

## ARTICLE

# HOW THE EROSION OF U.S. WAR POWERS CONSTRAINTS HAS UNDERMINED INTERNATIONAL LAW CONSTRAINTS ON THE USE OF FORCE

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The last several decades have witnessed a dramatic decline in the capacity of the U.S. Congress to constrain the president's unilateral decisions to send the United States to war. That erosion of congressional authority has accelerated since the terrorist attacks of September 11, 2001. Today, Congress's ability to limit the exercise of presidential decisions to deploy force abroad is highly constrained. Presidents of both parties have expansively interpreted presidential authority to make decisions to use force, and Congress has proven unable or unwilling to insist on playing its formal constitutional role in response. Courts, meanwhile, have stood back and allowed this accretion of power to take place unabated. On the rare occasion that they have been asked to intervene, courts have almost always refused, relying on a variety of justiciability doctrines.<sup>1</sup> As a result, the president today has had

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<sup>1</sup> For example, the U.S. District Court for the District of Columbia found that the suit brought by the father of Anwar al-Aulaqi challenging al-Aulaqi's targeting by the U.S. Department of Defense could not go forward because the plaintiff lacked standing and his claims were non-justiciable under the political question doctrine. *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1, 49–50 (D.D.C. 2010). The same court dismissed a suit by a member of the armed forces who challenged the legality of the U.S. military operations against ISIS. *Smith v. Obama*, 217 F. Supp. 3d 283 (D.D.C. 2016) (dismissing on standing and political question grounds), *order vacated, appeal dismissed sub nom. on other grounds*, *Smith v. Trump*, 731 F. App'x 8 (D.C. Cir. 2018) (vacated on mootness grounds, because Captain Smith had by then tendered an unqualified resignation from active duty). In addition, a line of cases has all but foreclosed the idea that an individual member of Congress or group of members can assert legislative standing to maintain a suit against a member of the Executive Branch. *See, e.g.*, *Kucinich v. Obama*, 821 F.Supp.2d 110, 124 (D.D.C. 2011); *Raines v. Byrd*, 521 U.S. 811 (1997); *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999); *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000). For a more complete list of cases through 2012, see generally Michael John Garcia, *War Powers Litigation Initiated by Members of Congress Since the Enactment of the War Powers Resolution*, CONG. RES. SERV. (2012), <https://sgp.fas.org/crs/natsec/RL30352.pdf> [<https://perma.cc/2QS6-ALEZ>]. The courts were not always so reluctant to reach the merits of such cases, but that changed in the 1970s and 1980s. *See, e.g.*, Carlin Meyer, *Imbalance of Powers: Can Congressional Lawsuits Serve as Counterweight?*, 54 U. PITT. L. REV. 63 (1992). For more on the dynamics that have led to few constraints on presidential power over national security decisions, see Oona A.

unprecedented free reign to decide when, where, and how to deploy armed force on behalf of the United States.

During the last two decades, one of the most notable trends to result from this largely unbridled presidential power over the decision to go to war is an ever-expanding reliance on the principle of “self-defense.” The reliance on self-defense by the president serves two purposes: It allows the president to paper over weaknesses in the congressional authorizations for use of force with a general reference to the president’s Article II powers to defend the nation. It also allows the president to make claims that sound in the register of international law—specifically the Article 51 self-defense exception to the United Nations Charter’s general prohibition on unilateral resort to force by states.<sup>2</sup>

This Article argues that these ever-expanding claims to act in “self-defense” have had the effect, perhaps unintended, of eroding the international law prohibition on the use of force—and not just for the United States. The prohibition on the unilateral resort to force by states under the 1945 UN Charter was designed to be highly restrictive, undergirding the creation of a new legal order in which might no longer made right. Article 51 offered a very limited exception to states to resort to force without Security Council authorization in cases where a state had come under an “armed attack.”<sup>3</sup> Enabled by the loose limits on presidential war powers, the United States has gradually expanded its claims to self-defense under Article 51. The consequence has been not only erosion of congressional authority, but also erosion of the *international law* limits on unilateral resort to force. After all, the United States, which drafted the UN Charter and holds one of five permanent seats on the UN Security Council, has played an outsized role in the creation and evolution of international law during the entire postwar era. Hence, whenever the United States makes novel or marginal claims to the right to use force under international law in “self-defense” or “collective self-defense” under Article 51, it offers up arguments to other states who may wish to capitalize on the legal space that the United States’ claims create. In this way, the erosion of U.S. law constraining unilateral presidential war power has had a direct effect—and a corrosive one—on the international law constraining the use of force under the United Nations Charter.

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Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?*, 68 UCLA L. REV. 2 (2021).

<sup>2</sup> U.N. Charter, arts. 2(4) & 51.

<sup>3</sup> Adil Ahmad Haque, *The United Nations Charter at 75: Between Force and Self-Defense — Part One*, JUST SECURITY (June 24, 2000), <https://www.justsecurity.org/70985/the-United-nations-charter-at-75-between-force-and-self-defense-part-one/> [<https://perma.cc/H8YF-65K8>].

The essay begins in Part I by documenting the erosion of U.S. constitutional constraints on the power of the president to wage war. Part II examines the impact of this erosion on interpretations of Article 51 of the United Nations Charter—which provides that states may respond in self-defense or collective self-defense to an armed attack. Part III concludes by calling on Congress to reassert its war powers—not simply to defend its proper constitutional role but also to stem the erosion of international legal limits on the use of armed force.

## I. THE EROSION OF CONSTITUTIONAL CONSTRAINTS ON PRESIDENTIAL WAR POWERS

Over the course of the last century, presidential war powers have expanded to the point that today the president effectively exercises significant unilateral authority over decisions to use military force—at least in cases where there are no major deployment of ground troops. The U.S. Congress has not approved a use of force since 2002, when it authorized the president to invade Iraq.<sup>4</sup> And yet the United States certainly has not been at peace in the two decades since. In 2001, Congress authorized the United States to go to war against those who carried out the 9/11 attacks and any nation, organization, or persons that harbored them.<sup>5</sup> Today, even as major combat operations have halted,<sup>6</sup> the U.S. military is still in Afghanistan battling insurgent and terrorist forces.<sup>7</sup> And the United States continues to battle the insurgent groups that emerged in Iraq after the U.S. invasion.<sup>8</sup> The U.S. government is also using force against extremist groups outside Iraq and Afghanistan. The United States reportedly has recently had active missions in around 20 countries, including most prominently Afghanistan, Somalia, Yemen, Syria, and Libya.<sup>9</sup>

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<sup>4</sup> Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107–243, 116 Stat. 1498 (2002).

<sup>5</sup> Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001).

<sup>6</sup> Joseph Biden, U.S. President, Remarks by President Biden on the End of the War in Afghanistan (Aug. 31, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/31/remarks-by-president-biden-on-the-end-of-the-war-in-afghanistan/> [<https://perma.cc/3QGG-YEDM>].

<sup>7</sup> Laura Dickinson, *Still at War: The Forever War Legal Paradigm in Afghanistan*, JUST SECURITY (April 14, 2022), <https://www.justsecurity.org/81110/still-at-war-the-forever-war-legal-paradigm-in-afghanistan/> [<https://perma.cc/2QTP-3J62>].

<sup>8</sup> Crispin Smith, *Still at War: The United States in Iraq*, JUST SECURITY (May 18, 2022), <https://www.justsecurity.org/81556/still-at-war-the-united-states-in-iraq/> [<https://perma.cc/67U4-4996>].

<sup>9</sup> Annika Lichtenbaum, *U.S. Military Operational Activity in the Sahel*, LAWFARE (Jan. 25, 2019), <https://www.lawfareblog.com/us-military-operational-activity-sahel> [<https://perma.cc/8QQL-75PQ>]; Greg Myre, *The Military Doesn't Advertise It, But U.S. Troops are All Over Africa*, NPR (Apr. 28, 2018), <https://www.npr.org/sections/parallels/2018/04/28/605662771/the-military-doesnt-advertise-it-but-u-s-troops-are-all-over-africa> [<https://perma.cc/3WJW-5TJ8>]; Stephanie Savell, *The 2001 Authorization for Use of Military Force: A Comprehensive Look at Where and How It*

None of these military operations have been separately authorized by Congress, even though the Constitution provides that Congress has the power to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,” as well as “raise and support Armies,” and “provide and maintain a Navy.”<sup>10</sup> Instead, they are grounded in capacious readings of Congress’s 2001 and 2002 authorizations for use of military force,<sup>11</sup> together with an expansive interpretation of the president’s Article II authority to use force on his own.<sup>12</sup> As a result, the vast majority of

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*Has Been Used*, WATSON INST. INT’L & PUB. AFF., BROWN UNIV. (Dec. 14, 2021), [https://watson.brown.edu/costsofwar/files/cow/imce/papers/2021/Costs%20of%20War\\_2001%20AUMF.pdf](https://watson.brown.edu/costsofwar/files/cow/imce/papers/2021/Costs%20of%20War_2001%20AUMF.pdf) [<https://perma.cc/Z2HX-DD5T>]; Nick Turse & Alice Speri, *How the Pentagon Uses a Secretive Program to Wage Proxy Wars*, THE INTERCEPT (July 1, 2022), <https://theintercept.com/2022/07/01/pentagon-127e-proxy-wars/> [<https://perma.cc/3HAY-L832>]. For additional detail, see *Just Security*’s “Still at War” symposium featuring articles examining U.S. operations in Yemen (Luke Hartig & Oona Hathaway), the Sahel (Brian Finucane), Syria (Tess Bridgeman & Brianna Rosen), and Somalia (Oona Hathaway & Luke Hartig). Tess Bridgeman & Brianna Rosen, *Introduction to Symposium: Still at War – Where and Why the United States is Fighting the “War on Terror,”* JUST SECURITY (Mar. 24, 2022), <https://www.justsecurity.org/80800/introduction-to-symposium-still-at-war-where-and-why-the-united-states-is-fighting-the-war-on-terror/> [<https://perma.cc/3WK7-97U7>].

<sup>10</sup> U.S. CONST. art. I, § 8, cl. 11, 12, 13. There are several other relevant grants of authority to Congress in the Constitution. See *id.* cl. 14 (authority to make rules regulating land and naval forces); *id.* cl. 15, 16 (authority relating to raising and providing for militias); *id.* cl. 18 (authority to “make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States”).

<sup>11</sup> See, e.g., Stephen W. Preston, U.S. Dep’t of Def. Gen. Coun., *The Legal Framework for the United States’ Use of Military Force Since 9/11*, Speech Before the Annual Meeting of the American Society of International Law (Apr. 10, 2015), <https://www.defense.gov/News/Speeches/Speech/Article/606662/the-legal-framework-for-the-united-states-use-of-military-force-since-911/> [<https://perma.cc/F8QZ-B43U>] (providing an explanation for the Obama Administration’s use of force in Syria against ISIS based on an expansive reading of the 2001 AUMF). Some claim that Congress continues to vote to pay for the wars through authorizing the military budget and that is enough, but the War Powers Resolution specifically provides that “[a]uthority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred . . . from any provision of law . . . including any provision contained in any appropriation Act” unless it specifically authorizes such action. War Powers Resolution, Pub. L. No. 93–148, 87 Stat. 555, § 8 (1973).

<sup>12</sup> See, e.g., Memorandum from Steven A. Engel, Assistant Att’y Gen., Office of Legal Counsel, Re: April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities (May 31, 2018), <https://www.justice.gov/olc/opinion/file/1067551/download> [<https://perma.cc/9ARA-ZT9D>]; Memorandum from Caroline D. Krass, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, to Eric Holder, Att’y Gen., Re: Authority to Use Military Force in Libya (Apr. 1, 2011) [hereinafter *Libya OLC Memo*], <https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf> [<https://perma.cc/3PUW-4DTN>]. For critiques of these claims, see Jack Goldsmith & Oona Hathaway, *Bad Legal Arguments for the Syria Strikes*, LAWFARE (Apr. 14, 2018), <https://www.lawfareblog.com/bad-legal-arguments-syria-airstrikes> [<https://perma.cc/3VUM-NCZE>]; Jack Goldsmith & Oona Hathaway, *The Downsides of Bombing Syria*, LAWFARE (Apr. 10, 2018), <https://www.justsecurity.org/54698/downsides-bombing-syria/>

those serving in Congress have never voted to authorize a military operation. When the 2002 authorization for war against Iraq was enacted, only 13 of the 100 current senators and 44 of the 435 representatives were in office.<sup>13</sup> The failure of Congress to be actively engaged in decisions about when and whether the United States should be at war means there has been little democratic accountability for two decades of constant warmaking,<sup>14</sup> which has cost trillions of dollars and hundreds of thousands of lives.<sup>15</sup>

One reason for the erosion of effective congressional constraints on the president's power to unilaterally wage war was the fateful decision of the authors of the War Powers Resolution to tie the reporting requirements and the automatic withdrawal provisions in the Resolution not to "war" or "armed conflict," but to "hostilities." The House report on the War Power Resolution explained that the word was "substituted for the phrase *armed conflict* during the subcommittee drafting process because it was considered to be somewhat broader in scope . . . . [*H*]ostilities also encompass a state of confrontation in which no shots have been fired, but where there is a clear and present danger of armed conflict."<sup>16</sup> Perhaps because the meaning was self-evident to those

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[<https://perma.cc/Y99D-E45K>]; Spencer Ackerman, Julian Borger, Ben Jacobs, & Ed Pilkington, *Syria Missile Strikes: US Launches First Direct Action Against Assad*, THE GUARDIAN (Apr. 7, 2017), <https://www.theguardian.com/world/2017/apr/06/trump-syria-missiles-assad-chemical-weapons> [<https://perma.cc/3E6J-BNPN>]; Cory Booker & Oona Hathaway, *A Syria Plan that Breaks the Law*, N.Y. TIMES (Jan. 23, 2018), <https://www.nytimes.com/2018/01/23/opinion/syria-tillerson-constitution-trump.html> [<https://perma.cc/V5HS-T7ZF>].

<sup>13</sup> Calculations by the author, based on the information available at Senate Seniority List: 118th Congress, United States Periodical Press Gallery, <https://www.periodicalpress.senate.gov/senate-facts/senate-seniority/> [<https://perma.cc/K3DM-24CS>] (last visited Mar. 6, 2023), and at Terms of Service for Members of the House of Representatives, House of Representatives History, Art & Archives (Jan. 3, 2023), [https://clerk.house.gov/member\\_info/Terms\\_of\\_Service.pdf](https://clerk.house.gov/member_info/Terms_of_Service.pdf) / [<https://perma.cc/HV3B-F4AN>].

<sup>14</sup> Some argue that presidential elections offer sufficient accountability. However, direct accountability is only effective during a president's first term. Moreover, presidential elections are multi-issue elections. *See, e.g.*, PEW. RSCH. CTR., 2016 CAMPAIGN: STRONG INTEREST, WIDESPREAD DISSATISFACTION 31–40 (2016), <https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2016/07/07-07-16-Voter-attitudes-release.pdf> [<https://perma.cc/6952-R6QQ>] (examining the many issues that mattered to voters in the 2016 presidential election).

<sup>15</sup> Costs of War: Human Costs, Watson Inst. Int'l & Pub. Aff., Brown Univ. (Sept. 2021), <https://watson.brown.edu/costsofwar/figures/2021/WarDeathToll> [<https://perma.cc/DGW4-EVCH>] (documenting roughly 900,000 lives lost due to post-9/11 wars); Costs of War: Economic Costs, Watson Inst. Int'l & Pub. Aff., Brown Univ. (Sept. 2021), <https://watson.brown.edu/costsofwar/costs/economic> [<https://perma.cc/FKV4-5M8W>] (documenting \$8 trillion in costs through FY 2022 for post-9/11 wars).

<sup>16</sup> *See* H. Rep. No. 93-287 (1973) in "The War Powers Resolution: Relevant Documents, Correspondence, Reports," Comm. on Int'l Rel., Subcomm. on Int'l Sec. and Sci. Aff., Committee Print, 94<sup>th</sup> Cong., 2nd sess., January 1976, at 23. <https://ufdc.ufl.edu/AA00022638/00001/images/30> [<https://perma.cc/FQ7B-AAZQ>].

involved, the term was not a subject of significant debate during the many hearings on the proposed legislation,<sup>17</sup> nor was it defined in the legislation. That has since left it open to wildly differing interpretations. The problem has been exacerbated by the unwillingness of the courts to weigh in, relying instead on justiciability doctrines to avoid reaching the merits. That has often left the executive branch as the only source of public legal opinions on war powers issues—issued in the form of Office of Legal Counsel memoranda or testimony and speeches by Executive Branch lawyers.<sup>18</sup>

Over the course of the decades following the passage of the resolution, administrations of both parties have adopted strained interpretations of “hostilities.” Many presidents evaded the consultation, reporting, and mandatory withdrawal provisions by arguing that military operations were not hostilities, even when they plainly were. For instance, according to the administration of President Ronald Reagan, the invasion of Grenada did not qualify as hostilities and so was not subject to the War Powers Resolution.<sup>19</sup> That incident was far from unique. In 1993, John Hart Ely observed,

Repeatedly—as in the final stages of the war in Indochina, the botched 1980 attempt to free our hostages in Iran, the tragic 1982-83 commitment of our troops to Lebanon, the 1983 invasion of Grenada, the Gulf of Sidra incident of March 1986, the bombing of Tripoli a month later, the 1987-1988 Persian Gulf naval war against Iran, and the 1989 invasion of Panama—

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Interestingly, the explanation given by the House report is at some odds with the common use of the term “hostilities” at the time—which was to refer to active fighting, as opposed to the legal state of war (which could begin after hostilities began and end before they were concluded). It is unclear whether the authors of the House Report understood this. The Senate report reflected this more common understanding of the term, stating, “The essential purpose of the bill, therefore, is to reconfirm and to define with precision the constitutional authority of Congress to exercise its constitutional war powers with respect to ‘undeclared’ wars [i.e., hostilities] and the way in which this authority relates to the constitutional responsibilities of the President as Commander-in-Chief.” *War Powers*, Report from the Sen. Comm. on Foreign Rel., 93rd Cong., 1st sess. 2 (June 14, 1973), [https://congressional-proquest-com.ezp-prod1.hul.harvard.edu/congressional/result/congresultpage:pdfevent?rsId=18641ADD345&pdf=/app-bin/gis-serialset/8/a/9/2/13017-3\\_srp220\\_from\\_1\\_to\\_38.pdf&uri=/app-gis/serialset/13017-3\\_s.rp.220](https://congressional-proquest-com.ezp-prod1.hul.harvard.edu/congressional/result/congresultpage:pdfevent?rsId=18641ADD345&pdf=/app-bin/gis-serialset/8/a/9/2/13017-3_srp220_from_1_to_38.pdf&uri=/app-gis/serialset/13017-3_s.rp.220) [https://perma.cc/WV4R-RTSJ].

<sup>17</sup> The many hearings on the Resolution use the term repeatedly, but there appears to be very little debate over its meaning. There was, by contrast, significant debate over the relative constitutional authorities of Congress and the President over the initiation, conduct of, and termination of hostilities. *See generally*, Congress, the President, and War Powers: Hearings before the Subcomm. on Nat’l Sec. Pol’y and Sci. Dev. of the Comm. on Foreign Aff., 91st Cong. 2nd Sess. (June-Aug. 1970).

<sup>18</sup> *See* Hathaway, *supra* note 1.

<sup>19</sup> Stuart Taylor Jr., *Legality of Grenada Attack Disputed*, N.Y. TIMES (Oct. 26, 1983), <https://www.nytimes.com/1983/10/26/world/legality-of-grenada-attack-disputed.html> [https://perma.cc/V2EC-E5P6].

the president filed either no report at all or a vague statement pointedly refusing to identify itself as a Section 4(a)(1) “hostilities” report.<sup>20</sup>

The War Powers Resolution was grievously ailing when the Obama administration dealt it what was arguably a death blow in 2011 by not seeking congressional authorization to continue military operations in Libya past the 60 day limit—and defending that decision as consistent with the War Powers Resolution.<sup>21</sup> There, the United States engaged in an extensive bombing campaign that precipitated the end of the Ghaddafi regime. Yet the administration asserted that its military operations were not “hostilities.” Speaking for the administration, State Department Legal Adviser Harold Koh stated that “hostilities” is “an ambiguous standard, which is nowhere defined in statute.”<sup>22</sup> He contended that because that the mission was limited, exposure of U.S. armed forces was limited, risk of escalation was limited, and the military means the United States was using were limited, the Libya operation did not amount to hostilities and thus the constraints in the War Powers Resolution did not apply. It later emerged that there had been a rare schism among lawyers in the administration on the issue, and President Obama had sided with Koh and White House counsel Robert Bauer over Department of Defense General Counsel Jeh Johnson and acting head of the Justice Department’s Office of Legal Counsel Caroline Krass, who had argued that the Resolution required the president to terminate or scale back the mission after sixty days.<sup>23</sup>

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<sup>20</sup> JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 49 (1993).

<sup>21</sup> For contemporaneous critique, see Bruce Ackerman & Oona Hathaway, *Obama’s Illegal War*, FOREIGN POL. (Jun. 1, 2011), <https://foreignpolicy.com/2011/06/01/obamas-illegal-war-2/> [<https://perma.cc/E5U3-B8ZF>]; Bruce Ackerman & Oona Hathaway, *The Constitutional Clock is Ticking on Obama’s War*, FOREIGN POL. (Apr. 6, 2011), <https://foreignpolicy.com/2011/04/06/the-constitutional-clock-is-ticking-on-obamas-war/> [<https://perma.cc/7WJ7-R32P>]; Bruce Ackerman & Oona Hathaway, *It’s Not Up to the President to Impose a No-Fly Zone Over Libya*, THE HUFFINGTON POST (Mar. 9, 2011), [https://www.huffpost.com/entry/no-fly-zone-libya\\_b\\_833426](https://www.huffpost.com/entry/no-fly-zone-libya_b_833426) [<https://perma.cc/KP56-6N29>].

<sup>22</sup> *Libya and War Powers: Hearing Before the S. Comm. On Foreign Rel.*, 112th Cong. 1–14 (2011) (statement of Harold Koh, Legal Adviser, U.S. Dep’t. of State), <https://2009-2017.state.gov/documents/organization/167452.pdf> [<https://perma.cc/3J27-STJU>]. Two months earlier, the DOJ Office of Legal Counsel (OLC) had issued an opinion concluding that “the President had the constitutional authority to direct the use of force in Libya because he could reasonably determine that such use of force was in the national interest.” It further decided that he “was not constitutionally required to use military force in the limited operations under consideration.” Both conclusions stretched the unilateral authority of the president to authorize the use of military force far beyond previous limits. Libya OLC Memo, *supra* note 12.

<sup>23</sup> Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. TIMES (June 17, 2011), <https://www.nytimes.com/2011/06/18/world/africa/18powers.html> [<https://perma.cc/5J9G-SR5D>].

A 2019 Senate hearing on war powers issues reflected ongoing uncertainty about the meaning of the term “hostilities.” Senator Tom Udall asked the acting State Department Legal Adviser Marik String whether the U.S. disabling of an Iranian drone counted as hostilities under the War Powers Resolution. String responded that his office had not yet made a determination—a puzzling answer given that if it did, it would trigger War Powers reporting obligations. Senator Mitt Romney then asked what the Trump administration understands by the term “hostilities” under the War Powers Resolution. String responded that he could only discuss that in a closed (classified) setting.<sup>24</sup>

There are signs that many members of Congress think that the word “hostilities” has a broader meaning than the Obama and Trump administrations gave it. In April 2019, House lawmakers passed a measure that would have used the War Powers Resolution to force an end to U.S. participation in the conflict in Yemen.<sup>25</sup> Part of what was intriguing about the draft resolution was the way in which it defined hostilities.<sup>26</sup> It found that “since March 2015, members of the United States Armed Forces have been introduced into hostilities between the Saudi-led coalition and the Houthis, *including providing to the Saudi-led coalition aerial targeting assistance, intelligence sharing, and mid-flight aerial refueling.*”<sup>27</sup> And it specifically stated that “For purposes of this resolution, in this section, the term ‘hostilities’ includes in-flight refueling of non-United States aircraft conducting missions as part of the ongoing civil war in Yemen.”<sup>28</sup> The definition of hostilities in this resolution is a far cry from the definition offered by the Obama Administration during the debate over the 2011 U.S. intervention into Libya. Yet, even in this case where Congress was able to muster the votes to attempt to claw back power, it was ineffective—Trump vetoed the effort to bring an end to U.S. support for the

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<sup>24</sup> *Reviewing Authorities for the Use of Military Force: Hearing Before S. Comm. on Foreign Rel.*, 115th Cong. 20 (2019), <https://www.foreign.senate.gov/download/transcript-072419> [https://perma.cc/PE7R-R9W6].

<sup>25</sup> See Missy Ryan, *After Yemen Vote, Question Remains: When is the U.S. at War?*, WASH. POST (Apr. 5, 2019), [https://www.washingtonpost.com/world/national-security/after-yemen-vote-question-remains-when-is-the-us-at-war/2019/04/05/08dbdcb6-57b4-11e9-9136-f8e636f1f6df\\_story.html?utm\\_term=.5de6fba7deb8](https://www.washingtonpost.com/world/national-security/after-yemen-vote-question-remains-when-is-the-us-at-war/2019/04/05/08dbdcb6-57b4-11e9-9136-f8e636f1f6df_story.html?utm_term=.5de6fba7deb8) [https://perma.cc/T3ZK-U87Y].

<sup>26</sup> A joint resolution to direct the removal of United States Armed Forces from hostilities in the Republic of Yemen that have not been authorized by Congress, S.J. Res. 7, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-joint-resolution/7/text> [https://perma.cc/FL27-QJLE].

<sup>27</sup> *Id.* (emphasis added).

<sup>28</sup> *Id.* A similar resolution was introduced and then withdrawn by Senator Bernie Sanders in 2022, apparently due to White House opposition. Ryan Grim & Ken Klippenstein, *Bernie Sanders Pulls Yemen War Powers Resolution Amid Opposition from White House*, THE INTERCEPT (Dec. 13, 2022), <https://theintercept.com/2022/12/13/bernie-sanders-yemen-war-white-house/> [https://perma.cc/6YAM-UFF2].



Saudi-led coalition's war in Yemen. A recent draft resolution on the war in Yemen similarly defined hostilities broadly, and it was pulled by its sponsors before a vote due in part to opposition by the Biden Administration over its definition of the term.<sup>29</sup> As a result of the narrow interpretation of hostilities by administrations of both parties, then, the constitutional order has been effectively turned on its head—requiring Congress to muster supermajorities in both houses to *stop* U.S. involvement in a war rather than requiring the President to seek the support of Congress to start one.

The one situation in which most would agree the War Powers Resolution does apply is a situation in which significant commitments of ground forces are involved (though even then there are those who would argue the president can act without Congress).<sup>30</sup> Due to the changing nature of warfare, however, such wars are now unusual. Instead, force is deployed from the air, often by remotely piloted aircraft, or in the form of cyber interventions, small footprint special operations, or warfare “by, with, and through” partners.<sup>31</sup> Hence, the result of years of decline in the role of Congress in decisions to use force abroad is that today the President is almost entirely unconstrained in waging war abroad.

## II. THE IMPACT ON ARTICLE 51

A major consequence of the erosion of Congress's war powers is the expansion of the self-defense exception to the UN Charter's prohibition on the use of military force. Because of the United States' geopolitical role and its ability to articulate its legal positions broadly and forcefully, this shift has affected not only the law as applied to the United States but the law on a global scale.

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<sup>29</sup> See Gunar Olsen, *So Much for Biden's Promise to End U.S. Support for the War in Yemen*, THE NEW REPUBLIC (Dec. 23, 2022), <https://newrepublic.com/article/169699/biden-pledge-yemen-hostilities-saudi> [<https://perma.cc/VKN8-RGWY>].

<sup>30</sup> John Yoo authored an opinion for the Office of Legal Counsel arguing that President George W. Bush could invade Iraq without Congressional authorization. Though his torture memos were withdrawn by the office, this opinion remains on the books and thus binding Executive Branch precedent. Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto Gonzales, Counsel to the President, Re: Authority of the President Under Domestic and International Law To Use Military Force Against Iraq (October 23, 2002), [https://www.justice.gov/d9/olc/opinions/2002/10/31/op-olc-v026-p0143\\_0.pdf](https://www.justice.gov/d9/olc/opinions/2002/10/31/op-olc-v026-p0143_0.pdf) [<https://perma.cc/Y545-E2NP>] (“The President possesses constitutional authority to use military force against Iraq to protect United States national interests. This independent constitutional authority is supplemented by congressional authorization in the form of the Authorization for Use of Military Force Against Iraq Resolution.”) (signed by Jay Bybee, but known to have been authored by John Yoo).

<sup>31</sup> For more on modern warfare, see Oona Hathaway, Tobias Kuehne, Randi Michel & Nicole Ng, *Congressional Oversight Over Modern Warfare*, 63 Wm. & Mary L. Rev. 137 (2021).

This Part begins with a brief description of the original understanding of Article 51 of the UN Charter, showing that the self-defense exception to the Charter's prohibition on force was, at its inception, understood to be quite narrow. It then proceeds to show how the United States has gradually expanded its use of this self-defense exception. This description begins with the period immediately following the September 11 attacks and continues through the present. It demonstrates that presidential administrations of both parties have resorted to increasingly stretched interpretations of the exception. Today, the uses of the exception by the United States and those who have followed its interpretation bear little resemblance to its original narrow meaning. As a result, the exception now threatens to undermine the prohibition on force it was once meant to support.

### *A. Text and Original Understanding of Article 51*

Article 51 of the United Nations Charter reads as follows:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>32</sup>

By its express terms, Article 51 created a narrow exception for individual and collective self-defense where a UN member state has suffered an "armed attack." The *travaux préparatoires* support this plain reading. At the Dumbarton Oaks conference, the Chinese delegation asked "whether it would be possible under the document for either member or non-member states to use force unilaterally under the claim that such action was not inconsistent with the purposes of the Organization." The answer was no: "except in cases of self-defense, no unilateral use of force could be undertaken without the approval of the council."<sup>33</sup> There could be no doubt that *all* uses of military force would be covered by the prohibition. Self-defense, moreover, was

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<sup>32</sup> U.N. Charter art. 51.

<sup>33</sup> Memorandum from Edward Stettinius Jr., Under Secretary of State, to Cordell Hull, Secretary of State, Re: Progress Report on Dumbarton Oaks Conversations—Thirty-seventh Day (Oct. 2, 1944), <https://history.state.gov/historicaldocuments/frus1944v01/d491> [<https://perma.cc/HRQ4-Q2ZV>]. For more on the negotiating history, see Haque, *supra* note 3; TOM RUYTS, "ARMED ATTACK" AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 126–249 (2010).

permitted only if there had been an “armed attack.” The delegates, after all, were well aware of the dangers of blurred lines between defensive and aggressive war. Indeed, it was precisely such concerns that had persuaded the authors of the Kellogg-Briand Pact not to include an express exception for self-defense at all. But that exclusion had proven paralyzing when Japan invaded Chinese Manchuria, leaving the world unsure how to respond.<sup>34</sup> The authors of the Charter, having learned that lesson, decided to include an express self-defense exception but make it narrow in scope. They chose the term “armed attack” specifically to avoid defining aggression, believing “armed attack” to be less likely to cause definitional problems.<sup>35</sup>

There is a strong textual argument that the Article 51 exception is so narrow that not all uses of force in violation of Article 2(4) amount to an “armed attack” under Article 51. After all, Article 2(4) prohibits any “use of force,” whereas Article 51 allows for self-defense only in response to an “armed attack.”<sup>36</sup> Subsequent interpretations of Article 51 by the International Court of Justice have largely affirmed this narrower reading, including by defining “armed attack” as a “grave violation” of Article 2(4)’s prohibition on the use of force.<sup>37</sup> Moreover, the text of the Charter makes clear that only states are prohibited from uses of force under Article 2(4) (“All Members shall refrain”) and only states have a right to self-defense and collective self-defense

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<sup>34</sup> OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS* 160–62 (2017).

<sup>35</sup> Memorandum by Mr. Robert W. Hartley of the United States Delegation of a Conversation Held at San Francisco, Saturday, May 12, 1945, in 1 US Department of State, *Foreign Relations of the United States 1945, General: The United Nations* (New York, 1967), <https://history.state.gov/historicaldocuments/frus1945v01/d224> [<https://perma.cc/MCU8-SHCZ>] (“the United States proposal attempted to define aggression in terms of ‘armed attack’ and in this way it was hoped to avoid the problem of trying to define aggression as such”).

<sup>36</sup> The United States is unusual in taking the position that the threshold for an Article 2(4) violation and a right of self-defense under Article 51 are one and the same. See Harold Hongju Koh, Legal Advisor at U.S. Dept. of State, *International Law in Cyberspace*, Speech at US CyberCom Inter-Agency Legal Conference (Sept. 18, 2012), <https://2009-2017.state.gov/s/l/releases/remarks/197924.htm> [<https://perma.cc/24DW-33SR>] (“the United States has for a long time taken the position that the inherent right of self-defense potentially applies against any illegal use of force”).

<sup>37</sup> See, e.g., *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 ¶ 191 (June 27); *Oil Platforms* (Iran v. U.S.), Judgment, 2003 I.C.J. 161 ¶ 64 (Nov. 6); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ 136 ¶ 139 (July 9) [hereinafter “Wall Advisory Opinion”]. Cf. *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), Judgment, 2005 ICJ Reports 168, ¶ 147 (Dec. 19) (finding that the “legal and factual circumstances of the exercise of a right of self-defense by Uganda against the DRC were not present,” but declining to reach the question of whether self defense extends to defense against non-state actors, perhaps signaling openness to such arguments in the future).

in response to an armed attack under Article 51 (“if an armed attack occurs against a Member of the United Nations”).<sup>38</sup>

While there is a strong case that the original understanding of Article 51 was narrow, there is little doubt that this understanding has come under intense pressure—much of it resulting from the United States executive branch’s increasingly aggressive interpretations of the exception. The United States is far from alone in offering stretched interpretations of Article 51. But as a key author and advocate of the Charter, a permanent member of the Security Council, and a state that holds itself out as committed to the rule of law with capacity to issue detailed legal justifications for its use of force decisions, the United States has an outsized impact on global understanding of the reach and limits of the self-defense exception. As its interpretation of the exception expands, other states follow. The rest of this Part traces that evolution.

### ***B. Preemptive Self-Defense (the “Bush Doctrine”)***

During the George W. Bush Administration, the United States claimed that it had the option to take preemptive action to counter a “sufficient threat to our national security.” In the case of significant threats, the United States could respond “even if uncertainty remains as to the time and place of the enemy’s attack.”<sup>39</sup> Indeed, in the lead-up to the Iraq War, John Yoo wrote an opinion of the Department of Justice’s Office of Legal Counsel that claimed congressional authorization of the war was unnecessary: “Although the Administration might welcome an expression of Congressional support for any

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<sup>38</sup> There is some debate whether Article 51 should be read in light of the customary law of self-defense at the time it was drafted. Reading Article 51 in this way would allow for some actions in self-defense in the absence of an armed attack if an armed attack is imminent and there is no alternative course of action to avert the attack, a principle drawn from the 1837 *Caroline* incident. D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 58–59 (1958, reprinted 2009); see also ALBERT B. COREY, THE CRISIS OF 1830-1842 IN CANADIAN-AMERICAN RELATIONS 61–69 (1941); CRAIG FORCESE, DESTROYING THE CAROLINE: THE FRONTIER RAID THAT RESHAPED THE RIGHT TO WAR 9–55 (2018); Martin A. Rogoff & Edward Collings Jr., *The Caroline Incident and the Development of International Law*, 16 BROOKLYN J. INT’L L. 493, 494–95 (1990); R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82, 82–92 (1938).

<sup>39</sup> THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), <https://2009-2017.state.gov/documents/organization/63562.pdf> [<https://perma.cc/4QMT-CBS4>]. This view was also reflected in opinions issued by the Office of Legal Counsel during the Bush Administration. See, e.g., Memorandum from John C. Yoo, Deputy Assistant Att’y Gen. & Robert J. Delahunty, Special Counsel, to Alberto R. Gonzales, Counsel to the President & William J. Haynes, II, General Counsel, Dep’t. of Def., Authority for Use of Military Force to Combat Terrorist Activities Within the United States 1 (Oct. 23, 2001), <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20011023.pdf> [<https://perma.cc/Z8HW-SQ99>] (concluding that the President has authority to “deploy military force against terrorist threats within the United States”);

military action the Executive Branch may decide to take against Iraq, such a resolution is unnecessary as a matter of constitutional law,” because, he claimed, “the President has the authority to initiate the use of force to protect the United States.”<sup>40</sup> This assertion was met with significant criticism at the time.<sup>41</sup> It later became clear that this idea of anticipatory, or preemptive, self-defense was not limited to weapons of mass destruction. Conventional weapons, if sufficiently concerning, could prompt a preemptive response as well.

The embrace of preemptive self-defense came to be known as the “Bush Doctrine.” Bush’s successor, Barack Obama, ran for office against Bush in part based on a more constrained view of presidential war powers. But once in office, he never renounced the expansive vision of self-defense that President Bush had espoused. Indeed, he surprised his supporters and detractors alike by taking steps to build upon it, as the following sections will make clear.<sup>42</sup> Tellingly, while John Yoo’s infamous torture opinions were

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<sup>40</sup> Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Re: Specter/Harkin Joint Resolution Calling for Congress to Vote on a Resolution for the Use of Force by the United States Armed Forces Against Iraq 1–2 (July 23, 2002), <https://www.justice.gov/sites/default/files/olc/legacy/2010/06/04/olc-memo-07232002.pdf> [<https://perma.cc/V6M3-MS6V>]. See also Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Re: Authorization for Use of Military Force Against Iraq Resolution of 2002 1 (Oct. 21, 2002), <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-military-force-iraq.pdf> [<https://perma.cc/HHL7-BYYJ>] (“We have no constitutional objection to Congress expressing its support for the use of military force against Iraq. . . . We have long maintained, however, that resolutions such as H. J. Res. 114 are legally unnecessary.”); Re: Authority of the President Under Domestic and International Law to Use Military Force Against Iraq, *supra* note 30, at 143 (“Using force against Iraq would be consistent with international law because it would be authorized by the United Nations Security Council or would be justified as anticipatory self-defense.”); Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Re: Effect of a Recent United Nations Security Council Resolution on the Authority of the President under International Law to Use Military Force Against Iraq 199 (Nov. 8, 2002), [https://www.justice.gov/d9/olc/opinions/2002/11/31/op-olc-v026-p0199\\_0.pdf](https://www.justice.gov/d9/olc/opinions/2002/11/31/op-olc-v026-p0199_0.pdf) [<https://perma.cc/42DD-4YBX>] (“We emphasize at the outset that U.N. Security Council authorization is not a necessary precondition under international law for the use of force . . . . Under the doctrine of anticipatory self-defense, the United States may use force against Iraq if the President determines the use of force would be necessary due to an imminent threat, and a proportional response to that threat.”).

<sup>41</sup> See, e.g., Christian Henderson, *The Bush Doctrine: From Theory to Practice*, 9 J. CONFLICT & SEC. L. 3, 24 (2004) (“It is clear that the Bush Doctrine has the potential to shatter the legal regulation of the use of force . . . . Putting too much power in the hands of individual states when making decisions on the use of pre-emptive force is potentially very dangerous . . . .”).

<sup>42</sup> See generally Noura S. Erakat, *New Imminence in the Time of Obama: The Impact of Targeted Killings on the Law of Self-Defense*, 56 ARIZ. L. REV. 195 (2014); Bruce Ackerman, *Is Obama Enabling the Next President to Launch Illegal Wars?*, THE ATLANTIC (Aug. 24, 2016) <https://www.theatlantic.com/politics/archive/2016/08/obama-illegal-wars/497159/> [<https://perma.cc/N2DK-ZX2Z>].

withdrawn by the Obama Administration, his equally problematic legal opinions on the use of force still stand.

### C. *Self-Defense Against Non-State Actors*

Before September 11, 2001, self-defense under Article 51 was generally believed to apply only “in the case of an armed attack by *one State against another State*.”<sup>43</sup> Although a number of states had filed Article 51 letters in which they cited both state and non-state actor threats, relatively few states had exclusively cited non-state actor threats in Article 51 letters filed before 2001.<sup>44</sup> After September 11, 2001, non-state aggressors were more frequently treated as direct targets of self-defensive force by states.<sup>45</sup> The United States in its Article 51 letter notifying the Security Council of its self-defense operations in Afghanistan after the 9/11 attacks indicated that it was responding to the “ongoing threat . . . posed by the Al-Qaeda organization” made possible by the Taliban’s willingness to allow Afghanistan to be used as

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<sup>43</sup> Monica Hakimi, *Defensive Force against Non-State Actors: The State of Play*, 91 INT’L L. STUD. 1, 4–5 (2015) (citing Wall Advisory Opinion); Wee Yen Jean, *The Use of Force against Non-State Actors: Justifying and Delimiting the Exercise of the Right of Self-Defence*, 9 SINGAPORE L. REV. 1, 3 (2017).

<sup>44</sup> See Annex: *HLS PILAC Catalogue of Communications to the Security Council of Measures Taken by United Nations Member States in Purported Exercise of the Right of Self-Defense: October 24, 1945 Through December 31, 2018*, in DUSTIN LEWIS ET. AL, QUANTUM OF SILENCE: INACTION AND *JUS AD BELLUM*, HARV. L. SCH. PROJECT ON INT’L L. AND ARMED CONFLICT (2019),

<https://dash.harvard.edu/bitstream/handle/1/40931878/Quantum%20of%20Silence%202019.pdf?isAllowed=y&sequence=1> [https://perma.cc/2KXN-8TA9]. Israel filed the most such letters, the first of which it filed on November 16, 1966. U.N. SCOR, 21st Sess., 1320th mtg. U.N. Doc. S/PV.1320 (Nov. 16, 1966),

[https://digitallibrary.un.org/record/581598/files/S\\_PV-1320-EN.pdf?ln=en](https://digitallibrary.un.org/record/581598/files/S_PV-1320-EN.pdf?ln=en)

[https://perma.cc/6W7S-YDMJ]. Iran also filed several such letters, the first of which it filed on May 25, 1993. U.N. SCOR, 48th Sess. U.N. Doc. S/25843 (May 25, 1993),

[https://digitallibrary.un.org/record/167123/files/S\\_25843-EN.pdf?ln=en](https://digitallibrary.un.org/record/167123/files/S_25843-EN.pdf?ln=en)

[https://perma.cc/56DC-J7ZQ]. Other states cited the right to self-defense against non-state actors only rarely. For example, Portugal filed such a letter on September 29, 1971. U.N. SCOR, 26th Sess. U.N. Doc. S/10343 (Sept. 29, 1971),

[https://digitallibrary.un.org/record/494391/files/S\\_10343-EN.pdf?ln=en](https://digitallibrary.un.org/record/494391/files/S_10343-EN.pdf?ln=en)

[https://perma.cc/EJE2-EVBH]. Kazakhstan, Kyrgyzstan, Russia, and Tajikistan submitted a joint letter in 1993. U.N. SCOR, 48th Sess. U.N. Doc. S/26290 (Aug. 11, 1993),

[https://digitallibrary.un.org/record/171757/files/A\\_48\\_304--S\\_26290-EN.pdf?ln=en](https://digitallibrary.un.org/record/171757/files/A_48_304--S_26290-EN.pdf?ln=en) [https://perma.cc/PFT2-828Y].

<sup>45</sup> As Christian Marxsen and Anne Peters put it, “while States did defend themselves against non-State actors by military means, these hardly triggered any international legal debate . . . . This changed significantly with the terrorist attacks of 9/11 in 2001 and with the subsequent military interventions. These events are often seen as constituting a ‘true turning point’ in the debate on the international law of self-defence.” Christian Marxsen & Anne Peters, *Introduction: Dilution of Self-Defense and its Discontents*, in SELF-DEFENSE AGAINST NON-STATE ACTORS 2–3 (Ellen O’Connell, Christian J. Tams & Dire Tladi, eds., 2019).

a base of operation.<sup>46</sup> A subsequent letter signed by the United Kingdom similarly indicated that it was engaging in collective self-defense “against targets we know to be involved in the operation of terror.”<sup>47</sup> Before the end of the year, Canada, France, Australia, Germany, New Zealand, and Poland had issued Article 51 letters that echoed the United States, relying explicitly or implicitly on an international law right of self-defense and collective self-defense against the non-state actors responsible for the September 11 attacks.<sup>48</sup> A number of other Article 51 letters filed by states against other non-state actors followed in the next few years, and, indeed, Article 51 letters citing the right of self-defense against non-state actors have become common in the years since.<sup>49</sup>

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<sup>46</sup> Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/567/85/PDF/N0156785.pdf?OpenElement> [<https://perma.cc/9RF8-5FCE>]; see Jutta Brunnee & Stephen J. Toope, *Self-Defence against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?*, 67 BRIT. INST. INT’L & COMP. L. 263, 269 (2018). The U.S. letter followed Security Council resolutions that mentioned the inherent right of self defense before condemning the terrorist attacks. S.C. Res. 1368 (Sept. 12, 2001); S.C. Res. 1373 (Sept. 28, 2001).

<sup>47</sup> Letter from the Chargé d’affaires of the Permanent Mission of the United Kingdom to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/947 (Oct. 7, 2001), [https://digitallibrary.un.org/record/449477/files/S\\_2001\\_947-EN.pdf?ln=en](https://digitallibrary.un.org/record/449477/files/S_2001_947-EN.pdf?ln=en) [<https://perma.cc/K9F2-DQLZ>].

<sup>48</sup> *HLS PILAC Catalogue*, *supra* note 44.

<sup>49</sup> In 2002, Rwanda cited a right of individual self-defense against the Democratic Republic of the Congo and “ex-Forces armées rwandaises (ex-FAR) and Interahamwe,” Letter from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2002/420 (Apr. 15, 2002), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N02/333/83/PDF/N0233383.pdf?OpenElement> [<https://perma.cc/V6H6-X6RE>]. In 2003, Cote d’Ivoire cited a right of individual self-defense against “[r]ebel forces,” Letter from the Permanent Representative of Cote d’Ivoire addressed to the President of the Security Council, U.N. Doc. S/2003/510, (Apr. 28, 2003) [https://digitallibrary.un.org/record/493559/files/S\\_2003\\_510-EN.pdf?ln=en](https://digitallibrary.un.org/record/493559/files/S_2003_510-EN.pdf?ln=en) [<https://perma.cc/8J5R-YTKV>]. In 2004 and 2005, Israel cited a right of individual self-defense against “Hezbollah and Ahmed Jibril’s Popular Front for the Liberation of Palestine (PFLP),” Letter from the Chargé d’affaires of the Permanent Mission of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. A/58/837-S/2004/465 (Jun. 8, 2004), [https://digitallibrary.un.org/record/523012/files/A\\_58\\_837--S\\_2004\\_465-EN.pdf?ln=en](https://digitallibrary.un.org/record/523012/files/A_58_837--S_2004_465-EN.pdf?ln=en) [<https://perma.cc/RJP3-UJD8>]; “the terrorist organization Hamas,” Letter from the Chargé d’affaires of the Permanent Mission of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. A/60/382-S/2005/609 (Sept. 28, 2005), [https://digitallibrary.un.org/record/557436/files/A\\_60\\_382--S\\_2005\\_609-EN.pdf?ln=en](https://digitallibrary.un.org/record/557436/files/A_60_382--S_2005_609-EN.pdf?ln=en) [<https://perma.cc/6KPN-WLZ8>]; “al-Aqsa Martyrs Brigade,” Letter from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. A/60/580-S/2005/756 (Dec. 5, 2005), [https://digitallibrary.un.org/record/561975/files/A\\_60\\_580\\_S\\_2005\\_756-EN.pdf?ln=en](https://digitallibrary.un.org/record/561975/files/A_60_580_S_2005_756-EN.pdf?ln=en)

The United States and some of its allies soon endorsed what has come to be referred to as the “unwilling or unable” doctrine—the claim that action against a non-state threat is justified so long as the state in which the non-state actor resides is “unwilling or unable” to suppress the threat.<sup>50</sup> The doctrine originated much earlier—during the Nixon Administration, which claimed that self-defense was permissible whenever the neutral state “cannot or will not” prevent the unneutral use of its territory to justify expanding its military campaign against North Vietnamese forces in Cambodia.<sup>51</sup> At last count, thirteen states either explicitly or implicitly endorse the “unwilling or unable doctrine,” six have objected to it, and ten have made ambiguous expressions.<sup>52</sup> Latin American states, including Brazil and Mexico, have voiced opposition to the unwilling or unable doctrine,<sup>53</sup> and the Community of Latin American and Caribbean States has expressed unease with the use of Article 51 to justify counterterrorism operations.<sup>54</sup> The vast majority of states, however, have not expressed a position on the “unwilling or unable” doctrine—and it remains controversial outside the U.S. government, even if widely accepted within.<sup>55</sup>

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[<https://perma.cc/NUK3-GVTS>]. For additional Article 51 letters against non-state actors, see *HLS PILAC Catalogue*, *supra* note 44. See generally Marxsen & Peters, *supra* note 45.

<sup>50</sup> Elena Chachko & Ashley Deeks, *Which States Support the 'Unwilling and Unable' Test?*, *LAWFARE* (Oct. 10, 2016), <https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test> [<https://perma.cc/V64L-DAFA>].

<sup>51</sup> Kevin John Heller, *The Earliest Invocation of “Unwilling or Unable”*, *OPINIO JURIS* (March 19, 2019), <http://opiniojuris.org/2019/03/19/the-earliest-invocation-of-unwilling-or-unable/> [<https://perma.cc/P3XW-R63H>] (attributing the insight to a doctoral dissertation by military historian Brian Cuddy).

<sup>52</sup> Chachko & Deeks, *supra* note 50.

<sup>53</sup> Pablo Arrocha Olabuenaga, *An Insider’s View of the Life-Cycle of Self-Defense Reports by U.N. Member States: Challenges Post to the International Order*, *JUST SECURITY* (Apr. 2, 2019), <https://www.justsecurity.org/63415/an-insiders-view-of-the-life-cycle-of-self-defense-reports-by-u-n-member-states/> [<https://perma.cc/K4XQ-D4BZ>] (describing “Latin American disquiet with the ‘Unable or Unwilling’ doctrine”); Alex Moorehead, *Brazil’s Robust Defense of the Legal Prohibition on the Use of Force and Self Defense*, *JUST SECURITY* (Apr. 20, 2018), <https://www.justsecurity.org/55126/brazils-robust-defense-legal-prohibition-force/> [<https://perma.cc/J9Y2-SQPR>].

<sup>54</sup> Statement by the Permanent Mission of El Salvador to the United Nations on Behalf of the Community of Latin American and Caribbean States (CELAC), *Measures to Eliminate International Terrorism* (Oct. 3, 2018), <http://statements.unmeetings.org/media2/19408950/el-salvador-on-behalf-of-celac-e.pdf> [<https://perma.cc/7SC3-UBDG>] (“We take note with concern of the increase in the number of letters to the Security Council under Article 51 of the Charter submitted by some States in order to have recourse to the use of force in the context of counter-terrorism, most of the times “ex post facto”. We reiterate that any use of force which is not in compliance with the UN Charter is not only illegal, it is also unjustifiable and unacceptable. Further consideration should be given in an open and transparent debate on this issue”).

<sup>55</sup> For more on the disconnect between government national security lawyers and public understanding of the law, see generally Hathaway, *National Security Lawyering*, *supra* note 1. For more on the unable or unwilling doctrine, see generally Gabriella Blum & John C.P. Goldberg, *The Unable or Unwilling Doctrine: The View from Private Law*, 63 *HARV. INT’L L. J.* 63 (2022); Dawood I. Ahmed, *Defending Weak States Against the “Unwilling or*



Controversially, the United States appears to take silence on the issue as acquiescence, while others challenge that inference.<sup>56</sup>

The assertion that Article 51 permits states to use armed force against non-state actors in a non-consenting state is in tension with the International Court of Justice's (ICJ) decision in *Nicaragua v. United States*, which held that an "armed attack" could include aggression by "armed bands, groups, irregulars, or mercenaries," but only if they were sent "by or on behalf of a state."<sup>57</sup> In 2004, the ICJ, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, affirmed that "Article 51 of the Charter . . . recognizes the existence of an inherent right to self-defense in the case of armed attack by *one State against another State*."<sup>58</sup> More recently, in *Democratic Republic of the Congo v. Uganda*, the ICJ rejected the claim that Uganda had an Article 51 right of self-defense against a non-state group within the Democratic Republic of the Congo (DRC) because it failed to establish that the non-state group had sufficient ties to the government of the DRC.<sup>59</sup>

Nonetheless, for much of the last two decades, the United States and United Kingdom have publicly pressed the claim that military force against non-state aggressors like al Qaeda is permissible under Article 51. Former U.K. Legal Adviser Daniel Bethlehem outlined the U.S., U.K., and other allied governments' legal position in a 2012 *American Journal of International Law* article published under Bethlehem's own name, though widely understood to be based on conclusions reached in government-to-government talks known as the "West Point Group."<sup>60</sup> That article articulated a set of principles that have

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*Unable*" Doctrine of Self-Defense, 9 J. INT'L L. & INT'L RELS. 1, 14 (2013); Tess Bridgeman, *When Does the Legal Basis for U.S. Forces in Syria Expire? The End Point of the "Unwilling or Unable" Theory of Self-defense*, JUST SECURITY (March 14, 2018), <https://www.justsecurity.org/53810/legal-basis-u-s-forces-syria-expire/> [<https://perma.cc/L7WR-JXZX>].

<sup>56</sup> For more on how to read silence, see *HLS PILAC Catalogue*, *supra* note 44. Mexico takes a very different view from the United States on both the legality of the "unable or unwilling" test and on how best to read silence. See generally Naz K. Modirzadeh & Pablo Arrocha Olabuenaga, *A conversation between Pablo Arrocha Olabuenaga and Naz Khatoon Modirzadeh on the origins, objectives, and context of the 24 February 2021 'Arria-formula' meeting convened by Mexico*, 8 J. USE OF FORCE & INT'L L. 291 (2021).

<sup>57</sup> Wee Yen Jean, *supra* note 43, at 3.

<sup>58</sup> Wall Advisory Opinion, *supra* note 37, at ¶ 139 (emphasis added).

<sup>59</sup> *Armed Activities on the Territory of the Congo*, *supra* note 37, at ¶¶ 146–47; see also Stephanie A. Barbour & Zoe A. Salzman, *The Tangled Web: The Right of Self-Defense Against Non-State Actors in the Armed Activities Case*, 40 INT'L L. & POL. 53, 55 (2008). Interestingly, the ICJ declined to address the question of whether there could have been a right of self defense against a non-state actor. *Armed Activities on the Territory of the Congo*, *supra* note 37, at ¶ 147.

<sup>60</sup> Interview by George W. Bush Oral History Project with John Bellinger III, Legal Adviser to the State Dep't., (April 20, 2013), <https://millercenter.org/the-presidency/presidential-oral->

come to be referred to as the “Bethlehem Principles.” The first principle provides: “states have a right of self-defense against an imminent or actual armed attack by nonstate actors.”<sup>61</sup> The eleventh and twelfth principles state that the requirement for consent by the host state does not operate where the host state is colluding with the non-state actor “or otherwise unwilling” to restrain its activities, nor does it apply when “there is a reasonable and objective basis for concluding the third state is unable to effectively restrain the armed activities of the nonstate actor.”<sup>62</sup> Part of what was notable about the principles, moreover, was the purpose of publishing them: Bethlehem acknowledged that they “do not reflect a settled view of any state,” but nonetheless indicated that “[t]he hope . . . is that the principles may attract a measure of agreement about the contours of the law relevant to the actual circumstances in which states are faced with an imminent or actual armed attack by nonstate actors.”<sup>63</sup> In other words, the project was self-consciously aimed at development and evolution of the international law of self-defense.

The effort met with some resistance.<sup>64</sup> Elizabeth Wilmschurst and Michael Wood (who was, like Bethlehem, formerly U.K. Legal Adviser), argued in response to Bethlehem that “there are some respects in which the new principles risk departing from international law”—noting that principles 11 and 12 “remain controversial.”<sup>65</sup> Some scholars objected to the “unwilling or unable” doctrine as inconsistent with existing law. Adil Haque, for example, argues that the UN Charter’s text, context, and purpose indicate that it does not permit “one State (say, the United States or Turkey) to use armed force on the

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histories/john-bellinger-iii-oral-history-part-ii [https://perma.cc/S8JK-CLS4] (describing the “West Point Group” meetings, which led to what came to be known as the Bethlehem principles).

<sup>61</sup> Daniel Bethlehem, *Principles Relevant to the Scope of a State’s Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT’L L. 1, 6 (2012). See also Themis Tzimas, *Self-Defense by Non-State Actors in States of Fragmented Authority*, 24 J. CONFLICT & SEC. L. 175, 179 (2019) (“[W]hile on the one hand self-defense constitutes a state-centric right, on the other hand, and given that it is part of the collective security system, we cannot fail to take into account the ongoing transformations in relation to the incursion . . . of non-state actors in the wider framework of collective security.”).

<sup>62</sup> Bethlehem, *supra* note 61, at 7.

<sup>63</sup> *Id.* at 4.

<sup>64</sup> See, e.g., Dire Tiladi, *The Use of Force in Self-Defence against Non-State Actors, Decline of Collective Security and the Rise of Unilateralism: Whither International Law?*, in SELF-DEFENSE AGAINST NON-STATE ACTORS 89 (Ellen O’Connell, Christian J. Tams & Dire Tiladi, eds., 2019) (“There are those arguing vociferously for an expansion of this right to such an extent that States would be free to use force in the territory of that State, without that State’s consent or without attribution of the conduct of the non-State actors to that State. Terrorism, as heinous as it certainly is, does not offer sufficient reason to depart from the constraints placed by international law”).

<sup>65</sup> Elizabeth Wilmschurst & Michael Wood, *Self-Defense against Nonstate Actors: Reflections on the ‘Bethlehem Principles’*, 107 AM. J. INT’L L. 386, 393 (2013).

territory of another State (say, Syria), without the territorial State's consent, targeting a non-State actor."<sup>66</sup>

Even as the unwilling or unable doctrine remains contested, the United States has openly relied on it to justify expansive and longstanding uses of force. In doing so, the United States has bypassed the need to establish that there had been an "armed attack" or to demonstrate ties to a sponsoring sovereign state. For example, in 2014, the United States submitted an Article 51 letter to the Security Council justifying its use of force against ISIS in Syria and Iraq on the grounds that states had the "inherent right to individual and collective self-defense . . . when the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for . . . [terrorist] attacks."<sup>67</sup> It has continued to use force against ISIS in Syria now for nearly a decade. It has relied on this same theory to justify other uses of force as well, including, most recently, in an Article 51 letter to the United Nations justifying strikes against a facility in eastern Syria use by Iran-backed militia groups.<sup>68</sup>

The U.S. approach has influenced not only other states' stated legal policy but even their targeting policies and practices. Following ISIS attacks in 2015, France stated that its military action in Syria, which had previously been justified as collective self-defense, could now also be characterized as individual self-defense.<sup>69</sup> French military forces participating in the operation emulated the U.S. approach to targeting in counterterrorism operations. In an

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<sup>66</sup> Adil Ahmad Haque, "Clearly of Latin American Origin": *Armed Attack by Non-State Actors and the UN Charter*, JUST SECURITY (Nov. 5, 2019), <https://www.justsecurity.org/66956/clearly-of-latin-american-origin-armed-attack-by-non-state-actors-and-the-un-charter/> [https://perma.cc/H4WR-53ED].

<sup>67</sup> Letter from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014), [https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_2014\\_695.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_695.pdf) [https://perma.cc/LJH4-6B4T].

<sup>68</sup> Letter from the Permanent Representative of the United States of America addressed to the President of the Security Council, U.N. Doc. S/2022/647 (Aug. 26, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/09/8.26.2022-Art.-51-Letter-Syria.pdf> [https://perma.cc/6DDA-VGAK]. For a review of "international law questions raised" by the letter, see Tess Bridgeman & Brian Finucane, *Tit-for-Tat Hostilities in Syria: War Powers and International Law Implications*, JUST SECURITY (Sept. 8, 2022), <https://www.justsecurity.org/82979/tit-for-tat-hostilities-in-syria-war-powers-and-international-law-implications/> [https://perma.cc/QG66-LBPL].

<sup>69</sup> Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/745 (9 Sept. 2015) [https://perma.cc/JV42-FV9P] ("By resolutions 2170 (2014), 2178 (2014) and 2199 (2015) in particular, the Security Council has described the terrorist acts of Islamic State in Iraq and the Levant (ISIL), including abuses committed against the civilian populations of the Syrian Arab Republic and Iraq, as a threat to international peace and security. Those acts are also a direct and extraordinary threat to the security of France.").

interview, a French drone pilot who had participated in French armed drone operations from the Niamey air base in Niger described the French use of drones and, in particular, their increased use to engage in “anticipatory” self-defense in the Sahel.<sup>70</sup> The operator received training on how to operate the drone in the United States,<sup>71</sup> and the legal policies under which he was operating were similarly modeled on U.S. legal policy for counterterrorism operations in the Middle East.<sup>72</sup>

#### ***D. “Collective Self-defense” on Behalf of Non-State Actor Partners***

The United States’ latest step in the expansion of self defense is the new assertion that the right of collective self-defense includes not only actions in defense of state actors, but actions in defense of *non-state actors* as well. While this view has not yet been openly embraced by other states, the invocation of “collective self-defense” in such contexts by the United States could, over time, once again shift the scope of what is considered permissible under international law.

The novel theory that collective self-defense could be undertaken on behalf of non-state actor partners first became public in 2017, when the United States announced military operations in defense of the Syrian Democratic Forces (SDF), a coalition of ethnic militia and anti-government groups operating in North and East Syria with which the United States had partnered since 2015. On June 18, 2017, the United States shot down a manned Syrian regime SU-22 aircraft that had “dropped bombs near SDF fighters south of Tabqah”—a city in north-central Syria near Raqqa.<sup>73</sup> This was in response to an attack by Syrian forces on Ja’Din, an SDF-controlled town, “wounding a number of SDF fighters and driving the SDF from the town.”<sup>74</sup> It is unclear if

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<sup>70</sup> *Testimony of French drone operator: anticipatory strikes in the Sahel*, EUR. F. ON ARMED DRONES (Feb. 16, 2022), <https://www.efadrones.org/testimony-of-a-french-drone-operator-anticipatory-strikes-in-the-sahel/> [<https://perma.cc/G6CK-FKUV>].

<sup>71</sup> Interview with Lieutenant-Colonel Romain, French Air Force officer and drone operator, by Alexandre Jubelin (Apr. 9, 2021), [https://www.efadrones.org/wp-content/uploads/2022/02/Drone-strike-in-the-Malian-desert\\_interview-in-English-2.pdf](https://www.efadrones.org/wp-content/uploads/2022/02/Drone-strike-in-the-Malian-desert_interview-in-English-2.pdf) [<https://perma.cc/RQ3M-YZEJ>].

<sup>72</sup> See generally Rebecca Mignot-Mahdavi, *Drones Programs, the Individualization of War and the Ad Bellum Principle of Proportionality*, in *NECESSITY AND PROPORTIONALITY IN INTERNATIONAL PEACE AND SECURITY LAW* (Claus Kress & Robert Lawless eds., 2020).

<sup>73</sup> Press Release No. 20170618-02, U.S. Central Command, Coalition Defends Partner Forces from Syrian Fighter Jet Attack (Jun. 18, 2017), <https://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1217892/coalition-defends-partner-forces-from-syrian-fighter-jet-attack> [<https://perma.cc/4SYJ-BYDA>].

<sup>74</sup> *Id.* There was an identical press release published the next day. Press Release, CJTF-OIR, Coalition Defends Partner Forces from Syrian Fighter Jet Attack (June 19, 2017), <https://www.centcom.mil/MEDIA/NEWS-ARTICLES/News-Article-View/Article/1217917/coalition-defends-partner-forces-from-syrian-fighter-jet-attack> [<https://perma.cc/NY4Q-HZ8C>].

any U.S. servicemembers were at risk, but the U.S. Department of Defense press release on the strike did not reference their presence. Instead, it stated, “At 6:43 p.m., a Syrian regime SU-22 dropped bombs near SDF fighters south of Tabqah and, in accordance with rules of engagement and *in collective self-defense of Coalition partnered forces*, was immediately shot down by a U.S. F/A-18E Super Hornet.”<sup>75</sup>

Perhaps recognizing the extraordinary step it had taken—attacking the military forces of a country in its *own territory* in order to defend an unlawful organized armed non-state actor group—the press release went on to connect the attack to the ongoing self-defense mission in Syria: “[T]he Coalition’s mission is to defeat ISIS in Iraq and Syria. The Coalition does not seek to fight Syrian regime, Russian, or pro-regime forces partnered with them, but will not hesitate to defend Coalition or partner forces from any threat.”<sup>76</sup> It further argued that “[t]he Coalition presence in Syria addresses the imminent threat ISIS in Syria poses globally. The demonstrated hostile intent and actions of pro-regime forces toward Coalition and partner forces in Syria conducting legitimate counter-ISIS operations will not be tolerated.”<sup>77</sup>

The incident was an inflection point in the Syrian conflict. In response, the Russian Ministry of Defense suspended its use of the U.S.-Russia deconfliction line, calling the U.S. strike “a blatant breach of the international law” and “military aggression” against the Syrian regime.<sup>78</sup> Russian Deputy Foreign Minister Sergei Ryabkov said the U.S. strike “has to be seen as a continuation of America’s line to disregard the norms of international law” and suggested that it was an “act of aggression.”<sup>79</sup> Australia suspended air strikes in Syria in response to what appeared to be a very real threat of escalation.<sup>80</sup>

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<sup>75</sup> *Id.* (emphasis added).

<sup>76</sup> See Press Release No. 20170618-02, *supra* note 73.

<sup>77</sup> *Id.*

<sup>78</sup> See, e.g., Russian Ministry of Defense, *Statement of the Russian Defence Ministry concerning downing of the Syrian Su-22 near the town of Resafa*, FACEBOOK (June 19, 2017), <https://www.facebook.com/mod.mil.rus/posts/1943173689258711:0> [<https://perma.cc/9S4B-FPX7>]; Michael R. Gordon & Ivan Nechepurenko, *Russia Warns U.S. After Downing of Syrian Warplane*, N.Y. TIMES (June 19, 2017), <https://www.nytimes.com/2017/06/19/world/middleeast/russia-syria.html> [<https://perma.cc/44UA-JGKX>]; *U.S. aviation actions against Syrian Armed Forces are gross violation of int’l law, military aggression - Russian Defense Ministry*, INTERFAX (June 18, 2017), <https://interfax.com/newsroom/top-stories/27770> [<https://perma.cc/3ZDZ-CHM3>].

<sup>79</sup> Patrick Wintour & Julian Borger, *Russia Warns US Its Fighter Jets are Now Potential Target in Syria*, GUARDIAN (June 19, 2017), <https://www.theguardian.com/world/2017/jun/19/russia-target-us-led-coalition-warplanes-over-syria> [<https://perma.cc/5MXA-KDSB>].

<sup>80</sup> *Australia suspends air strikes in Syria – government*, REUTERS (June 20, 2017), <https://www.reuters.com/article/mideast-crisis-syria-australia-idUSS9N1J304U> [<https://perma.cc/GT9D-YBMG>].

The June 18 shoot-down was the first time a U.S. “warplane downed a manned aircraft since 1999,” during the NATO intervention in Kosovo,<sup>81</sup> and it was the first time the United States justified force under international law as “collective self-defense of Coalition partnered forces” where that partner was a non-state actor and no U.S. servicemembers were apparently at risk.<sup>82</sup> In early August 2017, the State Department offered a more detailed legal justification for the June 18 incident in a letter to Senator Bob Corker.<sup>83</sup> First, the State Department justified the strike under domestic law, citing the 2001 Authorization for Use of Military Force (AUMF) as providing “authority to use force to defend U.S., Coalition, and partner forces engaged in the campaign to defeat ISIS to the extent such use of force is a necessary and appropriate measure in support of counter-ISIS operations.”<sup>84</sup> Second, the State Department justified the use of force under international law explaining that the United States “is using force in Syria against al-Qa’ida and associated forces, including ISIS, and is providing support to Syrian partners fighting ISIS, such as the Syrian Democratic Forces, in the collective self-defense of Iraq (and other States) and in U.S. national self-defense.”<sup>85</sup>

Nor was the June 18 incident the first—or only—time the United States invoked the collective defense of partnered forces to use force against another state. In February 2018, the United States again cited the “defense of Coalition and partner forces” to justify “defensive strikes” against Syrian pro-regime forces.<sup>86</sup> These justifications are notable because they indicate the U.S. government believed it could lawfully use force against Syria in *collective* self-defense of the SDF. And in the years since, the United States has reflexively

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<sup>81</sup> Ryan Browne, *New Details on US Shoot Down of Syrian Jet*, CNN (June 21, 2017), <https://www.cnn.com/2017/06/21/politics/us-syria-russia-dogfight/index.html> [https://perma.cc/DW8Y-URBT].

<sup>82</sup> See Press Release No. 20170618-02, *supra* note 73.

<sup>83</sup> Letter from Charles Faulkner, Bureau of Leg. Aff., U.S. Dep’t of State, to Bob Corker, Chair, Sen. Comm. on Foreign Rel. (Aug. 2, 2017), <https://www.politico.com/f/?id=0000015d-a3bf-d43a-a3dd-b3bf14170000> [https://perma.cc/LT8V-RMCZ]. Note that Charles Faulkner, the author of this State Department letter, came under scrutiny in summer 2019 for his background as an arms-industry lobbyist and his role in the Trump administration decision to “sell weapons to Saudi Arabia and the United Arab Emirates without seeking legislative approval.” Edward Wong & Catie Edmondson, *Democrats to Scrutinize Ex-Lobbyist’s Role in Trump’s Arms Sales to Gulf Nations*, N.Y. TIMES (June 11, 2019), <https://www.nytimes.com/2019/06/11/us/politics/democrats-charles-faulkner-arms-sales.html> [https://perma.cc/BJ7L-2GUE].

<sup>84</sup> Letter from Charles Faulkner, *supra* note 83.

<sup>85</sup> *Id.*

<sup>86</sup> Press Release No. 20180208-01, U.S. Central Command, Unprovoked attack by Syrian pro-regime forces prompts Coalition defensive strikes (Feb. 8, 2018), <https://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1435188/unprovoked-attack-by-syrian-pro-regime-forces-prompts-coalition-defensive-strike/> [https://perma.cc/XW8W-N6LB].

relied on “collective self-defense” in an array of circumstances that similarly push far beyond the historic boundaries of Article 51.<sup>87</sup> In 2018, Senator Tim Kaine sent a letter to Secretary of Defense James Mattis regarding the Administration’s reliance on collective self defense as a justification for the use of military force. The exchange made clear the Department of Defense’s extensive reliance on the concept, even if it did not entirely clarify the full extent of or legal basis for it.<sup>88</sup>

The United States has relied almost entirely on “collective self-defense” (this time of Somali counterparts) to justify strikes against Al Shabaab from 2015 through today. In characterizing the strikes as defensive in nature, U.S. forces were able to circumvent policy restrictions that would otherwise have applied.<sup>89</sup> Indeed, the International Crisis Group quotes a U.S. official explaining that “[c]ollective self-defense is really close air support without authorization.”<sup>90</sup> The rationale allowed military forces on the ground to get “ahead of what Washington had blessed or thought it had blessed,” and allowed more expansive strikes than would otherwise have been permitted under the 2001 AUMF.<sup>91</sup>

These decisions to stretch the scope of Article 51 have been made, it is important to note, without any affirmative approval from Congress. Because the operations have been justified by the Executive Branch under the 2001 AUMF or in “self-defense,” they have not been submitted to Congress for approval. Nor have any formal legal memos articulating these positions been released to the public. Rather, one can only glean the evolving legal positions from speeches, press releases, and occasional public statements.<sup>92</sup>

In a somewhat ironic twist, the latest evolution of U.S. legal policy has brought it into nearly direct conflict with a state that has emulated its

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<sup>87</sup> See, e.g., Hathaway & Hartig, *Still at War: Somalia*, *supra* note 9.

<sup>88</sup> 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/AJ24-KWM4>].

<sup>89</sup> This is well described in *Overkill: Reforming the Legal Basis for the U.S. War on Terror*, INT’L CRISIS GROUP, (Sept. 17, 2021), <https://www.crisisgroup.org/united-states/005-overkill-reforming-legal-basis-us-war-terror> [<https://perma.cc/6T94-6XPH>].

<sup>90</sup> *Id.* at text accompanying note 98–100.

<sup>91</sup> *Id.* President Biden’s new Presidential Policy Memorandum reportedly does not require White House approval “for strikes carried out in self-defense, such as the so-called collective self-defense of partner forces.” Charlie Savage, *White House Tightens Rules on Counterterrorism Drone Strikes*, N.Y. TIMES (Oct. 7, 2022), <https://www.nytimes.com/2022/10/07/us/politics/drone-strikes-biden-trump.html> [<https://perma.cc/9EST-BFUN>]. If correct, this simply extends and amplifies the reliance on self-defense and collective self-defense.

<sup>92</sup> For more on the pathologies of the National Security lawyering process, see Hathaway, *National Security Lawyering*, *supra* note 1.

longstanding position on self-defense against non-state actor forces. In 2019, Turkey—a NATO ally of the United States—launched an assault on Kurdish forces in northern Syria, an incursion it justified by “the right of self-defense as outlined in Article 51 of the UN Charter, to counter the imminent terrorist threat, to ensure Turkey’s border security, to neutralize terrorists.”<sup>93</sup> The non-state actor forces Turkey attacked were some of the very same the United States had used force to defend based on its own claims of “collective self defense.”<sup>94</sup> NATO allies thus found themselves on opposite sides of a conflict—one state (Turkey) using claims of self-defense under Article 51 to attack the SDF, the very same group the other state (the United States) claimed a right to defend under Article 51.

Perhaps even more concerning, Russian President Vladimir Putin attempted to claim a right to act in the “collective self-defense” of the “independent” eastern regions of Ukraine when he initiated Russia’s war in Ukraine on February 24, 2022. The day Russia launched the first attack, its Permanent Representative to the United Nations notified the UN Secretary-General that the military action was “taken in accordance with Article 51 of the UN Charter in the exercise of the right of self-defence.”<sup>95</sup> In explanation, he appended a speech Putin had made to the Russian people earlier in the day. “The People’s Republics of Donbass turned to Russia with a request for help . . .” he stated. “In this regard, in accordance with Article 51 (chapter VII) of the UN Charter, . . . I have decided to conduct a special military operation.”<sup>96</sup> Russia thus attempted to use the language of self-defense, and the expanded scope of Article 51, to justify a blatantly illegal invasion. The attempt at justification was met with widespread skepticism,<sup>97</sup> as it should have been, but that Russia even considered the argument worth making reveals how flexible Article 51 has come to be seen.

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<sup>93</sup> Letter from the Permanent Representative of Turkey to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2019/804 (Oct. 9, 2019), <https://daccess-ods.un.org/tmp/8213402.62889862.html> [<https://perma.cc/77CZ-6J3M>].

<sup>94</sup> See Oona Hathaway, *Turkey is Violating International Law. It Took Lessons from the United States*, WASH. POST (Oct. 22, 2019) <https://www.washingtonpost.com/outlook/2019/10/22/turkey-is-violating-international-law-it-took-lessons-us/> [<https://perma.cc/66VV-Q3E2>].

<sup>95</sup> Letter from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, U.N. Doc. S/2022/154 (Feb. 24, 2022), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/268/16/PDF/N2226816.pdf?OpenElement> [<https://perma.cc/EF6U-3XZZ>].

<sup>96</sup> *Id.*

<sup>97</sup> See, e.g., Elizabeth Wilmshurst, *Ukraine: Debunking Russia’s Legal Justifications*, CHATHAM HOUSE (Feb. 24, 2022), <https://www.chathamhouse.org/2022/02/ukraine-debunking-russias-legal-justifications> [<https://perma.cc/9ZLW-2Q2L>].



### III. A WAY FORWARD

The longstanding debate over reforming war powers and reasserting Congress's authority over decisions to use force does not simply have stakes for U.S. constitutional law and separation of powers within the United States. The debate has global consequences. Reasserting congressional war powers is important to ensuring that the expansion of self-defense claims made by successive presidents does not continue. It is not simply a matter of constitutional law, it is a matter of international law as well. And, as such, it has implications not only for the scope of future U.S. actions, but for the behavior of other states who may rely on the same legal theories to take action that may be antithetical to U.S. national security interests.

The connection between the erosion of war powers and the erosion of international law limits on the use of force should therefore add urgency to the debate over whether and how to reassert congressional war powers. If the United States is going to lead the charge in softening the limits on the use of military force globally—in ways that foreign states inevitably will emulate—that should be done not simply by the president and his lawyers acting on their own, but by the president in consultation with—and with the approval of—Congress.

There is a further reason to address the problem now: With the war waging in Ukraine, the United States has repeatedly (and rightly) condemned the Russian war of aggression.<sup>98</sup> It has for the first time endorsed accountability for the crime of aggression—that is, the crime of waging a war that violates the United Nations Charter's prohibition on force.<sup>99</sup> And the United States has helped create a coalition of states that have supported Ukraine through providing financial and military assistance while sanctioning Russia for its illegal acts.<sup>100</sup> But the capacity of the United States to rally others to the Ukrainian cause has been hampered by concerns that the United States is applying a double standard—holding Russia to account for violating the prohibition on force that it has itself undermined in its invasion of Iraq in 2003,

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<sup>98</sup> See, e.g., Joseph Biden, U.S. President, Remarks by President Biden on Russia's Unprovoked and Unjustified Attack on Ukraine (Feb. 24, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/02/24/remarks-by-president-biden-on-russias-unprovoked-and-unjustified-attack-on-ukraine/> [<https://perma.cc/45U6-TB8J>].

<sup>99</sup> Beth Van Schaack, Ambassador-at-Large for Global Criminal Justice, Ambassador Van Schaack's Remarks on the U.S. Proposal to Prosecute Russian Crimes of Aggression, Catholic University of America (Mar. 27, 2023), <https://www.state.gov/ambassador-van-schaacks-remarks/> [<https://perma.cc/Y43S-9ETP>].

<sup>100</sup> The White House, Fact Sheet: One Year of Supporting Ukraine (Feb. 21, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/21/fact-sheet-one-year-of-supporting-ukraine/> [<https://perma.cc/LUH5-FUUQ>].

which is widely regarded in much of the world as a manifestly illegal war, but also through its decades-long global counterterrorism campaign.

While comprehensive war powers reform may be out of reach in the near term, there are a number of reforms that could be made individually or collectively that would make a real difference in the capacity of Congress to exercise effective oversight over the use of military force and thus reduce the likelihood that the United States will use force in ways that violate international law. These include the following:<sup>101</sup>

*Define Hostilities.* As noted above, one of the reasons the War Powers Resolution has been ineffectual is that it turns on “hostilities,” a term that is not defined in the law. Any revision to the War Powers Resolution should define the term, to respond to the executive branch’s repeated interpretations of the term “hostilities” in ways that allow the executive branch to act without congressional consent. As of this writing, the most recent legislation proposed in Congress to reform war powers defined hostilities as “any situation involving any continuous or intermittent use of lethal or potentially lethal force by or against United States forces (or, for purposes of paragraph (3)(B), foreign regular or irregular forces) carried out through land, sea, air, space, or cyber operations, or through any other domain, including whether or not such force is deployed remotely.”<sup>102</sup> Any definition should make clear that it applies broadly to modern warfare operations—including cyber operations, operations involving remotely piloted vehicles, and operations involving partnered operations.

*Automatic funding cutoff.* There should be an automatic funding cutoff for operations that do not comply with the War Powers Resolution, without requiring further action by Congress. As noted above, Congress not only has the constitutional authority to “declare war” but also possesses the power of

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<sup>101</sup> For more proposals, see Oona A. Hathaway, *How to Revive Congress’s War Powers, Policy Roundtable: The War Powers Resolution*, TEXAS NAT’L SEC. REV. (Nov. 14, 2019), <https://tnsr.org/roundtable/policy-roundtable-the-war-powers-resolution/> [https://perma.cc/X63Y-NKYB]; Oona A. Hathaway & Geoffrey Block, *How to Recover a Role for Congress and the Court in Decisions to Wage War*, JUST SECURITY (Jan. 10, 2020), <https://www.justsecurity.org/68001/how-to-recover-a-role-for-congress-and-the-courts-in-decisions-to-wage-war/> [https://perma.cc/U8MS-8LYG].

<sup>102</sup> This was the House version. See National Security Reform and Accountability Act of 2021, H. R. 5410, 117th Cong. (2021). The Senate version was slightly different: “The term “hostilities” means any situation involving any use of lethal or potentially lethal force by or against United States forces (or, for purposes of paragraph 4(B), by or against foreign regular or irregular forces), irrespective of the domain, whether such force is deployed remotely, or the intermittency thereof. The term does not include activities undertaken pursuant to section 503 of the National Security Act of 1947 (50 U.S.C. 5093) if such action is intended to have exclusively non-lethal effects.” National Security Powers Act of 2021, S. 2391, 117th Cong. (2021).

the purse. And yet that power has been largely ineffectual. Due to the massive defense budgets, most military operations, even large ones, do not require separate appropriations. This means that members of Congress who disapprove must affirmatively enact a law to prohibit the use of funds—and this is subject to a veto by the very president seeking to use those funds for the military operation in question. This has had the effect of turning the constitutional order upside down. A law that would prohibit, *ex ante*, any use of funds that would violate the war powers act would reassert Congress's constitutional authority to control both the exercise of war powers and appropriations. Senators Chris Murphy, Mike Lee, and Bernie Sanders have introduced legislation that would do just that.<sup>103</sup> Their National Security Powers Act would require the president to consult congressional leaders and obtain congressional authorization before initiating military force, emergency powers, or arms exports. Any activities lacking authorization will face an automatic funding cutoff. The failure to abide by that cutoff would subject those involved to penalties under the Anti-Deficiency Act, which can include criminal penalties for those involved in unauthorized use of funds.

*Enhance congressional standing to challenge unlawful uses of force.* Recent DC Circuit and Supreme Court decisions indicate that the courts may be increasingly open to institutional standing.<sup>104</sup> Consistent with these decisions, each house of Congress could enact a Simple Resolution to authorize key members of each chamber—likely the Chair and Ranking member of the House Foreign Affairs Committee or Senate Foreign Relations Committee or the Speaker or House Minority Leader—to sue to challenge a decision by the executive branch that has concrete and particular injuries to Congress's war powers. In this way, Congress might encourage the courts to reengage on national security matters. A similar technique could be applied to address the political question doctrine, to the extent it is prudential and therefore discretionary.

*Repeal the existing AUMFs.* The authorizations for use of military force that remain in effect were enacted by past Congresses for purposes that have long since been achieved. The 1991 Authorization for the Use of Military Force permitted then-President George H.W. Bush to use military force pursuant to UN Security Council Resolution 678, a resolution that required Iraq, then led by Saddam Hussein, to withdraw from Kuwait, which it had

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<sup>103</sup> S. 2391, *supra* note 102.

<sup>104</sup> *Raines v. Byrd*, 521 U.S. 811 (1997); *U.S. House of Representatives v. Mnuchin*, 379 F.Supp.3d 8 (D.C. Cir. 2020); *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019); *Committee on the Judiciary of the U.S. House of Representatives v. McGahn*, 968 F.3d 755 (D.C. Cir. 2020) (en banc) (finding that a Committee of the House had standing to sue).

invaded and occupied, no later than January 15, 1991.<sup>105</sup> The 2002 Authorization for use of Military Force was enacted primarily in response to fears that Saddam Hussein's Iraq possessed weapons of mass destruction that posed a direct threat to the United States and its allies.<sup>106</sup> It authorized the President "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq."<sup>107</sup> The purposes of these authorities have long ago been met. The government of Iraq was long ago expelled from Kuwait, the U.N. resolutions referred to in the resolutions have long since expired, and Iraq does not pose a threat to the United States or its allies. The Biden Administration has endorsed repeal of the 2002 AUMF, explaining that it no longer relies on it for any authorities.<sup>108</sup> Leaving these AUMFs on the books simply leaves the door open to their misuse without giving Presidents any additional legitimate basis for military action.

The AUMF that the Executive Branch does continue to rely on—the 2001 Authorization for Use of Military Force<sup>109</sup>—has long been in need of reform. Enacted mere days after the September 11, 2001 attacks in the United States, it authorized the president to use "necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."<sup>110</sup> The clear intent was to allow the use of force against those who carried out the attacks and those who had harbored them. Today, more than two decades later, that authority has been

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<sup>105</sup> Authorization for the Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991). Though no one has sought to rely on it or suggested it is still effective, it may nonetheless be wise to also repeal the 1957 Middle East Force Resolution, Pub. L. No. 85-7, § 2, 71 Stat. 5 (1957). The 1957 Resolution authorized the President to use military force in the Middle East to "assist any such nation or group of such nations requesting assistance against armed aggression from any country controlled by international communism" (codified at 22 U.S.C § 1962). For further context, see Matthew Waxman, *Remembering Eisenhower's Middle East Force Resolution*, LAWFARE (March 9, 2019), <https://www.lawfareblog.com/remembering-eisenhowers-middle-east-force-resolution> [https://perma.cc/6934-Z2C2].

<sup>106</sup> Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

<sup>107</sup> *Id.*

<sup>108</sup> Tess Bridgeman, *Biden's Support of 2002 AUMF Repeal: The Start of a Long Overdue Conversation*, JUST SECURITY (June 16, 2021), <https://www.justsecurity.org/76949/bidens-support-of-2002-aumf-repeal-the-start-of-a-long-overdue-conversation/> [https://perma.cc/CV4B-YV8H].

<sup>109</sup> Authorization for Use of Military Force, *supra* note 5.

<sup>110</sup> *Id.*

stretched beyond any reasonable limits. It is far past time to repeal the authorization and replace it with one more narrowly focused on the threats that the United States currently faces. That new AUMF, moreover, should contain a sunset provision, so that Congress can retain control over decisions to use force in the future and restrain over-reading of the resolution in ways that Congress does not support. Because agreeing on a replacement is likely to be a time-consuming process that will require a theatre-by-theatre assessment of current military needs, Congress could simply pass a two-year sunset. Doing so would give ample time to agree on a replacement, while making clear that continuing to rely on the outdated authorization will no longer be an option.

*Internal Congressional Reforms.* With the exception of enhancing congressional standing, the reforms outlined above all would require passage of legislation that would be subject to a veto by the president. That makes reform an uphill battle. But there are internal reforms that Congress could adopt that could make it more effective in its oversight role that would not be subject to a presidential veto. First, Congress could take steps to address siloing of information in individual committees, including expanding cross-committee membership and holding more frequent joint briefings and hearings, particularly for cross-cutting, high-stakes issues that implicate the equities of multiple committees. It could even create a Congressional National Security Council (C-NSC)—a counterpart to the executive branch National Security Council, which was formed in 1947 to allow better coordination in the executive branch on national security matters. A C-NSC (or it could be called a “working group;” the name is unimportant) could bring together the leadership of each of the committees involved in national security matters to coordinate on cross-cutting matters, just as the NSC brings together the leadership of the agencies that have equities in planning certain operations or activities. Second, Congress could modify rules to allow for sharing of classified information with members and staff when necessary for effective oversight. When information is classified, it can only be shared on a need-to-know basis as determined by the executive branch. Classification can prevent members of Congress from sharing certain information with other congressional representatives, and it prevents staff from sharing information across committees. Third, Congress could create a Congressional Office of Legal Counsel (C-OLC). As noted above, one reason that the executive branch almost always wins war powers debates is that the Justice Department’s Office of Legal Counsel is too often the only body that opines on legal issues relating to war powers. Congress should create its own “C-OLC” to analyze the law in ways that take account of Congressional interests. To do this, Congress could constitute a new office that serves a role for Congress comparable to the role of the OLC for the Executive Branch. Like the Congressional Research Service, the new office should be placed under the leadership of the Library of Congress, a nonpartisan entity created to serve Congress. A modest version of this proposal would simply be to expand the role of legal analysts at the

Congressional Research Service so that they could offer more frequent and timely legal opinions on war powers matters.<sup>111</sup>

If adopted, these reforms would not only affirm domestic legal limits on the use of military force, but they would also help prevent further erosion of the international prohibition on the use of force.

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President Joe Biden, speaking before the United Nations on September 21, 2022, declared: “Russia has shamelessly violated the core tenets of the United Nations Charter—no more important than the clear prohibition against countries taking the territory of their neighbor by force . . . This world should see these outrageous acts for what they are. Putin claims he had to act because Russia was threatened. But no one threatened Russia, and no one other than Russia sought conflict.”<sup>112</sup> He continued: “standing up for those principles for the U.N. Charter is the job of every responsible member state . . . I reject the use of violence and war to conquer nations or expand borders through bloodshed.”<sup>113</sup>

These are powerful words. Yet there was a shadow in the room as the President spoke. The United States’ own actions over the last several decades—including during President Biden’s own tenure—have stretched the limits of the United Nations Charter up to, and sometimes past, their breaking point. President Biden was right to affirm the importance of the United Nations Charter and reject the use of violence in violation of its core legal principles. But these words would have more force if the United States acknowledged its own role in the erosion of the Charter’s protections and pledged to repair that harm.

Just as the erosion of Congress’s constitutional war powers have aided and abetted the erosion of constraints on Article 51’s exception for actions taken in self-defense, the opposite can also be true: Reaffirming Congress’s constitutional war powers could help reduce the likelihood that the United States will undertake military operations that are difficult, if not impossible, to square with the Charter. While taking steps to strengthen democratic checks on war is no guarantee that the United States will only use force consistent with

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<sup>111</sup> Several of these proposals are elaborated at greater length in Hathaway et al., *supra* note 31.

<sup>112</sup> Joseph R. Biden, U.S. President, Remarks by President Biden Before the 77<sup>th</sup> Session of the United Nations General Assembly (Sept. 21, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/21/remarks-by-president-biden-before-the-77th-session-of-the-united-nations-general-assembly/> [<https://perma.cc/QZA2-XY5B>].

<sup>113</sup> *Id.*

international law in the future, it would it make wars in violation of the Charter less likely. Moreover, a revised and revived War Powers Resolution that provides Congress real capacity to check presidential decisions to use force could serve a powerful symbolic function, demonstrating the United States' commitment to the international principles President Biden so powerfully defended before the General Assembly and serving as a counterpoint to the Russian state, which, it appears, has waged a disastrous illegal war of aggression on the whim of a single man.