

The Two Codes on the Use of Force

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Abstract

The jus ad bellum – the international regime that governs cross-border force – is an enigma. The regime is foundational to the global order and has been remarkably resilient over time. And yet, it is deeply discordant, even incoherent, in its operation. A few use of force norms are settled and robust. Although states occasionally deviate from these norms, the deviations are widely viewed and treated as legal violations. Other use of force norms are noticeably more compromised. Operations that stray from these norms are still perceived to be unlawful, but such operations might be tolerated or even supported in practice. Still other norms are highly contested. The substantive content of the norms is so openly and heatedly debated that the credibility of the entire regime has been called into question. This article presents a theory to explain why the regime on the use of force operates as it does. We argue that the regime is best understood as a site of ongoing contestation and compromise between two visions of the legal order – two ‘codes’. Each code has its own substantive policies, decision-making processes, and key advocates. The way in which advocates of the two codes interact in any given context determines whether and how specific use of force norms are articulated, invoked or applied.

1 Introduction

The *jus ad bellum* – the international regime that governs cross-border force – is an enigma. The regime is foundational to the global order and has been remarkably resilient over time. And yet, it is deeply discordant, even incoherent, in its operation. A few use of force norms are settled and robust. Although States occasionally deviate from these norms, the deviations are widely viewed and treated as legal violations. Other use of force norms are noticeably more compromised. Operations that stray from these norms are still perceived to be unlawful, but such operations might be tolerated or even supported in practice. Still other norms are highly contested. The norms’ substantive content is so openly and heatedly debated that the credibility of the entire regime has been called into question.

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This article presents a theory to explain why the regime on the use of force operates as it does: what accounts for the combined resilience and disharmony in the *jus ad bellum*? Why do its substantive norms display such varied characteristics? And how are specific norms likely to be invoked or applied in concrete cases? We argue that the regime is best understood as a site of ongoing contestation and compromise between two visions of the legal order – what we call ‘codes’. These two codes represent a ‘conflict between contending normative orders’.¹ They vie for pre-eminence within the regime, pulling in opposite directions and creating an inherent tension that often manifests in uncertainty or incoherence. At the same time, the advocates for each code recognize the benefits to working with, or at least not overtly challenging, the other code. The way in which the two codes’ advocates interact in any given context determines whether and how specific use of force norms are articulated, invoked or applied.

The two codes that we identify both stem from the United Nations (UN) Charter but are notably distinct. Each has its own procedural and substantive norms, and its own base of support. One code – the ‘institutional code’ – results from the structured and collective decision-making processes of international institutions. The institutional code’s processes consistently produce substantive norms that strictly limit the use of force by individual states and thereby reinforce the same institutional processes; restrictive substantive norms channel decisions, as much as possible, through the UN Security Council. A second code – the ‘state code’ – emerges from a disorganized and horizontal decision-making process in which states act or react in specific cases. This process produces substantive norms that push in the opposite direction of the institutional code’s – towards deregulating the use of force. Looser substantive norms, in turn, prioritize the state code’s own decentralized process.

Neither code prevails in this conflict because each lacks a key attribute that the other retains. The institutional code has an inherent authority that results from its collective and deliberative processes. Most lawyers treat its output as black letter law, at least absent strong evidence to the contrary.² The advocates of the institutional code use this authority to press for their preferred policies on the use of force. But while the institutional code is strong on authority, it is weak on control. International institutions lack their own coercive powers or implementing agents, so they are by themselves incapable of establishing the expectation that their decisions will be followed. The state code is effective in precisely this way. It reflects what states do and tolerate in particular cases, so it sets expectations about which norms will be implemented. The key backers of the state code use this operational power to advance their preferred policies. However, the state code on its own lacks sufficient authority for its policies to be

¹ Hartog, ‘Pigs and Positivism’, *Wisconsin Law Review* (1985) 899, at 935.

² See, e.g., C. Gray, *International Law and the Use of Force* (3rd edn, 2008), at 20; T. Ruys, ‘Armed Attack’ and Article 51 of the UN Charter (2010), at 52; O’Connell, ‘The Choice of Law against Terrorism’, 4 *Journal of National Security Law and Policy* (2010) 343, at 359. But see Glennon, ‘How International Rules Die’, 93 *Georgetown Law Journal* (2005) 939, at 960.

widely accepted as law. Because each code possesses a critical ingredient – authority or control³ – that the other mostly lacks, each consistently maintains its own influence in the regime and checks the sway of the other. The regime's contemporary contours are set not by one code or the other but by both together. The strength and shape of specific use of force norms depend on how the advocates of the two codes interact in different contexts.⁴

The theory that we present breaks with the principal way of thinking about the *jus ad bellum*. Most scholars recognize that the available sources on the use of force are replete with ambiguities and inconsistencies – and specifically, that norms that are widely accepted as authoritative do not always map the operational practice.⁵ But the usual response to this disharmony is to try to resolve or explain away the tensions among the sources in order to distill the best or most correct interpretations of the law. Indeed, almost all of the literature on the *jus ad bellum* aims to identify what the law is or should be, either generally or in specific cases.⁶ This approach presupposes that the *jus ad bellum* can be reduced to a single set of discernible rules. It treats the disharmony in the regime as either a function of the law's ambiguity or evidence of states' lawlessness – in other words, as a problem that reifying the law's content might solve. Attempts to divine a unified *jus ad bellum* have limited explanatory power and practical value, however, because they elide the tensions that shape how the regime actually operates.

³ On these terms, see Reisman, 'International Lawmaking: A Process of Communication', 75 *American Society of International Law Proceedings* (1981) 101.

⁴ Some readers might see similarities between our characterization of the two codes and Martti Koskenniemi's famous description of the forms and dynamics of international legal argument. In *From Apology to Utopia*, Koskenniemi does not discuss the use of force in any detail, but some of his ideas – like the dualism of apology and utopia, and the recognition that law is a site of both contestation and reconciliation – can be grafted onto this regime. M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989; reissued edn 2005), at 158–171. However, our project is also dissimilar from his. We are concerned not with the fluidity of legal argumentation or the justification of international law but with the actual operation of a regime. As such, we examine how global actors use the specific tools that are available to them (authority or control), within the distinct settings in which they operate (institutionalized or disaggregated) to advance their own policy positions and to resist competing positions.

⁵ See, e.g., O. Corten, *The Law Against War* (2010), at 5–29; Gray, *supra* note 2, at 6–24.

⁶ For prominent examples that were recently published, see M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015); Bethlehem, 'Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors', 106 *American Journal of International Law (AJIL)* (2012) 770; 'Self-Defense against Nonstate Actors (Continuation of the Debate)', 107 *AJIL* (2013) 563. There is one notable exception. Professor Reisman has argued that the regime on the use of force is best described in terms of a 'myth system' and an 'operational code'. While the myth system is known to and governs most actors, the operational code is familiar to and used by only key decision-makers. See Reisman, 'The Quest for World Order and Human Dignity in the Twenty-First Century: Constitutive Process and Individual Commitment', 351 *Recueil des Cours* (2010) 9, at 303–322. We, too, understand the regime as consisting of two codes, but we do not believe that the regime's two codes are usually directed at different audiences or that one code is usually hidden from view. Nevertheless, we recognize that Reisman's paradigm might describe certain facets of this regime.

We intentionally avoid taking a position on which norms – those of the institutional code or those of the state code – are more reflective of law.⁷ By instead emphasizing that the two codes operate concurrently and compete with each other for pre-eminence, we can answer questions that persistently appear in the literature but still lack resolution. For example, we can identify when institutional pronouncements are likely to persevere as recognized statements of law, despite a contrary operational practice, and when these pronouncements are at risk of deteriorating and appearing only aspirational because of the contrary practice. We can also explain why a contrary practice is widely condemned as a legal violation in some contexts, treated with ambivalence in other contexts and deeply destabilizing to the regime in still other contexts. We can, in other words, better account for and understand the regime.

We proceed as follows. The second part of the article introduces the two codes that operate in the use of force regime and outlines the basic characteristics of each. The third part then demonstrates the explanatory power of our theory. It examines how the two codes interact in a broad range of contemporary contexts, and it shows that these interactions define the regime's operative framework. Having developed and applied our theory, the fourth part uses the theory to explore the viability of the regime over the long term.

2 The Two Codes

The idea that the modern regime on the use of force consists of two codes, rather than one, might seem counterintuitive. After all, the regime stems from a single text: the UN Charter. But the Charter provisions on the use of force are spare, and their application requires that they be further interpreted and refined. In practice, two codes for developing the Charter's basic framework have emerged: the institutional code and the state code.

A *One Text, Two Codes*

The Charter's provisions on the use of force can be set out succinctly. Article 2(4) prohibits the use of force 'against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations'.⁸ Chapter VII of the Charter empowers the UN Security Council to 'take

⁷ As noted, most international lawyers treat the institutional code's norms as presumptively law. However, some theories posit that a practice must be both authoritative and controlling to qualify as law. See, e.g., Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1995), at 296, 300, 301 (positing that law both claims 'legitimate authority' and possesses the ability to 'impos[e] its will on many over whom it claims authority'); Reisman, *supra* note 3. These theories would suggest that a use of force policy qualifies as law only if it has some support in both the institutional code, which is authoritative, and the state code, which is controlling. For this article, we are agnostic on the question of what is or should be law. One need not adopt any particular definition of law or approach to law-making to accept our theory about the regime's operation.

⁸ UN Charter, Art. 2, para. 4.

such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security'.⁹ This enforcement authority is exclusive.¹⁰ Indeed, the Charter recognizes only one context in which states may use cross-border force unilaterally – meaning without the Council's authorization. Under Article 51, states may use force unilaterally in 'individual or collective self-defense if an armed attack occurs'.¹¹

The Charter text provides the foundation for the *jus ad bellum*, but most of its provisions on the use of force are open-ended. As such, the regime has largely developed outside the four corners of that text. Two distinct codes have emerged. By 'code', we mean a coherent set of legal policies that global actors advance through their decisions and practices.¹² We do not intend to suggest that either code has been formally enacted as law. Rather, each code reflects a politically relevant, normative vision for the regime. The two codes differ in that they stem from and prioritize distinct processes for making use of force decisions, and they advance competing substantive agendas.

One code – the institutional code – appears in the judgments, resolutions and other decisions of international institutions. The International Court of Justice (ICJ), the UN Security Council, and the UN General Assembly are major players in the institutional code. Other institutions, like regional organizations and the International Law Commission (ILC), also participate. These institutions make decisions through structured, collective and deliberative processes. And they share a similar normative impulse. They consistently aim to restrict unilateral uses of force. Of course, different institutions sometimes produce slightly incompatible substantive norms.¹³ Despite that modest variance within the institutional code, this code is noticeably more restrictive of unilateral force than is the state code. As we show in the third part of this article, the institutional code's least restrictive output in any given context is almost always more restrictive than the state code's most restrictive output. Restrictive norms are designed to channel use of force decisions, as much possible, through the Security Council, which itself is part of the institutional code. Thus, the institutional code's decision-making processes advance a substantive agenda that, in a feedback loop, benefits those same processes.

The state code is a function of an entirely different process. It relies on states' horizontal and unstructured decisions in the context of specific incidents. Because this process is highly disorganized, its substantive output – what states

⁹ *Ibid.*, Art. 42.

¹⁰ *Ibid.*, Art. 53.

¹¹ *Ibid.*, Art. 51.

¹² To be clear, each code's policies are coherent, even though they are ambiguous at the margins, and even though the processes for establishing them tend not to be coordinated.

¹³ Regional organizations are part of the institutional code in that they typically advance that code's substantive and procedural norms. Yet these organizations are well situated to mediate inter-code disagreements because they are structurally different from the universal institutions that are the principal participants in that code. See part 4 in this article.

do and tolerate in particular contexts – can be difficult to pin down. States might conduct operations discretely. They might advance legal justifications that do not map the facts. They might even bemoan an operation discursively while demonstrating in other ways that they appreciate the operation for ‘taking care of business’. Although the state code’s precise contours are not always clear, its normative bent is to tolerate much more unilateral force than does the institutional code. Still, even the state code does not jettison all restrictions on the use of force. States sometimes demonstrate in their horizontal and decentralized interactions that particular operations are unacceptable. By permitting more unilateral force, this code devolves decision-making from centralized institutions towards individual states. Thus, just as the institutional code’s norms prioritize its own processes, the state code’s norms prioritize *its* own process.

Each code has its own base of support or key ‘custodians’ – actors that unflinchingly advocate on the code’s behalf. International institutions are the principal custodians of the institutional code. The decision-making bodies of these institutions are often comprised of states – which means that, when states act in institutionalized arenas, they tend to endorse the institutional code’s policies. States might find these policies appealing for any number of reasons: states might prioritize non-forcible over forcible efforts to resolve security problems; they might worry about militarily powerful states interfering in their internal affairs; or they might see advantages to privileging the arenas in which a majority can outvote and hence exercise some leverage over a militarily powerful minority.

However, most states do not consistently advance the institutional code’s policies. The same states that endorse those policies in institutionalized arenas often tolerate or support the state code’s policies in the context of specific incidents. Again, their reasons for doing so might vary: states might react to an operation not on the basis of a generalizable principle but because of the particular issues at stake; they might lack a sufficient interest in any given case to express their views; or they might have multiple, context-dependent and conflicting interests, such that some interests are best advanced through international institutions, while others are not. In the end, most states support different policies when acting within, than when acting outside of, international institutions.¹⁴ Consequently, the real custodians of the institutional code are not the states that participate in institutions but rather the institutions themselves.

By contrast, the custodians of the state code are states that regularly use the military instrument to shape world affairs. These states do not always seek to weaken or sideline international institutions. On the contrary, they sometimes see

¹⁴ See generally Abbott and Snidal, ‘Why States Act through Formal International Organizations’, 42 *Journal of Conflict Resolution* (1998) 3. In this article, we focus on the question of how the regime operates, not on the question of why particular participants take the positions that they do. Still, we suggest a possible answer to that latter question in part 4 in the article. We explain that the two codes’ coexistence might be optimal for some states because it allows states to balance the sometimes competing interests of regulation and flexibility.

benefits to working through institutions. Still, the custodians of the state code are wary about relying too heavily on international institutions to make use of force decisions. For example, the United States has a real stake in the Security Council's viability and supports a Council role in decision-making. However, the United States also sees limits to working through the Council or other international institutions. Thus, it and the other custodians of the state code seek to relax the preconditions on the unilateral use of force. To be clear, all states participate in the state code through their actions or reactions in concrete incidents. But the vast majority of states participate in this code only passively or case specifically. The real drivers of the state code are a handful of militarily active states. Thus, although the modern regime on the use of force stems from a single text, it consists of two separate and independent codes. Each code has its own policies, processes and proponents. As we shall see, their coexistence does not always result in disagreement, but it often does.

B The Two Codes' Reciprocal Attributes and Limitations

The disharmony in the regime on the use of force is more than a consequence of the two codes' competing visions of policy and process. It also results from their distinctive attributes and intrinsic limitations. The institutional code maintains an inherent authority, but it cannot by itself create the expectation that its precepts will be followed. The reverse is true of the state code. It is controlling but relatively deficient in authority. Hence, each code has a key ingredient – authority or control – that the other mostly lacks. The code's custodians leverage that ingredient to promote their preferred policies and resist the policies of their rivals.

Although the Security Council may impose binding obligations on UN member states, none of the custodians of the institutional code is a legislature in the conventional sense.¹⁵ Rather, the institutional code's output is authoritative because its collective and structured processes confer on it legitimacy.¹⁶ This authority is evident in the weight that most international lawyers attribute to institutional pronouncements. Such pronouncements are widely understood to be black letter law, absent strong evidence to the contrary.¹⁷

Though institutions confer authority on their preferred norms, they are dissociated from any material power. Institutions, acting alone, lack the tools for establishing the expectation that their pronouncements will be followed.¹⁸ For the institutional code to be effective, individual states – and especially militarily

¹⁵ See Talmon, 'The Security Council as World Legislature', 99 *AJIL* (2005) 175, at 179.

¹⁶ See I. Hurd, *After Anarchy* (2007), at 71–72; Claude, Jr., 'Collective Legitimization as a Political Function of the United Nations', 20 *International Organization* (1966) 367, at 368–372.

¹⁷ See sources in note 2 in this article.

¹⁸ As Reisman explains, a '[c]ontrolling practice does not mean 100 per cent effective application. ... What is required is an expectation that the norm will be effectuated enough or, at least, that something will happen relevant to the norm often enough to sustain belief in its effectiveness'. Reisman, 'The Concept and Functions of Soft Law in International Politics', in E.G. Bello and B.A. Ajibola (eds), *Essays in Honour of Judge Taslim Olawale Elias* (1992) 135, at 135–136.

powerful states – must decide, outside any institutionalized arena, to make it so. Yet in many contexts, these states are unwilling to carry that burden; they disagree with some of the institutional code's core policies. As such, the institutional code is authoritative but struggles to be controlling. The code is important discursively, but unless it can rely on the state code for support, its operational import is weak.

The state code has the opposite problem. It is operational in the sense that it reflects what states do or tolerate to achieve certain objectives. But the state code lacks precisely what the institutional code offers: the legitimizing authority of collective decision-making. The state code certainly has the potential to become authoritative. International lawyers widely recognize that a state practice can develop into customary law if the practice is sufficiently widespread and understood to reflect the law (*opinio juris*).¹⁹ But in this regime, as in other areas of international law, institutional pronouncements have a strong hold on the legal imagination. A state practice that conflicts with these pronouncements will be viewed by most lawyers as lacking the requisite *opinio juris*, unless that practice is widely supported. In other words, because institutional pronouncements are treated as presumptively authoritative, a conflicting practice is generally evidence not of law but of lawlessness.

Indeed, the custodians of the institutional code jealously guard their position of authority in the regime – as this authority empowers them to advance their own policies and compete with the state code. For example, the ICJ has suggested that the use of force norms that it has articulated cannot be altered by a contrary practice, unless the majority of states openly reject those norms and defend the practice.²⁰ The state code rarely satisfies so stringent a test. Many states participate only passively in the state code, and its principal custodians often choose either not to defend their contrary practice or to defend that practice by reference to the institutional code's own norms. Thus, the ICJ's test for characterizing a practice as law helps ensure that the institutional code's own pronouncements remain authoritative, even in the face of a contrary practice. Similarly, the custodians of the institutional code have asserted that the Article 2(4) prohibition on the use of force qualifies as a *jus cogens* norm.²¹ Such norms are thought to be so fundamental and authoritative that they may be adjusted only through an equally robust and fundamental norm.²² The state code is, again, usually unable to meet that standard.

¹⁹ E.g., Statute of the International Court of Justice 1945, 1 UNTS 993, Art. 38, para. 1; *Continental Shelf (Libya v. Malta)*, Judgment, 3 June 1985, ICJ Reports (1985) 13, paras 26–27.

²⁰ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Merits, 27 June 1986, ICJ Reports (1986) 14, para. 186.

²¹ *Ibid.*, para. 190; Report of the International Law Commission to the General Assembly, UN Doc. A/6309/Rev.1 (1966), reprinted in 2 *Yearbook of the International Law Commission (YB ILC)* (1966) 169, at 247.

²² Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, Art. 53; see also Orakhelashvili, 'Changing Jus Cogens through State Practice? The Case of the Prohibition of the Use of Force and Its Exceptions', in Weller, *supra* note 6, 157.

By the same token, the custodians of the state code have guarded their control over how military force is actually used. The Charter's original plan was for the Security Council to have at its disposal and exercise command over a set of armed forces.²³ This plan would have enabled the Council to implement its own decisions. However, states never made their forces available to the Council. And none of the custodians of the state code has agitated to revive that original plan. Likewise, the custodians of the state code have repeatedly resisted the review of their operational decisions by international institutions. The most recent example concerns the jurisdiction of the International Criminal Court over the crime of aggression. The 2010 Kampala Amendments to the Rome Statute: (1) permit the state parties to opt out of this jurisdiction and (2) preclude the Court from exercising jurisdiction over states that are not parties.²⁴

Thus, each code has an attribute that is lacking in the other code. This attribute empowers the code's custodians to advance their preferred policies and to resist the other code's competing policies. Each code thereby checks the other. However, because they are deficient in reciprocal ways, neither can prevail in this competition and by itself constitute the regime. The institutional code needs the state code to be controlling, and the state code needs the institutional code to be authoritative.

3 Inter-Code Interactions

The regime on the use of force is defined not by one code or the other but by the interactions between the two – specifically, by how the custodians of each code choose to promote their own policies and engage with the policies of the other code. Disaggregating the two codes and then assessing their interactions thus enables us to make sense of the regime's contemporary contours. At the most basic level, we can explain why the regime has been so resilient, even as many of its norms have been contested or uncertain. The push-pull dynamic between the two codes means that each of them simultaneously depends on and competes with the other. Their co-dependence makes the regime resilient, while their ongoing contestation renders many of the norms uncertain. We can also help explain why specific use of force norms are articulated, invoked or implemented as they are. In other words, we can understand how the regime operates in discrete contexts, so we can anticipate what will happen in future incidents. For purposes of analysis, we map along a spectrum the dynamics between the institutional code and the state code, using as examples a broad range of contemporary contexts.

A Mutual Support

At the most supportive end of the spectrum, the two codes share the same substantive policies. Their mutual endorsement confers on the policies both authority and

²³ UN Charter, Art. 43.

²⁴ International Criminal Court (ICC), Assembly of States Parties, Review Conference on the Crime of Aggression (Kampala Amendments), Res. RC/Res.6, 11 June 2010, Annex I, Art. 15*bis*.

control, establishing norms that are strong and stable. These norms are both widely accepted as law and operational in practice. In fact, because the codes overlap here, the two might easily be confused for one. Recognizing that the two codes are distinct helps explain why these use of force norms are so strong, even as others are not. When both codes support the same policy, each code benefits the other by contributing its key ingredient – authority or control. Further, our theory reveals that the dynamic of mutual support is critical to the overall health of the regime. When the two codes work productively together, they create the impression that the regime itself is, essentially, functional – even if it is also, at times, disharmonious. Below, we examine two norms that benefit from the codes' mutual support: (i) the prohibition of forcible annexations and (ii) the norm that gives the Security Council primacy over enforcement actions.

1 *The Prohibition of Forcible Annexations*

The prohibition of forcible annexations – that is, of a state's acquisition of territory using armed force – is one of the regime's most accepted norms. The prohibition is both authoritative and controlling because the custodians of each code have repeatedly supported it. The institutional code's custodians have endorsed the prohibition in several general pronouncements. The General Assembly's 1970 Declaration on Friendly Relations and 1974 Definition of Aggression articulate the prohibition and claim that forcible annexations must not be recognized.²⁵ More recently, the ICJ's *Legal Consequences of the Construction of a Wall* posits that the 'illegality of territorial acquisition resulting from the threat or use of force' is customary international law.²⁶ Key institutions have also invoked and applied the prohibition in specific cases. The General Assembly and the Security Council both rejected as unlawful Israel's 1967 annexation of Jerusalem and the Golan Heights.²⁷ Similarly, after Iraq's 1990 invasion of Kuwait, the Council decided that the forcible annexation of Kuwait was unlawful and should not be recognized.²⁸ More recently, the General Assembly condemned Russia's annexation of the Crimea region of Ukraine. The General Assembly recalled its Declaration on Friendly Relations to affirm Ukraine's internationally recognized borders and to call on global actors not to recognize any alteration in the status of Crimea.²⁹ Only a Russian veto prevented the Security Council from likewise condemning Russia's annexation of Crimea.³⁰

²⁵ GA Res. 2625 (XXV), 24 October 1970, Annex, Art. 1; GA Res. 3314 (XXIX), 14 December 1974, Annex, Art. 5(3).

²⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 136, para. 87.

²⁷ GA Res. 2253 (ES-V), 4 July 1967; GA Res. 2254 (ES-V), 14 July 1967; SC Res. 242, 22 November 1967; SC Res. 252, 21 May 1968; SC Res. 497, 17 December 1981.

²⁸ SC Res. 662, 9 August 1990, paras 1–2.

²⁹ GA Res. 68/262, 27 March 2014, paras 5–6. See 3305th Security Council Meeting, Press Release, Foreign Affairs, No. 7196/14, 3 March 2014.

³⁰ See UN Doc. S/2014/189, 15 March 2014.

The state code's participants use various techniques to support the same prohibition. First, states commonly condemn and refuse to recognize the forcible annexations of other states. For example, almost no state recognizes Jerusalem or the Golan as part of Israel, or Crimea as part of Russia.³¹ Second, states sometimes impose sanctions on those that violate the prohibition. In the wake of Russia's annexation of Crimea, many states adopted sanctions on Russian persons or property.³² Third, states have used force, with the Security Council's authorization, to reverse such annexations. As we describe in more detail below, states acted on the Council's authorization to forcibly remove Iraq from Kuwait. Fourth, states that themselves appropriate foreign territory usually disclaim that they have done so. Israel has averred that its construction of a wall on territory that it acquired in 1967 does not constitute an annexation.³³ Similarly, Russia has attempted to characterize its incorporation of Crimea not as a forcible annexation but as the exercise of the Crimeans' right to self-determination.³⁴

Here, the custodians of each code endorse the same policy, so each reinforces the other. The institutional code authoritatively articulates a prohibition of forcible annexations; the state code agrees with that policy and makes it effective. Some might argue that the state code does not truly or fully support this prohibition. After all, Israel and Russia both continue to control the territories that they have annexed. But the overwhelming majority of states have taken steps to reject that conduct. The fact that these states have not made the prohibition fully effective should not detract from their clear message that forcible annexations are impermissible.

2 *The Security Council's Primacy over Enforcement Actions*

Both codes similarly support the policy that affords the Security Council primacy, at least in the first instance, on decisions to take enforcement actions. Consider the Council's paradigmatic success story. After Iraq invaded Kuwait, the states that sought to help Kuwait worked through the Council. The Council authorized the use of force to remove Iraq from Kuwait.³⁵ A US-led coalition then conducted Operation Desert Storm against Iraq. This sequence of events reflected a series of purposeful and policy-driven choices by the custodians of each code to endorse the Council's role in the decision to use of force. After all, the states that sought to assist Kuwait had a solid basis for acting in collective self-defence; Kuwait had been invaded and requested their assistance. They decided instead to obtain the Council's authorization. Meanwhile, the Council did not have to insert itself into the situation. It could easily have stood by or simply

³¹ On Crimea, see Grant, 'Annexation of Crimea', 109 *AJIL* (2015) 68, at 91–93.

³² See, e.g., Blocking Property of Certain Persons Contributing to the Situation in Ukraine, Executive Order 13660, 6 March 2014, 79 Fed. Reg. 13493, as amended; Ukraine Freedom Support Act of 2014, Pub. Law 113–272, 18 December 2014.

³³ See *Construction of a Wall*, *supra* note 26, para. 121.

³⁴ See UN SCOR, 7138th mtg, UN Doc. S/PV.7138, 15 March 2014, at 2–3.

³⁵ SC Res. 678, 29 November 1990, para. 2.

highlighted Kuwait's right to collective self-defence. It chose instead to authorize the use of force.³⁶

The effect of the two codes working so well together is difficult to overstate. The First Gulf War made the norm that favours the Council's primacy both more authoritative and more controlling than it had previously been. Many international lawyers cited the incident as evidence that the norm was now effective, despite having been dormant for decades during the Cold War.³⁷ Further, alternative norms that might have been legally viable during the Cold War became considerably less so.³⁸ In particular, the idea in the Uniting for Peace Resolution that the General Assembly may in certain circumstances authorize force, as a substitute for the Security Council, fell quickly out of favour.³⁹ The dynamic of mutual support thus created a strong impression that the norm on the Council's primacy was both effective and authoritative.

Since the First Gulf War, each code has consistently supported that norm. Some international lawyers might counter that, although states regularly channel through the Security Council decisions to use force, states also commonly remove the Council from decision-making, either by taking enforcement actions without authorization or by interpreting expansively the Council's resolutions. This counter-argument assumes that the relevant norm is broader than it is. First, although both codes support the Council's primacy in the first instance, the codes do not always agree on when that primacy gives way to other interests. For example, we show below that the two codes conflict on the question of whether states may ever conduct humanitarian interventions without the Council's authorization. Unsurprisingly, the state code's policy is more lenient. Still, the state code's custodians have, since the First Gulf War, made clear that they prefer to take humanitarian actions with, rather than without, the Council's authorization.⁴⁰ The conflict here is not about the Council's primacy *per se* but about the outer parameters of that primacy: may states act without the Council's authorization if the Council chooses not to resolve an internal crisis?

Second, although the custodians of each code support the Security Council's primacy on the initial decision to use force, they do not necessarily agree on how and by whom Council resolutions are to be interpreted. Expansive interpretations

³⁶ See Reisman, 'Some Lessons from Iraq: International Law and Domestic Politics', 16 *Yale Journal of International Law* (1991) 203, at 206.

³⁷ E.g., 'The 1992 Presidential Campaign and International Law and Institutions', 86 *American Society of International Law Proceedings* (1992) 88, at 93 (remarks by John Bolton); Caron, 'The Legitimacy of the Collective Authority of the Security Council', 87 *AJIL* (1993) 552, at 553.

³⁸ See Henderson, 'The Centrality of the United Nations Security Council in the Legal Regime Governing the Use of Force', in N.D. White and C. Henderson (eds), *Research Handbook on International Conflict and Security Law* (2013) 120, at 135; Krisch, 'Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council', 3 *Max Planck Yearbook of UN Law* (1999) 59, at 88.

³⁹ See Binder, 'Uniting for Peace Resolution (1950)', *Max Planck Encyclopedia of Public International Law*, available at <http://opil.ouplaw.com/home/epil> (last visited 25 March 2016), para. 34. Uniting for Peace Resolution, GA Res. 377A (V), 3 November 1950.

⁴⁰ See, e.g., A. Roberts, 'NATO's "Humanitarian War" over Kosovo', *Survival* (Autumn 1999), at 102.

of Council resolutions are in tension with the institutional code's normative impulse and preferred processes, because such interpretations devolve to individual states decisions on the scope of the relevant operations.⁴¹ The state code does not have a uniform practice on such interpretations. Although its custodians periodically advance expansive interpretations, the interpretations are sometimes rejected and other times tolerated or even supported through the code's horizontal decision-making process. In any event, expansive interpretations presuppose that the decision to take an enforcement action rests, in the first instance, with the Council.

B Accommodation

When the two codes endorse the same substantive policy – as they do on forcible annexations and the Security Council's primacy – each code supports the other. The institutional code confers authority on a policy, and the state code makes that policy effective. Elsewhere, the codes' policies do not overlap but rather push in opposite directions. Nevertheless, the custodians of the institutional code sometimes choose to accommodate the state code's policy. Specifically, the relevant institutions sometimes preserve ambiguity on whether particular conduct is permissible. This ambiguity creates space for the state code to fill. If the practice in the state code is sufficiently coherent, it will be interpreted into the institutional code's ambiguities – and the state code's policy will seem both controlling and authoritative. The state code's policy appears authoritative, however, only because the institutional code's custodians have abstained from advancing their own preferred policy. This dynamic explains, then, when an operational practice is likely to be accepted as law without affirmative support from any of the key institutions.

The dynamic is evident in the norms that govern the regulation of low-level violence. Here, the custodians of the institutional code expressly disagree with the very state code policy that they accommodate. Because the institutions articulate their competing policy in highly general terms or with a potentially large loophole, the two codes can mostly be reconciled. The practice in the state code can be interpreted into the ambiguities in the institutional code, such that the discrepancies between the two are explained away.

1 The 'Armed Attack' Threshold

The institutional code has a longstanding policy of restricting the right to use defensive force in response to low-level violence. Under this code, Article 2(4) prohibits even

⁴¹ For precisely this reason, many international lawyers treat such expansive interpretations as legally suspect. See, e.g., Lobel and Ratner, 'Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime', 93 *AJIL* (1999) 124, at 125; Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing"', 11 *EJIL* (2000) 541, at 554.

uses of force that are extremely limited in duration or severity,⁴² but such minimal violence does not trigger the right under Article 51 to respond with force. Rather, states may use defensive force only when the initial incursion is sufficiently serious to qualify as an ‘armed attack’.⁴³ This armed-attack threshold effectively narrows the right to use defensive force. Hence, it favours the institutional code’s own processes for making use of force decisions. It requires states to respond to low-level violence either with non-forcible measures or by going through the Security Council.⁴⁴

That policy on the regulation of low-level violence emerged from a decades-long effort within the General Assembly and the ILC to interpret the Charter’s use of force provisions. The effort culminated in General Assembly Resolution 3314 on the Definition of Aggression,⁴⁵ which strongly suggests that an incursion must pass a certain threshold of violence to constitute an armed attack.⁴⁶ Other custodians of the institutional code have since supported that proposition. The ICJ adopted the armed-attack threshold in its 1986 judgment in *Military and Paramilitary Activities in and against Nicaragua*.⁴⁷ The Court then reaffirmed the threshold 17 years later, in the *US–Iran Oil Platforms* case.⁴⁸ In 2005, the Eritrea–Ethiopia Claims Commission applied the threshold to find that ‘geographically limited clashes ... along a remote, unmarked, and disputed border ... were not of a magnitude to constitute an armed attack’.⁴⁹ And in 2010, the Kampala Amendments to the Rome Statute implicitly endorsed the threshold by reproducing the language of Resolution 3314.⁵⁰ The institutional code’s texts consistently support the armed-attack threshold.

⁴² See Gray, ‘The ICJ and the Use of Force’, in C.J. Tams and J. Sloan (eds), *The Development of International Law by the International Court of Justice* (2013) 237, at 247; Randelzhofer and Dörr, ‘Article 2(4)’, in B. Simma *et al.* (eds), *The Charter of the United Nations* (3rd edn, 2012) 200, at 211.

⁴³ UN Charter, Art. 51.

⁴⁴ Some international lawyers suggest that states that may not respond to low-level violence with defensive force may still respond with other forcible measures. These other measures presumably would be either less violent than whatever Article 51 would permit or available only to the victim states (and not to other states acting on the victims’ behalf). See *Oil Platforms (Iran v. United States)*, Judgment, 6 November 2003, ICJ Reports (2003) 161, at 265, para. 62 (separate opinion of Kooijmans J.), 331–333, paras 12–13 (separate opinion of Simma J.). However, the better and prevailing interpretation of the decisions of international institutions is that states may never use force in response to low-level violence. See Randelzhofer and Dörr, *supra* note 42, at 1405.

⁴⁵ GA Res. 3314, *supra* note 25.

⁴⁶ The resolution purported to define not ‘armed attack’ in Article 51 but ‘act of aggression’ in the provision that delineates the Council’s authorities. Yet because those two phrases were often used interchangeably, and because Resolution 3314 also sought to inhibit states from using Article 51 as a pretext for aggressive war, interpreting the one necessarily had implications for the other. See Ruys, *supra* note 2, at 128, 138; Randelzhofer and Dörr, *supra* note 42, at 1407–08.

⁴⁷ *Nicaragua*, *supra* note 20, paras 191, 210–211, 247–249; see also para. 195 (asserting that parts of Resolution 3314 qualify as custom).

⁴⁸ *Oil Platforms*, *supra* note 44, paras 51–64.

⁴⁹ Eritrea–Ethiopia Claims Commission, *Jus Ad Bellum (Ethiopia/Eritrea)*, 19 December 2005, reprinted in 45 ILM 430 (2006), para. 12.

⁵⁰ See Kampala Amendments, *supra* note 24. The Kampala Amendments defined the crime of aggression for the purpose of establishing individual criminal responsibility before the ICC, not for the purpose of defining state responsibility under the UN Charter. But by reproducing Resolution 3314, *supra* note 25, the Kampala Amendments implicitly endorse its content.

The state code has been considerably more lenient. States commonly use and justify defensive force in response to low levels of violence without referring to any armed-attack threshold.⁵¹ Recent incidents reflect this longstanding practice and suggest that, if the threshold is at all operative in the state code, it is imperceptibly low. For example, in September and October 2012, errant shells from the Syria conflict killed five people in Turkey.⁵² Turkey responded with armed force.⁵³ Some states urged Turkey to exercise restraint and avoid an escalation in violence, but these states did not question Turkey's right to use defensive force.⁵⁴ Other states affirmatively endorsed that right.⁵⁵ A month later, errant bullets and mortar rounds from Syria crossed into Israel, causing damage to an Israeli military vehicle.⁵⁶ Israel's forcible response was met with near silence.⁵⁷ The policy that the state code supports is deeply in tension with the policy that the institutional code articulates.

2 Tools of Accommodation

And yet, the custodians of the institutional code use two tools to accommodate the state code's policy. First, although the institutions insist that the armed-attack threshold is law, they have never provided sufficient guidance on the level or kind of violence that satisfies that threshold. Rather, they have preserved considerable ambiguity

⁵¹ See Antonopoulos, 'Force by Armed Groups as Armed Attack and the Broadening of Self-Defence', 55 *Netherlands International Law Review* (2008) 159, at 166; Greenwood, 'The International Court of Justice and the Use of Force', in V. Lowe and M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996) 373, at 380–381.

⁵² See, e.g., T. Arango and A. Barnard, 'Turkey Strikes Syrian Targets after Shelling', *New York Times* (4 October 2012), at A1.

⁵³ T. Arango, S. Arsu and A. Barnard, 'As It Shells Syria, Turkey Authorizes Further Military Action', *International Herald Tribune* (5 October 2012), at 4; M. Chulov, 'Turkey Strikes Syrian Targets after Cross-Border Mortar Bomb Kills Five', *Guardian* (3 October 2012).

⁵⁴ UN SCOR, UN Doc. S/PV.6847, 15 October 2012, at 18–19, 34–35 (statements of Brazil and Togo); S.V. Lavrov, Minister of Foreign Affairs of Russia, Speech and Responses during the Press Conference on the Outcomes of the Meeting of the NATO–Russia Council at the Ministerial Level, 4 December 2012, available at www.mid.ru/bdomb/brp_4.nsf/e78a48070f128a7b43256999005bcb3/ee5debc961e6467344257acd002dc79b!OpenDocument (last visited 25 March 2016).

⁵⁵ US Department of Defense, DOD News Briefing with George Little from the Pentagon, 4 October 2012, available at <http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5131> (last visited 25 March 2016); M. Weaver and B. Whitaker, 'Clegg Defends Turkish Action, posting to Turkey–Syria Border Tension', *Guardian* (4 October 2012), available at www.guardian.co.uk/world/2012/oct/04/turkey-syria-threat-security-live (last visited 25 March 2016).

⁵⁶ See I. Kershner, 'Errant Artillery Fire from Syrian War Hits Golan Heights Again', *New York Times* (8 November 2012), available at www.nytimes.com/2012/11/09/world/middleeast/errant-artillery-fire-from-syria-war-hits-golan-heights-again.html?_r=0 (last visited 25 March 2016); 'IDF Responds to Mortar Shell in Golan Heights', *Israel Defence Forces*, available at www.idf.il/1153-17552-en/Dover.aspx (last visited 28 January 2014).

⁵⁷ On the forcible response, see 'IDF Responds to Mortar Shell in Golan Heights', *supra* note 56. On a US statement supporting Israel's right to defend itself, see 'US State Department Daily Press Briefing', *IIP Digital* (13 November 2012), available at <http://translations.state.gov/st/english/text-trans/2012/11/20121113138607.html> (last visited 25 March 2016). For evidence that this cycle between Israel and Syria has repeated itself, see 'IDF Forces Return Fire in Response to Shots Fired from Syria', *Israel Defence Forces* (2 April 2013), available at www.idf.il/1283-18649-en/Dover.aspx (last visited 25 March 2016); 'Shots Fired from Syria; IDF Returns Fire', *Israel Defence Forces* (21 May 2013), available at www.idf.il/1283-19000-en/Dover.aspx (last visited 25 March 2016).

on the question of when the armed-attack threshold is met and, therefore, whether Article 51 is triggered. As such, many defensive operations that have support in the state code can be treated as satisfying the requirements of the institutional code.⁵⁸

The institutional code's second accommodation is more significant: the relevant institutions have left open the possibility that low-level violence satisfies the threshold when the violence is episodic. Under the so-called 'pinprick' or 'accumulation of events' theory of an armed attack, multiple small-scale attacks can together satisfy the threshold even if none of the attacks on its own would satisfy the threshold. The custodians of the institutional code initially resisted the pinprick theory. During the Security Council's early years, it periodically condemned operations that would have been justifiable under the theory.⁵⁹ However, with time, the Council stopped issuing these condemnations,⁶⁰ and the ICJ began creating space for the theory. To be clear, the ICJ has never affirmatively endorsed the theory. It has made plain that it would prefer to restrict the use of force in situations involving low-level violence.⁶¹ But the ICJ has recognized that the pinprick theory might be valid – that defensive force might be lawful in response to multiple, small-scale attacks.⁶² Over the last decade or so, the practice in the state code has resolved that ambiguity in favour of the pinprick theory. States consistently use or tolerate defensive force in response to repeat, low-level attacks.⁶³

Because of these moves within the two codes, many international lawyers now accept that the pinprick theory is law.⁶⁴ These lawyers instinctively use the practice in the state code to fill the ambiguities in the institutional code. Their legal analysis is contingent on the combined ambiguity in the institutional code and practice in the state code. For example, Steven Ratner has argued for the pinprick theory on the ground that, in recent years, 'the acquiescence of states ... suggests significantly greater acceptance of that doctrine' and that '[e]ven the ICJ stated, *albeit backhandedly*, ... that a series of attacks, none of which individually could amount to an armed attack, *might* together constitute an armed attack'.⁶⁵ Other international legal scholars similarly use the practice to interpret the ICJ's ambiguous language.⁶⁶

⁵⁸ See, e.g., Gazzini, 'A Response to Amos Guiora: Pre-Emptive Self-Defense against Non-State Actors', 13 *Journal of Conflict and Security Law* (2008) 25, at 138; Ruys, *supra* note 2, at 155.

⁵⁹ See Bowett, 'Reprisals Involving Recourse to Armed Force', 66 *AJIL* (1972) 1, at 6–8.

⁶⁰ *Ibid.*, at 10–12.

⁶¹ See notes 42–50 in this article and accompanying text.

⁶² *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Reports (2005) 168, para. 146 (emphasis added); *Oil Platforms*, *supra* note 44, para. 64; *Nicaragua*, *supra* note 20, para. 231.

⁶³ See Gray, *supra* note 2, at 130, 155; Reinold, 'State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11', 105 *AJIL* (2011) 244, at 283; Tams, 'The Use of Force Against Terrorists', 20 *EJIL* (2009) 359, at 388.

⁶⁴ See, e.g., Leiden Policy Recommendations on Counter-terrorism and International Law, para. 39, available at www.grotiuscentre.org/resources/1/Leiden%20Policy%20Recommendations%201%20April%202010.pdf (last visited 25 March 2016).

⁶⁵ Ratner, 'Self Defense against Terrorists: The Meaning of Armed Attack', in L. van den Herik and N. Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order* (2013) 334, at 342 (emphasis added).

⁶⁶ E.g., Ruys, *supra* note 2, at 173; Tams, *supra* note 63, at 388.

In short, the institutional code's custodians sometimes use ambiguity to accommodate a state code policy with which they disagree. That dynamic helps mitigate the tension within the regime. Although the two codes still advance different policies on the regulation of low-level violence, their differences can in most cases be explained away. The two codes appear as one, and the state code appears authoritative – but they appear that way only because the relevant institutions have chosen to stay their hand.

C Conflict

The result is noticeably different when the participants in the state code support or tolerate an operation that plainly conflicts with the institutional code's norm. Here, the state practice cannot plausibly be interpreted into the institutional pronouncements; the discrepancies between the two codes cannot easily be resolved. But even as states act on a contrary policy, they can – and sometimes do – downplay their conflict with the institutional code. The key to a code conflict is that, although the state code's practice occasionally deviates from the institutional code's norm, the states that participate in the practice do not overtly challenge that norm. For example, these states might endorse the institutional code's norm discursively while deviating from it in practice. They might defend their conduct by reference to the norm, even though such a defence is patently unavailable. Or they might refrain from offering a legal defence and appeal instead to the extraordinary interests at stake in the incident. Thus, just as the institutions make space for a state code policy in cases of accommodation, militarily active states make space for an institutional code policy in cases of conflict.

The effect of a code conflict is that each code does its own work in the regime without seriously undermining – but also without benefiting from – the other code. So long as the incidents of conflict are relatively infrequent, the institutional code's norm will persist as the authoritative statement of law. This norm will be invoked as law in future cases. At the same time, the institutional code's norm will be evidently inadequate to address particular security challenges. The state code's practice will be effective in precisely this way. The practice might even be applauded when it occurs. But most international lawyers will still characterize the practice as unlawful. Thus, this dynamic explains why norms that are accepted as law do not bend even in the face of a widely supported practice to the contrary; the state code's custodians do not push for that change. Below, we examine the dynamic in cases involving forcible reprisals and unauthorized humanitarian interventions.

1 Forcible Reprisals

The institutional code absolutely prohibits forcible reprisals that the state code sometimes permits. Reprisals are unilateral actions that do not fit the defensive paradigm. They typically seek not to defend against an attack but rather to punish unlawful conduct and thereby deter its recurrence.⁶⁷ Of course, the line between defensive

⁶⁷ See Darcy, 'Retaliation and Reprisal', in Weller, *supra* note 6, 879, at 882.

operations and reprisals is fuzzy and has become fuzzier as the state code's category of defensive operations has expanded.⁶⁸ But the distinction is real.

The institutional code flatly characterizes forcible reprisals as unlawful. In the 1950s and 1960s, the Security Council repeatedly classified as reprisals, and then condemned as unlawful, acts that did not satisfy a restrictive conception of self-defence.⁶⁹ Similarly, the General Assembly's Declaration on Friendly Relations asserts that '[s]tates have a duty to refrain from acts of reprisal involving the use of force'.⁷⁰ In *Nicaragua*, the ICJ quoted that declaration as evidence of custom.⁷¹ The ICJ affirmed the absolute prohibition of reprisals in its *Nuclear Weapons* opinion,⁷² and it simply assumed the prohibition in *Oil Platforms*. *Oil Platforms* found that the US attacks exceeded the bounds of permissible self-defence; it then concluded, without further analysis, that the attacks were unlawful.⁷³

The ILC likewise disavowed forcible reprisals when it developed its Draft Articles on State Responsibility.⁷⁴ One of the most controversial questions before the ILC was whether and, if so, when a state could lawfully resort to 'countermeasures' – that is, measures that deviate from the state's obligations in response to another state's breach.⁷⁵ The ILC's preparatory documents are replete with efforts to underscore that, no matter when non-forcible countermeasures are lawful, forcible ones are never lawful, except insofar as they satisfy the requirements for self-defence.⁷⁶ Thus, the ILC used the term 'countermeasures' largely to dissociate these measures, which are defined as non-forcible, from reprisals, which historically could be either forcible or non-forcible.⁷⁷ Moreover, the ILC's Draft Articles on State Responsibility make explicit that the provisions on countermeasures 'shall not affect ... the obligation to refrain from the threat or use of force as embodied in the Charter'.⁷⁸ The ILC took great pains to avoid any suggestion that forcible reprisals could be lawful.

⁶⁸ Counter-terrorism operations that historically would have been treated as reprisals are now largely covered by either the pinpoint theory of an armed attack or aggressive theories of anticipatory self-defence. See Gazzini, *supra* note 58, at 169; Seymour, 'The Legitimacy of Peacetime Reprisal as a Tool Against State-Sponsored Terrorism', 39 *Naval Law Review* (1990) 221. The inter-code dynamic for these operations has shifted from one of conflict to one of accommodation or confrontation, respectively.

⁶⁹ See Bowett, *supra* note 59, at 6–8.

⁷⁰ GA Res. 2625 (XXV), *supra* note 25.

⁷¹ *Nicaragua*, *supra* note 20, para. 194.

⁷² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226, para. 46.

⁷³ *Oil Platforms*, *supra* note 44, para. 78.

⁷⁴ International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Draft Articles), UN Doc. A/56/83, 3 August 2001.

⁷⁵ See Bederman, 'Counterintuiting Countermeasures', 96 *AJIL* (2002) 817, at 817.

⁷⁶ See, e.g., J. Crawford, Fourth Report on State Responsibility, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 1) (2001), reprinted in 2 *YB ILC* (2001) 1, para. 64; G. Arangio-Ruiz, Third Report on State Responsibility UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 1) (1991), reprinted in 2 *YB ILC* (1991) 1, paras 97–102; W. Riphagen, Fourth Report on the Content, Forms and Degrees of International Responsibility, UN Doc. A/CN.4/SER.A/1983/Add.1 (Part 1) (1983), reprinted in 2 *YB ILC* (1983) 3, paras 80–82.

⁷⁷ See, e.g., Arangio-Ruiz, *supra* note 76, para. 25.

⁷⁸ ILC Draft Articles, *supra* note 74, Art. 50(1)(a).

The state code is more lenient. It has long tolerated at least some forcible reprisals. The state code's norms on reprisals are difficult to pin down because states that use reprisals do not overtly challenge the institutional code's absolute prohibition. Instead, they tend to justify their conduct with the language of self-defence.⁷⁹ Yet some reprisals that are tolerated in the state code cannot plausibly be explained even under expansive theories of self-defence. A prominent example is the US 1993 bombing campaign in Baghdad, after evidence surfaced that Iraq's Saddam Hussein tried to assassinate US President George Bush. The United States made noises about self-defence to justify its attack, and most states responded with silence or even mild support.⁸⁰ Yet the operation did not fit the defensive paradigm.⁸¹ By the time the United States responded to the assassination attempt, the threat against President Bush had dissipated and the extent to which Iraq was still plotting assassinations was, at best, unclear. The US operation was a reprisal.⁸² The United States was retaliating for Iraq's past conduct and aiming to deter state-sponsored assassinations going forward.

The example illustrates a code conflict. The state code propounded a policy that favoured reprisals in certain circumstances and that was, therefore, incompatible with the institutional code's pronouncements. Despite the clear divergence, neither the United States nor the states that tolerated the US action openly challenged the institutional code; the absolute prohibition has persevered as the widely accepted statement of law. Some commentators worried at the time that the Baghdad incident portended a change in the law,⁸³ but because the state code's custodians refrained from challenging the institutional code's policy, the incident now seems like a momentary blip. The *Nuclear Weapons* and *Oil Platforms* judgments, and the Draft Articles on State Responsibility all postdate the incident, and they all unflinchingly endorse the institutional code's absolute prohibition. Likewise, most international lawyers understand that prohibition to be law.⁸⁴

2 Unauthorized Humanitarian Interventions

A similar dynamic has been evident in the context of unauthorized humanitarian interventions. Unauthorized humanitarian interventions aim to protect people from mass atrocities; they are taken without a valid claim of self-defence, without authorization from the Security Council and without the territorial state's consent. These operations are not justifiable under the institutional code. As *Nicaragua* plainly asserts,

⁷⁹ See Reisman, 'The Raid on Baghdad: Some Reflections on Its Lawfulness and Implications', 5 *EJIL* (1994) 120, at 125; Tams, *supra* note 63, at 391.

⁸⁰ Kritsiotis, 'The Legality of the 1993 US Missile Strike on Iraq and the Right of Self-Defence in International Law', 45 *International and Comparative Law Quarterly* (1996) 162, at 163–165; Reisman, *supra* note 79, at 121–122.

⁸¹ Indeed, though most states tolerated the US operation, only a handful endorsed the US legal justification. Kritsiotis, *supra* note 80, at 175.

⁸² See *ibid.*, at 166; Randelzhofer and Dörr, *supra* note 42, at 1406; Reisman, *supra* note 79, at 125.

⁸³ Kritsiotis, *supra* note 80, at 176.

⁸⁴ E.g., Randelzhofer and Dörr, *supra* note 42, at 1406; Darcy, *supra* note 67, at 888.

‘the use of force could not be the appropriate method to monitor or ensure ... respect for [human rights]’.⁸⁵ Most international lawyers have long understood that position to be law.⁸⁶

The state code has been more ambivalent. Consider three incidents from the 1970s that have received considerable attention. In 1971, India forcibly ended Pakistan’s brutal repression in what would become Bangladesh.⁸⁷ In 1978, Vietnam invaded and ended the Khmer Rouge’s campaign of terror in Cambodia.⁸⁸ And in 1979, Tanzania forcibly overthrew Idi Amin’s barbaric regime in Uganda.⁸⁹ In each of these incidents, the intervening state tried to justify its intervention primarily with the language of self-defence, though India and Tanzania also made noises about their humanitarianism.⁹⁰ The first two incidents were discussed at the UN, and the reactions were broadly negative. Very few third states accepted the claims on self-defence, and none endorsed a doctrine of unauthorized humanitarian intervention. Most states condemned these interventions or worried about setting a dangerous precedent.⁹¹ By contrast, Tanzania’s intervention was not discussed at the UN. The Organization of African Unity (OAU) eventually did discuss it, but by then, the regime change in Uganda was already a *fait accompli*. At the OAU, some states criticized Tanzania, but most were silent.⁹²

These three incidents together reveal a code conflict. The vast majority of states accepted the institutional code’s absolute prohibition as the authoritative statement of law. The intervening states did not challenge this prohibition, and most third states either verbally endorsed it or stayed silent about the interventions. The operational response to the interventions was noticeably laxer. The United States was the only state that took measures to sanction India, and within a few months, almost all states (including the United States) recognized Bangladesh.⁹³ In the Tanzania case, few third states took a public position,⁹⁴ but most quickly recognized the new Ugandan government.⁹⁵ The reaction to Vietnam was harshest; several states took economic measures against Vietnam.⁹⁶ The extent to which these states were sanctioning Vietnam for the intervention as such, rather than for broader Cold War politics or Vietnam’s extended

⁸⁵ *Nicaragua*, *supra* note 20, para. 268.

⁸⁶ E.g., Randalzhofer and Dörr, *supra* note 42, at 223; Gray, ‘The Use of Force for Humanitarian Purposes’, in White and Henderson, *supra* note 38, at 229, at 253.

⁸⁷ See UN SCOR, UN Doc. S/PV.1606, 4 December 1971.

⁸⁸ See UN SCOR, UN Doc. S/PV.2108, 11 January 1979, paras 73–89.

⁸⁹ See G. Klintworth, *Vietnam’s Intervention in Cambodia in International Law* (1989), at 7.

⁹⁰ For India’s justification, see UN Doc. S/PV.1606, *supra* note 87, paras 150–185. For Vietnam’s, see UN Doc. S/PV.2108, *supra* note 88, paras 112–145. On Tanzania, see T.M. Franck, *Recourse to Force* (2002), at 145.

⁹¹ For summaries of the reactions to these incidents by third states, see N. Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (1985), at 96–102; N.J. Wheeler, *Saving Strangers* (2000), at 65–75, 89–100, 124–132.

⁹² Wheeler, *supra* note 91, at 125–130.

⁹³ *Ibid.*, at 79; Klintworth, *supra* note 89, at 49.

⁹⁴ See Franck, *supra* note 90, at 145; Wheeler, *supra* note 91, at 122–125.

⁹⁵ See Ronzitti, *supra* note 91, at 104–5; Wheeler, *supra* note 91, at 122–36.

⁹⁶ Klintworth, *supra* note 89, at 126; Wheeler, *supra* note 91, at 92.

occupation of Cambodia, is unclear.⁹⁷ But whatever might be said of the state code's position on Vietnam, states largely tolerated India's and Tanzania's interventions.

Despite the toleration of at least some humanitarian interventions within the state code, the institutional code's absolute prohibition persevered as the recognized statement of law. Some international lawyers cited the three interventions in the 1970s as evidence that the absolute prohibition might or should be deteriorating.⁹⁸ However, many more lawyers argued that the practice was insufficiently authoritative to change that norm. The practice was said to be insufficiently authoritative precisely because states declined to 'own' it or endorse a doctrine of humanitarian intervention.⁹⁹ Thus, when the North Atlantic Treaty Organization (NATO) intervened in Kosovo decades later, most international lawyers still characterized the operation as illegal.¹⁰⁰ The states that engaged in the contrary practice did not openly challenge the institutional code's prohibition – and thus allowed that prohibition to stand.

Beginning in the 1990s, the custodians of the state code began to confront more openly the institutional code's absolute prohibition.¹⁰¹ A few states, including the United Kingdom, articulated a legal right to act without the Security Council's authorization in Kosovo.¹⁰² Most states supported the Kosovo intervention but did not endorse that legal claim. Indeed, even the state code's custodians did not all press for a right to use force without authorization.¹⁰³ Since Kosovo, certain states have continued to hint or assert that unauthorized humanitarian interventions can be legal.¹⁰⁴ To date, these claims

⁹⁷ See, e.g., GA Res. 37/6, 28 October 1982, para. 2; GA Res. 37/5, 21 October 1981, para. 2; Klintworth, *supra* note 89, at 110.

⁹⁸ E.g., Lillich, 'Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives', in J.N. Moore (ed.), *Law and Civil War in the Modern World* (1974) 229, at 244–251; Wedgwood, 'NATO's Campaign in Yugoslavia', 93 *AJIL* (1999) 828, at 833; Wippman, 'Enforcing the Peace: ECOWAS and the Liberian Civil War', in L.F. Damrosch (ed.), *Enforcing Restraint* (1993) 157, at 175.

⁹⁹ See, e.g., M. Byers, *War Law: Understanding International Law and Armed Conflict* (2005), at 92; S. Chesterman, *Just War or Just Peace?* (2001) 84, at 87.

¹⁰⁰ See, e.g., Roberts, 'Legality vs. Legitimacy: Can Uses of Force Be Illegal but Justified?', in P. Alston and E. Macdonald (eds), *Human Rights, Intervention, and the Use of Force* (2008) 179, at 182; Stahn, 'Enforcement of the Collective Will after Iraq', 97 *AJIL* (2003) 804, at 814.

¹⁰¹ On incidents from the early 1990s, in which states more openly used language of humanitarianism, see Gray, 'After the Ceasefire: Iraq, the Security Council and the Use of Force', 65 *British Yearbook of International Law* (1994) 135, 161–166; Greenwood, *supra* note 51.

¹⁰² See *Legality of Use of Force (Yugoslavia v. Belgium)*, Oral Pleadings of Belgium, 10 May 1999, ICJ Reports (1999) 15, available at www.icj-cij.org/docket/files/105/4515.pdf (last visited 25 March 2016) (uncorrected translation); UN SCOR, 4011st mtg, UN Doc. S/PV.4011, 10 June 1999, at 12–13 (statement of Netherlands); UK Foreign and Commonwealth Office, *FRY/Kosovo: The Way Ahead*; UK View on Legal Base for Use of Force, 7 October 1998, quoted in Roberts, *supra* note 40, at 106.

¹⁰³ See UN SCOR, UNSC 3988th mtg, UN Doc. S/PV.3988, 24 March 1999.

¹⁰⁴ See 'Chemical Weapon Use by Syrian Regime: UK Government Legal Position', GOV.UK (29 August 2013), available at www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version (last visited 25 March 2016); C. Savage, 'President Tests Limits of Power in Syrian Crisis', *New York Times* (9 September 2013), at A1; 'Hollande Seeks Coalition in Favour of Syria Intervention if the UN Security Council Could Not Agree [sic] Action', *Aljazeera*, available at <http://blogs.aljazeera.com/topic/syria/hollande-seeks-coalition-favour-syria-intervention-if-un-security-council-could-not> (last visited 25 March 2016).

within the state code that challenge the absolute prohibition have still been cautious. But because they are becoming more assertive, even as the institutional code maintains its absolute prohibition,¹⁰⁵ the inter-code dynamic on humanitarian intervention is turning confrontational.

D Confrontation

A code confrontation is, in some ways, a more intense version of a code conflict. The two codes still advance incompatible policies, but in a confrontation, their discrepancies become too transparent to ignore. At this end of the spectrum, states regularly tolerate operations that are incompatible with the institutional code. And rather than downplay the discrepancies, as they do in cases of conflict, the state code's custodians insist that their contrary practice is lawful. They actively challenge the institutional code's claim of authority.

In such cases, each code undercuts and betrays the core weakness of the other. Many international lawyers will deny that the practice in the state code is authoritative unless a relevant institution blesses the practice as lawful. This is especially true when the custodians of the state code try to defend their own practice, in the face of the overwhelming passivity of other states. The dynamic – a handful of militarily powerful states trying to remake the law in their favour, without the affirmative support of other states and in opposition to the norm that was produced through collective processes – leads many to conclude that the practice is just lawlessness. The institutional code thus generates agitation about and undercuts the state code's claim by painting the associated practice as a raw exercise of power, even when that practice is frequent and, on the whole, tolerated by other states. Whether the state code can ever 'prevail' in this kind of confrontation and by itself establish its practice as authoritative is unclear, but to the extent that it can, the bar is extremely high. The institutional code has tools for preserving its own norms as authoritative and delegitimizing the contrary practice. Yet just as the institutional code betrays the limits of state code, so too does the state code expose the bounds of the institutional code. The state code repeatedly and openly demonstrates that the institutional code is disconnected from the facts on the ground. To many, the institutional code's norm will seem only aspirational or unable to control the actual behaviour of states. The confrontational interaction thus portrays the regime as essentially dysfunctional. We show below that this dynamic is now evident on certain key issues relating to self-defence.

1 *Self-Defence against Non-State Actors*

The institutional code is not entirely clear on when, if ever, states may use defensive force against non-state actors. Most institutional pronouncements suggest that states may never use such force – that an initial attack must be committed by a foreign state to trigger Article 51. Yet some institutional pronouncements suggest that defensive

¹⁰⁵ See, e.g., GA Res. 60/1, 16 September 2005, para. 139; Group of 77, Declaration of the South Summit, 14 April 2000, para. 54, available at http://www.g77.org/summit/Declaration_G77Summit.htm (last visited 25 March 2016).

force against non-state actors is permissible in a limited subset of cases. Even if the institutional code licenses defensive force in that subset of cases, the state code is transparently more permissive.

The institutional code's apparent requirement that the initial attack come from a foreign state is most evident in the ICJ's jurisprudence. The Court's *Construction of a Wall* opinion, which assessed Israel's security barrier on and around the Palestinian territories, flatly asserts that Article 51 applies 'in the case of an armed attack *by one State against another State*'.¹⁰⁶ The Court determined that Israel could not justify the security barrier as an act of self-defence, in part because Israel did not claim that it had been victimized by another state.¹⁰⁷ Although the Court's *Armed Activities* judgment is arguably more ambiguous,¹⁰⁸ it strongly suggests that the attack must come from a foreign state.¹⁰⁹ The ICJ underscored that Uganda had not claimed or shown that the Democratic Republic of Congo (DRC) was involved in the relevant attacks.¹¹⁰ The Court then concluded that 'the legal and factual circumstances for the exercise of the right of self-defence by Uganda against the DRC were not present'.¹¹¹ The Court's logic suggests that Uganda could not lawfully respond with defensive force because the initial attacks were not attributable to the DRC.¹¹²

Other institutional decisions similarly resist the idea that states may use defensive force against non-state actors.¹¹³ In September 2000, the Security Council rejected the claim that Rwanda had the right to use defensive force against Hutu insurgents in the DRC.¹¹⁴ In 2008, both the Organization of American States (OAS) and the Rio Group of Latin American States condemned as unlawful Colombia's incursion into Ecuador; the incursion targeted a non-state group that the Colombian government

¹⁰⁶ *Construction of a Wall*, *supra* note 26, para. 139 (emphasis added).

¹⁰⁷ *Ibid.*

¹⁰⁸ See *Armed Activities*, *supra* note 62, at 334, para. 7 (separate opinion of Simma J.); Tams, *supra* note 63, at 384.

¹⁰⁹ See Randelzhofer and Dörr, *supra* note 42, at 213.

¹¹⁰ *Armed Activities*, *supra* note 62, para. 146.

¹¹¹ *Ibid.*, para. 147.

¹¹² The ambiguity in *Armed Activities*, *supra* note 62, exists because the Court ultimately avoided the question of whether defensive force can ever be lawful in response to 'large-scale attacks by irregular forces'. Perhaps the Court meant to preserve the right to use defensive force against irregular groups that do not act on a foreign state's behalf. However, the better interpretation – which makes the judgment both internally consistent and consistent with *Nicaragua* and GA Res. 3314, *supra* note 25 – is that the Court left open the question of when states may use defensive force against an irregular group that *does* act on a foreign state's behalf. See *Nicaragua*, *supra* note 20, para. 195. International lawyers who adopt the first, less convincing interpretation of *Armed Activities* are not, in our view, interpreting the judgment at face value. Rather, they are trying to find authoritative support for a pervasive and transparent practice. In other words, they are trying to shift the inter-code dynamic from confrontational to accommodating. These moves support our theory in two respects. First, they suggest that the state code's norms are not authoritative unless they have the institutional code's support. Second, they show that, when the institutional code is ambiguous but the state code is not, the state code becomes authoritative by being interpreted into the institutional code.

¹¹³ But cf. G. Palmer *et al.*, Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (2011), Appendix I, at 91.

¹¹⁴ SC Res. 1304, 16 June 2000, at 2.

had been fighting for decades.¹¹⁵ And in 2010, the Kampala Amendments defined ‘aggression’ – which has historically overlapped with ‘armed attack’ – to require ‘the use of armed force *by a State*’.¹¹⁶

Despite that evidence of an absolute prohibition, some institutional pronouncements seem to license defensive force against non-state actors in limited circumstances: when the territorial state actively harbours or supports the relevant non-state group.¹¹⁷ After the 11 September 2001 terrorist attacks, the Security Council, the OAS and NATO all implicitly or explicitly condoned the US-led operation in Afghanistan, which had harboured al Qaeda.¹¹⁸ In addition, the African Union adopted a harbour or support standard in its 2005 defence pact.¹¹⁹ As we discuss below, recent events suggest that the Security Council might be willing to accommodate defensive operations against non-state actors in a broader range of circumstances. But for now, the institutional code has endorsed such operations only in cases where a territorial state harboured or supported the non-state group.

The state code is openly and pervasively more permissive.¹²⁰ The state code’s policy was evident even before 2001 but has picked up considerable momentum since then.¹²¹ Consider some examples. First, most states tolerated Turkey’s 2008 ground invasion of Iraq to incapacitate Kurdish insurgents.¹²² Iraqi officials were working with Turkey to try to suppress the violence. Their efforts were just unsuccessful.¹²³ Second, most states likewise tolerated Russia’s 2002 and 2007 operations against Chechen rebels in Georgia, even though Georgia had actively tried to prevent the rebels’ violence.¹²⁴ Third, although the OAS and Rio Group criticized Colombia’s 2008

¹¹⁵ Organization of American States (OAS), Report of the OAS Commission that Visited Ecuador and Colombia, OEA/Ser.F/II.25 RC.25/doc. 7/08, 16 March 2008, at 10, Annex 2 (reprinting Rio Group Declaration).

¹¹⁶ Kampala Amendments, *supra* note 24, Art. 8bis (2) (emphasis added). On the overlap, see note 46 in this article.

¹¹⁷ See Hakimi, ‘Defensive Force against Non-State Actors: The State of Play’, 91 *International Law Studies* (2015) 1, at 7–11.

¹¹⁸ SC Res. 1368, 12 September 2001, para. 3; OAS, Convocation of the Twenty-Third Meeting of Consultation of Ministers or Foreign Affairs, OEA/Ser.G CP/Res. 796 (1293/01), 19 September 2001; North Atlantic Treaty Organization (NATO), Statement by NATO Secretary General, Lord Robertson, Press Release, 8 October 2001, available at www.nato.int/docu/pr/2001/p01-138e.htm (last visited 25 March 2016). Some commentators have interpreted these decisions as signaling that defensive force against non-state actors is available not just in harbour or support cases but more generally. See, e.g., Franck, ‘Terrorism and the Right of Self-Defense’, 95 *AJIL* (2001) 839, at 840; Greenwood, ‘International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq’, 4 *San Diego International Law Journal* (2003) 7, at 17. That interpretation is plausible, but it requires extending the resolutions beyond their immediate texts and contexts.

¹¹⁹ African Union Non-Aggression and Common Defence Pact, 31 January 2005, Art. 1(c)(xi), available at www.au.int/en/treaties (last visited 25 March 2016).

¹²⁰ For a recent review of this practice, see Hakimi, *supra* note 117.

¹²¹ See Franck, *supra* note 90, at 64; Tams, *supra* note 63, at 367.

¹²² Reinold, *supra* note 63, at 272.

¹²³ *Ibid.*; Ruys, ‘*Quo Vadit Jus ad Bellum?* A Legal Analysis of Turkey’s Military Operations against the PKK in Northern Iraq’, 9 *Melbourne Journal of International Law* (2008) 334, at 342.

¹²⁴ Reinold, *supra* note 63, at 252–257; Tams, *supra* note 63, at 380. Significantly, Russia’s 2002 actions were rejected in the Council of Europe, which is part of the institutional code. See Parliamentary Assembly, Council of Europe, Recommendation 1580: The Situation in Georgia and Its Consequences for the Stability of the Caucasus Region (2002), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta02/EREC1580.htm> (last visited 25 March 2016).

incursion into Ecuador, states were almost completely silent outside of those institutions.¹²⁵ Finally, many operations in anticipatory self-defence are taken against non-state actors. We describe this practice in more detail below. The point here is that such operations are not evidently limited to cases in which the territorial state harbours or supports the violent non-state actors. Thus, even if the institutional code licenses the use of defensive force in those circumstances, the state code is considerably and transparently more lenient.

The principal custodians of the state code do not just act inconsistently with the institutional code's policy. They openly confront that policy and challenge the institutional code's role in authoritatively articulating the law. Several states, including the United States, Israel, Russia and Turkey, have expressly claimed that defensive force against non-state actors is lawful so long as the territorial state is unable or unwilling to prevent the violence.¹²⁶ This legal standard is broader than any standard that requires the territorial state to harbour or support the non-state group. The unable or unwilling standard permits defensive force even if the territorial state has governance authority over the area and actively tries to suppress the violence but is ineffective. Each code articulates an affirmative and mutually exclusive claim on the law; the interaction between the two codes has become confrontational.

The recent actions involving the Islamic State show how this kind of interaction undermines both codes – and makes the regime itself seem hollow. The Islamic State emerged in Syria in 2013 in the midst of the ongoing civil war. By the summer of 2014, the Islamic State had crossed into Iraq and controlled large portions of Iraqi and Syrian territory.¹²⁷ In response, dozens of states have participated, directly or indirectly, in a US-led military operation to repel the Islamic State.¹²⁸ All of the participating states presumably support the strikes in Iraq and Syria because the strikes in both states are critical to the operation's success. During the early stages of the operation, however, several states that were willing to use force in Iraq with its consent declined to use force in Syria.¹²⁹ The number of states operating in Syria has increased over time. A number of these states, including Australia, Canada and Turkey, have defended their Syria strikes under the unable or unwilling standard.¹³⁰ However, many other states have

¹²⁵ Reinold, *supra* note 63, at 273; Tams, *supra* note 63, at 380.

¹²⁶ See, e.g., UN SCOR, 36th Sess., 2292d mtg, UN Doc. S/PV.2292, 17 July 1981, at 5 (Israel); UN Doc. S/2002/1012/Annex, 12 September 2002 (Russia); UN Doc. S/1996/479, 2 July 1996 (Turkey).

¹²⁷ See P. Baker and E. Schmitt, 'Many Missteps in Assessment of ISIS Threat', *New York Times* (30 September 2014), at A1.

¹²⁸ See Hakimi, *supra* note 117, at 20–21.

¹²⁹ E. Schmitt, 'Obstacles Limit Targets and Pace of Strikes on ISIS', *New York Times* (10 November 2014), at A1.

¹³⁰ Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc. S/2014/695, 23 September 2014 (United States); Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/693, 9 September 2015 (Australia); Letter dated 31 March 2015 from the Chargé d'affaires of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/221, 31 March 2015 (Canada); Letter dated 24 July 2015 from the Chargé d'affaires of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/563, 24 July 2015 (Turkey).

not. Some simply assert the lawfulness of the action without articulating a governing legal standard.¹³¹ Others offer a justification that is more limited than the unable or unwilling standard.¹³² Still others rely on the Syrian government's consent.¹³³ And the vast majority of states have not taken a position one way or the other on the legality of any defensive force in Syria. The deputy prime minister of the Netherlands characterized the situation well when he said that, '[f]or military operations in Syria, there is currently no international agreement on an international legal mandate'.¹³⁴ The Security Council's November 2015 resolution on the Islamic State reflects this lack of consensus. The resolution calls on states 'to take all necessary measures, in compliance with international law, in particular with the United Nations Charter' against the Islamic State, but the resolution does not identify the legal basis for any forcible measures.¹³⁵

The institutional code's pre-existing norms thus undercut the state code's contrary claim. Several states that clearly support the operation against the Islamic State have avoided saying or doing things that might bolster the unable or unwilling standard. The fact that these states have not themselves articulated the legal standard that applies in Syria suggests either that they prefer for the law's authoritative standards to develop through the institutional code or that they worry about slipping too far towards the state code's claim. At the same time, the state code's persistent operational practice and strong legal claim together undermine the institutional code. The overall impression from the legal literature is that the law on the use of defensive force against non-state actors is contested and confused, not as the institutional code says.¹³⁶ To be sure, some lawyers still cite the institutional code's output as law and insist that the state code's contrary practice is just lawlessness.¹³⁷ However, many more lawyers try

¹³¹ See 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, UN Doc. S/2015/745, 8 September 2015 (France); Identical letters dated 25 November 2014 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2014/851, 25 November 2014 (United Kingdom); Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/688, 7 September 2015 (United Kingdom); Letter dated 3 December 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/928, 3 December 2015 (United Kingdom).

¹³² Letter dated 10 December 2015 from the Chargé d'affaires of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council.

¹³³ Identical letters dated 14 October 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council.

¹³⁴ E. Rapport, 'Dutch Parliament Commits Soldiers, F-16s to Fight ISIS in Iraq', *NL Times* (Netherlands) (24 September 2014), available at www.nltimes.nl/2014/09/24/parliament-commits-troops-isis-fight/ (last visited 25 March 2016).

¹³⁵ SC Res. 2249, 20 November 2015.

¹³⁶ See, e.g., Leiden Policy Recommendations, *supra* note 64, para. 29; Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence', 55 *International and Comparative Law Quarterly* (2006) 963, at 964.

¹³⁷ See, e.g., Ruys, *supra* note 2, at 486–489; Antonopoulos, 'Force by Armed Groups as Armed Attack and the Broadening of Self-Defence', 55 *Netherlands International Law Review* (2008) 159, at 169–171; Tladi, 'The Nonconsenting Innocent State: The Problem with Bethlehem's Principle 12', 107 *AJIL* (2013) 570, at 572, 576; O'Connell, 'Dangerous Departures', 107 *AJIL* (2013) 380, at 380, 383.

to interpret the institutional code to cover some – though certainly not all – of that practice. The specific proposals and the extent to which they incorporate the contrary practice vary.¹³⁸ The point here is that the institutional code's norm is transparently ineffective in controlling state behaviour, and its authority is significantly diminished. Incidents like the Syria case thus are damaging to the regime as a whole. They create the impression that the *jus ad bellum* is confused and perhaps even irrelevant to the operational realities. After all, states went ahead with the Syria operation even though they disagreed on the law – in other words, no matter what the law required.

2 Anticipatory Self-Defence

A code confrontation is also evident in the norms on anticipatory self-defence. These norms regulate when, if ever, a state may use defensive force to avert an attack that has not yet occurred. The attack might be impending and almost certain, as when an enemy's troops are marching towards a border with orders to invade. Or the attack might be more conjectural and latent.¹³⁹ The more Article 51 covers those latter scenarios, the broader the right is, and the more it removes decision-making from the institutional code.

Unsurprisingly, the institutional code is highly sceptical of claims on anticipatory self-defence. To the extent that the institutional code accepts these claims, it does so only in cases of actual imminence – when the enemy is on the verge of attacking. The ICJ's most comprehensive treatment of the issue appears in the *Armed Activities* judgment. There, Uganda insisted that its operations in the DRC were a response to actual, not anticipated, attacks. The Court thus claimed that it would not address the issue of anticipatory self-defence.¹⁴⁰ Nevertheless, the court observed that Uganda's stated objectives in the DRC were mostly preventive and prospective – designed to ensure that the crisis in the DRC would not spill over into Uganda.¹⁴¹ According to the Court, these objectives 'were not consonant with the concept of self-defence as understood in international law'.¹⁴² The Court explained that Article 51 'does not allow the use of force by a State to protect perceived security interests', given that '[o]ther means are available to a concerned State, including, in particular, recourse to the Security Council'.¹⁴³ Thus, *Armed Activities* rejected the idea that states may use unilateral force

¹³⁸ See, e.g., Institut de Droit International, Present Problems of the Use of Armed Force in International Law, Resolution 10A, 27 October 2007, para. 10; Kreß, 'Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force', 1 *Journal on the Use of Force and International Law* (2014) 11, 48–49. But cf. Bethlehem, *supra* note 6, at 770.

¹³⁹ International lawyers use different terms for each of these scenarios. For example, the UN Secretary-General's High-Level Panel on Threats, Challenges and Change uses 'anticipatory self-defense' to cover only the imminent scenario and 'preemptive self-defense' to cover the conjectural scenario. See A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, 2 December 2004, para. 189.

¹⁴⁰ *Armed Activities*, *supra* note 62, para. 143.

¹⁴¹ *Ibid.*, para. 143.

¹⁴² *Ibid.*, para. 119.

¹⁴³ *Ibid.*, para. 148.

to counteract a threat that is not yet operational. Indeed, the judgment leaves open the question of whether anticipatory self-defence can ever be lawful – even in cases of actual imminence.

Other institutions have been similarly sceptical of claims for anticipatory self-defence against latent threats. In 1981, Israel bombed an Iraqi nuclear reactor that seemed ready to produce weapons-grade uranium. Israel sought to nip in the bud an emerging but not yet operational threat.¹⁴⁴ The Security Council and the Board of Governors of the International Atomic Energy Agency both condemned Israel's operation as unlawful.¹⁴⁵ More recently, the UN Secretary-General's High-Level Panel on Threats, Challenges and Change recognized a right of anticipatory self-defence in cases of actual imminence.¹⁴⁶ The panel expressly rejected the idea that defensive force can be lawful when the threat is more latent.¹⁴⁷ Further, even the panel's endorsement for cases of actual imminence was controversial. The Non-Aligned Movement issued a comment that suggests that, in its view, anticipatory self-defence might never be lawful.¹⁴⁸

Meanwhile, the custodians of the state code have openly challenged the institutional code's restrictive position on anticipatory self-defence. In their 2006 study, Michael Reisman and Andrea Armstrong demonstrated that several states had expressly claimed the right to anticipatory self-defence, without limiting that right to truly imminent attacks.¹⁴⁹ The claim is that waiting for the threat to materialize might preclude states from meaningfully defending themselves, especially in cases involving weapons of mass destruction or violent non-state actors.¹⁵⁰ This position was an implicit part of the US justification for the 2003 Iraq war,¹⁵¹ which was widely condemned.¹⁵² But anticipatory actions to contain latent or conjectural threats have become increasingly common and tolerated.

Ethiopia's 2006–2007 incursion into Somalia is especially instructive because the key facts are similar to those in *Armed Activities*, where the ICJ declared that any threat was too remote for Uganda to use defensive force. Like Uganda in the DRC, Ethiopia

¹⁴⁴ UN SCOR, 2280th mtg, UN Doc. S/PV.2280, 12 June 1981.

¹⁴⁵ International Atomic Energy Agency Res. S/14532, 15 June 1981.

¹⁴⁶ A More Secure World, *supra* note 139, para. 188.

¹⁴⁷ *Ibid.*, paras 189, 191.

¹⁴⁸ Comments of the Non-Aligned Movement on the Observations and Recommendations Contained in the Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565 and UN Doc. A/59/565 Corr. 1 (2005), para. 23, available at www.un.int/malaysia/NAM/NAM.html (last visited 25 March 2016).

¹⁴⁹ Reisman and Armstrong, 'The Past and Future of the Claim of Preemptive Self-Defense', 100 *AJIL* (2006) 525, at 538–546. Some use the word 'imminence' inconsistently with its dictionary meaning, to cover conjectural threats. See, e.g., J.O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks, Strengthening Our Security by Adhering to Our Values and Laws, 16 September 2001, available at www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an (last visited 25 March 2016); Foreign Affairs Committee, Foreign Policy Aspects of the War against Terrorism, Doc. H.C. 441-I (2003–4), para. 429 (United Kingdom).

¹⁵⁰ Waxman, 'Regulating Resort to Force: Form and Substance of the UN Charter Regime', 24 *EJIL* (2013) 151, at 160.

¹⁵¹ 'US Directive on Critical Infrastructure Identification, Prioritization, and Protection', 39 *Weekly Compilation of Presidential Documents* (17 December 2003) 1816, para. 4.

¹⁵² See M. Weller, *Iraq and the Use of Force in International Law* (2010), at 182–185.

actively supported armed factions in Somalia.¹⁵³ Like Uganda, Ethiopia had reason to worry that the neighbouring conflict would spill over into its territory.¹⁵⁴ And like Uganda's, Ethiopia's stated objectives for the operation were mostly preventive.¹⁵⁵ Yet unlike the ICJ's reaction in *Armed Activities*, the majority of states reacted to Ethiopia's incursion with silence or mild support.¹⁵⁶

Other incidents likewise suggest that states tolerate anticipatory operations against latent threats, at least when the force is at a low level. Consider several recent actions that have been met by the near-silence of other states. First, Israel reportedly attacked a partially constructed nuclear reactor in Syria in 2007. Although the Security Council condemned a very similar operation in 1981, most states said nothing about the 2007 attack.¹⁵⁷ Second, Israel has reportedly bombed weapons caches in Sudan and Syria on the ground that the caches were heading to Hamas or Hezbollah.¹⁵⁸ Third, Israel and the United States have repeatedly attacked Iran's nuclear programme. Some of these attacks involved cyber tools and might not have qualified as forcible, but others caused physical destruction or death.¹⁵⁹ Fourth, some US drone operations reflect expansive applications of the principle of anticipatory self-defence. For instance, in the summer of 2011, the United States reportedly attacked several members of the Shabab militant group in Somalia. According to media reports, the United States conducted those operations not because the Shabab had attacked the United States but because the Shabab was developing closer ties to al Qaeda's Yemen branch and might strike targets outside Somalia in the future.¹⁶⁰ US drone operations have received considerable

¹⁵³ Report of the Monitoring Group on Somalia Pursuant to SC Resolution 1676 (2006) (Somalia Report), UN Doc. S/2006/913, 22 November 2006, paras 15–86, 129–131, 204.

¹⁵⁴ See Gray, *supra* note 2, at 247; S. Bloomfield, 'Somalia: The World's Forgotten Catastrophe', *Independent* (United Kingdom) (9 February 2008), available at www.independent.co.uk/news/world/africa/somalia-the-worlds-forgotten-catastrophe-778225.html (last visited 25 March 2016).

¹⁵⁵ See Yihdego, 'Ethiopia's Military Action Against the Union of Islamic Courts and Others in Somalia: Some Legal Implications', 56 *International and Comparative Law Quarterly* (2007) 666, at 670; J. Clayton, 'Ethiopia Confronts Somali Warlords', *Times* (United Kingdom) (24 November 2006), at 53. Though Ethiopia relied principally on a claim of self-defence, it also hinted that the transitional Somali government invited its intervention. Invitations to intervene by only one side of a conflict – and especially by a side that lacks much territorial control – are controversial and, many would say, unlawful. See Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government', 56 *British Yearbook of International Law* (1985) 189, at 251. In the event, the transitional Somali government lacked control over large portions of the territory. See Somalia Report, *supra* note 153, paras 200–11. Thus, even if the transitional government invited Ethiopia's intervention, this invitation does not by itself explain the differences between the reaction to this incident and the *Armed Activities* judgment.

¹⁵⁶ Gray, *supra* note 2, at 244; Yihdego, *supra* note 155, at 673.

¹⁵⁷ R. Weitz, 'Israeli Airstrike in Syria: International Reactions', Centre for Non-Proliferation Studies, 1 November 2007, available at <http://cns.miis.edu/stories/071101.htm> (last visited 25 March 2016).

¹⁵⁸ See, e.g., M.R. Gordon and J. Gettleman, 'U.S. Officials Say Israel Struck in Sudan', *New York Times* (27 March 2009), at A7; M. Landler, 'Israel Hints at New Strikes in Syria over Weapons Transfers to Militants', *New York Times* (16 May 2013), at A12.

¹⁵⁹ See D.E. Sanger, 'Obama Order Sped Up Wave of Cyberattacks against Iran', *New York Times* (1 June 2012), at A1; R. Gladstone, 'Iran Signals Revenge over Killing of Scientist', *New York Times* (13 January 2012), at A10.

¹⁶⁰ M. Mazzetti and E. Schmitt, 'U.S. Expands Its Drone War into Somalia', *New York Times* (2 July 2011), at A1; G. Jaffe and K. DeYoung, 'U.S. Drone Targets Somali Militants Tied to al-Qaeda', *Washington Post* (30 June 2011).

criticism for intruding on individual rights, but most states have remained relatively quiet about the operations' difficulties under the *jus ad bellum*.¹⁶¹

To some extent, the custodians of the institutional code have accommodated the more permissive policy in the state code. Institutions have either left open the question of whether anticipatory self-defence is ever lawful or answered this question with imminence language, which has some flexibility.¹⁶² Recall that institutions have also accommodated the pinprick theory of an armed attack.¹⁶³ Because this theory treats multiple small-scale attacks as one, some anticipatory actions can be re-characterized as responsive – not as preventing future attacks but as responding to already completed attacks.¹⁶⁴ Still, these moves within the institutional code are limited. They do not plausibly cover all of the state code's practice and legal claims. The custodians of the state code have confronted the institutional code by promoting, through their practice and legal claims, a much more expansive policy.

Both codes suffer from this confrontation. The state code's legal claim is not widely accepted. Only two states – the United States and Israel – have consistently taken actions in anticipatory self-defence, and they have done so largely on their own. Most other states have tolerated these actions in silence, without affirmatively endorsing or participating in the actions. The expansive practice in the state code lacks legitimacy and has the veneer of the raw exercise of power. At the same time, the state code's blatant disregard for the institutional code paints the institutional pronouncements as ineffectual aspiration and not fully authoritative. Thus, although some international lawyers continue to insist that the institutional code's output is law, many others argue that the law now covers some – but, again, by no means all – of the state practice.¹⁶⁵ The law in this area appears confused. And the regime's capacity both to address modern security challenges and to restrain militarily powerful states appears dubious.¹⁶⁶

E *The Spectrum of Inter-Code Interactions*

We have argued that the regime on the use of force acquires its contemporary character from the interactions between the institutional code and the state code. Each code has its own set of processes for making use of force decisions, its own substantive agenda and its own base of support within the international community. And though the two codes sometimes overlap, each competes with the other for pre-eminence in the regime. However, neither prevails in that contest, and neither by itself establishes the regime's operative framework. Because each code contains an attribute that the other lacks, each effectively checks the other. Without the control signal that the state code transmits, the institutional code's normative pronouncements go unheeded and

¹⁶¹ See Alston, 'The CIA and Targeted Killings Beyond Borders', 2 *Harvard National Security Journal* (2011) 283, at 434.

¹⁶² See, e.g., Wilmschurst, *supra* note 136, at 968; Leiden Policy Recommendations, *supra* note 64, at paras 45–46. But see, e.g., Randelzhofer and Dörr, *supra* note 42, at 1423; Gazzini, *supra* note 58, at 32.

¹⁶³ See notes 59–62 in this article and accompanying text.

¹⁶⁴ See Tams, *supra* note 63, at 390.

¹⁶⁵ See, e.g., sources in note 162 in this article.

¹⁶⁶ See Murphy, 'Protean Jus Ad Bellum', 27 *Berkeley Journal of International Law* (2009) 22.

appear only aspirational. Without the authority signal that the institutional code nearly monopolizes, efforts to legitimize the state code's policies as law are likely to fall flat.

Assessing the interactions between codes enables us to understand certain persistent features of the regime. We can appreciate that some use of force norms are strong and uncontroversial (mutual support and accommodation), even as others are not (conflict and confrontation). We can identify when institutional pronouncements are likely to persevere as recognized statements of the law, despite a contrary state practice (conflict), and when those pronouncements are at risk of appearing weak and only aspirational (confrontation). Likewise, we can comprehend why in some contexts state practice is accepted as evidence of law (accommodation), while in other contexts it is treated with ambivalence (conflict) or even the cause of uncertainty and confusion (confrontation).

Most of all, our approach accounts for the combined disharmony and resilience of this regime. Because the two codes reflect contending normative visions, they pull in opposite directions, creating an inherent tension within the regime that often manifests in uncertainty or incoherence. But the custodians of each code also appreciate the benefits of working with, or at least not overtly challenging, the other. Thus, even as each code advances its own agenda, its custodians to some extent try to manage their disagreements and ultimately live with the other.

4 Reconciliation and Confrontation

Although the two codes often clash on policy and process, the regime on the use of force is surprisingly resilient. Each code's custodians tacitly recognize that the other code adds value to the regime and hence that managing their differences is, for the most part, desirable. Still, these actors sometimes find rapprochement to be too costly, which explains why in other contexts the regime is characterized by confrontation and volatility. The coexistence and competition between the two codes thus are not themselves destructive to the regime. Use of force policies are inherently contentious, and the stakes are always high. Different actors inevitably try to use the law to advance their own preferred policies. The regime becomes unstable, however, when the custodians of one code refuse to recognize the role and contribution of the other. We assess below the future prospects for the regime by examining the causes and benefits of the two codes working together, as well as the sources and dangers of their confrontation.

A Reconciliation

Despite their deep disagreements, the custodians of each code usually do not actively try to undercut the other code. The interactions that we characterize as mutual support, accommodation and conflict all reflect a shared but unstated understanding that each code contributes something unique and valuable to regime. This understanding explains the regime's overall resilience. The key backers of each code appreciate that they should generally work with, not against, the other code. Such reconciliation does

not strip either code of its independent identity. Rather, it reflects a shared commitment to making the regime both authoritative and controlling, so long as each code's operation is tolerable to the other.

The terms of any reconciliation depend on the specific policy that is at stake and the extent to which one code's custodians are willing to bend to the other for the overall health of the regime. The regime's robustness in cases of mutual support reflects a policy agreement. Both codes advance the same policy, so each benefits the other. In cases of accommodation, the institutional code's custodians choose not to promote their own policy and in effect defer to the state code's policy. By exercising such restraint, the institutions decide, even if only implicitly, that their preferred policy is not worth fighting for, whether because they are not so strongly committed to it or because they know that they are unlikely to make it effective. In contrast, during code conflicts, the state code's custodians work to manage the differences. These states refrain from openly challenging the institutional code's policy, and they sometimes verbally support that policy, even as they conduct or tolerate operations that conflict with it. This approach allows the institutional code's policy to persevere as the most widely accepted statement of law. The state code's custodians either do not want to reform the law or do not believe that their proposal for reform would be accepted as law.

Thus, the participants in the regime engage with one other in different ways, depending on their levels of commitment to specific policies and their tools for mediating any discrepancies. The nature of the interaction in any given context is not accidental. Different actors make concerted choices that create the conditions for, and define the possible terms of, reconciliation. Some actors might even view the two codes' coexistence as an optimal arrangement. It allows the regime to retain both the regulatory slant that is inherent in the institutional code and the operational practicality that is inherent in the state code. Further, reconciliation creates some predictability in the regime and allows global actors to anticipate how particular scenarios will play out.

B Confrontation

The factors that allow for reconciliation are highly contingent. They arise at specific moments and take hold within particular contexts. As such, any reconciliation is tenuous, even assuming that sophisticated analysts appreciate its benefits. Ideological, geopolitical, and technological changes can destabilize the two codes' pre-existing arrangements and, therefore, the expectations on how the regime does or should operate. For example, changing sensibilities relating to human rights – and a reduced tolerance for mass atrocities – have begun to alter the dynamic between the two codes on humanitarian interventions. Similarly, geopolitical shifts, like the rise of China and creation of the International Criminal Court, might shape how the two codes interact on particular issues in the future.

Most critically, new security problems put pressure on arrangements that were established with other contexts in mind. Today's most serious security problems result primarily from advances in technology and the associated proliferation of violence,

particularly as they relate to weapons of mass destruction, transnational terrorism and cyber-attacks. Because of the perceived dangers that these problems pose, the custodians of the state code demand the right to act quickly and unilaterally. These states are unwilling to wait for the institutional code's more deliberate and collective processes to catch up, whether by articulating new, generally applicable norms or by acting in particular cases. The impatience among the state code's custodians is evident in their aggressive policies on self-defence. Such policies have long had seeds in the state practice, but they are now openly and regularly advanced in the state code. At the same time, the institutional code is predisposed against loosening the restrictions on unilateral force. Allowing defensive force in the broad range of circumstances that the state code advocates would be extraordinarily dangerous for the institutional code. It would essentially eviscerate the institutional code's policies and sideline the institutional code's processes. This might explain why its key custodians have in recent years been relatively quiet or at times even accommodating on the law on self-defence: they do not want to endorse the state code's expansive claims, but neither do they want to double-down on claims that will be disregarded.

Confrontation arises in these circumstances because one code's policies and processes so fundamentally threaten the other's that compromise does not seem possible. Instead of the two codes working together or checking each other, one seeks to usurp the role of the other. These confrontations expose each code's inherent inadequacies. Without the authority signal, the state code's operations strike many as exercises of raw power. And without the control element, the institutional code's precepts seem like the aspirational declarations of ineffective institutions.

More troubling, the current code confrontations are deeply destabilizing to the regime as a whole. By advancing such aggressive policies on self-defence, particularly on anticipatory self-defence, the state code claims almost the entire regime for itself. If states may act in anticipatory self-defence to thwart still-latent threats, then they may act unilaterally to maintain international peace and security – that is, to do exactly what the Charter charges the Security Council to do. These confrontations thus have systemic implications and create the impression that the entire regime is in crisis,¹⁶⁷ despite the many ways in which the institutional and the state code still work together.

C Limiting Confrontation

For those who support a workable regime on the use of force, the current confrontations between the two codes present a significant challenge. Of course, the codes might work together in some parts of the regime but not in others. Yet the confrontations that currently exist call into question the entire premise of the regime: that the use of force in international affairs is and should be meaningfully regulated. Going forward, the question is whether the factors that attract the two codes together are or can be made stronger than the factors that push them apart. Because each code is the lesser when it acts alone, each has some incentive to rebalance the relationship – to

¹⁶⁷ See, e.g., Joyner, 'Jus Ad Bellum in the Age of WMD Proliferation', 40 *George Washington International Law Review* (2008) 233, at 247; Murphy, *supra* note 166, at 23.

establish a new status quo. So long as the custodians of the state code seek the law's authority, and the custodians of the institutional code want their pronouncements to be operationally relevant, the possibility of reconciliation endures, even under these new and challenging circumstances.

The most probable prospect for diffusing the current code confrontations is for the institutional code to move closer to the state code. Militarily powerful states are highly unlikely to give up their ability to use force unilaterally, unless the facts that have led them to expand their defensive claims materially change. Indeed, the institutional code might already be moving towards the state code's policies on self-defence. As discussed, a few institutions have sought to accommodate some of the practice on defensive force. Separately, regional organizations might help mediate the confrontational dynamic that now exists between the two codes. Relative to universal organizations like the UN, regional ones are smaller and more homogenous. They are therefore more capable of being influenced by regional powers who support the state code's policies. For example, although the institutional code's universal norms prohibit unauthorized humanitarian interventions, regional organizations have themselves engaged in such interventions.¹⁶⁸ Further, African organizations have amended their constitutive documents to permit both humanitarian interventions and defensive operations that are questionable under the institutional code's universal norms.¹⁶⁹ Yet these shifts do not reflect an agreement among the institutional code's principal custodians and are still fairly modest, relative to the state code's claims. Because neither code has yet demonstrated its willingness to bend to the other, the conditions and terms for a full rapprochement are not yet evident.

5 Conclusion

We have argued that the regime on the use of force is defined by the coexistence of two distinct codes: the institutional code and the state code. Because these two codes reflect competing normative orders, they pull in opposite directions. Yet because each is deficient in a key attribute that the other retains, each to some extent relies on the other, and neither by itself constitutes the regime. The regime's operative framework is a product of the interactions between the two codes. So long as each code's participants see greater benefits to working with their counterparts in the other code than to advancing their separate agendas, the regime will persevere – though it will, in any event, be disharmonious and contentious. What threatens the regime is not the contention per se but rather the efforts within one code to occupy the entire field and displace the other.

¹⁶⁸ See, e.g., Hakimi, 'To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization', 40 *Vanderbilt Journal of Transnational Law* (2007) 643, at 666–672; see also notes 100–103 in this article and accompanying text.

¹⁶⁹ See Constitutive Act of the African Union 2000, 2158 UNTS 3, Art. 4(h); African Union, Protocol Relating to the Establishment of the Peace and Security Council of the African Union, 9 July 2002, available at www.au.int/en/treaties (last visited 25 March 2016), Art. 4(j); Economic Community of West African States, Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, ECOWAS Doc. A/P10/12/99, 10 December 1999, Art. 25.

Understanding this regime as a contest between two very different approaches on policy and process explains why certain norms on the use of force are operative, while others are not. It explains why the regime has been so resilient, even as many of its norms have been contested or uncertain. And it provides a guide to finding the norms that will be articulated, invoked or implemented in particular contexts. These insights are valuable to the international lawyer no matter whether she seeks to analyse a particular incident, craft a successful operation, assess an operation's precedential effects, or plan for future eventualities. By looking at both codes simultaneously – by appreciating the ways in which the two interact – she can understand how the regime actually operates, and she thus can better anticipate what will happen in the future.