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The Legality of Foreign Military Action against Islamic State in Syria

By

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Declaration of Originality

I certify that this thesis does not incorporate without acknowledgement any material previously submitted for a degree or diploma in any university; and that to the best of my knowledge and belief it does not contain any material previously published or written by another person except where due reference is made in the text.

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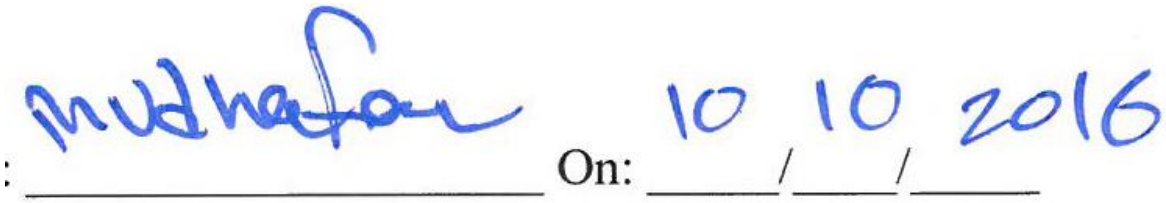

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Abstract

The Islamic State of Iraq and the Levant (ISIL) (also known as *Da'esh*) emerged in Iraq and Syria in 2013, adopting an extremely radical ideology and controlling a wide area of both the Iraqi and Syrian territories. The international community has unanimously agreed that ISIL represents an unprecedented threat to international peace and security. In October 2014, the President of the United States (US) announced the formation of an international coalition to defeat ISIL. The US-led coalition began its operations by conducting strikes in the Syrian territory. Meanwhile, the Russian air force and the Iranian Revolutionary Guard were the strongest supporters of the Assad regime in Syria.

This project seeks to analyse the legal basis used to justify the use of foreign force against ISIL in Syria. The unsolicited armed action of foreign forces in Syria based on the invoked principle of self-defence as a justification is untenable in international law. The participants in the military operations in Syria have invoked different legal approaches to justify their operations. Many different questions have been raised concerning the legality of intervention with or without the consent of the Syrian government. The adoption of the self-defence principle according to Article 51 of the United Nations (UN) Charter does not provide a solid legal basis for intervention. As the international law does not give a clear answer on how to respond to armed attacks conducted by non-state actors emanating from foreign territories without the involvement of the state that harbours them. The language of the UN Security Council Resolution 2249 is controversial, as it does not explicitly authorise the use of force. The intervention by the Russian and Iranian forces, at Syria's invitation, also faces certain legal challenges. The legality of interfering in a civil war, as well as an examination of the intervening states' intentions and purposes, has exposed the difficulties that arise regarding respect for the fundamental principles of self-determination and intervention under international law

The ambiguity in the international law that is controlling the use of force, especially against non-state actors. As well as, the lack of political consensus between the superpower states reflects negatively on the endorsement of a mutual legal basis to eradicate the threat of ISIL and reduce the suffering of the Syrian people. As a matter of law, the consent of the Syrian Government is deemed crucial to legalise the use of force in its territory.

Keywords: Non-state actors, self-defence, state consent, UN Security Council authorisation, Syria.

Preface and Acknowledgement

The Syrian Crisis has a significant impact on international peace and security. It has many prongs - both national and international. It has produced millions of refugees and displaced and hundred thousand of casualties. The Islamic State (IS) has appeared as a new player in International order in the backdrop of this crisis. The lack of criteria to how to deal with Non-state actors in case of extraterritorial self-defence alongside an absence of international consensus has lead to prolonging the age of crisis. Indeed, the legality of foreign intervention in Syrian has raised a significant legal debate, since the intervening states have failed to present a clear and straightforward justification in this regard.

The Project of the ' Legality of the Foreign Military Action against Islamic State in Syria' has undertaken as a part of fulfilling of my Master of Research (MR es) program at the Macquarie Law School, Macquarie University that I started from January 2016.

I would like to thank my supervisor Professor M Rafiqul Islam for his excellent guidance and support while conducting my research. Thank you, Professor, for providing me with the right tools that I need to complete my thesis.

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Table of Contents

List of Acronyms

ANF:	Al-Nusrah Front
DRC:	the Democratic Republic of the Congo
EU:	European Union
FARC:	Fuerzas Armadas Revolucionarias de Colombia
ICJ:	International Court of Justice
ICRC:	International Committee of the Red Cross
ISIL:	the Islamic State of Iraq and the Levant
NATO:	North Atlantic Treaty Organization
UAE:	United Arab Emirates
UK:	United Kingdom
UN:	United Nations
US:	United States

Chapter 1: Introduction

1.1 Brief Factual Background

After the United States' (US) invasion of Iraq in 2003, the chaos following the fall of Saddam Hussein and the resulting power vacuum created a perfect environment for extremist groups to form in Iraq and Syria.[1] Part of the ideology of the Islamic State of Iraq and the Levant (ISIL) belongs to a school of thought known as Jihadism, while another part of their ideology can be traced back to the Muslim Brotherhood movement.[2] Both believe in the caliphate, a political system governing the Islamic community. ISIL has its interpretation of Islam. Any individual who does not accept ISIL's views is considered a non-believer. The Syrian crisis provided the ideal circumstances for ISIL to grow and expand.[3] On 10 June 2014, ISIL overtook the strategic city of Mosul in northern Iraq. Subsequently, ISIL officially announced that it was the Islamic State of Iraq and Syria and that the town of Raqqa was its capital.

The security situation in Iraq and Syria has dramatically deteriorated, while the threat to international peace and security posed by ISIL has increased. US President Barack Obama formed an international coalition to defeat ISIL. Under this coalition, 66 states committed to eliminating the threat of ISIL and set five goals to supress the threat of ISIL.[4]

1.2 Legal Issues and Research Questions

Many legal points have arisen about foreign intervention against ISIL in Syria, as Syria has not expressly consented to military strikes being made against ISIL on its territory. Thus, a critical question arises: is it legal to conduct foreign military actions against non-state actors (i.e., ISIL) in Syria without its consent? The United Nations' (UN), Charter and customary

[1] Samantha Arrinton Sliney, 'Right to Act: United States Legal Basis under the Law of Armed Conflict to Pursue the Islamic State in Syria' (2015) 4 *University of Miami National Security and Armed Conflict Review* 1, 5.

[2] The Muslim Brotherhood is a Sunni Islamist origination established in Egypt by Islamic scholar's Hassan al-Banna in 1928; see the Bryony Jones and Susannah Culliane, 'What is the Muslim Brotherhood?' CNN (online) 22 June 2016< http://edition.cnn.com/2013/07/03/world/africa/egypt-muslim-brotherhood-explainer/>.

[3] Christopher M Blanchard and Carl E Humud, *The Islamic State and US Policy*, Congressional Research Service Research Paper No R43612 (18 June 2016) <https://fas.org/sgp/crs/mideast/R43612.pdf>.

[4] The website of the Special Presidential Envoy for the Global Coalition to Counter ISIL outlined five steps to defeat ISIL: (i) providing military support to its partners; (ii) impeding the flow of foreign fighters; (iii) stopping ISIL's financing and funding; (iv) addressing the humanitarian crises in the region; and (v) exposing ISIL's true nature.

international law, prohibit the use of force in the territory of another state,[5] with three exceptions: for self-defence, when a UN Security Council Resolution has been passed and when the consent of the state on whose territory the operation is to be conducted has been obtained.[6] The international coalition conducted airstrikes against ISIL in Syria even though the Syrian Government had not given its consent for military operations to be performed in its territory. In light of the recognised legal exceptions stated above, the use of force in the Syrian's territory is unjustified.

1.3 Contemporary Opinion on the Use of Force Against Non-State Actors

The use of force in Syria breaches two foundational elements of international law: state sovereignty and territorial integrity. This research project investigates three elements that will help to determin the legality of foreign intervention In syria: (i) a harbouring state (i.e., Syria) which refer to the state that non-state actors based in its territory, (ii) a victim state which refers to the states that are performing or coordinating the air strike or military operations, Due to exposing to the non-state actors' attacks (i.e., Iraq) and (iii) a non-state actor (i.e., ISIL).

The external use of force against non-state actors is a contentious issue among scholars. The legal use of force against non- state actors under international law is not clearly defined, nor does it explain when and how decision-makers can use force against non-state actors. This project explores the following questions:

i. When can states use force as a form of self-defence in the territory of other countries against non-state actors?
ii. Is it possible to treat non-state actors as armed attacks launching?
iii. What is the required relationship between non-state actors and their harbouring state(s) (i.e., attribution)?
iv. Is it possible to use defensive force in response to unattributed armed attacks by non-state actors?

[5] M Rafiqul Islam, *International Law: Current Concepts and Future Directions* (LexisNexis Butterworths, 2013) 230.
[6] Ibid 256.

Lubell has analysed the use of various forms of extraterritorial force by states against non-state actors.[7] He argued that the act of self-defence is only legitimate if the attack is a 'frontier incident'; however, he did not specify what constitutes an armed attack, or whether a different threshold—independent of an armed attack—should be used in relation to non-state actors.[8] Lubell also proposed a different threshold for the use of force between non-state actors and states, but his study did not draw a clear relationship between states and non-state actors, nor did it sufficiently explain the attribution of wrongful acts to non-state actors. Further, some of his arguments contradicted each other. Lubell first stated that under the current international law of armed conflict model, extraterritorial measures of self-defence against non-state actors are not allowed; Therefore, he suggested that the existing law of armed of conflict should be changed.[9]

Deeks has investigated the behaviour of host and territorial states and devised a framework of standards to evaluate such behaviour.[10] First, a country is evaluated on whether the host country was 'unwilling or unable' to suppress the threat. Second, they are evaluated according to the victim state's behaviour, and whether the use of force is compatible with international law.[11] Deeks characterised the main elements of the test as follows:

i. the consent of the host state must be considered by the victim state;
ii. the host state should be given reasonable time to deal with the threat;
iii. the victim state must address multi-factorial needs, such as the effective control of the host state over its territory, and the means that the host state has to suppress that threat.

Deeks noted that some factors in the 'unwilling or unable' test were not properly connected. Further, she contended that the acknowledgement of the victim states under the 'unwilling or unable' test reflects the state's belief that the test is an obligatory rule. Williams analysed

[7] Noam Lubell, *Extraterritorial Use of Force against Non-State Actors* (Oxford University Press, 2010) 48.
[8] Ibid.
[9] Hadassa A Noorda, 'Extraterritorial Use of Force Against Non-State Actors (Book Review)' (2011) 16 *Journal of Conflict and Security Law* 211.
[10] Ashley S Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defence' (2012) 52 *Virginia Journal of International Law* 483.
[11] Ibid.

Deeks's substantive work [12] but was of the view that it was 'aspirational', as investigating the nature of the harbouring state was not simple.[13]

Michael classified the attribution requirements, arguing that there are three views of attribution. The first was adopted by the International Court of Justice (ICJ) in the *Case Concerning Military and Paramilitary Activates in and against Nicaragua* (*Nicaragua v. United States of America)* in 1986 and states that the host state must have 'effective control' over the individual or groups conducting the attacks.[14] The second view states that the requirements for attribution are not necessary. For example, Bethlehem argued that a state may exercise self-defence against non-state actors within any state's territory, as the consent of the sanctuary state is not necessary when there is a reasonable and objective reason for concluding that the host state is unwilling or unable to quell the threat posed by the non-state actors.[15] The third view states that attribution is required, but does not have a low threshold.[16]

Michael argued that the decisions of the ICJ insufficiently address the limitations of the attribution issue. Many scholars have noted that a change occurred following the attacks on the US on 11 September 2001 and that the traditional concept of attribution can no longer be used in attribution cases, especially given the emergence of non-state actors as essential elements in international law.[17] Michael contended that the rules of attribution have changed from 'effective control' to simply providing support and harbouring. Thus, he is of the view that the current threshold is reasonable as it equalises the interests of states to preserve their sovereignty and territorial integrity, as well as the interests of the international community to maintain international peace and security.[18]

It has been suggested that states that fail to prevent, or refrain from preventing, non-state actors from conducting attacks inside their territories are the same as countries that provide

[12] Gareth D Williams, 'Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the "Unwilling or Unable" Test' (2013) 36(2) *University of New South Wales Law Journal* 619.
[13] Ibid 620.
[14] *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua vs. United State of America*) (Merits) [1986] ICJ Rep 70, [114] ('*Nicaragua case*').
[15] Daniel Bethlehem, 'Self-Defence Against an Imminent or Actual Armed Attack by Non-State Actors' (2012) 106(4) *American Journal of International Law* 770.
[16] Brent Michael, 'Responding to Attacks by Non-State Actors: The Attribution Requirements of Self-Defence' (2009) 16 *Australian International Law Journal* 133, 140.
[17] Eric A Heinze, 'Non-State Actors in the International Legal Order: The Israeli-Hezbollah Conflict and the Law of Self-Defence' (2009) 15(1), *Global Governance: A Review of Multilateralism and International Organizations* 87.
[18] White House, *The National Security Strategy of the United State of America* 2002 (July 2016) <http://www.state.gov/documents/organization/63562.pdf>.

support to these groups.[19] Michael argued that current standards have helped create an uncertain atmosphere, and left room for superpower states to use illegal force.

1.4 Methodology

This project adopts a doctrinal methodology. The doctrinal method is a very practical tool as it can be used to analyse legal rules, clarify ambiguities in these rules and decide which rules apply to particular situations.[20] This methodology also provides insight into the relationships between rules; helps organise and analyse case studies according to their categories, concepts and elements; and can be used to decode limitations within the law to find appropriate solutions.[21] Doctrinal research is prominent in legal research. The application of a doctrinal research methodology to this thesis is appropriate[22] as it helps analyse the relevant rules, such as the Articles 2(4) and 51 of the UN Charter, and can be used to clarify state practices and cases, such as the *Nicaragua* case and the *Armed Activities in the Territory of Congo* case. Thus, doctrinal methodology is the most relevant methodology for analysing materials and examining perceptions, and assists in resolving the research question, thus leading to correct conclusions.

1.5 Thesis Structure

The following chapter will provide an overview of the relevant non-state actors, and discuss the relationships between state and non-state actors. It will address questions about the attribution requirements, and whether a particular relationship is required between a host state and non-state actors, to determine whether the use of force in the territory of the harbouring state is legal in circumstances where consent has not been granted to the intervening state. Chapter Three considers the self-defence exception and explores whether the self-defence criterion justifies the military actions undertaken against ISIL in Syria. Chapter Four considers whether Syria granted consent and invited some foreign forces to intervene. The research examines the recognition of government under international law, and analyses whether the Syrian Government was entitled to invite foreign states to intervene, given the ongoing civil war in Syria. The fifth chapter analyses the UN Security Council's role in the

[19] Michael, above n 16, 143.
[20] Paul Chynoweth, 'Legal Research' in Andrew Knight (ed), *Advanced Research Methods in the Built Environment* (Wiley Blackwell, 2008) 28.
[21] Ibid 34.
[22] Khushal Vibhute and Filipos Anynalem, *Legal Research Methods* (Justice and Legal System Research Institute, 2009).

Syrian crisis and Resolution 2249, to determine whether the Resolution explicitly authorised the intervening foreign states to use force against ISIL in Syria. This research deals with a contemporary international crisis with serious implications for the rule of international law. It offers an analysis that can be used to reach conclusions as to whether the military actions against ISIL are legal.

Chapter 2: Non-State Actors in the International Order

The issue of state practice of external self-defence against non-state actors has become a controversial topic in international law concerning the use of force. The interdependence of states in conducting 'wars by proxy', relying on perpetrators not affiliated with the structure of the states and the threat emanating from failed or weak states poses a significant threat to international peace and security.[23] This difficulty is described in this chapter. Non-state actors—in this case, ISIL—conduct attacks against Iraq and pose a serious threat to international peace and security. They initiate their attacks from within a state's territory—in this case, Syria.

There are no clear relationships or involvement between harbouring states and non-state actors. The victim state(s)—such as Iraq, the United Kingdom (UK), the US and other international coalition states[24]—conduct air strikes and other military operations on Syrian territory without Syrian consent. Therefore, it is necessary to draw a clear legal framework regarding non-state actors in the international order. This chapter will focus on two main issues: the ability of non-state actors to commit an armed attack that meets a threshold test for the application of Article 51, and the required relationship between non-state actors and the host state.

2.1 The Notion of Armed Attack

The phrase 'armed attack' was consciously chosen in the formation of Article 51 of the UN Charter, as the participants of the San Francisco Conference wished to ensure a precise definition that would cover most modern wars. They aimed to avoid ambiguity in the provisions of the UN Charter.[25] However, many scholars have stated that it is not necessarily the case that an 'armed attack' only originates from states under Article 51, and that armed attacks on other countries by non-state actors can trigger the right to self-defence under Article 51. There is nothing in the wording of Article 51 that prevents states from invoking

[23] Brian Finucane, 'Fictitious States, Effective Control, and the Use of Force Against Non-State Actors' (2012) 30(1) *Berkeley Journal of International Law* 35,42.
[24] On 10 September 2014, President Obama announced the formation of a broad international coalition to defeat ISIL. State Department of the United States, *The Special Presidential Envoy for the Global Coalition to Counter ISIL* (22 June 2016) <http://www.state.gov/s/seci/>.
[25] Islam, above n 5, 272.

the right to self-defence against an armed attack by non-state actors.[26] Hence, it remains to be determined when non-state actor can commit an armed attack.

2.1.1 The level of gravity

It is agreed that states can act out of self-defence if there is an armed attack against them, but the question remains as to when such military action amounts to an armed attack. What is the level of gravity that can be considered severe enough to constitute an armed attack and trigger a state's right to act in self-defence?[27] Both the ICJ jurisprudence and state practice confirm that an armed attack must reach a certain level of gravity to be considered an armed attack as defined by Article 51 of the UN Charter.[28]

The ICJ has investigated the concept of 'armed attack' on different occasions. In the *Nicaragua* case, the Court held that Nicaragua's claim regarding US assistance to the *contras* by providing them with weapons and other logistical facilities could be considered an intervention or a threat of the use of force, but that it did not amount to an armed attack in itself. Conversely, the Court gave weight to the scale of severity of the armed attack when considering what constitutes an armed attack.[29] Sending a group of rebels, or backing them by supplying weapons, may amount to armed attack if it reaches the threshold to be considered such. Otherwise it would be regarded as a frontier incident.[30] However, the Court did not detail the difference between an armed attack and a border incident. The Court left open questions of intent and motive with regards to frontier incidents.

The ICJ's notion of an 'armed attack' does not refer to the ordinary meaning of the words, which allows a state to respond to an actual armed attack. The ICJ fortified its position in *The Advisory Opinion Concerning the Construction of Wall in the Occupied Palestinian Territory,* in which Israel alleged that construction of the wall was compatible with Article 51 of the UN Charter and Security Council Resolutions 1386 (2001) and 1372 (2001). The Court held that Article 51 of the Charter recognised the inherent right to self-defence in the case of

[26] Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 2011) 224; Heinze, above n 17, 87; Jordan J Paust, 'Self-Defence Targetings of Non-State Actors and Permissibility of US Use of Drones in Pakistan' (2010) 19(2) *Journal of Transnational Law & Policy* 237, 238.
[27] Christine D Gray, *International Law and the Use of Force* (Oxford University Press, 3rd ed., 2008) 128.
[28] Islam, above n 5, 272.
[29] *Nicaragua case* [1986] ICJ Rep 70, [119].
[30] Gray, above n 27, 172.

armed attack by one state against another.[31] The Court statement concerning the necessity of attribution to a host state came shortly after the 11 September 2001 attacks, and it is hard to harmonise the two arguments mentioned in the Security Council Resolution in 2001 and the ICJ decisions in the *Palestinian Wall Case* in 2004. In the *Oil Platforms Judgement,* the Court restated its previous position by making a distinction between the gravest use of force and less severe forms and advocated that only the most grave meets the 'armed attack' form.[32] In the *Armed Activities in the Territory of the Congo* case *(Congo vs. Uganda),* the ICJ stated that states can respond to a definitive, but not a vague, armed attack.[33]

The Court received bitter criticism for its approach, which narrowed the concept of 'armed attack' in the *Nicaragua* case. Its distinction between armed attack and other use of force was irrational, especially as the principles of necessity and proportionality provide an adequate shield against excessive use of force. Jackson stated that a rational relationship between the intensity of the attack and the intensity of the response could be regarded as an adequate safeguard to prevent the misuse of force.[34] Other criticisms were made of the Court's perspective on armed attack, in that its lenient view of low-intensity conflicts reflects negatively on international peace and stability.[35] Further criticism was launched at the Court's views on the scale of 'armed attack'. Scholars have pointed out that frontier incidents would be automatically excluded from the application of Article 51, despite the fact that some incidents may have reached a degree of gravity exceeding the severity of an 'armed attack'. Further, they have stated that there is no limitation in Article 51 in the sense of 'armed attack'; in other words, there is no difference between a large or significant attack, meaning that the illegality of armed attack includes all incidents, ranging from small to extremely grave.[36] Some scholars have expressed discomfort with the ICJ's position on the

[31] *Legal Consequences of the Constructions of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 109–*5*, cited in Kimberley Natasha Trapp, 'Actor-Pluralism, the "Turn to Responsibility" and the *jus ad bellum*: "Unwilling or Unable" in Context' (Pt Routledge) (2015) 2(2) *Journal on the Use of Force and International Law* 199, 11.

[32] *Oil Platforms, (Islamic Republic of Iran v. United States of America)* judgement [2003] ICJ Rep 161, [51].

[33] *Armed Activities in the Territory of Congo (The Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 160, [223] ('*Armed Activities*').

[34] Jackson Nyamuya Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* (Ashgate Publishing, 2013) 95.

[35] Dinstein, above n 27, 229.

[36] Tom Ruys, '*Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice Vol 74* (Cambridge University Press, 2010) 144.

basis that it would restrict a third state's engagement in collective self-defence or indirect military aggressions.[37]

In state practice, the issue of whether an 'armed attack' would allow the victim state to respond to an attack committed by non-state actors remains unclear. In the last two decades, there have been many military actions in response to armed attacks by non-state actors. In 2001, the US responded to an attack by al-Qaeda by deployed its troops within Afghanistan's territory. In 2006, Israel launched a massive operation against Lebanon and Hezbollah. In 2008, Israeli forces began an operation in Gaza, in Palestinian territory, on the grounds that Palestinians launched missiles against Israel.[38] In all of these operations, state practice refers to two highlights. First, the state's right to self-defence would not be triggered unless the severity of the attack against it had reached a certain level of gravity. Second, the seriousness of the attack could be affected by its background; that is, many attacks occurring close together and connected by the same intention could amount to an 'armed attack'; for example, the continual firing of missiles from Gaza towards Israeli territory, or the constant attacks by the Kurdistan Workers Party against the Turkish Army.[39]

The element of gravity has been carefully examined, and many authors have challenged the notion of maximising the threshold of armed attack in self-defence. However, there is a broad consensus on the importance of such a threshold. In its discussion in the final text of Paragraph 3(g) of the definition of aggression, the Fourth Special Committee affirmed the exclusion of all 'sporadic' acts of violence from the ambit of Article 51.[40] Moreover, the discussions of the Committee illustrate that there is a developing consensus between states' delegations that only an 'unambiguous' case of indirect aggression would allow the use of the right of self-defence. They concluded that the vast majority of frontier incidents, incursions and insurgent attacks could be labelled 'lesser acts'.[41] Similarly, some terrorist attacks on individual diplomats have been considered crimes instead of armed attacks. This suggests that attacks by non-state actors may fall within the sphere of criminal justice. Only when the attack poses a real threat to the security interests of the victim state can it enter the area of *jus ad bellum.* For example, the killing of three Israeli citizens in Cyprus in 1985 was not

[37] Gray, above n 27, 180.
[38] Raphaël Van Steenberghe, 'Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent State Practice: A Step Forward?' (2010) 23(01) *Leiden Journal of International Law* 183, 187.
[39] Ibid 203.
[40] *Report of the Special Committee of the Divination of the Aggression*, GA Res 2420, UN GARO, 23rd sess, 1746th plen mtg, Agenda item 86 (18 December 1968).
[41] Ruys, above n 36, 499.

regarded adequate justification for a strike against the Palestinian Liberation Organization's headquarters in Tunisian territory.[42]

As described on the previous pages, it seems that the ICJ was very vigilant and deliberately aimed to establish a high threshold for what triggers a state's right to activate the right of self-defence. Broadening the notion of 'armed attack' outside the actual meaning of Article 51 of the UN Charter may result in significant danger. Relaxing the definition of armed attack would undermine international law on the use of force. A broad definition of armed attack would too easily justify and open endless paths for the utilisation of military force. The unlawful use of force has become common. A lower threshold could inspire powerful states to use small incidents as a pretext to invoke the right of self-defence for other purposes. Moreover, lowering the threshold may affect international stability by creating an endless cycle of force and countermeasures. Setting a boundary at the level of 'less grave attacks' of Article 51 of the UN Charter may pose a particularly high risk, especially in high-tension regions (such as the border between India and Pakistan). Relying on strict application helps avoid military escalation.

2.1.2 The scale of the state's involvement

Non-state actor attacks are not a new issue in international law. However, the attack of 11 September 2001 exposed their harmful effects on international peace and security. The extraterritorial use of force against non-state actors is raised when non-state actors, such as terrorist groups, commit attacks against a state (the victim state) but operate from the territory of another state (the harbouring state). Can the victim state cross the borders of the harbouring state to suppress the threat of non-state actors, despite the fact that there is no direct link with, or involvement of, the host state and non-state entities? Eradication of the threat of non-state actors in the territory of the host state without its consent contradicts two vital principles of international law: sovereignty and territorial integrity.[43]

The right to self-defence can be applied to overcome this obstacle. However, what amount of involvement (if any) is required on the part of the harbouring state to allow the victim state to invoke the right of self-defence? That is, is it necessary to attribute an 'armed attack' to a state to trigger the right of self-defence? Conclusions can be drawn from examinations of the

[42] Ibid 501.
[43] Brent Michael, 'Responding to Attacks by Non-State Actors: The Attribution Requirements of Self-Defence' (2009) 16 *Australian International Law Journal* 133, 141.

ICJ decisions, state practices and *opinion~~n~~ juris* to determine the attribution threshold to legalise the use of force in the territory of other states under the principle of self-defence.

2.2 ICJ Decisions

In ascertaining the legality of the right to self-defence, the ICJ adopted the UN definition of aggression.[44] The ICJ has steadily relied on Article (3) g of the definition of aggression as the grounds for attributing the armed attack to harbouring states when concluding on the capacity of Article 51 of the UN Charter.[45] In *The Palestinian Wall Case*, Judge Higgins stated that the right to self-defence could be invoked if an armed attack is carried out by non-state actors, as the wording of Article 51 does not state that a state can only commit the armed attack. Further, harbouring state involvement is a very significant legal requirement when invoking the right of self-defence against non-state actors. In the same case, the ICJ held that the principle of territorial integrity could not be overcome unless attributing the armed attack to a state.[46]

In the *Nicaragua* case, the ICJ cited the 'effective control' requirement over non-state actors as a requirement for attributing the act to the state. Also, they held that supplying weapons and other logistical assistance did not constitute an armed attack that by itself could be attributed to a state.[47] That is, the supply of weapons, even when attributed to the harbouring state, is not sufficient to amount to an armed attack. Nevertheless, the judges in the *Nicaragua* case were not united, and Judges Schwebel and Jennings believed that supplying arms and training could be considered equivalent to an armed attack. Also, the victim state can exercise the right to self-defence by demonstrating that the harbouring state had significant involvement in sending non-state actors to its territory.[48] That is, it is not necessary to prove that non-state actors operate under the direct control of a foreign state from the territory of the harbouring state.

[44] Definition of aggression, GA Res 3314, UN GAOR, 6th Comm, 2319th plen mtg (14 December 1974).
[45] *Nicaragua case* [1986] ICJ Rep 70, [195]; *Armed Activities* [2005] ICJ Rep 160, [146], cited in Kimberley Natasha Trapp, 'Can Non-State Actors Mount an Armed Attack?' in M Weller (ed), *Oxford Handbook on The Use of Force* (Oxford University Press, 2015) 5.
[46]. *Legal Consequences of the Constructions of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 33 (Judge Higgins).
[47] *Nicaragua case* [1986] ICJ Rep 70, [209].
[48] Ibid [231].

In the *Armed Activities on the Territory of the Congo (DRC v. Uganda),*[49] the Court concluded that the legal and factual circumstances were not sufficient to allow Uganda to exercise the right of self-defence against the Democratic Republic of the Congo (DRC), as the actions of the non-state actors were not attributable to the DRC. The Court rejected Uganda's argument that tolerance by DRC was sufficient to attribute the attacks to the DRC. Meanwhile, the DRC invoked the *Nicaragua* case threshold to impute responsibility to Uganda.[50]

In the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide of 2007*, despite the fact that the ICJ was not dealing with the principle of self-defence, the Court attempted to determine whether the persons or bands that committed the acts of genocide during the Bosnia war were linked to the Serbian Government. The Court utilised the *State Responsibility Act* stipulated in Article 8[51] to answer this question.[52] The Court held that 'overall control' over such groups or bands is not sufficient to impute the wrongful act to a state, as it would expand the perception of state responsibility beyond the actual meaning of the term.[53] Therefore, the Court asserted that the *Nicaragua* test of 'effective control' would be a more reliable threshold for attribution.[54]

2.3 State Practice

The attack of 11 September 2001 had a significant effect on the international use of force, especially under the self-defence principle. However, to what extent have those attacks affected the attribution of an armed attack on a state? Is the attribution element still required to invoke the right of self-defence against non-state actors? In September 2001, the UN Security Council adopted Resolutions 1368 and 1373. These did not refer to the host state's

[49] In 2005, the ICJ, in a case brought by the DRC, accused Uganda of aggression and violating international law. Uganda argued that anti-Ugandan rebels committed armed attacks from DRC territory, with the tolerance of the DRC Government. Uganda confessed its assistance to the opposition and claimed that assistance was justifiable as self-defence. The judgement concluded that Uganda violated the sovereignty and territorial integrity of DRC.

[50] *Armed Activities* [2005] ICJ Rep 160, [171].

[51] Article 8, Conduct direct or controlled by a state: 'The conduct of a person or group of persons shall be considered an act of a state under international law if the person or group persons are in fact acting on the instruction of, or under direction or control of that state in carrying out the conduct'.

[52] International Law Commission, *Draft Articles on the Responsibility of States on Wrongful Acts*, Supp No 10 (A/56/10), (2011).

[53] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, (*Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] ICJ Rep 43, [209].

[54] *Nicaragua case* [1986] ICJ Rep 70, [110].

involvement and the criterion set by the ICJ. Hence, scholars have focused on their potential impact on the customary international law.[55]

The UN Charter does not mention who and what constitutes an 'armed attack'. Further, there is no indication in the Charter that the 'armed attack' must be assigned to a state prior to exercising the right to self-defence. There are many examples in state practice that can be used to examine the attribution requirements. State practice is one of the two elements constituting customary international law. The state behaviour in international relations reflects the state intention in adopting a particular attitude. Therefore, the ICJ decision in the *Nicaragua* case demonstrated that the verbal form of state practice would be considered as evidence for determining the provisions of customary international law.[56]

In 1986, the US Air Force conducted airstrikes against Libya. The US claimed that the Gaddafi regime was involved in the bombing of West Berlin Pop, which killed many American officials.[57] The Reagan administration stated that this military action was taken under the self-defence principle of Article (51) of the UN Charter, as the Gaddafi regime was responsible for, and supported, the attack. President Reagan stated that the attack was strongly linked to the Libyan regime and that it was engaged in preparing and executing it. The US administration asserted that it had intelligence information stating that two Libyan embassies had issued orders to the terrorists to conduct the attack. [58] However, the US response provoked a wave of condemnation.[59] In another case, in 1998, al-Qaeda attacked the US embassies in Nairobi and Dar es Salaam. Two weeks later, the US launched missile attacks against targets in Sudan and Afghanistan. The US administration stated that the sites in Afghanistan were facilities used in training and logistical support, as well as for meetings between high-ranking al-Qaeda members. The target in Khartoum, Sudan was the el-Shifa pharmaceutical site, which they believed was associated with the production of chemical weapons.[60] The US response received support from the UK, Australia, Spain, Germany and Israel. Japan was hesitant in its support, and the Japanese Prime Minister, Keizo Obuchi, told

[55] SC Res 1368, UN SCOR, 3470th mtg, UN Doc S/RES 1368 (12 September 2001); SC Res 1373, UN SCOR, 4385th mtg, UN DOC S/RES 1373 (28 September 2001).
[56] *Nicaragua case* [1986] ICJ Rep 70, [100].
[57] The La Belle discotheque attack occurred in Berlin in 1986. Three people were killed (including two Americans) and 230 were injured (including 80 Americans). Four people—a Palestinian, a German, a Libyan and a Lebanese citizen born in Germany—were convicted by German authorities. See W Hays Parks, 'Lessons from the 1986 Libya Airstrike' (2001) 36 *New England Law Review* 764,768.
[58] .Ibid 755.
[59] General Assembly Resolution, A/RES/41/38, 78th sess (20 November 1986) para 1.
[60] Ruth Wedgwood, 'Responding to Terrorism: The Strikes Against Bin Laden' (1999) 24 *Yale Journal of International Law* 559.

the Japanese Parliament that 'the Japanese government is currently investigating the details, but I believe we can express understanding of the US position'.[61] Russia condemned the attack. Most Arab and Muslim states did not voice their positions, except for Iraq and Libya, who denounced the attacks.[62]

Examining the military responses in the two cases indicates that the absence of a clear attribution of the armed attack on a particular state leads to a lack of international support for any reprisal attack. The absence of an explicit attitude by Arab and Muslim governments reflects the critical situation of these countries, which had to choose between criticising the US response and facing the consequences of this or keeping silent. This attitude reflects what is called universal support, which was not freely provided by the international community. Some states may support the US position under the influence of courtesy, morality or coercion. These factors would affect the universal consensus to constitute an *opinion juris.*[63]

Many scholars have stated that practice in use of force against non-state actors after the 11 September 2001 attacks has taken a new direction, in response to non-attributable 'armed attacks' conducted by non-state actors.[64] The US operation against al-Qaeda in Afghanistan received widespread support from the international community.[65] Shortly after the attack, the North Atlantic Treaty Organization (NATO) issued a statement stating that the 'armed attack' was covered by Article (5) of the Washington Treaty because the attacks were guided from abroad.[66] NATO's description of the 11 September 2001 attacks (that they were directed from abroad) seemed to be an attempt to stretch the concept of 'armed attack' to cover the provisions of the Washington Treaty. The European Union (EU) issued a statement concluding that EU members would offer direct support to the US in military action against states supporting and hosting terrorist groups.[67]

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[61] William Drozdiak, 'European Allies Back US Strikes', *Washington Post* (online), 22 July 2016 <https://www.washingtonpost.com/archive/politics/1998/08/21/european-allies-back-us-strikes/cb506c4a-ed70-482f-9617-5fba1a2129b0/>.

[62] Douglas Jehl, 'Muslims Voice Fury Over US Strikes', *New York Times* (online), 22 July 2016 <https://partners.nytimes.com/library/world/africa/082298attack-mideast-react.html>.

[63] *North Sea Continental Shelf, (Republic Federal of Germany v Denmark; Netherlands), (Judgement)* [1968] ICJ Rep 327, [63].

[64] Dinstein, above n 26; Ruys, above n 36, 438.

[65] *Condemnation of the Terrorist Attack on the United States of America,* GA Res 56/1, (12 September 2001) para 4.

[66] Gray, above n 27, 194.

[67] 'Conclusion Plan of Action of the Extraordinary European Council Meeting', EU DOC CL01-57EN, 21 September 2001.

On one hand, the universal participation in, and support of, the military intervention against al-Qaeda in Afghanistan indicated to certain scholars that the traditional threshold of attribution is no longer valid for exercising the right of self-defence against non-state actors. Further, the threshold of the test of 'effective control' set by the ICJ has been lowered.[68] Conversely, it is not clear whether the international community remains enthusiastic in their support of military action against terrorist groups, in the absence of a clear link to the involvement of harbouring states. Recent state practice employed ground defence of self-defence when using force against non-state actors based beyond their borders.[69] Moreover, the formation of new norms in the customary international law requires constant state practice, supported by *opinio juris*. A few states adopting certain principles for political reasons does not constitute international custom.[70]

Does interpretation of state practice in the last two decades reflect a shift in customary international law and give a new interpretation of Article 51? States' practice shows that it is insufficient to crystallise a new threshold and replace the traditional one. State sovereignty and territorial integrity remain the cornerstone of the international legal order. State practice has been inconsistent. While there was intense support for the US campaign in Afghanistan in 2001, the Colombian raids against the Fuerzas Armadas Revolucionarias de Colombia (FARC) camps within Ecuadorian territory were criticised by the Organization of American States, while the Israeli strikes against the al-Jihad camps in Syrian territory were condemned by the vast majority of the Security Council. These fluctuations in international community attitudes reflect political influence rather than legal norms. The interpretations of the ICJ decisions illustrate that attribution is a necessary factor for the exercise of the right of self-defence against non-state actors within the scope of Article 51 of the UN Charter.

International law considers that non-state actors may carry out 'armed attacks' if such attacks reach a certain level of gravity. However, only the existence of substantial evidence proving the link between the non-state actors and the harbouring state gives the victim state the right to act in self-defence. If we consider that there is no clear relationship between ISIL and the Syrian Government, this leads us to conclude that the use of force in Syrian territory without the consent of the Syrian Government is illegal.

[68] Michael, above n 43, 150.
[69] Islam, above n 5, 303.
[70] Ibid.

Chapter 3: Self-Defence

3.1 Prohibitions of the Use of Force in International Law

The use of force in the territory of other states is prohibited under the UN Charter Article 2(4) and customary international law.[71] However, there are three recognised exceptions to these prohibitions: individual and collective self-defence,[72] by mandate of the UN Security Council[73] and consent of the state whose territory is used to conduct the military action. Article 2(4) not only prohibits war but any use or threat of use of force in general.

The wording of Article 2(4) mentions the terms 'territorial integrity' and 'political independence'—not to limit the capacity of the use of force, but rather to enable it to be used in modes that include any form of the use of force. Therefore, limited operations, raids and incursions into the territory of another state will constitute a violation of Article 2(4). That is, maintaining international peace and security must be the intention for any explanation related to the use of force.[74] The two concepts cover a broad range of prohibitions of the use of force. Other kinds of use of force (such as the threat of force) that is not covered by those two terms, territorial integrity' and 'political independence' may be incompatible with the purposes of the UN.[75]

In its decision in the *Nicaragua* case, the ICJ attempted to define the borders of what constitutes a violation of Article 2(4). It made a distinction between what could amount to the unlawful of use of force—such as supplying weapons and training for armed bands—as well as other forms of support that would not constitute a violation of Article 2(4). Additionally, the Court has confirmed on many occasions—such as in the *Nicaragua* case and *The Corfu Channel* case—that Article 2(4) is not part of the law treaty, but it has a deep foundation in customary international law.[76]

[71] *Charter of the United Nations* art 2(4): 'All members shall 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 UN'.
[72] Article 51.
[73] Article 42.
[74] Maogoto, above n 34, 31.
[75] Ibid.
[76] *Corfu Channel Case (United Kingdom v. Albania)* Merits [1949] ICJ Rep 149, [28] ('*Corfu Channel Case*').

Similarly, international constitutional law states that Article 2(4) was deemed illustrative of the new customary international law, and it represents the *jus cogens* principle. The UN *Declaration on Friendly Relations* sheds light on the legitimate use of force. The seven principles adopted by the *Declaration* explicitly state that direct and indirect use of force is prohibited under an international order.[77] Using force in international relations would undermine the purposes mentioned in the UN Charter. Further, states cannot rely on the use of force against the territorial integrity and political independence of states directly. Because the principle of non-intervention and non-aggression is universally accepted, it is deemed to be a crucial principle for the maintenance of international peace and security.[78] Article 2(3) of the UN Charter calls on all members to exhaust all peaceful means in settling their disputes, which reflects the UN Charter trend of maintaining international peace and security.[79]

In its *Declaration on the Definition of Aggressions* in 1974, the UN urged all states to refrain from all kinds of aggression or other use of force that contradicts the UN Charter.[80] Despite the fact that the prohibition of the use of force is codified in international law, there is widespread use of force around the world. Debate has arisen over the language of Article 2(4). Scholars have questioned whether the words 'against the territorial integrity of or political independence of any state' can be read as a general prohibition for all kinds of force, or if they grant permission for the use of force where it does not aim to change a government or occupy a territory. Other commentators, especially in the US, argue that Article 2(4) should be read depending on the effectiveness of the UN Security Council. That is, the Security Council's failure to take action for any reason gives states permission to use force to maintain the principles or purposes of the UN Charter. In *The Corfu Channel* case, the ICJ rejected the divergent interpretation of Article 2(4) by the UK authorities, which asserted that the forceful entry of British warships into Albanian territorial waters did not breach Article 2(4), as it did not threaten the territorial integrity and political independence of Albania.[81]

Nevertheless, Article 2(4) of the UN Charter has been placed at the core of international law. Hence, any ambiguity in interpretation of the Article must not depart too far from the purposes of the UN Charter. Limitation of the interpretation of Article 2(4) is a sufficient

[77] *Declaration on Principle of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, GA Res 2652, 25th sess, (24 October 1970).
[78] Islam, above n 5, 230.
[79] *Charter of the United Nations* art 2(3).
[80] *Definition of Aggression*, GA Res 3314 (xxix), 4th Comm, 2319th plen mtg (14 December 1974).
[81] *Corfu Channel Case* [1949] ICJ Rep 149, [31].

approach to restrict the superpower states from espousing interpretations inconsistent with the purposes of the UN Charter and used as a pretext to use force for political or economic reasons.[82]

The above discussion illustrates that the prohibition of the use of force is the cornerstone of international law and the UN Charter. However, the Charter considered the security interests of states by giving permission for the use of force as a provisional measure, according to the conditions of Article 51of the UN Charter, if Article 2(4) is violated, providing that the Security Council cannot act against the attacker.

3.2 Self-Defence Under Article 51

In June and September 2014, Iraq addressed letters to the President of the UN Security Council, asking for support from the international community to eradicate ISIL and maintain its peace and stability. The Iraqi Government stated that ISIL had created a haven outside of Iraqi territory that was posing a direct and severe threat to Iraqi national security. In the same letter, the Iraqi Government mentioned that it had asked the US to lead an international coalition to defeat ISIL.[83] The US Government addressed a letter to the Security Council stating that ISIL posed a serious threat to the security situation in Iraq, in that ISIL was conducting attacks from Syrian territory. The Iraqi Government explicitly asked for US help with the conflict with ISIL, under the claim of collective self-defence.[84] The US stated that ISIL posed a threat not only to Iraq but also to the US interests and its alliances in the region, as well as many other countries. Therefore, the US invoked the inherent right of individual and collective self-defence. The UK also addressed a letter to the Security Council, expressing its support for international efforts to defeat ISIL. This letter relied on Article 51 of the UN Charter and affirmed that the use of force was necessary in order for Syria to quell the threat posed by ISIL. The UK concluded that Syria was either unwilling or unable to suppress the threat of ISIL.[85] France also addressed a letter to the UN Secretary General and the President of the Security Council. This included many different legal issues; first, it referred to the Iraqi request from the international community to confront the attacks

[82] Islam, above n 5, 234.
[83] The *Letter of the Permanent Representative of Iraq to the United Nations Addressed to the President of the Security Council*, S/2014/691, dated 20 September 2014.
[84] The *Letter of the Permanent Representative of the United States to the United Nations Addressed to the President of the Security Council*, S/2014/695, dated 23 September 2014.
[85] The *Letter of the Permanent Representative of the United Kingdom to the United Nations Addressed to the President of the Security Council*, S/2014/851, dated 26 November 2014.

committed by ISIL. Second, France deemed the abuses perpetrated against civilians in Iraq and Syria to be a threat to international peace and security, as well as a direct threat to France's national security. Third, France relied on the inherent right to individual and collective self-defence to conduct air strikes against ISIL on Syrian territory.[86] Given these facts, we will now determine whether the behaviour of the international coalition is compatible with international law.

3.2.1 The legal status of ISIL

The state represents the most important component in international law. In recent years there has been considerable development in the recognition of individual, non-state entities as a subject of international law. ISIL has a judicial system and other kinds of law enforcement systems.[87] Aside from its domains in the Iraqi and Syrian territory, it also possesses other territories. ISIL utilises the products of oil fields to support its expenses. However, ISIL has not achieved the four components of the Montevideo statehood requirements.[88]

ISIL can be considered an insurgent group that is not part of, under the direct control of nor acting on behalf of a state. There is no evidence that ISIL is acting on behalf of or under the control of the Syrian Government.[89] Van Essen described the characteristics of a *de facto* regime, stating that it can practice some 'effective authority' over a certain part of a country, in particular with a certain level of political and institutional capacity.[90] Categorising ISIL as a *de facto* regime that can exercise authority over a territory within a state is debatable, as it does not meet the criteria of a *de facto* state. Wrongful acts by terrorist groups are not attributed to harbouring states unless they work on behalf of, or under the directions of, a state. Giving them any international legal obligations will automatically give them equal rights under international law.[91]

It is hard to say that ISIL met the requirements under international law, as they have breached many fundamental principles of international law. The primary challenges that ISIL faces is that the international community is not ready to give legitimacy to ISIL International law

[86] The *Letter of the Permanent Representative of France to the United Nations Addressed to the President of the Security Council*, S/2015/745, dated 9 September 2015.
[87] *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic Rule of Terror: Living under ISIS in Syria*, UNHCR, UN Doc A/HRC/27/CRP.3 (19 November 2014).
[88] *Montevideo Conventions on the Right and Duties of State*, Singed in Montevideo in 26 December 1933,art 1
[89] UNSC, Doc S/PV.3716 (19 November 2014) 33.
[90] Jonte Van Essen, 'De Facto Regimes in International Law' (2012) 28(74) *Merkourios* 31, 34.
[91] Islam, above n 5, 160.

does not recognise new states that emerge from the unlawful acquisition of the territory of other countries, defined as a territory under enemy occupation. This illegal act cannot produce legal rights and duties in international law.[92] Determining the legal status of ISIL would help to determine the proper course of action when using force in Syrian territory.

3.2.2 Collective self-defence

Iraq has indirectly declared—in its letter to the Security Council—that ISIL has created a haven in Syrian territory, and that the threat stems in part from the ISIL forces in Syria.[93] The countries of the international coalition have argued that the theory of collective self-defence is an adequate justification for responding to the ongoing threat posed by ISIL against Iraq and its citizens with military action in Syria, as the Syrian Government is either unwilling or unable to quell the threat.[94] Since Iraq is a state exposed to armed attack, it has a right to request help on the grounds of collective self-defence. On one hand, based on a restrictive interpretation of Article 51 and the opinions of those who deny the 'unwilling or unable test', Iraq has no right to self-defence, or can only act in self-defence within its territory. Conversely, those who support the unwilling or unable test and a broader interpretation of Article 51 assert that Iraq has the full right to exercise both individual and collective self-defence.[95] The legal issue is whether Iraq has the right to exercise the right of self-defence beyond the Syrian border, taking into consideration that there is no link between ISIL and the Syrian Government. Hence, the right of other states to exercise the right to collective self-defence depends on whether Iraq has the right to act in self-defence within Syrian territory. To trigger the right to self-defence against non-state actors under Article 51, the sovereignty of Syrian territory may have been violated when the international coalition did not obtain the consent of the Syrian Government when taking into account the absence of attribution of the armed attacks on the Syrian Government. The absence of robust criteria stating how to use force against non-state actors means that the notion of collective self-defence in Syria is contested. The principle of collective self-defence may be feasible on the Iraqi border.

[92] Jure Vidmar, 'Territorial Integrity and the Law of Statehood' (2013) 44 *George Washington International Law Review* 137,143.
[93] *Letter of the Permanent Representative of Iraq to the United Nations*, above n 82.
[94] *Letter of the Permanent Representative of the United States to the United Nations*, above n 83.
[95] Louise Arimatsu and Michael N Schmitt, 'Attacking "Islamic State" and the Khorasan Group: Surveying the International Law Landscape' *Colombia Journal for Transitional Bulletin,* 53 (2014) 23.

3.2.3 Individual self-defence

The US, UK and France referred to Article 51 of the UN Charter when they addressed their letters to the UN Security Council. The US claimed that the Khorasan group was associated with al-Qaeda and that they presented a real threat to the US and its allies. Little information was known about Khorasan until the US identified the threat posed by this group against its national security. To justify the right to individual self-defence, the US asserted that the Khorasan group was associated with al-Qaeda. Accordingly, the US administration considers itself in an ongoing war with al-Qaeda and affiliated groups. However, no armed attacks have occurred by Khorasan group against the US and its allies. Further, the geographical scope of the battle covers wherever al-Qaeda exists. Similarly, John O. Brennan—Assistant to the US President for Homeland Security and Counter-Terrorism—has asserted that 'by the international law we have the authority to take action against al-Qaeda and its associated forces without doing a separate self-defence analysis each time'.[96]

It is not clear whether the international community still offers the same level of assistance to the US in its war against al-Qaeda and its associated forces. There is no clear link between Khorasan group and al-Qaeda that achieve a certain level of coordination, to enable them to pass the threshold of immanency to conduct armed attacks against the US. The US builds its position on the universal support it received after the attacks of 11 September 2001. The ground that the US bases its position on is not robust enough, plus the intelligence showing the association between the Khorasan group and al-Qaeda should be presented to the Security Council. In light of the available facts, the right to individual self-defence cannot be deemed a suitable justification for the coalition states to undertake an act of self-defence. Most recently, Turkish forces launched an operation called the 'Euphrates Shield' on Syrian territory, to clear the town of Jarablus, near the Turkish border, of terrorist groups. The Turkish Government invoked the right of self-defence. However, the main goal to the Turkish operation was to target Kurdish forces and push them to the west bank of the Euphrates River.[97]

[96] John O Brennan, *Strengthening Our Security by Adhering to Our Values and Laws*, speech delivered at the White House, Program on Law and Security Harvard Law School, Massachusetts, Friday, 16 September 2011, <https://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-and-laws>.

[97] 'Turkey Using Right to Self-defence in Euphrates Shield', *TRTWORLD* (online), 29 September 201) <http://www.trtworld.com/mea/turkey-using-right-to-self-defence-in-euphrates-shield-171382>.

3.2.4 Anticipatory self-defence

On 20 November 2014 the US Central Commander Admiral John Kirby said: 'we still assess the Khorasan group to be a very real threat to Western interests and American interests. This is why we continue to go after them where and when we can'. The US has asserted an anticipatory claim of self-defence. Under customary international law, many conditions must be fulfilled to legitimise anticipatory self-defence; in particular, proportionality, necessity and immediacy. The anticipation of self-defence refers to the use of force before the occurrence of an armed attack.[98] However, anticipation of an imminent attack must be sufficient to legalise an advanced attack as an act of self-defence, as not taking action would lead to catastrophic consequences. The ICJ explained the meaning of the term 'imminent' in the case *Gabcikove-Nagymaros Project (Hungary v. Slovakia)*, stating that the definition of 'imminent' is equivalent to 'immediacy', which goes beyond a simple prediction.[99]

There are two views in international scholarship on anticipatory self-defence. The first adopts a restrictive interpretation of Article 51 of the UN Charter, arguing that there be no self-defence without a prior armed attack. The victim state can take other measures—such as making preparations to confront the potential attack or notifying the Security Council. The second asserts that anticipatory self-defence is permissible under customary international law, and the interpretation of Article 51 legalises the use of force as an act of self-defence if the aggressor has the intention and capability of carrying out such an attack, and if the use of defensive force is the best option.[100] About the threat posed by ISIL against the US, Lt. General William Mayville Jr., Director of Operations for the Joint Staff, has stated: 'intelligence reports indicated the Khorasan group was in the final stages of plans to execute major attacks against Western targets and potentially the US'.[101]

There is no doubt that ISIL and Khorasan pose a threat to the US and other countries. However, the legal issue is whether the Khorasan group has the capability and the means to commit an armed attack against the US and its allies and whether the US has any alternative to anticipatory self-defence. Answering this question is difficult without evaluating the credibility of the intelligence information to determine whether or not the element of

[98] Leo Van den Hole, 'Anticipatory Self-Defence Under International Law' (2003) 19 *American University International Law Review* 69, 72.
[99] *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgement [1997] ICJ Rep 6, [42].
[100] Leo Van den Hole, above n 98, 84.
[101] US Department of Defence, 'Successful Syrian Strikes Only the Beginning' (online), 23 September 2014 <http://www.defense.gov/News/Article/603308>.

immediacy is present. Finally, taking into consideration the willingness and ability of the harbouring state prior to the use of force is vital.

3.3 The Unwilling or Unable Test

Neither the UN Charter nor contemporary international law has addressed the issue of establishing clear guidance able to determine the status of unlawful acts regarding invoking the right to self-defence against attacks by non-state actors.[102] Many countries have invoked the 'unwilling and unable' test, to use force against non-state actors. For example, Israel has relied on 'unwilling and unable' standards to justify its use of force against Hezbollah in Lebanon and Hamas in Palestinian territory.[103] What remains unclear is whether the victim state attacks the non-state actors if the harbouring state is not responsible for the non-state attacks. A new interpretation of the ICJ's decision in the *Armed Activities of Congo* case was made by Trapp, who stated that the decision of the ICJ means that the victim state cannot use force against the host state unless the wrongful act can be attributed to the host state.[104] That is, Trapp distinguished between the host state and non-state actors, arguing that the victim state can use force against non-state actors directly, without the consent of the host state. This interpretation should be considered with caution, as the absence of the state would grant non-state actors a legal personality under international law, to a certain extent.

Scholars continue to debate the ICJ's position. For example, Cassese and Ellen adopt the ICJ's stance about not permitting the automatic use of force against a host state.[105] Conversely, other scholars have found it essential for the host state to rely on the self-defence principle, thus justifying the legitimacy of taking military action against terrorists in states that are either unwilling or unable to meet their legal obligations.[106] One major drawback of this approach is the lack of clarity on who should determine whether the host state is unwilling or unable to deal with or suppress a threat.

Difficulties arise when there is no explicit consent given, or when coercion gained consent, such as in the case of the US use of drones over Pakistani territory without the explicit

[102] Anton Larsson, *The Right of States to Use Force Against Non-State Actors: Is the 'Unwilling or Unable' Test Customary International Law* (Thesis,30 HE Credits, University of Stockholm, 2015).
[103] Ashley S Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defence' (2012) 52 *Virginia Journal of International Law* 483.
[104] Kimberley Natasha Trapp, 'Actor-Pluralism, the "Turn to Responsibility" and the *jus ad bellum*: "Unwilling or Unable" in Context' (Pt Routledge) (2015) 2(2) *Journal on the Use of Force and International Law* 199, 11.
[105] Lubell, above n 7, 134.
[106] Dinstein, above n 26, 207; Deeks, above n 103, 483, 466.

consent of the Pakistani Government.[107] It is necessary to ask whether a lack of physical interference can be considered implied consent to the US. The Pakistani Government has on many occasions condemned American drone strikes in its territory. However, no states or international organisations consider the US and Pakistan to be at war.[108] As victim states often tend to be powerful states, and host states are generally weaker states, it is likely that the unwilling or unable test carries a particular bias against victim states by overprotective states that are willing to use force. Most host states consider the unwilling or unable test a significant addition to contemporary international law, which introduces a group of principles to ensure that the harbouring state has been given an adequate time within which to suppress the threat.

Under international law, many obligations have been imposed on states to ensure that they do not assist terrorist groups. Some scholars have hypothesised that the breach of these obligations may justify extraterritorial intervention by victim states against non-state actors.[109] Similarly, some scholars have justified the victim state's reaction by using force within the territory of the harbouring state without its consent and consider the 'unwilling and unable' test to be unclear and irrelevant. Scholars are concerned that in the absence of a legal framework able to deter powerful states from misusing the right to self-defence, and unless the international community recognises that territorial states are unwilling or unable to supress the threat of non-state actors, the doctrine will remain weak and unpractical.[110]

A reasonable approach to overcoming this issue could be to identify a particular international body—such as the Security Council, the ICJ or the UN General Assembly—to determine which states are unwilling or unable, as the unwilling or unable test aims to consider both the rights of the victim and host states. In recent years, the illegal use of force has led to an increase in states lacking effective control over their territories, which is an advantage for non-state actors, who then pose a greater threat to international peace and security. The case of Iraq, Syria, Libya and Afghanistan illustrate this. Applying the unwilling or unable test is imperative in the Syrian case, as the US claimed that the Assad regime was unable and unwilling to quell the threat of ISIL.

[107] Jordan J Paust, 'Operationalizing the Use of Drones Against Non-State Terrorists Under the International Law of Self-Defense' (2015) 8 *Albany Government Law Review* 166, 259.
[108] Ibid 188.
[109] Gareth D Williams, 'Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the "Unwilling or Unable" Test' (2013) 36(2) *University of New South Wales Law Journal* 619, 627.
[110] Dawood I Ahmed, 'Defending Weak States Against the "Unwilling or Unable" Doctrine of Self-Defense' (2013) 9(1) *Journal of International Law & International Relations* 1.

3.3 .1 Applying the unwilling or unable test in the Syrian case

In its letter to the UN, the US claimed that the Syrian Government had demonstrated that it was unwilling or unable to prevent its territory being used as a haven for terrorist groups and suppress the threat. Therefore, they claimed, it was legal to carry out incursions into Syrian territory.[111] Iraq also indirectly mentioned that ISIL had established a training ground on Syrian soil. That is, Syria was unable to prevent ISIL from managing a presence in its territory.[112] Similarly, the Turkish Government has invoked the right to self-defence through Article 51 of the UN Charter and stated that Syria is unwilling and unable to quell the threat posed by ISIL.[113]

Australia has invoked the right of collective self-defence against ISIL in Syria at the request of the Iraqi Government. The Australian Government has acknowledged the unwilling or unable test as the threshold that triggers the right to self-defence.[114] However, the language of the letter indicates that Australia has adopted a different approach by reminding the Syrian Government to comply with its duty to prevent its territory from being a haven for terrorist groups posing a threat to the security of other countries.[115] It is not clear how the Australian Government made this distinction between the Syrian Government and its territory. The UK's letter did not explicitly mention that Syria was either unwilling or unable to suppress the threat of ISIL, but it alluded to the fact that Syria was unable or unwilling by mentioning

[111] *Letter of the Permanent Representative of the United States to the United Nations*, above n 83: '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 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 UN, 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 US has initiated necessary and proportionate military actions in Syria to eliminate the ongoing ISIL threat to Iraq'.

[112] UN Doc S/2014/691 Annex.

[113] *The Letter of the Permanent Representative of Turkey to the United Nations Addressed to the President of the Security Council*, S/2014/563, dated 24 July 2015: 'With the emergence of Da'esh, the threats from Syria have gained a new dimension. Syria has become a haven for Da'esh and is used by Da'esh for training, planning, financing and carrying out attacks across borders. It seems that the government of Syria is neither capable of nor willing to prevent this peril emanating from its territory, which clearly imperils the security of Turkey and the safety of its nationals'.

[114] *The Letter of the Permanent Representative of Australia to the United Nations Addressed to the Security Council*, S/2015/693, dated 9 September 2015: 'States must be able to act in self-defence when the government of the State where the threat is located is unwilling or unable to prevent attacks originating from its territory. The Government of Syria has, by its failure to constrain attacks upon Iraqi territory arising from ISIL bases within Syria, demonstrated that it is unwilling or unable to prevent those attacks. [T]hese operations are not directed against Syria or the Syrian people, nor do they entail support for the Syrian regime. When undertaking such military operations, Australia will abide by its obligations under international law'.

[115] Ibid.

the activities of ISIL in planning and directing attacks against the UK from Syrian soil.[116] The other participating states in the international coalition—such as Bahrain, Jordan, Saudi Arabia, Qatar and the United Arab Emirates (UAE)—did not mention that Syria was unable or unwilling to deal with the threat coming from within its territory.[117]

The members of the coalition did not have a common attitude towards Syria's inability or unwillingness to combat ISIL. During the Security Council meeting in 2014, many coalition states—including the Netherlands, New Zealand and Germany—were very clear in their positions regarding air strikes within Syrian territory. They emphasised that their military contributions would be made within Iraqi borders. China's representative indicated his country's support for confronting the threat of international terrorism, but at the same time stated that 'in the fight against terrorism, we must abide by international law and the purposes and principles of the Charter of the UN. We must respect the *sovereignty, independence and territorial integrity* of the countries concerned'.[118] Iran and Russia condemned the operations against ISIL in Syria and deemed that a flagrant breach of international law had occurred.[119] The Syrian Government expressed its readiness to cooperate with international efforts to defeat ISIL. However, there was no political intention to work with the Syrian regime due to fear that it would misuse cooperation and direct it towards its opponents.[120]

Reviewing the attitudes of state shows that several support the notion that Syria is unwilling or unable. The fact that other countries have refrained from military operations in Syria suggests that this test is still unsettled in international law. Thus, it is implausible to rely on the unwilling or unable test because it does not reach the degree of consistency or uniformity required to be considered customary international law. Obtaining the consent of the Syrian Government is crucial before conducting military operations.

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[116] *The Letter of the Permanent Representative of the United Kingdom to the United Nations Addressed to the Security Council*, S/2015/928, dated 3 December 2015.

[117] Olivia Flasch, 'The Legality of the Air Strikes Against ISIL in Syria: New Insights on the Extraterritorial Use of Force Against Non-State Actors' (2016) *Journal on the Use of Force and International Law* 1, 24.

[118] The Security Council, *Threats to International Peace and Security Caused by Terrorist Acts International Cooperation on Combating Terrorism and Violent Extremism*, letter dated 4 November 2014 from the Permanent Representative of Australia to the United Nations addressed to the Secretary-General (S/2014/787), S/PV.7316, 7316rd mtg, 19 November 2014.

[119] Ian Black and Dan Roberts, 'ISIS Air Strikes: Obama's Plan Condemned by Syria, Russia and Iran', The Guardian (online), 28 July 2016 <https://www.theguardian.com/world/2014/sep/11/assad-moscow-tehran-condemn-obama-isis-air-strike-plan>.

[120] Michael Lewis, 'What Does the "Unwilling or Unable" Standard Mean in the Context of Syria?' *Just Security* (29 July 2016) <https://www.justsecurity.org/14903/unwilling-unable-standard-context-syria/>.

The principle of self-defence failed to provide robust, direct justification for the use of force against the Islamic State in Syria. The next chapter explores the principle of 'intervention by invitation', and whether it renders legal the use of force against ISIL in Syria.

Chapter 4: The Right of the State to Invite Foreign Intervention

Many states have been invited by other governments to assist in establishing and restoring peace and national settlement. In the last decade, a number of invitations for intervention have been made, such as the French intervention in Mali, the Saudi coalition in Yemen and the Russian intervention in Ukraine.[121] The notion of 'intervention by invitation' has raised a significant issue about whether consent is issued by a competent authority or given under coercion. Valid consent can be given, but analysis of the circumstances of the consent provided by the Syrian Government shows contradictions with some fundamental principles of international law. This chapter will focus on the possibility of intervention in the civil war under the provisions of international law, and will then analyse the military action against ISIL in Syria under the argument of 'passive consent'. This was invoked by the international coalition as feasible because of the reaction of the Syrian Government. Finally, this chapter will examine the legal argument of the invitation invoked by both Russia and Iran, the genuineness of Syrian intervention and the validity of the Syrian Government's consent.

4.1 Rules of the Use of Force in Civil War

Three stages of internal conflict were identified in the pre-UN Charter era. In the early stage, a government largely retains control of a vast area of its territory, and the opposition is called a 'rebellion'; further, the conflict remains within the jurisdiction of domestic law. The severity of a civil war increases gradually if non-state actors succeed in expanding their control over territory. Third-party states should refrain from offering support to either side, and the conflict is labelled an 'insurgency'. The final stage of civil war is 'belligerency' when a government's degree of territorial control is reduced. Other states may recognise other parties involved in the conflict.[122]

From the first decade of the UN era, the Resolutions of the General Assembly have prohibited the use of force in civil wars. In a series of significant Resolutions—such as Resolution 375 (1949) *On the Rights and Duties of States*—the General Assembly urges states to refrain from inciting civil wars in the territories of others states and to prevent

[121] Gregory H Fox, 'Intervention by Invitation' in Marc Weller (ed), *The Oxford Handbook on the Use of Force* (Oxford University Press, 2015) 2.
[122] Christopher Le Mon, 'Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested' (2003) 35 *New York University Journal of International Law and Politics* 741, 746.

entities within their territories from fomenting such wars.[123] General Assembly Resolution 2131 (1965), *The Inadmissibility of Interventions*, condemned all forms of armed intervention.[124] The principle of self-determination is understood not only in the traditional sense of achieving independence from colonisation, but also to assist a state's people choose who should govern them. The notion of self-determination is clearly expressed in General Assembly Resolution 2652. The Security Council has reflected the state's duty to refrain from the use of force in its relations with other countries in various situations. In Resolution 1234 (1999) regarding the conflict in the DRC, the interim measure of seeking foreign assistance and the legitimacy of using foreign aid to overthrow the government, the Security Council demonstrated that assistance to a government is permissible, but that intervention in eradicating a legal government is not.[125]

The ICJ made a considerable contribution when, in the *Nicaragua* case, it confirmed that frequent reliance on international interference in favour of certain parties that work against governments did not change that fact that such intervention is incompatible with international law. The ICJ added that political or moral motives are not sufficient to create new rules permitting states to intervene in the internal affairs of other states, or to offer assistance to their internal opposition. Therefore, the ICJ concluded that there is nothing in contemporary international law giving permission to a state to intervene or support the opposition in any other state. This kind of intervention would amount to a breach of the principle of non-intervention or the non-use of force.[126] Similarly, in the *Armed Activities in the Territory of Congo in 2005*, the ICJ acknowledged the 1970 UN *Declaration of Friendly Relations* as a part of customary international law. The ICJ concluded that the admission of the Government of Uganda that it had offered training and other forms of support to opposition groups in the DRC could be deemed a violation of the sovereignty and territorial integrity of the DRC. Accordingly, it had violated the principle of non-intervention by intervening in the internal affairs of the DRC while the civil war was raging.[127] Such variation of state practice and judicial interpretations put the rights of governments concerning invitations to foreign forces in cases of civil war under scrutiny. A debate ensued regarding the efficient and legitimate control by government.

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[123] Gray, above n 27, 67.
[124] GA Re /20/2131, *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty* (21 December 1965) para 1.
[125] SC Res 1234, UN SCOR, 3993th mtg, UN Doc S/RES/1234 (9 April 1999).
[126] *Nicaragua case* [1986] ICJ Rep 70, [209].
[127] *Armed Activities* [2005] ICJ Rep 116, [297].

The doctrine of effective control may take different forms or elements. The key factor in effective control is whether a government exercises its authority consistently. Further, obedience to the government reflects its legitimacy. Other arguments on effective control claim that a government is recognised as long as it controls the capital.[128] However, the international community did not withdraw its recognition from the Government of Yemen after President Hadi—recognised as Yemen's legitimate leader by the international community—escaped to Aden, which he declared the *de facto* capital.[129] The crucial point for the invitation of foreign forces to intervene is whether governmental consent is properly given or given under coercion. The literature shows that there is deep division concerning intervention by invitation. On one hand, some views conclude that foreign assistance is not the proper way to challenge a nation's government. Conversely, the opposite view holds that the principle of self-determination provides a stable platform to legalise intervention by invitation.[130]

The purpose of the intervention is vital in determining the legality of the intervention. If the intervention does not violate the principle of self-determination, the intervention is legal. State practice demonstrates that intervention by invitation would not create problems if the purpose of the intervention were to fight terrorism for whoever takes the territory of a neighbouring country as a haven to conduct attacks against the acting state. The next section will focus on the legal basis of the intervention in Syria by first analysing the Russian and Iranian arguments, then by examining the Syrian reactions to the international US-led coalition strikes in Syrian territory.

4.2 The US-Led Coalition's Intervention in Syria

In September 2014 the US-led coalition started to conduct air strikes against ISIL in Syrian territory. Until early June 2016, the coalition had conducted 4,024 airstrikes in Syria.[131] The crucial point here is whether Syrian statements can be considered implied consent to conduct air strikes within its territory, or just a matter of 'saving face' and not genuine consent.

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[128] Anne Schuit, 'Recognition of Governments in International Law and the Recent Conflict in Libya' (2012) 14(4) *International Community Law Review* 381, 389.

[129] 'Yemen Crisis: Who is Fighting Whom?' *BBC News* (online), 6 August 2015 <http://www.bbc.com/news/world-middle-east-29319423>.

[130] Fox, above n 119, 816, 22.

[131] US Department of Defense, *Operation Inherent Resolve* (1 August 2016) <http://www.defense.gov/News/Special-Reports/0814_Inherent-Resolve>.

There is no precise form of state consent given to invite other states to intervene. Article 1(b) of the 10th Commission of Institut de Droit International stated that its definition of 'request' means a request reflecting the free expression of the will of the demanding state, and its permission to the terms and modalities of military assistance.[132] Similarly, Article 20 of the Draft Articles on state responsibility provide that certain conditions should be available in the consent, that it should be 'freely given and clearly established' and must be valid and remain within the border of the given permission to be feasible.[133] The ICJ took the same attitude in the *Armed Activates Case* in 2005.[134] On one hand, the Syrian Government has not consented to the US and other coalition states to conduct military actions in Syrian territory. The Syrian Foreign Minister, Waleed al-Moallem, cautioned the US against conducting air strikes against ISIL in Syrian territory without the permission of his government and added that any action without Syrian consent would be deemed an act of aggression.[135] In its letter to the Security Council dated 17 September 2015, the Syrian Government affirmed this, stating: 'If any state invokes the excuse of counter-terrorism in order to be present on Syrian territory without the consent of the Syrian Government, whether on the country's land or in its airspace or territorial waters, its actions shall be considered a violation of Syrian sovereignty'.[136]

Conversely, none of the coalition states relied on consent or an invitation from the Syrian Government when they conducted their air strikes within Syrian territory. They adopted other legal principles to justify their military intervention, such as the right to self-defence or collective self-defence.[137] However, the Syrian Foreign Minister has expressed his government's readiness to cooperate with and coordinate the international efforts to combat terrorism.[138] The Syrian attitude illustrates that the Syrian Government has not authorised the US-led coalition to act within its territory. However, frequent remarks from Syrian officials

[132] Institute of International Law, *Present Problems of the Use of Force in International Law*, 10th Commission, 8 September 2011, 2.
[133] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Suppl No 10 (A/56/10), ch IV.E.1.
[134] *Armed Activities* [2005] ICJ Rep 116, [52]. The ICJ pointed out: 'the Court draws attention to the fact that the consent that had been given to Uganda to place its forces in the DRC and to engage in military operations, was not an open-ended consent. The DRC accepted that Uganda could act, or assist in acting, against rebels on the eastern border and in particular to stop them operating across the shared border'.
[135] Zeina Karam, 'Syria Warns US against Bombing ISIS without Permission', *National Post* (online), 5 August 2016 <http://news.nationalpost.com/news/syria-warns-u-s-against-bombing-isis-without-permission>.
[136] *The Letter of the Permanent of Representative of the Syrian Arab Republic to the United Nations Addressed to the Secretary General and to the President of the Security Council*, dated 21 September 2015, S2015/719.
[137] See the Letters of the US, s/2015/745, dated 9 September 2015, and France, S/2015/745, dated 9 September 2015.
[138] Karam, above n 135.

call on the international community to cooperate to defeat the common enemy, and there is a notable absence of any Syrian action in response to the air strikes.[139] Further, the letter of the Syrian Government to the Security Council asserted that 'combating terrorism on Syrian territory requires close cooperation and coordination with the Syrian Government by the counter-terrorism Resolutions of the Security Council'.[140] The Syrian Government Minister for National Conciliation, Ali Hider, stated that 'the US-led air strikes against militants are going in the "right direction" because the government had been informed before they started and they were not hitting civilians or Syrian military targets'.[141] In an interview with the Associated Press Agency, the Deputy Prime Minister and Minister of Foreign Affairs, Waleed al-Moallem, demanded that the US expand the coalition's actions to target other radical groups in addition to ISIL. He commented that Syria and Western countries have the same enemy, and added that the Syrian Government 'was satisfied with being simply informed of any US-led coalition action', and that the Obama administration had done that, sending three separate messages to Damascus before launching air strikes.[142]

Neither has the Syrian Government given its permission to the US-led coalition nor does the coalition rely on the invitation to legitimise its operation in Syria. Examination of the statements of Syrian officials shows that the argument of 'passive consent' is not valid to justify coalition actions in Syria. The next section explores the Russian intervention in the Syrian crisis.

4.3 The Russian and Iranian Interventions

In the last five years, the Russian Government has committed to providing diplomatic and political support to the Syrian regime at international and internal levels. Moscow has rendered military and economic and political support to the Syrian government. [143] It seems that the relationship between Moscow and Damascus is close. Besides their mutual geopolitical and economic interests, fundamentalism in Syria and its effect on the Islamic

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[139] 'Another Long War', *The Economist* (online), 7 August 2016 <http://www.economist.com/news/briefing/21620220-americas-bombing-raids-so-called-islamic-state-syria-have-greatly-increased-its>.

[140] *Letter of the Permanent Representative of the Syrian Arab Republic to the United Nations*, above n 128.

[141] Kinda Makieh, 'Syrian Minister Says US-Led Strikes Going in "Right Direction"', *Reuters* (online), 7 August 2016 <http://www.reuters.com/article/us-syria-crisis-minister-idUSKCN0HJ19S20140924>

[142] Zeina Karam, 'Syrian Foreign Minister: The US Said "We Are Not after the Syrian Army" Before Airstrikes', *The Business Insider* (online), 10 August 2016 <http://www.businessinsider.com/syrian-foreign-minister-the-us-said-we-are-not-after-the-syrian-army-before-airstrikes-2014-9?IR=T#ixzz3MjKw64bF>.

[143] Roy Allison, 'Russia and Syria: Explaining Alignment with a Regime in Crisis" (2013) 89(4) *International Affairs* 795, 796.

network in the Caucasus may explain why Russia supports the Syrian regime.[144] On 30 September 2015, Russians began air strikes within Syrian territory. Two issues have been contested regarding Russian intervention in Syria: first, the validity of the invitation and the eligibility of the Syrian Government to invite Russia to provide military assistance. Second, the basis of the legality of the intervention, its purpose and whether it is possible to intervene in a civil war. US Senator John McCain has stated that the aim of Russian support is to achieve its strategy in the Middle East through re-establishing the Assad regime.[145]

The UN Charter does not explicitly mention intervention by invitation. However, if two states have agreed to the use of force against a certain threat, such an agreement would fall outside the scope of Article 2(4), subject to the availability of valid consent. The International Law Commission has, in its comment on the *Draft of Articles on the Responsibility of States for International Wrongful Acts,* set some conditions that must be met for a state's consent to be valid:

i. consent must be valid and not based on error, fraud, corruption or coercion;
ii. consent must be clearly established and expressed, which excludes merely presumed consent;
iii. consent must be given in advance and clearly attributed to the state;
iv. Consent must be a compatible state obligation under international law.[146]

The first challenge to the Syrian invitation to Russia is whether the Syrian Government of Bashar al-Assad still has the authority to issue such an invitation. Many states have argued that the Assad government can no longer fully claim to represent the people of Syria. Instead, the opposition could be considered the representative of Syria and the government can no longer lawfully invite foreign military forces to intervene and fight on its behalf.[147] However, this argument is not persuasive for many reasons. First, no unified and credible leadership has yet emerged from the Syrian opposition to represent the Syrian people.[148] Second, the international community still deals with the Assad regime as representing Syria. Third, the

[144] Ibid.
[145] John McCain, 'Russian Airstrikes Target CIA-Backed Rebels', *CNN* (online), 9 August 2016 <http://www.cnn.com/2015/10/01/politics/john-mccain-cia-russia-airstrikes/>.
[146] Christian Marxsen, 'The Crimea Crisis—An International Law Perspective' (2014) 74(2) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Heidelberg Journal of International Law)* 367, 376.
[147] Nick Robins-Early, 'Russia Says its Airstrikes in Syria are Perfectly Legal. Are They?' *World Post* (online) 10 August 2016 <http://www.huffingtonpost.com/entry/russia-airstrikes-syria-international-law_us_560d6448e4b0dd85030b0c08>.
[148] Lamis Andoni, 'Who Represents the Syrian people?' *Aljazeera English* (online) 14 August 2016 http://www.aljazeera.com/indepth/opinion/2015/12/represents-syrian-people-151209090928516.html>.

Assad regime still has effective control over an important area of the country, including the capital.[149]

The second legal issue that challenges the legality of Russian intervention is the legality of intervention in the civil war in favour of the Assad regime. The International Committee of the Red Cross (ICRC) has stipulated the conditions of non-international armed conflict in its definitions of civil war. According to Article 3 of the Geneva Convention and Article 1 of the Second Additional Protocol, non-international conflict occurs between a government and armed groups or between armed groups, providing that such conflict reach a certain level of intensity and the armed groups have a certain degree of organisation.[150] In 2012, the ICRC declared the conflict in Syria was a civil war, and expressed its obligations to protect civilians under the Geneva Convention.[151]

The conflict in Syria has actually passed the threshold of intensity for a civil war. Western countries have commenced air strikes in Syria, with the British Foreign Minister stating that the Russian air raids created advantages for ISIL, as over 75 of the Russian raids targeted civilians and moderate opposition groups.[152] Similarly, the UN Secretary General, Ban Ki-Moon, the Council of Europe and NATO have condemned the Russian airstrikes targeting civilians and civil facilities, considering such attacks a blatant violation of the international humanitarian law.[153] Russia has claimed that it is fighting to defeat the terrorist groups.

The reports of international organisations have shown that Russian air strikes do not conform with its obligations under the international humanitarian law. Amnesty International and Human Rights Watch identified serious disregard for the provisions of international humanitarian law. Amnesty International referred to reports and images showing that the Russian air force has used cluster munitions in its strikes.[154] The same report documented that

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[149] 'Syria: Mapping the Conflict', *BBC* (online), 10 August 2016 <http://www.bbc.com/news/world-middle-east-22798391>.

[150] International Committee of the Red Cross, *How is the Term 'Armed Conflict' Defined in International Humanitarian Law*, Opinion Paper (12 August 2016) <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

[151] Alex Spillius, 'Syrian Conflict Declared a Civil War by the Red Cross', *The Telegraph* (online) 15 August 2016 <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9401899/Syrian-conflict-declared-a-civil-war-by-the-Red-Cross.html>.

[152] 'Russian Strikes on Syria Opposition "helping IS"—Hammond', *BBC* (online) 18 August 2016 <http://www.bbc.com/news/uk-35114440>.

[153] 'Syrian Civilians Killed by Deliberate Strikes on Hospitals, Schools', *CBC News* (online), 18 August 2016 <http://www.cbc.ca/news/world/syria-msf-hospital-bombing-1.344851>

[154] Amnesty International, *Russia's Statements on its Attacks in Syria* (26 July 2016) <https://www.amnesty.org/en/documents/mde24/3113/2015/en>.

the Russian air force also used unguided bombs and fuel/air explosive or vacuum bombs in residential areas. In other cases, Russian attacks have targeted civilians without distinction or prior notice.[155] Ban Ki-moon has condemned the targeting of hospitals and schools, stated that these attacks have killed close to 50 people and are a blatant violation of international law.[156] The Joint Investigative Mechanism of the UN Organisation for the Prohibition of Chemical Weapons issued a report on 24 August 2016 regarding the using the chemical weapons in the Syrian conflict. The report has identified that both the Syrian Government and ISIL have used chemical weapons on different occasions.[157]

Based on the abovementioned facts, it could be argued that the Russian position that intervention in Syria aims to combat terrorist groups is no longer valid as Russia has violated the provisions of international humanitarian law. Article 26 of the International Law Commission stipulates that 'nothing in the Charter precludes the wrongfulness of any act of states which is not in conformity with and obligations arising under peremptory norms of general international law'.[158] This indicates that the failure of Russia to respect international norms would define its air strikes as an aggression against Syrian civilians, as long as it does not comply with international norms and the purposes of the UN Charter.

Iran shares Russia's attitude and desire to keep President al-Assad in power and has sent thousands of its Islamic Revolutionary Guard Corps to Syria. Tehran has asked Hezbollah to send its fighters to provide support to the Assad regime. Moreover, Iran has recruited Shiite militiaman to Syria from Iraq, Afghanistan and Pakistan.[159] In the early stage of the Syrian crisis, Tehran officially denied intervention. However, due to the growing number of casualties among its fighters, Iran has begun to reveal its role in Syria. Since then, Iran has relied on the theory of intervention by invitation to justify its participation. Two legal issues have arisen from Iranian involvement in Syria: involvement in a civil war and the Syrian people's right to self-determination.

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[155] Human Rights Watch, *Russia and Syria, Possibly Unlawful Russian Air Strikes* (26 August 2016) <https://www.hrw.org/news/2015/10/25/russia/syria-possibly-unlawful-russian-air-strikes>

[156] Suleiman al-Khalid and Lisa Barrington, 'Around 50 Dead as Missiles Hit Medical Centres and Schools in Syrian Towns', *Reuters* (online) 15 February 2016 <http://www.reuters.com/article/us-mideast-crisis-syria-missiles-idUSKCN0VO12Y>.

[157] Farnaz Fasishi, 'U.N. Report Finds Chemical Weapons Used by Syrian Regime, Islamic State', *The Wall Street Journal* (online) 10 September 2016 <http://www.wsj.com/articles/u-n-report-finds-chemical-weapons-used-by-syrian-regime-islamic-state-1472092954>.

[158] International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, November 2001, Supp No 10 (A/56/10), ch IV.E.1, 84.

[159] Ali Alfonch and Michael Eisenstdt, *Iranian Casualties in Syrian and the Strategic Logic of Intervention*, The Washington Institute for Near East Policy (25 August 2016) <http://www.washingtoninstitute.org/policy-analysis/view/iranian-casualties-in-syria-and-the-strategic-logic-of-intervention>.

Article 3 of the Institute de Droit International 2011 on military assistance requests states that military assistance is prohibited when it contradicts the purposes of the UN Charter.[160] There is no universal agreement over intervention in a civil war. The principle of self-determination has deep roots in customary international law. The ICJ confirmed this right in the *Western Sahara Advisory Opinion*.[161] Further, to claim the right to self-determination, a set of conditions must be achieved. First, the people must prove that they are a distinct ethnic group regarding objective and subjective conditions. Second, they must demonstrate that their self-determination has been denied. Finally, judicial and political means must be exhausted before resorting to other means.[162] Excluding the case of civil war from intervention by invitation is a highly controversial issue in international law.

Scholars and commentators are divided into two groups. The first argues that the majority of international documents—such as the *Wiesbaden Resolution 1975,* adopted by Institute de Droit International, and the UK *Document of Foreign Policy*—accept the principles of non-intervention and self-determination, and have proclaimed that a national government has no right to invite foreign forces to intervene when the state is experiencing civil war.[163] The second group holds that governments are entitled to ask for foreign military aid in the case of civil war, while non-state actors are not eligible to do so.[164] It appears that the approach adopted by the first school, who denied intervention in a civil war, has become more acceptable and relevant. Intervening in a civil war would be affected by political motive unless it occurred under the umbrella of the UN. In the case of Syria, the Syrian opposition represents a broad range of the Syrian population and controls a large part of the nation's territory. After the outbreak of civil war and the Syrian revolution against the al-Assad regime, the role of Iran gradually increased, from providing strategic and technical support to involvement in combat and mass protests against direct participation in military actions.[165] Many significant reports have stated that the Iranian-controlled militias and Hezbollah have

[160] The article stipulated: 'when it is exercised in violation of the Charter of the United Nations, of the principles of not- intervention, the equal rights and self-determination of the people and generally, accepted standing for human rights and particularly when its object is to support an established government against own population'. Institute de Droit International, *Military Assistance on Request*, Session de Rhodes (29 August 2016) <http://www.justitiaetpace.org/idiE/resolutionsE/2011_rhodes_10_C_en.pdf>.

[161] *Western Sahara (Advisory Opinion)* [1975], ICJ Rep 12, [55].

[162] Andrew Coffin, 'Self-Determination and Terrorism: Creating a New Paradigm of Differentiation' (2013) 63 *Naval Law Review* 31, 46.

[163] Tom Ruys and Luca Ferro, 'Weathering the Storm: Legality and Legal Implications of the Saudi-Led Military Intervention in Yemen' (2016) 65(01) *International and Comparative Law Quarterly* 61, 73.

[164] Ibid 24.

[165] Fouad Hamdan and Shiar Youssef, *Iran as an Occupying Force in Syria*, The Middle East Institute (17 December 2014) <http://www.mei.edu/content/article/iran-occupying-force-syria>.

committed human rights violations and acts that may be considered crimes against humanity in Syria.[166] Therefore, it could be argued that Iranian intervention in favour of the al-Assad regime may be undermining the Syrian people's right to freely determine their political allegiance and self-determination. Also, legitimising the intervention by invitation in the case of civil war would create an endless circle of unilateral interventions. Finally, there is no clear criterion guiding decision-makers as to when and how they have the right to invite foreign states to intervene in internal conflicts. The evidence from this study shows that the consent given was not legal, and that the justification for the intervention conflicts with the norms of international law. The next chapter will assess the role of the UN.

[166] Report of Human Right Council, *Report of the Independent Commission of Inquiry in the Syria Arab Republic*, 22nd sess, (26 August 2016) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A.HRC.22.59_en.pdf>.

Chapter 5: The UN Authorisation

Under Chapter VII of the Charter of the UN, the Security Council has granted the authority to use force in order to maintain international peace and security.[167] Further, the Charter urges the UN member states to provide the Security Council with all necessary troops, assistance and facilities to allow the Security Council to succeed in its duty to maintain international peace and security.[168] Since the beginning of the civil war in Syria, the Security Council has issued a series of Resolutions and statements. On 15 August 2014, the Security Council unanimously adopted Resolution 2170, which strongly condemned the systemic violations committed by ISIL and the Al-Nusrah Front (ANF) and other entities affiliated with al-Qaeda against international human rights and international humanitarian law.[169] Moreover, the Resolution also listed new individuals and entities in the security sanctions list and emphasised that combating the terrorist groups must be compatible with its obligations under international law.[170] In its presidential statement, the Security Council expressed its concern over the increase in radical ideology and its negative effect on international peace and security. It encouraged its member states to build bilateral and regional cooperation to prevent the flow of foreign fighters. Additionally, the Security Council expressed its deep concern that the terrorist groups have begun to use new technology—such as social media—and that the income from the oil fields under their control is used to support their operations and conduct further terrorist attacks.[171] On 20 November 2014, the Security Council passed a new Resolution concerning ISIL in Syria. However, the language of the Resolution was controversial regarding whether or not it authorised UN member states to use force against ISIL in Syria. Hence, to determine whether the Resolution explicitly gives the right to use force, two important issues are discussed in this chapter: (i) does the Security Council have the authority to delegate its right to use force to others? And (ii) do the Security Council Resolutions contain an implied authorisation of the use of force?

[167] *Charter of the United Nations* art 24.
[168] *Charter of the United Nations* art 43.
[169] SC Res 2170, 7242th mtg, UN Doc S/RES/2170/ (15 August 2014) para 6.
[170] Ibid.
[171] Security Council, *Statement by President of the Security Council*, S/PRST/214/23 (19 November 2014).

5.1 Centralised Use of Force

Article 43 of the UN Charter manages the state members' contributions to the UN's international efforts to restore international peace and stability. It stipulates the existence of an agreement between the member states and the UN that regulates the numbers and kind of forces that could be used by international organisations to achieve their goal within the purposes of the UN Charter.[172] The question raised here is what the role of the UN Security Council is. Is it just to authorise the use of force, or is the function of the Security Council to directly take action against its own forces? Article 24 has elaborated on the role of the Security Council in maintaining international peace and security. In certain cases, the Security Council has failed to fulfil its endowed functions.

In accordance with the *Uniting for Peace Resolution,* and under Article 10 of the Charter, the General Assembly has the authority to issue recommendations dealing with matters threatening international peace and security.[173] The Security Council has authorised UN members to use force on behalf of the Security Council on various occasions, such as in Iraq, Haiti, the former Yugoslavia, Kosovo and Libya. On the one hand, decentralisation of the use of force was justified because it was accepted by member states. Further, it came as a result of the mature development of the UN provisions, which were developed based on need in practice.[174] Conversely, scrutiny of the UN Charter shows that the Security Council does not have the explicit or inherent right to transfer its mandate to member states,[175] even if there is a tendency to give the Security Council the implied power to authorise member states to use force. The Security Council would still be responsible for any misuse or excess beyond the authorisation granted.[176]

The approach of the Security Council following the adoption of Resolution 678 against Iraq in 1990 was strongly criticised, as the Security Council gave open authorisation for the use of force. However, this authorisation was not used to force Iraq to withdraw its troops from Kuwait. Many civilians were killed, and most Iraqi public infrastructure was destroyed under the Security Council authorisation. However, the Security Council avoided reference to the

[172] *Charter of the United Nations* art 43.
[173] The Unity for Peace, GA Res 377, UN GOR, 302nd plen mtg, Agenda Item 68, UN Doc A/RES/5/302(3 November 1950), cited in Islam, above n 5, 254.
[174] Peter Hilpold, 'The Fight against Terrorism and SC Resolution 2249 (2015): Towards a More Hobbesian or a More Kantian International Society?' (2016) *Indian Journal of International Law* 1, 16.
[175] Islam, above n 5, 255.
[176] Ibid.

UN's accountability when other states used the authorisation beyond the purposes of the Security Council to maintain public order. Security Council Resolutions that were adopted in the aftermath of Resolution 678 against Iraq include Resolution 940 (Haiti), Resolution 1125 (South Africa), Resolution 1114 (Albania) and Resolution 770 (the former Yugoslavia). These demonstrate that the Security Council has responded to the concerns of its member states, and relies on the evolution of certain aspects, such as narrowing its mandates and their period of validity and the reporting requirements of the Security Council.[177]

Scrutiny of the provisions of the UN Charter leads to the conclusion that the Security Council has no explicit right to delegate enforcement actions. The only explicit right granted to the Security Council is to restore or maintain international peace and security by its own forces, which can be offered by member states in light of Article 43 of the Charter.[178]

5.2 Implied Authorisation

In recent years, many states' practice has relied upon implied authorisation, or their own interpretation of the Security Council's Resolutions, to justify the use of force. The history of Iraq, the US and the UK after the Iraqi invasion of Kuwait in 1990 provides a good example. Both the US and the UK sought to impose a no-fly zone in northern and southern Iraq, based on Security Council Resolution 688, which had been adopted by the Security Council on 5 April 1991.[179] Both the US and the UK was well as France (who later withdrew), argued that Resolution 688 gave an implicit authorisation to establish a safe haven to protect the Kurdish people in the north and the Shia in the south of Iraq. However, this view was defeated by a declaration of the UN Secretary General, Javier Peres de Cuellar, who stated that either an explicit Security Council Resolution or the consent of the Iraqi Government would legitimise the presence of foreign forces in its territory.[180] Additionally, Russia and China deemed the US and UK's unilateral imposition of the no-fly zone illegal and in contradiction with international law.[181] To establish a peaceful settlement, the Security Council adopted Resolution 1441 in November 2002.[182] The Resolution contains three significant points; first,

[177] Niels Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing"' (2000) 11(3) *European Journal of International Law* 541, 568.
[178] Ibid 542.
[179] SC Res 688, 2982th mtg, UN Doc S/RES/688/ (5 April 1991).
[180] Jules Lobel and Michael Ratner, 'Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime' (1999) *American Journal of International Law* 124, 132.
[181] Gray, above n 27, 351.
[182] SC Res 1441, 4644th mtg, UN Doc S/RES/1441/ (5 November 2002).

it showed that Iraq did not provide complete and final information to the UN inspectors. Second, it gave Iraq a last chance to meet its obligations and complete the disarmament process. Finally, it stated that if Iraq did not comply with its obligation to disarm, it would confront 'serious consequences'.[183] Nonetheless, the members of the Security Council were divided into groups. On one side, both the US and the UK claimed that the Resolution gave them the authority to use force if Iraq did not comply with its obligations. Further, they alleged that the Security Council would decide whether Iraq had fulfilled its obligations or not, and mentioned that there was no need for a second Resolution. Conversely, Russia, China, Germany and France stated that the process of the use of force required the inclusion of two stages.[184] They argued that the matter of cooperation should be brought in front of the Security Council and that the inspectors would decide whether Iraq had breached its obligations.[185]

In 2003, after the US, UK and Australia failed to pass the draft of the new Security Council Resolution supported by the US, UK and Spain, they argued that the Security Council Resolutions 678 (1990) and 1441 (2002) provided an adequate legal justification for the use of force against Iraq.[186] The US further argued that the war in Iraq was part of the 'ongoing war against terror'.[187] Russia, China, the NATO states and the EU reported that the use of force must not be allowed without a clear authorisation from the Security Council.[188] The US administration said that the provision of the Security Council Resolutions authorised the use of force against Iraq. Thus, the US and the UK took the role of the Security Council as being to determine who represents a threat to international peace and security, and they assented to the unilateral use of force based on their interpretation of the Security Council Resolutions.

The international community learned a lesson from the Iraqi case after the Gulf War. Most Security Council Resolutions that have been adopted after the Gulf War have tended to address the issues of broad mandates, vague language and unlimited scope. Security Council Resolution 1244 (1999) was passed under Chapter VII of the UN Charter and called upon the member states to establish an international security presence to replace the Yugoslavian

[183] Alex J Bellamy, 'International Law and the War with Iraq' (2003) 4(2) *Melbourne Journal of International Law* 145, 497, 507.
[184] John Chilcot, *The Report of the Iraq Inquiry*, Volume 2 (2 September 2016), 277, <http://www.iraqinquiry.org.uk/the-report/>.
[185] Gray, above n 27, 357.
[186] Bellamy, above n 183.499
[187] Ibid 503
[188] Gray, above n 27, 355.

military troops in Bosnia.[189] Paragraph 9 of the Resolution set out the responsibilities of this force. Paragraph 7 authorised the force, permitting it to use 'all necessary means' to achieve its duties mentioned in Paragraph 9.[190] It seems that the words 'necessary means' were sufficient for the Western countries to justify the use of force. Meanwhile, both Russia and China have tended to restrict the use of force under the control of the Security Council.[191]

Due to the ambiguity of the objectives, the unlimited time frame and the broad interpretation of the Security Council's Resolutions beyond their real intentions, many states have relied on their interpretations of the Security Council's Resolutions under the doctrine of 'implied authorisation' of the use of force. This doctrine is highly controversial and could pose a real threat to international peace and security, as well as weaken the role of the Security Council. Further, the doctrine of 'implied authorisation' could keep the door open for the superpower states to abuse the less powerful states, or to interpret the language of the Security Council for their interests. Use of force requires explicit authorisation from the Security Council, and this authorisation must be within the limits of the purpose of the UN Charter. Finally, permission for the use of force must be a last resort. That is, all other peaceful means must have been exhausted prior to recourse to the use of force in international relations.[192]

This section has reviewed the implied authorisation in the Security Council Resolution. It is also necessary to examine whether the Security Council Resolution 2249 has authorised members to use of force against ISIL in Syria.

5.3 The Security Council Resolution 2249

On 20 November 2015, the Security Council unanimously passed Resolution 2249. This emphasises respect for state sovereignty and territorial integrity by the UN Charter.[193] The Security Council considers ISIL to be a real threat to international peace and security. The Resolution labelled both the ANF and other individuals and entities linked to al-Qaeda as a threat to international peace and security. The Security Council urged all member states to confront these terrorist groups by any measure, providing that they acquiesce to their obligations under international human rights law, humanitarian law and refugee law.[194] Two

[189] SC Res 1244, 4011th mtg, UN Doc S/RES/1244/ (11 June 1999).
[190] Ibid.
[191] Gray, above n 27, 343.
[192] Lobel and Ratner, above n 180, 134.
[193] SC Res 2249, 7565th mtg, UN Doc S/RES/2249 (20 November 2015) para 1.
[194] Ibid.

significant issues need to be determined in this regard: first, whether the Resolution was adopted under Chapter VII of the UN Charter, and second, whether the Resolution authorised the member states to use force in Syria.

The language of the Resolution is unclear, and there is no explicit reference saying that the was adopted under Chapter VII. However, the preamble to the Resolution indicates that the Security Council invoked Article 39 of the UN Charter when the Security Council determined that ISIL, ANF and the individuals and entities associated with al-Qaeda posed a threat to international peace and security.[195] In its advisory opinion in the *Namibia* case, the ICJ stated that lack of explicit reference to Chapter VII in any Security Council Resolution does not mean that the Resolution is not obligatory or does not have operational consequences.[196] Conversely, other opinions are that the Security Council Resolution was not made under Chapter VII. However, it still binding but is not operative. The Resolution does not give member states the right to use force; rather, it clarifies the general rules in international law.[197]

Regarding the second point of whether the Resolution authorised the use of force against ISIL in Syria, the most significant paragraph in the UN 2249 Resolution is Paragraph (5).[198] First, by calling on 'all states that have the capability to do so to use all necessary measures' has allowed for the use of force by permitting member states to take action against ISIL.[199] Nonetheless, the Resolution provides that such measures must be compatible with general rules of international law. Therefore, 2249 reslution was difficult to argue that the Resolution gives a clear authorisation for the use of force. Other opinions are that the Security Council

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[195] Dapo Akande and Marko Milanvic, 'The Constructive Ambiguity of the Security Council's ISIS Resolutions', *EJIL: Talk! Blog of the European Journal of International Law* (4 September 2016), <http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/>.

[196] *The Legal Consequences for States of the Continued Presences of South Africa in Namibia (South West Africa), (Advisory Opinion)* [1971], ICJ Rep 16, [110].

[197] Marc Weller, 'Permanent Imminence of Armed Attack: Resolution 2249 (2015) and the Right to Self-Designated Terrorist Group', *EJIL: Talk! Blog of European Journal of International Law* (6 September 2016) <http://www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-self-defence-against-designated-terrorist-groups/>.

[198] *Resolution 2249*, UN Doc SRE/2249, para 5: '*Calls upon* member states that have the capacity to do so *to take all necessary measures*, in *compliance with international law*, in particular with the UN Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL also known as Da'esh as well as ANF, and all other individuals, groups, undertakings, and entities associated with al-Qaeda, and other terrorist groups, as designated by the UN Security Council, and as may further be agreed by the International Syria Support Group (ISSG) and endorsed by the UN Security Council, pursuant to the Statement of the ISSG of 14 November, and to eradicate the safe haven they have established over significant parts of Iraq and Syria'.

[199] Hilpold, above n 171.

Resolution is designed to offer a political blessing to the ongoing military action on Syrian territory by the Russians and the US-led coalition.[200] There are contradictions between the two aims of the Resolution.

Both Russia and China were concerned about the sovereignty and independence of Syria. Russia aims to provide Syria with all kinds of support to preserve the Assad regime. Conversely, Western countries, along with individual Arab countries (such as Saudi Arabia, Qatar and the UAE), were willing for Assad to step down. The Russian Permanent Representative to the UN stated that the French delegation has considered the Russian delegation's opinion on the draft of the Resolution. Meanwhile, Michele Sison, a member of the US delegation to the UN, welcomed the Security Council's Resolution 2249. It 'urges the states to take all the necessary measures', and asserts that the Syrian Government had illustrated that it was unwilling and unable to quell the threat of ISIL.[201]

Therefore, the vagueness of the Resolution leads the states to interpret the Security Council Resolutions based on their own willingness to enter into conflict with ISIL. Those who have committed to fighting ISIL by the use of force based on Resolution 2249 argue that the Resolution is issued based on Chapter VII, and provides an implicit authorisation for the use of force. On the contrary, the other groups of states that remains cautious about state sovereignty and the supremacy of the state in the international order state that the Resolution does not provide a stand-alone authorisation for the use of force in Syria.[202]

Despite the fact that the Security Council member states have categorised ISIL, the ANF and other entities linked to al-Qaeda as a serious threat to international peace and security, they appear to have reached a deadlock on how to deal with the Syrian case, based on their internal interests. It can be concluded that the Security Council Resolutions do not authorise the use of force in Syria; but rather that it compromises the willingness of the member states and presents political support to the ongoing military action on Syrian territory.

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[200] Vito Todeschini, 'Approving Force without Authorising it: UN Security Council Resolution 2249 on the Fight against ISIL', *Rights!* (22 August 2016) <https://rightsblog.net/2015/12/07/approving-force-without-authorising-it-un-security-council-resolution-2249-on-the-fight-against-isil/>.

[201] UN, *Security Council 'Unequivocally' Condemns ISIL Terrorist Attacks, Unanimously Adopting Text that Determines Extremist Group Poses 'Unprecedented' Threat*, SC/12132 (6 September 2016) <http://www.un.org/press/en/2015/sc12132.doc.htm>.

[202] Ashley Deeks, 'Threading the Needle in Security Council Resolution 2249', *The Law Fare* (12 September 2016) <https://www.lawfareblog.com/threading-needle-security-council-resolution-2249>.

Chapter 6: Conclusion

There is no doubt that the situation in Syria poses a real threat to international peace and security. The Syrian crisis has deepened and become more tragic, posing an even greater threat to regional and international peace and security. After 2013, the situation in Syria has been complicated by the emergence of a new element in the crisis: non-state actors, namely ISIL, which have led to significant disagreements among scholars and international lawyers concerning their position in the international legal order. As a matter of law, the Syrian crisis presents a good example of the lack of, and ambiguity in, international rules governing the use of force against non-state groups.

This project has analysed the legal basis for the use of force against ISIL in Syrian territory. The first point that arose in this project was whether force may be employed in the case of self-defence against non-state actors. Although the armed attacks have reached a certain level of gravity, the element of attribution to Syria, the host state, is lacking. This research has investigated the US-led coalition and the legality of the use of force against ISIL within Syrian territory, and whether it can be justified by the right to collective self-defence based on the request of the Government of Iraq, or by the right to individual self-defence. This research has also examined whether the criteria and conditions of the right to self-defence have been met in the Syrian case, including proportionality, necessity and immediacy, and as a temporary measure, as well as appropriate reporting to the Security Council. Moreover, the element of imminence was discussed, with the aim of evaluating whether the US argument of a real threat can justify air strikes against the Khorasan group, by assuming that it is associated with al-Qaeda.

The Russian and Iranian intervention in Syria has also been investigated, and different legal aspects were examined, such as the eligibility of the Syrian Government to invite foreign forces to intervene in the crisis. The legality of intervention in the civil war was discussed within the framework of international jurisprudence. Finally, this research explored the role of the Security Council in the Syrian crisis by focusing on whether Security Council Resolution 2249 authorises the US-led coalition to use force against ISIL in Syria. Two main issues were expored in Chapter 5. First, the legality of the delegation of the use of force by the Security Council to the member states by the practice of the Security Council and

member states; and second, the implied authorisation or the wider interpretation of the Security Council Resolutions.

From critically analysing the international legal issues and principles relevant to the Syrian crisis, this research draws the following conclusions. First, the international position is still fluctuating regarding which circumstances a state may use force against grave armed attacks under. The ICJ, the legal body of the UN, has not expressed itself clearly regarding when and how states can invoke the right of self-defence. Meanwhile, the Security Council, the political body of the UN, has justified the use of force against non-state actors as self-defence in Resolutions such as 1368 and 1372, despite the absence of any relationship between non-state actors and their harbouring states. Therefore, there is discrepancy between the political and legal intentions of the international community. State practice demonstrates that there is no accurate legal framework for governing the use of force against non-state actors in a foreign territory.

The right to self-defence—invoked by the US, UK and France as the justification for their operations in Syrian territory—does not provide a solid legal basis for military intervention. As long as the US-led coalition solely targeted ISIL's sites and training camps, certain conditions for the exercise of the right to self-defence were fulfilled, such as the necessity, proportionality and immediacy of the response. Further, the coalition states have reported to the Security Council that they are exercising the right to self-defence under Article 51 of the UN Charter. However, the sovereignty of the Syrian state may be affected and be used as a shield to prevent member states from invoking the right to self-defence. Additionally, the absence of any direct or indirect link between ISIL (Da'esh) and the Syrian Government negates one of the elements of the armed attack. Hence, it is hard to rely on collective self-defence based on the request of the Iraqi Government to justify their air strikes on Syrian territory.

The abovementioned factors explain why many states have engaged in air strikes on Iraqi territory, and asserted the right to individual self-defence and striking the groups associated with ISIL, such as the Khorasan group. It is hard to prove that there is an imminent threat, that these terrorist groups are planning to conduct an attack against the US and that there is no alternative to stopping the attack than exercising the right to self-defence. Finally, it is hard to evaluate whether there is a real imminent threat as the relevant intelligence information is not accessible to all to assess its credibility, from a legal point of view.

Reliance on the doctrine of 'unwilling or unable' must also be challenged, as many issues arise in this regard. First, the doctrine is still under debate and not crystallised under customary international law. Second, it is not clear what criteria were adopted by the US to determine whether Syria is unwilling or unable. Analysing the statement of Syrian officials shows that Syria is willing to cooperate with the international community to defeat ISIL. For the purpose of the doctrine, Syria is unable to deal with the threat posed by ISIL. Therefore, resorting to the use of force as self-defence against non-state actors may be necessary when the hosting state refuses to meet its obligations to suppress non-state actor terrorists. As such, it may be argued that the proper legal measure to defeat ISIL would be through supporting the Syrian Army. However, political motives still play a decisive role in such situations.

Concerning the doctrine of intervention by invitation, many legal debates have been raised regarding the legality of the intervention by Russian and Iranian forces on Syrian territory after Syria's request. Although the Syrian Government has lost control over a considerable part of Syria, the international community continues to deal with the Assad regime as Syria's representative to the international community. Therefore, the argument adopted by some states that the Syrian Government is illegitimate is not valid, particularly if we consider the serious division between Syrian opposition groups as a factor in their ability to represent the Syrian people.

Moreover, the international community did not challenge Syria's invitation to Russian forces, but many scholars have raised the issue of participation in a civil war. Regardless of official statements made by states, or their legal justification for intervening in the civil war, it seems that the reactions of the international community are driven by the behaviour of the intervening state on the battlefield. Russian targeting of the moderate opposition and civilians has received sharp criticism. Despite the fact that the principle of intervention by invitation has been widely invoked in recent years, the trend within the international community is not to recognise intervention in civil wars, for different reasons. First, such intervention may contradict the fundamental principles of international law, such as the principles of non-intervention and self-determination. As for the Russian and Iranian intervention in Syria, this is undeniably at odds with the right to self-determination and the Syrian people's right to freely choose their leaders.

Further, it is unlawful to invite foreign troops to commit crimes or act against the purposes of the UN Charter. The recent international intervention in Syria, Yemen, Ukraine and Mali—

all justified under the doctrine of intervention by invitation—demonstrates that international jurisdiction has not yet developed a clear and objective pattern to govern the process of intervention by invitation, such as who and under what conditions the national government may invite foreign forces to its territory. As for the argument that the passive reaction towards the US-led coalition in Syria could be interpreted as 'passive consent', this argument has been refuted as the Syrian Government has condemned the coalition's air strikes as a flagrant breach of international law.

The language of Security Council Resolution 2249 does not explicitly indicate whether the Resolution was issued according to Chapter VII of the UN Charter. However, it does express the spirit of the provisions of Chapter VII. Moreover, the Resolution does not authorise the member states to use force in Syria. Reliance on a broad interpretation of the Security Council's Resolutions may lead to the abuse or misuse of the Security Council's mandate beyond the purposes the UN Charter.

Finally, none of the abovementioned principles provides a robust or direct justification for the use of force against ISIL on Syrian territory. As a matter of law, the consent of the Syrian Government is deemed crucial in order to legalise the use of force in its territory. Further, there is ambiguity in the international law controlling the use of force, especially against non-state actors. The UN and the ICJ may play a crucial role in offering a valuable remedy to this ambiguity. There is also a lack of confidence, as well as differentiation, between how superpower states approach the Syrian crisis, leading to the prolongation of the civil war. This has prevented the adoption of more reliable principles, such as humanitarian intervention.

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