

THE USE OF FORCE AGAINST ISIL IN IRAQ AND SYRIA—A LEGAL BATTLEFIELD

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ABSTRACT

This paper examines the various legal grounds on which States may justify the use of force against ISIL in Syria and Iraq. As a preliminary question to this analysis, the paper elaborates on whether ISIL can be regarded as a State under international law. It identifies two novel arguments for refuting ISIL's statehood besides the regularly cited Montevideo criteria. First, ISIL intends to become a worldwide Caliphate instead of seeking statehood. Second, the very existence of ISIL as a State would violate *jus cogens*, and States are barred from recognizing entities that were formed in breach of peremptory norms.

The paper goes on to examine the different legal justifications that the intervening States invoked or could have invoked to preclude violating Article 2(4) of the UN Charter. The paper identifies and assesses four such grounds, namely: (i) intervention by invitation, (ii) Security Council authorization, (iii) the right to individual or collective self-defense, and (iv) humanitarian intervention. The paper provides an in-depth survey of State practice and *opinio juris* on the "unable and/or unwilling" test, and analyzes the anomalies of this novel and vague doctrine. As an overall framework, the paper suggests the "war on ISIL"

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is better described as a legal rather than military battlefield. Although the battle over geopolitical dominance overshadows other aspects of the conflict, scholarly debates concerning the scope of Article 2(4), the criteria for issuing a valid invitation, the binding nature of a Security Council decision, the well-founded nature of the unable and/or unwilling doctrine, and the possibility of a humanitarian intervention will have even more far-reaching consequences, as certain doctrines and their infiltration into state practice can hollow out the entire *jus contra bellum* system.

The paper concludes with a workable proposal to use force against ISIL, and non-state actors in general, within the current confines of the UN Charter. The unable and/or unwilling test could be lawfully interpreted as giving content to the “substantial involvement” scenario enshrined in Article 3(g) of GA Resolution 3314 on the Definition of Aggression.

Abstract.....	535
Introduction.....	537
I. Setting the scene: the timeline of events and the parties to the conflict.....	538
II. The statehood of ISIL and its implications for the use of force	543
A. ISIL does not meet any of the Montevideo criteria	544
B. Statehood is a claim of right which ISIL does not aim for.	548
C. The existence, recognition or toleration of ISIL as a State violates <i>jus cogens</i>	549
III. Legal justifications for the use of force against ISIL in Iraq and Syria.....	552
A. Intervention by invitation	553
1. The nature and the basis of the doctrine	554
2. The prior consent given by Iraq and Syria.....	555
3. The requirements for issuing a valid invitation	558
4. Until what point a government may issue a valid invitation? The applicability of the doctrine in a civil war	559
5. Exceptions to the prohibition of intervention in civil wars.....	562
a. Counter-intervention	562
b. Fight against terrorism.....	563
B. Authorization by the Security Council	567

C. Right to self-defense and the applicability of the “unable and/or unwilling” doctrine.....	571
1. The alleged right to self-defense directly against non-state actors.....	571
2. The critique of the unable and/or unwilling doctrine....	574
3. Fitting the inability or unwillingness of a State into the current jus contra bellum system	578
D. Humanitarian intervention in Syria?.....	579
IV. Conclusion	582

INTRODUCTION

From the beginning of the conflict in Syria in the spring of 2011, hundreds of thousands of lives have been lost, and millions have been forced to flee their homes.¹ The protests against the Syrian government in March 2011 quickly turned into a bloody civil war, destroying entire cities and regions.² The desperate fight between the Syrian government forces and the Syrian opposition made it possible for the Islamic State of Iraq and the Levant (ISIL) to take over key cities and seize control of significant territories in not just Syria, but also in Iraq.³ Soon, President Bashar al-Assad’s military forces were fighting against the Syrian opposition forces and ISIL simultaneously.⁴ By early 2016, government forces had not only stabilized their positions but also gained important military advantages, which would hardly have been possible without external assistance.⁵

This paper aims to analyze and critically assess the possible legal justifications for the use of force against ISIL in Syria and Iraq. First, it

¹ *Syria Regional Refugee Response*, U.N. HIGH COMM’R FOR REFUGEES, <http://data.unhcr.org/syrianrefugees/regional.php> (last visited Jan. 3, 2017).

² See, e.g., *Drone footage of Homs in Syria Shows Utter Devastation – Video*, THE GUARDIAN (Feb. 4, 2016, 9:41 AM), <http://www.theguardian.com/world/video/2016/feb/04/drone-footage-homs-syria-utter-devastation-video>.

³ Tim Arango, *Sunni Extremists in Iraq Seize 3 Towns From Kurds and Threaten Major Dam*, N.Y. TIMES (Aug. 3, 2014), https://www.nytimes.com/2014/08/04/world/middleeast/iraq.html?_r=0.

⁴ Charles Lister, *Not Just Iraq: The Islamic State Is Also on the March in Syria*, HUFFINGTON POST (Oct. 7, 2014), http://www.huffingtonpost.com/charles-lister/not-just-iraq-the-islamic_b_5658048.html.

⁵ See *Syria Pro-government Forces Seize Rebel-held Town in Latakia Province*, REUTERS (Jan. 12, 2016), <http://www.reuters.com/article/us-mideast-crisis-syria-latakia-idUSKCN0UQ2AJ20160112?feedType=RSS&feedName=worldNews>.

outlines the evolution of the conflict and introduces its main players. Second, it elaborates on the issue of whether ISIL can be regarded as a State under international law. The question of statehood gains relevance for the applicability of Article 2(4) of the UN Charter and for the possible exceptions to it. Third, the paper addresses the different legal justifications that the intervening States invoked or could have invoked to preclude violating Article 2(4). The following justifications are examined in detail: (i) intervention by invitation, (ii) Security Council authorization, (iii) the right to individual or collective self-defense with a special focus on the increasingly invoked “unable and/or unwilling” doctrine, and (iv) humanitarian intervention.

The paper will argue that the ongoing conflict involving ISIL can be better described as a legal, rather than military battlefield. Besides the ongoing military actions in Syria, what we witness today is a battle of competing interpretations on the content of the non-intervention principle; on the conditions of a valid invitation for intervention, on the binding nature of a Security Council decision, on the scope of Article 2(4) and that of the right to self-defense. This paper suggests that the unfolding scholarly debates about the aforementioned issues are more consequential than the actual (and predictable) military outcome in Syria, as they will have far-reaching consequences for the entire *jus contra bellum* system. The paper argues that lowering the standards for issuing a valid invitation and invoking the vague and inconsistent “unable and/or unwilling” test in order to broaden the scope of self-defense will ultimately erode the general prohibition on the use of force, which serves as a cornerstone of the UN Charter’s current rules regulating the use of force. The paper concludes by suggesting an effective and lawful alternative to the use of force against non-state actors such as ISIL, which, at the same time, does not hollow out the UN Charter’s collective security system.

I. SETTING THE SCENE: THE TIMELINE OF EVENTS AND THE PARTIES TO THE CONFLICT

During the Arab Spring in March 2011, protests began in the city of Deraa against the Syrian government. After government forces opened fire on protesters, the violence escalated and spread to other Syrian cities. In the summer of 2011, hundreds of thousands protested the brutality of the Assad regime. The tension soon turned into a civil war and reached the two major cities in Syria: Damascus and Aleppo. The number of

deaths during the war quickly surpassed a hundred thousand,⁶ and the commission of war crimes were repeatedly reported.⁷ In August 2013, chemical weapons were deployed, killing hundreds of civilians.⁸ Due to imminent U.S. military intervention, the Assad regime agreed to eliminate its use of chemical weapons.⁹ In turn, President Obama decided against the use of force in order to prevent and halt gross human rights violations.¹⁰

As the government and opposition forces were fighting for control over Syria, Islamist terrorist groups entered the territory and started to dominate the conflict around the Iraqi-Syrian border. The Syrian branch of al-Qaeda, the al-Nusra Front,¹¹ and ISIL became the most significant players. The bloody civil war and the war crimes committed by the Syrian government and the opposition forces were soon outdone by the barbaric and heinous crimes of ISIL.¹² Hundreds of thousands of people were forced to flee from the territories controlled by the terrorist organization.¹³ In the meantime, ISIL began publicly decapitating Western journalists,¹⁴ prosecuting and killing local Muslim

⁶ See Megan Price et al., Hum. Rts. Data Analysis Group Updated Statistical Analysis of Documentation of Killings in the Syrian Arab Republic, (June 13, 2013), <https://hrdag.org/wp-content/uploads/2013/06/HRDAG-Updated-SY-report.pdf>.

⁷ Rep. of the Indep. Int'l Comm. of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/21/50 (2012).

⁸ Rep. of the United Nations Mission to Investigate Allegations of the Use of Chem. Weapons in the Syrian Arab Republic on the Alleged Use of Chem. Weapons in the Ghouta Area of Damascus on 21 August 2013, U.N. Doc. A/67/997-S/2013/553 (2013).

⁹ Patrick Wintour, *John Kerry gives Syria week to hand over chemical weapons or face attack*, THE GUARDIAN (Sept. 9, 2013, 7:47 AM), <https://www.theguardian.com/world/2013/sep/09/us-syria-chemical-weapons-attack-john-kerry>; *Syria's Accession to the Chemical Weapons Convention Enters into Force*, ORG. FOR THE PROHIBITION OF CHEMICAL WEAPONS, (Oct. 14, 2013), <https://www.opcw.org/news/article/syrias-accession-to-the-chemical-weapons-convention-enters-into-force/>.

¹⁰ Mark Landler and Jonathan Weisman: Obama Delays Syria Strike to Focus on a Russian Plan, NYTIMES (Sept. 10, 2013), http://www.nytimes.com/2013/09/11/world/middleeast/syrian-chemical-arsenal.html?pagewanted=all&_r=0.

¹¹ David Ignatius, *Al-Qaeda Affiliate Playing Larger Role in Syria Rebellion*, WASH. POST (Nov. 30, 2012), https://www.washingtonpost.com/blogs/post-partisan/post/al-qaeda-affiliate-playing-larger-role-in-syria-rebellion/2012/11/30/203d06f4-3b2e-11e2-9258-ac7c78d5c680_blog.html.

¹² U.N. Assistance Mission for Iraq & Office of the U.N. High Comm'r for Hum. Rts., Report on the Protection of Civilians in the Armed Conflict in Iraq: 1 May – 31 October 2015 8–20, <http://ohchr.org/Documents/Countries/IQ/UNAMIRreport1May31October2015.pdf>.

¹³ *Id.*

¹⁴ Greg Miller, *U.S. confirms authenticity of second journalist beheading video*, WASH. POST (Sept. 3, 2014), https://www.washingtonpost.com/world/national-security/islamic-state-claims-to-have-beheaded-american-journalist-steven-sotloff/2014/09/02/ae5e8ffa-32c3-11e4-9e92-0899b306bbea_story.html?utm_term=.7017c2a132de.

and Christian populations,¹⁵ and systematically destroying important ancient cultural sites in the territories under its control.¹⁶

It soon became clear that ISIL had declared war on human civilization and that the radical terrorist organization was the common enemy of mankind, *hostis humani generis*.¹⁷ In the words of President Obama: “[T]hese terrorists are unique in their brutality. They execute captured prisoners. They kill children. They enslave, rape, and force women into marriage. They threatened a religious minority with genocide. And in acts of barbarism, they took the lives of two American journalists.”¹⁸

As the Syrian civil war escalated, the number of States involved in the conflict grew sharply. From the very beginning, Russia, Iran, and the Lebanese Hezbollah supported Assad’s government.¹⁹ Russian air strikes started on September 30, 2015, against both ISIL and the forces of the Free Syrian Army.²⁰ Iran provided financial and logistical support, training, equipping, and arming Syrian government forces.²¹ Later, Iranian forces were deployed in Syrian territory.²² Hezbollah also sent

¹⁵ *Convert, pay tax, or die, Islamic State warns Christians*, REUTERS (July 18, 2014, 7:20 PM), <http://uk.reuters.com/article/uk-iraq-security-christians-idUKKBN0FN29N20140718>.

¹⁶ Jane Arraf, *Islamic State seeking to ‘delete’ entire cultures, UNESCO chief warns in Iraq*, REUTERS (Nov. 8, 2014), <http://www.csmonitor.com/World/Middle-East/2014/1108/Islamic-State-seeking-to-delete-entire-cultures-UNESCO-chief-warns-in-Iraq>.

¹⁷ See S.C. Res. 2249 (Nov. 20, 2015); *Russian Condemns Attacks in Syria, Calls for Global Action*, REUTERS (Feb. 22, 2016, 5:24 AM), <http://www.reuters.com/article/us-mideast-crisis-russia-syria-idUSKCN0VV0WP> (Condemning ISIL and calling for international action against the “abhorrent criminal acts” of ISIL); Sam Webb & Matt Cannon, *China Declares War on ISIS After Terrorists Claim to have Executed Chinese Hostage*, MIRROR (Nov. 21, 2015, 6:68 PM), <http://www.mirror.co.uk/news/world-news/china-declares-war-isis-after-6862200>. See also U.N. SCOR, 70th Sess., 7565th mtg. at 3, U.N. Doc. S/PV.7565 (Nov. 20, 2015).

¹⁸ Barack Obama, U.S. Pres., Statement by the President on ISIL (Sept. 10, 2014), in David Hudson, *President Obama: “We Will Degrade and Ultimately Destroy ISIL”*, THE WHITE HOUSE (Sept. 10, 2014, 10:15 PM), <https://www.whitehouse.gov/blog/2014/09/10/presidentobamawewilldegradeandultimatelydestroyisil>.

¹⁹ *Syria Crisis: Where Key Countries Stand*, BBC (Oct. 30, 2015), <http://www.bbc.com/news/world-middle-east-23849587>.

²⁰ Ed Payne et al., *Russia Launches First Airstrikes in Syria*, CNN (Sept. 30, 2015, 10:15 PM), <http://www.cnn.com/2015/09/30/politics/russia-syria-airstrikes-isis/>.

²¹ Jonathan Saul & Parisa Hafezi, *Iran Boosts Military Support in Syria to Bolster Assad*, REUTERS (Feb. 21, 2014, 1:04 AM), <http://www.reuters.com/article/us-syria-crisis-iran-idUSBREA1K09U20140221>.

²² *Iran ‘deploys troops’ to Help Syrian Army Offensive*, AL JAZEERA (Oct. 15, 2015), <http://www.aljazeera.com/news/2015/10/iran-deploys-troops-syrian-army-offensive-aleppo-homs-151015053316090.html>.

forces to Syria to support the Assad government in the civil war.²³ On the other side of the conflict, Turkey, Saudi-Arabia, Jordan, Qatar,²⁴ the United States, the United Kingdom, and France backed the Syrian opposition. The backers provided financial support, arms, and training.²⁵

A military coalition against ISIL was formed on the margins of the 2014 Wales NATO Summit between the United States, the United Kingdom, France, Australia, Germany, Canada, Turkey, Italy, Poland, and Denmark.²⁶ On September 19, 2014, the French Air Force began conducting airstrikes against ISIL targets in Iraq.²⁷ Three days later, the United States, Saudi Arabia, Jordan, the United Arab Emirates, Bahrain, and Qatar launched operations targeting ISIL, the Khorasan group, and the al-Nusra Front in Syria.²⁸ The first United Kingdom airstrike in Iraq was launched on September 30, 2014.²⁹ The next month, Prime Minister Tony Abbott confirmed that Australia also joined these efforts by targeting ISIL positions in Iraq.³⁰ In the same month, the UK Ministry of Defence confirmed the launch of surveillance activity in Syrian airspace.³¹ Canada joined the bombing of ISIL in Iraq on November 2,

²³ *Hezbollah Claims it has Helped Assad Win Syria Conflict*, THE GUARDIAN (Apr. 7, 2014, 5:11 AM), <http://www.theguardian.com/world/2014/apr/07/hezbollah-syria-assad-win-conflict>.

²⁴ Karen DeYoung & Liz Sly, *Syrian Rebels get Influx of Arms with Gulf Neighbors' Money*, U.S. COORDINATION, WASH. POST (May 15, 2012), https://www.washingtonpost.com/world/national-security/syrian-rebels-get-influx-of-arms-with-gulf-neighbors-money-us-coordination/2012/05/15/gIQA2TSU_story.html.

²⁵ Peter Apps, *Syria's Assad Faces Growing Rebel, Foreign Threat*, REUTERS (June 27, 2012, 5:55 PM), <http://uk.reuters.com/article/uk-syria-escalation-idUKBRE85Q11C20120627>.

²⁶ Denver Nicks, *U.S. Forms Anti-ISIS Coalition at NATO Summit*, TIME (Sept. 5, 2014, 8:43 AM), <http://time.com/3273185/isis-us-nato/>.

²⁷ Oliver Holmes & Alexandria Sage, *French Jets Strike in Iraq, Expanding U.S.-Led Campaign Against Islamic State*, REUTERS (Sept. 20, 2014, 3:19 PM), <http://uk.reuters.com/article/uk-iraq-crisis-france-strikes-idUKKBN0HE0Y220140920>.

²⁸ Martha Raddatz et al., *Airstrikes 'Successful' Against ISIS Targets in Syria*, US MILITARY SAYS, ABC NEWS (Sept. 23, 2014, 8:44 AM), <http://abcnews.go.com/International/airstrikes-successful-isis-targets-syria-us-military/story?id=25686031>.

²⁹ *RAF Conducts First Air Strikes of Iraq Mission*, GOV.UK (Sept. 30, 2014), <https://www.gov.uk/government/news/raf-conducts-first-air-strikes-of-iraq-mission-2>.

³⁰ *Islamic State Jihadists Advance on Syrian Border Town Kobane Despite US-Led Air Strikes*, THE DAILY TELEGRAPH (Oct. 9, 2014, 2:38 PM), <http://www.dailytelegraph.com.au/news/world/islamic-state-jihadists-advance-on-syrian-border-town-kobane-despite-us-led-air-strikes/news-story/7200f9dc9804d4ac4e488848088f79a0?>

³¹ *Surveillance Missions Over Syria Confirmed*, GOV.UK (Oct. 21, 2014), <https://www.gov.uk/government/news/surveillance-missions-over-syria-confirmed>.

2014,³² and in Syria the following April.³³ Finally, the Netherlands also started to attack ISIL in Iraq.³⁴

Turkey began targeting ISIL in Syria on July 24, 2015.³⁵ After ISIL claimed responsibility for the deadly terrorist attacks in Paris that killed 130 civilians in November 2015,³⁶ President Francois Hollande sent the Charles de Gaulle aircraft carrier to the eastern Mediterranean. France subsequently engaged in airstrikes against ISIL in Syrian territory.³⁷ In early December, the House of Commons, the lower house of the Parliament of the United Kingdom, approved airstrikes against ISIL in Syria.³⁸ One day later, Germany decided to join the international coalition against ISIL.³⁹ By the end of 2015, the United States and its allies had carried out almost 3,000 airstrikes against ISIS in Syria.⁴⁰ As military strikes continued, the Netherlands⁴¹ and Denmark⁴² announced

³² *ISIS Weapons Hit by CF-18 Jets in Northern Iraq, DND Says*, CBC NEWS (Nov. 11, 2014, 4:00 PM), <http://www.cbc.ca/news/politics/isis-weapons-hit-by-cf-18-jets-in-northern-iraq-dnd-says-1.2831514>.

³³ *ISIS Mission: Canada Conducts 1st Airstrike in Syria*, CBC NEWS (Apr. 8, 2015, 8:11 PM), <http://www.cbc.ca/news/politics/isis-mission-canada-conducts-1st-airstrike-in-syria-1.3025559>.

³⁴ Thomas Escritt, *The Netherlands Is Joining The Fight Against ISIS In Iraq*, BUSINESS INSIDER (Sept. 24, 2014, 7:12 PM), <http://www.businessinsider.com/the-netherlands-is-joining-the-fight-against-isis-2014-9>.

³⁵ *Turkish Airstrikes Target ISIL in Syria*, HURRIYET DAILY NEWS (July 24, 2015), <http://www.hurriyetdailynews.com/turkish-airstrikes-target-isis-in-syria.aspx?pageID=238&nID=85853&NewsCatID=352>.

³⁶ Mariano Castillo et. al., *Paris Suicide Bomber Identified; ISIS claims Responsibility for 129 dead*, CNN (Nov. 16, 2015, 12:30 PM), <http://www.cnn.com/2015/11/14/world/paris-attacks/>.

³⁷ Ben Doherty et. al., *Paris Attacks: French Police Launch Raids as Military Strikes Isis in Syria*, THE GUARDIAN (Nov. 16, 2015, 3:02 PM), <http://www.theguardian.com/world/2015/nov/15/paris-attacks-car-found-with-kalashnikovs-as-gunmans-relatives-questioned>.

³⁸ *Syria Air Strikes: MPs Authorise UK Action Against Islamic State*, BBC (Dec. 3, 2015), <http://www.bbc.com/news/uk-politics-34989302>.

³⁹ Alison Smale, *German Parliament Votes to Send Military Assistance to Fight ISIS*, N.Y. TIMES (Dec. 4, 2015), http://www.nytimes.com/2015/12/05/world/europe/german-parliament-military-isis-syria.html?_r=0.

⁴⁰ Matthew Weaver & Julian Borger, *Syria airstrikes: everything you need to know*, THE GUARDIAN (Dec. 1, 2015), <https://www.theguardian.com/politics/2015/dec/01/syria-airstrikes-everything-you-need-to-know>.

⁴¹ Julian Robinson, *Holland Announces its Jets Will Begin Bombing ISIS Targets in Syria as Part of the US-Led Coalition*, DAILYMAIL.COM (Jan. 29, 2016, 1:58 PM), <http://www.dailymail.co.uk/news/article-3422954/Dutch-jets-bomb-Islamic-State-targets-Syria.html>.

⁴² *Denmark Tells U.N. it has Trained Radar on Syria*, REUTERS (Jan. 18, 2016, 7:46 PM), <http://www.reuters.com/article/us-denmark-syria-idUSKCN0UW270>.

future air strikes against ISIL on Syrian territory. Belgium⁴³ and Norway⁴⁴ joined this military coalition later that year.

II. THE STATEHOOD OF ISIL AND ITS IMPLICATIONS FOR THE USE OF FORCE

According to Article 2(4) of the UN Charter: “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 United Nations.”⁴⁵ The clear wording of this provision shows the focus on States as the main actors in international relations. Thus, the prohibition on the use of force does not extend to individuals or groups of individuals such as non-state actors. Consequently, the use of force against non-state actors will not violate Article 2(4) and, thus, no exception to the general prohibition is needed in order to legalize such strikes.⁴⁶ The definition of States in the meaning of Article 2(4), however, must be interpreted broadly, and the lack of UN membership or recognition alone does not deprive any State from the protection enshrined in the UN Charter.⁴⁷

For this reason, whether ISIL can be regarded as a State in an international legal sense becomes a key question from a *jus contra bellum* perspective. ISIL began to achieve significant military successes from early 2014 in both Iraq and Syria. The group proclaimed a worldwide Caliphate in June 2014, controlling a territory of an area similar in size to the United Kingdom by September of the same year⁴⁸ and signaling a “new era of international jihad.”⁴⁹ ISIL aims to gain

⁴³ Cynthia Kroet, *Belgium to Launch Air Strikes Against ISIL in Syria. Military Role to be Extended from Iraq to Syria*, POLITICO (May 13, 2016, 7:19 PM), <http://www.politico.eu/article/islamic-state-isis-us-belgium-to-launch-air-strikes-against-isil-in-syria/>.

⁴⁴ *Norway Could Send Troops into Syria*, REUTERS (Jun. 22, 2016, 10:12 AM), <http://www.reuters.com/article/us-mideast-crisis-syria-norway-idUSKCN0Z81O3>.

⁴⁵ U.N. Charter art. 2, ¶ 4, Oct. 24, 1945, 1 U.N.T.S. 16.

⁴⁶ Jörg Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective*, 38 (2011).

⁴⁷ Ian Brownlie, *International Law and the Use of Force by States*, 380–381 (1963); *The Charter of the United Nations: A Commentary* 121–122 (Bruno Simma et. al. eds., 3rd ed. 2012).

⁴⁸ Matthew G. Olsen, *Dir. of the Nat’l Counterterrorism Ctr., Remarks at the Brookings Inst.* (Sept. 3, 2014).

⁴⁹ Adam Withnall, *Iraq Crisis: Isis Declares its Territories a New Islamic State with ‘restoration of caliphate’ in Middle East*, THE INDEPENDENT (June 30, 2014), <http://www.independent.co.uk/news/world/middle-east/isis-declares-new-islamic-state-in-middle-east-with-abu-bakr-al-baghdadi-as-emir-removing-iraq-and-9571374.html>.

control and power over all Muslims in the world and denies every other State the right to exist.⁵⁰ An argument can be made that ISIS has already gained statehood based on these strategic victories, the territory and population it controls in a seemingly effective way, and ISIL's daily presence in the international arena.

Contrary to its name, however, ISIL is far from being a State. President Obama summarized the most important attributes of ISIL as follows:

ISIL is not "Islamic." No religion condones the killing of innocents. And the vast majority of ISIL's victims have been Muslim. And ISIL is certainly not a state. It was formerly Al-Qaeda's affiliate in Iraq, and has taken advantage of sectarian strife and Syria's civil war to gain territory on both sides of the Iraq-Syrian border. It is recognized by no government, nor by the people it subjugates. ISIL is a terrorist organization, pure and simple. And it has no vision other than the slaughter of all who stand in its way.⁵¹

From an international law point of view, ISIL lacks statehood for three reasons. First, it does not satisfy the substantive criteria of statehood set out in the Montevideo Convention. Second, it does not seek statehood in terms of international law. Third, the existence, recognition, or toleration of ISIL as a State would clearly violate *jus cogens* norms. ISIL "constitutes a global and unprecedented threat to international peace and security"⁵² and its establishment of statehood would breach several peremptory norms. Moreover, States cannot recognize a terrorist organization as a State. States have an express duty to eradicate the safe haven that ISIL has established in Iraq and Syria.⁵³

A. ISIL DOES NOT MEET ANY OF THE MONTEVIDEO CRITERIA

The customary criteria for statehood⁵⁴ are set out in Article 1 of the 1933 Montevideo Convention.⁵⁵ Under the Montevideo formula, an entity fulfilling the conditions of defined territory, permanent population, effective government, and capacity to enter into relations with other

⁵⁰ *Id.*

⁵¹ *See, e.g.,* Obama, *supra* note 19.

⁵² S.C. Res. 2249 (Nov. 20 2015).

⁵³ *Id.*

⁵⁴ D. J. Harris, *Cases and Materials of International Law* 102 (5th ed. 1997); Malcolm N. Shaw, *International Law* 198 (6th ed. 2008).

⁵⁵ Convention on Rights and Duties of States, art. 1, Dec. 26, 1933, 49 Stat. 3097.

States achieves the status of statehood.⁵⁶ Therefore, recognition is not a constitutive requirement of statehood. Ostensibly, ISIL appears to satisfy all these criteria, since it controls a considerable territory with population, it administers the occupied cities and territories, and it is capable of communicating and trading with the rest of the world. Under closer scrutiny, it becomes apparent that ISIL does not, in fact, satisfy any of the Montevideo conditions.

The requirement of having a permanent population is not fulfilled by ISIL, because millions of people are fleeing from its occupied territories. According to James Crawford, “States are territorial entities, but above all they are territorial communities, aggregates of individuals sharing a common allegiance.”⁵⁷ The people living in the territories controlled by ISIL share, at best, a common fate: that of persecution and torture,⁵⁸ which cannot qualify as an allegiance in the latter sense. As there is no minimum threshold for the size of population that is necessary for statehood, it could be argued ISIL’s military personnel is its permanent population. This broad interpretation, however, would hollow out this condition of statehood, since paramilitary groups and terrorist organizations necessarily have a considerable number of personnel.⁵⁹ Notably, ISIL fighters are deserting from the army in great numbers on a regular basis.⁶⁰ This further weakens the position that would regard ISIL’s personnel as its population.

There is no rule prescribing a certain minimum area for the defined territory condition.⁶¹ Nevertheless, it is dubious whether ISIL meets this criterion, as its control over certain parts of Iraqi and Syrian territories is extremely fragile and is the result of a handful of strategic

⁵⁶ Shaw, *supra* note 54.

⁵⁷ James R. Crawford, *State*, in Max Planck Encyclopedia of International Law (2011).

⁵⁸ U.N. Assistance Mission for Iraq & Office of the U.N. High Comm’r for Hum. Rts., *supra* note 13.

⁵⁹ See, e.g., *Guide to the Syrian Rebels*, BBC (Dec. 13, 2013), <http://www.bbc.com/news/world-middle-east-24403003>; *The Guerrilla Groups in Columbia*, U.N. REGIONAL INFO. CTR., <http://www.unric.org/en/colombia/27013-the-guerrilla-groups-in-colombia> (last visited Jan. 3, 2017).

⁶⁰ Samuel Osborne, *Isis ‘executes 8 Dutch members for trying to desert’*, THE INDEPENDENT (Mar. 1, 2016), <http://www.independent.co.uk/news/world/middle-east/isis-executes-8-dutch-members-who-tried-to-desert-a6904586.html>; Jay Akbar et. al., *Were the Names of 22,000 ISIS Fighters DELIBERATELY Leaked to Stop Them Deserting? Theory Emerges that Data was Released so Everyone on it Must ‘fight to the death’*, DAILYMAIL.COM (Mar. 11, 2016, 9:19 AM), <http://www.dailymail.co.uk/news/article-3486484/Were-names-22-000-ISIS-fighters-DELIBERATELY-leaked-stop-deserting-Theory-emerges-data-released-fight-death.html>.

⁶¹ See Crawford, *supra* note 57.

victories.⁶² Although the fragmented nature of the controlled territory does not in itself preclude a claim for statehood, it renders achieving independence very difficult.⁶³ Hersch Lauterpacht draws attention to the fact that recognition is postponed in State practice if serious doubts are cast on the future frontiers of the entity.⁶⁴ The frontiers of ISIL are more than dubious, because the UN Security Council has repeatedly reaffirmed the territorial integrity of Iraq and Syria.⁶⁵

Furthermore, ISIL fails to satisfy the requirement of effective government. This condition is understood as having “sufficient degree of internal stability as expressed in the functioning of a government enjoying the habitual obedience of the bulk of the population.”⁶⁶ ISIL, however, terrorizes the people who live temporarily under its control,⁶⁷ which is the opposite of enjoying the obedience of a certain group. Admittedly, ISIL has a relatively effective military command, which enables the organization to economically sustain itself.⁶⁸ In contrast, ISIL has neither a parliamentary body nor governmental structure.⁶⁹ The “governing cabinet” of ISIL consists of a group of influential terrorists, who are in charge of financing the terrorist organization, supplying its members with weapons, and planning terrorist attacks.⁷⁰ They are, thus, not comparable to any functioning governing structures of other States.

⁶² Sergio Peçanha & Derek Watkins, *ISIS' Territory Shrank in Syria and Iraq This Year*, N.Y. TIMES (Dec. 22, 2015), http://www.nytimes.com/interactive/2015/12/18/world/middleeast/Where-ISIS-Gained-and-Lost-Territory-Islamic-State.html?_r=0. See also *Islamic State and the Crisis in Iraq and Syria in Maps*, BBC (Dec. 22, 2016), <http://www.bbc.com/news/world-middle-east-27838034>.

⁶³ As for independence as a separate criterion of statehood. See Hersch Lauterpacht, *Recognition in International Law*, 26–28 (1947). See also James Crawford, *The Creation of States in International Law* 47 (2d ed., 2007).

⁶⁴ LAUTERPACHT, *supra* note 63, at 30.

⁶⁵ See, e.g., S.C. Res. 2249 (Nov. 20, 2015); S.C. Res. 2254 (Dec. 18, 2015).

⁶⁶ LAUTERPACHT, *supra* note 63, at 28.

⁶⁷ U.N. Assistance Mission for Iraq & Office of the U.N. High Comm'r for Hum. Rts., *supra* note 13.

⁶⁸ Harriet Alexander & Alastair Beach, *How Isil is Funded, Trained and Operating in Iraq and Syria*, THE TELEGRAPH (Aug. 23, 2014, 4:05 PM), <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/11052919/How-Isil-is-funded-trained-and-operating-in-Iraq-and-Syria.html>.

⁶⁹ Ruth Sherlock, *Inside the Leadership of Islamic State: How the New 'caliphate' is Run*, THE TELEGRAPH (Jul. 9, 2014, 2:28 PM), <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/10956280/Inside-the-leadership-of-Islamic-State-how-the-new-caliphate-is-run.html>.

⁷⁰ Hisham al-Hashimi, *Revealed: The Islamic State 'cabinet', From Finance Minister to Suicide Bomb Deployer*, THE TELEGRAPH (Jul. 9, 2014, 1:33 PM),

The condition of effective government is closely related to additional criteria, namely independence and the capacity to enter into relations with other States.⁷¹ ISIL does not meet these requirements. As alluded to above, ISIL lacks a minister or ministry entrusted with managing foreign affairs.⁷² ISIL has neither the capacity nor the willingness to enter into relations with other States.⁷³ The fact that no State has recognized ISIL as a State and that it is universally condemned as a terrorist organization makes it impossible for ISIL to fulfill the fourth Montevideo criteria of statehood.

It is true that, according to State practice, not all the four requirements must be met simultaneously.⁷⁴ ISIL, however, should be distinguished from borderline cases, such as Kosovo and Palestine. The main difference between these cases and ISIL is that both Palestine and Kosovo fulfill at least three conditions under the Montevideo Convention, which point in the direction of the creation of a new State. Both Kosovo and Palestine are recognized by more than a hundred states.⁷⁵ Furthermore, in the case of Palestine, the right to self-determination of the Palestinian People is widely recognized.⁷⁶ These cases should be clearly distinguished from that of Abkhazia, South Ossetia and the so-called Turkish Republic of Northern Cyprus (TRNC), which are not recognized by the international community, thus violating Article 2(4) in their very existence.⁷⁷

Finally, even if some criteria of statehood are weakened or temporarily missing with respect to some parts of Iraq and Syria, customary international law reflects a strong presumption for the

<http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/10956193/Revealed-the-Islamic-State-cabinet-from-finance-minister-to-suicide-bomb-deployer.html>.

⁷¹ See Crawford, *supra* note 57.

⁷² See Christoph Reuter, *Secret Files Reveal the Structure of Islamic State*, SPIEGEL ONLINE (April 18, 2015, 1:17 PM), <http://www.spiegel.de/international/world/islamic-state-files-show-structure-of-islamist-terror-group-a-1029274.html>.

⁷³ Radwan Mortada, *What does ISIS' Declaration of a Caliphate Mean?*, AL-AKHBAR ENGLISH (June 30, 2014), <http://english.al-akhbar.com/node/20378>.

⁷⁴ SHAW, *supra* note 54, at 198–200.

⁷⁵ On November 29, 2012, the General Assembly granted Palestine Non-Member Observer State Status in the UN with 138 votes in favor. G.A. Res. 67/19, Status of Palestine in the United Nations (Nov. 29, 2012). The Republic of Kosovo is recognized by 111 countries as of March 2016. *International Recognitions of the Republic of Kosovo*, REPUBLIC OF KOS. MINISTRY OF FOREIGN AFF., <http://www.mfa-ks.net/?page=2,224> (last visited Mar. 6, 2016).

⁷⁶ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, ¶ 118, 122 (July 9). See also G.A. Res. 69/165 (Dec. 18, 2014); G.A. Res. 58/163 (Dec. 22, 2003).

⁷⁷ CRAWFORD, *supra* note 63, at 132.

continuing statehood of an existing state.⁷⁸ This presumption clearly covers the political independence and territorial integrity of the given state. The United Nations (UN) has repeatedly reaffirmed the territorial integrity and political independence of Iraq⁷⁹ and Syria.⁸⁰ All these facts lead to the conclusion that ISIL does not fulfill the requirements for statehood under customary international law. Thus, no new State has been created by ISIL, and the territorial integrity of Iraq and Syria must be respected and protected.

B. STATEHOOD IS A CLAIM OF RIGHT WHICH ISIL DOES NOT AIM
FOR

Besides the four substantive criteria enshrined in the Montevideo Convention, statehood has an additional, inherently necessary criterion: that the given entity ought to strive for statehood. Statehood is a claim of right based on a certain factual and legal situation.⁸¹ As a result, the entity must proclaim that it is aiming for statehood under international law.⁸² Even if an entity would qualify for statehood, as was the case with Taiwan⁸³ and Formosa,⁸⁴ if it did not make this claim under international law, it cannot be regarded as a State under international law.

ISIL never proclaimed statehood in an international legal sense; quite the opposite, it denies the legitimacy of any other entity other than the Caliphate.⁸⁵ By doing so, ISIL denies, *per se*, the existence of all other States. This renders recognition theoretically impossible, since recognition can only be accorded by other States. ISIL denies the existence of all other subjects of international law and also denies international borders as such.⁸⁶ This suggests that ISIL does not intend to

⁷⁸ Crawford, *State Responsibility*, *supra* note 57.

⁷⁹ S.C. Pres. Statement 2014/20 (Sept. 19, 2014) (“The Security Council reaffirms its support for the independence, sovereignty, unity, and territorial integrity of Iraq. . .”). *See also* S.C. Res. 2249 (Nov. 20, 2015).

⁸⁰ S.C. Res. 2254, ¶ 1 (Dec. 18 2015) (“Reaffirming its strong commitment to the sovereignty, independence, unity and territorial integrity of the Syrian Arab Republic.”); *See also* S.C. Res. 2253, ¶ 1 (Dec. 17, 2015).

⁸¹ CRAWFORD, *supra* note 63, at 132.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ James Crawford, *The Criteria for Statehood in International Law*, 1976 BRIT. Y.B. OF INT’L L. 93, 181 (1976).

⁸⁵ Mortada, *supra* note 73.

⁸⁶ *Id.*

be integrated into the community of states;⁸⁷ it instead aspires to be the successor of the current system.”⁸⁸

By and large, the Caliphate exists in a parallel universe. It is much more, or less, than a political entity: it is the vehicle for salvation.⁸⁹ The “One State” given by Allah, which aims to eliminate all other existing States, never has and never will proclaim its statehood in an international law sense.⁹⁰ This is highly relevant, as the existence of a State is by no means just a factual question: the State is a legal entity created by and under law. According to Lauterpacht, “[l]egal personality is a creature of law, not of nature. . . . When we assert that a State exists as a normal subject of international law by virtue of the fact of its existence, we must necessarily have in mind a State fulfilling the conditions as laid down in international law.”⁹¹

C. THE EXISTENCE, RECOGNITION OR TOLERATION OF ISIL AS A STATE VIOLATES *JUS COGENS*

Accepting the statehood of ISIL would be an illogical result from an international law point of view. Martti Koskenniemi points out that even though Ian Smith’s Rhodesia existed in a physical sense for fourteen years, it did not exist as a State, but only as a pariah entity.⁹² Even though Smith’s racist regime had a defined territory, a permanent population, an effective government, and even had the capacity to enter into relations with other States after its recognition by Portugal and the South African Republic, it was never recognized as a State by the international community.⁹³ Georg Nolte highlights that an entity has to have a “minimal internal legitimacy” in order to become a State, and this

⁸⁷ Graeme Wood, *What ISIS Really Wants*, THE ATLANTIC (Mar. 2015), <https://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/>.

⁸⁸ Alex Johnson, ‘Deviant and Pathological’: *What Do ISIS Extremists Really Want?*, NBC NEWS (Sept. 3, 2014), <http://www.nbcnews.com/storyline/isis-terror/deviant-pathological-what-do-isis-extremists-really-want-n194136> (“The legality of all emirates, groups, states and organizations becomes null by the expansion of the khilafah’s authority and arrival of its troops to their areas.”).

⁸⁹ Graeme Wood, *What ISIS Really Wants*, THE ATLANTIC (Mar. 2015), <http://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/>.

⁹⁰ *Id.*

⁹¹ Lauterpacht, *supra* note 63, at 45.

⁹² Thomas Assheuer, *Eine absurde Vorstellung*, ZEIT ONLINE (Dec. 10, 2015), <http://www.zeit.de/2015/48/voelkerrecht-islamischer-staat-krieg-frieden-interview>.

⁹³ Shaw, *supra* note 54, at 206.

goes clearly beyond the condition of effective control.⁹⁴ Similarly to Rhodesia, ISIL lacks any legitimacy essential for statehood.⁹⁵

The UN recognizes ISIL as a terrorist organization with no arguable claim for legitimacy.⁹⁶ With the unanimous adoption of SC Resolution 2253 (2015), the Security Council decided under Chapter VII of the United Nations Charter that the 1267/1989 Al-Qaida Sanctions Committee would be known as the “1267/1989/2253 ISIL (Da’esh) and Al-Qaida Sanctions Committee,” and that the Al-Qaida Sanctions List would be known as the “ISIL (Da’esh) and Al-Qaida Sanctions List.”⁹⁷ The Security Council reiterated

its unequivocal condemnation of the Islamic State in Iraq and the Levant (ISIL, also known as Da’esh), Al-Qaida, and associated individuals, groups, undertakings, and entities for ongoing and multiple criminal terrorist acts aimed at causing the deaths of innocent civilians and other victims, destruction of property, and greatly undermining stability.⁹⁸

The statehood of ISIL would have preposterous legal consequences as well. It would *inter alia* result in the creation of a new and independent subject of international law possessing sovereignty and exclusive jurisdiction over its internal matters. It would be legally equal to all other States and would not be subject to any other State’s or international organization’s jurisdiction.⁹⁹

Similar to Lauterpacht, James Crawford also holds that “independence is the central criterion for statehood.”¹⁰⁰ Crawford refers to independence in a Huberian sense: “Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.”¹⁰¹ The current legal system, however, makes it impossible for ISIL to claim any right regarding any territory or independence. In contrast, the Security Council confirmed in resolution 2249 of November 20, 2015, that ISIL “constitutes a global

⁹⁴ Georg Nolte, *Intervention by Invitation*, in Max Planck Encyclopedia of International Law (2011).

⁹⁵ Assheuer, *supra* note 92.

⁹⁶ See, e.g., S.C. Res. 2169, ¶ 4 (July 30, 2014); S.C. Res. 2178, ¶ 12 (Sept. 24, 2014); S.C. Res. 2249, ¶ 5, U.N. Doc S/RES/2249 (Nov. 20, 2015).

⁹⁷ S.C. Res. 2253, ¶ 6 (Dec. 17 2015).

⁹⁸ *Id.*

⁹⁹ See U.N. Charter art. 1–2; see also Crawford, State Responsibility, *supra* note 57.

¹⁰⁰ Crawford, *supra* note 67, at 93–182, 119.

¹⁰¹ *Island of Palmas* (Neth. v. U.S.), 2 RIAA 829, 838 (1928).

and unprecedented threat to international peace and security.”¹⁰² Hence, not only does ISIL lack the right to exercise the functions of a State regarding a portion of the globe, but its existence has only been verified as a threat to international peace and security.

The principle that no State can exist as a result of a manifest violation of peremptory norms of international law further exemplifies that minimal legitimacy is an additional criterion for statehood.¹⁰³ However, the principle of *ex injuria jus non oritur* in itself does not bar statehood. As Crawford points out, war crimes and torture can occur during state creation.¹⁰⁴ The crucial aspect is “whether the illegality is so central to the existence or extinction of the entity in question that international law may justifiably treat an effective entity as not a State, or a non-effective entity as continuing to be a State.”¹⁰⁵ Thus, the central question is not whether *jus cogens* norms have been violated during the creation of a State, but rather how closely the creation of the new State is linked to *jus cogens* violations. If a territorial entity is created in violation of the right of self-determination, as was the case in Rhodesia¹⁰⁶ and Bantustan,¹⁰⁷ or in violation of Article 2(4) of the UN Charter, as happened in the case of the Turkish Republic of Northern Cyprus, the prohibition of recognition will prevail and, as a result, no new State will come into existence.¹⁰⁸

According to Lauterpacht, “[t]o recognize a political community as a State is to declare that it fulfills the conditions of statehood as required by international law.”¹⁰⁹ Consequently, if an entity is created in violation of international law, the entity’s legal title to statehood is at stake.¹¹⁰ As Lauterpacht eloquently summarized this problem, “facts, however undisputed, which are the result of conduct violative of international law cannot claim the same right to be incorporated

¹⁰² S.C. Res. 2249, ¶ 5 (Nov. 20 2015).

¹⁰³ Crawford, State Responsibility, *supra* note 57.

¹⁰⁴ CRAWFORD, *supra* note 63, at 148.

¹⁰⁵ Crawford, State Responsibility, *supra* note 57.

¹⁰⁶ See S.C. Res. 216, ¶ 2 (Nov. 12, 1965) (calling “upon all States not to recognize this illegal racist minority regime in Southern Rhodesia and to refrain from rendering any assistance to this illegal regime.”).

¹⁰⁷ CRAWFORD, *supra* note 63, at 155.

¹⁰⁸ See S.C. Res. 541 (Nov. 18, 1983) (invalidating the creation of the Turkish Republic of Northern Cyprus). See also S.C. Res. 367 (Mar. 12, 1975); G.A. Res. 3212 (XXIX), (Nov. 1, 1974) (stating that Northern Cyprus is recognized only by Turkey, the occupying power).

¹⁰⁹ LAUTERPACHT, *supra* note 63, at 6.

¹¹⁰ Crawford, State Responsibility, *supra* note 57.

automatically as part of the law of nations.”¹¹¹ Thus, a factual situation created in violation of a *jus cogens* norm cannot claim any legal result. According to Crawford, “[b]y virtue of their primacy, then, peremptory norms may invalidate not just treaties but other inconsistent legal acts, as well as affecting the legal consequences which would otherwise flow from factual situations inconsistent with them.”¹¹²

Not only are the aims, purposes and criminal activities of ISIL contrary to *jus cogens* norms, but the mere existence and the recognition of ISIL as a State would also violate the peremptory norms of international law. Terror is a constitutive element of the organization’s structure, which immanently violates the People’s right to self-determination and all possible norms of international humanitarian law, and results in the persecution of minorities under its control.¹¹³ ISIL systematically perpetrates ethnic cleansing and torture, enslaves women, and questions the territorial integrity and political independence of all other States.¹¹⁴ ISIL essentially aims to establish a worldwide apartheid regime based on a *sui generis* religious fundamentalism. Recognizing the perpetrator of such *jus cogens* violations as a State would violate the *erga omnes* obligation of States to prevent such heinous acts.¹¹⁵

III. LEGAL JUSTIFICATIONS FOR THE USE OF FORCE AGAINST ISIL IN IRAQ AND SYRIA

Because ISIL cannot be regarded as a State and the presumption prevails for the territorial integrity of Iraq and Syria, possible legal justifications for using force must be examined with respect to the military interventions by the United States, the United Kingdom, Australia, Belgium, Canada, Denmark, the Netherlands, Norway, Saudi Arabia, Russia, Qatar, and Germany. The general prohibition on the use of force in inter-state relations enshrined in Article 2(4) allows only two exceptions: (1) the right to individual or collective self-defense according

¹¹¹ LAUTERPACHT, *supra* note 63, at 410.

¹¹² CRAWFORD, *supra* note 63, at 102.

¹¹³ John Kerry, *Isis is committing genocide in Syria and Iraq*, THE GUARDIAN, (Mar. 17 2016), <https://www.theguardian.com/world/2016/mar/17/john-kerry-isis-genocide-syria-iraq>.

¹¹⁴ U.N. Assistance Mission for Iraq (UNAMI) and the Office of the High Commissioner for Human Rights (OHCHR), Report on the Protection of Civilians in the Armed Conflict in Iraq: 1 May – 31 October 2015, 8-20 (2015), <http://ohchr.org/Documents/Countries/IQ/UNAMIRreport1May31October2015.pdf>.

¹¹⁵ Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. ¶ 33–34 (Feb. 5).

to Article 51,¹¹⁶ and (2) the use of force with the authorization of the Security Council under Chapter VII of the UN Charter (Articles 39-42).¹¹⁷ However, some scholars claim a third exception: the right to humanitarian intervention.¹¹⁸

In light of the immense human suffering in Iraq and Syria, the applicability of a right to humanitarian intervention must be considered. Furthermore, not as an exception, but rather as a preliminary question to the application of Article 2(4), the possible application of the intervention by invitation doctrine will be addressed. Therefore, this paper will elaborate on these four possible legal justifications in an order reflecting the logic and spirit of the UN Charter.

A. INTERVENTION BY INVITATION

Before looking for any possible exception to Article 2(4), the invitation for intervention issued by Iraq and Syria should be examined, since the consent given by the territorial State precludes the violation of Article 2(4).¹¹⁹ The intervention by invitation doctrine applies to a military intervention by the troops of a State in an armed conflict ongoing in the territory of another State by the invitation of the government of the territorial State.¹²⁰ The doctrine raises the following preliminary issues regarding the concept itself and its applicability to the fight against ISIL in Iraq and Syria:

¹¹⁶ U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”).

¹¹⁷ U.N. Charter art. 42 (“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”).

¹¹⁸ See, e.g., Anthony D’Amato, *Trashing Customary International Law*, 81 AJIL 101, 104 (1987); Fernando R. Tesón, *Humanitarian Intervention: An Inquiry Into Law and Morality*, TRANSNATIONAL PUBL., 1988.

¹¹⁹ U.N. Charter art. 2, ¶ 4 (prohibiting the threat or use of force against the territorial integrity or political independence of any State.) In case of consent, no such threat or use of force exists. For detailed discussion, see *infra* Section 4.1.1.

¹²⁰ Nolte, *supra* note 94.

- What is the nature and basis of the doctrine?
- Was there an invitation, at all, to use force in Iraq and Syria?
- What are the requirements for validity of an invitation?
- Who and until when is entitled to issue an invitation?
- Does the doctrine generally apply in a civil war?
- If the answer is in the negative, are there possible exceptions?

1. *The nature and the basis of the doctrine*

The intervention by invitation doctrine rests dogmatically on Article 2(1), read in conjunction with Article 2(7) and 2(4) of the UN Charter.¹²¹ According to Article 2(1), “[t]he Organization is based on the principle of the sovereign equality of all its Members.”¹²² Article 2(7) prevents even the UN from intervening in matters that fall within the domestic jurisdiction of a State.¹²³ This provision, as well as some other rules of customary nature,¹²⁴ are commonly regarded as the basis for the non-intervention principle.¹²⁵ The International Court of Justice (ICJ), while elaborating on this principle in the Nicaragua case,¹²⁶ based its analysis on its previous findings made in the Corfu Channel case.¹²⁷ The ICJ remarked that “[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations”.¹²⁸ The ICJ explicitly referred to the intervention by invitation doctrine in both

¹²¹ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J., ¶ 251 (June 27) (“The effects of the principle of respect for territorial sovereignty inevitably overlap with those of the principles of the prohibition of the use of force and of non-intervention.”).

¹²² U.N. Charter art. 2, ¶ 1.

¹²³ *Id.* ¶ 7. (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter 7.”).

¹²⁴ Nicar. v. U.S., 1986 I.C.J. 14, ¶ 246; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 162 (Dec. 19); G.A. Res. 2131 (XX), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (Dec. 21, 1965); G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Oct. 24, 1970).

¹²⁵ Maziar Jamnejad & Michael Wood, *The Principle of Non-intervention*, 22 LEIDEN J. OF INT. 'L L. 345 (2009).

¹²⁶ Nicar. v. U.S., 1986 I.C.J. 14, ¶ 246.

¹²⁷ Corfu Channel Case (Gr. Brit. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, ¶ 35 (Apr. 9).

¹²⁸ *Id.*

the Nicaragua case¹²⁹ and in the Armed Activities case (DRC v. Uganda).¹³⁰

Article 2(4) prohibits the threat or use of force against the territorial integrity or political independence of any State.¹³¹ Consequently, if the invitation was issued properly, the foreign State's intervention would not amount to a threat or use of force and, thus, would not violate *jus cogens*. The act of the intervening State will constitute a breach of the prohibition on the use of force or the nonintervention principle unless validly invited by the proper party to a domestic conflict.¹³²

2. *The prior consent given by Iraq and Syria*

The government of Iraq repeatedly asked for help from the international community in fighting ISIL, noting its "great need of the assistance of its friends in combatting this evil terrorism."¹³³ In a subsequent letter, Iraq noted that it was "grateful for the military assistance it is receiving, including the assistance provided by the United States of America in response to Iraq's specific requests."¹³⁴ Iraq also requested the United States to "lead international efforts to strike ISIL sites and military strongholds, with [their] express consent."¹³⁵ As a consequence, the United States, the United Kingdom, Australia and Canada based the legal justification for their use of force in Iraq against ISIL on Iraq's express invitation.¹³⁶ Furthermore, the UN has expressed

¹²⁹ Nicar. v. U.S., 1986 I.C.J. 14, ¶ 246.

¹³⁰ Dem. Rep. Congo v. Uganda, Judgment, 2005 I.C.J. ¶ 105 (Dec. 19).

¹³¹ U.N. Charter art. 2, ¶ 4.

¹³² Nicar. v. U.S., 1986 I.C.J. 14, ¶ 205.

¹³³ Permanent Rep. of Iraq to the U.N., Letter dated June 25, 2014 from the Permanent Rep. of Iraq to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/440 (June 25, 2014).

¹³⁴ Permanent Rep. of Iraq to the U.N., Letter dated Sept. 20, 2014 from the Permanent Rep. of Iraq to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2014/691 (Sept. 22, 2014).

¹³⁵ *Id.*

¹³⁶ See Permanent Rep. of the U.S. to the U.N., Letter dated Sept. 23, 2014 from the Permanent Rep. of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014); Permanent Rep. of Gr. Brit. to the U.N., Identical letters dated Nov. 25, 2014 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2014/851 (Nov. 26, 2014); Chargé d'affaires a.i. of the Permanent Mission of Canada to the U.N., Letter dated Mar. 31, 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security

its clear and unanimous support for the external assistance provided to the Iraqi government against ISIL.¹³⁷

By contrast, Syria publicly protested several times against the US-led airstrikes¹³⁸ and also protested before the UN.¹³⁹ In June 2014, the government even banned the entry of humanitarian aid without its consent.¹⁴⁰ Further, the Assad regime emphasized that the Syrian government has the sole authority to agree or refuse to consent to the use of its territory. Syria based its argument on Article 2(7) of the UN Charter, under which even the UN is prevented to intervene into the domestic affairs of States.¹⁴¹ The letter demanded that the sovereignty, territorial integrity, and national unity of Syria be fully respected.¹⁴² According to Syria, importing aid for terrorist organizations would amount to an attack against Syria in violation of the prohibition on the use of force.¹⁴³

Similarly, in mid-September 2015, Syria protested the United Kingdom, Australia and France for taking military measures in its territory. President Assad accused the intervening States of relying on a “distorted reading of the intention of Article 51 of the Charter of the

Council, U.N. Doc. S/2015/221 (Mar. 31, 2015); Permanent Rep. of Austl. to the U.N., Letter dated Sept. 9, 2015 from the Permanent Rep. of Australia to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/693 (Sept. 9, 2015).

¹³⁷ Meetings Coverage, Security Council, in Statement, Expresses Deep Outrage at ‘ISIL’, Urging Expanded Support for New Iraqi Government to Defeat It, U.N. Meetings Coverage SC/11571 (Sept. 19, 2014).

¹³⁸ Two F16 aircrafts violate Syrian airspace, target electric power plants in Aleppo, SYRIAN ARAB NEWS AGENCY (Oct. 10, 2015), <http://sana.sy/en/?p=57274>.

¹³⁹ See Permanent Rep. of Syria to the U.N., Identical letters dated Sept. 17, 2015 from the Permanent Rep. of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/719 (Sept. 21, 2015); Permanent Rep. of Syria to the U.N., Identical letters dated Sept. 18, 2015 from the Permanent Rep. of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/727 (Sept. 22, 2015).

¹⁴⁰ Permanent Rep. of Syria to the U.N., Letter dated June 18, 2014 from the Permanent Rep. of the Syrian Arab Republic to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/426 (June 20, 2014).

¹⁴¹ U.N. Charter art. 2, ¶ 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”).

¹⁴² Permanent Rep. of Syria to the U.N., Letter dated June 18, 2014 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/426, annex (June 20, 2014).

¹⁴³ *Id.*

United Nations, one that is blatantly inconsistent with the Charter.”¹⁴⁴ Syria contended that the Security Council had already taken the measures necessary to maintain international peace and security.¹⁴⁵ According to the Syrian position, an invitation for intervention was not issued.¹⁴⁶ Quite the opposite, Syria was effectively fighting ISIL on its territory “in accordance with its constitutional duties.”¹⁴⁷ Syria accused Turkey, Jordan, Saudi Arabia, Qatar and “certain well-known western States” of arming and training terrorist groups.¹⁴⁸ Only one day later, Syria accused Saudi Arabia, Turkey, and Qatar of providing support for terrorism, including funds and weapons.¹⁴⁹ Furthermore, Syria extended its protests against unlawful intervention to the United States and Canada in light of its lack of prior consent.¹⁵⁰ In contrast, Syria consented to Russian intervention¹⁵¹ and requested that Russia “provide military assistance in combating the terrorist group Islamic State in Iraq and the Levant (ISIL) and other terrorist groups operating in Syria.”¹⁵² As a response, Russia began missile strikes against terrorist organizations in Syria on September 30, 2015.¹⁵³

The Syrian communications provide clarity: except for the case of Russia, Syria did not consent to the intervention of foreign States. Consequently, these operations need to be justified on other grounds in order to avoid violating Article 2(4). The Russian intervention certainly does not violate the UN Charter in regard to the military measures against ISIL; Russia used force with Syrian consent.¹⁵⁴ Furthermore, President Assad not only had the right to ask for assistance against ISIL,

¹⁴⁴ Permanent Rep. of Syria to the U.N., Identical letters dated Sept. 17, 2015 from the Permanent Rep. of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/719 (Sept. 21, 2015).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Permanent Rep. of Syria to the U.N., Identical letters dated Sept. 21, 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/727 (Sept. 22, 2015).

¹⁵⁰ *Id.*

¹⁵¹ *Damascus confirms Assad asked Putin for military aid*, CHANNEL NEWS ASIA (Sept. 30, 2015) <http://www.channelnewsasia.com/news/world/damascus-confirms-assad/2160992.html>.

¹⁵² Permanent Rep. of Russ. to the U.N., Letter dated Oct. 15, 2015 from the Permanent Rep. of the Russian Federation to the United Nations addressed to the President of the Security Council, U.N. Doc S/2015/792 (Oct. 15, 2015).

¹⁵³ *Syria crisis: Russian air strikes against Assad enemies*, BBC (Sept. 30, 2015), <http://www.bbc.com/news/world-middle-east-34399164>.

¹⁵⁴ *Damascus confirms Assad asked Putin for military aid*, supra note 151.

but was obliged to fight the terrorist organization by all means.¹⁵⁵ In contrast, the fact that Russian airstrikes targeted Syrian opposition forces as well¹⁵⁶ makes the evaluation of the Russian intervention more complex, which will be addressed later in more detail.

3. *The requirements for issuing a valid invitation*

For consent to be valid it must satisfy four conditions: (1) it must be issued by the highest authority, (2) prior to the intervention, (3) without coercion, (4) and the assistance has to remain within the scope of the consent.¹⁵⁷ Coercion invalidates consent by virtue of the Vienna Convention on the Law of Treaties (VCLT) Article 51-52 and most likely violates Article 2(4) of UN Charter by constituting a threat of force.¹⁵⁸ Consent must be given prior to the intervention since an armed intervention without invitation automatically violates Article 2(4) and amounts to an act of aggression.¹⁵⁹ In the Armed Activities case, the ICJ reaffirmed that State actions not covered by the consent of the territorial State are contrary to the UN Charter¹⁶⁰ and constitute a violation of Article 3(e) of General Assembly Resolution on the Definition of Aggression.¹⁶¹

As a general rule, a government that meets any of the following criteria is vested with the power to issue a valid consent.¹⁶² The

¹⁵⁵ See e.g. S.C. Res. 2178, (Sept. 24, 2014); S.C. Res. 2249 (Nov. 20, 2015).

¹⁵⁶ *Russia air strikes target Syrian rebel positions*, AL JAZEERA (Oct. 15, 2016), <http://www.aljazeera.com/news/2015/10/russia-air-strikes-target-syrian-rebel-positions-151016074121789.html>.

¹⁵⁷ Nolte, *supra* note 94; Tom Ruys & Luca Ferro, *Weathering the Storm: Legality and Legal Implications of the Saudi-led Military Intervention in Yemen*, 65 INT'L & COMP. L. Q. 61 (2016); Olivier Corten, *The Law Against War: The Prohibition on the Use of Force*, in CONTEMPORARY INTERNATIONAL LAW 259–76 (2010). See also *Nicar. v. U.S.*, 1986 I.C.J. at ¶ 52.

¹⁵⁸ NIKOLAS STÜRCHLER, *THE THREAT OF FORCE IN INTERNATIONAL LAW* 57 (2007) (“A threat directed towards a specific reaction on the part of the target State violates Article 2(4).”); see Vienna Convention on the Law of Treaties, art. 51-52, May 23, 1969, 1155 U.N.T.S. 331.

¹⁵⁹ See G.A. Res. 3314 (XXIX) ¶ 195 (Dec. 14, 1974) (defining aggression.); see also *Nicar. v. U.S.*, 1986 I.C.J. at ¶ 195 (showing the customary status of this resolution being reaffirmed by the ICJ).

¹⁶⁰ *Dem. Rep. Congo v. Uganda*, 2005 I.C.J. at ¶¶ 104-105.

¹⁶¹ G.A. Res. 3314 (XXIX), at 2 (Dec. 14, 1974) (“Any of the following acts . . . shall . . . qualify as an act of aggression . . . (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement . . .”).

¹⁶² Nolte, *supra* note 94, ¶¶ 17-18.

government either has to exercise effective control over its territory or it has to display a minimum of effectiveness¹⁶³ and, at the same time, has to enjoy the recognition of the international community.¹⁶⁴ Recent precedents reinforce these customary requirements. Tom Ruys and Luca Ferro argue that although the government in Yemen has practically lost control over all its territory, the international community still regards it as the representative of the State.¹⁶⁵ On the other hand, Viktor Yanukovich, who fled Ukraine, was not recognized as a Head of State by the overwhelming majority of the international community, and thus, was not able to issue a valid invitation for intervention.¹⁶⁶ In the present case, neither the Iraqi or Syrian government have lost control over their territory, and in both situations, the invitation for intervention was issued by the highest authority that was recognized by the international community.¹⁶⁷ Therefore, both the Iraqi and the Syrian government were in a position to issue a valid invitation.

4. *Until what point a government may issue a valid invitation? The applicability of the doctrine in a civil war*

The temporal aspect of invitation is possibly the most controversial issue regarding the doctrine of intervention by invitation. International law scholars do not agree on the issue of the termination of a government's authority to issue a valid invitation.¹⁶⁸ ICJ decisions are often cited for backing the position that a government can issue the invitation at any time. The relevant case law of the ICJ, however, does not support such a position.

In *Nicaragua*,¹⁶⁹ the ICJ declared that "it is difficult to see what would remain of the principle of non-intervention in international law if

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Ruys & Ferro, *supra* note 157, at 8.

¹⁶⁶ *Id.* at 20.

¹⁶⁷ In the case of Syria, see Colum Lynch, *Why Putin Is So Committed to Keeping Assad in Power*, FOREIGN POLICY, Oct. 7, 2015, <http://foreignpolicy.com/2015/10/07/putins-russia-is-wedded-to-bashar-al-assad-syria-moscow/>.

¹⁶⁸ For the restrictionist view see, e.g., CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 67–113 (3rd ed. 2008); Nolte, *supra* note 94, ¶ 18. For a wider interpretation of the right to intervene in civil wars see YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 119 (5th ed. 2011); Gregory H. Fox, *Intervention by Invitation*, in THE OXFORD HANDBOOK OF THE USE OF FORCE 816 (Marc Weller ed., 2015).

¹⁶⁹ *Nicar. v. U.S.*, 1986 I.C.J., ¶ 52.

intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition.”¹⁷⁰ This statement, however, refers to armed conflict situations in general, and not specifically to a civil war context. In *Nicaragua*, the ICJ was concerned about the effectiveness of the non-intervention principle provided that the threshold of giving consent to intervention was so low it could be met by any entity, anytime.¹⁷¹ The ICJ has made this very clear: “This would permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of its opposition. Such a situation does not, in the Court’s view, correspond to the present state of international law.”¹⁷² Therefore, the *Nicaragua* case does not provide guidance on the requirements of issuing a valid invitation in a conflict that amounts to civil war. Similarly, neither does the *Nicaragua* case provide support for the argument that a government may issue invitations at any time.

In the *Uganda* case, the ICJ ruled that Uganda violated the non-intervention principle by intervening in an ongoing civil war in the Democratic Republic of Congo (DRC).¹⁷³ The DRC invited Uganda, however, in an entirely different context. The DRC invited Uganda to use force against anti-Ugandan rebels operating in Congolese territory on its Eastern border to stop their operations across the common border.¹⁷⁴ Thus, Uganda used force on the territory of the DRC against anti-Ugandan rebels, and not against forces fighting the Congolese government. The *Uganda* case, however, was not about a State embroiled in civil war issuing an invitation for an outside State to fight an opposing group of its own citizens, further demonstrating the lack of ICJ case law on the validity of an intervention in a civil war situation.

In the absence of a clear ICJ ruling on the matter, some scholars support the view that a government can issue a valid invitation even in civil war.¹⁷⁵ This position, however, seems to contradict state practice and

¹⁷⁰ *Id.* ¶ 246.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Dem. Rep. Congo v. Uganda, 2005 I.C.J. ¶¶ 162-165.

¹⁷⁴ *Id.* ¶ 52. See Ruys & Ferro, *supra* note 157.

¹⁷⁵ DINSTEIN, *supra* note 168, at 119; Fox, *supra* note 168; Dapo Akande & Zachary Vermeer, The Airstrikes against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars, EJIL: TALK! (Feb. 2, 2015), <http://www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/>; Laura Visser, Russia’s Intervention in Syria. EJIL: TALK! (Nov. 25, 2015), <http://www.ejiltalk.org/russias-intervention-in-syria/>.

the ICJ's understanding of the non-intervention doctrine as articulated in the *Nicaragua* case, that "[t]he principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference."¹⁷⁶ The non-intervention principle, thus, protects the State as the manifestation of the right to self-determination, and not the government itself. As soon as an internal strife reaches the level of a civil war, or the point when the right of self-determination of Peoples is affected, the government loses its right to invite foreign military forces. Similarly, Article 3 of the Institut de Droit International's (IDI) 2011 report explicitly prohibits military assistance if exercised in violation of the right to self-determination of Peoples and in situations "when its object is to support an established government against its own population."¹⁷⁷ Scholarly positions also confirm that intervention by invitation is excluded in civil wars.¹⁷⁸

The concept of civil war within the context of intervention by invitation is generally understood as "any armed conflict, not of an international character."¹⁷⁹ It is clear from the IDI Wiesbaden Declaration that for the purposes of the principle of non-intervention, civil war situations are defined in the light of the right of self-determination. This clearly flows from the definition provided by the Declaration, according to which a civil war takes place either: (a) between the government and "one or more insurgent movements whose aim is to overthrow the government or the political, economic or social order of the State",¹⁸⁰ or (b) between "two or more groups which in the absence of any established government contend with one another for the control of the State."¹⁸¹ A State's inability to issue valid invitations in civil war can be distinguished¹⁸² from internal disturbances, tensions, riots, isolated, and sporadic acts of violence, which do not meet the threshold of non-international armed conflicts within the meaning of Article 1 of Protocol

¹⁷⁶ *Nicar. v. U.S.*, 1986 I.C.J. 14, ¶ 202.

¹⁷⁷ *Id.*

¹⁷⁸ GRAY, *supra* note 168; Nolte, *supra* note 94; Theodore Christakis & Karine Bannelier, *French Military Intervention in Mali: It's Legal but Why? Part II: Consent and UNSC Authorisation*, EJIL: TALK! (Jan. 25, 2013), <http://www.ejiltalk.org/french-military-intervention-in-mali-its-legal-but-why-part-2-consent-and-unscc-authorisation/>; Corten, *supra* note 157, at 289–90.

¹⁷⁹ Institut de Droit International, Wiesbaden Session, Resolution III, The Principle of Non-Intervention in Civil Wars 1975, art. 1 (Aug. 14, 1975).

¹⁸⁰ *Id.* at art. 1(a).

¹⁸¹ *Id.* at art. 1(b).

¹⁸² For support for the distinction between civil wars and mere local unrests see GRAY, *supra* note 168 at 82; Nolte, *supra* note 94, ¶ 11.

II Additional to the Geneva Conventions of 1977.¹⁸³ Irrespective of the above limitations, a government is free to consent to the use of force on its territory in case of isolated domestic violence, for the sake of rescuing nationals abroad, or for hot pursuit operations across the borders.

Furthermore, State practice and the case law of the ICJ suggest that even before the emergence of a civil war situation, a State's power to issue invitation may be limited by the right of self-determination. The ICJ explicitly linked lawful interventions to the right of self-determination in the *Nicaragua* case:

[T]he principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy.¹⁸⁴

According to the right to self-determination, all Peoples have the right to freely determine, without external interference, their political status.¹⁸⁵

To conclude, the intervention by invitation doctrine cannot be applied either in civil wars or in the case of an intrastate violence of lower intensity where the right of self-determination is at stake. Allowing the contrary would hollow out the *erga omnes* and *jus cogens* character of the right of self-determination.¹⁸⁶ Two possible exceptions, however, may arise that allow for interventions even in such situations: the case of counter-intervention and the international fight against terrorism.

5. *Exceptions to the prohibition of intervention in civil wars*

a. Counter-intervention

The well-established exception of counter-interventions¹⁸⁷ is rooted in the right of self-determination. According to the Friendly

¹⁸³ Institut de Droit International, Present Problems on the Use of Force in International Law: Military assistance on request, art. 2 (Sept. 8, 2011).

¹⁸⁴ *Nicar. v. U.S.*, 1986 I.C.J. ¶ 205.

¹⁸⁵ G.A. Res. 2625 (XXV), *supra* note 124.

¹⁸⁶ *East Timor (Port. v. Austrl.)*, Judgment, 1995 I.C.J. Rep. 90, ¶ 29 (June 30).

¹⁸⁷ GRAY, *supra* note 168, at 81; CORTEN, *supra* note 157, at 301–02; Ruys & Ferro, *supra* note 157, at 26–27; Raphael Van Steenberge, The Alleged Prohibition on Intervening in Civil Wars Is Still Alive after the Airstrikes against Islamic State in Iraq: A Response to Dapo Akande and Zachary Vermeer, EJIL: Talk! (Feb. 12, 2015), <http://www.ejiltalk.org/the-alleged-prohibition-on->

Relations Declarations of the General Assembly, “[e]very State has the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination and freedom and independence.”¹⁸⁸ The exception of counter-intervention in Article 5 of the 1975 Wiesbaden Declaration of IDI states that, “[w]hensoever it appears that intervention has taken place during a civil war in violation of the preceding provisions, third States may give assistance to the other party. . . .”¹⁸⁹

The rationale of this exception is to offer a counterbalance to achieve the original balance and secure the right of self-determination in cases of unlawful external intervention. This very rationale, however, entails that the counter-intervention ought to be proportionate with the intervention, as it “should be about undoing the impact of the original intervention.”¹⁹⁰ Applying this to the interventions in Syria helps to evaluate the legality of the Russian airstrikes against the Syrian opposition forces. Although the Russian intervention might be justified by the fact that the opposition was earlier supported by other States, it still fails to satisfy the proportionality requirement. The airstrikes thus were not a proportionate counterbalance to the supply of arms and logistics that were provided to the Syrian opposition; they apparently result in the strategic victory of the government.¹⁹¹

b. Fight against terrorism

The fight against terrorism as an exception to the prohibition to intervene in civil wars is based on the fact that terrorist groups cannot be regarded as a “People,” denying any claim to the right of self-determination. This exception is widely supported in scholarly literature¹⁹² and reflected in State practice. No State has recognized ISIL as a People, let alone as a People struggling against colonial or alien

intervening-in-civil-wars-is-still-alive-after-the-airstrikes-against-islamic-state-in-iraq-a-response-to-dapo-akande-and-zachary-vermeer/.

¹⁸⁸ G.A. Res. 2625 (XXV), *supra* note 124.

¹⁸⁹ Institut de Droit International, *supra* note 179, at art. 5. (The Wiesbaden Declaration mentions only three exceptions from the general prohibition of intervening in a civil war: granting humanitarian aid, technical or economic aid not likely to have substantial impact on the outcome of the civil war and assistance recommended or authorized by the UN in accordance of the UN.).

¹⁹⁰ Ruys & Ferro, *supra* note 157, at 29.

¹⁹¹ Suleiman Al-Khalidi et.al., *Syria peace talks near collapse as opposition declares pause*, REUTERS (Apr. 18, 2016), <http://www.reuters.com/article/us-mideast-crisis-syria-latakia-idUSKCN0XF0VN>.

¹⁹² Ruys & Ferro, *supra* note 157, at 26–27; Steenberge, *supra* note 187; Christakis & Bannelier, *supra* note 178.

domination.¹⁹³ To the contrary, the international community unequivocally has condemned ISIL as a terrorist organization.¹⁹⁴ UN S.C. Resolution 2253 on the modification of the UN Sanction regime, which was adopted unanimously under Chapter VII, stated regarding ISIL that “terrorism cannot and should not be associated with any religion, nationality, or civilization.” In November 2015, the United Kingdom informed the UN about the requested intervention of the Iraqi government and noted that the intervention was only against ISIL.¹⁹⁵ Canada, Australia, the Netherlands and Belgium all responded to Iraq’s invitation for intervention specifically in the context of the fight against ISIL.¹⁹⁶

As opposed to the status of ISIL, the Syrian National Council and the Syrian National Coalition are deemed as the representatives of the Syrian People.¹⁹⁷ The Syrian National Council is recognized by many States, including France,¹⁹⁸ the United States¹⁹⁹ and the United Kingdom,²⁰⁰ as the legitimate representative of the Syrian People. In the same capacity, the Syrian opposition met and held talks with the foreign

¹⁹³ G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960); G.A. Res. 3103 (XXVIII), Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist régimes (Dec. 12, 1973); G.A. Res. 2625 (XXV), *supra* note 124.

¹⁹⁴ S.C. Res. 2169, ¶ 10, (July 30, 2014).

¹⁹⁵ Permanent Rep. of Gr. Brit. to the U.N., Identical letters dated Nov. 25, 2014 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2014/851 (Nov. 26, 2014).

¹⁹⁶ See Steenberge, *supra* note 187. Denmark and Norway similarly emphasized that their strikes were directed solely against ISIL and not against Syria. Permanent Rep. of Den. to the U.N., Letter dated Jan. 11, 2016 from the Permanent Rep. of Denmark to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/34 (Jan. 13, 2016); Permanent Rep. of Nor. to the U.N., Letter dated June 3, 2016 from the Permanent Rep. of Norway to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/513 (June 3, 2016).

¹⁹⁷ See, e.g., *Syria opposition delegation arrives for Geneva talks*, AL JAZEERA, (Feb. 2, 2016), <http://www.aljazeera.com/news/2016/01/syria-main-opposition-group-join-talks-geneva-160129182452541.html>.

¹⁹⁸ *Syria: France backs anti-Assad coalition*, BBC, (Nov. 13, 2012), <http://www.bbc.com/news/world-middle-east-20319787>.

¹⁹⁹ Elise Labott, *Clinton to Syrian opposition: Ousting al-Assad is only first step in transition*, CNN, (Dec. 6, 2011), <http://www.cnn.com/2011/12/06/world/meast/clinton-syrian-opposition/index.html>.

²⁰⁰ Daniel Tovrov, *UK Recognizes Syrian Opposition*, INT’L BUS. TIMES, (Feb. 24, 2012), <http://www.ibtimes.com/uk-recognizes-syrian-opposition-415952>.

ministers of the EU in December 2012.²⁰¹ Consequently, terrorist groups like ISIL or the Khorasan Group must be distinguished from insurgent groups, such as the Syrian National Coalition or the Peshmerga,²⁰² given that only the latter can qualify as representative of a People.

Having established that ISIL is a universally condemned terrorist group and not a representative of a People, State intervention in Syria can be justified during the course a civil war by intervening for the sake of fighting against terrorism. Consistent practice of States confirm the existence of such an exception from the general prohibition on intervening in civil war situations. In the case of the 2013 French intervention in Mali, a valid invitation was issued by the Mali government, and France declared that the intervention was purely against the terrorists and not against the forces of MLNA.²⁰³ UN SC Resolution 2100 also welcomed the intervention.²⁰⁴ Similarly, the government of Iraq made it clear in 2014 that it requested foreign military help in “great need of the assistance of its friends in combatting this evil terrorism,” referring to ISIL.²⁰⁵

President Barack Obama emphasized in his speech on September 10, 2014 that US military strikes are aimed against terrorist groups in both Iraq and Syria.²⁰⁶ Thus, the US intervention against the Islamic State in Iraq in 2014 was directed against “ISIL and other terrorist groups,”²⁰⁷ such as the Khorasan Group.²⁰⁸ Similarly, in the spring of 2015, the

²⁰¹ *EU foreign ministers meet Syrian opposition*, EURONEWS, (Oct. 12, 2012), <http://www.euronews.com/2012/12/10/eu-foreign-ministers-meet-syrian-opposition/>.

²⁰² The Peshmerga are the Kurdish military forces in Iraq.

²⁰³ Permanent Rep. of Fr. to the U.N., Identical letters from the Permanent Rep. of France to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2013/17 (11 January 2013).

²⁰⁴ S.C. Res. 2100, ¶ 5, (Apr. 25, 2013).

²⁰⁵ Permanent Rep. of Ir. to the U.N., Letter dated June 25, 2014 from the Permanent Rep. of Iraq to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/440, annex (June 25, 2014); Permanent Rep. of Ir. to the U.N., Letter dated Sept. 20, 2014 from the Permanent Rep. of Iraq to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2014/691, annex (Sept. 22, 2014).

²⁰⁶ David Hudson, *President Obama: “We Will Degrade and Ultimately Destroy ISIL”*, WHITE HOUSE BLOG, (Sept. 10, 2014, 10:15 PM) <https://www.whitehouse.gov/blog/2014/09/10/president-obama-we-will-degrade-and-ultimately-destroy-isil> (“I have made it clear that we will hunt down terrorists who threaten our country, wherever they are. That means I will not hesitate to take action against ISIL in Syria, as well as Iraq.”).

²⁰⁷ Permanent Rep. of the U.S. to the U.N., Letter dated Sept. 23, 2014 from the Permanent Rep. of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014).

²⁰⁸ The Khorasan Group consists of al-Qaeda members active in Syria.

Kingdom of Bahrain, the State of Qatar, the Kingdom of Saudi Arabia, the United Arab Emirates, and the State of Kuwait intervened in Yemen in response to the request of the President of the Republic of Yemen, Abd Rabbu Mansour Hadi, “for the protection of Yemen and its people and to help Yemen to counter terrorist organizations.”²⁰⁹

Similarly, in its notification to the UN Security Council, Russia declared that the aim of its intervention was to support the Assad regime against terrorism. Russia did not, however, refer to any foreign intervention backing the Syrian opposition forces,²¹⁰ which indicates that Russia’s intervention did not fall under the exception of counter-intervention in a civil war. In a letter to the UN, Russia noted that its strikes were

in response to a request from the President of the Syrian Arab Republic, Bashar al-Assad, to provide military assistance in combating the terrorist group Islamic State in Iraq and the Levant (ISIL) and other terrorist groups operating in Syria.²¹¹ The Russian Federation began launching air and missile strikes against the assets of terrorist formations in the territory of the Syrian Arab Republic on 30 September 2015.²¹²

In the same letter, Russia not only justified its intervention by Syrian invitation, but clearly distinguished between the terrorists and the “patriotic opposition” fighting with the Syrian government. The Russian letter to the UN clarifies that the intervention was justified and directed solely against ISIL. President Putin also made clear that Russia interprets the concept of “terrorists” according to UN terminology, and not merely based on the fact that they fight against the Syrian government.²¹³ This confirms that Russia’s *opinio juris* also subscribes to the view that an intervention in a civil war is only acceptable if it serves the fight against terrorism.

²⁰⁹ Permanent Rep. of Qatar to the U.N., Identical letters dated Mar. 26, 2015 from the Permanent Rep. of Qatar to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/217, annex (Mar. 27, 2015).

²¹⁰ Permanent Rep. of Russ. to the U.N., Letter dated Oct. 15, 2015 from the Permanent Rep. of the Russian Federation to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/792, annex (Oct. 15, 2015).

²¹¹ *Id.*

²¹² *Id.*

²¹³ See Putin: *Timing of operation in Syria was right, FSB quashed groups ready to attack*, TASS RUSSIAN NEWS AGENCY, (Feb. 6, 2016), <http://tass.ru/en/politics/859179>. President Putin’s warning in February 2016: “no one will forget that besides ISIL there are other terrorist organizations designated by the UNSC.”

Consequently, Russia's use of force under the intervention by invitation doctrine is lawful against the terrorist groups. Russia's use of force against the Syrian opposition forces, however, would have violated the UN Charter—even if President Assad had been entitled to issue a valid invitation in a civil war due to other states' intervention on the side of the opposition forces.

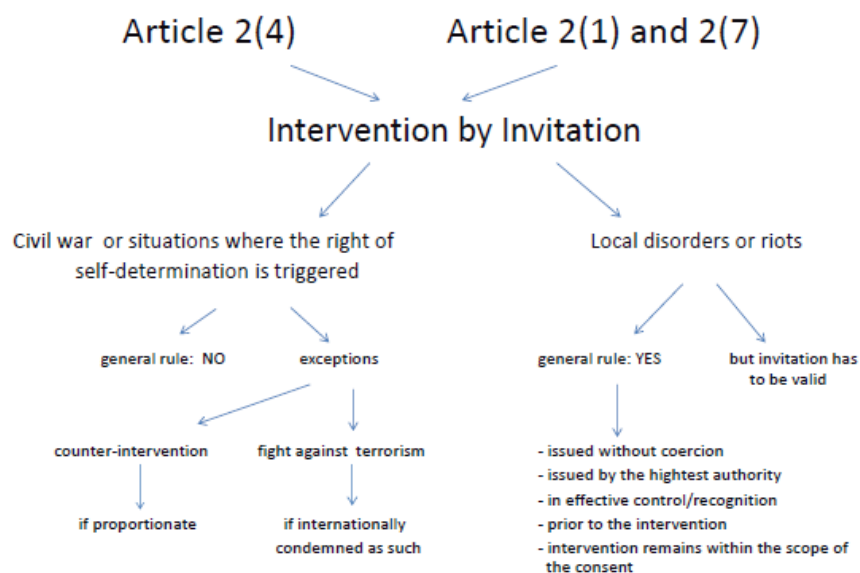


Fig. 1: Intervention by invitation

B. AUTHORIZATION BY THE SECURITY COUNCIL

Even in the absence of a valid invitation, the use of force in Syria could be justified by a prior and express authorization of the Security Council under Chapter VII²¹⁴ or Article 25 of the UN Charter.²¹⁵ After

²¹⁴ Christine Gray, *From Unity to Polarization: International Law and the Use of Force against Iraq*, 13 EUR. J. INT'L L. 1, 6 (2002).

²¹⁵ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 110–16 (June 21). See also S.C. Res. 2165 (July 14, 2014) ("Underscoring that

the November 2015 Paris attacks, the Security Council unanimously adopted S.C. Resolution 2249 as a direct response to the terrorist attacks attributed to ISIL.²¹⁶ The Resolution preamble sets out that ISIL “constitutes a global and unprecedented threat to international peace and security,”²¹⁷ placing the resolution in a collective security context under Article 39 of the UN Charter.²¹⁸ Paragraph (5) of the Resolution uses traditional Chapter VII terminology (“to take all necessary measures”), which further strengthens the impression that the resolution was intended to be binding, authorizing the use of force against ISIL in the territory of Syria.²¹⁹

At the same time, several factors indicate that S.C. Resolution 2249 was meant to neither be binding nor create a new justification for the use of force in Syria beyond the legal bases enshrined in the UN Charter. These factors are the following:

- S.C. Res. 2249 does not explicitly refer to Chapter VII or Article 25 of the UN Charter, which would be a clear indication of its binding nature;
- It merely “calls upon” States to act, as opposed to “authorizing” such actions, which it did in previous situations, where the binding nature of the resolution was not disputed;²²⁰
- It expressly states that the necessary measures have to be “in compliance with international law, in particular with the United

Member States are obligated under Article 25 of the Charter of the United Nations to accept and carry out the Council’s decisions . . . Decides that the United Nations humanitarian agencies and their implementing partners are authorized to use routes across conflict lines . . . in order to ensure that humanitarian assistance . . . reaches people in need throughout Syria through the most direct routes, with notification to the Syrian authorities.”).

²¹⁶ S.C. Res. 2249 (Nov. 20, 2015).

²¹⁷ *Id.*

²¹⁸ U.N. Charter art. 39. (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”).

²¹⁹ S.C. Res. 2249, ¶ 5 (Nov. 20, 2015). (“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 United Nations 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 . . . and to eradicate the safe haven they have established over significant parts of Iraq and Syria.”).

²²⁰ See, e.g., S.C. Res. 794, (Dec. 3, 1992) (regarding the situation in Somalia); S.C. Res. 1973, (Mar. 17, 2011) (regarding the situation in Libya).

Nations Charter,” which implies a reference to Article 2(4) and Article 51 of the Charter;

- It is clear from the political deliberations in the SC prior to the vote that its members did not aim to adopt a final binding resolution. Ambassador Vitaly Churkin, Russia’s Permanent Representative to the UN emphasized the following: “In our view, the French resolution is a political appeal, rather than a change to the legal principles underlying the fight against terrorism. We consider it a step in creating a broad anti-terrorism by marshalling comprehensive cooperation among all States to end all manifestations of terrorism and eradicate its root causes;”²²¹
- Despite the adoption of S.C. Res. 2249, France,²²² the United Kingdom,²²³ Denmark,²²⁴ Norway,²²⁵ Belgium,²²⁶ and Germany²²⁷ all relied on the inherent right to self-defense as a legal basis of using force in Syria, and not on the resolution.

Scholarly literature predominantly interprets the ambiguity of S.C. Resolution 2249 as not authorizing the use of force against ISIL in Syria beyond what is permitted under the UN Charter.²²⁸ The ambiguity

²²¹ U.N. SCOR, 70th Sess., 7565th mtg. at 5, U.N. Doc. S/PV.7565 (Nov. 20, 2015).

²²² *Id.* at 2 (“[T]he events of 13 November were an armed aggression against France. Our military action, of which we informed the Security Council from the outset and which was justified as legitimate collective self-defence, can now also be characterized as individual self-defence, in accordance with Article 51 of the Charter of the United Nations.”).

²²³ House of Commons Library, Legal basis for UK military action in Syria, 2015, H.C. 7404 (U.K.).

²²⁴ Permanent Rep. of Den. to the U.N., Letter dated Jan. 11, 2016 from the Permanent Rep. of Denmark to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/34 (Jan. 13, 2016).

²²⁵ Permanent Rep. of Nor. to the U.N., Letter dated June 3, 2016 from the Permanent Rep. of Norway to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/513 (June 3, 2016).

²²⁶ Permanent Rep. of Belg. to the U.N., Letter dated June 7, 2016 from the Permanent Rep. of Belgium to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/523 (June 9, 2016).

²²⁷ Chargé d’affaires a.i. of Ger. to the U.N., Letter dated Dec. 10, 2015 from the Chargé d’affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/946 (Dec. 10, 2015).

²²⁸ Dapo Akande & Marko Milanovic, *The constructive ambiguity of the Security Council ISIS resolution*, EJIL: TALK!, (Nov. 21, 2015), <http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/>; Ashley Deeks, *Threading the Needle in Security Council Resolution 2249*, LAWFARE, (Nov. 23, 2015), <https://www.lawfareblog.com/threading-needle-security-council-resolution-2249>; Marc Weller, *UN resolution on IS “extraordinary step”*, BBC (Nov. 23, 2015), <http://www.bbc.com/news/world-europe-34900384>; Anne Peters, *German*

of the resolution, however, can be read in different ways. According to Dapo Akande and Marko Milanovic, S.C. Resolution 2249 “is constructed in such a way that it can be used to provide political support for military action, without actually endorsing any particular legal theory on which such action can be based or providing legal authority from the Council itself.”²²⁹ The resolution “allows for continuing disagreement as to the legality of those actions,”²³⁰ but given the decentralized and fragmented nature of international law and the dynamics of international politics, the situation is more complex. First, the non-binding character of the resolution signals that the permanent members of the Security Council were not willing to adopt a binding resolution to solve even this “unprecedented threat to international peace and security”²³¹ within the collective security system. Second, by using ambiguous language, the Security Council blurred the line between binding and non-binding decisions,²³² which is alarming with respect to future cases, especially in light of the history and interpretations of S.C. Resolution 1441 (2003) on the U.S. intervention in Iraq.²³³ Third, the ambiguous wording of the resolution can also have a negative effect on the scope of the right to self-defense. Instead of clarifying the rules on the use of force, it potentially opened the door to interpreting situations resembling the Syrian conflict as a permanent imminence of threat, which triggers the right to self-defense, even in the absence of an ongoing or imminent armed attack.²³⁴

Parliament decides to send troops to combat ISIS – based on collective self-defense “in conjunction with” SC Res. 2249, EJIL: TALK!, (Dec. 8 2015), <http://www.ejiltalk.org/german-parliament-decides-to-send-troops-to-combat-isis--based-on-collective-self-defense-in-conjunction-with-sc-res-2249/>.

²²⁹ Akande & Milanovic, *supra* note 228.

²³⁰ *Id.* Marko Milanovic, *How the Ambiguity of Resolution 2249 Does Its Work*, EJIL: Talk!, (Dec. 3 2015), <http://www.ejiltalk.org/how-the-ambiguity-of-resolution-2249-does-its-work/>.

²³¹ S.C. Res. 2249 (Nov. 20 2015).

²³² Deeks, *supra* note 228.

²³³ For the detailed analysis of S.C. Res. 1441 see GRAY, *supra* note 168, at 356–66.

²³⁴ Marc Weller, *Permanent Imminence of Armed Attacks: Resolution 2249 (2015) and the Right to Self Defence Against Designated Terrorist Groups*, EJIL: TALK!, (Nov. 25, 2015), <http://www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-self-defence-against-designated-terrorist-groups/>.

C. RIGHT TO SELF-DEFENSE AND THE APPLICABILITY OF THE
“UNABLE AND/OR UNWILLING” DOCTRINE

1. *The alleged right to self-defense directly against non-state actors*

Individual or collective self-defense might also serve as justification to use force within the territory of Syria. Except for France, which invoked the right to individual self-defense following the Paris attacks, all western States rely on collective self-defense. The lawfulness of the use of force in both the individual and the collective form of self-defense depends on the meaning of “armed attack” under Article 51 UN Charter.²³⁵ The right to collective self-defense has three requirements under customary international law: (i) the State of origin must be the victim of an armed attack, (ii) the State must openly declare this fact, and (ii) the State ought to call for assistance.²³⁶ As Iraq fulfilled all these criteria, the lawfulness of the self-defense measures against Syria will turn on the question of whether ISIL can be directly targeted, and if not, whether its actions can be attributed to Syria.

According to the original interpretation of Article 51 of the UN Charter, an armed attack has to directly or indirectly emanate from a state.²³⁷ The structural interpretation of Article 51, read in conjunction with Article 2(4),²³⁸ the established case law of the ICJ,²³⁹ and state

²³⁵ U.N. Charter art. 51.

²³⁶ *Nicar. v. U.S.*, 1986 I.C.J. ¶ 205.

²³⁷ *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 139 (July 9); *id.*, at ¶35 (Kojimans, J., separate opinion) (“This is the completely new element in these resolutions. This new element is not excluded by the terms of Article 51 since this conditions the exercise of the inherent right of self-defense on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years.”); *see also* Dem. Rep. Congo v. Uganda, Judgment, 2005 I.C.J. ¶ 28 (Dec. 19).

²³⁸ The main prohibition bans the use or threat of force between states. The well-established exception to this prohibition can possibly not be broader than the main prohibition rule. This is also reflected in the definition of aggression – which is one of the triggering act of the other exception to Article 2(4) namely that of SC authorizations and which, like armed attack, is also regarded as a more serious form of the use of force. “Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State . . .” G.A. Resolution 3314 (XXIX), at 143 (Dec. 14, 1974). *See also* Olivier Corten, *The ‘Unwilling or Unable’ Test: Has it Been, and Could it be, Accepted?*, 29 LEIDEN J. INT’L L., 777, 795 (2016).

²³⁹ *Nicar. v. U.S.*, 1986 I.C.J. ¶ 205 ; *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. Rep. 161 (Nov. 6); *Dem. Rep. Congo v. Uganda*, 2005 I.C.J. ¶¶ 162-165; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 139 (July 9).

practice, also confirms that some degree of state involvement is required. Contrary to the widely held view that self-defense directly against non-state actors has sufficient support in state practice,²⁴⁰ a survey of the relevant positions of States suggests otherwise. For example, regarding the invasion of Afghanistan in October 2001, the U.S. referred to the tight link between the Taliban and Al-Qaeda²⁴¹ and did not invoke the right to self-defense against non-state actors. Similarly, Israel did not claim self-defense against non-state actors after the abduction of the IDF soldiers. Rather, Prime Minister Ehud Olmert made clear that Israel attributed the attack to Lebanon, Syria and Iran and, thus, Israel used force against those territorial States to whom the attack was attributed.²⁴²

²⁴⁰ This is the position of the so-called expansionist school, on which I will elaborate further in the subsequent paragraph.

²⁴¹ The US has exercised self-defense against Afghanistan based on the UK's report on Al Qaeda, where the investigation concluded that the Taliban, the de facto government and bin Laden's terrorist organization were mutually dependent on each other. See UK Press Release, Office of the British Prime Minister, Responsibility for the Terrorist Atrocities in the United States, 11 September 2001, (Oct. 4, 2001), <http://fas.org/irp/news/2001/11/ukreport.pdf> ("Osama bin Laden's Al Qaeda and the Taliban regime have a close and mutually dependent alliance. Osama bin Laden and Al Qaeda provide the Taliban regime with material, financial and military support. They jointly exploit the drugs trade. The Taliban regime allows bin Laden to operate his terrorist training camps and activities from Afghanistan, protects him from attacks from outside, and protects the drugs stockpiles. Osama bin Laden could not operate his terrorist activities without the alliance and support of the Taliban regime . . . Osama bin Laden and the Taliban regime have a close alliance on which both depend for their continued existence."). During the adoption of S.C. Res. 1368, none of the Security Council members interpreted the 9/11 attacks as an armed attack within the meaning of Article 51. See U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/PV.4370 (Sept. 12, 2001). During the adoption of S.C. Res. 1368, none of the Security Council members interpreted the 9/11 attacks as an armed attack within the meaning of Article 51. See U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/PV.4370 (Sept. 12, 2001).

²⁴² Olmert: *This was an act of war, without any provocation, on our sovereign territory*, JERUSALEM POST (July 13, 2006), <http://www.jpost.com/Israel/Olmert-This-was-an-act-of-war-without-any-provocation-on-our-sovereign-territory> ("This morning, actions were carried out against IDF soldiers in the North. At this time, the security forces are operating in Lebanese territory. The cabinet will convene this evening in order to approve the continuation of the activity. I want to make it clear: This morning's events were not a terrorist attack but the action of a sovereign state that attacked Israel for no reason and without provocation. The Lebanese government, of which Hizbullah is a member, is trying to undermine regional stability. Lebanon is responsible and Lebanon will bear the consequences of its actions."). See also Steven Erlanger, *Israel Seeks Hint of Victory*, N. Y. TIMES, Aug. 13, 2006, <http://www.nytimes.com/2006/08/13/world/middleeast/13israel.html> (describing the conflict as "an Iranian Army division . . . a war conceived, organized, trained and equipped by Iran, with Iran's goal of destroying Israel . . ."); see also Permanent Rep. of Isr. to the U.N., Identical letters dated July 12, 2006 from the Permanent Rep. of Isreal to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2006/515 (July 12, 2006) ("Responsibility for this belligerent act of war lies with the Government of Lebanon, from whose territory these acts have been launched into Israel. Responsibility also lies with the

Finally, during the incursions into Iraq, Turkey did not rely on direct self-defense against the Kurdish militants; rather its argument was based on the narrow interpretation of Article 2(4).²⁴³

Despite the lack of clear customary foundations of claiming self-defense directly against non-state actors, scholarly literature is severely divided on this issue. The restrictionist school supports the view that no such right exists, and in order to use force against a non-state actor on the territory of another State some form of attribution is required.²⁴⁴ The expansionist school, however, interprets the right of self-defense with a considerably broader scope. These authors allege that victims of an attack that reaches a certain gravity can directly use force against non-state actors.²⁴⁵ This approach has led to what some deem the “unable or unwilling” doctrine. This doctrine permits defensive force against non-state actors on the territory of another State, not only if the latter actively supports the non-state actor, but even when the State is unable or unwilling to effectively address the threat posed by such actors.²⁴⁶ The reliance on the “unable or unwilling” test raises a troubling question:

Government of the Islamic Republic of Iran and the Syrian Arab Republic, which support and embrace those who carried out this attack.”).

²⁴³ Permanent Rep. of Turk. to the U.N., Identical letters dated Oct. 7, 1996 from the Permanent Rep. of Turkey to the United Nations addressed to the Secretary-General and to the President of the Security Council, U.N. Doc A/51/468 (Oct. 8, 1996). *See also* GRAY, *supra* note 168, at 141–43.

²⁴⁴ *See* GRAY, *supra* note 168 at 130, 132–33, 135–38; JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 747–48 (8th ed. 2012); Georg Nolte & Albrecht Randelzhofer, *Ch. VII Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 51*, in *THE CHARTER OF THE UNITED NATIONS : A COMMENTARY* 1397, 1417–19 (Bruno Simma et. al. eds., 2012); CORTEN, *supra* note 157, at 443–70; TOM RUYTS, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 426 (2013); KAMMERHOFER, *supra* note 46.

²⁴⁵ Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 *HARV. INT’L L. J.* 41, 47–51 (2002); Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 *J. TRANSNAT’L L. & POL’Y* 237, 238–39, 41, 44, 47, 51–53 (2010); Carsten Stahn, *Terrorist Acts as “Armed Attack”: The Right to Self-Defense, Article 51(1/2) of the UN-Charter and International Terrorism*, 27 *FLETCHER F. WORLD AFF.* 35, 36 (2003); NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 50–51 (2010); Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 *AM. J. INT’L L.* 839, 840 (2001); STANIMIR A. ALEXANDROV, *SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW* 183 (1996); Karl Zemanek, *Response to a Terrorist Attack: A Clarification of Issues*, 15 *AUSTRL. R. INT’L EUR. L.* 199, 209 (2010); Kimberley N. Trapp, *Can Non-State Actors Mount an Armed Attack?*, in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW* 679–80, (Marc Weller ed., 2015).

²⁴⁶ Monica Hakimi, *Defensive Force against Non-State Actors: The State of Play*, 91 *INT’L L. STUD.* 1, 12–13 (2015); Ashley S. Deeks, *“Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense*, 52 *VA. J. INT’L L.* 483, 487 (2012).

why are States invoking this admittedly novel and vague concept²⁴⁷ to justify their actions in Syria if the right to self-defense against non-state actors is established in international law for hundreds of years, as the expansionists claim?

2. *The critique of the unable and/or unwilling doctrine*

In light of the unanimously adopted S.C. Resolution 2249, the series of notifications to the Security Council reporting the use of force based on the right to self-defense, and the acquiescence of the international community, it is difficult to argue that individual self-defense by Iraq and France and collective self-defense by other States is contrary to the UN Charter. However, only some of the intervening States, such as the United States,²⁴⁸ the United Kingdom,²⁴⁹ Australia,²⁵⁰ and Canada,²⁵¹ claimed that Syria was unable or unwilling to fight ISIL effectively. In contrast, neither Germany,²⁵² Denmark,²⁵³ Norway²⁵⁴ or Belgium²⁵⁵ based their arguments on the unable and/or unwilling doctrine. The table below summarizes the various legal bases States invoked for their use of force on the territory of Syria.

²⁴⁷ See, e.g., Lang, *supra* note 223, at 14; see Sachstand [State of Affairs] Staatliche Selbstverteidigung gegen Terroristen: Völkerrechtliche Bewertung der Terroranschläge von Paris vom Nov. 13, 2015 [State Self-Defense against Terrorists: Legal evaluations of the Nov. 13, 2015 terror attacks in Paris], Wissenschaftliche Dienste Deutscher Bundestag [DT] WD 2 - 3000 - 203/15. See also Hakimi, *supra* note 246, at 3 (Ger.).

²⁴⁸ Permanent Rep. of the U.S. to the U.N., *supra* note 136. See Brian J. Egan, State Department Legal Advisor, Speech at the American Society of International Law (ASIL) (Apr. 1, 2016) (for a more detailed description of the US position).

²⁴⁹ Permanent Rep. of Gr. Brit. to the U.N., Letter dated Sept. 7, 2015 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/688 (Sept. 8, 2015); Permanent Rep. of Gr. Brit. to the U.N., Letter dated Dec. 3, 2015 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/928 (Dec. 3, 2015).

²⁵⁰ Permanent Rep. of Austl. to the U.N., *supra* note 136.

²⁵¹ Permanent Mission of Can. to the U.N., *supra* note 136.

²⁵² Permanent Mission of Ger. to the U.N., *supra* note 227.

²⁵³ Permanent Rep. of Den. to the U.N., Letter dated Jan. 11, 2016 from the Permanent Representative of Denmark to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/34 (Jan. 13, 2016).

²⁵⁴ Permanent Rep. of Nor. to the U.N., *supra* note 196.

²⁵⁵ Permanent Rep. of Belg. to the U.N., *supra* note 226.

Party	Legal basis	Since	UN Doc.
Iraq	Request for assistance	09/20/2014	S/2014/691
US	Invitation (from Iraq)	09/23/2014	S/2014/695
	Self-defence: unable or unwilling (in Syria)	09/23/2014	S/2014/695
Turkey	Self-defence: imminent threat (in Syria)	02/23/2015	S/2015/127
	Self-defence: neither capable of nor willing (in Syria)	07/24/2015	S/2015/563
UK	Collective self-defence: request from Iraq	11/26/2014	S/2014/851
	Individual self-defence: Imminent armed attack	09/08/2015	S/2015/688
	Collective self-defence: request from Iraq and unwilling and/or (sic!) unable	Nov/2015	PM Cameron
	Individual and collective self-defence	12/03/2015	S/2015/928
Russia	Invitation (from Syria)	10/15/2015	S/2015/792
France	Collective self-defence: request from Iraq	9/8/2015	S/2015/745
	Individual self-defence: Paris attacks	11/20/2015	S/PV.7565
Canada	Collective self-defence: unwilling or unable (Syria)	03/31/2015	S/2015/221
Australia	Collective self-defence: unwilling or unable (Syria)	09/09/2015	S/2015/693
Germany	Collective self-defence on behalf of Iraq and France: Syria lost effective control	12/10/2015	S/2015/946
Denmark	Collective self-defence against ISIL in Syria	01/11/2016	S/2016/34
Norway	Collective self-defence against ISIL in but not against Syria	06/03/2016	S/2016/513
Belgium	Collective self-defence against ISIL in but not against Syria Exceptional situation, Syria is not in effective control	06/09/2016	S/2016/523

Fig. 2: *The unable and/or unwilling doctrine in State practice*

In light of the above survey of State practice, it is extremely difficult to accept that the unable and/or unwilling test has found its way into customary international law. Although on its face the unable or unwilling test may sound very persuasive, legal scholarship is rightfully critical about its capacity to provide a new legal basis for using force or to serve as a test that substantially broadens the right to self-defense according to Article 51.²⁵⁶

²⁵⁶ Kevin Jon Heller, *Do Attacks on ISIS in Syria Justify the "Unwilling or Unable" Test?*, OPINIO JURIS (Dec. 13, 2014, 11:58 AM), <http://opiniojuris.org/2014/12/13/attacks-isis-syria-justify-unwilling-unable-test/>; Paulina Starski, *Right to Self-Defense, Attribution and the Non-State Actor – Birth of the "Unable or Unwilling" Standard?* 75 ZaöRv 455, 496, 498 (2015); Tom Ruys & Luca Ferro, *Divergent Views on the Content and Relevance of the Jus Ad Bellum in Europe and the United States? The Case of the U.S.-Led Military Coalition Against 'Islamic*

The unable or unwilling test raises the following unsolved problems and unanswered questions:

- The content of the test is unknown. The question, thus, arises as to the true meaning of the “unable or unwilling” terms. Who decides their content, in what procedure, and who applies these rules? Does loss of effective control amount to being “unable”? If so, for how long does a State have to lose (effective) control over its territory?²⁵⁷ Does omission constitute “unwillingness”?
- Diverse formulations raise the question of whether the newly established test is “unable *and* unwilling” or “unable *or* unwilling”?²⁵⁸
- It is not clear whether the unable and/or unwilling test is a new, *par excellence* self-defense argument, or a new attribution test within the meaning of Article 51, or only forms part of the necessity criteria that arises once the right to self-defense has been already triggered.²⁵⁹
- In the course of 2016, none of the States reporting to the Security Council under Article 51 of the UN Charter (Denmark,²⁶⁰ Norway,²⁶¹ and Belgium²⁶²) invoked the unable and/or unwilling doctrine;
- Even when the unable and/or unwilling doctrine was invoked, it was far from obvious if the territorial State was unable and/or unwilling to act, and whether the intervening State in fact

State’ (forthcoming article) (manuscript at 8-9) (on file with Book Chapter ASIL International Legal Theory Interest Group); Hakimi, *supra* note 246, at 31; Kinga Tibori-Szabó, *The ‘Unwilling or Unable’ Test and the Law of Self-defense*, in FUNDAMENTAL RIGHTS IN INTERNATIONAL AND EUROPEAN LAW 73 (2016); Dawood I. Ahmed, *Defending Weak States Against the “Unwilling or Unable” Doctrine of Self-Defense*, 9 J. INT’L L. & INT’L REL. 1, 4-5 (2013); Corten, *supra* note 238, at 778-80.

²⁵⁷ See e.g. Douglas Cantwell, “Unwilling or Unable” in the Legal Adviser’s ASIL Speech, LAWFARE (Apr. 12, 2016, 3:46 PM), <https://www.lawfareblog.com/unwilling-or-unable-legal-advisers-asil-speech> (for the critique on State Department Legal Advisor Brian Egan’s short reference to the relevance of loss of effective control over a certain territory).

²⁵⁸ See Prime Minister’s Response to the Foreign Affairs Select Comm.’s Second Report of Session 2015-16: The Extension of Offensive British Military Operations to Syria, Memorandum to the Foreign Affairs Select Comm. (Nov. 2015), <http://www.parliament.uk/documents/commons-committees/foreign-affairs/PM-Response-to-FAC-Report-Extension-of-Offensive-British-Military-Operations-to-Syria.pdf> (emphasis added).

²⁵⁹ This is indicated by State Legal Advisor Brian Egan’s speech at ASIL’s 2016 Annual Conference. See generally, Egan, *supra* note 248.

²⁶⁰ Permanent Rep. of Den. to the U.N., *supra* note 196.

²⁶¹ Permanent Rep. of Nor. to the U.N., *supra* note 196.

²⁶² Permanent Rep. of Belg. to the U.N., *supra* note 226.

seriously investigated the inability and/or unwillingness of that State.²⁶³

- How should we evaluate the Syrian request for Russian assistance against ISIL, which certainly expresses Syria's willingness to fight the non-state actor?
- The legal basis of the unable and/or unwilling doctrine is absolutely unclear; some states rely on neutrality law,²⁶⁴ others on the violation of the due diligence principle,²⁶⁵ and still others on the lack of the sovereignty-shield of failed States.²⁶⁶ Certain positions rely on the Caroline-precedent²⁶⁷ and the argument that the right of self-defense directly against non-state actors has been part of *jus ad bellum* for at least 200 years, while the unable and/or unwilling test only forms part of the necessity requirement of the right to self-defense.²⁶⁸ Hence, even those States that invoked the doctrine "lack a common and clear opinio juris" regarding this novel test.²⁶⁹
- Without fitting the concept into the existing framework of *jus contra bellum*, it undermines the concept of sovereignty, broadens the right to self-defense and hollows out the prohibition enshrined in Article 2(4).
- The doctrine is contrary to the logic of the collective security system, since it is primarily the Security Council's responsibility to assist those States that are unable and/or unwilling to cope with the continuing threat posed by non-state actors on their territory.

²⁶³ See, e.g., Jordan J. Paust, *Permissible Self-Defence Targeting and the Death of Bin Laden*, 39 DENVER J. INT'L L. & POL'Y 569, 580-81 (2011).

²⁶⁴ Deeks, *supra* note 246, at 490.

²⁶⁵ Claus Kreß, *The Fine Line Between Collective Self-Defense and Intervention by Invitation: Reflections on the Use of Force against 'IS' in Syria*, JUST SECURITY (Feb. 17, 2015, 8:45 AM), <https://www.justsecurity.org/20118/claus-krebs-force-isil-syria/#more-20118>.

²⁶⁶ Kenneth Chan, *State Failure and the Changing Face of the Jus ad Bellum*, 18 J. CONFLICT & SEC. L. 395 (2013).

²⁶⁷ Robert Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 82-99 (1938).

²⁶⁸ Egan, *supra* note 248.

²⁶⁹ Corten, *supra* note 238 at 780-85.

- Permitting the use of force solely on the basis of the territorial State's inability to address a non-state actor is very much open to abuse.²⁷⁰

Finally, how could the unable and/or unwilling test claim customary law status in the absence of sufficient state practice to determine its content? Professor Anne Peters recently expressed doubts about this aspect of the unable and/or unwilling principle.²⁷¹ Despite the recent practice of the United States, Australia and Canada, Professor Peters points to the potential dangers of the broad interpretation of self-defense that permits the use of force based on the too vague criteria of unwillingness and/or inability.²⁷² Paulina Starski is also critical about the concept, pointing out that it could potentially erode the general prohibition on the use of force and that the "Security Council itself has contributed to blurring the lines between self-defense and law enforcement."²⁷³ In an in-depth analysis, Olivier Corten points out that the unable and/or unwilling test lacks both sufficient state practice and clear *opinio juris*, reinterprets the right to self-defense, undermines the system of Article 2(4) and 51 of the UN Charter, and challenges the very foundations of the UN collective security system.²⁷⁴

3. *Fitting the inability or unwillingness of a State into the current jus contra bellum system*

Even if we accept that using force in Syria is lawful on the basis of Article 51, it is unnecessary to subscribe to a concept of self-defense directly against non-state actors, nor to the novel and dangerous unable and/or unwilling doctrine. As an effective and lawful alternative to this uncertain concept, the inability or unwillingness of a State can also be interpreted as the content of the "substantial involvement" scenario, enshrined in Article 3(g) G.A. Resolution 3314 on the Definition of

²⁷⁰ Ruys and Ferro draw attention to the fact that Molenbeek was widely regarded as safe haven for terrorist in Brussels and there were doubts whether the government had control over the territory from where the 2015 Paris attacks originated. See Ruys & Ferro, *supra* note 256, at 22.

²⁷¹ Peters, *supra* note 228.

²⁷² *Id.*

²⁷³ Starski, *supra* note 256, at 497.

²⁷⁴ Corten, *supra* note 238, at 780, 86, 92, 95, 97, 99.

Aggression.²⁷⁵ The customary nature of this provision was reinforced by the ICJ, which used Article 3(g) as an analogy to find that an armed attack can be committed not only directly, but also indirectly.²⁷⁶ Although the ICJ in Nicaragua did not clarify the types of State conduct that can qualify as an act of aggression under Article 3(g),²⁷⁷ nothing excludes the possibility to interpret “substantial involvement” as the unwillingness or inability of a State to prevent attacks emanating from non-state actors present on its territory.

Using the unable and/or unwilling test for defining the content of Article 3(g) would be in conformity with the internal logic of Article 2(4) and Article 51 of the Charter. The usual conditions of proportionality and necessity would be still applicable. Consequently, in an unable or unwilling scenario under Article 3(g), the victim State would most likely be prevented from using force against the military of the territorial State, and would be confined to use proportionate force only against the non-state actor. In this way, both aims will be duly met: on the one hand, there will be a legal basis to use force against the actual attacker, satisfying the legitimate security concerns of the victim State; and on the other hand, the violation of the territorial integrity and political independence of the territorial state, which would otherwise be a clear violation of the *jus cogens* norm of Article 2(4),²⁷⁸ will be justified.

D. HUMANITARIAN INTERVENTION IN SYRIA?

Although Marc Weller argues for applying humanitarian intervention to the Syrian conflict as a possible way “to justify forcible action in extreme circumstances of humanitarian need,”²⁷⁹ State practice does not support a separate exemption for humanitarian intervention under the general ban on the use of force. As discussed above, the only exceptions from the general prohibition of Article 2(4) are those enshrined in the Charter, namely the right to self-defense and the

²⁷⁵ G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631, at 2 (14 Dec. 1974) (“The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”).

²⁷⁶ *Id.*

²⁷⁷ *Nicar. v. U.S.*, 1986 I.C.J. ¶ 195.

²⁷⁸ *Id.* ¶ 190.

²⁷⁹ Marc Weller, *Islamic State crisis: What force does international law allow?*, BBC (Sept. 25, 2014), <http://www.bbc.com/news/world-middle-east-29283286>.

authorization of the Security Council.²⁸⁰ Humanitarian intervention as a separate legal ground for using force is excluded by the all-encompassing scope of Article 2(4), which prohibits any use or threat of force “against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”²⁸¹ According to the *travaux préparatoires* to the UN Charter, this language was proposed by Australia and other smaller States in order to broaden the scope of the general prohibition.²⁸² The U.S. representative explicitly stated that the drafters intended to create a general ban without any exceptions other than those named in the Charter.²⁸³ Although contrary interpretations exist, they are limited in number.²⁸⁴

In the Corfu Channel case in 1949, the ICJ famously rejected the permissive reading of Article 2(4) by the United Kingdom in order to allow the gathering of evidence without violating the territorial integrity and political independence of Albania.²⁸⁵ The ICJ stated, “[t]he Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law . . . from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.”²⁸⁶

The Corfu Channel judgment in effect held that annexation or occupation is not a prerequisite for a violation of a State’s territorial integrity. Use of force falling short of a regime change or the disapproval of the political system of another State will infringe the political independence of that State. Thus, humanitarian intervention as a separate legal ground to use force runs against the broad interpretation of Article 2(4).²⁸⁷ The US invasion of Grenada (1983),²⁸⁸ and later of Panama

²⁸⁰ U.N. Charter art. 2(4); U.N. Charter art. 42.

²⁸¹ *Supra* note 279.

²⁸² Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law* (1999); Carin Kahgan, *Jus Cogens and the Inherent Right to Self-Defense*, 3 ILSA J. INT’L & COMP. L. 767, 801 (1997).

²⁸³ Ian Brownlie, *The Use of Force in Self-Defense*, 37 BRIT. Y. B. INT’L L. 183, 236 n.2 (1961).

²⁸⁴ See Anthony D’Amato, *The Invasion of Panama was a Lawful Response to Tyranny*, 84 AM. J. INT’L L. 516, 522-23 (1990).

²⁸⁵ *Gr. Brit. v. Alb.*, Judgment, 1949 I.C.J. ¶ 35 (Apr. 9).

²⁸⁶ *Id.*

²⁸⁷ Oliver Dörr & Albrecht Randelzhofer, *Ch.I Purposes and Principles, Article 2(4)*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (Bruno Simma et al. eds., 3rd ed. 2012);

(1989),²⁸⁹ were both based partly on humanitarian considerations and condemned by the international community as violations of international law, particularly that of the UN Charter.²⁹⁰

Although humanitarian intervention is often referred to and discussed in legal literature,²⁹¹ it is striking that only a handful of States have ever invoked the concept. Intervening States continue to ignore this concept as a possible justification, including India regarding its intervention in Bangladesh (1971),²⁹² Tanzania in its intervention in Uganda (1979),²⁹³ or Vietnam regarding Cambodia (1978).²⁹⁴ In the last two decades, only the United Kingdom²⁹⁵ and Belgium²⁹⁶ have relied on humanitarian intervention. For this reason, it is unsurprising that none of the States intervening in Syria (2014-2016) have relied on the doctrine of humanitarian intervention to justify the use of force against ISIL, in spite of the fact that the humanitarian situation engendered by the Syrian government and ISIL would have rendered this a textbook example of a humanitarian intervention. The fact that none of the intervening States

Nigel Rodley, *Humanitarian Intervention*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 775 (Marc Weller, ed., 2015).

²⁸⁸ GRAY, *supra* note 168 at 390–91.

²⁸⁹ G.A. Res. 44/240, ¶ 1 (Dec. 29, 1989) (calling intervention in Panama a “flagrant violation of international law.”). See Sarah A. Ramage, *Panama and the Myth of Humanitarian Intervention in U.S. Foreign Policy: Neither Legal Nor Moral, Neither Just Nor Right*, 10 ARIZ. J. INT’L & COMP. L. 1, 4 (1993); Ved P. Nanda, *The Validity of United States Intervention in Panama under International Law*, 84 AM. J. INT’L L. 494 (1990); Tom J. Farer, *Panama: Beyond the Charter Paradigm*, 84 AM. J. INT’L L. 503 (1990).

²⁹⁰ See generally OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 118–19 (1991); see also Ian Brownlie, *The U. N. Charter and the Use of Force, 1945-1985*, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 491 (A. Cassese ed. 1986).

²⁹¹ ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 244 (1994); GRAY, *supra* note 168, at 33-55; SIMON CHESTERMAN, JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW (2001); HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS (J.L. Holzgrefe & Robert O. Keohane eds., Cambridge Univ. Press 2003); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 Eur. J. Int’l L. 1 (1999); Peter Hilpold, *Humanitarian Intervention – Is There a Need for a Legal Reappraisal?*, 12 EUR. J. INT’L L. 437 (2001); Christian J. Tams, *Prospects for Humanitarian Uses of Force*, in Realizing Utopia: The Future of International Law 359 (Antonio Cassese ed., 2012).

²⁹² GRAY, *supra* note 168, at 33-34.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ Operation Provide Comfort in Iraq (1992). See generally Peter Malanczuk, *The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War*, 2 EUR. J. INT’L L. 114 (1991); Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, 10 FINNISH Y. B. INT’L L. 141 (1999).

²⁹⁶ In Kosovo in 1999. See Legality of Use of Force (Yugoslavia v. Belg.), Preliminary Objections of the Kingdom of Belgium, 2000 I.C.J. ¶¶ 93-113 (July 5).

have invoked the principle in such a clear situation puts an end to the debate on the status of the doctrine.²⁹⁷

IV. CONCLUSION

Given that ISIL is not a State but a universally condemned terrorist organization, the territorial integrity of Iraq and Syria has remained unaffected by the presence of ISIL. Consequently, a valid invitation must be issued by the effective government of the respective States allowing foreign forces to intervene for justifying the use of force in both Iraq and Syria by outside States. Alternatively, the intervening States may invoke one of the exceptions under Chapter VII and Article 51 in order to secure compliance with the UN Charter's provisions regarding the lawful use of force.

The United States and its allies are lawfully using force in Iraq by relying on the invitation of the Iraqi government. This invitation is unlimited, as the Iraqi government is not involved in a fight with an armed group legitimately claiming the right to self-determination. The same holds true for Russia's use of force against ISIL in Syria. President Assad's invitation, however, cannot cover the strikes against the opposition forces, because they are engaged in a civil war with the government. Moreover, as a representative of a People, the opposition forces could validly rely on their right to self-determination even in a conflict short of civil war. In this regard, the Syrian government lacks the authority to issue a valid invitation, thus, Russia is violating the UN Charter by bombing opposition forces.

As to the exceptions from the general prohibition to the use of force enshrined in Article 2(4) of the UN Charter, the analysis of UN Security Council authorization and the right to self-defense leads to a different conclusion. S.C. Resolution 2249 (2015) is not binding, and therefore lacks the power to authorize any State to use force in Syria. The resolution only eases the political decision-making of national parliaments and governments by "calling upon Member States that have the capacity to do so to take all necessary measures" and to eradicate the safe haven created by ISIL.²⁹⁸ The resolution's political compromise, however comes with an additional cost: it blurs the line between binding

²⁹⁷ The Security Council can authorize the use of force in a humanitarian crisis but this too has to be adopted under Article 25 or Chapter 7 (Article 42). U.N. Charter art. 25, 42.

²⁹⁸ S.C. Res. 2249, ¶ 5, (Nov. 20, 2015).

and non-binding SC decisions, the consequence of which will only be seen in the future.

This research shows that if State practice and *opinio juris* are properly examined, neither the right to self-defense directly against non-state actors nor the vague concept of the unable and/or unwilling test have gained customary status. None of the States invoking the right to self-defense in Syria since December 2015 relied on this doctrine, showing considerable reluctance against the novel concept. Furthermore, an increasing number of leading scholars have expressed their concerns about the dangers of this doctrine.

Syria serves as a battlefield of two simultaneous struggles. One struggle, of a military nature, takes place between States and non-state actors. Although this war is extremely brutal and devastating for both Syria and Iraq, it is, sadly, not an unprecedented event, and hopefully will not last long.²⁹⁹ The other struggle is more enduring, pertaining to doctrine and methodology. Expansionist and restrictionist scholars debate desperately over the scope of Article 2(4) and that of the right to self-defense.³⁰⁰

The general prohibition of the use of force enshrined in Article 2(4) is one of the most outstanding achievements of human civilization. Despite all of its imperfections and deficiencies, the international community was able to reach a consensus on eliminating the use of force from international relations except for two narrow exceptions. Those who codified the text and voted for the UN Charter experienced two world wars and numerous occasions when States abused their power. As reflected in the Preamble of the UN Charter,³⁰¹ our ancestors, inspired by their decisive historical experience, aimed to pass a general prohibition on the use of force onto forthcoming generations and international lawyers.

The ongoing legal battle regarding the use of force against ISIL also demonstrates the considerable room that exists for competing interpretations on the norms of *jus contra bellum*. Commentators and

²⁹⁹ Kenneth M. Pollack, *Iraq Situation Report, Part I: The military campaign against ISIS*, BROOKINGS (Mar. 28, 2016), <http://www.brookings.edu/blogs/markaz/posts/2016/03/28-military-campaign-against-isis-pollack>.

³⁰⁰ For the expansionist school see, e.g., DINSTEIN, *supra* note 168, at 189; DEREK BOWETT, *Self-Defence in International Law* 3 (Manchester Univ. Press 1958). For the restrictionist school see, e.g., CORTEN, *supra* note 157, at 94; GRAY, *supra* note 168.

³⁰¹ U.N. Charter Preamble (“We the Peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind . . .”).

legal advisors have to decide on a case-by-case basis whether they support an extensive interpretation of the use of force or maintaining the restraints of the UN Charter. By paraphrasing Koskenniemi, this paper aimed to stress that “the gentle civilizers of nations”³⁰² are, in fact, the international lawyers themselves, while their discipline serves only as a tool for accomplishing their task.

³⁰² MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 1-2 (2004).