

Attacking “Islamic State” and the Khorasan Group: Surveying the International Law Landscape

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In October 2014, the United States and various other States commenced an air campaign against the “Islamic State” in Iraq and Syria and the Khorasan Group in Syria. The international law governing when a State may use force against non-State actors on the territory of another is generally unsettled, except when either the territorial State has granted its consent to the operations and those operations remain within the scope of the consent or the United Nations Security Council has authorized them pursuant to its U.N. Charter, Chapter VII, authority. Beyond those justifications, States remain divided as to how to lawfully respond to armed non-state actors acting independently of a State without violating the use of force prohibition in Article 2(4) of the U.N. Charter, as well as the sovereignty of the territorial State. In particular, the nature of the right to use force in self-defense in such circumstances remains hotly contested.

The current military operations against the “Islamic State” and the Khorasan Group have each been justified on different legal grounds. This article critically evaluates the legality of the respective

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operations to isolate the legal questions that continue to divide opinion on the use of force by States against non-State armed groups located in other States.

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INTRODUCTION

Since early October 2014, militants of the so-called “Islamic State” (IS) have been positioned on the outskirts of Baghdad and threatening the Syrian city of Kobani, which lies a mere six miles from the Turkish border.¹ IS now controls wide swaths of territory in both Iraq and Syria and the prospect of either State reasserting control over the areas anytime soon is slim. In Iraq, IS-related violence has led to over five thousand civilian casualties and the displacement of over a million people.² Likewise, in Syria, the

1. As of November 17, 2014. See Umar Farooq, *Kurds State Islamic State Militants Near Defeat in Kobani*, L.A. TIMES, Nov. 17, 2014, available at <http://www.latimes.com/world/middleeast/la-fg-kobani-kurds-20141117-story.html>. The group is also known as the “Islamic State of Iraq and the Levant” (ISIL) and the “Islamic State of Iraq and Syria” (ISIS) or “Daesh,” an acronym of the group’s full name in Arabic. For a useful and concise background of the group’s origins, aims, and structure, see CHRISTOPHER M. BLANCHARD, CARLA HUMUD & MARY BETH D. NIKITIN, CONG. RESEARCH SERV., RL33487, ARMED CONFLICT IN SYRIA: OVERVIEW AND U.S. RESPONSE 6–11 (2014), available at <http://fas.org/sgp/crs/mideast/RL33487.pdf>.

2. Human Rights Office of the United Nations High Commissioner for Human Rights & United Nations Assistance Mission for Iraq (UNAMI) Human Rights Office, *Rep. on the Protection of Civilians in the Armed Conflict in Iraq: 6 July–10 September 2014*, i, available at

number of civilians killed and injured in IS-controlled territory is estimated to be in the thousands.³ In particular, the group’s deliberate targeting of minority groups, women, and foreign nationals has prompted international outrage and condemnation.⁴

Most States share the U.S. view that IS has “dramatically undermined stability in Iraq, Syria, and the broader Middle East, and poses a threat to international peace and security.”⁵ The United Nations Security Council responded to the situation in September 2014 through adoption of Resolution 2178, which introduces counter-terrorist measures targeting IS and other terrorist groups. The Council adopted the resolution unanimously and pursuant to its Chapter VII powers.⁶ Currently, the United States, Australia, Belgium, Canada, Denmark, France, the Netherlands, United Kingdom, Bahrain, Jordan, Qatar, Saudi Arabia, and the United Arab Emirates are providing military assistance to the Iraqi armed forces in

http://www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_POC_Report_FINAL_6July_10September2014.pdf.

3. Difficulties in obtaining accurate figures for Syria are compounded by the fact that United Nations human rights monitors have been denied access to the country. Nevertheless, see the recent statistical study commissioned by the Office of the United Nations High Commissioner on Human Rights (OHCHR). MEGAN PRICE, ANITA GOHDES & PATRICK BALL, *UPDATED STATISTICAL ANALYSIS OF DOCUMENTATION OF KILLINGS IN THE SYRIAN ARAB REPUBLIC* (2014), available at <http://www.ohchr.org/Documents/Countries/SY/HRDAGUpdatedReportAug2014.pdf>. See also Human Rights Council (HRC), *8th Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic*, ¶¶ 30–38, U.N. Doc. A/HRC/27/60 (Aug. 13, 2014).

4. See, e.g., *Iraq: Forced Marriage, Conversion for Yezidis*, HUMAN RIGHTS WATCH (Oct. 12, 2014), <http://www.hrw.org/news/2014/10/11/iraq-forced-marriage-conversion-yezidis>; Press Release, Security Council, *Horroric Acts by Extremist Group in Iraq Present Complex Threat to Peace, Security of Entire Region, Top United Nations Official Tells Security Council*, U.N. Press Release SC/11488 (Jul. 23, 2014).

5. Office of the Spokesperson, U.S. Dep’t of State, *Building International Support to Counter ISIS*, Sept. 19, 2014, <http://iipdigital.usembassy.gov/st/english/texttrans/2014/09/20140919308682.html#axzz3GkiDRCFa>; see also U.N. Secretary-General, *Implementation of Security Council Resolutions 2139 (2014) and 2165 (2014): Rep. of the Secretary-General*, ¶ 63, U. N. Doc. S/2014/696 (Sept. 24, 2014) (“ISIL, Jabhat al-Nusra and other groups pose a real threat to international peace and security.”); S.C. Res. 2170, U.N. Doc. S/RES/2170 (Aug. 15, 2014).

6. S.C. Res. 2178, U.N. Doc. S/RES/2178 (Sept. 24, 2014). The resolution condemns violent extremism and requires States to prevent the “recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning of, or participation in terrorist acts. . . .” *Id.* ¶ 5. The Council underscored the “particular and urgent need” to prevent the travel of, and support for, foreign terrorist fighters associated with IS, Al-Nusra Front (ANF), and other affiliates or splinter groups of al Qaeda. *Id.* ¶ 10.

their operations against IS.⁷

Yet, States remain divided on how best to respond to the threat posed by IS militants in Syria, with even the United States' perennial partner, the United Kingdom, remaining uncommitted. The key player in the region—Turkey—has, for the moment, made the strategic decision not to enter the fray in light of its historical conflict with Kurdish groups, who are currently fighting IS in Syria. Only Bahrain, Jordan, Qatar, Saudi Arabia, and the United Arab Emirates, have joined the U.S.-led coalition conducting airstrikes against Syrian-based IS forces and assets.⁸ In parallel with its counter-IS operations, the United States has separately commenced a bombing campaign against the Khorasan Group in Syria, which it characterizes as an “element” of al Qaeda.⁹ It has also reportedly begun striking other Islamist groups, including the al-Nusra Front, al Qaeda's affiliate in Syria.¹⁰

This complex political and military situation is complicated by an equally multifarious array of legal issues pertaining to the use

7. On the operation, see generally U.S. Dep't of Defense, *Operation Inherent Resolve: Targeted Operations against ISIS Terrorists*, http://www.defense.gov/home/features/2014/0814_iraq/ (last visited Nov. 7, 2014). On the state of operations as of early November, see Eric Schmitt, *Obstacles Limit Targets and Pace of Strikes on ISIS*, N.Y. TIMES, Nov. 9, 2014, at A1, available at <http://www.nytimes.com/2014/11/10/world/middleeast/trouble-pinning-down-isis-targets-impedes-airstrikes.html>.

8. Press Release, The White House, Statement by the President on Airstrikes in Syria (Sept. 23, 2014), <http://www.whitehouse.gov/the-press-office/2014/09/23/statement-president-airstrikes-syria>.

9. 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).

10. Ben Hubbard & Eric Schmitt, *American Fighter Jets Carry Out Series of Airstrikes Against Qaeda Cell in Syria*, N.Y. TIMES, Nov. 7, 2014, at A4, available at <http://www.nytimes.com/2014/11/07/world/middleeast/us-jets-strike-at-khorasan-militant-group-in-syria.html>; Erika Solomon & Geoff Dyer, *Coalition Airstrikes Target Jabhat al-Nusra Fighters in Syria*, FINANCIAL TIMES, Nov. 6, 2014, available at <http://www.ft.com/cms/s/0/3dad5cf6-658f-11e4-a454-00144feabdc0.html#axzz3IeK9aZVK>. The Al-Nusra Front was listed by the United Nations Al-Qaida Sanctions Committee on May 14, 2014 as an entity associated with Al Qaeda. See Security Council Committee Pursuant to Resolutions 1267 (1999) and 1989 (2011) Concerning Al-Qaida & Associated Individuals and Entities, List Established and Maintained by the Al-Qaida Sanctions Committee with respect to Individuals, Groups, Undertakings and Other Entities Associated with Al-Qaida (Oct. 28, 2014), available at http://www.un.org/sc/committees/1267/aq_sanctions_list.shtml (last visited Nov. 12, 2014). As this article is being written, these latter strikes have just begun and their scope and intent remain unclear. Therefore, they will not be addressed further. However, the legal analysis set forth in this article applies equally to such operations.

of force against the two groups. Under Article 2(4) of the United Nations Charter (and customary international law¹¹), States must “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”¹² Although the prohibition does not apply to military operations against non-State groups *per se*,¹³ one State’s use of force on another’s territory, even if not directed at that State, breaches the prohibition vis-à-vis the latter absent an exception to the rule.¹⁴ It also constitutes a violation of the territorial sovereignty of that State.¹⁵

The U.N. Charter contains two express exceptions—Security Council authorization pursuant to Articles 39 and 42 (enforcement measures)¹⁶ and self-defense, whether individual or collective, in accordance with Article 51. The latter reflects customary law as well.¹⁷ Consent is a further, extra-Charter, exception recognized as customary law by all States.¹⁸ To the extent that a State approves foreign operations on its territory, it obviously cannot claim that they

11. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (Jurisdiction and Admissibility), 1984 I.C.J. 392, ¶ 71 (Nov. 26); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 175 (June 27) [hereinafter Nicaragua]; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 87 (July 9).

12. U.N. Charter art. 2(4). On its customary law nature, see Nicaragua, *supra* note 11, ¶¶ 188–90.

13. Albrecht Randelzhofer & Oliver Dorr, *Article 2(4)*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 200, 213–14 (Bruno Simma et al. eds., 3d ed. 2012).

14. *Id.* at 216 (the norm encompasses “any possible kind of trans-frontier use of armed force”).

15. Island of Palmas (Neth. v. U.S.), 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928) (“Sovereignty in relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.”). See also Corfu Channel case (U.K. v. Alb.), 1949 I.C.J. 4, 43 (Apr. 9), (individual opinion of Judge Alvarez).

16. U.N. Charter, *supra* note 12, arts. 39 & 42. By the two articles, the Security Council must first “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and may then decide upon measures, including the use of force, necessary “to maintain or restore international peace and security.”

17. Nicaragua, *supra* note 11, ¶ 176.

18. It is an accepted premise of law that the consent of a State to an act precludes that act from qualifying as an “internationally wrongful act.” G.A. Res. 56/83, Annex, art. 20, U.N. Doc. A/RES/56/83 (Jan. 28, 2002). Pursuant to the Vienna Convention on the Law of Treaties, consent may excuse the violation of a treaty obligation owed another country, as in the prohibition of the use of force against other States. Vienna Convention on the Law of Treaties art. 41, May 23, 1969, 1155 U.N.T.S. 331.

amount to either a breach of its sovereignty or the unlawful use of force against it. A final possible exception, and one that is not universally accepted, is humanitarian intervention.

This article evaluates the legality of the military operations against IS in Iraq and Syria, now labeled Operation Inherent Resolve,¹⁹ as well as those targeting the Khorasan Group in Syria, in the context of these normative yardsticks. Distinguishing between the three components of the ongoing campaign is essential because States have justified each on the basis of different legal arguments. The analysis that follows is limited to the *jus ad bellum*, the aspect of international law governing *when* States may use force as an instrument of their national policy. There is no assessment of the various *jus in bello* (international humanitarian law) issues regarding *how* the force is being employed, particularly whether the States involved are technically party to an “armed conflict” with IS or the Khorasan Group or whether the targets they are attacking, like oil production facilities, are lawful military objectives.²⁰ Nor does the piece address the legal authority to use of force in any nation’s domestic laws, such as the U.S. Authorization to Use Military Force.²¹ The sole question addressed is whether the United States and other States participating in the military operations have a basis in international law to conduct them.

I. OPERATIONS IN IRAQ

Nearly every State participating in the military operations in Iraq against IS has expressly and publicly asserted its legal right to do so based the consent of the Iraqi Government.²² International law permits a State to respond to a request for external assistance, including military assistance, by another State to reinstate law and

¹⁹ Press Release, U.S. Central Command, Iraq and Syria Operations Against ISIL Designated as Operation Inherent Resolve (Oct. 15, 2014), *available at* <http://www.centcom.mil/en/news/articles/iraq-and-syria-ops-against-isil-designated-as-operation-inherent-resolve>.

²⁰ On the latter issue, see Kenneth Watkin, *Targeting “Islamic State” Oil Facilities*, 90 INT’L L. STUD. 499 (2014).

²¹ Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

²² See, e.g., Fionnuala Ni Aolain, *Authorizing Force: A Review of Turkish, Dutch and French Action*, JUST SECURITY (Oct. 16, 2014, 12:48 PM), <http://justsecurity.org/16282/authorizing-force-review-turkish-dutch-french-action/>. On the issue of consent in the *jus ad bellum* context, see Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT’L L.J. 1 (2013)

order within the latter's territory.²³ There is also widespread agreement that, as reflected in the International Law Commission's Articles of State Responsibility, "[v]alid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent."²⁴ Considerable State practice supports this exception.²⁵

On occasion, disputes involving consent surface. They usually pivot on one of three factors. First, it is sometimes asserted that the principle of non-intervention prohibits States from intervening on either side in an ongoing classic civil war.²⁶ Second, States occasionally disagree on whether the consenting party has the lawful authority to consent.²⁷ Third, States may differ as to the genuineness of the consent.²⁸

None of these considerations arises in the case of Iraq. As noted, the international community is united in defining IS as a terrorist organization. No State has suggested that the current situation constitutes a classic civil war and, indeed, despite IS's control over a vast portion of territory, the group is regarded as little more than a foreign armed group by most of the Iraqi population. As to legal authority, the international community generally recognizes the current government in Iraq, under the leadership of Prime Minister Haider al-Abadi, as the legitimate and lawful government.²⁹ And with respect to the validity of consent, Iraq's consent to the use of force by other States on its territory is expressly set out in a September 20, 2014 letter from the Iraqi Government to the President of the Security Council. In that letter, Iraq confirmed that it had

23. Nicaragua, *supra* note 11, ¶ 246; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶ 46-47 (Dec. 19). *See also* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE ch. 3 (3d ed. 2008).

24. G.A. Res. 56/83, *supra* note 18, art. 20.

25. *See Materials on the Responsibility of States for Internationally Wrongful Acts*, Int'l Law Comm'n., commentary to art. 20, ¶ 2, U.N. Doc. ST/LEG/SER.B/25 (2012) [hereinafter *Articles on State Responsibility*].

26. *See* U.K. 1984 Foreign Policy Document No. 148, in U.K. Materials on International Law, 1986 BRIT. Y.B. INT'L L. 614.

27. *See, e.g.*, U.N. SCOR, 15th Sess., 873d mtg ¶¶ 186-89, 209 (July 13-14, 1960) (statement of the Belgium Representative) (case of Belgian troops being sent into the Congo in 1960) [hereinafter *Congo*].

28. Articles of State Responsibility, *supra* note 25, commentary to art. 20, ¶ 7.

29. For instance, he was greeted as such by Secretary General Ban Ki-moon. U.N. Secretary General, Readout of the Secretary General's meeting with H.E. Mr. Haider Al-Abadi, Prime Minister of the Republic of Iraq, Sept. 25, 2014, <http://www.un.org/sg/offthecuff/index.asp?nid=3599>.

“requested the United States of America to lead international efforts to strike ISIL sites and military strongholds, with our express consent.”³⁰

The Iraqi government’s express consent removes any doubt as to the legality of operations by the United States and its coalition partners against IS in Iraqi territory. That said, and as reflected in the Articles of State Responsibility, a State granting consent retains the right to limit the conditions for the use of force on its territory and may rescind its consent at any time.³¹ For instance, in this case, external States are only entitled to conduct military operations in Iraq as a member of an *ad hoc* coalition led by the United States.³² In fact, using force inconsistent with the terms of consent by the territorial State would constitute an “act of aggression” against that State.³³

II. OPERATIONS IN SYRIA

In contrast to Iraq, the international law basis for military operations against IS in Syria is more complex and, arguably, tenuous. The decision by numerous States, most notably the United Kingdom,³⁴ to expressly limit their assistance to operations on Iraqi

30. Letter dated 20 September 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).

31. Congo, *supra* note 23, ¶ 47; G.A. Res. 56/83, *supra* note 18, art. 20 (the act consented to must remain “within the limits of that consent”); *see also* Terry D. Gill, *Military Intervention at the Invitation of a Government*, in *THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS* 229 (Terry D. Gill & Dieter Fleck eds., 2010).

32. For example, Australian military personnel deployed to assist in the operation remained in the United Arab Emirates waiting for further clearance from the Iraqi government. The right of the Iraqi government to set the terms by which foreign powers might assist was made unequivocal by the Iraqi Foreign Minister’s comment that “[w]e are absolutely against foreign military bases and the presence of foreign military forces. Yes, we did ask for help, but it concerned air cover.” Gabrielle Chan, *Australian Military Role Unclear as Iraq Minister Rejects Idea of Foreign Troops*, *THE GUARDIAN* (Oct. 14, 2014, 10:48 PM), <http://www.theguardian.com/australia-news/2014/oct/15/australian-military-role-unclear-as-iraq-minister-rejects-idea-of-foreign-troops>.

33. Definition of Aggression, G.A. Res. 3314 (XXIX), Annex, art. 3(e), U.N. Doc. A/RES/3314 (Dec. 14, 1974).

34. See the Government’s September 26, 2014 motion on the United Kingdom’s involvement in the military operations against ISIL in Iraq. Prime Minister Cameron expressly noted that “this motion does not endorse U.K. air strikes in Syria as part of this campaign and any proposal to do so would be subject to a separate vote in Parliament.” 26 Sept. 2014, Parl. Deb., H.C. (2014) 1255, 1255,

territory suggests that there is a certain degree of apprehension as to the legal propriety of operations in Syria. The United States has also executed unilateral strikes against the Khorasan Group, an "al-Qaida-affiliated terrorist organization located in northwest Syria," on the basis that the group "was in the final stages of plans to execute major attacks against Western targets and potentially the United States."³⁵ Because force is being used against both armed groups on the territory of another State, and because there is no Security Council resolution authorizing them, the strikes into Syria are lawful only if they can be justified on the basis of one of the other exceptions cited above.

A. Consent

Syria has not expressly consented to military operations against IS, nor have any States engaging in the airstrikes offered consent as the legal basis for their operations.³⁶ Syria even publically stated prior to their launch that the strikes would violate international law.³⁷ Nevertheless, it could be argued that Syria's apparent

<http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm140926/debtext/140926-0001.htm#1409266000002>. The motion was approved 524 to 43.

35. Cheryl Pellerin, DoD Official: Successful Syrian Strikes Only the Beginning, U.S. DEPARTMENT OF DEFENSE NEWS (Sept. 23, 2014), <http://www.defense.gov/news/newsarticle.aspx?id=123241> (quoting Lieutenant General William Mayville); Rear Adm. John Kirby & Lt. Gen. William Mayville, Dep't of Defense Press Briefing (Sept. 23, 2014), *available at* <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5505> [hereinafter DOD Press Briefing].

36. A further complication is that it may be unclear who represents Syria for the purpose of granting consent. In November 2012, the National Coalition for Syrian Revolutionary and Opposition Forces (Syrian Opposition Council, SOC) was established. Some States recognized the entity as the "legitimate representative" of the Syrian people. *See, e.g.*, Council Conclusions on Syria (EC) No. 16392/12, ¶ 2, Nov. 19, 2012, *available at* <http://register.consilium.europa.eu/pdf/en/12/st16/st16392.en12.pdf>. A State Department spokesperson also labeled the SOC the "legitimate representative of the Syrian people," a characterization repeated in December at the Friends of the Syrian People meeting. However, consent of the "government" is assessed under law irrespective of legitimacy. Press Briefing, U.S. Department of State Deputy Spokesperson David Toner (Nov. 13, 2012), *available at* <http://www.state.gov/r/pa/prs/dpb/2012/11/200477.htm#SYRIA>. Interestingly, in the 2012 *Digest of U.S. Practice in International Law*, the State Department noted, "[t]he United States does not recognize the SOC as the government of Syria." Diplomatic Relations, Succession, Continuity of States, and Other Statehood Issues, 2012 DIGEST § 9, at 281, *available at* <http://www.state.gov/documents/organization/211955.pdf>.

37. Ian Black & Dan Roberts, *Isis Air Strikes: Obama's Plan Condemned by Syria, Russia and Iran*, THE GUARDIAN (Sept. 12, 2014, 2:42 AM), <http://www.theguardian.com/world/2014/sep/11/assad-moscow-tehran-condemn-obama-isis->

opposition was insincere and that it has impliedly consented. In fact, a Syrian government spokesperson has reportedly stated, “[w]e are facing one enemy. We should cooperate.”³⁸ Moreover, Syria has made no effort to interfere with the operations despite U.S. notification of the attacks prior to their launch.³⁹ That is unsurprising since the air strikes are targeted at IS, one of the regime’s most powerful opponents. What is more, the operations indirectly benefit the government in that they have freed up units of the Syrian armed forces, which would otherwise have had to deal with IS, to concentrate on military operations against other rebel groups, including, paradoxically, the Western-supported Free Syrian Army.

Although probably factually accurate, justifying the operations in law on the basis of Syria’s implied consent would be highly contentious. In particular, the Russian Foreign Ministry has stated that “one-sided ‘notification’ of airstrikes” does not suffice to render the operation lawful and that “explicit consent from the government of Syria” would be required.⁴⁰ That position would appear to be correct, for, as explained in the commentary to the Articles on State Responsibility, consent “must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked.”⁴¹ It is worth noting that there has been no suggestion that Syria may have impliedly consented to airstrikes on its territory against the Khorasan Group.

B. Self-Defense

The military operations by the U.S.-led *ad hoc* coalition may be justifiable under international law pursuant to the law of self-defense. This is the position of the United States. In a September 23 letter to the U.N. Secretary-General, the U.S. Ambassador to the United Nations stated:

ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the

air-strike-plan.

38. *Attacks on Islamic State: Another Long War*, THE ECONOMIST (Sept. 27, 2014), available at <http://www.economist.com/news/briefing/21620220-americas-bombing-raids-so-called-islamic-state-syria-have-greatly-increased-its>.

39. DOD Press Briefing, *supra* note 35.

40. *Russia: Airstrikes Must be Agreed with Syria or Will Fuel Tension*, REUTERS, Sept. 23, 2014, 6:06 AM, <http://www.reuters.com/article/2014/09/23/us-syria-crisis-airstrikes-russia-idUSKCN0HI0OU20140923>.

41. Articles on State Responsibility, *supra* note 25, commentary to art. 20, ¶ 6.

region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe havens effectively itself. Accordingly, the United States has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq, including by protecting Iraqi citizens from further attacks and by enabling Iraqi forces to regain control of Iraq's borders. In addition, the United States has initiated military actions in Syria against al-Qaida elements in Syria known as the Khorasan Group to address terrorist threats that they pose to the United States and our partners and allies.⁴²

Article 51, which is generally understood to reflect customary law,⁴³ provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁴⁴

Drawing on Article 51, the United States is grounding Operation Inherent Resolve on the right to engage in *collective* self-defense in support of Iraq, and those against the Khorasan group on the right of *individual* self-defense. The statement also intimates that individual self-defense may provide a separate ground for operations against IS and that collective self-defense may offer further

42. Letter from Permanent Representative of the United States, *supra* note 9.

43. Nicaragua, *supra* note 11, ¶ 176.

44. U.N. Charter, *supra* note 12, art. 51.

justification for strikes against the group in support of States other than Iraq that are facing attacks by IS. To assess these grounds, it is necessary to both understand how the law of self-defense operates generally, and how and when individual and collective self-defense rights arise.

1. The Notion of Armed Attack

The assertion of a right of individual self-defense by States other than Iraq is problematic because the right is contingent on the State concerned having been the subject of an “armed attack.” Armed attack implies more than isolated criminal acts against a State’s citizens, however repellent they may be. Rather, the term denotes hostilities of a certain magnitude that have a transborder element.⁴⁵ In its landmark *Nicaragua* judgment, the International Court of Justice (ICJ) distinguished “the most grave forms of the use of force (those constituting an armed attack) from other less grave forms.”⁴⁶ The Court continued that it:

[S]ees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of “armed attack” includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.⁴⁷

There is no doubt that the scale and effects of the IS operations against Iraq cross the armed attack threshold.⁴⁸ However,

45. *Self-Defence Against Armed Attack*, in, TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 54, 54 (Michael N. Schmitt ed., 2013) (on transborder element).

46. *Nicaragua*, *supra* note 11, ¶ 191. *Accord Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, ¶ 51 (Nov. 6).

47. *Nicaragua*, *supra* note 11, ¶ 195. See also Albrect Randelzhofer & Georg Nolte, *Article 51*, in THE CHARTER OF THE UNITED NATIONS, *supra* note 13, at 1397.

48. Yoram Dinstein has suggested that “an armed attack presupposes a use of force producing (or liable to produce) serious consequences, epitomized by territorial intrusions,

it is doubtful that the group's actions against the citizens of other States, including the beheadings of U.S. and British citizens or the killing of two Canadian soldiers in Canada, even if attributable to IS as a matter of law, reach the generally accepted threshold of what constitutes an armed attack. Both the ICJ and the Eritrea Ethiopia Claims Commission have excluded clashes in which numerous deaths have resulted as "border incidents" that fall outside the ambit of armed attacks.⁴⁹ This would support the conclusion that the numbers of foreign citizens killed by IS, however horrific the means, simply do not reach the requisite "gravity" threshold.⁵⁰ If this is the proper legal assessment, the right of individual self-defense would provide feeble legal justification for operations against IS by any State other than Iraq. To lawfully engage in operations on Syria's territory, another legal basis would be required.

Some commentators have criticized the scale and effects requirement. For instance, former U.S. State Department Legal Advisor William Taft has argued that "[t]he gravity of an attack may affect the proper scope of the defensive use of force . . . but it is not relevant to determining whether there is a right of self-defense in the first instance."⁵¹ Rejection of the scale and effects requirement would open the door to an assertion of individual self-defense as a legal basis for Operation Inherent Resolve, although that claim has not been made by any State.

In international law circles, there has been some sidebar discussion regarding the concept of "rescue of nationals abroad" and whether it applies in the Syrian case. Some international law experts assert that international law permits the use of force to rescue nationals in a foreign State without the consent of that State even when an armed attack is neither underway nor imminent.⁵² Recent

human casualties or considerable destruction of property." YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 208 (5th ed. 2011).

49. Nicaragua, *supra* note 11, ¶ 195; Partial Award—Jus ad Bellum, Ethiopia's Claims 1–8 (Eth. v. Eri.), 45 I.L.M. 430, 443 (Eri. Ethi. Claims Comm'n 2005), available at <http://www.pca-cpa.org/upload/files/FINAL%20ET%20JAB.pdf>.

50. The standard is the subject of significant ambiguity. For instance, the International Court of Justice has noted that it cannot "exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the 'inherent right of self-defence.'" *Oil Platforms*, *supra* note 46, ¶ 72.

51. William H. Taft IV, *Self-Defense and the Oil Platforms Decision*, 29 *YALE J. INT'L L.* 295, 300 (2004). See also the excellent discussion of the issue in DINSTEIN, *supra* note 48, at 207–12.

52. See generally DEREK BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 91–94 (1958); LILLICH ON FORCIBLE PROTECTION OF NATIONALS ABROAD (Thomas C. Wingfield & James E. Meyen eds. 2002). See also Randelzhofer & Dorr, *supra* note 13, at 226–28.

State practice involving the use of force by a foreign State for the exclusive purpose of rescuing its nationals in environments where there is no effective government and pervasive insecurity has not met with significant protest from either the territorial or other States.⁵³ This would indicate that in such circumstances there is a degree of acquiescence by States. However, no State has asserted such a right with respect to Syria. More to the point, there is a distinction between removing a threat to one's citizens and rescuing them. The operations, as presently framed, can only logically be styled as the former. Therefore, assuming for the sake of analysis that such a doctrine exists in international law, it does not apply with respect to Operation Inherent Resolve.

Evaluation of the U.S. claim of individual self-defense against the Khorasan Group is somewhat more complex because there has been no armed attack by that specific group against the United States or another State. As such, the strikes against the group would have to be based on one of two possible grounds: Affiliation with al Qaeda or, as explained later, anticipatory self-defense (or combination thereof, which appears to be the case in this instance).

An argument can be made that the Khorasan Group is an integral component of the broader al Qaeda network that is engaged in an ongoing campaign of armed attacks against the United States, as is apparently the case with the al-Nusra Front. Accordingly, the United States would enjoy the right of individual self-defense against the group irrespective of whether it is presently engaged in an armed attack. Recall that the United States characterized the Khorasan Group as an "al-Qaida element" in its September 23 letter to the Security Council.⁵⁴

While this legal claim is colorable, cogent fact-dependent counter-arguments exist.⁵⁵ Absent a clear and formal connection between terrorist groups, aggregating them for the purpose of either combining their operations to cross the armed attack threshold *ensemble* or justifying strikes against a group that has not committed an armed attack by reference to one that has done so is not possible. Therefore, the link between the Khorasan Group and al Qaeda must

53. Gray, *supra* note 23, at 156–160.

54. Letter from the Permanent Representative of the United States, *supra* note 9.

55. See discussion in Ryan Goodman & Shalev Roisman, *Assessing the Claim that ISIL is a Successor to Al Qaeda—Part I (Organizational Structure)*, JUST SECURITY (Oct. 1, 2014, 9:04 AM), <http://justsecurity.org/15801/assessing-isil-successor-al-qaeda-2001-aumf-part-1-organizational-structure/>; Ryan Goodman & Shalev Roisman, *Assessing the Claim that ISIL is a Successor to Al Qaeda—Part I (Organizational Goals)*, JUST SECURITY (Oct. 6, 2014, 9:01 AM), <http://justsecurity.org/16003/assessing-claim-isil-successor-al-qaeda-part-2-organizational-goals/>.

be sufficiently close to consider the former an integral component of the latter. Although there is no bright line test for the requisite relationship, a reasonable requirement is that al Qaeda either direct and control the Khorasan Group’s operations or that the two groups rely operationally on each other. The United States claims that the group is a “network of seasoned al Qaida veterans”⁵⁶ and an “offshoot of Al Qaida” affiliated with al-Nusra,⁵⁷ but the precise relationship remains somewhat murky. Consequently, no definitive conclusion on this point can be drawn.⁵⁸

As an aside, it can fairly be argued that the strikes against al Qaeda have been so effective that it is no longer possible to speak of it as more than an entity inspiring the activities of others. If this is the case, the Khorasan Group would have to engage in an armed attack of its own against the United States for the right of individual self-defense to arise. Additionally, the same analysis would have to be made with regard to the al Nusra Front.

2. Necessity and Proportionality

A use of force by a State in response to an armed attack must meet the requirements of necessity and proportionality.⁵⁹ The principle of necessity requires that there be no alternative to the use of force to redress the situation that constitutes the armed attack (or imminent threat thereof, as explained below). In these cases, the sole basis for disallowing action on the basis of lack of necessity would be the availability of law enforcement measures, either by Iraq or Syria, as the case may be, or by other States enjoying criminal jurisdiction with the consent of Iraq or Syria. Although a question of fact, it seems self-evident that this option is unavailable.

The principle of proportionality in the *jus ad bellum* context of self-defense must be distinguished from proportionality in related areas of law, such as international humanitarian law⁶⁰ or the law of

56. DOD Press Briefing, *supra* note 35.

57. Rear Admiral John Kirby, Department of Defense Press Briefing (Sept. 25, 2014), <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5506>.

58. On the distinction between IS, al-Nusra and the Khorasan Group, see 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/>.

59. Nicaragua, *supra* note 11, ¶¶ 194, 237; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 41 (July 8); Oil Platforms, *supra* note 46, ¶¶ 43, 73–74, 76.

60. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, arts. 51(5)(b), 57(2)(a)(iii),

State responsibility.⁶¹ With respect to self-defense, it refers to the condition that no more force be used than required to halt and repel the attack and to prevent further ones that are likely imminent. In the case of operations in both Syria and Iraq, this condition would appear to be satisfied since the air strikes are directed solely against the fighters, bases, and assets of the respective groups for the purpose of diminishing their capability.

3. The Notion of Anticipatory Self-Defense

A separate basis for acting in self-defense exists when an attack is “imminent.” Although the right of “anticipatory self-defense” does not appear in the text of Article 51, the majority of international law experts and most States agree that the standard of imminency, drawn rather ahistorically from the celebrated *Caroline* incident,⁶² represents customary international law.⁶³ Traditionally, the standard has been understood as denoting a requirement of temporal proximity to an impending armed attack before forceful defensive action may be taken.⁶⁴ That approach is increasingly being discarded in favor of one that entails the confluence of three factors: A capability to conduct an armed attack, the intent to launch one, and

57(2)(b), June 8, 1977, 1125 U.N.T.S. 3; *Rule 14—Proportionality in Attack*, in, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 46, 46–50 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

61. Rep. of the Int'l L. Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, 341–345, art. 51, U.N. Doc. A/56/10, GAOR 56th Sess., Supp. No. 10 (2001), *reprinted in* [2001] 2 Y.B. INT'L L. COMM. 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), *available at* <http://www.un.org/documents/ga/docs/56/a5610.pdf>.

62. A State may act anticipatorily when the “necessity of self-defense [is] instant, overwhelming, leaving no choice of means, and no moment for deliberation.” Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), *reprinted in* 2 DIGEST INT'L L. 412 (John Bassett Moore ed., 1906).

63. Barack Obama, President of the United States, Remarks by the President at the National Defense University (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> [hereinafter Obama NDU Speech]; U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All: Rep. of the Secretary-General*, ¶¶ 124–25, U.N. Doc. A/59/2005 (March 21, 2005); High Level Panel on Threats, Challenge, & Change, *A More Secure World: Our Shared Responsibility: Rep. of the High-Level Panel on Threats, Challenges and Change Addressed to the Secretary General*, ¶ 188, U.N. Doc. A/59/565 (2004); Institute of International Law, Resolution, Self Defence, art. 6, 72 A.I.D.I. 233 (2007); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1633–65; DINSTEN, *supra* note 48, at 205.

64. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 275–78 (1963).

a need to act promptly lest the opportunity to effectively use defensive force be lost (the so called "last window of opportunity").⁶⁵

From the September 23 letter, it is apparent that the United States is largely basing its actions against the Khorasan group on anticipatory self-defense. In a September news conference, senior Pentagon spokespersons explained:

In terms of the Khorasan group, which is a network of seasoned Al Qaida veterans, these strikes were undertaken to disrupt imminent attack plotting against the United States and western targets. These targets have established a safe haven in Syria to plan external attacks, construct and test improvised explosive devices, and recruit westerners to conduct operations. The United States took action to protect our interests and to remove their capability to act The intelligence reports indicated that the Khorasan Group was in the final stages of plans to execute major attacks against Western targets and potentially the U.S. homeland.⁶⁶

The express reference to an IS threat to the United States and other States in the Security Council notification also leaves the door open to taking this position with respect to that group. President Obama has repeatedly asserted that the threat posed by IS extends well beyond Iraq and Syria. For example, after meeting with his military leadership and that of twenty coalition partners in mid-October, he stated:

ISIL poses a significant threat to the people of Iraq and Syria. It poses a threat to surrounding countries. And because of the numbers of foreign fighters that are being attracted, and the chaos that ISIL was

65. See Michael N. Schmitt, *Responding to Transnational Terrorism under the Jus ad Bellum: A Normative Framework*, in INTERNATIONAL LAW & ARMED CONFLICT: EXPLORING THE FAULTLINES 157 (Michael N. Schmitt & Jelena Pejic eds., 2007). The last window of opportunity approach was initially proposed in Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 534–36 (2003). It has since been adopted by the United States. See, e.g., DEP'T OF JUST., LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE 7 (Nov. 8, 2011) (draft), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dept-white-paper.pdf> [hereinafter DOJ WHITE PAPER]; Eric Holder, Attorney General, Remarks at Northwestern University School of Law (Mar. 5, 2012), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law>.

66. DOD Press Briefing, *supra* note 35 (statements by Rear Adm. John Kirby and Lt. Gen. William Mayville).

creating in the region, ultimately it will pose a threat beyond the Middle East, including to the United States, Europe, and far-flung countries like Australia that have already seen terrorist networks trying to infiltrate and impact population centers on the other side of the world.⁶⁷

Importantly, the United Kingdom shares this assessment. For instance, in September the Foreign Secretary stated in Parliament that “ISIL represents a threat to Iraq and to the region. But it also represents a major threat to us, here at home, particularly at the hands of returning foreign fighters; and to our citizens worldwide.”⁶⁸

With regard to anticipatory self-defense, the legal question is not whether IS and the Khorasan Group represent a future threat to the United States: They clearly do. Instead, it is whether an armed attack by them is imminent such that the U.S. right (or indeed that of any other State) of anticipatory self-defense has matured. Both IS and the Khorasan Group have the potential capability of mounting an armed attack.⁶⁹ Additionally, because they operate from weakly governed territory, it is unlikely that an opportunity to address the threat they pose through other than forceful means will present itself. Consequently (assuming for the sake of analysis that IS has not already crossed the armed attack threshold by virtue of its murder of U.S. and U.K. citizens), the legal linchpin in the anticipatory self-defense analysis is the intent to conduct an armed attack in the immediate future. IS has called on others to conduct attacks and has implied that it may also mount attacks as well.⁷⁰ But the legal question is whether the group itself has definitive plans to do so at the armed attack level.

67. Barack Obama, President of the United States, Remarks by the President after Meeting with Chiefs of Defense (Oct. 14, 2014), <http://www.whitehouse.gov/the-press-office/2014/10/14/remarks-president-after-meeting-chiefs-defense>.

68. 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>.

69. Capability implies the operational ability and wherewithal to mount an armed attack.

70. On September 21, 2014, an IS leader urged Muslims to “hinder those who want to harm your brothers and state as much as you can. The best thing you can do is to strive to your best and kill any disbeliever, whether he be French, American, or from any of their allies.” 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/>; see also Rick Noack, *The Islamic State Wants to Attack these Western Countries*, WASH. POST (Sept. 22, 2014), <http://www.washingtonpost.com/blogs/worldviews/wp/2014/09/22/the-islamic-state-wants-to-attack-these-western-countries/>.

Whether either or both groups harbor that intent is an issue of fact. The United States asserts the Khorasan Group does, but its express comments on the IS threat do not support the same conclusion vis-à-vis that group. If the US conclusions are reasonable (and this is a question that cannot be answered without access to the underlying intelligence), anticipatory self-defense would constitute a legal justification for its operations, although, as will be seen, other challenging legal issues remain to be addressed.

4. Non-State Actors

Even if an ongoing attack rises to the armed attack level (or a yet to be launched attack can be said to be "imminent"), opinion remains divided as to whether Article 51 can be invoked with respect to a non-State group acting independently of any State.⁷¹ Illustrating the extent to which the matter remains unsettled in international law, the co-authors hold different views on the point.⁷² Central to the debate is whether, in the wake of 9/11, international law has evolved to allow for a more expansive reading of Article 51 than was hitherto accepted. In other words, can Article 51 be interpreted as not only applying to attacks conducted by States or otherwise attributable to them, but also to attacks launched by non-State groups when legal attribution is inappropriate?

In support of their position, proponents of an expansive interpretation, like the United States,⁷³ typically cite the Security Council resolutions adopted in the immediate wake of 9/11, which refer to Article 51 in the context of the al-Qaeda attacks,⁷⁴ and various examples of State practice and *opinio juris*. The latter include, *inter alia*, invocation of Article 5 of the Washington Treaty in response to the 9/11 attacks and the international community's reaction to Israel's assertion of the right to conduct defensive operations into Lebanon in 2006 against Hezbollah.⁷⁵ In their view,

71. Randelzhofer & Nolte, *supra* note 13, at 1416–19.

72. Michael N. Schmitt, *Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law*, 52 COLUM. J. TRANSNAT'L L. LAW 77, 84–85 (2013); Louise Arimatsu, *The Law of State Responsibility in Relation to Border Crossing: An Ignored Legal Paradigm*, 89 INT'L L. STUD. 21, 24–35 (2013).

73. DOJ WHITE PAPER, *supra* note 65, at 2; *see also* Harold Hongju Koh, Legal Advisor, Dep't of State, Address at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm>.

74. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001)

75. Examples are set forth in Michael N. Schmitt, *Responding to Transnational*

Article 51 extends to attacks by non-State actors and is accordingly available in the Syrian case, assuming the operations amount to, as discussed above, armed attacks, and the conditions discussed below are satisfied.

Traditionalists, on the other hand, also point to State practice and *opinio juris* to argue that, as a rule, States continue to treat attacks perpetrated by non-State actors as a law enforcement concern and that Article 51 only applies to terrorist attacks when expressly recognized as such by the Security Council.⁷⁶ Additionally, they cite two of the ICJ's post-9/11 pronouncements—the 2004 Advisory Opinion on the *Wall* and 2005 judgment in the *Congo v. Uganda* case—in support of the proposition that self-defense is limited to attacks tied to States.⁷⁷ In fairness, it must be noted that even traditionalists acknowledge that in certain limited circumstances attacks by non-State actors may be attributable to a State such that action against, or into, the State where they are located is lawful. As noted by the Court in the Nicaragua case:

[A]n armed attack must be understood as including not merely action by regular forces across an international border, but also “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to” (*inter alia*) an actual armed attack conducted by regular forces, “or its substantial involvement therein.”⁷⁸

In the Syrian case, however, it is obvious that IS operations are not attributable to Syria, as the group is involved in a non-international armed conflict with that country. Nor are there any indications of a relationship between the Khorasan Group and the Syrian regime. This being so, by the traditional approach, Iraq, the United States, and other States involved in the operations enjoy no

Terrorism under the Jus ad Bellum: A Normative Framework, 56 NAVAL L.R. 1, 7–13 (2008).

76. Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 997 (2001); Eric Myjer & Nigel White, *The Twin Towers Attack: An Unlimited Right to Self-Defence?*, 7 J. CONFLICT & SECURITY L. 5, 7 (2002).

77. *Wall*, *supra* note 11, ¶ 139; *Congo*, *supra* note 23, ¶¶ 146–47. *But see Wall*, *id.*, ¶ 33 (separate opinion of Judge Higgins); *id.* at 229–30, ¶ 35 (separate opinion of Judge Kooijmans); *id.* at 242–43, ¶ 6 (declaration of Judge Buergenthal); *Congo*, *id.*, ¶ 11 (separate opinion of Judge Simma).

78. *Nicaragua*, *supra* note 11, ¶ 195; *see also* Definition of Aggression, *supra* note 33, Annex, art. 3(g).

right of individual or collective self-defense that might allow them to use force in Syrian territory. Therefore, the operations against the two groups can only be justified on the basis of self-defense by the broader view as to applicability of Article 51 to non-State actor attacks.

5. Unwilling and Unable

Those taking the position that the law of self-defense extends to armed attacks by non-State actors face yet another legal hurdle before the strikes into Syria against IS and the Khorasan Group can be adjudged lawful. There is presently an ongoing debate in the international law community as to whether the sovereignty of the State in which non-State actors conducting attacks against another State are located has to yield to the victim State's right of self-defense, such that operations against them may be mounted on the former's territory.

Again, there are two views. By the first, the territory of the State where the non-State actors are located is inviolable absent an exception that applies to the State itself, as in a Chapter VII authorization permitting military operations on the territory, consent by the territorial State or the existence of an ongoing or imminent armed attack attributable to the territorial State.⁷⁹ For proponents of this view, the operations into Syria violate Syrian sovereignty and constitute an unlawful use of force against the country. There might be a right of self-defense against the non-State group, but the veil of sovereignty may not be pierced to effectuate it.

The alternative approach balances the right of sovereignty against that of self-defense. It begins with the premise that States have an obligation to ensure their territory is not used to the detriment of other States.⁸⁰ Should non-State groups operating from a State's territory ("the territorial State") conduct an armed attack against another State, the victim State's right of self-defense crystallizes. The victim State must demand that the territorial State comply with its duty to police its territory and afford it adequate opportunity to do so. The extent of the opportunity afforded is, of course, dependent on the attendant circumstances. If the territorial State is either "unwilling or unable" to prevent further attacks from its territory, the victim State may act defensively against the non-State group, but must, in light of the violation of the territorial State's

79. Brownlie, *supra* note 64, at 299–301. *But see* Bowett, *supra* note 52, at 87–105; Dinstein, *supra* note 48, at 268–72.

80. *See* Corfu Channel, *supra* note 15, at 22.

sovereignty, limit the scope and nature of its operations to those strictly necessary to defend itself against the group.⁸¹ The U.S. statement to the Security Council expressly referenced the unwilling and unable standard, as have previous U.S. pronouncements.⁸² Only if the doctrine properly replicates international law are Operation Inherent Resolve and the strikes against the Khorasan Group lawful.

6. Collective Self-defense

Collective self-defense is, as apparent from its notification to the Security Council,⁸³ the primary legal justification asserted by the United States for Operation Inherent Resolve. The United States and its partners in the airstrikes are not alone in taking this position. In his statement to Parliament on September 26, 2014, U.K. Prime Minister David Cameron made it unambiguously clear that if the United Kingdom were to act in Syria, “collective self-defence against ISIL which threatens Iraq” would constitute the legal basis for

81. See generally Michael N. Schmitt, *Counter-terrorism and the Use of Force in International Law*, 32 ISR. Y.B. HUM. RTS. 53 (2002).

82. Letter from Permanent Representative of the United States, *supra* note 9; Obama NDU Speech, *supra* note 63 (“[W]e act . . . when there are no other governments capable of effectively addressing the threat.”); Office of the Press Secretary, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism> (requiring “[a]n assessment that the relevant governmental authorities in the country where the action is contemplated cannot or will not effectively address the threat to U.S. persons”); DOJ WHITE PAPER, *supra* note 65, at 1–2. For statements by earlier officials, see Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 108 (1989); Bill Richardson, Letter dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Sec. Council, U.N. Doc. S/1998/780 (1998); John B. Bellinger, III, Legal Advisor, U.S. Dep’t of State, Address at the London School of Economics: Legal Issues in the War on Terrorism (Oct. 31, 2006), <http://www.state.gov/s/l/2006/98861.htm>; Address by Harold Hongju Koh, *supra* note 73; John O. Brennan, Assistant to the Pres. for Homeland Security and Counterterrorism, Remarks at the Program on Law and Security at Harvard Law School: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> (“And as President Obama has stated on numerous occasions, we reserve the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves.”). For an excellent academic treatment of the subject, see Ashley S. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT’L L. 483 (2012). For earlier treatment of the issue see Schmitt, Preemptive, *supra* note 65, at 540–43.

83. Letter from Permanent Representative of the United States, *supra* note 9.

military operations there.⁸⁴

In its own letter to the Security Council, Iraq noted that “ISIL has established a safe haven outside Iraq’s border that is a direct threat to the security of our people and territory” and that “[t]he presence of this safe haven has made our borders impossible to defend and exposed our citizens to the threat of terrorist attacks.”⁸⁵ It then noted that it had requested assistance from a U.S.-led coalition, thereby satisfying one key condition precedent for collective self-defense, a request from the State that has been the victim of an armed attack.⁸⁶

The right of States to engage in collective self-defense is derivative of the right of the State that has been the victim of an armed attack.⁸⁷ Thus, in this case, the right of the United States and other States to conduct operations depends on whether Iraq enjoys a right of individual self-defense against IS in Syria. There would appear to be no question that IS attacks against Iraq have crossed the armed attack threshold and are continuing (i.e., there is no anticipatory self-defense issue). The legality of the operations would therefore turn on the view one takes regarding self-defense against armed attacks by non-State actors unaffiliated with any State and the “unwilling and unable” approach.

For those who oppose broad interpretation of Article 51, as well as those who reject the “unwilling or unable” test, the purported collective self-defense operations in Syria violate international law. Either Iraq enjoys no right of self-defense against IS or it has no right to cross the Syrian border; therefore, no other State does on the basis of collective self-defense. By contrast, for those taking the opposite view on both issues, collective self-defense is clearly acceptable since Iraq enjoys the right of individual self-defense and has asked for help. Of course, because collective self-defense is a derivative right, it must be cautioned that if Iraq withdrew its request for assistance, the operations would have to cease. The Iraqi government is also entitled to limit the scale, scope and nature of the operations into Syria on its behalf. And as soon as there is no longer a need to strike at IS in Syria in order to defend Iraq, Operation Inherent Resolve must come to an end (absent resort to other legal bases such as individual self-defense).

At this stage, what remains unknown is the position of a

84. Cameron Statement to House of Commons, *supra* note 34, at 1263.

85. Letter from Permanent Representative of Iraq, *supra* note 30.

86. Nicaragua, *supra* note 11, ¶ 199.

87. Nicaragua, *supra* note 11, ¶ 195 (“[i]t is the State which is the victim of the armed attack which must form and declare the view that it has been so attacked.”)

majority of States on these legal issues; few have been willing to publicly express their views on the matter. For the United States, this is problematic since its legal claim for using force in Syria rests on the development of customary international law since 2001. The fact that only a modest number of the sixty States that have committed themselves to supporting the operations against IS expressly support the operations in Syria somewhat undermines the U.S. legal position.

However, the reluctance of States to commit publicly to one view or another could change in light of the dynamic situation on the ground. In particular, it must be remembered that Turkey is a member State of NATO. Should IS militants pose an imminent threat to Turkey, the latter is likely to respond with force and concurrently request the assistance of its treaty partners pursuant to Article 5 of the North Atlantic Treaty, the collective-defense clause.⁸⁸ No doubt legal advisors in those NATO member States that do not subscribe to an expansive interpretation of Article 51, let alone the “unable or unwilling” test, have been pondering how to reconcile compliance with their treaty obligations without adding to State practice that supports the very legal claims that they would otherwise reject in the abstract. NATO Secretary-General Jens Stoltenberg’s October 6, 2014 statement that “Turkey should know that NATO will be there if there is any spillover, any attacks on Turkey as a consequence of the violence we see in Syria” has no doubt further complicated the matter for those States.⁸⁹ In a twist of irony, Syria is the one State that can assist in reinstating a more restrictive interpretation of Article 51 by expressly consenting to the use of force in its territory against the IS militants.

C. Humanitarian Intervention

Over the last three years, opponents of the Assad government in Syria (both civilians and armed actors) have repeatedly appealed to the international community to intervene on humanitarian grounds.⁹⁰

88. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

89. NATO Press Point, Response by NATO Secretary-General Jens Stoltenberg to a Question During a Joint Press Conference with Poland’s Deputy Prime Minister and the Minister of Foreign Affairs (Oct. 9, 2014), http://www.nato.int/cps/en/natolive/opinions_113758.htm?selectedLocale=en.

90. See, e.g., C.J. Chivers, *Rebels Say West’s Inaction is Pushing Syrians to Extremism*, N.Y. TIMES, Oct. 5, 2012, http://www.nytimes.com/2012/10/06/world/middleeast/rebels-say-wests-inaction-is-radicalizing-syria.html?pagewanted=all&_r=0. Humanitarian intervention must be distinguished from the “responsibility to protect doctrine (R2P).” The latter involves collective action through the Security Council, rather than unilateral action where the

However, the Security Council has been unable to reach the agreement necessary to authorize the use of force to “protect civilians” in Syria as it did with respect to Libya.⁹¹ This deadlock has, once more, revived interest in the doctrine of humanitarian intervention.⁹²

Indeed, in August 2013 the U.K. government openly stated that humanitarian intervention would be lawful in the face of Syria’s use of chemical weapons and the resulting “overwhelming humanitarian necessity.”⁹³ It asserted that in situations where a Security Council authorization cannot be secured to justify the use of force, a State would “be permitted under international law to take exceptional measures in order to alleviate the scale of the overwhelming humanitarian catastrophe . . . provided three conditions are met: (i) there is convincing evidence, generally accepted by the international community as a whole, of extreme

Security Council is unwilling or unable to act, and is a political doctrine, not a legal right. INTERNATIONAL COMMISSION ON INTERVENTION & STATE SOVEREIGNTY, REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001). For a useful distinction between humanitarian intervention and R2P, see Further Supplementary Written Evidence from the Rt. Hon. Hugh Robertson MP, Minister of State, Foreign and Commonwealth Office to the Foreign Affairs Committee, Humanitarian Intervention and the Responsibility to Protect, Jan. 14, 2014, reproduced in the APPENDIX TO THE HOUSE OF COMMONS DEFENCE COMMITTEE’S FOURTH SPECIAL REP. OF SESS. 2014-15, INTERVENTION: WHY, WHEN AND HOW?: GOVERNMENT RESPONSE TO THE COMMITTEE’S FOURTEENTH REPORT OF SESSION 2013-14 (2014), available at <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmdfence/581/581.pdf>. The United States supports the concept of R2P as set forth in the Outcome Document of the 2005 U.N. World Summit, G.A. Res. 60/1, ¶¶ 138–40, U.N. Doc. A/RES/60/1 (Sept. 16, 2005); DIGEST, supra note 36, at 570. See also United States Mission to the United Nations, Remarks by the United States at an Informal Discussion on “Responsibility while Protecting” (Feb. 21, 2012), <http://usun.state.gov/briefing/statements/184487.htm>.

91. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011). For other examples of UN Security Council authorization of intervention on humanitarian grounds, see S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992); S.C. Res. 814, U.N. Doc. S/RES/814 (Mar. 26, 1993).

92. Deadlock within the Security Council has prompted some States to suggest alternative and more limited intervention models ranging from the establishment of “humanitarian corridors” to “no fly zones” and peace-keeping operations. However, none have been created since all such suggestions rely either on the consent of Syria or on Security Council authorization. See, e.g., Colum Lynch, *France, Turkey call for Humanitarian Corridors in Syria*, FOREIGN POLICY (Feb. 15, 2012, 2:55 PM), http://blog.foreignpolicy.com/posts/2012/02/15/france_turkey_call_for_humanitarian_safe_zones_in_syria.

93. U.K. Prime Minister’s Office, Chemical Weapon Use by Syrian Regime: UK Government Legal Position (Aug. 29, 2013), www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position.

humanitarian distress on a large scale, requiring immediate and urgent relief; (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and (iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).⁹⁴

Despite attempts on the part of the U.K. government to argue that under customary international law humanitarian intervention is not “unambiguously unlawful,” the doctrine remains a highly controversial.⁹⁵ The paucity of State practice, while not determinative, presents a significant barrier.⁹⁶ For example, except for Belgium and the United Kingdom, no other NATO member State involved in the 1999 use of force in Kosovo—which is often cited as the leading precedent for such a right—justified their intervention on the basis of the doctrine.⁹⁷ Moreover, in the intervening years, States have expressly rejected the “right” of humanitarian intervention in a number of fora.⁹⁸

Assuming, *arguendo*, that such a doctrine exists, further hurdles exist in the Syrian case. First, arguments in favor of the

94. *Id.* These three criteria approach essentially reproduces a memo drafted by the Foreign Office in October 1998 prior to the intervention in the Federal Republic of Yugoslavia; for details of that text, see Adam Roberts, *NATO's "Humanitarian War" over Kosovo*, 41 SURVIVAL 102, 106 (1999).

95. U.K. 1984 Foreign Policy Document No. 148, *supra* note 26. See also discussion in Randelzhofer & Dorr, *supra* note 13, at 222–26; Vaughan Lowe & Antonios Tzanakopoulos, *Humanitarian Intervention*, in, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e306?rskey=9iQyVV&result=124&q=&prd=EPIL>.

96. Events supporting the crystallization of a norm of humanitarian intervention include international condemnation for failure to intervene in Rwanda, acceptance of ECOWAS interventions in Africa without Security Council authorization, NATO's intervention in the Federal Republic of Yugoslavia, and criticism over the failure of the international community to intervene in meaningfully in Darfur.

97. See individual pleadings of NATO States before the ICJ in the Legality of the Use of Force, <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=yuk&case=113&k=e3&p3=0> (last visited Nov. 7, 2014); see also Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, 10 FINNISH Y.B. INT'L L. 141 (1999). But see Bruno Simma, *NATO, the U.N. and the Use of Force: Legal Aspects* 10 EUR. J. INT'L L. 1 (1999); W. Michael Reisman, *Kosovo's Antinomies*, 93 A.J.I.L. 860 (1999).

98. See Annex I to the Letter Dated 5 May 2000 from the Permanent Representative of Nigeria to the United Nations Addressed to the President of the General Assembly, Declaration of the South Summit, ¶ 54, U.N. Doc. A/55/74 (May 12, 2000); Group of 77, Declaration on the Occasion of the 23d Annual Ministerial Meeting of the Group of 77, New York, ¶ 69 (Sept. 24, 1999) (132 States participated).

doctrine as an exception to the Article 2(4) and customary law prohibition on the use of force are based on the assumption that it is the territorial State that is perpetrating the human rights violations against the civilian population. In Syria, it would not be the actions of the territorial State that justify penetrating its sovereign territory, but rather those of a non-State group operating on the territory. Therefore, any argument that the mass human rights violations in Syria serve as an exception to the prohibition on the use of force in Article 2(4) and excuse violation of Syria's territorial sovereignty is on weaker ground. Second, those supporting the existence of a right of humanitarian intervention have generally done so when the scale of the humanitarian catastrophe is overwhelming. The toll of IS-related deaths, injury, destruction and displacement of civilians is substantial. However, the humanitarian consequences of the fighting between the government and its various opponents are staggering. This differentiation begs the question of how the right can be justified in quantitative terms in the case of IS, but be unsettled vis-à-vis regime crimes and those of other rebel groups. It also highlights the third problem, the requirement that the intervention be humanitarian in fact and not merely amount to a subterfuge for other purposes. It would be hard to argue that the international community is intervening to stop a human catastrophe when the situation is occurring in the midst of a far greater humanitarian catastrophe that is being ignored. Moreover, the current airstrikes by the United States and its partners in northern Syria are not being conducted in a manner that would support a claim of direct humanitarian ambition.⁹⁹ On the contrary, it may be argued that Operation Inherent Resolve has enabled the Syrian forces to turn their attention to other regime opponents, thereby actually exacerbating the humanitarian situation.¹⁰⁰ As it presently stands, there is little basis in law or fact for characterizing the operations as a humanitarian intervention, nor does there appear to be much leeway to do so in the future.

CONCLUSION

The prohibition of the use of force lies at the heart of public international law. It is the norm upon which the U.N. Charter system

99. For instance, it is difficult to find a direct humanitarian link to the strikes on IS oil facilities. *See generally*, Watkin, *supra* note 20.

100. Anne Barnard & Eric Schmitt, *U.S. Focus on ISIS Frees Syria to Battle Rebels*, N.Y. TIMES, Oct. 8, 2014, available at http://www.nytimes.com/2014/10/09/world/middleeast/us-focus-on-isis-frees-syria-to-battle-rebels.html?smid=nytcore-ipad-share&smprod=nytcore-ipad&_r=0.

is constituted and, as such, serves to preserve and sustain the sovereign equality and territorial integrity of States.¹⁰¹ There is little doubt that, but for the existence of an applicable exception to the prohibition, Operation Inherent Resolve violates the prohibition and represents a violation of sovereignty.

The case of operations against IS in Iraq is uncontroversial. The Iraqi government has formally consented to the operations, and so long as the members of the U.S.-led coalition stay within the limits of that consent, the strikes are lawful. However, those aspects of Operation Inherent Resolve taking place in Syrian territory are on shakier legal ground. Although the Syrian government is surely delighted at the weakening of IS, it has not consented to the operations. And although the airstrikes against IS clearly have humanitarian impact in terms of denuding the capabilities of a group that has brutalized the civilian population, the scale of suffering has probably not reached the level necessary to justify a humanitarian intervention even if such a doctrine as emerged as customary in international law. Further, had it crossed that threshold, it appears clear that the strikes are not exclusively humanitarian in nature in the sense of being designed to have generate effects limited to a humanitarian purpose.

Therefore, in the absence of a Security Council authorization under Chapter VII of the U.N. Charter, the sole basis for strikes against IS targets in Syria is self-defense under Article 51 and its customary law counterpart. With the exception of Iraq (and possibly Turkey), individual self-defense provides a weak legal justification for any other State in light of the publicly available facts at this present time. As a matter of law, the violence that has been directed by IS at those States other than Iraq arguably falls short of the level of gravity that is generally accepted as constituting an armed attack allowing for the lawful use of defensive force by a State. Moreover, it is not apparent (again, based on open sources) that the group is preparing to mount an imminent armed attack on those States, thereby giving rise to the right of individual self-defense.

These two hurdles do not arise in the case of collective self-defense, which derives from Iraq's right to individual self-defense. IS is engaged in an ongoing armed campaign against Iraq and is doing so from its bases within Syria. Moreover, Iraq has requested assistance under Article 51. Nevertheless, to find the strikes into Syria lawful on the basis of self-defense, it is necessary to adopt the approach by which Article 51 and customary law extends to attacks by non-State actors, as well as the position that the sovereignty of a

101. The International Court of Justice has labeled Article 2(4)'s prohibition as "a cornerstone of the United Nations Charter." Congo, *supra* note 23, ¶ 148.

State may be pierced to effectuate the right of self-defense against such groups when the territorial State is unable or unwilling to remedy the situation. The co-authors remain split on the former issue.

Finally, strikes against the Khorasan Group in Syria are only lawful if either the group can be characterized as an element of al Qaeda (assuming the organization continues to meet the requirements for a single armed group), or reliable intelligence exists supporting the conclusion that the group is planning an imminent attack against the United States at the armed attack level. Both approaches would require treating the law of self-defense as encompassing attacks by armed groups and accepting the unable or unwilling test.

This case demonstrates the inherent ambiguity in the law governing the use of force by States. Such ambiguity should not be surprising, because States are caught on the horns of a dilemma. On the one-hand, clear and restrictive norms serve to enhance international peace and security by limiting what States may do in terms of uses of force. Yet, on the other, opacity benefits the State when it is facing threats. After all, the less precise the norms are, the greater the range of options that are available to meet the threats. This explains in part why States are so reticent to expressly set forth the legal basis for operations involving the use of force.¹⁰² It equally augurs for taking assertions by States of a legal basis for their military operations *cum grano salis*.

102. On the willingness of States to set forth their views on international legal issues, see Michael N. Schmitt & Sean Watts, *The Decline of International Humanitarian Law Opinio Juris and the Law of Cyber Warfare*, 50 TEX. INT'L L. J. __ (forthcoming 2014). The U.N. Special Rapporteur on Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism has called on States to set forth their views on international legal issues with respect to drone operations. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Rep. of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶¶ 70, 72, U.N. Doc. A/HRC/25/59 (Mar. 11, 2014) (by Ben Emmerson). As of October 26, 2014, no State has responded.