

SYRIA: THE UNBEARABLE LIGHTNESS OF INTERVENTION

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ABSTRACT

Now that the US-led intervention against the Islamic State in Syria is winding down, we would do well to begin to understand it. While critics of the intervention have long sensed that the US was proceeding on the basis of a novel legal theory, they have misinterpreted what that theory is. Far from seeking to lower the threshold of infringement of United Nations Charter (UNC) Article 2(4) to one of strict liability for “unable” Non-State-Actor (NSA) host States, the US militarily intervened in Syria on the basis of a theory of sovereignty-forfeiture according to which unable hosts that are deemed politically unworthy lose the right to consent to, and place conditions on, counter-NSA intervention by foreign states.

This actual US theory represents a creative commingling of two threads of interventionist logic that once had seemed incompatible: Humanitarianism to deal with dictators and the Failed State Doctrine to deal with weak central State authorities. But is it consistent with existing international law or with basic notions of political-moral legitimacy? This article offers the first in-depth analysis of the “Commingled Position” in an attempt to answer these questions. Combining sympathy for an expansive reading of UNC Article 51 with a deep concern to safeguard the political equality and independence of NSA-host States, this article concludes that the Commingled Position is both legally deficient and—as deployed in Syria—morally untenable.

Abstract.....	515
Introduction: A Tale of Two Septembers	516
I. Back to Basics: The Necessity of Seeking and/or Accepting Offers of Consent.....	525
II. Justifications for Not Seeking and/or Accepting Syria’s Offer of Consent.....	529
A. The Humanitarian Justification.....	529
B. The Civil War Justification.....	532

C. The Self-Defense Justification.....	541
III. Conclusion.....	547

INTRODUCTION: A TALE OF TWO SEPTEMBERS

The West's sustained campaign of involvement in Syria, now in its seventh year, can be likened to a two-act play. Act I began in 2011 when the United States and many of its allies decided that the government of Syria, headed by President Bashar al-Assad, was unacceptable from a humanitarian and democracy standpoint. President Obama declared that "Assad must go,"¹ politically recognized the anti-Assad opposition as the legitimate representative of the Syrian people,² and eventually (in September 2013) proposed a kinetic campaign with Responsibility to Protect (R2P) overtones to rescue the Syrian population from Assad's alleged chemical weapons use.³ When this proposal failed to gain the support of key allies and rivals that sit in the UN Security Council,⁴ as well as in the US Congress,⁵ the pro-Democracy/R2P

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¹ Scott Wilson & Joby Warrick, *Assad Must Go, Obama Says*, WASH. POST (Aug. 18, 2011), https://www.washingtonpost.com/politics/assad-must-go-obama-says/2011/08/18/gIQAelheOJ_story.html?utm_term=.93e180cb2f2e/. The Arab League quickly reinforced Obama's call with a power-transition proposal of its own. See Kareem Fahim, *Arab League Floats Ambitious New Peace Plan for Syria*, N.Y. TIMES (Jan. 22 2012), <http://www.nytimes.com/2012/01/23/world/middleeast/arab-league-floats-new-peace-plan-for-syria.html?mcubz=3>.

² Jill Dougherty, *Obama Recognizes Syrian Opposition Coalition*, CNN (Dec. 12, 2012), <http://edition.cnn.com/2012/12/11/world/us-syria-opposition/index.html>.

³ President Barack Obama, Remarks by the President in Address to the Nation on Syria (Sept. 10, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria/>.

⁴ Peter Allen, *French Oppose Military Intervention in Syria and Don't Trust Francois Hollande to Carry It Out*, TELEGRAPH (Aug. 31, 2013), <https://www.telegraph.co.uk/news/worldnews/europe/france/10278076/French-oppose-military-intervention-in-Syria-and-dont-trust-Francois-Hollande-to-carry-it-out.html>; Saptarshi Ray, *Syria: Putin Rubbishes Chemical Attack Claims*, THE GUARDIAN (Aug. 31, 2013), <https://www.theguardian.com/world/2013/aug/31/syria-un-weapons-inspectors-leave>; *UK Parliament Votes Against Military Action in Syria*, CNBC (Aug. 29, 2013), <https://www.cnbc.com/id/100988766>.

⁵ Mark Landler & Jonathan Weisman, *Obama Delays Syria Strike to Focus on a Russian Plan*, N.Y. TIMES (Sept. 10, 2013), <http://www.nytimes.com/2013/09/11/world/middleeast/syrian-chemical-arsenal.html?pagewanted=all>; Sebastian Murdock, *Majority of Republicans Said 'No' When Obama Wanted to Launch a Strike On Syria*, HUFFINGTON POST (Apr. 7, 2017), http://www.huffingtonpost.com/entry/republi-cans-strike-syria-trump_us_58e6f71de4b051b9a9da355d.

narrative—what I shall call the “Better Syria” rationale—lost momentum and seemed in danger of fizzling out.

Act II of the interventionist drama began almost immediately thereafter. By early winter 2014 there were reports of a major international terrorist threat brewing in the thinly policed and administered terrain of western Iraq/eastern Syria. The US and many of its allies declared this threat—variously known as the Islamic State, ISIL, ISIS, and Daesh—to be unacceptable from a national security standpoint. On September 10, 2014, precisely one year to the day after he had proposed sending bombers against President Assad to teach him a lesson in *jus in bello* (broadly construed), President Obama went before the cameras seeking support for a bombing campaign against an NSA located on Assad’s territory in the name of that most sacrosanct element of *jus ad bellum*: (collective) self-defense.⁶

Once Act II began, those officials most responsible for articulating the United States’ international legal position acted largely as if Act I had never occurred. In her Article 51 letter to the UN Security Council, US Ambassador Samantha Power avoided the customary condemnation of the Syrian Government and instead curtly justified the US bombing campaign on the basis of the Syrian Government’s alleged unwillingness or inability to tackle the ISIL threat.⁷ Further details of the US legal position were slow to trickle out, but when they did they had an equally conclusory and de-contextualized ring to them. In April 2016, then-State Department Legal Adviser Brian Egan delivered remarks suggesting that the US was relying exclusively on the “unable” prong of the “unwilling or unable” standard and, further, that the Syrian Government’s inability vis-à-vis ISIL *in and of itself* obviated the need for the US to seek and receive the Syrian Government’s consent prior to deploying military force against ISIL on Syrian territory.⁸ Like Powers

⁶ President Barack Obama, Statement by the President on ISIL (Sept. 10, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/09/10/statement-president-isil-1>.

⁷ Permanent Rep. of the U.S. to the U.N., Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014).

⁸ See Benjamin Wittes, *State Department Legal Adviser Brian Egan’s Speech at ASIL*, LAWFARE BLOG (Apr. 8, 2016), <https://www.lawfareblog.com/state-department-legal-adviser-brian-egans-speech-asil>. Remarkd Egan:

[I]n the case of ISIL in Syria, as indicated in our Article 51 letter, we could act in self-defense without Syrian consent because we had determined that the Syrian regime was unable or unwilling to prevent the use of its territory for armed attacks by ISIL . . . With respect to the ‘unable’ prong of the standard, inability perhaps can be

before him, Egan avoided making any statements that impugned the legitimacy of the Syrian Government. While the White House and the US State Department each emphasized that the US had no interest in cooperating with the Syrian Government against ISIL and had not sought its consent prior to bombing ISIL positions,⁹ neither explained the American posture in terms that were overtly derogatory of the regime. Key US allies like Germany seemed to support the American effort to put Act I in the rear-view mirror as quickly as possible.¹⁰

For its part, the Syrian Government expressed relief at the United States' shift in focus toward ISIL—an enemy it had been battling for several years¹¹—and quickly sought to assert Syria's sovereignty rights respecting that shift.¹² The Syrian Government declared early on that it opposed ISIL's presence on Syrian territory and was willing to work with foreign States (including the US) in a counter-ISIL campaign *provided* they respect Syrian sovereignty by consulting and coordinating their military action with the Syrian Government.¹³ In the ensuing years

demonstrated most plainly, for example, where a State has lost or abandoned effective control over the portion of its territory from which the non-State actor is operating. This is the case with respect to the situation in Syria. By September 2014, the Syrian government had lost effective control of much of eastern and northeastern Syria, with much of that territory under ISIL's control.

Id.; see also Doug Cantwell, *Unwilling or Unable' in the Legal Adviser's ASIL Speech*, IT SEC. NEWS (Apr. 12, 2016), <https://www.itsecuritynews.info/unwilling-or-unable-in-the-legal-advisers-asil-speech>.

⁹ See Justin Sink, *White House Won't Commit to Asking Congress for Syria Strike*, THE HILL (Aug. 25, 2014), <http://thehill.com/policy/defense/215905-white-house-wont-commit-to-asking-congress-for-syria-strike>; Craig Whitlock, *US Begins Airstrikes Against Islamic State in Syria*, WASH. POST (Sept. 23, 2014), https://www.washingtonpost.com/world/national-security/us-begins-airstrikes-against-islamic-state-in-syria/2014/09/22/8b677e26-42b3-11e4-b437-1a7368204804_story.html?utm_term=.df4f81e691c7.

¹⁰ Stephen Brown, *Berlin Voices Support for Air Strikes on Islamic State in Syria*, REUTERS (Sept. 27, 2014), <http://www.reuters.com/article/us-mideast-crisis-germany/berlin-voices-support-for-air-strikes-on-islamic-state-in-syria-idUSKCN0HL1BU20140926> (“The attacks in northern Syria are not about Syria itself or the Syrian government, it is about helping the Iraqi government to defend Iraq against attacks carried out by IS from Syria,” said Merkel’s spokesman Steffen Seibert.”).

¹¹ See Olivier Corten, *The ‘Unwilling or Unable’ Test: Has It Been, and Could It Be, Accepted?*, 29 LEIDEN J. INT’L L. 777, 787 (2016); Kinga Tibori-Szabó, *The ‘Unwilling or Unable’ Test and the Law of Self-Defense*, in FUNDAMENTAL RIGHTS IN INTERNATIONAL & EUROPEAN LAW 73, 94 (Christophe Paulussen et al. eds., 2015).

¹² See U.N. SCOR, 7271st mtg. at 43, U.N. Doc. S/PV.7271 (Sept. 19, 2014).

¹³ See, e.g., *id.*; U.N. SCOR, 7316st mtg. at 33, U.N. Doc. S/PV.7316 (Nov. 19, 2014); H.E. Walid Al-Moualem, Deputy Prime Minister of Syria, Statement to the United Nations General Assembly (Sept. 29, 2014), <https://www.justsecurity.org/wp-content/uploads/2014/12/Syria-Foreign-Minister-Walid-al-Moualem-address-69th-United-Nations-General-Assembly-September-29-2014.pdf>; *Syria Offers to Help Fight ISIS but Warns Against Unilateral Air*

the Syrian Government never wavered in any significant respect from this position.¹⁴ While some scholars saw in it a highly attenuated form of consent to a unilaterally conducted intervention,¹⁵ it plainly amounted to something more assertive than that. The Syrians did not greet the Americans with silence but with a conditional offer grounded in a bilateral understanding of the scope and purpose of the proposed intervention. And the reason for this conditionality was clear: given all that had transpired in Act I, Syrian officials feared the US would turn some of its counter-ISIL firepower against Syrian government forces.¹⁶ It

Strikes, THE GUARDIAN (Aug. 26, 2014), <https://www.theguardian.com/world/2014/aug/26/syria-offers-to-help-fight-isis-but-warns-against-unilateral-air-strikes>; *Syria's President Speaks: A Conversation with Bashar al-Assad*, FOREIGN AFFAIRS (Mar.–Apr. 2015), <https://www.foreignaffairs.com/interviews/2015-01-25/syrias-president-speaks>.

¹⁴ See, e.g., Permanent Rep. of Syria, Identical Letters dated 12 July 2017 from the Chargé d'affaires a.i. of the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2017/603 (July 14, 2017) [hereinafter Identical Letters dated 12 July 2017]; Permanent Rep. of Syria, Identical Letters dated 21 September 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, UN Doc. A/70/385- S/2015/727 (Sept. 22, 2015); Permanent Rep. of Syria, Identical Letters dated 17 September 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/2015/719 (Sept. 21, 2015); see also Corten, *supra* note 11, at 787; Olivia Flasch, *The Legality of the Air Strikes Against ISIL in Syria: New Insights on the Extraterritorial Use of Force Against Non-State Actors*, 3 J. ON THE USE OF FORCE & INT'L LAW 37, 43-46 (2016).

On one brief occasion, in late September 2014, the Syrian Government indicated that the coordination and consultation it was seeking amounted to little more than vaguely-worded advance notice of counter-ISIL airstrikes. But even then it made clear that its consent to the strikes was based on the expectation that they would avoid civilian and governmental structures and hit only ISIL positions. See Zeina Karam, *Syrian Foreign Minister: The US Said 'We Are Not After the Syrian Army' Before Airstrikes*, BUS. INSIDER (Sept. 30, 2014), <http://www.businessinsider.com/syrian-foreign-minister-the-us-said-we-are-not-after-the-syrian-army-before-airstrikes-2014-9?IR=T>.

¹⁵ See, e.g., Karine Bannelier-Christakis, *External Intervention Against ISIS and the Legal Basis of Consent*, 29 LEIDEN J. INT'L L. 743, 771 (2016) (absence of protest by Syria during first year of intervention 'could lead' toward idea of passive consent); Monica Hakimi, *Assessing (Again) the Defensive Operations in Syria*, JUST SEC. (Jan. 22, 2015), <https://www.justsecurity.org/19313/assessing-again-defensive-operations-syria/> (The US "operation appears to have some 'buy in' from the Syrian regime. While the United States has insisted that it did not obtain Assad's consent or otherwise coordinate with the regime, the United States *did* notify Assad in advance of the strikes, and Assad chose not to resist.") (emphasis in original).

¹⁶ See *infra* Sections II.B, II.C. This fear was stoked by statements made by both President Obama and the anti-Assad opposition. See President Barack Obama, Statement by the President on Airstrikes in Syria (2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/09/23/statement-president-airstrikes-syria> ("Meanwhile, we will move forward with

was this conditional offer of consent that the US barely acknowledged and (in the words of one commentator) “quickly rebuffed.”¹⁷ Needless to say, a rebuffed offer of consent, even if it occasions no outright resistance on the part of the host State, does little to legitimate an intervention as consensual.¹⁸

To describe the United States’ “inability-obviates-consent” formula¹⁹ as novel would be a vast understatement; it went far beyond the existing bounds of controversy regarding the relationship between UNC Articles 2(4) and 51. While some scholars have proposed making the latter independent of the former by dispensing with state attribution/responsibility as a precondition to self-defense in “unable-but-unwilling-to-accept-help” cases,²⁰ few have dared propose jettisoning the requirement of seeking a host State’s consent in the first instance.²¹ And for good reason: asserting the right of self-defense in the face of refused consent is one thing; asserting the right of self-defense without even bothering to ask for consent and/or ignoring an offer of it—what Ryan Goodman calls the “exception to the exception”²²—is quite another. That key architects of the “unwilling or unable” standard were sensitive to the difference is clear from their early emphasis on the importance of host-State consent to counter-NSA campaigns.²³ And while these very same

our plans . . . to ramp up our effort to train and equip the Syrian opposition, who are the best counterweight to ISIL *and the Assad regime.*”) (emphasis added); Ian Black & Dan Roberts, *ISIS Air Strikes: Obama’s Plan Condemned by Syria, Russia and Iran*, THE GUARDIAN (Sept. 12, 2014), <https://www.theguardian.com/world/2014/sep/11/assad-moscow-tehran-condemn-obama-isis-air-strike-plan> (“Syrian opposition groups welcomed Obama’s announcement and called for heavy weapons to fight the ‘terror’ of ISIS *and Bashar al-Assad.*”) (emphasis added).

¹⁷ Cantwell, *supra* note 8.

¹⁸ Significantly, none of the States taking part in the US-led coalition sought to justify their intervention on the basis of consent. Bannelier-Christakis, *supra* note 15, at 767.

¹⁹ The formula was acknowledged, arguably to the point of endorsement, by those U.S. allies that mentioned the ‘unwilling or unable’ standard in the Syrian context. See Corten, *supra* note 11, at 780–85 (canvassing the legal positions of States participating in the US coalition); Marko Milanovic, *Belgium’s Article 51 Letter to the Security Council*, EJIL: TALK! (June 17, 2016), <https://www.ejiltalk.org/belgiums-article-51-letter-to-the-security-council/> (analyzing German and Belgian Article 51 UNC letters).

²⁰ See, e.g., Kimberley Trapp, *Actor-Pluralism, the ‘Turn to Responsibility’ and the Jus Ad Bellum: ‘Unwilling or Unable’ in Context*, 2 J. ON USE FORCE & INT’L L. 199 (2015).

²¹ For a rare exception, see Michael Lewis, *What Does the ‘Unwilling or Unable’ Standard Mean in the Context of Syria?*, JUST SEC. (Sept. 12, 2014), <https://www.justsecurity.org/14903/unwilling-unable-standard-context-syria/>.

²² Ryan Goodman, *International Law on Airstrikes against ISIS in Syria*, JUST SEC. (Aug. 28, 2014), <https://www.justsecurity.org/14414/international-law-airstrikes-isis-syria/>.

²³ See Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT’L L. 770, 776 (2012); Ashley Deeks, *‘Unwilling or Unable’: Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT’L L. 483, 520 (2012).

architects went mysteriously quiet on the issue of consent after the US unveiled its legal power play,²⁴ other scholars who correctly perceived in that play a radical departure from the *jus ad bellum* of modern international law fired off strong and effective criticism.²⁵

There is much to applaud in this criticism and it indeed represented a necessary rebuke of a highly destabilizing theory. That said, we must recognize the extent to which it also represented a mostly intellectual exercise. The “inability-obviates-consent” formula was and remains an easy target precisely because it was and remains a sham: it is my contention that it *never* served as the true legitimizing basis of the United States’ intervention in Syria. This was evident from the very outset of the counter-ISIL campaign (September 2014) from the words of President Obama himself:

Across the border, in Syria, we have ramped up our military assistance to the Syrian opposition. Tonight I call on Congress again to give us additional authorities and resources to train and equip these fighters. *In the fight against ISIL, we cannot rely on an Assad regime that terrorizes its own people, a regime that will never regain the legitimacy it has lost.* Instead, we must strengthen the opposition as the best counterweight to extremists like ISIL, while pursuing the political solution necessary to solve Syria’s crisis once and for all.²⁶

President Obama’s reasoning was echoed by France two months later, in November 2014, when it stated that success in fighting ISIL depended not on cooperation with the Syrian Government but, in effect, its removal:

Military action alone cannot sustainably address terrorism. . . . [I]n Syria, *only a political transition at the national level* will definitely

²⁴ Deeks affirmed the legality of the initial U.S. airstrikes in Syria without mentioning the issue of consent, see Jennifer Daskal et al., *Strikes in Syria: The International Law Framework*, JUST SEC. (Sept. 24, 2014), <https://www.justsecurity.org/15479/strikes-syria-international-law-framework-daskal-deeks-goodman/>, and neither she nor Bethlehem questioned Egan’s subsequent treatment of it, see Ashley Deeks, ‘Imminence’ in the Legal Adviser’s Speech, LAWFARE (Apr. 6, 2016), <https://www.lawfareblog.com/imminence-legal-advisers-speech>; Daniel Bethlehem, *Not By Any Other Name: A Response to Jack Goldsmith on Obama’s Imminence*, LAWFARE (Apr. 7, 2016), <https://www.lawfareblog.com/not-any-other-name-response-jack-goldsmith-obamas-imminence>.

²⁵ See, e.g., Corten, *supra* note 11; Anne Peters, *German Parliament Decides to Send Troops to Combat ISIS – Based on Collective Self-Defense ‘in Conjunction with’ SC Res. 2249*, EJIL: TALK! (Dec. 8, 2015), <https://www.ejiltalk.org/german-parlament-decides-to-send-troops-to-combat-isis-%E2%88%92-based-on-collective-self-defense-in-conjunction-with-sc-res-2249/>; *A Plea against the Abusive Invocation of Self-Defense as a Response to Terrorism* (July 5, 2016), <http://derechointernacionalcr.blogspot.co.nz/2016/07/a-plea-against-abusive-invocation-of.html>.

²⁶ President Obama, *supra* note 6 (emphasis added).

overcome the scourge of Daesh, whose rise has been promoted and exploited by the regime in Damascus.²⁷

One year later, following the adoption of UN Security Council Resolution 2249, close US ally and NATO member Lithuania made much the same point:

[T]he importance of resolving the Syria crisis could not be more urgent. We must restore hope to the Syrian people. *While we cannot see, by any measure, the regime at the core of this crisis as a partner in the fight against Daesh*, we are encouraged by the Vienna talks and the new momentum they seem to produce, with a hope that this will lead to the desperately needed transition.²⁸

And in case the message was not getting across, some scholars chose to reinforce it using far less diplomatic language:

[W]hether . . . someone should cooperate with Syria to make it able . . . to fight ISIS, I think that's absurd. Cooperate with Syria and provide arms to Syria to use them perhaps not only against ISIS but also against their own people? So the whole argument of trying to cooperate with certain regimes becomes completely absurd and too formalistic.²⁹

Such statements strongly suggest that the real reason for the West's refusal to seek and/or accept the Syrian Government's consent was that government's alleged illegitimacy vis-à-vis the Syrian people, not its inability vis-à-vis ISIL. In other words, regime *unworthiness*, not regime *inability*, was the decisive factor. And if this was the case, then it is clear that at the end of 2013 the Better Syria rationale was not discarded so much as recycled: it reappeared, re-casted, in Act II to play a crucial supporting role to the "star" rationale of self-defense. A coalition of States, led by the US, would deploy force in Syria based on their inherent right of self-defense against an NSA (i.e., self-defense would be the legally actionable basis of intervention), but in the exercise of that right they would disregard Syria's sovereignty based on the allegedly ugly nature of the Syrian regime (i.e., the Better Syria rationale would support a key tactical move within the larger self-defensive operation).

²⁷ U.N. SCOR, 7316st mtg. at 22, U.N. Doc. S/PV.7316 (Nov. 19, 2014) (emphasis added).

²⁸ U.N. SCOR, 7565st mtg. at 6, U.N. Doc. S/PV.7565 (Nov. 20, 2015) (emphasis added).

²⁹ Nicholas Tsagourias, U. of Sheffield, Remarks Made at the 2015 ESIL Conference, Oslo, Norway (Sept. 11, 2015), <http://www.jus.uio.no/pluricourts/english/news-and-events/events/2015/esil-2015-en/video-and-streaming/international-law-and-isis.html#5> (commencing at 31:11 of the discussion segment).

This was, to say the very least, an interesting development. It represented an ambitious commingling of two threads of Western interventionist logic that had been developing slowly since the end of the Cold War: Humanitarianism, which presumes a strong, malign government bent on the destruction of a people,³⁰ and the Failed State Doctrine, which presumes a weak government incapable of containing the effects of deleterious and possibly malign developments on its territory.³¹ Prior to Syria, these two threads had seemed quite incompatible. In the wake of Syria, there is certain to be recognition that they can be woven together. Moreover, we are justified in wondering whether this commingled rationale for the exercise of extraterritorial self-defense—what might be labelled the “unworthiness-obviates-consent” doctrine, but what I shall call the “Commingled Position”—did not in fact represent the implied legal position of the US rather than the kind of contingent political motivation that international lawyers are trained to ignore.³² When the proffered legal theory (“inability-obviates-consent”) is absurd, one must look elsewhere and see if other legal reasoning isn’t afoot.

To date no legal scholar has looked elsewhere. Specifically, no scholar has analyzed whether the Commingled Position makes sense either as a matter of law or of legitimacy. Corten, for example, acknowledges that the US never requested consent from the Syrian regime “for political reasons (due to the strong opposition between Damascus and Washington).”³³ But because he does not unpack those reasons or investigate the possibility that they did real work in structuring and promoting the United States’ legal position regarding Syria, he is left to assume that the US was effectively accusing Syria of

³⁰ See, e.g., Int’l Comm’n on Intervention and State Sovereignty [ICISS], *The Responsibility to Protect: Report of the Int’l Comm’n on Intervention and State Sovereignty* (Dec. 2001), <https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/18432/IDL-18432.pdf>.

³¹ See Edward Newman, *Failed States and International Order: Constructing a Post-Westphalian World*, 30 CONTEMP. SECURITY POL’Y 421 (2009).

³² Cf. 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), <https://www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/>.

Whenever states take action they will undoubtedly have a policy reason for embarking on such action and will often, particularly in the case of action as serious so the use of force, set out that reason. However, it would be wrong to think that the motivation or reason equates to the legal justification.

Id.

³³ Corten, *supra* note 11, at 779.

breaching Article 2(4) UNC vis-à-vis Iraq.³⁴ There is no evidence of any such accusation. Flasch perceptively (if tentatively) links the Syrian Government's "inability" vis-à-vis ISIL to the West's "unwillingness" to cooperate and coordinate with it,³⁵ but she neglects to probe the specific nature of the West's unwillingness or to consider whether it was an appropriate posture for the West to adopt in the counter-NSA context. Goodman describes the United States' refusal to seek the Syrians' consent as "stunning when viewed in light of international law" and goes so far as to ask the key question:

What is the international law when a host state (Syria) is willing and able to deal with a nonstate group (ISIS) through military cooperation with the threatened state (the United States) but the latter (the United States) doesn't want to associate itself with the host state for other potentially unrelated reasons?³⁶

Unfortunately, Goodman does not specify what those "potentially unrelated reasons" are. Nor does he answer his own question, apart from noting—correctly—that if those unrelated reasons have nothing to do with the effectiveness of the exercise of self-defense, they cannot be judged from within the self-defense framework.³⁷ Finally, although a host of scholars—Corten included—have lamented the lack of dialogue and cooperation with NSA-host states such as Syria,³⁸ they have failed to follow up their expressions of dismay with concrete analysis. Omissions like these may explain why the US "legal approach to the counter-ISIL conflict has been one of the most discussed and least understood topics of US practice in recent years."³⁹

This article provides the analysis of the Commingled Position that has been missing from the literature. Because the Commingled Position has never been advanced with any degree of detail but merely

³⁴ See *id.* at 792 (arguing that the United States' legal position signifies a drastic reinterpretation of UNC Article 2(4)).

³⁵ Flasch, *supra* note 14, at 64–65.

³⁶ Goodman, *supra* note 22.

³⁷ See Ryan Goodman, *International Law – and the Unwilling and Unable Test – for US Military Operations in Syria*, JUST SEC. (Sept. 12, 2014), <https://www.justsecurity.org/14949/international-law-unwilling-unable-test-military-operations-syria/>.

³⁸ See *A Plea against the Abusive Invocation of Self-Defense as a Response to Terrorism*, *supra* note 25 ("Before launching a military operation in a foreign State, the territory of which is used by a terrorist group, it is essential to try to enter into discussions with the government of that State.").

³⁹ Wittes, *supra* note 8 (internal quotation marks omitted).

adumbrated by bits and pieces of official statements, I must in a certain sense construct it as a prelude to evaluating it. I then assess whether, as constructed, the Commingled Position has a credible basis in existing international law. I also consider whether “legitimacy” arguments are legitimate in this context and, if so, whether they are successful. It is my hope that this analysis will not only set the record straight regarding what has happened in Syria but also help us to understand what may be about to occur elsewhere. Even as the Western intervention against ISIL winds down,⁴⁰ the new US administration has suggested that Pakistan may be the next venue of an “unwilling or unable” intervention.⁴¹ Clarity and discernment need not be tools available to us only in hindsight.

I. BACK TO BASICS: THE NECESSITY OF SEEKING AND/OR ACCEPTING OFFERS OF CONSENT

Before we consider whether the United States and its allies had a sound reason for refusing to seek (and/or accept) the Syrian Government’s offer of consent, it does well to recall why consent is so important in the first place.

Everyone seems to agree that as of September 2014 the Syrian Government had proven incapable of eliminating (or at least degrading) the threat that ISIL posed to Iraq.⁴² Since ISIL itself showed no signs of wanting to negotiate an end to hostilities with Iraq, Syria’s objective inability gave rise to a certain necessity—let us call it “naked necessity”—on the part of outside powers to use armed force within

⁴⁰ See Bethan McKernan, *Mosul Defeat Leaves ISIS ‘Unlikely to Survive’ Three Years After Declaring Caliphate in Iraq, Analysts Say*, THE INDEPENDENT (June 29, 2017), <http://www.independent.co.uk/news/world/middle-east/isis-mosul-defeat-latest-iraq-caliphate-al-nuri-mosque-extinction-survival-islamic-extremists-a7814866.html>. Note, however, that ISIL’s impending defeat does not necessarily herald the United States’ departure from Syria. As of early 2018, all indications are that the US is determined to remain militarily present in a post-ISIL Syria. See Idrees Ali, *Mattis Sees Larger U.S. Civilian Presence in Syria*, REUTERS (Dec. 29, 2017), <https://www.reuters.com/article/us-mideast-crisis-syria-usa/mattis-sees-larger-u-s-civilian-presence-in-syria-idUSKBN1EN1H8>; Tyler Durden, *Tillerson Pledges Open-Ended Military Presence in Syria to Counter Iran*, ZEROHEDGE (Jan. 1, 2018), <https://www.zerohedge.com/news/2018-01-17/tillerson-pledges-open-ended-military-presence-syria-counter-iran>; Tyler Durden, *Why Does Washington Hate Bashar al-Assad?*, ZEROHEDGE (Jan. 24, 2018), <https://www.zerohedge.com/news/2018-01-23/why-does-washington-hate-bashar-al-assad>.

⁴¹ See President Donald Trump, Remarks by President Trump on the Strategy in Afghanistan and South Asia (Aug. 21, 2017), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-strategy-afghanistan-south-asia/>.

⁴² See, e.g., U.N. SCOR, 7271st mtg., *supra* note 12.

Syria. Naked necessity is best conceived of as the need to use force because peaceful measures are either futile or have been exhausted and because any prior exercise of armed force, by any actor whatsoever, has proven insufficient to eliminate the threat. It is to be contrasted with self-defensive necessity, which, as well-understood, is the need to use force non-consensually against the territorial integrity and/or political independence of a State.

In the context of inter-state hostility there is usually no need to distinguish between these two types of necessity. When State A attacks State B, naked necessity will almost always equate to self-defensive necessity because the very persistence of a threat means that the aggressor-State remains hostile toward the victim. It is not so much that consent in this context is irrelevant as that it is highly improbable—barring, of course, a quick coup d'état by pacifists in the aggressor State coupled with a continuing potential for violence of the deposed aggressors. However, in the NSA context a gap can easily open up between naked necessity and self-defensive necessity. A host State that is unable to neutralize an NSA threat may nonetheless be willing to invite other States in to help it. Given this possibility, the existence of naked necessity in the NSA context does not *necessarily* tell us anything about the existence of self-defensive necessity, and the two types of necessity exist in merely contingent relationship to each other. In cases where the host State aids, abets or acquiesces in the NSA, self-defensive necessity may arise both as a practical matter and as a legal one.⁴³ But in cases where the host is willing to mitigate the threat posed by the NSA with the help of foreign States, self-defensive necessity does not arise,⁴⁴ and allowing the non-consensual deployment of force on host territory would convert naked necessity from its intended role as a restraint on the use of force into a free-wheeling license for it. One can be sympathetic to, and even embrace, the literal and “expansionist” interpretation of UNC Article 51 according to which the use of defensive force is permissible irrespective of issues of State responsibility. But unless one couples that interpretation with a strict insistence that the victim seek and/or accept

⁴³ See Mahmoud Hmoud, *Are New Principles Really Needed? The Potential of the Established Distinction Between Responsibility for Attacks by Nonstate Actors and the Law of Self-Defense*, 107 AM. J. INT'L L. 576, 578 (2013); Christian J. Tams, *The Use of Force Against Terrorists*, 20 EUR. J. INT'L L. 359, 383–87 (2009).

⁴⁴ See Dapo Akande & Thomas Liefländer, *Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense*, 107 AM. J. INT'L L. 563, 566 (2013).

the host's offer of consent, it is likely to result in a veritable melee of unilateral intervention.

The obvious problem with the United States' "inability-obviates-consent" formula is that it equates naked necessity with self-defensive necessity as an *a priori* matter. This, again, is a forgivable move in the inter-state context—and Egan's formulation deftly trades on the ambiguity of the word "necessity" as drawn from that context⁴⁵—but it is a potentially unforgiveable move in the NSA context for the reason noted. Some scholars implicitly recognize this point when they remark that the "unwilling or unable" standard is not even relevant to the case of the unable-but-willing State, their assumption being that consent will invariably be sought by the victim and granted by the host.⁴⁶ While this assumption oversimplifies matters by glossing over the two very distinct ways in which a host State can present as "unwilling,"⁴⁷ it certainly is reasonable relative to a host, like Syria, that seeks to avail itself of foreign-State assistance in fulfilling its counter-terrorism obligations. Other commentators leave nothing to chance and stipulate that the consent of an unable-but-willing State must be sought unless the act of seeking it would undermine the effectiveness of the victim State's self-defensive action.⁴⁸

⁴⁵ Per Egan:

[T]here will be cases in which there is a reasonable and objective basis for concluding that the territorial State is unwilling or unable to effectively confront the non-State actor in its territory *so that it is necessary to act* in self-defense against the non-State actor in that State's territory without the territorial State's consent.

Wittes, *supra* note 8 (emphasis added).

⁴⁶ See, e.g., Gareth D. Williams, *Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the 'Unwilling or Unable' Test*, 36 U. NEW. S. WALES L.J. 619, 627 (2013).

⁴⁷ There is, for instance, the interesting case of the "unable" host state that is opposed to allowing an NSA to use its territory as a base from which to threaten other States but is even *more* opposed—for perhaps highly understandable political reasons—to allowing the victim State to deploy military force on its territory. In such circumstances it would not be fair to label the host State a colluding or harboring State vis-à-vis the NSA; yet at the same time its refusal to accept the victim State's military assistance means that the NSA threat to the victim persists. Accord Trapp, *supra* note 20, at 218. This is arguably the only situation in which something akin to an "unable or unwilling" standard is needed, as the usual interplay between UNC Articles 2(4) and 51 will not be able to reconcile the legitimate sovereignty interests of the host with the legitimate self-defence interests of the victim. Perhaps not surprisingly, scholars disagree on how best to handle this presumably rare scenario. See Dawood I. Ahmed, *Defending Weak States Against the "Unwilling or Unable" Doctrine of Self-Defense*, 9 J. INT'L L. & INT'L REL. 1 (2013) (favoring a multilateral approach centered on Security Council superintendence over the standoff between victim and host but noting scholars who favor a unilateral approach catering to the needs of the victim yet cabined by a strict proportionality requirement); Trapp, *supra* note 20, at 218.

⁴⁸ See Akande & Liefänder, *supra* note 44, at 566; Bethlehem, *supra* note 23, at 776.

As for the implications of a refusal to seek and/or accept an offer of consent from an unable-but-willing State, they too are obvious: the victim State (or in the case of collective self-defense, the intervening State⁴⁹) would breach, as against the host, UNC Article 2(4). The principle of sovereign equality of States that animates Article 2(4) imposes on each State a duty to refrain from using force in a manner that disrespects the personality of other States and/or violates their political independence.⁵⁰ There is, additionally, a duty on States “to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security.”⁵¹ These duties would plainly seem to require that a host State’s government be given a say in how armed force is used on State territory,⁵² regardless of whether the State benefits from that use or whether proportionality and discrimination are observed in its exercise.⁵³ Moreover, breach of Article 2(4) by the victim State—assuming it entailed a sufficiently grave use of force (such as aerial bombing⁵⁴)—would in turn trigger the host’s Article 51 right of self-defense. In other words, the stakes are high. It is therefore quite important to consider what might constitute a justified refusal to seek and/or accept an unable-but-willing State’s offer of consent and to critically assess the facts adduced by the victim State in support of such a refusal.

⁴⁹ In the discussion that follows I shall use the term “victim State” to denote both an actual victim State invoking individual self-defense and an intervening State invoking collective self-defense.

⁵⁰ G.A. Res. 25/2625 (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); Corten, *supra* note 11, at 791.

⁵¹ G.A. Res. 25/2625, *supra* note 50, para. 1, principle 4.

⁵² For further discussion, see *infra* Section II.C.

⁵³ Akande & Vermeer, *supra* note 32 (“[I]n international law, one of the prerogatives accorded to the government is the ability to sanction activity within the territory of a state.”); cf. Dapo Akande, *Are Extraterritorial Armed Conflicts with Non-State Groups International or Non-International?*, EJIL: TALK! (Oct. 18, 2011), <https://www.ejiltalk.org/are-extraterritorial-armed-conflicts-with-non-state-groups-international-or-non-international/> (endorsing the view that an international armed conflict arises when one State uses force against an NSA on the territory of another State without the latter’s consent).

⁵⁴ See G.A. Res. 3314 (XXIX), art. 3(b) (Dec. 14, 1974) (adopting the definition of “aggression,” which includes the act of “[b]ombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State”).

II. JUSTIFICATIONS FOR NOT SEEKING AND/OR ACCEPTING SYRIA'S OFFER OF CONSENT

A. THE HUMANITARIAN JUSTIFICATION

When President Obama declared in September 2014 that in the fight against ISIL the US could not “rely on an Assad regime that terrorizes its own people,”⁵⁵ he was referring to his Government’s allegation that since 2011 the Syrian Government had been committing atrocity crimes against the Syrian people.⁵⁶ As noted above, in September 2013, in the wake of a chemical-weapons attack in the Damascus suburb of Ghouta, President Obama momentarily sought—but failed to achieve—an international R2P coalition “à la Libya”⁵⁷ for Syria. Bearing in mind the widespread consensus that unilateral humanitarian intervention is illegal under international law,⁵⁸ the question that arises is: can humanitarian concern that fails to occasion Chapter VII military action against State A nonetheless justify States B-Z in omitting attempts to obtain State A’s consent to the use of counter-NSA force on its territory?

It is very hard to see how it can. In the *Nicaragua* case, the ICJ stated that humanitarian concern did not justify the US in indirectly using force against the government of Nicaragua via the training and arming of anti-government rebels.⁵⁹ This suggests that unless humanitarian concern has been made legally actionable by the Security Council, it cannot excuse any degree of force used against the territorial integrity or political independence of a State—be it direct counter-State force (e.g., Yugoslavia), indirect counter-State force (e.g., Nicaragua), or direct

⁵⁵ See President Obama, *supra* note 6.

⁵⁶ See, e.g., Press Release, Office of the Press Secretary, Statement by the President on Syria (Feb. 4, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/02/04/statement-president-syria>.

⁵⁷ See S.C. Res. 1973 (Mar. 17, 2011).

⁵⁸ See, e.g., Dapo Akande, *The Legality of Military Action in Syria: Humanitarian Intervention and Responsibility to Protect*, EJIL: TALK! (Aug. 28, 2013), <https://www.ejiltalk.org/humanitarian-intervention-responsibility-to-protect-and-the-legality-of-military-action-in-syria/>; Marty Lederman, *My Discrete but Important Disagreement with Harold Koh on the Lawfulness of the Strikes on Syria*, JUST SEC. (Apr. 7, 2017), <https://www.justsecurity.org/39704/discrete-disagreement-harold-koh-lawfulness-strikes-syria/>.

⁵⁹ The court observed that “while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect.” *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 268 (June 27).

counter-NSA force without State consent (e.g., Syria). The simple logic of the criminal law would seem to dictate this result: humanitarian concern can be likened to an affirmative defense for what would otherwise be an unlawful use of force, and the weight or sufficiency of an affirmative defense does not typically vary according to the seriousness of the crime charged. A defense of insanity that fails to excuse a murder (Yugoslavia) is unlikely to excuse an assault (Syria). The result is also sound from the perspective of international political morality, as it reduces the likelihood that a would-be intervenor whose “R2P pass” has been rejected as invalid at the front door (in the Security Council on a bid to directly intervene against a state) will be able to use it slyly at the back (unilaterally in the exercise of self-defense).

None of this is to say that there is no conceivable set of circumstances under which a host State’s maltreatment of its people would eliminate the need of a victim State to seek its consent in the fight against an NSA. It is certainly possible—albeit unlikely—that a legitimate R2P intervention scenario could unfold at approximately the same time as a legitimate counter-NSA-scenario. In such an anomalous case, there is no reason to think that the same Security Council that suspended a State’s sovereignty for the purpose of authorizing R2P military action would not also suspend the State’s sovereignty for the purpose of authorizing unconsented-to counter-NSA force. The problem, in other words, should resolve itself within the framework of the existing *de jure ad bellum* paradigm.

I realize that this argument will fail to convince those who believe that meritorious R2P proposals can fail to gain the endorsement of an often geopolitically divided Security Council, and who consequently argue that unilateral humanitarian decisions will sometimes have to be made by certain States exercising “mature judgment.”⁶⁰

⁶⁰ This argument was suggested in the written statement issued by the United States and certain of its allies in the wake of the Ghouta attack:

Signatories [of the statement] have consistently supported a strong UN Security Council Resolution, given the Security Council’s responsibilities to lead the international response, but recognize that the Council remains paralyzed as it has been for two and a half years. The world cannot wait for endless failed processes that can only lead to increased suffering in Syria and regional instability. We support efforts undertaken by the United States and other countries to reinforce the prohibition on the use of chemical weapons.

Press Release, Office of the Press Secretary, Joint Statement on Syria (Sept. 6, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/09/06/joint-statement-syria>. For

However, the legitimacy of such arguments is highly questionable. The attempt to “pull a Kosovo” in any way, shape or form at this particular point in time is not merely (in the words of one commentator) a “tough line to walk”;⁶¹ it represents a rather blatant disregard of the considerable effort made by the international community in the aftermath of the Kosovo crisis to put humanitarian intervention on a sound *legal* footing.⁶²

Moreover, while the potential for a P5 stalemate and even dereliction-of-duty in respect of human rights always exists, it is far from clear that either explains what happened in the case of Syria in late 2013. Indeed, I would suggest that skepticism of the merits of the United States’ allegations against the Syrian Government apropos the Ghouta attack was the more likely dispositive factor. The groundwork for such skepticism was regrettably laid by the United States itself when it misrepresented to the UN (and to the world at large) the WMD threat posed by the Iraqi Government in 2003⁶³ and the humanitarian threat posed by the Gaddafi regime in 2011.⁶⁴ The skepticism was then fuelled just three months prior to the Ghouta attack when Carla Del Ponte, former chief prosecutor for the International Criminal Tribunal for the Former Yugoslavia and then-member of the UN Independent International Commission of Inquiry on Syria, reported that her Commission had found evidence implicating anti-Government rebels, but *not* the Syrian Government, in the use of chemical weapons.⁶⁵ The skepticism was then arguably vindicated four months after Ghouta by a

expression of the (rather hegemonic) idea of “normatively mature” States, see Ruth Wedgwood, *NATO’s Campaign in Yugoslavia*, 93 AM. J. INT’L L. 828, 834 (1999).

⁶¹ Ryan Goodman, *What Do Top Legal Experts Say About the Syria Strikes?*, JUST SEC. (Apr. 7, 2017), <https://www.justsecurity.org/39712/top-legal-experts-syria-strikes/> (statement of Stephen Pomper).

⁶² See Akande, *supra* note 58; Amy B. Benjamin, *To Wreck a State: The New International Crime*, 19 NEW CRIM. L. REV. 208, 228 (2016) (“One principle that the long and controversial debate over R2P seems to have established is that unilateral R2P intervention is illegal in international law. The UN General Assembly explicitly conditioned its 2005 endorsement of military intervention on Security Council primacy over the issue.”).

⁶³ See E. ALTERMAN, *WHEN PRESIDENTS LIE: A HISTORY OF OFFICIAL DECEPTION AND ITS CONSEQUENCES* 296–306 (2004); J. J. MEARSHEIMER, *WHY LEADERS LIE: THE TRUTH ABOUT LYING IN INTERNATIONAL POLITICS* 49–55 (2011).

⁶⁴ See Benjamin, *supra* note 62, at 228–35.

⁶⁵ See Richard Hall, *UN’s Carla Del Ponte Says There Is Evidence Rebels ‘May Have Used Sarin’ In Syria*, THE INDEPENDENT (May 6, 2013), <http://www.independent.co.uk/news/world/middle-east/uns-carla-del-ponte-says-there-is-evidence-rebels-may-have-used-sarin-in-syria-8604920.html>; Shaun Waterman, *Syrian Rebels Used Sarin Nerve Gas, Not Assad’s Regime: UN Official*, WASH. TIMES (May 6, 2013), <http://www.washingtontimes.com/news/2013/may/6/syrian-rebels-used-sarin-nerve-gas-not-assads-regi/>.

lengthy investigative report published in the London Review of Books that detailed the ways in which the Obama Administration had knowingly overstated the strength of the evidence against the Syrian Government.⁶⁶ Finally, the skepticism was strong enough to echo in subsequent evaluations of events in Syria: when the Trump Administration accused the Syria Government of using chemical weapons against civilians in April 2017 and April 2018, a number of credible commentators questioned the strength of the evidence adduced to show Syrian Government culpability.⁶⁷

It would seem, therefore, that the failure of the R2P aspect of the Better Syria rationale in late 2013 cannot easily be attributed to Russian or Chinese indifference to the suffering of innocents. Accordingly, the US could not successfully claim either legality or even legitimacy in citing Syrian Government atrocities as justification for its refusal to seek and/or accept the Syrian Government's consent to enter Syrian territory in order to fight ISIL.

B. THE CIVIL WAR JUSTIFICATION

From the outset of the internal strife that began within Syria in 2011, the US depicted the situation as a lopsided civil war. On the one side stood the Syrian people, yearning to live freely and democratically; on the other, a dictator (Assad) brutalizing them and doing his utmost to deny them their right of self-determination.⁶⁸ In a written statement released in August 2011, President Obama left no doubt as to which side the US was rooting for:

We recognize that it will take time for the Syrian people to achieve the justice they deserve. There will be more struggle and sacrifice. It

⁶⁶ See Seymour M. Hersh, *Whose Sarin?*, 35 LONDON REV. OF BOOKS, Dec. 19, 2013, at 9, 9–12.

⁶⁷ See James Carden, *The Chemical-Weapons Attack In Syria: Is There A Place For Skepticism?*, THE NATION (Apr. 19, 2017), <https://www.thenation.com/article/the-chemical-weapons-attack-in-syria-is-there-a-place-for-skepticism/>; *How to Become 'an Assad Apologist'? Just Question MSM Rhetoric and Welcome to the Club*, RT (Apr. 18, 2018), <https://www.rt.com/uk/424505-fisk-hitchens-west-syria-attack>; George Washington, *US Congressman: "In Briefing to Congress, [the Director of National Intelligence, Secretary of Defense and Secretary of State] Provided ZERO Real Evidence. Referenced Info Circulating Online*, ZEROHEDGE (Apr. 19, 2018), <https://www.zerohedge.com/news/2018-04-19/us-congressman-briefing-congress-director-national-intelligence-secretary-defense>.

⁶⁸ See Macon Phillips, *President Obama: "The Future of Syria Must Be Determined By Its People, But President Bashar al-Assad Is Standing In Their Way"*, THE WHITE HOUSE: BLOG (Aug. 18, 2011, 9:37 AM), <https://obamawhitehouse.archives.gov/blog/2011/08/18/president-obama-future-syria-must-be-determined-its-people-president-bashar-al-assad>.

is clear that President Assad believes that he can silence the voices of his people by resorting to the repressive tactics of the past. But he is wrong. As we have learned these last several months, sometimes the way things have been is not the way that they will be. It is time for the Syrian people to determine their own destiny, and we will continue to stand firmly on their side.⁶⁹

This statement represented the pro-democracy, “Arab Spring” aspect of the Better Syria rationale. The question it raises is whether the United States’ clear political sympathies with the anti-Assad opposition could justify its refusal to seek and/or accept the Syrian Government’s consent to deploy force against ISIL on Syrian territory.

As with the R2P aspect, it is difficult to see how it could. It is beyond settled that “[f]oreign powers deal with the existing de facto government” as determined by “internal discussion and decision,”⁷⁰ not with the group they may wish were de facto. Throughout the years of strife in Syria the government of President Assad remained the de facto central political authority by virtue of its ongoing effective control of State organs and territory, including the capital of Damascus.⁷¹ The US bowed to this reality in late 2012 when it declined to recognize the Syrian Opposition Coalition (SOC) as the legal government of Syria and agreed instead to extend only political recognition.⁷² Later, in 2016, the US State Department hinted at the view (again via Egan’s remarks) that consent did not need to be sought from the Assad Government because it had “lost control of significant parts of [its] territory.”⁷³ It is not entirely clear what Egan was trying to suggest with this comment, but if it was that the territory lost to ISIL from 2014 onwards was to count in the calculation of effective control for purposes of governmental recognition, he was mistaken. The competition for recognition was always between the Assad Government and the SOC, not the Assad Government and

⁶⁹ *Id.*

⁷⁰ *Aguilar-Amory and Royal Bank of Canada Claims (U.K. v. Costa Rica)*, 1 R.I.A.A. 369, 378 (1923).

⁷¹ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 203 (1987); Bannelier-Christakis, *supra* note 15, at 762; Michael N. Schmitt, *Legitimacy Versus Legality Redux: Arming the Syrian Rebels*, 7 J. NAT’L SECURITY L. & POL’Y 139, 152–54 (2014).

⁷² See Schmitt, *supra* note 71, at 153–54.

⁷³ Per Egan:

[T]he concept of consent can pose challenges in a world in which governments are rapidly changing, or have lost control of significant parts of their territory, or have shown no desire to address the threat. Thus, it sometimes can be a complex matter to identify the appropriate person or entity from whom consent should be sought.

Wittes, *supra* note 8, at 3.

ISIL, and it is highly doubtful that the SOC ever controlled more Syrian territory or State organs than the Assad Government.⁷⁴ Once again Egan seems to have been trying to gain legal mileage out of ambiguity, this time conflating the concept of effective control for purposes of governmental recognition with that of effective control for purposes of assessing State inability vis-à-vis an NSA.⁷⁵

Some scholars subscribe to a restrictive view of the legality of consensual force according to which State-to-State military assistance should not be given to an established government that is involved in a civil war against its own people.⁷⁶ Fair enough. But even if this position represents the majority view—a questionable assumption⁷⁷—requesting a government's consent to intervene against an NSA and/or respecting conditions placed on that consent (short of a demand for weaponry) hardly amounts to lending that government military or even moral support against its internal enemies.⁷⁸ Nor do such actions, without more, make the victim State complicit in any meaningful way in whatever nastiness a host government may be visiting on its population. Simply put, if honoring a State's sovereignty by acknowledging and dealing with its de facto government is deemed tantamount to collusion with that government, the line separating internal affairs and foreign relations effectively disappears.

The difficulties with the Commingled Position do not, however, end there. For while the US sought to convey the impression that it was ignoring the Syrian Government out of high-minded concern not to lend it legitimacy vis-à-vis its democratic opponents, the reality was a good deal more complicated.

By now it is indisputable that, beginning in 2012, the US and several of its Middle Eastern allies began a covert operation to fund, arm and train anti-Assad rebels for the purpose of effecting regime change in

⁷⁴ See Bannelier-Christakis, *supra* note 15, at 762.

⁷⁵ Former UN Secretary-General Ban Ki-Moon invoked the concept of effective control to justify the unilateral nature of the United States' counter-ISIL airstrikes in September 2014. See Ban Ki-Moon, Secretary-General, U.N., Remarks at the Climate Summit Press Conference (Sept. 23, 2014), <https://www.un.org/sg/en/content/sg/speeches/2014-09-23/remarks-climate-summit-press-conference-including-comments-syria>. So, too, did some US allies. See Milanovic, *supra* note 19.

⁷⁶ See, e.g., Bannelier-Christakis, *supra* note 15, at 745–47.

⁷⁷ See Akande & Vermeer, *supra* note 32.

⁷⁸ See *A Plea Against the Abusive Invocation of Self-Defense as A Response To Terrorism*, *supra* note 25. For further discussion on this point, see *infra* Section II.C.

Damascus.⁷⁹ This CIA operation—codenamed *Operation Timber Sycamore* and clearly illegal under the principles of non-use of force and non-intervention affirmed in *Nicaragua*⁸⁰—was first reported on in the mainstream press in early 2013 and then became even more of an “open secret” in 2014 due to the commencement of the counter-ISIL campaign and the United States’ very public decision to arm many of these same rebels for the purpose of fighting ISIL.⁸¹ *Timber Sycamore* then continued unabated until May 2017, when the Trump Administration reportedly put a formal end to it.⁸² The Syrian Government complained bitterly about *Timber Sycamore* in the General Assembly⁸³ and the Security Council⁸⁴—but to no discernible effect.

What we arguably have, then, is a situation in which the US committed one violation of international law for the sake of abetting a second violation. It violated Syrian sovereignty at one level (not asking

⁷⁹ See C.J. Chivers & Eric Schmitt, *Arms Airlift to Syria Rebels Expands, With Aid From CIA*, N.Y. TIMES (Mar. 24, 2013), <http://www.nytimes.com/2013/03/25/world/middleeast/arms-airlift-to-syrian-rebels-expands-with-cia-aid.html>; Jack Goldsmith & Marty Lederman, *Ongoing ‘Covert’ Training of Syrian Rebels: But Is It Still Covert . . . and, If So, Why?*, LAWFARE (Sept. 22, 2014), <https://www.lawfareblog.com/ongoing-covert-training-syrian-rebels-it-still-covert-and-if-so-why>; Mark Mazzetti, *US Relies Heavily on Saudi Money to Support Syrian Rebels*, N.Y. TIMES (Jan. 23, 2016), <https://www.nytimes.com/2016/01/24/world/middleeast/us-relies-heavily-on-saudi-money-to-support-syrian-rebels.html>; Greg Miller, *CIA Ramping Up Covert Training Program for Moderate Syrian Rebels*, WASH. POST (Oct. 2, 2013), https://www.washingtonpost.com/world/national-security/cia-ramping-up-covert-training-program-for-moderate-syrian-rebels/2013/10/02/a0bba084-2af6-11e3-8ade-a1f23cda135e_story.html?utm_term=.047751374450.

⁸⁰ *Accord Dapo Akande, Would It Be Lawful for European (or other) States to Provide Arms to the Syrian Opposition?*, EJIL: TALK! (Jan. 17, 2013), <https://www.ejiltalk.org/would-it-be-lawful-for-european-or-other-states-to-provide-arms-to-the-syrian-opposition/>; Schmitt, *supra* note 71, at 158–59.

⁸¹ See Goldsmith & Lederman, *supra* note 79; Ryan Goodman & Michael Schmitt, *Assad: Willing to Risk Direct Confrontation With the US Over Moderate Rebels – and Stronger Opposition to US Airstrikes*, JUST SEC. (Jan. 27, 2015), <https://www.justsecurity.org/19419/syria-assad-risk-direct-confrontation-moderate-rebels-opposition-airstrikes/>; Ryan Goodman & Michael Schmitt, *Having Crossed the Rubicon: Arming and Training Syrian Rebels*, JUST SEC. (Sept. 26, 2014), <https://www.justsecurity.org/15660/crossed-rubicon-arming-training-syrian-rebels/> [hereinafter *Having Crossed the Rubicon*].

⁸² Greg Jaffe & Adam Entous, *Trump Ends Covert CIA Program to Arm Anti-Assad Rebels in Syria, A Move Sought by Moscow*, WASH. POST (July 19, 2017), https://www.washingtonpost.com/world/national-security/trump-ends-covert-cia-program-to-arm-anti-assad-rebels-in-syria-a-move-sought-by-moscow/2017/07/19/b6821a62-6beb-11e7-96ab-5f38140b38cc_story.html?utm_term=.be12adb8c776.

⁸³ See Al-Moualem, *supra* note 13.

⁸⁴ See Permanent Rep. of Syria, Identical Letters dated 2 October 2014 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. A/69/421-S/2014/715 (Oct. 3, 2014).

for consent prior to intervening against ISIL) in order to abet a more egregious violation of sovereignty at a deeper level (attempted violent regime change). And although one can only speculate, this deeper level of illegality may well explain why US officials distanced themselves so abruptly from the events of Act I in Syria once Act II began in 2014. The Better Syria rationale had spawned undertakings that were clearly illegal under international law, and continuing to focus the public's attention on that rationale carried the risk of exposing those undertakings. Once the emergence of ISIL provided a way to justify the use of force in Syria without talking about the rationale, the rationale was marginalized in public discussion, even though this came at the cost of a sharp reduction in the credibility of the US legal position (i.e., the need to offer the "inability-obviates-consent" theory).

Apart from its illegality, *Timber Sycamore* did much to discredit the United States' claim that the Syrian Government was "unable" to deal with ISIL. By all accounts, the Operation was significant in size and scale, meriting description by *The New York Times* as "one of the most expensive efforts to arm and train rebels since the agency's program arming the mujahedeen in Afghanistan during the 1980s."⁸⁵ The US reportedly spent more than \$1 billion to arm and train "thousands of Syrian rebels"⁸⁶ and gave 600 tons of weapons to them in 2013 alone.⁸⁷ Even as it described *Timber Sycamore* as "too late, too limited and too dependent on dubious partners" to succeed, *The Washington Post* offered these revealing details in its 2017 post-mortem of the Operation:

Run from secret operations centers in Turkey and Jordan, the program pumped many hundreds of millions of dollars to many dozens of militia groups. One knowledgeable official estimates that the CIA-backed fighters may have killed or wounded 100,000 Syrian soldiers and their allies over the past four years. By the summer of 2015, the rebels were at the gates of Latakia on the northern coast, threatening Assad's ancestral homeland and Russian bases there. Rebel fighters were also pushing toward Damascus.⁸⁸

⁸⁵ Mark Mazzetti et al., *Behind the Sudden Death of a \$1 Billion Secret C.I.A. War in Syria*, N.Y. TIMES (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/world/middleeast/cia-syria-rebel-arm-train-trump.html?mcubz=3>.

⁸⁶ *Id.* at 2.

⁸⁷ See Goldsmith & Lederman, *supra* note 79 (quoting US Senator Rand Paul).

⁸⁸ David Ignatius, *What the Demise of the C.I.A.'s Anti-Assad Program Means*, WASH. POST (July 20, 2017), https://www.washingtonpost.com/opinions/what-the-demise-of-the-cias-anti-assad-program-means/2017/07/20/f6467240-6d87-11e7-b9e2-2056e768a7e5_story.html?utm_term=.05409885f9f1.

It does not take much imagination or mathematical skill to appreciate that 100,000 Syrian soldiers lost in the fight against *Timber Sycamore* meant 100,000 fewer soldiers available to the Syrian Government in the fight against ISIL. If the Syrian Government was proving “unable” vis-à-vis ISIL in late 2014, can it reasonably be denied that its inability was due in part to the United States’ efforts to overthrow it?⁸⁹ I think not. The US could be likened to a homeowner who secretly sets fire to his neighbor’s house and then complains when the neighbor, who is busy fighting the fire, fails to keep his dangerous dogs from escaping onto the homeowner’s property. The unfairness (not to mention legal insufficiency) of such a complaint will be obvious to any fair-minded observer. Perhaps this explains why, as one scholar noted with barely concealed astonishment, “the extent of Syria’s inability to tackle the threat of ISIS has not been—publicly—discussed by the US and its allies in the context of their claim of individual or collective self-defense.”⁹⁰ Drilling down too deeply into the issue of inability would undoubtedly have uncovered some uncomfortable facts for the US and its allies.⁹¹

There will be some who are not troubled by the picture painted by the above facts, and they have their reasons. One common one is the belief that the United States’ covert regime-change war against the Syrian Government was legitimate from a political-moral perspective, if not from a legal one. Ryan Goodman and Michael Schmitt, for example, have acknowledged that the arming and training of anti-Assad rebels “may disrupt the international legal system on the use of force in far-reaching ways,” yet they are quick to add that “[n]one of this is to say

⁸⁹ Russia obliquely referred to this causal connection when, in November 2014, it noted before the Security Council that terrorist groups such as ISIL “have acquired additional capacities for their criminal activities due to the weakening of State institutions, courtesy of foreign intervention in no small measure.” U.N. SCOR, 7316st mtg., *supra* note 13, at 24.

⁹⁰ Tibori-Szabó, *supra* note 11, at 94.

⁹¹ Reticence in discussing the details of the Syrian Government’s “inability” afflicted some scholars as well. In an interview with *Foreign Policy Magazine* in late August 2014, Deeks stated that Syria “looks like a country that is willing but unable. They’re getting their asses kicked by ISIS.” Colum Lynch, *Obama Hints at Legal Rationale for Airstrikes in Syria*, FOREIGN POLICY (Aug. 28, 2014, 9:11 PM), <http://foreignpolicy.com/2014/08/28/obama-hints-at-legal-rationale-for-airstrikes-in-syria/>. Surely this diagnosis was disingenuous given Deeks’ documented awareness, as early as May 2013, of the US Government’s intention to arm the anti-Assad rebels. See Ashley Deeks, *Arming Syrian Rebels: Lethal Assistance and International Law*, LAWFARE (May 1, 2013, 10:00 AM), <https://www.lawfareblog.com/arming-syrian-rebels-lethal-assistance-and-international-law>. Cantwell was no less uncharitable when he belittled “the minimal steps the [Assad] regime had taken to counter ISIS before September 2014.” Cantwell, *supra* note 8.

that arming and training the rebels to undermine the Assad regime is illegitimate or unsound. It is a reasonable position to take that such action is unlawful but legitimate and morally required.”⁹²

Writing separately, Schmitt has suggested that the continued evolution of *ad bellum* norms depends on instances of international law-breaking like *Timber Sycamore*:

States should be very cautious about using legitimacy as a justification for violating international law; to accept legitimacy as trumping legality is to risk admitting an exception that swallows the rules. But it must be acknowledged that because international law norms emerged in response to past events, they may prove lacking in the present political, operational, and moral context. The international community may begin ignoring or reinterpreting extant norms and new ones may materialize through treaty-making or the crystallization of customary law. This is a natural process of law development by which legitimate actions can become lawful ones. Arguably, and only arguably, this dynamic is underway in the Syrian case, perhaps through a broadening of the purported right of humanitarian intervention.⁹³

As a general comment on the process of change in customary law norms and in the interpretation of open-ended provisions of treaties of constitutional magnitude (like UNC Article 2(4)), this reasoning is eminently sound. I do, however, question its relevance in the case of the specific rule proscribing the arming and training of foreign rebels. As far as I am aware, this rule has not been overtly ignored in general state practice nor subjected to any significant reinterpretation by the international community since its affirmation in *Nicaragua* forty years ago. Indeed, unlike other important concepts that informed the Charter’s original use-of-force regime—such as the once-high threshold for “armed attack” and the once-narrow purpose of self-defense, both of which have come under strain from the relative impotence of the collective-security system⁹⁴—the rule proscribing the arming and training of rebels has proven remarkably robust in the post-Cold War and post-9/11 eras.⁹⁵ When a State breaks a rule, like this one, that shows little sign of erosion by larger geo-political developments, the “legitimacy” of

⁹² *Having Crossed the Rubicon*, *supra* note 81.

⁹³ Schmitt, *supra* note 71, at 159.

⁹⁴ See Robert Delahunty, *Paper Charter: Self-Defense and the Failure of the United Nations Collective Security System*, 56 CATH. U. L. REV. 871 (2007); Tams, *supra* note 43, at 387–91.

⁹⁵ See Akande, *supra* note 80.

its action presents more of an excuse for vigilantism than as a gateway to eventual legality.

Nor does one have to be a dyed-in-the-wool formalist to appreciate the incoherence wrought by all the talk of legitimacy in the Syrian case. Consider, for example, what a lawyer for the United States would have to argue in presenting an honest version of the Commingled Position:

- (1) The US needs to deploy force in Syria because the Syrian Government is unable to deal with the threat posed by ISIL.
- (2) The Syrian Government is unable to deal with ISIL in part because the US and its allies are abetting an internal armed insurgency that is absorbing a considerable amount of that Government's resources.
- (3) Abetting this internal insurgency is illegal but morally legitimate because the Syrian Government is impeding democracy and abusing the Syrian people. Because aid to the insurgency is morally legitimate, the Syrian Government's inability vis-à-vis ISIL should be regarded as self-inflicted instead of externally-imposed. Self-inflicted inability can give rise to the naked necessity required for US military intervention against ISIL in Syria.
- (4) The legitimacy of abetting the insurgency also excuses the United States' refusal to coordinate with the Syrian Government prior to deploying force on Syrian territory. It therefore gives rise to self-defensive necessity.

Suffice it to say that, from an international law perspective, compounding legitimacy claims with further legitimacy claims leads one out onto the end of a very thin and brittle branch.

I would like to conclude this section, as I did the previous one, with some words of caution regarding the merits of the United States' legitimacy claims. We should be wary of accepting such claims at face value. The US has always sought to portray the Syrian civil war as a genuine internal fight pitting a home-grown opposition against a dictatorial regime. In this portrayal, the efforts to topple the Syrian Government began merely as a reaction to the Syrian Government's violent repression of dissent in 2011.⁹⁶ However, the reality (again) is more complicated—and far from flattering of the US.

⁹⁶ See, e.g., President Obama, *supra* note 3 (“Over the past two years, what began as a series of peaceful protests against the repressive regime of Bashar al-Assad has turned into a brutal civil war.”).

According to retired US General Wesley Clark, former NATO Supreme Allied Commander for Europe (1997–2000), regime change in Syria had been a strategic objective of the US as far back as October 2001. Describing a conversation he had with a senior Pentagon official shortly after the attacks of September 11, Clark reports:

I came back to the Pentagon [in October 2001], [and] I saw the same officer. I said, ‘Why haven’t we attacked Iraq? We still gonna attack Iraq?’ He said, ‘Oh sir, it’s worse than that . . . I just got this memo from the Secretary of Defense’s Office. It says we’re gonna attack and destroy the governments in seven countries in five years. We’re gonna start with Iraq and then we’re gonna move to Syria, Lebanon, Libya, Somalia, Sudan and Iran . . . My mind was spinning, and I put that aside. It’s like a nugget that you hold onto . . . They wanted us to de-stabilise the Middle East, turn it upside down, make it under our control . . . They could hardly wait to finish Iraq so they could move into Syria.’⁹⁷

In 2006, in apparent execution of this plan, US diplomatic personnel in Syria proposed to Washington a variety of measures to destabilize the Syrian Government. These were not pretty. They included fomenting sectarian distrust between Sunni and Shia communities within Syria and across the Arab world; exacerbating tensions between Syrian Kurds and the Syrian Government; discouraging foreign direct investment in Syria in order to blunt the success of the Syrian Government’s economic reform agenda; encouraging talk of a coup d’etat against President Assad in order to provoke his Government into overreaction; *and undermining the Government’s efforts to combat Sunni terrorist groups on Syrian territory by portraying those efforts as a sign of regime weakness and instability.*⁹⁸ Between 2006 and 2011, the US covertly spent over \$12 million trying to ignite and then amplify political opposition to the Syrian Government.⁹⁹ While some US officials publicly

⁹⁷ General Wesley Clark, Speech at the Commonwealth Club of California (Oct. 3, 2007), <https://www.youtube.com/watch?v=TY2DKzastu8>. For an analysis of General Clark’s remarks, see Benjamin, *supra* note 62, at 231–33.

⁹⁸ See *Influencing the SARG in the End of 2006*, WIKILEAKS (Dec. 13, 2006), https://wikileaks.org/plusd/cables/06DAMASCUS5399_a.html; see also Robert Naiman, *WikiLeaks Reveals How the US Aggressively Pursued Regime Change in Syria, Igniting a Bloodbath*, TRUTHOUT (Oct. 9, 2015), <http://www.truth-out.org/progressivepicks/item/33180-wikileaks-reveals-how-the-us-aggressively-pursued-regime-change-in-syria-igniting-a-bloodbath#a11/>.

⁹⁹ *US Admits Funding Syrian Opposition*, CBC (Apr. 18, 2011), <http://www.cbc.ca/news/world/u-s-admits-funding-syrian-opposition-1.987112>; Craig Whitlock, *US Secretly Backed Syrian Opposition Groups, Cables Released by Wikileaks Show*, WASH. POST (Apr. 17, 2011),

denied that such funding was directed against the Syrian Government, others conceded that it could easily be construed as having that aim.¹⁰⁰

These facts prompt uncomfortable questions. When we look at the Syrian civil war, what in fact are we seeing: a homegrown uprising or a long-planned Western regime-change operation that finally found a patina of local outrage as its cover? Put more bluntly: was the US aiding a genuine Syrian opposition movement or masquerading as one? We need not resolve these questions with any degree of finality here to appreciate their seriousness. In view of them we can conclude that the legitimacy claims that do so much subliminal work for the Commingled Position are far from established. Accordingly, the US could claim neither legality nor even legitimacy in citing the Syrian civil war as justification for its refusal to seek and/or accept the Syrian Government's consent to enter Syrian territory to fight ISIL.

C. THE SELF-DEFENSE JUSTIFICATION

Thus far we have seen that the Better Syria rationale informed both a humanitarian and a pro-democracy justification for disregarding the Syrian Government in the fight against ISIL. It also informed a third, and far more subtle, justification sounding in self-defense. The key claim underlying this justification was that cooperation with the Syrian Government in the fight against ISIL would prejudice the very effectiveness of that fight. It would prejudice the effectiveness of the fight in two distinct (but not mutually exclusive) ways:

- (1) The Syrian people, desperate to be rid of Assad, would sooner support and join the ranks of ISIL than continue living under the "barbarity"¹⁰¹ of his regime. Accordingly, unless the US marginalized the Assad regime, ISIL would grow in popularity amongst the Syrian population and thereby become undefeatable. The causal nexus suggested here is two-fold: Frustrated aspirations toward freedom and democracy lead to hopelessness, which in turn leads to Islamic radicalization/jihadism threatening to the West.¹⁰²

https://www.washingtonpost.com/world/us-secretly-backed-syrian-opposition-groups-cables-released-by-wikileaks-show/2011/04/14/AF1p9hwD_story.html?utm_term=.8a9708be73f1

¹⁰⁰ See CBC, *supra* note 99.

¹⁰¹ Goodman, *supra* note 61 (statement of Brian Egan).

¹⁰² See, e.g., S.C. Res. 2249, ¶ 10 U.N. Res. (Nov. 20, 2015) ("Reiterating that the [ISIL] situation will continue to deteriorate further in the absence of a political solution to the Syria conflict."); U.N. SCOR, 7316st mtg., *supra* note 13, at 39 (statement of Germany) ("An inclusive political process in Syria is a prerequisite for successfully combating the so-called Islamic State."); U.N.

(2) Assad may not be colluding with ISIL in any formal or direct sense—and thus may narrowly avoid the label ‘unwilling’—but this does not mean that he is a good-faith partner of the West in the fight against ISIL. His priority is to defeat the Syrian people, not ISIL, and he even regards ISIL as a useful tool with which to force Western States to align themselves with his regime. Any military cooperation with Assad is likely to be twisted or misused to slow down or even sabotage the West’s defensive efforts. In short, Assad’s desire to preserve his (barbarous) rule makes him and his allies—especially Russia—untrustworthy partners against ISIL.¹⁰³

The idea that a victim State’s obligation to seek consent is not absolute and that it may dissolve entirely if it is likely to lead to the frustration of the victim’s defensive efforts is a reasonable one that finds

SCOR, 7565st mtg., *supra* note 28, at 2 (statement of France) (“Politically, the fight against Daesh will be effective only if it is based on a political transition that will end the Syrian conflict, which has served and continues to serve as a nursery of terrorism.”); U.N. SCOR, 7565st mtg., *supra* note 28, at 4 (statement of the US) (“The Al-Assad regime in Syria has shown that it cannot and will not suppress [the ISIL] threat, even as it undertakes actions that benefit recruitment by extremists.”); Ki-moon, *supra* note 75 (“[T]he rise of these extremist groups in Syria is a consequence and not a cause of Syria’s tragic civil war.”); Peters, *supra* note 25 (“[I]t is . . . plausible that the failure of the United Nations to intervene under the heading of R2P in Syria, or of the US and the UK under the banner of humanitarian intervention, have been important factors for the rise of IS.”). Western journalists—sometimes opining of their own initiative, sometimes citing anonymous officials or Syrian opposition stakeholders—have echoed this reasoning with somewhat greater specificity. See, e.g., Aryn Baker, *Why Bashar Assad Won’t Fight ISIS*, TIME (Feb. 26, 2015), <http://time.com/3719129/assad-isis-asset/>; Daniel Marans, *Rep. Tulsi Gabbard Met with Syrian President Bashar Assad*, HUFFINGTON POST (Jan. 26, 2017), http://www.huffingtonpost.com/entry/tulsi-gabbard-met-with-assad_us_58891f5ce4b073fd5cb6d29; *Russia Bigger Threat to America Than ISIS? Dangerous Case Made on False Facts*, RT (July 1, 2017, 12:25 PM), <https://www.rt.com/op-edge/394920-isis-us-russia-threat/>.

¹⁰³ See, e.g., U.N. SCOR, 7316st mtg., *supra* note 13, at 22 (statement of France) (Damascus has “promoted and exploited” the rise of ISIL); Corten, *supra* note 11, at 778 n. 4; Zack Beauchamp, *ISIS Is Awful. Allying with Assad to Fight It Would Be Worse*, VOX (Aug. 26, 2014, 1:30 PM), <https://www.vox.com/2014/8/26/6067019/ally-assad-bad-idea-isis> (“Assad has no interest in actually winning against ISIS, because that would leave the US to turn against him, but every interest in seeing the US conflict with ISIS stretch on in perpetuity.”); Cantwell, *supra* note 8 (“Before airstrikes began [in September 2014], there were suggestions that the Syrian government was not really willing to engage ISIS, preferring to use the threat of ISIS to deflect attention away from its own abuses and allow the opposition to bear the brunt of ISIS’s destructive capabilities.”); Goodman, *supra* note 22 (“[T]he United States could argue that Assad is not acting in good faith. Indeed, many close observers believe Assad is playing a double game in which he deliberately failed to quell ISIS in order to try to rally parts of the international community to his side.”); Jaffe & Entous, *supra* note 82 (accusing Russia of focusing its firepower on anti-regime rebels instead of ISIL); Gopal Ratnam & John Hudson, *Kerry: Assad and ISIS Have ‘Symbiotic’ Relationship*, WORLD AFFAIRS (Nov. 17, 2014) <http://www.worldaffairsjournal.org/content/kerry-isis-and-assad-have-symbiotic-relationship>; Wittes, *supra* note 8 (Egan suggesting in the context of remarks on Syria that consent need not be sought from a government that has “shown no desire to address the [NSA] threat.”).

support in the literature. Bethlehem, for example, has asserted that the obligation dissolves where there is “a strong, reasonable, and objective basis for concluding that the seeking of consent would be likely to materially undermine the effectiveness of action in self-defense, whether for reasons of disclosure, delay, incapacity to act, *or otherwise*.”¹⁰⁴ I am happy to stipulate for the sake of argument that each of the two versions of the self-defense justification outlined above states a legally adequate claim of “otherwise.” If the sole way to prevail against ISIL were to disregard the political authority of a compromised Syrian Government, then self-defensive necessity would seem to have arisen, albeit in a rather odd fashion. The question that remains is whether disregarding the political authority of the Syrian Government was *in fact* indispensable to the fight against ISIL, as judged under the strict standard (“strong, reasonable, and objective basis”) proposed by Bethlehem.

Let us consider the first argument for not cooperating with the Syrian Government (frustrated aspirations lead to radicalization). It certainly represents an artfully crafted and cohesive narrative that would pass muster as a Hollywood movie script. Its congruence with external reality, however, is questionable. No concrete evidence beyond the purely anecdotal/second-hand variety has ever been offered to show that ISIL drew strength from the ranks of secular and/or non-radicalized Syrians frustrated with the continued rule of President Assad. Indeed, if anything, all available evidence suggests that ISIL’s remarkable burst in strength in 2013–2014 was due to the support—both affirmative and tacit, material and moral—lent to it by the US and its Middle Eastern allies in the wake of President Obama’s failed “R2P moment” in September 2013. Consider the following:

(1) In October 2014, then-Vice President Joe Biden publicly remarked that ISIL’s rise was due in no small measure to the material support (funding and armaments) provided to it by NATO member Turkey and the United States’ Sunni Gulf allies.¹⁰⁵ Biden implied, although did not directly so state, that these allies’ support of ISIL had occurred against the wishes of the US.

(2) In 2015, a US Defense Intelligence Agency (DIA) report written in 2012 was declassified that belied the impression left by Biden.

¹⁰⁴ Bethlehem, *supra* note 23, at 776 (emphasis added); *see also* Akande & Liefländer, *supra* note 44, at 566.

¹⁰⁵ Barbara Usher, *Joe Biden Apologises Over IS Remarks, But Was He Right?*, BBC (Oct. 7, 2014), <http://www.bbc.com/news/world-us-canada-29528482>.

According to leading Arabist and Tufts historian Hugh Roberts, the report indicated the following:

American intelligence saw [ISIL] coming and was not only relaxed about the prospect but, it appears, positively interested in it.

....

... [I]n 2012, American and other Western intelligence services saw [ISIL] much as they saw Jabhat al-Nusra and other jihadi groups, as useful auxiliaries in the anti-Assad drive, and could envisage its takeover of north-eastern Syria as a helpful development with no worrying implications.¹⁰⁶

Professor Roberts's appraisal was shared by the few journalists who mentioned the intelligence report in the mainstream press.¹⁰⁷ It was also remarkably consistent with the revelations of several high-ranking Obama Administration officials, including (improbably enough) President Obama himself.¹⁰⁸

¹⁰⁶ Hugh Roberts, *The Hijackers*, 37 LONDON REV. OF BOOKS, July 16, 2015, at 5, 5–10 (The report itself is available through Judicial Watch).

¹⁰⁷ Writing in *The Guardian*, Seumas Milne interpreted the report as follows:

A year into the Syrian rebellion, the US and its allies weren't only supporting and arming an opposition they knew to be dominated by extreme sectarian groups; they were prepared to countenance the creation of some sort of "Islamic state"—despite the "grave danger" to Iraq's unity—as a Sunni buffer to weaken Syria.

Seumas Milne, *Now the Truth Emerges: How the US Fueled the Rise of ISIS in Syria and Iraq*, THE GUARDIAN (June 3, 2015), <https://www.theguardian.com/commentisfree/2015/jun/03/us-isis-syria-iraq>.

¹⁰⁸ In a 2014 interview with the New York Times, Obama revealed that the US had not acted sooner against ISIL in Iraq because it had wanted ISIL's growing presence there to force then-Iraqi Prime Minister al-Maliki to make political concessions to Iraq's Sunni minority. Per the interviewer:

The reason, the president added, 'that we did not just start taking a bunch of airstrikes all across Iraq as soon as ISIL came in was because that would have taken the pressure off of [Prime Minister Nuri Kamal] al-Maliki.' That only would have encouraged, he said, Maliki and other Shiites to think: 'We don't actually have to make compromises.'

Thomas L. Friedman, *Obama on the World*, N.Y. TIMES (Aug. 8, 2014), <https://www.nytimes.com/2014/08/09/opinion/president-obama-thomas-l-friedman-iraq-and-world-affairs.html>. In a closed-door meeting with members of the Syrian opposition in 2016, US Secretary of State John Kerry made much the same point, this time with respect to Syria:

The reason Russia came in [to Syria] was because ISIL was getting stronger. Daesh was threatening the possibility of going to Damascus and so forth. And that's why Russia came in, because they didn't want a Daesh government. And they supported Assad. And we knew that this was growing, we were watching, we saw that Daesh was growing in strength, and we thought Assad was threatened. We thought, however, we could probably manage that [and] Assad might then negotiate. But instead of negotiating he got Putin to support him.

(3) The US continued supplying weapons to the anti-Assad opposition via *Timber Sycamore* even though that opposition was known to be rife with jihadists¹⁰⁹ who were funneling the weapons onward into ISIL's arsenal.¹¹⁰ Such was the seepage of weaponry through to ISIL that Russia called attention to it in the Security Council¹¹¹ and a member of the US House of Representatives, convinced from her own investigation that the seepage could only be explained as intentional transfer, proposed legislation to ban it.¹¹²

In his recent assessment of the turmoil in Syria former British diplomat Alastair Crooke minces no words, describing “fired-up Sunni jihadism as a ‘go-to’ political tool for Saudi Arabia and its Western backers.”¹¹³ If he is right, then the claim that Assad's continuing grip on power was a material cause of ISIL's strength, and a consequent hindrance to the West's defensive efforts, not only fails the Bethlehem test; it borders on the fanciful. Indeed, we might build on the analogy introduced above by asking: if there were dangerous dogs on the property of the neighbor of our hypothetical homeowner, was it not because the homeowner (with the help of his friends) helped place them there himself?

The second version of the self-defensive rationale is no stronger than the first. It rests on both a misconception of the principle of respect for State sovereignty that animates UNC Article 2(4) and an exaggeration of Syrian demands. Respecting Syrian sovereignty did not require the US to extend military aid to the Syrian Government so that it

Angel North, *Leaked Audio of John Kerry's Meeting with Syrian Revolutionaries/UN (improved audio)*, YOUTUBE (Oct. 4, 2016), https://www.youtube.com/watch?v=e4pB-_pXDM [hereinafter *Leaked Audio of John Kerry's Meeting*] (beginning at 26:10). Statements like these may explain why retired US General Michael Flynn, who was DIA director at the time the DIA report was authored, told Al-Jazeera television in 2016 that the Obama Administration had made a ‘willful decision’ to support the rise of ISIL. See *Transcript: Michael Flynn on ISIL*, AL JAZEERA (Jan. 13, 2016), <http://www.aljazeera.com/programmes/headtohead/2016/01/transcript-michael-flynn-160104174144334.html>.

¹⁰⁹ See Ignatius, *supra* note 88. See generally Robert Fisk, *Syria's 'Moderates' Have Disappeared . . . and There Are No Good Guys*, THE INDEPENDENT (Oct. 4, 2015, 5:08 PM), <http://www.independent.co.uk/voices/syria-s-moderates-have-disappeared-and-there-are-no-good-guys-a6679406.html>.

¹¹⁰ See Tyler Durden, *Weapons Went from the CIA to ISIS in Less Than Two Months*, ZEROHEDGE (Dec. 15, 2017, 11:38 PM), <http://www.zerohedge.com/news/2017-12-15/weapons-went-cia-isis-less-two-months-new-study-reveals>.

¹¹¹ See, e.g., U.N. SCOR, 7316st mtg., *supra* note 13, at 24.

¹¹² See Tulsi Gabbard, *Stop Arming Terrorists*, GABBARD HOUSE (Jan. 13, 2017), <https://gabbard.house.gov/news/StopArmingTerrorists>.

¹¹³ Alastair Crooke, *How Syria's Victory Reshapes Mideast*, CONSORTIUM NEWS (Sept. 30, 2017), <https://consortiumnews.com/2017/09/30/how-syrias-victory-reshapes-mideast/>.

could fight ISIL. Indeed—contra the suggestion of Professor Tsagourias¹¹⁴—the Syrian Government never appears to have conditioned its cooperation against ISIL on the provision of weaponry. Nor did respect for Syrian sovereignty require the US to accept the Syrian Government’s choice of counter-ISIL airstrike targets or allow it to take operational control of the counter-ISIL campaign. What it *did* require was that the US (1) ask for the Syrian Government’s consent to enter Syrian territory for the purpose of fighting ISIL; and (2) comply with the modest conditions placed on that consent, the key one being prior consultation and coordination with the Syrian Government in order to ensure that coalition forces did not target Syrian Government forces or civilian infrastructure “by mistake” in covert furtherance of *Timber Sycamore*.¹¹⁵ It is hard to see how granting the Syrian Government this kind of defensive veto—in the context of an illegal regime-change war no less—would have materially undermined the effectiveness of the coalition’s defensive efforts against ISIL.

It is also hard to see how the geo-strategic priorities of the Syrian Government were even remotely relevant to the issue of the effectiveness of the West’s self-defense. The Syrian Government did not qualify as an unreliable partner against ISIL merely because it chose to reserve a portion of its military resources, perhaps even a major portion, for the fight against *Timber Sycamore*.¹¹⁶ In a world where “counterproductive”

¹¹⁴ Tsagourias, *supra* note 29 and accompanying text.

¹¹⁵ Syrian Government fears in this regard were borne out on multiple occasions. *See, e.g.*, U.N. SCOR, 7316st mtg., *supra* note 13, at 33; Identical Letters dated 12 July 2017, *supra* note 14; Anne Barnard & Mark Mazzetti, *US Admits Airstrike in Syria, Meant to Hit ISIS, Killed Syrian Troops*, N.Y. TIMES (Sept. 17, 2016), <https://www.nytimes.com/2016/09/18/world/middleeast/us-airstrike-syrian-troops-isis-russia.html>; Nabih Bulos & W.J. Hennigan, *US Airstrike Hits Pro-Assad Forces in Syria*, L.A. TIMES (May 18, 2017, 3:15 PM), <http://www.latimes.com/world/la-fg-syria-us-airstrike-20170518-story.html>; *Damascus Urges UN to Stop US-led Coalition “War Crimes” & to Expel Alliance from Syria*, RT (Sept. 29, 2017, 1:01 PM), <https://www.rt.com/news/404964-damascus-un-coalition-war-crimes/>.

¹¹⁶ The claim that the Syrian Government and its allies were not committed to the defeat of ISIL is falsified by many sources, including some that are not usually known for their sympathies toward the Assad regime. *See, e.g.*, *Leaked Audio of John Kerry’s Meeting*, *supra* note 108 (Kerry stating that Russia intervened in Syria for the purpose of combatting ISIL); Ratnam & Hudson, *supra* note 103 (“Prior to coalition strikes against the Islamic State in September [2014], Syrian warplanes targeted a number of ISIL strongholds in eastern Syria.”); Craig Whitlock, *US Begins Airstrikes Against Islamic State in Syria*, WASH. POST (Sept. 23, 2014), https://www.washingtonpost.com/world/national-security/us-begins-airstrikes-against-islamic-state-in-syria/2014/09/22/8b677e26-42b3-11e4-b437-1a7368204804_story.html?utm_term=.df4f81e691c7 (“The Islamic State . . . represents a mortal threat to Assad and has beaten back his forces on several fronts.”).

means nothing more unhelpful than “less than fully committed,” host-State consent and UNC Article 2(4) can be circumvented far too easily. Surely the Bethlehem standard, if taken seriously and applied objectively, required the US to give the Syrian Government the benefit of the doubt when it offered its cooperation against ISIL. Any intent on its part to misdirect or otherwise undermine the efforts of the US-led coalition presumably would have revealed itself soon enough and warranted appropriate adjustments. Can it reasonably be denied, then, that when the US refused to give the Syrian Government the benefit of the doubt and started unilaterally bombing Syrian territory instead, it committed the crime of aggression against the State of Syria? I do not think that it can be. Whether this aggression was retroactively excused or otherwise cured in November 2015 with the passage of Security Council Resolution 2249 is a question respecting which reasonable disagreement is possible, although I subscribe to the view, ably articulated by others,¹¹⁷ that it was not.

III. CONCLUSION

As noted in the Introduction, the Commingled Position represents a subtle and intellectually agile blending of two interventionist rationales: Humanitarian Intervention to deal with a dictator, and the Failed State Doctrine to deal with the threatening effects of intra-state weakness. If legality were a function of doctrinal creativity, the Commingled Position would certainly pass legal muster. But the *jus ad bellum* has thankfully never aspired to the status of creative fiction, and so perhaps it should come as no surprise that, for the reasons set out above, the Commingled Position is legally deficient. Moreover, given what we know at this stage about the true nature of the United States’ agenda and activities in Syria during the years 2006-2017, the Commingled Position should also fail to pass any reasonable person’s test of political-moral legitimacy.

It would be easy to feel dispirited by these conclusions, yet I believe that, in a strange way, we should feel heartened by them instead. Much of the Middle East, and now Syria in particular, lies in ruins as a result of the post-9/11 wars. If this ruination were the product of

¹¹⁷ See Dapo Akande & Marko Milanovic, *The Constructive Ambiguity of the Security Council’s ISIS Resolution*, EJIL: TALK! (Nov. 21, 2015), <https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/>.

lawfulness or legitimacy, these two values would have little with which to commend themselves. Is it not better to be able to say—as Europeans could say at the end of the Thirty Years' War—that ruination has resulted from unbridled opportunism rather than from humanity's highest ideals? It is worth recalling in this connection that a Catholic French King's semi-covert alliance with German and Swedish Protestants against a Catholic Pope was as scandalous back in 1648 as the United States' apparent covert encouragement of Sunni radicalism against a secular Arab State is (or should be) now.

In the mid-seventeenth century, the challenge for Europeans was to ensure that international law, not geo-strategic opportunism, controlled their future. With the help of men like Hugo Grotius and the architects of the Peace of the Westphalia, they had some success in meeting that challenge; 'defending the faith' was never again to serve as a legitimate basis of armed intervention. The question for us is whether we will meet our challenge, which is to ensure that those most laudable values of human rights, democracy, and counter-terrorism are never deployed pretextually to disturb the peace of nations.