remains exclusively the competence of the State and unable to be regulated by a general or particular norm of international law."[8]

The legalization of war[9] is a striking example of the spread of

4. Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1, 2 (2006).

5. OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD 378 (2017).

6. SUSAN BLOCK-LIEB & TERENCE C. HALLIDAY, GLOBAL LAWMAKERS 32 (2017) (citation omitted).

7. James Crawford & Martti Koskenniemi, *Introduction* to THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 1, 1 (James Crawford & Martti Koskenniemi eds., 2012).

8. ROBERT KOLB, THEORY OF INTERNATIONAL LAW 45 (2016) (translating Hans Kelsen, *Théorie du droit international public* [*Theory of Public International Law*], 84 RECUEIL DES COURS 111, 112–13, 116–17 (1953)).

9. I use the word "war" in a familiar sense to mean military activity beyond the borders of the state, rather than in a formal sense that might differentiate war *strico sensu* from other categories of militarized dispute defined in law. *See* LYAL S. SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS 25 (1992) (explaining that defining war crimes *stricto sensu*, as opposed to generally, is a narrower approach that focuses on "specific technical methods in the use of weaponry" or "specific situations").

the rule of law ideology in international affairs.[10] Late 19th century ideas about humane rules for war blossomed into an expansive web of rules, institutions, jurisdictions, and punishments that specifies individual and state responsibility related to targeting, weapons, and motivations.[11] These rules govern wars and "armed conflicts," state and non-state actors, soldiers and irregular forces, and are backed today by courts in both civilian and military forms and at the domestic and international levels.[12] The rules and institutions governing the use of force have grown so extensively and varied that they long ago became an academic field of study, thence fragmenting into so many sub-specializations that no one person is likely to master them all.[13]

War has become a legal category as well as a political and military activity. When the legal condition of "armed conflict" exists, the legal rights and responsibilities of soldiers, governments, and bystanders differ from the legal rights and responsibilities outside of "armed conflict."[14] Each step in this development increased legal oversight in war and added to states' need for legal reasoning in their military activities.[15] Legal justification is pervasive in contemporary state discourse on war,[16] as is lawyerly oversight on targeting and other choices within the military.[17]

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10. *See* IAN HURD, HOW TO DO THINGS WITH INTERNATIONAL LAW 48–50 (2017) (discussing the "international rule of law"); Shirley V. Scott, *International Law as Ideology: Theorising the Relationship Between International Law and International Politics*, 5 EUR. J. INT'L L. 313, 319–22 (1994) (describing international law as an ideology).

11. *See* MICHAEL BYERS, WAR LAW: INTERNATIONAL LAW AND ARMED CONFLICT 115–16 (2005); CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 144–48 (2000).

12. *See* Gabriella Blum, *The Paradox of Power: The Changing Norms of the Modern Battlefield*, 56 HOUS. L. REV. 745, 752–62, 753 n.14 (2019).

13. As evidence, consider that THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW (Marc Weller ed., 2015) runs to over 1,200 pages, and it sits alongside THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT (Andrew Clapham & Paola Gaeta eds., 2014) at almost 900 pages. Additionally, THE OXFORD HANDBOOK OF THE RESPONSIBILITY TO PROTECT (Alex J. Bellamy & Tim Dunne eds., 2016) is more than 900 pages, and THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW (Dieter Fleck ed., 2d ed. 2008) runs over 700 pages.

14. *See* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 16–19, 24–29 (4th ed. 2005); TANISHA M. FAZAL, WARS OF LAW 81 (2018) ("[B]y engaging the formalities of war, belligerents cross a bright line that leaves them unable to equivocate about the applicability of the laws of war.").

15. *See* ROSA BROOKS, HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING 195–96 (2016).

16. *See* CHARLOTTE PEEVERS, THE POLITICS OF JUSTIFYING FORCE 21–64 (2013); REBECCA SANDERS, PLAUSIBLE LEGALITY 1–32 (2018); RUTI TEITEL, HUMANITY'S LAW 73 (2011) ("The concept of the just war is enjoying a revival . . . .").

17. BROOKS, *supra* note 15, at 198. FERNANDO G. NUÑEZ-MIETZ, THE USE OF FORCE UNDER INTERNATIONAL LAW: LAWYERIZED STATES IN A LEGALIZED WORLD 1 (2019).

At the heart of *jus ad bellum* is the concept of "self-defense." Since the U.N. Charter came into effect in 1945, governments are permitted to use force in international affairs in one of two situations: first, when authorized by the U.N. Security Council, and second, as absolutely necessary for self-defense.[18] All other possible reasons a government might have for using force have passed into illegality and indeed very rarely appear in the self-explanations of governments. This may include wars for profit, aggression, territorial expansion, collecting debts, reprisal, and spite.

The text that forms the foundation of these rules is in Articles 2 and 51 of the U.N. Charter. Alexandrov says, "The Charter of the United Nations for the first time included a general prohibition of the use of force with two exceptions: self-defense and use of force authorized by the international organization."[19] Article 2(4) forbids U.N. member-states from "the threat or use of force against the territorial integrity or political independence of any state, ..."[20] and Article 51 makes clear that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs . . . ."[21] Together these constitute the familiar legal framework of contemporary international politics: states are barred from the use of force except as needed in "self-defense."

Article 51 locates the right of "self-defense" in a pre-existing natural-law right which the Charter does not impair. It elaborates some of the conditions that were believed to attach to that right—specifically that Article 51 contemplates individual *or* collective defense that is triggered when "an armed attack occurs," and the right to "self-defense" ends when then U.N. Security Council takes measures to respond to the threat to the peace.[22] It also specifies some procedures for how that right can be exercised—notably, that it must be reported to the Security Council.[23]

Self-defense, of course, has a long history as a justification for foreign intervention. It does not begin with the Charter. In U.S. foreign policy, it has frequently appeared as a rationalization for American military operations. One dramatic speech in 1901 by Jonathan Ross, a recently-retired U.S. senator, began by noting

18. U.N. Charter arts. 2, 51.

19. STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 77 (1996).

20. U.N. Charter art. 2, ¶ 4.

21. *Id.* art. 51.

22. *Id.*

23. *Id.*

that "self-defence is a God-given right, not dependent on, nor given, nor taken away by the ordinances or statutes of man."[24] He went on to claim that the war against Great Britain in 1776 was self-defense on the part of the thirteen American colonies and that both "[t]he Monroe Doctrine and the war with Spain are rare, and somewhat exceptional, applications of the right of self-defence. They are evidently the exercise of that right by the United States to its fullest extent."[25]

He saw self-defense also as the rationale for preventing the newly acquired American subjects—in Puerto Rico, the Philippines, and elsewhere—from voting, reasoning that they might "take part through the elective franchise in wielding the national sovereignty, and thereby may become an element of danger" to the United States from within.[26]

In the 19th century, the distinction between war *de jure* and war *de facto* was salient. The former describes wars that had been formally declared by the parties. The latter describes the recourse to force absent a formal declaration. According to Bowett, the notion of "self-defense" applied only to the latter—self-defense permitted the use of force in response to certain provocations and *in the absence of a declaration of war*.[27] For war *de jure*, formally preceded by a declaration, there was no need to speak of self-defense since the declaration itself was enough to produce a status of lawful war between the parties.[28] No further justification was needed, at least as a matter of law; the declaration made the war *de jure* by itself. Self-defense, by contrast, provided permission to use force outside of the legal framework of war declarations; it did not make war "legal" in any sense—it was legible in relation to *de facto* wars only, not *de jure* wars.

What was new as of 1945 was the formal legalization of self-defense as codified international law along with both the clarity and the ambiguity that this necessarily entails. It made self-defense a *legal* construct and invested in it the power to distinguish lawful—and therefore legitimate—uses of force from unlawful and illegitimate ones. It drew a line between acceptable and unac-

24. Jonathan Ross, President, Vt. Bar Ass'n, President's Address (1901), *in* VT. BAR ASS'N: OFFICERS, PROCEEDINGS, PAPERS AND ADDRESSES 3–4 (1903).

25. *Id.* at 5–7.

26. *Id.* at 6.

27. D. W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 118 (1958).

28. *See id.* at 120–21.

ceptable killing and thus created a focal point for intense contestation between state power and human welfare.[29] This codification would change how the rule related to governments and how governments could relate to the rule. It made possible a new kind of politics around self-defense that began as a constraint but soon became permissive and enabling.

In 1945, self-defense served the important function of reconciling the new structure of the Security Council with the longstanding perceived needs of states. The Security Council was granted a monopoly position in international affairs with the sole authority to decide when there was a "threat to . . . international peace and security" and what measures should be taken by the collective in response.[30] Individual action against international threats was outlawed by Article 2(4), and governments were asked to trust that the Council's use of force would effectively safeguard their interests. Recognizing that this might not always be enough, the pragmatists involved in Charter drafting added Article 51 to make clear that governments retained the right to act for themselves *in extremis*.[31] The inkling of doubt that this reflects is revealing: the U.N. founders were not quite convinced that collective institutionalization could fully tame states' recourse to force.[32] Their doubt, however, is framed as a temporal rather than a substantive problem because self-defense was permitted only in the period that the Council was organizing itself to meet, deliberate, and decide on its collective response. Self-defense must cease once the Council takes measures to address the situation.

Article 51 was thus understood as a right that is bounded in time, allowing the preservation of the status quo. This notion is akin to the "provisional measures" available to the International Court of Justice as it considers the merits of a case; these are meant to secure the interests of the parties and prevent their destruction while the organization comes to a decision.[33]

Self-defense in the Charter was limited as well by the requirement that there be an armed attack to precipitate the legality of defensive measures in reaction. The armed attack makes it possible, as a legal matter, to act in self-defense. It means absent an

29. See HELEN M. KINSELLA, THE IMAGE BEFORE THE WEAPON 2–3, 120 (2011), for the line that separates acceptable and unacceptable killing and contestation over it.

30. *See* U.N. Charter arts. 39–41.

31. *See id.* art. 51.

32. On the tension between institutionalization and pragmatism in a longer history of *jus ad bellum*, see HATHAWAY & SHAPIRO, *supra* note 5, at 105–30, 195–96, 211–14 ("Like the American Constitution, the United Nations Charter was idealistic and pragmatic at once.").

33. ROSENNE'S THE WORLD COURT 79–80 (Terry D. Gill ed., 6th rev. ed. 2003).

armed attack there can be no lawful recourse to force by states without Council approval, and it also implies that the attack should precede the defensive response.

III. STATE PRACTICE AND THE EXPANSION OF SELF-DEFENSE

These two conditions—an armed attack and its temporal sequencing—were intended to differentiate genuine self-defense emergencies from the broader set of circumstances in which governments may want to use force for other reasons. They give modern legal form to a much older effort to identify and punish "war[s] of aggression,"[34] and they draw a clear line between the U.N. Charter era and what came before.[35]

Both conditions have provided rich fodder for controversies of interpretation and application. The plain language of the text is clear, and the rule is widely endorsed, but its nuance and application are contested. On the one hand, this is unremarkable since it is typical of international law that it becomes more controversial the closer one gets to the details and since in this particular case it regulates something so close to the core of state power: when can the government use of force? Who can it kill?

Excellent reference works exist that trace the evolution of self-defense law since 1945: Christine Gray, Tom Ruys, Stanimir Alexandrov, and others document how the Charter language has been variously invoked and interpreted over the years by governments or scholars in relation to particular instances of force or threatened force.[36] The result of this is a contemporary self-defense law that is very different from the black-letter origins in the Charter. I do not repeat their analyses but focus directly on their conclusions: both the temporal and the material limits of self-defense have loosened considerably—the small-scale threats that were rejected as triggers for defensive military actions in 1945 are now routinely accepted.

On *ratione materiale*, Tom Ruys has expertly documented the term "armed attack," using law, state practice, expert writing, and *traveaux preparatoires* to draw a picture of its legal meaning. He is particularly attentive to how governments have spoken and acted with respect to this precondition, using self-defense to explain and to justify the use of force in circumstances far beyond

34. *See* ALEXANDROV, *supra* note 19, at 53. For a discussion of the Pact of Paris and the pre-history of the U.N. Charter, see *id.* at 51–76.

35. *See* HATHAWAY & SHAPIRO, *supra* note 5, at 370.

36. ALEXANDROV, *supra* note 19, at 80–82; GRAY, *supra* note 11, at 87; TOM RUYS, 'ARMED ATTACK' AND ARTICLE 51 OF THE UN CHARTER 55–60 (2010).

Article 51's textual limits. Ruys is sensitive to the fact that governments' claims are largely self-serving and not entirely persuasive as legal analyses, and yet at the same time, he takes them seriously in the aggregate as an important indication for the operative understanding of the law. He calls this "concrete custom," which he uses "for the purpose of deducing customary evidence" on operative content of the law.[37] Ruys notes the "growing gap between the 'law in practice' and the 'law in the books'" with respect to self-defense and he makes the reasonable claim that the latter gives a stronger indication of actually existing legal rules than the former.[38]

Ruys concludes that "evolutions in the international security environment" have encouraged governments to define and to use "armed attack" in new ways.[39] The legal system's deference to state practice has permitted it. Self-defense is invoked to justify operations that rescue nationals from perceived dangers,[40] undermine foreign militias or groups that may pose a danger,[41] respond to attacks on civilian vessels,[42] oil platforms,[43] and diplomatic premises.[44] Along the way, the language of "war" as a formal legal state of affairs has disappeared as well. Fazal notes that "[t]he United States . . . today refers to its conflicts as 'police actions,' 'counterinsurgencies,' or 'counterterrorism'—but not war."[45]

The temporal limit on self-defense in the Charter, *ratione temporis*, has also given way in the face of states' evident interest in a more permissive regime. The legal argument against a strict reading of the Charter rests on the long history of anticipatory attacks. Among international law scholars, a customary right of anticipatory self-defense is widely believed to exist. It is defended on a variety of grounds, including as inherent in the natural law among

37. RUYS, *supra* note 36, at 511.

38. *Id.* at 513.

39. *See id.* at 511, 513.

40. *See* Ved P. Nanda, *The Validity of United States Intervention in Panama Under International Law*, 84 AM. J. INT'L L. 494, 494 & n.1 (1990) (explaining that, according to the United States, the overthrow of President Noriega of Panama in 1989 was provoked by "reckless threats and attacks upon Americans in Panama").

41. *See* Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3(b)(2), 116 Stat. 1498, 1501 (authorizing United States to use military force).

42. Tullio Treves, *Piracy, Law of the Sea, and the Use of Force: Developments off the Coast of Somalia*, 20 EUR. J. INT'L L. 399, 400–01 (2009).

43. Concerning Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 27 (Nov. 6).

44. Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537, 540–41 (1999).

45. FAZAL, *supra* note 14, at 3.

states,[46] as a corollary to state sovereignty,[47] as a logical necessity in light of the unacceptability of the alternative,[48] and as evidence of the customary practices of states over a long time.[49] On these or other grounds it is understood to be part of the "inherent" right of states referred to in Article 51 as being left unchanged by the positive law of the Charter.[50] Its scope and operation are highly contested, but there is frequent reference back to the *Caroline* conditions as a steering framework: specifically, that anticipatory acts must show a "necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[51] *Caroline* does not explain the existence of this right; it merely provides guidelines for the management of a right that is believed to already exist.

Even while the restrictive reading against preemption was never really in force, many observers have noted that the space for its exercise has grown since the 1990s. Dinstein says that "[i]ncreasingly, and resolutely, the United States has asserted an entitlement to take 'preemptive' military action in exercise of the right of self-defence.'"[52] This has partly come in arguments away from the need for 'imminence' of a threatened attack and partly in the expansion of the concept of imminence itself. For all the ink that has been devoted to the difference, the two lead to the same outcome: a more permissive environment that demands less by way of triggering conditions before permitting a state to use force.

The test for self-defense no longer rests on the question "did an armed attack occur?" but rather "are vital national security interests threatened?" Where the answer is yes, international law provides a permissive justification for the lawful use of force. We have seen a turn from an objective test in the form of an evident

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46. *See* HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 314–22 (Archibald C. Campbell ed. & trans., 1901) (1625).

47. *See* Thomas H. Lee, *International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today*, 67 L. & CONTEMP. PROBS., Autumn 2004, at 147, 149 (2004).

48. *See* WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), https://www.state.gov/documents/organization/63562.pdf [https://perma.cc/R5EC-H4J7] ("The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack.").

49. RUYS, *supra* note 36, at 256–57.

50. U.N. Charter art. 51.

51. Letter from Daniel Webster to British Envoy, Mr. Fox (Apr. 24, 1841), *in* THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER, WHILE SECRETARY OF STATE 132 (1848).

52. DINSTEIN, *supra* note 14, at 222.

armed attack to an internal test that is relative to perceived national interests. The consequences for policy, as I show below, are significant.

The expansion of self-defense follows a well-accepted path in international legal theory. As needs change, rules should change as well lest they become irrelevant—at least, so say the eminent legal theorists Thomas Franck, who says a "strictly literal interpretation of the Charter[]" is unworkable, and W. Michael Reisman, who says "[o]ne should not seek point-for-point conformity to a rule without constant regard for the policy or principle that animated its prescription . . . ."[53] Instead, Ruys notes that it is conventional to argue that treaty interpretation should take into account "evolutions in the international security environment"[54] so that treaties remain, as Franck says, in "accord with changing circumstances and social values."[55] After all, a law that ignores contemporary reality would presumably be of little use to anyone.

Franck, Reisman, and others couch their argument in the language of common sense,[56] but it is clear they are taking sides in a contentious debate that is central to international legal theory and practice: when law and state interests are opposed to each other, which wins? If the law holds, then what the state wants to do remains illegal even if the state does it. (This is in fact the Franck's prescription for a different question, on the legality of humanitarian intervention: he suggested that the practice should remain illegal even though it should be excused under certain extreme circumstances.[57]) For the laws on war, however, they argue that changing state needs for security are sufficient reason to read the law differently than it is written. When new threats, new technologies, new ideas about the state and its security arise, the rules should be read in a new fashion to reflect them. Brunnée and Toope note there is a "curious mutual referencing system" by which a government that insists that the law says something it clearly does not can change how the law is interpreted such that the law comes to match what is being said. [58]

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53. THOMAS M. FRANCK, RECOURSE TO FORCE 21 (2002); W. Michael Reisman, *Coercion and Self-Determination: Construing Article 2(4)*, 78 AM. J. INT'L L. 642, 644 (1984).

54. RUYS, *supra* note 36, at 511.

55. FRANCK, *supra* note 53, at 21.

56. Reisman, *supra* note 53, at 645 (stating that insisting on a literal reading of the treaty "rapes common sense").

57. FRANCK, *supra* note 53, at 174–91.

58. Jutta Brunnée & Stephen J. Toope, *Self-Defence Against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?*, 67 INT'L & COMP. L. Q. 263, 266 (2018).

What Reisman and Franck offer as a description of self-defense matches well with empirical practice, but it is remarkable for how it contradicts the central tenets of the rule of law as an ideology. The rule of law is usually defined in terms of relatively fixed and publicly known rules that constrain the actions of subjects.[59] By demarcating what is lawful and what is unlawful, such rules allow actors to make decisions knowing where they stand in relation to law: some might still choose to act in unlawful ways, but they know the risks of so doing. The shifting terrain of self-defense law charts a different path. Rather than judge state acts against a fixed standard of legality, the rules on self-defense have changed to keep up with the perceived security needs of powerful governments. Legality is preserved by changing the terms of the law rather than constraining behavior. This is a dramatic admission for Franck and Reisman, scholars who in other circumstances are ardent defenders of the rule of law in world affairs.

IV. SELF-DEFENSE AND FOREVER WAR

Self-defense now means the use of force across borders in response to urgent national security needs. Its temporal and material limits have been greatly diminished and have likely never actually matched the black-letter law of the Charter. The governing regime today is more permissive than in the past, but it continues to do the work of distinguishing between lawful and unlawful uses of force.[60] As Harold Koh says, "[a]lthough the law might change, the emerging issues of armed conflict nevertheless remain issues governed by law."[61] In that sense, it remains a powerful legal regime—but its effects are not what traditional textbooks of international law might suggest.

In conclusion, I draw out three implications from the current state of self-defense law. First, Article 51 has become an enabling tool that facilitates the use of force by governments. Second, it facilitates the kind of perpetual and dispersed low-intensity military operations that have come to be known as the forever war. And third, it makes it more likely that scenes of the type documented

59. HURD, *supra* note 10, at 22–25.

60. *See* Rick Gladstone, *If U.S. Attacks North Korea First, Is That Self-Defense?*, N.Y. TIMES (Aug. 11, 2017), https://www.nytimes.com/2017/08/10/world/asia/us-north-korea-preemptive-attack-questions-answers.html [https://perma.cc/W938-79TH] (discussing various interpretations of Article 51, including an interpretation that allows a state to attack preemptively).

61. Harold Hongju Koh, *The Emerging Law of 21st Century War*, 66 EMORY L.J. 487, 489 (2017).

by Bruce Cockburn in Mexico will spread. This is not evidence regarding the frequency of 'war' overall—instead, it means only that governments will find it relatively easier today to justify this new form of military operation than they would under the rules of 1945. And it will confound analysts who assume that international legalization necessarily pacifies international relations, in ways that are familiar to scholars who recognize the close connection between law and state power.

First, the rules of 1945 were thought to be revolutionary for their constraint on state sovereignty in relation to war. They centralized military decision-making in the Security Council and permitted independent action only under the exceptional circumstances prescribed by the Charter. The U.N. system appeared to subsume state autonomy under the overwhelming legal authority of the Charter and limit the permitted rationales for war.[62] Armstrong, Farrell, and Lambert represent this view that international law constrains governments that want to use force.[63] This is true up to a point—the rules exclude all motives for war except defense—but it must be seen alongside the enabling power of the exception. It empowers governments to use force as needed for the defense of the self, and these key terms can be understood expansively.

The legal construct of self-defense is powerful. It distinguishes acceptable from unacceptable wars, and by remaining on the side of the former, a state today is able to invest in a claim of good citizenship in a modern, rules-based international order. A legal rationalization is a powerful device for an actor who exists in a political system based on the rule of law. This can be measured by the costs that come from acting outside of the law or by the benefit that comes from being seen as acting within it. To the extent that international affairs is indeed rules-based, these costs and benefits are relevant to governments seeking legal justifications for war.[64] Thus, access to a formal right of self-defense empowers governments that want to use force. It does more than

62. IAN HURD, AFTER ANARCHY: LEGITIMACY AND POWER IN THE UN SECURITY COUNCIL 184–88 (2007).

63. They endorse the view that law serves in principal to restrain governments, even if in practice it has a hard time succeeding around decisions on war. They argue that "law, in itself, is a poor restraint on the use of force by states[,]" but they are buoyed by the extent to which "international law on the use of force clearly captures values in the international community and provides a discourse on the legitimacy of using force." DAVID ARMSTRONG, THEO FARRELL, & HÉLÈNE LAMBERT, INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 117 (2007).

64. Ian Hurd, *The International Rule of Law and the Domestic Analogy*, 4 GLOBAL CONSTITUTIONALISM 365, 366–69, 383–84 (2015).

merely dress up a policy that would be no different in the absence of law—it is not just an "apology" for state behavior. It contributes something extra to the power of the state in such situations by giving governments resources with which to legitimize their actions. Legal justification is a force multiplier.

The pairing of constraint and empowerment is also seen in American domestic law. The Foreign Military Sales Act requires that the United States certify that weapons exports are used only for "legitimate self-defense."[65] This operates as a constraint in the sense that it excludes some possibilities, but it is empowering to the Executive because it invests that branch with the authority to decide when the criteria are satisfied.[66] The play of political possibility between the two is evident in the controversies over U.S. military support of Saudi Arabia's war in Yemen. Against the charge that U.S. weapons are being used for non-defensive purposes and to kill civilians, Senator Bob Corker turned the case around and argued that U.S. munitions are so high-tech that they, in fact, protect civilians—with military aid, he said, "we're helping them not kill civilians."[67]

These instances show the productive power of legal interpretations. As governments invoke legal categories to explain their actions, they seek to use the law to craft their political meaning and control the reaction to them. In the case of self-defense, this has been jurisgenerative as it has given new meaning to the legal terms and made the law politically useful to accomplish goals that would previously have been considered illegal. This is evident in

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65. Foreign Military Sales Act, Pub. L. 90-629, § 4, 82 Stat. 1320, 1322–23 (1968) (codified at 22 U.S.C. § 2754 (2012)); *see also* Donald G. Boudreau, *The Bombing of the Osirak Reactor*, 10 INT'L J. ON WORLD PEACE, June 1993, at 21, 27–28.

66. Memorandum from Am. Law Div., Cong. Research Serv. on "Aggression and Self-Def. Under Int'l Law" (Aug. 6, 1981), *reprinted in Israeli Attack on Iraqi Nuclear Facilities: Hearings Before the Subcomms. on Int'l Sec. & Sci. Affairs, on Eur. & the Middle E., and on Int'l Econ. Policy & Trade, of the H. Comm. on Foreign Affairs*, 97th Cong. app. 6, at 112 (1981); JIM ZANOTTI ET AL., CONG. RESEARCH SERV., R40101, ISRAEL AND HAMAS: CONFLICT IN GAZA (2008-2009) 35–36 (2009) (showing the Executive's authority to support Israel's right to defend itself in the Gaza conflict); Elvina Pothelet, *U.S. Military's "Collective Self-Defense" of Non-State Partner Forces: What Does International Law Say?*, JUST SECURITY (Oct. 26, 2018), https://www.justsecurity.org/61232/collective-self-defense-partner-forces-international-law-say/ [https://perma.cc/6NW3-BKPN].

67. Joe Gould, *US Senate Advances Saudi Guided-Munitions Sale, 53-47*, DEF. NEWS (June 13, 2017), https://www.defensenews.com/breaking-news/2017/06/13/us-senate-advances-saudi-guided-munitions-sale-53-47/ [https://perma.cc/VEV8-96PJ]; Jeremy Herb, *Senate Narrowly Votes to Back Saudi Arms Sale*, CNN (June 13, 2017, 3:30 PM), https://www.cnn.com/2017/06/13/politics/senate-saudi-arms-deal-paul/index.html [https://perma.cc/Y5J3-PCTS].

the recent turn to the language of "unwilling and unable" to describe foreign governments whose policies fail to satisfy the security needs of the self.[68]

Rationalizations for intervention are as old as the interstate system itself. The language and resources by which this is done vary over time, and in their changes, we can see something of the internal workings of state power.[69] Self-defense is today a dispositive claim that makes intervention lawful, and it is both evidence of and a contribution to the core idea of liberal internationalism that law and institutions are the foundation of world order,[70] but one that authorizes war as much as it outlaws it.

Second, self-defense law today helps sustain the contemporary practice of small-scale and pervasive military operations. Drone attacks, targeted killings, and more have come to mark a new form of war in which the enemy is a dispersed group of people, the battlefield is anywhere on the globe, and the goal is to defeat those who seek to undermine the state. Harold Koh has described this as the "Forever War" because it describes military operations that are unbounded by battlefield limits, time, or realistic win conditions. He fears that the United States may be moving toward this state of affairs and is particularly concerned that American military operations in Afghanistan, Iraq, Syria, and elsewhere, as well as "such related topics as torture, Guantánamo, and drones,"[71] are all legally part of a war with "al Qaeda and associated forces." The legal implication, arising from Congress's enactment of the Authorization to Use Military Force from Congress in

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68. Brunnée & Toope, *supra* note 58, at 264.

69. Notable examples of intervention rationalizations in other situations include: Britain's legal efforts in the early 1800s as "bilateral treaties created a series of permissive spaces for imperial enforcement that relied on British municipal law and modified prize law . . . .", LAUREN BENTON & LISA FORD, RAGE FOR ORDER 20 (2016); the obligation of the "international community" under the doctrine of "Responsibility to Protect" to intervene to prevent mass atrocities, Roland Paris, *The 'Responsibility to Protect' and the Structural Problems of Preventive Humanitarian Intervention*, 21 INT'L PEACEKEEPING 569, 569, 572–73 (2014); the United States' claim to a right to intervene in the Americas in the event of a "sharp local deviation" from U.S.-prescribed paths, Ian Hurd, *The Permissive Power of the Ban On War*, 2 EUR. J. INT'L SECURITY 1, 12 n.69 (2016) (quoting Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544, 546 (1971); and intervention "by invitation," Erika de Wet, *The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force*, 26 EUR. J. INT'L L. 979, 997–98 (2015).

70. Daniel Deudney & G. John Ikenberry, *Liberal World: The Resilient Order*, FOREIGN AFF., July–Aug. 2018, at 16, 20–21.

71. KOH, *supra* note 3, at 91; *see also* Brian D'Haeseleer, *Are We Mishandling the War on Terror in Africa?*, WASH. POST (Dec. 7, 2018), https://www.washingtonpost.com/outlook/2018/12/07/are-we-mishandling-war-terror-africa/?utm_term=.668932290fb9 [https://perma.cc/J5BD-PFHN] (Somalia and East Africa).

2001,[72] is that the United States can target any person anywhere in the world on the grounds of self-defense if that person can be understood as in line with the anti-American ideas of al Qaeda. The policy implication, as Rosa Brooks and others explain, is that a constant state of war is the new normal.[73]

The United States has entered a legal formulation in which its attacks against any person anywhere in the world are lawful as long as the United States believes that the person poses an imminent threat. The "battlefield" is wherever the enemy happens to be, and the "enemy" is anyone who the United States understands as a threat to its security. "War" ends when all such people are killed. Its victory conditions are impossible, and its battlefield is unlimited. Its foundation is the international law of self-defense understood as the pursuit of national security against outside threats. Stephen Walt explored this fact in Afghanistan, where "by 2016 the United States seemed trapped in a war it could neither win nor leave," and the only certainty was the continuation of military destruction with costs to all sides.[74]

Finally, the net effect is that state violence is today lawful under a much broader set of circumstances and with more agency on the part of governments than was imagined by the Charter. This is not far from the world of the 1890s and the Hague Conferences, of which one observer remarked at the time, "[T]he convention . . . leaves the Powers free to declare war at their pleasure, provided only that the pretext be capable of formulation."[75] The many degrees of freedom for lawful war today serves the interests of strong governments but is likely worse for the people against whom that violence is directed. In this sense, the main function of the rule is not "to save succeeding generations from the scourge of war"[76] as the U.N. Charter would have it but instead to provide a path for governments to attack their enemies around the world. This would probably not be a surprise to Bruce Cockburn on the Mexican hilltop in 1983.

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72. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001) ("[T]he President is authorized to use all necessary and appropriate force . . . to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.").

73. *See* BROOKS, *supra* note 15, at 350.

74. STEPHEN M. WALT, THE HELL OF GOOD INTENTIONS 37 (2018).

75. BOWETT, *supra* note 27, at 120–21 (quoting JAMES BROWN SCOTT, THE HAGUE PEACE CONFERENCES OF 1899 AND 1907, at 522 (1909)).

76. U.N. Charter pmbl.

V. CONCLUSION

International law has been successful at putting war within a legal frame. The 20th century witnessed an expanding roster of laws around military action—encompassing first the treatment of wounded, then of civilians, then certain classes of weapons, and eventually the motives for war and individual responsibility for war crimes. This history can be summarized by the treaties and institutions that mark each step in this growth—among them the Geneva Conventions of 1906 and 1929,[77] the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare,[78] the Kellogg-Briand Pact of 1928,[79] the U.N. Charter in 1945,[80] and the Rome Statute of the International Criminal Court in 1998.[81]

Its history can also be told through the changing uses of law in the political practice of justification. The legal formulations that were once thought to enclose war fully within self-evident and constraining legal categories have turned inside out and now operate to disperse military action throughout the world. As national interests and military technologies have changed, the rules have adapted, both in *ratione temporis* and *ratione materiale*. The instrumental utility of expansive self-defense claims for powerful governments is great, and the power of state practice to redefine international law is well-accepted—together these two facts ensure that the operative understanding of international rules will not deviate far from the desires of strong states. As the rule has moved, so has its political effects. Today it serves to legitimize and legalize the turn to "endless war" that has characterized American foreign policy since 2001.

With self-defense now anchored on national security interests, it has released its former connections to time and to armed attack. From this new foundation, it became useful to ambitious governments who are eager to attack their enemies abroad. In self-defense defined as national security, these states found a legal justification that matched neatly with their new technologies of drones and cyber. Together, these tools encouraged those with the capabilities to engage in undeclared and perhaps never-ending

77. *See* Christopher Greenwood, *Historical Development and Legal Basis*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 1, 22, 26 (Dieter Fleck ed., 2d ed. 2008); KINSELLA, *supra* note 29, at 112.

78. *See* RICHARD M. PRICE, THE CHEMICAL WEAPONS TABOO 88–96 (1997).

79. *See* HATHAWAY & SHAPIRO, *supra* note 5, at 130.

80. *See* HURD, *supra* note 10, at 59–60.

81. *See* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 18–21 (5th ed. 2017).

military operations against those whom they see as enemies of the state.

The history of self-defense helps to show the gap between the mythology of international law and its practical life. The myth says that international law provides a stable framework of rules that enable states to act toward their objectives while limiting their capacity to engage in acts that are damaging to the entire community. The reality is that rules become tools which powerful actors aim to use to their advantage. As Rebecca Sanders asserts, "There is nothing inherently progressive about legal culture[]" or international law.[82] The political effects of law depend on who is using it against what and against whom.

82. SANDERS, *supra* note 16, at 19.

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