PROHIBITION ON THE USE OF FORCE, COUNTER-TERRORISM AND THE ISIS CRISIS

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Abstract

The onset of terrorism has drastically impacted the evolution of the doctrine on the prohibition on the use of force in international law. This essay aims at providing a comprehensive survey of these modifications and plausible justifications invoked by States to claim legality of their actions in foreign territories against the Islamic State of Iraq and Syria. The underlying aim of tracing the evolution is to examine the contribution of the United States of America in moulding and effectively transforming international law through its extra-legal hegemonic interventions. Part 1 of this essay reflects on various constructions of the ambiguously worded Security Council Resolution 2249 (2015) to indicate that the UN machinery's failure to effectively address terror threats has given way to unilateral assessments of risk at the behest of individual States wedged in power politics. Part 2 of the essay addresses shifting interpretations of the use of force and its immediate applicability to the ISIS crisis:

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Section 1 of this Part explores the possibility of the use of defensive force against non-State actors without requiring attribution of their conduct to territorial States; Section 2 establishes the legality of American-led intervention in Iraq grounded in the principle of 'intervention by invitation'; and Section 3 examines the viability of the grounds of collective self-defense and anticipatory self-defense that have been invoked by USA for its intervention in Syria. Part 3 of the essay appraises the detrimental implications of according ostensible legality to hegemonic interventions on the fundamentality of Article 2(4) of the Charter of the United Nations and the perpetuation of a xenophobic narrative all-pervading international law.

I. INTRODUCTION

In an attempt to couch its use of force in foreign territories in the language of legality, the United States of America ("**USA**") has persistently invoked doctrines previously unacknowledged as norms within the realm of international law. The growing academic tendency to accept such principles to justify the legality of American interventions is a reinforcement of the hegemonic currency and an outright dismissal of the sovereign equality of States. This essay aims at tracing the evolution of the prohibition on the use of force through an analysis of Security Council ("**SC**") Resolutions, State practice and decisions of the International Court of Justice ("**ICJ**") in light of growing terror threats. The underlying theme of examining the legality of American-led interventions against the Islamic State of

Iraq and Syria ("**ISIS**")[1] purports to highlight the American tilt in international lawmaking and avers that any response to combat terrorism is bound to remain ineffective if not in consonance with the fundamental principles of the Charter and Purposes of the United Nations ("**UN**").

II. INTERPRETING SECURITY COUNCIL RESOLUTION 2249 (2015)

The prohibition on the use of force contained in Article 2(4)[2] of the Charter of the UN has increasingly shifted from being elevated to a jus cogens norm into one with a multitude of exceptions being carved out therefrom. Two such exceptions formally recognized within the Charter are that of the inherent right of self-defense in Article 51[3] and collective security efforts in furtherance of SC authorizations under Article 39[4] specifically and Chapter VII[5] generally. SC Resolutions acting under the mandate granted by the UN are typically suggestive of the path of legality in order to combat acts of terror. As will be evident throughout the course of this essay, the 9/11 attacks have

[1]The Islamic State of Iraq and Syria was originally a consolidation of the al-Qaeda in Iraq and various Sunni insurgent groups, which together referred to themselves as the Islamic State of Iraq and Levant ("ISIL"). On June 29, 2014 however, the insurgent group broke away from the al-Qaeda following power struggles and ideological differences. Since then, ISIL has been renamed as ISIS. While it has interchangeably referred to itself as the Islamic State (to legitimate a pan-Islamic Caliphate transcending geographical limits of Iraq and Syria), this essay refers to the insurgent group as ISIS, unless the context requires otherwise. See generally Islamic State in Iraq and the Levant (ISIL), ENCYCLOPEDIA BRITANNICA (2015) http://www.britannica.com/topic/Islamic-State-in-Iraq-and-the-Levant (July 7, 2017).

[2]U.N. Charter art. 2, para 4.

[3]U.N. Charter art. 51.

[4]U.N. Charter art. 39.

[5]U.N. Charter art. 39-51.

drastically changed the way States perceive the prohibition on the use of force. This Part assesses differing interpretations accorded to the recent SC Resolution 2249 (2015)[6] in order to ascertain whether in effect there exists a right to use force against the ISIS.

SC Resolution 2249 (2015) in response to the Paris attacks declared an express intention to combat the ISIL, constitutive of a "global and unprecedented threat to international peace and security", "by all means".[7] The operative clause "calls upon member States…to take all necessary measures…to prevent and suppress terrorist acts committed specifically by ISIL…and entities associated with Al-Qaida…and to eradicate the safe haven they have established over significant parts of Iraq and Syria".[8] While failure to refer to Chapter VII does not ipso facto preclude a resolution from acquiring binding value,[9] it does however restrain a resolution from authorizing the use of force beyond that which is already permitted in general international law.[10] The contentious "call" to take "all necessary measures" has been interpreted as falling short of a blatant authorization.[11] If not reflective of a Chapter VII authorization, the next level of investigation ought to focus on its bearing on the use of force under

[6]S.C. Res. 2249, (Nov. 20, 2015).
[7]Security Council 'Unequivocally' Condemns ISIL Terrorist Attacks, Unanimously Adopting Text that Determines Extremist Group Poses 'Unprecedented' Threat, MEETINGS COVERAGE AND PRESS RELEASES, UN NEWS CENTER (June 28, 2016) http://www.un.org/press/en/2015/sc12132.doc.htm.
[8]Id. at ¶5.
[9]Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 1970 I.C.J. 16 (June 21).
[10]Marc Weller, Permanent Imminence of Armed Attacks: Resolution 2249 (2015) and the Right to Self Defence Against Designated Terrorist Groups, EJIL TALK (June 28, 2016)http://www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-self-defence-against-designated-terrorist-groups/.
[11]Dapo Akande & Marko Milanovic, The Constructive Ambiguity of the Security Council's ISIS Resolution, EJIL TALK (June 28, 2016), http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/.

Article 51. Interpreted as a declaration officially reiterating ISIL as a permanent and active threat subsequent to attacks in Sousse, Ankara, Sinai, Beirut and Paris, a few have considered such a declaration to "relieve individual States from having to fulfil the criteria for self-defense when considering armed action in Syria".[12] However, the use of self-defense to combat acts of terror is subject to compliance with the UN Charter specifically and international law generally. The inherent right of self-defense reiterated in the case of Nicaragua v. United States[13] is still qualified by thresholds of immediacy, necessity and proportionality recognized in customary international law. Notwithstanding its ambiguous construction, the Resolution does not progress beyond making a reference to existing law on the use of force in counter-terrorism acts.[14] However, a problematic implication of the SC merely reiterating existing law is the sanction that it accords to individual States to unilaterally determine the criteria to invoke exceptions to Article 2(4).

III. EXAMINING THE LEGALITY OF THE USE OF FORCE IN IRAQ AND SYRIA

This Part discusses the legality of the use of force against the ISIS based on an appraisal of ICJ decisions and customary international law. In the process of exploring the available justifications for American-led interventions, I endeavor to establish that in the absence of precise rulings on the present question of law by the ICJ, State practice has been overpoweringly dominant in ascertaining legality.

[12]Weller, supra note 10.
[13]Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 181 (June 27), [hereinafter Nicaragua].
[14]Paulina Starski, "Legitimized Self-Defense" – Quo Vadis Security Council?, EJIL TALK (June 28, 2016), http://www.ejiltalk.org/legitimized-self-defense-quo-vadis-security-council/.

Section 2.1 of this Part addresses concerns regarding the availability of the use of defensive force against non-State actors, in the event that the ISIS is a non-State actor. It then proceeds to answer the question, whether attribution of actions by non-State actors to a State is a prerequisite to the lawful exercise of the right of self-defense. Section 2.2 assesses the viability of the doctrine of intervention by invitation in American-led airstrikes launched in Iraq. Section 2.3 then comprehensively examines whether collective self-defense on behalf of Iraq or in the alternative, anticipatory self-defense may be viably employed as legitimate grounds for the use of force in Syrian territory.

A. Is The Islamic State a Non-State Actor?

The term 'non-State actor' refers to an individual or organization that is "not allied to any particular country or State".[15] With regard to use of force discourse, it typically entails "cross-border terrorist groups or insurgent groups subject to Common Article 3[that mandates humane treatment of "…persons taking no active part in the hostilities" during an armed conflict not of an international character],[16] or Additional Protocol II [that necessitates respect for and humane treatment of the wounded and sick, civil populations, and unarmed persons who have ceased to participate in similar hostilities],[17] of the Geneva Conventions".[18] The ISIS currently possesses an executive apparatus,

[15]Non-state actor (2017), in Oxford Dictionary [online], https://en.oxforddictionaries.com/definition/non-state-actor (July 7, 2017); See also, NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 15 (Oxford University Press 2011).

[16]Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, Aug. 12, 1949, 75 U.N.T.S. 31, Art 3.

[17]Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609, Art 4.

[18]Id.

a law enforcement agency,[19] judicial machinery[20] and a written manifesto equated to a Constitution.[21] Its fluctuating territory canvassing parts of Syria and Iraq along with a permanent population of Syrians and Iraqis, established social institutions, tax revenue mechanisms and healthcare clinics seem to make a prima facie strong case for statehood.[22] While there are some who argue that ISIS is a State for assumedly fulfilling the bare minimum criteria of statehood laid down in the Montevideo Convention;[23] others have questioned whether ISIS in fact satisfies the individual requisites of 'defined territory' and 'permanent population' contained therein.[24] The ISIS has established itself in the territory of existing States of Syria and Iraq where people identify themselves as possibly Syrian or Iraqi and the States claim them to be their citizens. Wedged between unsteady territorial boundaries[25] and absence of consent of the people ISIS purportedly claims to guarantee citizenship rights to,[26] would ISIS

[19]Ghazi Balkiz & Alexander Smith, What Life Is Like Inside ISIS' Capital City of Raqqa, SYRIA NBC NEWS (June 23, 2016), http://www.nbcnews.com/storyline/isis-uncovered/what-life-inside-isis-capital-city-raqqa-syria-n211206.

[20]UNHRC, Rep. of the Independent International Comm. of Inquiry on the Syrian Arab Republic: Rule of Terror: Living under ISIS in Syria, U.N. Doc. A/HRC/27/CRP.3, (2014).

[21]Olivia Flasch, The legality of the air strikes against ISIL in Syria: new insights on the extraterritorial use of force against non-state actors, 3 JOURNAL ON THE USE OF FORCE AND INTERNATIONAL LAW 37, 46 (2016).

[22]Zack Beauchamp, The 7 biggest myths about ISIS, VOX (June 28, 2016), http://www.vox.com/cards/isis-myths-iraq.

[23]Montevideo Convention on the Rights and Duties of States, Dec. 26 1933, 165 L.N.T.S. 19, Art 1.

[24]Andres Coleman, The Islamic State and International Law: An Ideological Rollercoaster?, 5(2) JOURNAL OF THE PHILOSOPHY OF INTERNATIONAL LAW 75, (2014).

[25]Islamic State Caliphate Shrinks by 16 Percent in 2016, IHS Markit Says, BUSINESS WIRE (July 8, 2017, http://www.businesswire.com/news/home/20161009005034/en/, ["In 2015, the Islamic State's caliphate shrunk from 90,800 sq. km to 78,000 sq. km, a net loss of 14 percent. In the first nine months of 2016, that territory shrunk again by a further 16 percent…"].

[26]Coleman, supra note 24.

still conform to the Montevideo ingredients of statehood? Even if it were to be assumed that it would, ISIS indisputably has emerged as a result of unlawful use of force, and Judge Elaraby's Separate Opinion in the Wall Advisory Opinion[27] has affirmed the general principle that an illegal act cannot produce legal rights.[28] Additionally, despite fulfilment of the declaratory theory of statehood, the equally imperative constitutive theory remains unsatisfied on account of the large-scale non-recognition of the Islamic State as a State.[29] Former President of USA Barack Obama's following statement[30] is one of several instances exemplifying the non-fulfilment of the constitutive theory of statehood:

"*Now let's make two things clear: ISIL is not "Islamic." No religion condones the killing of innocents, and the vast majority of ISIL's victims have been Muslim. And ISIL is certainly not a state. It was formerly al Qaeda's affiliate in Iraq, and has taken advantage of sectarian strife and Syria's civil war to gain territory on both sides of the Iraq-Syrian border. It is recognized by no government, nor the people it subjugates. ISIL is a terrorist organization, pure and simple. And it has no vision other than the slaughter of all who stand in its way…"*

Furthermore, non-recognition is an indicator of the entity's inability to enter into diplomatic relations with other States, which would render the fourth Montevideo criterion unfulfilled as well.[31]

[27]Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, Separate Opinion of Judge Elaraby, ¶3.1 [hereinafter the Wall Advisory Opinion].
[28]Ex injuria jus non oritur, fn. 81 in supra note 15.
[29]Flasch, supra note 21, at 46.
[30]TRANSCRIPT: PRESIDENT OBAMA'S SPEECH ON COMBATING ISIS AND TERRORISM, CNN (July 7, 2017, http://edition.cnn.com/2014/09/10/politics/transcript-obama-syria-isis-speech/.
[31]Thomas D Grant, The Recognition of States: Law and Practice in Debate and Evolution 19, 30, 32–33 (Praeger 1999).

Therefore, ISIS acting independent of the established regimes in Iraq and Syria is a non-State actor.

a) Can The Right of Self-Defense Be Invoked Against Non-State Actors?

Traditionally, Article 51 has been conceptualized as a right that may be invoked against another State.[32] A restrictive absolute prohibition on the use of defensive force against non-State actors was established in the *Wall* Advisory Opinion, which constrained the applicability of Article 51 to "*the case of an armed attack by one State against another State*".[33] *Nicaragua*[34] too reinforces the notion that only effective control exercised by the territorial State over paramilitary and military operations conducted by the non-State actor would attract Article 51. Thus, it is imperative to attribute State responsibility for actions of non-State actors. Article 8 of the ILC Articles on State Responsibility resonates with the above.[35] However, post-9/11, the absolute prohibition has given way to more fluid interpretations of the impugned Article.[36] Monika Hakimi, Professor of Law at Michigan Law School, argues that a State may exercise its right of self-defense against non-State actors in the event that another State actively harbors or supports such non-State actors; is unwilling or unable to address the threat they pose; or if the threat is territorially situated within such State. The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions[37] accepted the emergence of a perception that required a higher threshold of violence

[32]Matthew C. Waxman, Regulating Resort to Force: Form and Substance of the UN Charter Regime, 24 EUROPEAN JOURNAL OF INTERNATIONAL LAW 151, (2013).
[33]Wall Advisory Opinion, supra note 27, at 139.
[34]Nicaragua, supra note 13.
[35]G.A. Res. 56/83, (Dec. 12, 2001).
[36]Christine Gray, International Law and the Use of Force 199 (3rd edn, OUP 2008).
[37]Christof Heyns, (Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions), U.N. Doc. A/68/382 (Sept. 13, 2013), ¶89.

to justify resort to self-defense when responding to attacks perpetrated by non-State actors. An examination of State practice too seems to suggest acceptance of the legality of defensive operations against non-State actors.[38] Such an answer is inevitably dependent on whether a non-State actor is capable of conducting an armed attack, which forms a prerequisite for invocation of the right of self-defense. SC Resolutions 1368 (2001)[39] and 1373 (2001)[40] confirm the inherent right of self-defense against terrorist attacks without any particular mention of a restrictive approach of an armed attack only by one State against another. The *Nicaragua* case expanded the ambit of the prohibition of armed attacks beyond those carried out by regular armed forces and recognized sufficiency of "scale and effect" as the legitimate gravity threshold to ascertain whether an act of aggression (as understood under Article 3(g) of the Definition of Aggression[41]) would qualify as an armed attack.[42] Notwithstanding its non-combatant status then, a terrorist organization carrying out an attack that fulfils the threshold requirement would then legitimize military action in response.[43] Dissenting opinions of Judge Buergenthal[44] and Judge Higgins[45] in the *Wall* Advisory Opinion undertake a literal investigation of Article 51 to conclusively determine that since there exists nothing in the Article that specifically precludes applicability

[38]Monica Hakimi, Defensive Force against Non-State Actors: The State of Play, 91 INTERNATIONAL LAW STUDIES 2, 28 (2015).
[39]S.C. Res. 1368, (Sept. 12, 2001).
[40]S.C. Res. 1373, (Sept. 28, 2001).
[41]G.A. Res. 3314 (Dec. 14, 1974), Art 3(e).
[42]Nicaragua, supra note 13.
[43]J. Rowles, Military Responses to Terrorism, 81 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 307, (1987); See also Davis Brown, Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses, 11(1) CARDOZO J. OF INT'L & COMP. LAW 1, (2003-04).
[44]Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136 (July 9), para 242 (declaration of Judge Buergenthal).
[45]Id. at 215 (separate opinion of Judge Higgins).

against non-State actors, such an inherent right ought to be contained within the provision.

b) Is Attribution Of Actions By Non-State Actors To A State A Prerequisite To The Lawful Exercise Of The Right Of Self-Defense?

The conventional understanding of international legal norms perceived from the lens of ICJ decisions *prima facie* indicates a stringent requirement of attribution of conduct of non-State actors to a State. Article 8 of ILC's Articles on State Responsibility expressly imputes liability of the State in the event that private persons act "on the instructions of, or under the direction or control of"[46] the State, thereby positing a premium on real links and integral State involvement. Israel's construction of a security barricade bordering the West Bank was not construed to be a lawful exercise of Article 51, for Palestinian terrorist attacks could not be attributed to a State in the *Wall* advisory opinion.[47]*Nicaragua*[48] contemplated the existence of effective control as the stringent (and higher) threshold to impute State responsibility for conduct of private actors, in contrast to the subsequent decision in *Tadic*,[49] which adopted a broader overall control test. Particularly, the former test requires proven State participation in planning, direction, support, and execution of violent acts to impute State responsibility,[50] while the latter test accepts a realistic concept of responsibility in recognizing that if the State exercises overall control over a private armed group, through financing, equipping and generally participating in and supervising its military operation, there should exist no additional burden to establish that the host State demanded or directed the specific operation.[51] It has however been argued that adjudication upon the legitimate use of defensive force against non-State actors, unless such armed

[46]Gray, supra note 36, at art. 8.
[47]Id. at 139.
[48]Nicargua, supra note 13.
[49]Prosecutor v Tadic, Opinion and Judgment, No. IT-94-1-T, § 137 (May 7, 1997).
[50]Nicaragua, supra note 13, at 86.
[51]Supra note 53, at 121, 145.

attacks are attributable to a State, was beyond the scope of questions of law presented to the ICJ[52]. Kimberley Trapp, a Senior Lecturer in Public International Law at University College London, has interpreted *Nicaragua*[53] and *Armed Activities*[54] as strictly tethered to opining on the legality of invocation of Article 51 against the government of the respective States.[55] This would effectively imply that there exists no principle of international law, especially under Article 38(1)(d) of the ICJ statute that expressly proscribes invocation of defensive force against non-State actors in the absence of State involvement.

Judge Kooijmans in the *Armed Activities* case asserted:

> "*if the attacks by irregulars would, because of their scale and effect, have had to be classified as an armed attack had they been carried out by regular armed forces… it would be unreasonable to deny the attacked State the right to self-defense merely because there is no attacker State, and the Charter does not so require*".[56]

It has been argued that attribution is essential only when the injured State "*intends to use force against host State forces or facilities, or seeks to hold the host State liable for the damages resulting from the terrorist attack*".[57] The rationale behind the same is the fear of granting impunity to acts of terror in the event that attribution fails to establish State responsibility. Further, such a void in international law would provide escape avenues to host States officially turning a blind eye to terrorist operations within their

[52]Supra note 21, at 49.
[53]Supra note 13, at 154-160.
[54]Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Feb. 3, 2006, paras. 146-147.
[55]Kimberley N Trapp, Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors, 56 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY ICLQ 141, 141-42 (2007).
[56]Supra note 58, at 29-30.
[57]Major Michael D. Banks, Addressing State (Ir-)responsibility: The Use of Military Force as Self-Defense in International Counter-Terrorism, 200 MILITARY LAW REVIEW 54, 84 (2009).

territorial compass.[58] However, a geographical nexus must necessarily be established between the terrorist organization and the host State in order to institute a "*call upon the legal responsibility of the host State to prevent the commission of terrorist attacks from within its borders*"[59] aimed at balancing competing interests of counter-terrorism and territorial sovereignty.

B. Whether State Consent Can Legally Justify American-Led Air Strikes in Iraq?

Typically, exercise of the right of self-defense is subject to several qualifiers, predominantly including, sovereign equality of States-the fundamental legend of international law; and renunciation of force in international relations.[60] The rationale behind the same is to posit the primary prerogative on the State within whose territorial boundary the non-State actor operates. However, such sovereign equality may be by-passed and use of force may be resorted to if such State validly consents to the same. The ground of State consent has been formally reinforced in *Nicaragua,*[61] officially recognized in UNGA Resolution 3314 (xxix),[62] and codified in Article 20 of the ILC Articles on State Responsibility.[63] The international community by and large has recognized the government in Iraq as functioning with an effective governance structure.[64] The Letter from the

[58] Interview with John Norton Moore, Walter L. Brown Professor of Law, Dir., Ctr. for Nat'l Sec. Law, Univ. of Va. Law Sch., in Charlottesville, Va. (Jan. 16, 2008).
[59]State Responsibility, [2001] 2 Y.B. Int'l L. Commentary 40-42, U.N. Doc. A/CN.4/SER.A/2001 /Add.1 (Part 2) (2007), Commentary to G.A. Res. 56/83, Responsibility of States for Internationally Wrongful Acts. U.N. Doc. A/RES/56/83 (Jan. 28, 2002).
[60]Davis Brown, Use of Force Against Terrorism after September 11th: State Responsibility, Self-Defense and Other Responses, 11 CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 1, 30 (2003).
[61]Supra note 13, at 126.
[62]General Assembly Resolution on the Definition of Aggression No. 3314 (xxix), Article 3(e).
[63]G.A. Res. 29/3314, U.N. Doc. A/RES/29/3314 (Dec. 14, 1974).
[64]Frederic Gilles Sourgens, The End of Law: The ISIL Case Study for a Comprehensive Theory of Lawlessness, 39 FORDHAM INTERNATIONAL LAW JOURNAL 355, 396 (2015-16).

Permanent Representative of Iraq addressed to the President of the Security Council dated 20th September 2014[65] attests to the express consent of Iraq in requesting for American aid to "*lead international efforts to strike ISIL sites and military strongholds*" to combat the constant threat to Iraq and its citizens.

On one hand, States have, through statements[66] and overt practice,[67] supported the American-led intervention in Iraq, thereby attaching greater legitimacy to the prospects of 'intervention by invitation' during civil conflict as an emerging rule of customary international law. On the other hand, the legal plausibility of the same has been assailed by a few. For instance, Dapo Akande, Professor of Public International Law at the University of Oxford, has deconstructed the applicability of the 'intervention by invitation' norm in an internal war or civil conflict.[68] Interestingly, States participating and/or supporting the airstrikes in Iraq have restrained from opining on the prohibition of military assistance to governments in the midst of civil wars, which renders the existence of such a prohibition dubious at best. Akande proceeds to explore the possibility of establishing the legality of international intervention in Iraq based on an exception to the general prohibition. Characterization of ISIS as not merely an internal threat operating out of Iraq but as an increasingly global threat with an indubitable "safe haven" in Syria committed to the establishment of

[65]UNSC, Letter dated Sept. 20, 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2014/691 (Sept. 22, 2014), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_691.pdf.

[66]Background Briefing by Senior Administration Officials on Iraq, THE WHITE HOUSE (June 28, 2016), https://www.whitehouse.gov/the-press-office/2014/08/08/background-briefing-senior-administration-officials-iraq.

[67]Summary of the government legal position on military action in Iraq against ISIL, GOV.UK (June 28, 2016), https://www.gov.uk/government/publications/military-action-in-iraq-against-isil-government-legal-position/summary-of-the-government-legal-position-on-military-action-in-iraq-against-isil.

[68]Dapo Akande & Zachary Vermeer, The Airstrikes against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars, EJIL TALK (June 28, 2016), http://www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/.

a caliphate breaking borders in the Middle East,[69] enables an escape route to preclude treatment of the ISIS threat as a mere internal conflict. Theodore Christakis and Karine Bannelier, Professors of International Law at the University Grenoble-Alpes, France, seem to additionally posit fight against terrorism as another exception to the general civil wartime prohibition on the use of force.[70] Against such a backdrop, outright terrorist attacks by ISIS ought to be distinguished from the exercise of the right to self-determination in an internal conflict,[71] and express consent by the Iraqi government is likely to successfully accord legitimacy to the impugned intervention.

a) Can Collective Self-Defense On Behalf Of Iraq Warrant International Intervention In Syria?

USA claims that their intervention in Syria is an exercise of the right of collective self-defense on behalf of Iraq in furtherance to Iraq's express request to combat ISIL and the "safe haven" created outside Iraqi territory.[72] A State asking for assistance in its own self-defense[73] has been embedded in Article 5 of the NATO Treaty which requires

[69]Matthew Weaver & Mark Tran, Isis announces Islamic caliphate in area straddling Iraq and Syria, THE GUARDIAN (June 28, 2016), https://www.theguardian.com/world/2014/jun/30/isis-announces-islamic-caliphate-iraq-syria.

[70]Karine Bannelier & Theodore Christakis, Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict, 26 LEIDEN JOURNAL OF INTERNATIONAL LAW 855–874, 855-874 (2013).

[71]Raphael Van Steenberghe, The Alleged Prohibition on Intervening in Civil Wars Is Still Alive after the Airstrikes against Islamic State in Iraq: A Response to Dapo Akande and Zachary Vermeer, EJIL TALK (June 28, 2016), http://www.ejiltalk.org/the-alleged-prohibition-on-intervening-in-civil-wars-is-still-alive-after-the-airstrikes-against-islamic-state-in-iraq-a-response-to-dapo-akande-and-zachary-vermeer/.

[72]UNSC, 'Letter dated Sept. 20, 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council', U.N. Doc. S/2014/691 (Sept. 22, 2014), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3CF6E4FF96FF9%7D/s_2014_691.pdf.

[73]Ashley Deeks, US Airstrikes Against ISIS in Syria? Possible International Legal Theories, LAWFARE BLOG (2014), http://www.lawfareblog.com/2014/08/u-s-airstrikes-against-isis-in-syria-possible-international-legal-theories/ (June 16, 2016).

members of the collective to fight in response to an armed attack against any other member.[74] However, the legitimacy of this justification is overpoweringly contingent on the validity of Iraqi consent, which if withdrawn at any subsequent time, would simultaneously invalidate actions in Syria. Further, American-led interventions ought to be geographically restricted to the ostensible purpose of eliminating the ongoing ISIL threat in Iraq and help Iraqi forces regain control of Iraq's borders,[75] in the absence of Syrian consent.[76] A claim grounded on collective self-defense in a State distinct from the one expressing unequivocal consent would necessarily require an examination of whether there exists a norm of international law that legitimises infringement of territorial sovereignty of another State in the event that such State has been unable or unwilling to fulfil its own legal obligations.

Though Ashley Deeks, Associate Professor at the University of Virginia School of Law, argues that there exist no cases in which States have clearly asserted that they follow the "unwilling or unable" test out of a sense of legal obligation,[77] Johan van der Vyver, Professor at Emory Law School, has considered it to be a new norm of customary international law through an examination of American official statements in the absence of an express prohibition contained therein.[78] It is vital to dissociate this test from the purview of humanitarian intervention since the latter is perceptively aimed at toppling repressive governments, while the former may arguably be

[74]North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.
[75]*Supra* note 69.
[76]Olivia Gonzales, The Pen and the Sword: Legal Justifications for the United States' Engagement against the Islamic State of Iraq and Syria, 39 FORDHAM INTERNATIONAL LAW JOURNAL 133, 144 (2015-16).
[77]Ashley Deeks, 'Unwilling or Unable': Toward a Normative Framework for Extraterritorial Self-Defense, 52 VIRGINIA JOURNAL OF INTERNATIONAL LAW 503, 503 (2012).
[78]Johan D. van der Vyver, The ISIS Crisis and the Development of International Humanitarian Law, 30 Emory International Law Review 531 (2015-16).

employed against non-State actors.[79] The UN Secretary-General's comment recognizing the validity of intervention in Syria on the ground that the area is "no longer under the effective control of the government"[80] has been construed by some[81] as an implicit endorsement of the test. However, against the contextual backdrop of only American officials proclaiming the test,[82] past solely American support for the test in Pakistan[83] and Yemen,[84] a few States expressing reservations about the legality of intervention in Syria,[85] and inconsistent State practice at best,[86] it seems unlikely that the doctrine has crystallized yet.[87] Furthermore, Canada,[88] Australia,[89]

[79]Id. at 561.

[80]Ban Ki Moon, Remarks at the Climate Summit press conference (including comments on Syria) UN News Center, (June 28, 2016), http://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statid=2356#.virmznfyz9a.

[81]Antonio Coco & Jean-Baptiste Maillart, The Conflict with Islamic State: A Critical Review of International Legal Issues, OUP, 14 (2015).

[82]John O. Brennan Assistant to the President for Homeland Security & Counterterrorism, Strengthening Our Security and Adhering to Our Values and Laws, THE WHITE HOUSE (June 19, 2016), https://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an.

[83]Adam Entous & Siobhan Gorman, U.S. Slams Pakistani Effort On Militants, THE WALL STREET JOURNAL (June 25, 2016), http://www.wsj.com/articles/sb10001424052748703298504575534491793923282.

[84]Barack H. Obama, President Obama's Speech at National Defense University: The Future of our Fight against Terrorism May, 2013, COUNCIL ON FOREIGN RELATIONS (June 23, 2016), http://www.cfr.org/counterterrorism/president-obamas-speech-national-defense-university-future-our-fight-against-terrorism-may-2013/p30771.

[85]Dutch Parliament commits soldiers, F-16s to fight ISIS in Iraq, NL TIMES (June 28, 2016), http://www.nltimes.nl/2014/09/24/parliament-commits-troops-isis-fight/.

[86]Kevin Jon Heller, Do Attacks on ISIS in Syria Justify the "Unwilling or Unable" Test?, OPINIO JURIS (June 28, 2016), http://opiniojuris.org/2014/12/13/attacks-isis-syria-justify-unwilling-unable-test/.

[87]Jens David Ohlin, The Unwilling or Unable Doctrine Comes to Life, OPINIO JURIS (June 28, 2016), http://opiniojuris.org/2014/09/23/unwilling-unable-doctrine-comes-life/.

[88]UNSC, 'Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council' (Mar. 31, 2015), UN Doc S/2015/ 221.

Turkey,[90] France[91] and UK's[92] support towards the doctrine seems imitational in their bandwagon strategy grounded in underlying political US and NATO allegiances, more than a concrete commitment indicative of opinio juris. The bipolar remnants of the Cold War (with Russia unsurprisingly denouncing US missile strikes on its ally, Syria[93]) and the political (and strategic) allegiances of the said States arguably lead to a plausible judgment that is suspect of the emergence of the unwilling or unable doctrine as a new norm of customary international law. In the absence of the same, a determination as to the unwillingness or inability of Syria to combat terrorist operations conducted within its territory seems redundant.

b) Can Anticipatory Self-Defense Be Used As A Legal Justification For American Intervention In Syria?

It is apparent from the letter dated 23rd September 2014, from the US Ambassador to the UN addressed to the UN Secretary-General,[94] that the attempt to legitimize American intervention against the Khorasan group in Syria was based on the doctrine of anticipatory self-defense.

[89]UNSC, 'Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council' (Sept. 9, 2015), UN Doc S/2015/693.
[90]UNSC, 'Letter dated 24 July 2015 from the Chargé d'affaires a.i of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council' (July 24, 2015), UN Doc S/2015/563.
[91]UNSC, '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' (Sept. 9, 2015), UN Doc S/2015/745.
[92]UNSC, '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' (Dec. 3, 2015), UN Doc S/2015/928.
[93]U.S. allies show support for strikes on Syria, REUTERS (July 8, 2017), http://www.reuters.com/article/us-mideast-crisis-syria-reaction-idUSKBN1790M4.
[94]Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014).

A primary analysis of the existence of a right of anticipatory self-defense requires characterization of formerly interchangeable phrases (anticipatory, pre-emptive, and preventive) as concentric circles presently, wherein anticipatory self-defense has been accorded sufficient legal backing for its higher degree of imminence in comparison to the latter two.[95] A comprehensive examination of the existence of such a right would require a survey of past ICJ decisions, particularly the Caroline case.[96] In that case, the British had destroyed an American ship, Caroline, under the belief that it was being utilized to support Canadian forces in a rebellion against the British colonial power.[97] During judicial proceedings, former American Secretary of State Daniel Webster claimed that a State can pre-emptively defend itself if there is a need that is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation".[98] The Caroline test has been affirmed by the Nuremburg Tribunal regarding Germany's invasion of Norway in the Second World War, and invoked by the US in its response to cyber-attacks in the Middle East.[99] Judge Schwebel in the Wall Advisory Opinion concluded that a reading of Article 51 as being applicable "if, and only if, an armed attack occurs" would run contrary to the language and purpose of the Charter in keeping with contemporary global threats to international peace and

[95]Kalliopi Chainoglou, Reconceptualising Self-Defence in International Law, 18 KING'S LAW JOURNAL 68-69, 61-94 (2007).
[96]Caroline Case, 29 BFSP 1137-8.
[97]James Dever & John Dever, Making Waves: Refitting the Caroline Doctrine for the Twenty-First Century, 31 QUINNIPIAC LAW REVIEW (2013).
[98]James A. Green, Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense, 14 CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 429, 435 (2006)
[99]Olivia Gonzales, The Pen and the Sword: Legal Justifications for the United States' Engagement against the Islamic State of Iraq and Syria, 39 FORDHAM INTERNATIONAL LAW JOURNAL 133, 149 (2015-16).

security.[100] Further, Vohn Glahn, Professor at the University of Minnesota,[101] has substantiated his claim of SC acceptance of such a right through the example of the 1967 Six Day War, wherein the SC in failing to condemn Israel's use of anticipatory defensive force to thwart expected Arab invasion implicitly allowed it.[102] An argument generally furthered in favour of the existence of such a right finds merit in its deterrent value to possibly compel States from allowing the creation of "safe havens" within their independent territories.103 The High Level Panel of Experts' clarification recognizing a threatened State's right to "take military action as long as the threatened attack is imminent, no other means would deflect it, and the action is proportionate"[104] has been termed as a mere restatement of "long established international law".[105]

Reference to the Khorasan group as a "network of seasoned Al-Qaida veterans" against whom airstrikes were launched to disrupt the "imminent attack plotting against the United States and western targets" by Pentagon spokespersons[106] is telling of the premium attached on the imminence and immediacy necessitating action. The

[100]The Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, 2003 ICJ, Dissenting Opinion of Judge Schwebel, paras 247-248.
[101]G. Von Glahn, Law Among Nations 550 (4th ed. 1981), p. 133.
[102]The Arabs Unite to Support War, N.Y. TIMES June 6, 1967, at A10.
[103]Steven Westphal, Counterterrorism: Policy of Pre-emptive Action, USAWC STRATEGY RESEARCH PROJECT, p.7.
[104]A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change, (2004) UN Doc A/59/565, at para. 188, www2.ohchr.org/English/bodies/hrcouncil/docs/gaA.59.565_En.pdf (June 22, 2016).
[105]Id.
[106]Rear Adm. John Kirby & Lt. Gen. William Mayville, Department of Defense Press Briefing (Sept. 23, 2014), http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5505.

ISIS similarly has been categorized as a "major threat" to the UK,[107] and a "global and unprecedented threat" by SC Resolution 2249 (2015) in both Iraq and Syria, which may arguably reiterate the imminent nature of attacks. Louise Arimatsu and Michael Schmitt, Professors at Exeter Law School, instate three factors, fulfilment of which would enable a legal invocation of the doctrine of anticipatory self-defense:[108] "capability to conduct an armed attack; the intent to launch one; and a need to act promptly lest the opportunity to effectively use defensive force be lost".[109] Dr. Kalliopi Chainoglou, Lecturer at the University of Macedonia, speaks of components to satisfy the last element specifically, such as timing of the future attack; urgency of deflecting the attack; degree of threat; magnitude of harm the attack would potentially cause to the victim; and availability of non-forcible counter-measures.[110]

Applying the above criteria to the present ISIS crisis, it seems evident that both the Khorasan group and the Islamic State have the potential capability to conduct an armed attack, and repeated statements issued by them[111] indicate a clear intention to launch one too.[112] However, the imminence of such an attack against USA remains contentious and dependent on a factual analysis. One evasive channel utilized by USA in this sphere is the strategic referencing of ISIS as ISIL, since

[107]Philip Hammond, U.K. Foreign Secretary, Foreign Secretary Statement on ISIL: Iraq and Syria (Oct. 16, 2014), https://www.gov.uk/government/speeches/foreign-secretary-statement-on-isil-iraq-and-syria.

[108]Michael N. Schmitt, Preemptive Strategies in International Law, 24 MICHIGAN JOURNAL OF INTERNATIONAL LAW 513, 534–36 (2003).

[109]Louise Arimatsu & Michael N. Schmitt, Attacking "Islamic State" and the Khorasan Group: Surveying the International Law Landscape, 53 COLUMBIA JOURNAL OF TRANSNATIONAL LAW BULLETIN 1, 16-17.

[110]Supra note 100, at 68-69, 75.

[111]Kyle Shideler, ISIS's New Threat is Anything But New, CENTER FOR SECURITY POLICY (Sept. 22, 2014), https://www.centerforsecuritypolicy.org/2014/09/22/isiss-new- threat-is-anything-but-new/.

[112]Supra note 116, at 18.

Obama has justified the interventions under the 2001 Authorization for Use of Military Force, which authorized the use of all necessary force against those who "planned, authorized, committed or aided" the 9/11 bombings.[113] Al-Qaeda was a part of ISIL, however, it gave way to the creation of ISIS in 2013 on account of ideological divergence.[114] Interestingly, USA insists on the al-Qaeda linkages with the ISIS in order to ensure that its airstrikes are in compliance with domestic congressional approval.[115] In so doing, it claims the existence of an imminent attack ensuing from al-Qaeda and its affiliates, to strengthen its use of anticipatory defensive force. However, while there exists no concrete evidence attesting to the proximate nexus between al-Qaeda and the ISIS or the Khorasan group,[116] it also seems misguided to allow intervention against non-State actors in Syria for the threat of an arguably imminent attack posed by another non-State actor, when these two sets of entities have distinctly parted ways.

IV. USE OF FORCE 2.0?

Till now, I have explored the legality of American-led interventions in Iraq and Syria. While airstrikes in Iraq seem by and large legitimate under international law on account of the doctrine of intervention by invitation, the events that have transpired in Syria

[113]AUTHORIZATION FOR USE OF MILITARY FORCE, Pub. L.No.107-40, 115 STAT. 224 (2001).
[114]Oliver Holmes, Al Qaeda Breaks Link with Syrian Militant Group ISIL, REUTERS (Feb. 3, 2013, 8:33 AM), http://www.reuters.com/article/us-syia-crisis-qaeda-idUSBREA12NS20140203.
[115]Supra note 83.
[116]Holly Yan, What's the Difference between ISIS, al-Nusra, and the Khorasan Group?, CNN (Sept. 24, 2014, 3:01 PM), http://edition.cnn.com/2014/09/24/world/meast/isis-al-nusra-khorasan- difference/.

appear to be more complex.[117] I examined the viability of two justifications among many that have been invoked to justify the legitimacy of action in Syria: collective self-defense and anticipatory self-defense. Upon an analysis of these extensions of Article 51, it appears that the "unwilling or unable" norm has not gained sufficient traction to be constitutive of customary international law, and in absence of imminent attacks, anticipatory self-defense is likely to be rendered a weak ground based on the current factual circumstances. However, underlying this ostensibly legal analysis is the following subtext: USA's consistent push towards the emergence of the "unable or unwilling" test as an international law norm, and USA's strategic manoeuvring of referring to ISIS as ISIL to supposedly attract an imminent attack from al-Qaeda, or attempt at establishing pre-emptive self-defense or the Bush Doctrine[118] as a rule of international law. This Part argues that despite absence of evidence indicating crystallization of the abovementioned norms, the international community tends to confer legitimacy on hegemonic use of force by bringing extralegal exercise of hegemonic power within the ambit of legality. Dr. Achilles Skordas, Professor at the University of Bristol, bases such legitimacy in risk containment; failure to accord legality to hegemonic action in light of the polarity in the present power structure would "magnify the destabilization of the global system".[119] However, the American tilt in international lawmaking is abundantly clear in its posture towards diluting the once cardinal prohibition on

[117]Marc Weller, Islamic State crisis: What force does international law allow?, BBC News (June 28, 2016), http://www.bbc.com/news/world-middle-east-29283286.

[118]Originally a reference to the foreign policy of the George W. Bush's administration, the Bush Doctrine entails the right of USA to pre-emptively secure itself against States that harbour or provide aid to terrorist groups in the aftermath of the 9/11 attacks. See, George Bush, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (June 20, 2016), http://www.state.gov/documents/organization/63562.pdf.

[119]Achilles Skordas, Hegemonic Intervention as Legitimate Use of Force, 16 MINNESOTA JOURNAL OF INTERNATIONAL LAW 407, 408 (2007).

the use of force. Notwithstanding the inception of contemporary threats, I argue that the approach of the international community has shifted from pursuing centralized action authorized under the Charter to unilateral assessments and interventions under the garb of contemporaneity and immediacy. What is at play is a more daunting fear, that of carving out enough exceptions to the prohibition on the use of force to render the doctrine and the Purposes of the UN redundant. Employment of phraseology expressing intent to "destroy",[120] "disrupt and degrade"[121] is testimony to the growing deviation from the preambular dedication to "save succeeding generations from the scourge of war".[122]Instead of fostering a centralized urgent action plan to expediently deal with contemporary terrorism threats, delegation of such responsibility to individual member States has allowed for a convoluted mesh of the doctrine on the use of force, especially when such determination is at the behest of the hegemon itself. It is important to preserve Article 51 as a defensive right,[123] and not one that can potentially be misused for offensive conduct in jus ad bellum.

V. CONCLUSION

During the course of this essay, I have attempted to challenge the necessity of this evil by examining the legality of American-led

[120]Dutch prime minister compares bombing of Islamic State to WWII, DUTCHNEWS.NL (June 28, 2016), http://www.dutchnews.nl/news/archives/2014/10/dutch_prime_minister_compares_1/.

[121]UNSC, 7272nd Meeting, U.N. Doc. S/PV.7272 (Sept. 24, 2014), http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7272.

[122]U.N. Charter Preamble.

[123]Nitish, The Use of Force against Terrorism: Does International Law fall Victim, LEGAL SERVICES INDIA (June 28, 2016), Legal Services India, http://www.legalservicesindia.com/article/article/the-use-of-force-against-terrorism-does-international-law-fall-victim-1777-1.html.

interventions in Iraq and Syria. While there has been a growing trend towards reading Article 51 as available against non-State actors absent any State involvement, the standards invoked in order to apply Article 51, especially in the case of Syria, appear problematic. On one hand, the collective self-defense argument is excessively contingent on the validity of Iraq's consent to intervene in ISIS safe havens on foreign territory. Here, I have attempted to establish that the "unwilling or unable" doctrine is essentially a by-product of an American push towards creation of such a norm in international law, and academic scholarship that remotely justifies the crystallization of such a norm is buying into the hegemonic discourse in the absence of consistent practice of other States. On the other hand, interventions against the ISIS are likely to fall short of proving imminence as required for a claim of anticipatory self-defense to succeed. In this case, I argued that the American manipulation of language to refer to ISIS as ISIL in order to reinforce its otherwise severed Al-Qaeda connections, and subsequent academic publications acknowledging the same as an emerging norm of international law, is an act of submission to the dominant hegemonic narrative. In its critical appraisal of the evolution of the prohibition on the use of force, this essay aimed at necessitating a reflection on the doctrine, its deviation from the peremptory Purposes of the United Nations and provide plausible solutions to counter terrorism in a centralized, collaborative manner that is flexible enough to adapt to contemporary threats and sufficiently rigid enough to prevent monist States from undermining fundamental principles of international law under the garb of politically accepted legality.

The dilution of the prohibition on the use of force has predominantly been characterized as a necessary evil to combat acts of terror perpetrated by non-State actors without allegiances to a particular State. Instead, it is submitted that a Comprehensive Convention against International Terrorism, a centralized mechanism under the SC to effectively and expressly take collective security measures to

combat acts of terror in compliance with the UN organ's mandate to restore and maintain international peace and security would enable a reading of Article 51 that is consonant with the Purposes of the Charter. The greater responsibility to be accorded to the SC may be attributed to the express recognition of its role in both Charter-acknowledged exceptions to Article 2(4). Instead of creating further exceptions to Article 2(4) to the extent that the exceptions become the norm, it is important to support a collaborative and cooperative approach to counter contemporary threats and strict measures to ensure that domestic penal systems are in compliance with Charter requirements.