Unresolved Legal Questions Concerning Operation Inherent Resolve

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Unresolved Legal Questions Concerning Operation Inherent Resolve

OREN GROSS

To start from first principles—the United States complies with the international law of armed conflict in our military campaign against ISIL, as we do in all armed conflicts. We comply with the law of armed conflict because it is the international legal obligation of the United States; because we have a proud history of standing for the rule of law; because it is essential to building and maintaining our international coalition; because it enhances rather than compromises our military effectiveness; and because it is the right thing to do.

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INTRODUCTION

Since August 2014, the United States and several of its allies have been embroiled in military operations against the Islamic State of Iraq and al-Sham in Iraq, Syria, and later, also in Libya. Those military engagements raise a plethora of vexing legal questions both on the domestic constitutional law plane in the United States and on the international level. This Article seeks to explore and examine the legal justifications for the United States’s military operations against ISIS under international law.

Part I sketches the rise of ISIS, and Part II briefly describes the contours of Operation Inherent Resolve, which was launched by the United States on August 8, 2014 with a series of airstrikes directed against ISIS targets in Iraq before expanding, a month later, to attacks on ISIS targets in Syria. Part III examines critically the four main legal justifications put forward in support of the United States’s (and its allies’) military operations against ISIS, namely acting in pursuance of Security Council authorization (in reliance on Security Council Resolution 2249 of 2014), invitation by the Iraqi government to its friends and allies to intervene militarily in order to defeat ISIS, claims of humanitarian intervention, and last but not least, arguments that in pursuing military options, the United States exercises its inherent right for individual or collective self-defense.

I. RISE OF ISIS

The origins of ISIS can be traced back to 1999 and the founding of Jamaat al-Tawhid wa’l-Jihad (JTWJ) by Abu Musab al-Zarqawi. In October 2004, after several years in which JTWJ was loosely affiliated with al-Qaeda, al-Zarqawi formally pledged allegiance to that organization and to Osama bin Laden, renaming JTWJ as al-Qaeda in the Land of Two Rivers (AQI). However, there continued to be an “ideological divide” between AQI and al-Qaeda, as “Zarqawi felt that the only way to save the umma (global Islamic community) from itself was through purging it, whereas bin Laden’s number two, Ayman al-Zawahiri, believed that Muslims were not the problem, but that instead the ‘apostate’ institutions needed to be changed.” In 2006, al-Zarqawi established a new terrorist organization, the Majlis Shura al-Mujahedin (MSM), a collection of “Iraqi insurgent factions...with AQI at the top.”

2. These questions are explored separately in Oren Gross, Fighting ISIS Under the Constitution (2017) (unpublished manuscript) (on file with author).
4. Id. at 2; see also JOBY WARRICK, BLACK FLAGS: THE RISE OF ISIS 67-68 (2016) (detailing how al-Qaeda provided “start-up money” to al-Zarqawi, as al-Zarqawi was identified as someone al-Qaeda could use to help establish a “presence in the countries of the Levant”).
5. Zelin, supra note 3, at 2; see also WARRICK, supra note 4, at 174 (“[T]hree years after the attacks of September 11, 2001, Zarqawi offered the potential for something that Bin Laden desperately needed: a win...[b]y co-opting Zarqawi, al-Qaeda could share the credit for his successes and draw in new energy.”).
7. Id.
Zarqawi’s death in June 2006 by U.S. airstrike invalidated MSM’s implied pledge to bin Laden.1 Within a few months, al-Zarqawi’s successor, Abu Hamza al-Muhajir, shifted his loyalty to Abu Omar al-Baghdadi, the leader of the Islamic State of Iraq (ISI).10 In 2010, al-Baghdadi was killed in “an operation led by Iraqi security forces with the support of U.S. troops.”11 He was replaced by Abu Bakr al-Baghdadi, who, in April 2013, changed the organization’s name to the Islamic State of Iraq and al-Sham (ISIS), announcing that it was extended into Syria.12 Baghdadi went so far as to assert that al-Zarqawi was never truly loyal to Osama bin Laden and al-Qaeda and that the purported alliance was “for strategic reasons, and not out of some genuine devotion or need.”13

For its part, al-Qaeda openly disavowed ISIS in February 2014, declaring, “ISIS is not a branch of the Qaidat al-Jihad [al-Qaeda’s official name] group, we have no organizational relationship with it, and the group is not responsible for its actions.”14 Part of the reason for the split is that ISIS believes that it—and not the current iteration of al Qaeda—is the “true heir of bin Laden’s al-Qaeda.”15 There were also deep ideological differences between ISIS and al-Qaeda responsible for the groups’ split. As an example, al-Qaeda had deep misgivings regarding the “beheadings and other shock-theater tactics” used by ISIS.16

In June 2014, ISIS declared itself a Caliphate (Islamic state), claiming that its own leader, al-Baghdadi, was the spiritual leader of all Islam.17 Since then ISIS and other terrorist organizations pledging allegiance to the caliphate have established provinces in Syria, Iraq, Saudi Arabia, Yemen, Afghanistan, Pakistan, Egypt, Libya, Algeria, and Nigeria.18

10. Id.
13. WARRICK, supra note 4, at 283.
15. Id. at 5-6.
16. WARRICK, supra note 4, at 283-84.
Nowhere was ISIS's expansion and reach as wide as in Iraq and Syria. In June 2016, the United Nations Human Rights Council concluded that "Islamic State forces have committed genocide and other war crimes in a continuing effort to exterminate the Yazidi religious minority in Syria and Iraq."\(^{20}\) These crimes have included "mass killings of Yazidi men and boys who refused to convert to Islam, . . . with dozens of mass graves . . . uncovered in areas recaptured from [ISIS]."\(^{21}\) ISIS has also committed brutal acts of rape and sexual slavery,\(^{22}\) thrown homosexuals off of buildings,\(^{23}\) engaged in torture,\(^{24}\) forced marriages,\(^{25}\) detonated bombs in civilian centers,\(^{26}\) and carried out attacks targeting children.\(^{27}\)

Raqqa, one of the largest cities in Syria, was taken by ISIS in January 2014 and made into the capital of the caliphate.\(^{28}\) In Iraq, ISIS captured the city of Fallujah in the same month, with the Anbar province becoming "a battleground" that spring.\(^{29}\) Five months later, the cities of Mosul and Tikrit were seized "in a blitz offensive."\(^{30}\) ISIS continued to expand its reach in Iraq, "seiz[ing] the districts of Sinjar, Tel Afar and the Ninewa Plains" in August 2014.\(^{31}\)

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21. Id.


23. Isaac Chotiner, *The ISIS Correspondent*, SLATE (July 12, 2016, 5:45 AM), http://www.slate.com/articles/news_and_politics/interrogation/2016/07/rukmini_callimachi_the_new_york_times Isis_reporter_discusses_her_beat.html [https://perma.cc/6DH3-Y2CN] ("[T]he ISIS ideology is a perfect place for somebody who is homophobic. This an ideology of a group of people that are throwing homosexuals off of buildings in Iraq and Syria as punishment for what they consider to be their devious sexuality.").


26. See WARRICK, supra note 4, at 285 ("ISIS dispatched suicide bombers into sports arenas and community soccer games as well as mosques, cafés, and markets.").

27. Id. ("Even Iraqis inured to bloodshed expressed shock when an ISIS recruit drove an explosives-laden truck into an elementary-school playground . . . in October 2013, killing thirteen children . . . ").


30. Id.

31. Id. para. 5.
In early 2015, ISIS became a truly globalized terrorist organization. Since then, more than 1,200 people outside of Iraq and Syria have been killed in attacks coordinated or inspired by ISIS. These terrorist attacks have included:

- January 2015: “A series of simultaneous bombings targeting security facilities in the Sinai killed at least 26 people,” with ISIS claiming responsibility.33

- February 2015: In Libya, ISIS claimed responsibility “for three car bombs that killed at least 38 people.”34

- March 2015: A series of suicide attacks on mosques throughout Yemen took the lives of at least 130 citizens.35

- April 2015: In Sinai, Egypt, “[ISIS] carried out three separate attacks on Egyptian security forces . . . including bombing a police station,” killing at least 12 people.36

- May 2015: ISIS claimed responsibility “for a suicide bombing during midday prayer at a Shiite mosque in eastern Saudi Arabia” that killed at least 21 people and injured more than 120 others.37

- June 2015: A series of car bombings in Sana, Yemen killed at least 30 people.38

- June 2015: An ISIS gunman killed at least 38 people, “most of them British tourists,” at a resort in Tunisia.39

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32. Yourish, supra note 17.
July 2015: A suicide bomber “killed at least 32 people” in southeastern Turkey. The Turkish government believed the bomber had ties to ISIS.40

September 2015: Two bombings at a mosque in Sanaa, Yemen “killed at least 25 people . . . during prayers.”41

October 2015: Bombings at a peace rally in Ankara, Turkey killed at least 95 people, at the time making it “the deadliest terrorist attack in modern Turkey’s history.”42

November 2015: ISIS claimed responsibility for bombing a Russian charter jet, “which killed all 224 people aboard.”43

November 2015: ISIS claimed responsibility for a double suicide bombing in Beirut, Lebanon that killed “at least 43 people . . . and [wounded] more than 200.”44

November 2015: Three coordinated attacks in Paris killed at least 130 civilians45 and wounded 352 others.46

December 2015: A car bombing in Yemen killed a provincial governor and eight of his bodyguards.47

• March 2016: Multiple bombings throughout the city of Brussels killed at least 30 civilians. 48

• May 2016: ISIS claimed responsibility for a shooting in Cairo that claimed the lives of eight plainclothes police officers. 49

• June 2016: The Turkish government attributed a series of bombings at Istanbul's international airport to ISIS. The bombings killed at least 44 people and injured 238 others. 50

• July 2016: ISIS claimed responsibility for a truck attack in Nice, France that killed at least 84 civilians and injured 303 others. 51 ISIS called the attacker “a soldier of the Islamic State,” but authorities question this claim, as there was “no evidence suggesting the driver was radicalized, or had even been exposed to the Islamic State’s propaganda.” 52

While the frequency of terror attacks claimed by ISIS has increased over the past couple of years, recently, the group has been losing significant ground in both Iraq and Syria. 53 Indeed, as former President Obama has noted, the weakening of ISIS “domestically” has directly contributed to the increase in the frequency of terrorist attacks carried out or inspired by the group in Europe and the United States. 54


49. See Declan Walsh, Ambush Kills 8 Police Officers in. Egypt, N.Y. TIMES (May 8, 2016), http://www.nytimes.com/2016/05/09/world/middleeast/cairo-egypt-policemen-killed.html [https://perma.cc/CCV3-UTDB] (giving an account of the deadly attack in Cairo, which is believed to be an act of ISIS, that left eight plainclothes police officers in a minibus dead; ISIS’s claim of responsibility at the time of this article’s publication was not independently verified).

50. See Ceyland Yeginsu & Rukmini Callimachi, Turkey Says Airport Bombers Were from Kyrgyzstan, Russia and Uzbekistan, N.Y. TIMES (June 30, 2016), http://www.nytimes.com/2016/07/01/world/europe/istanbul-airport-attack-turkey.html [https://perma.cc/P3KR-NKB9] (finding that while no group has claimed responsibility for the attacks at a Turkish airport that produced 44 fatalities, Turkish officials say ISIS is responsible). According to Turkish officials, the three suicide bombers were from Kyrgyzstan, Russia, and Uzbekistan; the recruitment of fighters from Central Asian stations is a result of government suppression against Muslim organizations and widespread poverty. Id.


52. Id.


54. Stephen Collinson & Kevin Liptak, Obama: Trump’s Warning on Elections is ‘Ridiculous’, CNN
and August 2016, the local, U.S.-assisted forces in Iraq and Syria “made significant progress against ISIL . . . [by] tak[ing] key territory from [the group],” including Fallujah and the Qarayyah airfield. Perhaps most significantly, in January 2017 Iraqi forces, “aided by American air support and military advisors,” reclaimed control of the eastern half of Mosul. At the time of this writing, efforts to salvage the entire city remain ongoing. Iraqi Prime Minister Haidar al-Abadi has announced “[a]n Iraqi offensive to retake the western half of Mosul,” and on February 18, 2017, “Iraqi planes dropped millions of leaflets on western Mosul warning residents that the battle to dislodge [ISIS] was imminent . . . [and] told the jihadists to surrender ‘or face a fatal end.’”

U.S. Secretary of Defense James Mattis reaffirmed U.S. commitment to the operation, stating “[t]he coalition forces are in support of this operation and we will continue . . . with the accelerated effort to destroy ISIS.”

In Syria, an aerial campaign is being waged against ISIS targets in the city of Raqqa. On August 12, 2016, a coalition of local forces—backed by U.S. special operations forces and airstrikes—liberated Manbij, a city in northern Syria, which had been described by former President Obama as “a gateway for ISIS fighters coming in and terrorists heading out to attack Europe.” ISIS had been using the town “as a hub for recruiting and processing foreign fighters . . . [and] for dispatching operatives across the Turkish border for potential use in external operations.” The seizure of the town provides a significant strategic advantage for the coalition fighting ISIS, as it “essentially blocks a supply route ISIS has between its heartland of Raqqa and Turkey.”

ISIS leaders have acknowledged the group’s weakening position. Yet, ISIS continues to control western Mosul in Iraq and Raqqa in Syria, the group’s primary


56. Id.


nerve centers. In addition, experts caution that even the destruction of ISIS's command network and strongholds would not immediately end the group's global threat since "[ISIS's] highly decentralized nature ensures that it will remain dangerous for some time to come." 

II. OPERATION INHERENT RESOLVE

ISIS was designated as a foreign terrorist organization by the U.S. State Department in May 2014. On August 8, with tensions escalating throughout the summer, President Barack Obama launched operation "Inherent Resolve" with a series of airstrikes directed against ISIS targets in Iraq. One month later, the scope of the operation expanded and the United States began striking targets in Syria.

The United States has continued to increase the number of its troops dedicated to fighting ISIS. In April 2016, the BBC reported that the United States was committing 200 additional special forces troops, bringing the total number of U.S. personnel deployed in Iraq to about 4,100. Additionally, in 2016, the United States pledged to provide more than $400 million in assistance to Kurdish Peshmerga forces fighting ISIS in the region. In July 2016, Defense Secretary Ash Carter announced another troop increase, adding 560 new U.S. personnel to bring the total number of deployed personnel in Iraq up to 4,647. CNN reported that this troop increase was to assist the Iraqi troops with the logistics and recapturing of Mosul. Secretary Carter stated that "[t]hese additional U.S. forces will bring unique capabilities to the campaign and provide critical enabler support to Iraqi forces at a key moment in the fight." Throughout 2016, significant goals have been achieved in the fight against ISIS. In March, U.S. operations in the Middle East killed ISIS's second-in-command, Abd al-Rahman Mustafa al-Qaduli and ISIS's "defense minister," Omar al-Shishani. These operations were part of the United States' plan to "systematically eliminate[e]
ISIS’s cabinet.” In August 2016, the United States began an aerial bombing campaign against ISIS targets in Libya. The Libyan operation has been characterized as “a sustained offensive against the militant group” that does not have “an end point at this particular point of time.” The initial focus of the Libya bombings is on targets in Sirte with the stated goal to “provide a decisive advantage to the [GNA] attackers and help break the stalemate along the fighting fronts in the southern and western part of the city.”

Actions against ISIS in Iraq and Syria have continued into August 2016. As of January 31, 2017, the United States has spent $11.4 billion on Operation Inherent Resolve. As of August 3, 2016, a total of 14,235 strikes have been conducted against ISIS forces in Iraq and Syria by the United States and its coalition allies. These strikes have collectively destroyed more than 26,000 strategic ISIS targets in Iraq and Syria and are estimated to have killed “as many as 45,000 ISIS-linked fighters.” There has also been increased ground combat between U.S. troops and ISIS fighters.

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77. Id. (quoting, in part, the Secretary of Defense, Ash Carter) (internal quotation marks omitted).
84. Lee & Sonne, supra note 66; see also id. (explaining that the coalition includes forces from Australia, Bahrain, Belgium, Canada, Denmark, France, Jordan, the Netherlands, Saudi Arabia, Turkey, the United Arab Emirates, and the United Kingdom).
85. Operation Inherent Resolve, supra note 83.
87. See Mark Mazzetti & Helene Cooper, Another Combat Death in Iraq May Presage Future U.S. Role, N.Y. TIMES (May 4, 2016), http://www.nytimes.com/2016/05/05/us/another-combat-death-in-iraq-may-presage-future-us-role.html?_r=0 (stating that daily firefights between U.S. and ISIL forces are becoming “routine [ ]”).
III. INTERNATIONAL LAW AND OPERATION INHERENT RESOLVE

Several theories have been offered to justify the use of force by the United States against ISIS forces in Iraq and Syria (and later, also in Libya). This section focuses on four of those theories upon which the United States could rely in claiming that Operation Inherent Resolve complies with international law: United Nations Security Council authorization, invitation to intervene, humanitarian intervention, and self-defense.

A. Security Council Authorization

Article 2(4) of the Charter of the United Nations—"[t]he pivot on which the present-day jus ad bellum hinges"—contains a prohibition on the threat or use of force among member States. This foundational prohibition is only subject to two exceptions: The "inherent" right of individual or collective self-defense under Article 51 of the Charter and enforcement measures carried out by, or through the authorization of, the UN Security Council.

Article 42 of the UN Charter allows the Security Council to authorize the use of force "as may be necessary to maintain or restore international peace and security" when alternative methods of resolution have proven inadequate. So far the Security Council has passed two resolutions addressing the threat posed by ISIS. Resolution 2178 declares terrorism "one of the most serious threats to international peace and security," but leaves out the essential force authorization language of "all necessary means."

This language, "all necessary means," has appeared in all the Security Council resolutions that authorized member States to use military force. It resurfaced, however, in November 2015 when the Security Council unanimously passed Resolution 2249. Paragraph 5 of that resolution provides that the Security Council,

[c]alls upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL . . . in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL . . . and all other individuals, groups, undertakings, and entities associated with Al-Qaida, and other terrorist groups . . . and to eradicate the safe haven they have established over significant parts of Iraq and Syria.92

88. YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 87 (2011).
89. U.N. Charter art. 42.
However, while historically the phrase “all necessary measures” has been considered tantamount to an authorization to use armed force, several challenges face those who may wish to rely on Resolution 2249 as a legal basis to use force against ISIS. For starters, the Resolution does not “authorize” member States to take all necessary measures. Nor does it even use the verb “decide” that would indicate a Security Council exercising its authority to adopt a decision that would be binding on all the member States. Rather, the resolution simply “calls upon Member States” to act. As Dapo Akande and Marko Milanovic note, “[t]his difference in language itself suggests that though the Council contemplates, and perhaps would even welcome, the use of force by [S]tates, it does not authorize such action.” Equally significant is that “for the resolution to have those [binding and operative] effects the Council must actually decide to do something or to authorize something.” Calling upon States to take action is entirely different from authorizing States to so act, and thus Resolution 2249 has little, if any, operative impact. Moreover, in contradistinction to previous Security Council resolutions authorizing the use of force, which have invoked the Security Council’s authority under Chapter VII of the Charter (e.g., by incorporating the phrase “acting under Chapter VII of the Charter”), Resolution 2249 is silent on the matter and Chapter VII is nowhere mentioned. The absence of any such mention of Chapter VII, it is argued, means that a Security Council authorization to use force is, at least at present, off the table. Thus, as Ashley Deeks argues, while “[m]ost UNSCRs that authorize force . . . contain a preambular paragraph that specifically


94. See id. (noting that the Resolution does not authorize all measures due to lack of certain required language).


96. S.C. Res. 2249, supra note 92, para. 5.


98. Id. (emphasis omitted).

99. See Harriet Moylan, Assessing the Legal Basis for UK Military Action in Syria, ROYAL INST. INT’L AFF. (Nov. 26, 2015), https://www.chathamhouse.org/expert/comment/assessing-legal-basis-uk-military-action-syria [https://perma.cc/TU7J-MBYV] (“In order to provide legal authority for the use of force against ISIS under international law, a Security Council resolution would need to constitute a decision, taken under Chapter VII of the UN Charter, that states could use all necessary measures in their action against ISIS. Although resolution 2249 determines that ISIS is a ‘global and unprecedented threat to international peace and security’ and refers to ‘all necessary measures’, the language used in the operative part of the resolution is merely hortatory (‘calls upon’) and does not refer to Chapter VII. For those who are looking for specific UN authorization for the use of force, this is not it.”).


101. See generally S.C. Res. 2249, supra note 92, para. 5.

102. See Sharmine Narwani, Breaking International Law in Syria, RT (Nov. 25, 2015), https://www.rt.com/op-edge/323396-unsc-isis-syria-us/ [https://perma.cc/W3KK-KWWB] (arguing that the lack of Chapter VII language in the Resolution means that use of force is not in accordance with international law unless States have other means to render use of force compliant).
invokes Chapter VII[,] . . . use the word ‘decides’ as the active verb in the paragraph that authorizes force [, and] . . . use the term ‘all necessary means’ or ‘all necessary measures’ as the code for force authorization." 103 Only the third of these elements is present in Resolution 2249, making it clear that the Resolution “is not intended to serve as a stand-alone authorization for using force against ISIS in Syria and Iraq.” 104

What, then, is the significance of Resolution 2249 according to this view? For those who reject the position that the resolution authorizes member States to use force against ISIS, the resolution is nothing more than a restatement that member States may only use force against ISIS if, and only if, they are already permitted to do so legally, namely in exercising their inherent right of individual or collective self-defense in accordance with Article 51 of the Charter. 105 In fact, Resolution 2249 may also be construed as suggesting that “if a state has a legal basis, compatible with the UN Charter, to take military action, and if it has capacity to do so, then it is encouraged to act.” 106 According to this view, the resolution legitimates “the options taken by major stakeholders involved in the Syrian conflict” 107 without giving any further legal authorization to such actions. It is also worth noting that Resolution 2249 “dodges the question of whether outsiders can use force against IS in Syria without the explicit permission of the Syrian government.” 108 Such a crucial question is highly unlikely to have gone unaddressed in a resolution authorizing military force.

The combination of the factors noted above has led many to conclude that Resolution 2249 reflects a political compromise that prevents any reading of that resolution as independently authorizing force against ISIS in Syria or Iraq. As Ashley Deeks notes,

Russia is acting against ISIS in Syria with Assad’s consent, and asserts that other bases for using force in Syria are inconsistent with international law. The United States, France, Canada, Australia, Turkey, and other states are using force in Syria on a theory of collective self-defense of Iraq or of national self-defense or both. OP5 neither rejects nor accepts the legitimacy of any particular legal theory. Instead, it indicates approval for states to use force in Syria and Iraq as long as that force is consistent with the UN Charter. That allows states to continue to rely on their existing theories for


104. Id.


106. Moynihan, supra note 99.


using force—which each state asserts is consistent with the Charter—without having to resolve the legal dispute between Russia and the other states using force.109

Yet, even if one accepts this reading of Resolution 2249, I would suggest that its significance goes beyond the immediate issue of whether member States are authorized by the Security Council to use force, or merely encouraged to do so based on their individual or collective right of self-defense. For, as the resolution clearly indicates, the target for such use of force is not a State but rather ISIS, a non-State terrorist organization.110 In acknowledging the possibility that member states will take “all necessary measures” against such a non-State entity, the Security Council seems to recognize that force can be legally used against terrorist groups.111 And if, as suggested by the view above, all Resolution 2249 does is encourage member States to exercise their right of self-defense against ISIS, then it essentially confirms that self-defense may indeed be used against terrorist groups and similar non-State actors. This, in and of itself, is a significant point, the true meaning of which is explored further below.

Moreover, the view of Resolution 2249 as political encouragement, rather than legal authorization, does not go uncontested. The resolution calls on States to “eradicate the safe haven [ISIL has] established over significant parts of Iraq and Syria.”112 It is hard to construe the word “eradicate” in any way other than authorizing military force. Furthermore, the resolution contains other allusions to Chapter VII powers, such as the phrase “[the Council] regards all such acts of [ISIL] terrorism as a threat to peace and security,”113 which harkens back to the language appearing in Article 39 of the Charter.114 Indeed, “[a]s the [International Court of Justice]’s Namibia Advisory Opinion makes clear, “the lack of reference to Chapter VII in a resolution does not mean that it is not to be regarded as binding nor does it mean that the resolution does not have operative legal effect.”115

The treatment of Resolution 2249 by several member States blurs the answer to the question of encouragement versus authorization further still. Thus, for example, the French government has taken the view that the resolution “authorise[d] collective self-defence [sic] against an armed attack . . . and immediately announced it was tripling air strikes against I[SIL].”116 Similarly, the German Parliament decided to

109. Deeks, supra note 103. It is noteworthy that as part of that compromise, Russia managed to add language “protecting Bashar-al Assad’s role in a political transition, [so] the text cannot be used to justify attacking government positions.” Rob Crilly, UN Approves Syria Resolution-What Does it Mean?, TELEGRAPH (Nov. 21, 2015), http://www.telegraph.co.uk/news/worldnews/islamic-state/12010091/UN-approves-Syria-resolution-what-does-it-mean.html [https://perma.cc/48XA-ZWD5].
110. See S.C. Res. 2249, supra note 92, para. 5 (Nov. 20, 2015) (stating that it calls on member States to renew their efforts against ISIS, not a State organization).
111. Id.
112. Id.
113. Id. para. 1.
114. See U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace . . . .”).
approve the government’s formal request to send up to 1200 troops to combat ISIS.\footnote{117} The international legal basis for the deployment decision, as officially claimed by the Government, is “collective [] self-defence under Art. 51 of the UN Charter [as] covered by [SC Res.] 2249 (2015).”\footnote{118} In his November 2015 report to Parliament, former British Prime Minister David Cameron adopted a more robust view of Resolution 2249 when he quoted it, stating that, “[t]here [was] a clear legal basis for military action against ISIL in Syria.”\footnote{119} He then strongly implied that the existence of the resolution would dispel the “political, legal, and military risks” that would otherwise come from using force against ISIS.\footnote{120} Following the Prime Minister’s lead, Parliament voted (by a 397-223 margin) to approve airstrikes against ISIS in Syria despite the earlier view of many members that such action could not, in fact, be legally justified.\footnote{121} Since then, “the UK [and] the United States [have joined] in bombing ISIS targets throughout Syria.”\footnote{122} However, for its part, the United States has not relied expressly on Resolution 2249 to justify its military operations against ISIS in Iraq and Syria.\footnote{123}

B. Invitation to Intervene

Customary international law incorporates the principle of non-intervention in other States’ internal affairs as a reflection of respect for their sovereignty.\footnote{124} However, international law recognizes a qualified right of a government to request foreign assistance, including by way of military intervention, to suppress rebels acting against the government.\footnote{125} The invitation doctrine allows a foreign State to “legally send troops to another State upon invitation for certain limited operations.”\footnote{126}

In a speech given on April 1, 2016 before the annual meeting of the American Society of International Law, Brian Egan, the State Department Legal Advisor, stated:

As a matter of international law, the United States has relied on both consent and self-defense in its use of force against ISIL . . . . Beginning in the summer of 2014, the United States’

\footnote{118. Id.}
\footnote{120. Id.}
\footnote{121. Michael P. Scharf, How the War Against ISIS Changed International Law, 48 CASE W. RES. J. INT’L L. 15, 65 (2016).}
\footnote{122. Id.}
\footnote{123. Id. at 66.}
\footnote{124. U.N. Charter art. 2, para. 7.}
\footnote{125. See id. arts. 39-51 (discussing UN procedures for requesting military assistance with respect to “threat[s] to the peace, breach[es] of the peace, [and] act[s] of aggression”).}
actions in Iraq against ISIL have been premised on Iraq’s request for, and consent to, U.S. and coalition military action against ISIL on Iraq’s territory in order to help Iraq prosecute the armed conflict against the terrorist group.127

Indeed, the Iraqi Defense Minister Khaled al-Obeidi acknowledged that his country had “asked for help from many countries that we have a strategic relationship with, and that includes the United States . . . . We are in a state of war, and we look to our friends to help us in this confrontation.”128 In a letter submitted by the government of Iraq to the Security Council on September 20, 2014, Iraq states,

[W]e, in accordance with international law and the relevant bilateral and multilateral agreements, and with due regard for complete national sovereignty and the Constitution, have requested the United States of America to lead international efforts to strike ISIL sites and military strongholds, with our express consent. The aim of such strikes is to end the constant threat to Iraq, protect Iraq’s citizens and, ultimately, arm Iraqi forces and enable them to regain control of Iraq’s borders.129

However, relying exclusively on Iraq’s invitation would permit a narrower course of conduct than the United States would likely prefer,130 since under this theory, the continuation of U.S. military operations against ISIS will depend on Iraq’s on-going consent, which, as Ashley Deeks correctly notes, “it could withdraw.”131 Moreover, as the International Court of Justice held in the Democratic Republic of Congo v. Uganda case, when one State gives its consent to another to carry out military operations in the territory of the former, such operations must be limited and restricted within the parameters of such consent.132

No express invitation has been extended to the United States, unlike Russia, which was asked by Syria to act against ISIS forces.133 Although some have argued that the United States might claim Syrian “implied consent” based upon the Syrian government’s passivity in allowing U.S. operations on and in Syrian territory,134 the

127. Egan, supra note 1.
131. Id.
134. Louise Arimatsu & Michael Schmitt, The Legal Basis for the War against ISIS Remains Contentious, GUARDIAN (Oct. 6, 2014), http://www.theguardian.com/commentisfree/2014/oct/06/legal-basis-war-isis-
notion of “implied invitation” is not accepted in international law and would be particularly dangerous due to its inherent manipulability. 133

Traditionally, only the established, internationally recognized government can extend such an invitation. Thus, while international law permits a country to intervene in a fellow nation on the request of that fellow nation’s government, the validity of a request by the Libyan government is complicated by the fact that there are currently rival governments in Libya, namely the Government of National Accord (GNA) and the House of Representatives (HoR). 136 The GNA is backed by the United Nations, 137 while the HoR has some western support, including France. 138 While the GNA appears to be the stronger of the two governments, “on the domestic front, the GNA still has to gain recognition and earn its legitimacy from many—including the powerful eastern tribes and . . . the most powerful man in the country, General Haftar.”139 The GNA requested foreign assistance, 140 but the U.S. airstrikes have been declared “illegal and unconstitutional” by members of the HoR. 141 While the United States argues that the GNA has been characterized as “the internationally recognized government of Libya,”142 if it “still lacks power within the country and has been unable to create a truly national unified government[,]” it is a dubious claim to suggest the GNA has the authority under international law to request foreign assistance. 143 Indeed, while Pentagon Press Secretary Peter Cook noted that “the head of the GNA . . . specifically requested [the U.S.] strikes as part of the GNA’s campaign to defeat ISIL,”144 the U.S.

135. See Eliav Lieblich, Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements, 29 B.U. INT’L L.J. 337, 349–50 (2011) (stating that interventions without explicit consent “raise difficult questions, particularly regarding whether the consent was freely given”).


137. Id.

138. Id. (“[R]ecently the French have been discovered as supporting the [GNA] rival House of Representatives (HoR) government and its forces under General Haftar. Three French agents were killed when a helicopter crashed or was shot down while on a reconnaissance mission for Haftar.”); John Pearson, French Support of Rival General Threatens Libya’s UN-Backed Government, NATIONAL. (July 23, 2016, 1:48 PM), http://www.thenational.ae/world/middle-east/french-support-of-rival-general-threatens-libyas-un-backed-government [https://perma.cc/AA74-J35Z] (“The GNA is struggling to control the country’s west . . . . The realisation that Gen Hafter has French backing further undermines its credibility, leaving Libyans on all sides questioning whether it should stay in office.”).

139. Guitta, supra note 78.

140. Id. (“The [U.S.] bombing [campaign] was in response to the request of the Government of National Accord (GNA), whose Prime Minister Fayez al-Sarraj had previously said Libya did not need foreign intervention.”).


143. Hanly, supra note 136.

144. Press Release, supra note 142; see also Timm, supra note 79.
government, perhaps due to the uncertain status of the GNA within Libya, has not relied solely on the GNA’s request to justify its intervention.

C. Humanitarian Intervention

The United States’s first air strikes against ISIS came on the heels of news reports describing the critical condition of tens of thousands of Yazidis trapped on Mount Sinjar.\(^{145}\) Michael Scharf suggests that such military actions could have been framed in terms of humanitarian intervention.\(^{146}\) However, from a legal standpoint, arguments about humanitarian intervention are rather weak since, under positive international law, unilateral humanitarian intervention (i.e., one carried out by a State or a group of States without an authorization from the UN Security Council) is unlawful.\(^{147}\)

Unilateral humanitarian intervention does not fulfil the conditions for a lawful self-defense,\(^{148}\) and, by definition, it lacks Security Council approval. Since these are the only two exceptions to the prohibition on the use of force under Article 2(4), the UN Charter does not recognize a unilateral right of a member State to use force against another, regardless of the aims of such intervention. The International Court of Justice accepted this position in its decision in the Nicaragua v. United States case holding that the United States could not invoke Nicaragua’s human rights record to justify American military activities.\(^{149}\) However, this state of affairs creates a sharp schism between the strictures of positive international law and the need to address urgent humanitarian appeals and prevent or stop mass atrocities. As Thomas Franck argues, “the law’s legitimacy is surely [] undermined if, by its slavish implementation, it produces terrible consequences. The paradox arises from the seemingly irreconcilable choice, in such hard cases, between consistency and justice.”\(^{150}\)

While this paradox has led some proponents of humanitarian intervention to couch their arguments in moral terms, seeking to bypass “capricious legalistic


\(^{146}\) Scharf, supra note 121, at 55-62.


\(^{148}\) Bruno Simma, NATO, the UN and the Use of Force: Legal Aspects, 10 EUR. J. INT’L L. 1, 4-6 (1999).

\(^{149}\) Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, para. 129 (June 27); see also Nigel S. Rodley, Human Rights and Humanitarian Intervention: The Case Law of the World Court, 38 INT’L & COMP. L. Q. 321, 332 (1989). But see Dino Kritsiotis, Reappraising Policy Objections to Humanitarian Intervention, 19 MICH. J. INT’L L. 1005, 1013 (1998) (interpreting the ICJ’s ruling as merely finding that, in the particular circumstances before the ICJ, there was no right of intervention in support of an opposition within another state because states had not justified their conduct by reference to a new right of intervention, and thus there was no possibility of demonstrating the emergence of a new customary norm on the matter).

\(^{150}\) THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 175 (2002).
logomachy" by direct appeals to moral legitimacy, I have suggested elsewhere that the extra-legal measures model, which I developed in the context of emergency powers, could be utilized to offer an alternative for States to undertake unilateral humanitarian intervention while, at the same time, maintaining the strong principle of prohibiting the use of force and the integrity of the UN Charter’s collective security system. This model involves the possibility that when the circumstances on the ground are truly exceptional, the Security Council is unwilling or unable to act, and no other alternatives for action exist, unilateral action could be undertaken. Such action would violate international law, and a state would acknowledge that violation, rather than attempting Orwellian legal interpretations, reasoning, and justifications for action.

The debate surrounding the legality of unilateral humanitarian intervention was rekindled just as this Article went to print. On April 6, 2017, U.S. destroyers launched 59 Tomahawk missiles against a Syrian airfield from which the Syrian regime had earlier conducted a chemical weapons attack. In the aftermath of the attacks, a number of scholars argued in support of unilateral humanitarian intervention of the kind carried out by the United States. Others reiterated the view that unilateral humanitarian intervention is illegal under existing international law. For my part, I

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152. See, e.g., Michael J. Smith, Humanitarian Intervention: An Overview of the Ethical Issues, 12 ETHICS & INT’L AFF. 63, 75–79 (1998) (“I regard it still as a moral imperative to prevent or mitigate evil when one has the capacity to do so. Thus as an ethical imperative, the issue of humanitarian intervention demands our deepest attention and response.”); Allen Buchanan, Human Rights, Legitimacy, and the Use of Force 298 (2010) (“Most would agree that the international legal system has undergone significant moral improvements since 1945.”).


155. See also Michael Byers, Letting the Exception Prove the Rule, 17 ETHICS & INT’L AFF. 9, 16 (2003) (suggesting that the mitigation approach (a sub-category of ELM) is not intended to provide an alternative system for regulating the use of force in international affairs; it simply recognizes that circumstances will invariably arise when the existing rules cannot be made to work—in such circumstances, it seems unwise to change longstanding and largely effective rules to accommodate the exception, rather than simply letting the exception prove the rule).


157. See, e.g., Harold Hongju Hoh, Not Illegal: But Now the Hard Part Begins, JUST SECURITY (Apr. 7, 2017, 6:09 AM), https://www.justsecurity.org/39695/illegal-hard-part-begins/ [https://perma.cc/9UWZ-F557] (arguing that the Trump administration must “use whatever opening may be created by the strike to pivot to a longer-term ‘smart power’ approach to Syrian diplomacy”); Jens David Ohlin, Two Visions of the UN Charter, OPINIO JURIS (Apr. 13, 2017, 11:50 AM), http://opiniojuris.org/2017/04/13/two-visions-of-the-uncharter/ [https://perma.cc/6S4M-CE2C] (“I don’t think that international security is promoted and enhanced when we give a free pass to allow governments to mistreat their own citizens, and treat this as a ‘lesser problem’—subject only to non-military measures—than the problem of international conflict, which is subject to unilateral military measures.”).

remain steadfast in the position that the American military action was, indeed, unlawful yet, much like its 1999 Kosovo precursor, legitimate and morally justified.

D. Self-Defense

Article 51 of the Charter states that, "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a [member State], until the Security Council has taken measures necessary to maintain international peace and security." The United States has relied on the doctrines of individual and collective self-defense to justify its military operations against ISIS under international law. In his speech before the American Society of International Law (ASIL) at its annual meeting, Brian Egan commented that, "[u]pon commencing air strikes against ISIL in Syria in September 2014, the United States submitted a letter to the UN Security Council explaining the international legal basis for our use of force in Syria in accordance with Article 51 of the UN Charter." In the letter mentioned, which was submitted to the President of the Security Council on September 23, 2014, the United States noted that, "States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense, as reflected in Article 51 of the UN Charter, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks."

1. The Inherent Right of Individual or Collective Self-Defense

The United States, like all other States who submitted similar letters to the Security Council, invoked primarily the right of collective self-defense based on an explicit request by the government of Iraq for military assistance in its fight against ISIS. For its part, Iraq, the target of numerous armed attacks by ISIS, invoked its inherent right of individual self-defense and requested military assistance by other countries. Interestingly, in his ASIL speech, Brian Egan suggested:

Consistent with the inherent right of individual and collective self-defense, the United States initiated necessary and proportionate actions in Syria against ISI[S]... although the United States maintains an individual right of self-defense against ISI[S], it has not
relied solely on that international law basis in taking action against ISI[S]. In Iraq, U.S. operations against ISI[S] are conducted with Iraqi consent and in furtherance of Iraq's own armed conflict against the group. And in Syria, U.S. operations against ISI[S] are conducted in individual self-defense and the collective self-defense of Iraq and other States. However, despite the repeated mention of the United States's right of individual self-defense, Brian Egan has not elaborated further on the factual and legal bases behind its invocation, leaving one to wonder what precisely is the armed attack perpetrated by ISIS against the United States that would justify the exercise of that inherent right of self-defense.

At the time Brian Egan made his speech, it seems that the only events that could have conceivably amounted to armed attacks by ISIS against the United States would have been the 2014 beheadings of two American journalists, the 2015 attack in San Bernardino, and the 2016 attack in Orlando, though there is still "no consensus on what type of attack by a non-state actor against a sovereign state could trigger the latter's right of self-defense." More likely, the United States would have argued that its military intervention in Syria and Iraq was justified on the basis of preemptive self-defense. The United States has taken the approach that terrorists, by their nature, "pose a continuing and imminent threat to the American people." Specifically, as of April 2016, ISIS had attacked U.S. citizens both abroad and within the United States, and the organization continued to grow in wealth, territory, and power, as well as made "credible threats . . . against the United States." However, as Marty Lederman notes:

164. Egan, supra note 1.
167. Jared Malsin, What We Know About ISIS's Role in the Orlando Shooting, TIME (June 12, 2016), http://time.com/4365507/orlando-shooting-isis-claims-responsibility-terror/ [https://perma.cc/N8YF-B9L3] ("ISIS claimed responsibility for the mass shooting attack in an Orlando gay club on Sunday that left at least 50 people dead.").
169. See Gonzalez, supra note 91, at 151 (noting that the United States would have been required to show a threat to personnel or global peace to obtain approval).
171. See Gonzalez, supra note 91, at 149 ("The growing wealth and territorial expansion of ISIS has led the United States to view it as a credible national security threat."). This trend has now reversed. Sarah Almukhtar et al., ISIS Has Lost Many of the Key Places It Once Controlled, N.Y. TIMES (July 3, 2016), https://www.nytimes.com/interactive/2016/06/18/world/middleeast/isis-control-places-cities.html?_r=2.
172. Gonzalez, supra note 91, at 150; see Jim Michaels, Islamic State Releases Video Threatening Attack
Because ISI[S] has not yet actually engaged in an armed attack against the United States, this assertion suggests that the U.S. believes that ISI[S]'s presence in Syria presents an “imminent” threat of an attack on the United States. This might or might not be correct; but, as far as I know, the government has not (yet) publicly offered any specific evidence . . . to support such an “imminent threat of attack on the U.S.” theory.

Jack Goldsmith suggests that Brian Egan’s speech constitutes the final stage of the Obama administration’s normalization of once-controversial Bush-era doctrines about the conduct of war . . . . [T]he Obama administration[] officially embraced the same preemption doctrine that justified the invasion of Iraq . . . . If anything, Egan announces a broader principle than Bush’s, since he (unlike the Bush team) applies it in the context of threats short of the weapons of mass destruction that motivated Bush.

Daniel Bethlehem rejects Goldsmith’s hypothesis, claiming that, “the policy [Egan] outlined . . . is some distance, and materially different, from the broad, unilateralist brush of the Bush doctrine of preemption and its associated policies of the non-application of the jus in bello and the global war on terror.” Bethlehem believes the imminence elements outlined by Egan provide “a more rigorous and transparent framework of legal enquiry for assessing whether a State had a right to use force by way of anticipatory self-defence in the face of a threat from a non-State actor,” which contrasts strongly with the Bush administration approach of “invent[ing] new language . . . suggest[ing] that the United States was moving away . . . from established tenets of international law.” To Bethlehem, Egan’s speech outlined a policy that ensured continued compliance with “the last resort character of the use of force and the principles of necessity and proportionality.”
Traditionally, the UN Charter provisions that handle use of force are premised on States using force against other States. However, the rapidly growing capabilities of non-State actors have challenged these traditional notions. Interpretations of Article 51 range from permitting, not expressly prohibiting, and prohibiting use of force without Security Council approval against non-State actors.

In his ASIL speech, Brian Egan stated the United States's official position that, "the inherent right of individual and collective self-defense recognized in the UN Charter is not restricted to threats posed by States." However, this position seems to run against the decisions of the International Court of Justice (ICJ). The ICJ famously defined "armed attack" in its 1986 Nicaragua case as including actions by regular armed forces across an international border as well as "the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces." The criticisms of the Court's "scale and effects" language (criticisms which I share) notwithstanding, the Court makes it absolutely clear that for there to be an "armed attack" for the purposes of Article 51, the relevant military operation must be attributable to a State. In its 2004 Legal Consequences of the Construction of a Wall in the Occupied...
Palestinian Territory advisory opinion, the ICJ opined similarly that, “[article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.”187 The ICJ thus rejected the contention that a victim State may respond by invoking its inherent right of self-defence when the claim is that the relevant armed attack had been carried out by a non-State actor.188 The ICJ also maintained this position in DRC v. Uganda, where it found that, “the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present.”189 The Court ruled, among other things, that Uganda had failed to prove “the involvement in [the] attacks, direct or indirect, of the Government of the DRC. The attacks [carried out against Uganda by a rebel group opposed to the Ugandan government with bases in the DRC] did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC.”190

This position of the Court has been controversial and, I believe, was erroneous when originally put forward, and is no longer tenable.191 Unlike Article 2(4) of the Charter, which refers to “Members” as both resorting to threat of, or using force, Article 51 only speaks of a “Member” as the target of an armed attack that “occurs.”192 No mention is made therein of the origin of that attack.193 In her Separate Opinion in Wall, Judge Higgins rejected the Court’s strict reading of Article 51, proclaiming that, “[t]here is . . . nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State.”194 Similarly, Judge Buergenthal declared that the Court’s position was “legally dubious.”195 Furthermore, the ICJ’s 2004 advisory opinion should be examined against the background of the terrorist attacks of September 11, 2001 and the international reaction to those attacks. As Yoram Dinstein argues, “the concerted reaction of the international community in 2001” to the attacks was “the defining moment that should have dispelled all lingering doubts concerning the application of Article 51 to non-State actors.”196 Most significant in this context are two Security Council resolutions—Resolution 1368 (2001) and Resolution 1373 (2001)197—both of which reaffirm the inherent right of

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188. But see Flasch, supra note 178, at 49 (discussing the ICJ’s “ambiguous” findings and “reluctance to pronounce” on the legality of using force in self-defense against non-state actors).
190. Id. para. 146.
192. U.N. Charter art. 2, para. 4; art. 51.
195. See id. paras. 5–6 (declaration by Buergenthal, J.) (“[T]he United Nations Charter, in affirming the inherent right of self-defence, does not make its exercise dependent upon an armed attack by another State . . . .”).
196. DINSTEIN, supra note 88, at 227.
197. See id. at 228 (discussing the importance of the two Security Council resolutions).
individual or collective self-defense against Al-Qaeda,\(^\text{198}\) as well as the North Atlantic Council decision to consider the 9/11 attacks as falling within the ambit of Article 5 of the Washington Treaty (later clarified to be the North Atlantic Treaty),\(^\text{199}\) which proclaims that an armed attack against one NATO member is considered as an attack against all members.\(^\text{200}\) Indeed, recognizing the importance of these resolutions and the realities of the struggle against terrorism\(^\text{201}\) has led other judges of the ICJ to part ways with the Court’s decision\(^\text{202}\). Thus, in his separate opinion in *DRC v. Uganda*, Judge Kooijmans stated forcefully that,

>a phenomenon which in present-day international relations has unfortunately become as familiar as terrorism, viz. the almost complete absence of government authority in the whole or part of the territory of a State. If armed attacks are carried out by irregular bands from such territory against a neighboring State, they are still armed attacks even if they cannot be attributed to the territorial State. It would be unreasonable to deny the attacked State the right to self-defense merely because there is no attacker State, and the Charter does not so require.\(^\text{203}\)

In yet another separate opinion, Judge Simma added:

Such a restrictive reading of Article 51 might well have reflected the state, or rather the prevailing interpretation, of the international law on self-defence for a long time. However, in the light of more recent developments not only in State practice but also with regard to accompanying *opinio juris*, it ought urgently to be reconsidered, also by the Court . . . Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as “armed attacks” within the meaning of Article 51.\(^\text{204}\)


\(^{199}\) DINSTEIN, supra note 88, at 228–29.

\(^{200}\) Id.

\(^{201}\) See Rosa Brooks, *Lessons for International Law from the Arab Spring*, 28 AM. U. INT’L L. REV. 713, 725 (2013) (“Unsurprisingly, post-9/11 counterterrorism concerns triggered the rapid emergence of normative and legal argument for expanding the basis for using force within the territory of other states.”); Lekas, supra note 180, at 328 (acknowledging that after 9/11 there is an inherent right of self-defense against non-state actors); John F. Murphy, *International Law in Crisis: Challenges Posed by the New Terrorism & the Changing Nature of War*, 44 CASE W. RES. J. INT’L L. 59, 66–67 (2011) (discussing how after 9/11, there has been a shift away from the criminal justice approach as a way of handling terrorism and a shift towards a military model of counter-terrorism); Reinold, supra note 191, at 252 (discussing how the rules governing the use of force have changed in a post-9/11 world).


\(^{203}\) Id. at 314, para. 30 (separate opinion by Kooijmans, J.).

\(^{204}\) Id. at 337, para. 11 (separate opinion by Simma, J.).
Moreover, any arguments that could have been made to the effect that in both Resolution 1368 and Resolution 1373, the inherent right of self-defense is only referred to in the preamble and not in the operative language of those resolutions, have been fully and completely laid to rest with the adoption of Resolution 2249. That resolution, as noted above, expressly accepts the possibility that member States will take “all necessary measures” against a non-State entity,\(^205\) acknowledging that force can be legally used against terrorist groups. Indeed, even if all that Resolution 2249 does is encourage member States to exercise their right of self-defense against ISIS, then it is as much as confirming that self-defense may indeed be used against terrorist groups and similar non-State actors. In that, Resolution 2249 surely ought to confirm the application of Article 51 to non-State actors.

3. “Unable or Unwilling”

Even if one accepts, as suggested above, that a State may invoke its inherent right of self-defense whenever it is subject to an armed attack, regardless of the origin of that attack, there still remains a separate question of where the victim State may exercise its right of self-defense. Specifically, when the armed attack is committed by a non-State actor, may the victim State respond by military force against that actor in the territory of another State to whom the violent actions of the non-State actor are not attributable and who does not give its consent to such use of force by the victim State?\(^206\)

International law has long recognized the obligation of every State “not to allow knowingly its territory to be used for acts contrary to the rights of other States.”\(^207\) All States have the obligation to ensure through the exercise of due diligence that illegal non-State actor uses of force are not emanating from their borders or, if such actions do take place, to apprehend and punish the perpetrators of the attack.\(^208\) Yoram Dinstein argues that if the State from whose territory the armed attack is carried out fails to exercise the requisite degree of due diligence, either because it is unable or unwilling to do so, the victim State may do that which the former State should have done had it possessed the means and disposition to perform its duty.\(^209\) Under such circumstances, the victim State may engage in a particular category of self-defense that Dinstein calls extra-territorial law enforcement, i.e., “recourse in self-defence to cross-border counter-force against terrorists and armed bands ... Utopia is entitled to enforce international law extra-territorially if and when Arcadia is unable or unwilling to prevent repetition of that armed attack.”\(^210\) Under the “unable or unwilling” doctrine, a State which is victim of an armed attack is “permitted to use force in the territory of a host state where the host state is either ‘unwilling or unable’ to do so.”\(^211\)

\(^{205}\) S.C. Res. 2249, para. 5 (Nov. 20, 2015).

\(^{206}\) On use of force by state consent, see generally Ashley S. Deeks, Consent to the Use of Force and International Law Supremacy, 54 Harv. Int’l L.J. 1 (2013).


\(^{209}\) DINSTEIN, supra note 88, at 271.

\(^{210}\) Id. at 272 (emphasis added).

\(^{211}\) Williams, supra note 182, at 620. See also Ashley S. Deeks, “Unwilling or Unable”: Toward a
In recent years, the notion of "unable or unwilling" has become "a well-settled part of the U.S. government's legal position." Ashley Deeks identifies the origins of the "unable or unwilling" doctrine in the 1837 Caroline case, in which Canadian rebels used U.S. territory to attack British forces in Canada, and suggests numerous other instances in which the doctrine was applied, even if tacitly, culminating in the American raid on Osama bin Laden's compound in Abbottabad, Pakistan—without Pakistan's consent. In his ASIL speech, Brian Egan set out the United States view regarding the unable or unwilling doctrine:

[In 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. This "unable or unwilling" standard is, in our view, an important application of the requirement that a State, when relying on self-defense for its use of force in another State's territory, may resort to force only if it is necessary to do so—that is, if measures short of force have been exhausted or are inadequate to address the threat posed by the non-State actor emanating from the territory of another State... applying the standard ensures that force is used on foreign territory without consent only in those exceptional circumstances in which a State cannot or will not take effective measures to confront a non-State actor that is using its territory as a base for attacks and related operations against other States.]

The United States has invoked the unable or unwilling test to justify its military intervention in Syria. Samantha Power, the American Ambassador to the United Nations, sent a letter to the President of the Security Council to justify U.S. air strikes in Syria, notifying the president:

States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense, as reflected in Article 51 of the UN Charter, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.

Normative Framework for Extraterritorial Self-Defense, 52 VA. INT'L L. REV. 483, 486 (2012) (using the Pakistan-U.S. relationship and others as an example of how the "unable or unwilling" test is applied).


215. Id. at 549–50 (Appendix I).

216. Murphy, supra note 201, at 69–71 (quoting John Bellinger in a 2006 speech that employs the unwilling or unable test with respect to the United States acting against al Qaida).

217. Egan, supra note 1.

218. See Michael P. Scharf, How the War Against ISIS Changed International Law, 48 CASE W. RES. J. INT'L L. 15, 34, 44 (2016) (asserting that these justifications find legal basis also in the Hague Conventions (V)); see also Johan D. van der Vyver, The ISIS Crisis and the Development of International Humanitarian Law, 30 EMORY INT'L L. REV. 531, 558 (2016) (quoting Letter from Samantha Power, U.S. Representative
With regards to the “unable” prong of the test, Brian Egan provided concrete example in his ASIL speech:

[I]nability perhaps can be 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.\footnote{Egan, supra note 1.}

For his part, Egan relied extensively on an article published by Daniel Bethlehem, the former principal Legal Advisor to the British Ministry of Foreign Affairs, in which Bethlehem suggested that inability exists when “there is a reasonable and objective basis for concluding that the [host] state is unable to effectively restrain the armed activities of the nonstate actor.”\footnote{Bethlehem, supra note 208, at 776.}

The United States also questioned how “willing” Syria was in supporting the United States’s exercise of its right of self-defense, since ISIS had established a “safe haven” in areas of Syria.\footnote{Tom Ruys & Luca Ferro, Divergent Views on the Content and Relevance of the Jus Ad Bellum in Europe and the United States? The Case of the U.S.-Led Military Coalition Against ‘Islamic State’ 9-10 (Feb. 10, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2731597 [https://perma.cc/8L5N-SR2L].}

In that respect, States may be deemed as “unwilling” when they fail to comply with international law standards of due diligence or reasonableness in undertaking measures to prevent or punish dangerous internal conduct.\footnote{See Starski, supra note 208, at 479-80 (explaining how states failing to exercise due diligence in preventing acts of terrorism could be held accountable).}

On the other hand, Sharmine Narwani questions the validity of the U.S. argument that Syria is “unwilling and unable” to combat ISIS in light of Russia’s involvement in the country. Russia “began to launch widespread airstrikes against terrorist targets inside Syria” on September 30, 2015.\footnote{Narwani, supra note 102.}

Narwani observes that “Russia is operating [in Syria] due to a direct Syrian government appeal for assistance, [making] the Russian military role in Syria ... perfectly legal.”\footnote{Id.}

Given that Syria is able to combat ISIS vis-à-vis the Russian military, it becomes harder for the United States to reasonably claim Syria is unable to strike back against ISIS. Furthermore, the fact that “the Russian intervention has assisted the Syrian state in going on the offensive against ISIS” makes it very difficult to claim that Syria is “unwilling” to attack ISIS.\footnote{Id.}

Thus, there is a genuine debate over whether Syria can fairly be characterized as “unwilling or unable.” In August 2014, Ryan Goodman cited the Syrian government as stating “that it is willing and able to cooperate with the United States in carrying out strikes against ISIS.”\footnote{Ryan Goodman, International Law on Airstrikes against ISIS in Syria, JUST SECURITY (Aug. 28, 2014, 12:27 PM), https://www.justsecurity.org/14414/international-law-airstrikes-isis-syria/ [https://perma.cc/Y8X8-4ZRJ].}

As Goodman then asks, “[w]hat 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 threatened state
doesn’t want to associate itself with the host state . . . ?” There appears to be no international consensus on this issue. However, a counterpoint to Syria’s assertion that they are willing to cooperate is that the proper question should not be whether Syria is willing to assist, but whether they are actually capable of effectively suppressing ISIS on their own. Furthermore, is it appropriate to leave the capability determination to the forum State, or should the victim State(s) be allowed to make the evaluation? As Mahira N. Khan writes, “that the regime may be willing to tackle ISIS is not enough to prevent Iraq or its allies from invoking the self-defense doctrine.”

This viewpoint is supported by the UN Secretary-General’s statement from September 2014 that “Syria had over two years to dismantle ISIS and the [U.S.] strikes took place in areas no longer under the effective control of [the Syrian government].” Some have taken this quote to be “an implicit endorsement” of U.S. actions, though the opinion of the UN Secretary-General is not dispositive on the question of international legality.

More generally, the American legal position is not without its critics and the doctrine remains highly controversial today, with a significant number of scholars rejecting it as part of international law’s lex lata. The doctrine, as it is currently touted by its proponents, lacks needed limitations. The test can easily fall into a pattern of dangerous circular reasoning: If a host State does not comply with a victim State’s desired route for self-defense, then the host State is deemed “unable or

227. Id.
229. Id. (quoting, in part, UN Secretary General Ban Ki-moon) (emphasis added).
231. Flasch, supra note 178, at 52–53; Kevin Jon Heller, The Absence of Practice Supporting the “Unwilling or Unable” Test, OPINIO JURIS (Feb. 17, 2015, 2:53 PM) [hereinafter Heller, The Absence of Practice Supporting the “Unwilling or Unable” Test], http://opiniojuris.org/2015/02/17/unable-unwilling-test-unstoppable-scholarly-imagination/ [https://perma.cc/ML9Y-YF8T]; see, e.g., Starski, supra note 208, at 486 (stating that “severe doubts” remain that base the standard in international law); Jack Goldsmith, Thoughts on the Latest Round of Johnson v. Koh, LAWFARE (Sept. 16, 2011, 8:43 AM), https://www.lawfareblog.com/thoughts-latest-round-johnson-v-koh [https://perma.cc/6MHA-6QV8] (discussing the debate over “the scope of the president’s authority to target members” of terrorist groups); see also Heller, supra note 186 (showing that for many American international law scholars, “it is meaningless to distinguish between the lex lata and the lex ferenda—international law is simply whatever the U.S. says it is”). For a short discussion of the opposing sides to this debate, see Kevin Jon Heller, Ashley Deeks’ Problematic Defense of the ‘Unwilling or Unable’ Test, OPINIO JURIS (Dec. 15, 2011), http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/ [https://perma.cc/X867-F44W].
unwilling.\textsuperscript{233} Moreover, at least according to the United States' official position, the judgment as to whether a host State is, in fact, "unable or unwilling" is in the hands of the victim State with little, if any, meaningful control or checks.\textsuperscript{234} In contrast, some have argued that the Security Council should act as a fact-finder to determine unwillingness or inability instead of the victim State.\textsuperscript{235} Only once the victim State receives confirmation from the Security Council that the host State has indeed been "unable or unwilling" may it proceed against the non-State actor operating in and from the territory of the host State.\textsuperscript{236}

Ashley Deeks argues that "centuries of state practice" support the unwilling or unable doctrine.\textsuperscript{237} In the context of the fight against ISIS, several States have invoked the doctrine to justify their use of force against the organization in Syrian territory. In their letters to the President of the Security Council, the United States,\textsuperscript{238} Australia,\textsuperscript{239} and Turkey\textsuperscript{240} have expressly invoked the "unable or unwilling" doctrine. Thus, for example, the letter sent by Australia to the Security Council declares:

States must be able to act in self-defence when the Government of the State where the threat is located is unwilling or unable to prevent attacks originating from its territory. The Government of Syria has, by its failure to constrain attacks upon Iraqi territory originating from ISIL bases within Syria, demonstrated that it is unwilling or unable to prevent those attacks.\textsuperscript{241}

Other countries—such as Germany\textsuperscript{242} and Belgium\textsuperscript{243}—have not resorted to the "unwilling" prong of the test, but have invoked the "unable" prong in addition to other justifications for military operations, such as collective self-defense. Thus, for example, the letter sent on December 10, 2015 from the Permanent Mission of Germany to the President of the Security Council states that,

\begin{itemize}
  \item Brooks, \textit{supra} note 201, at 728 (explaining that if a territorial state does not completely agree with a victim state's intended self-defense tactics, then the victim state can easily label the former as "unwilling or unable").
  \item Egan, \textit{supra} note 1.
  \item Id. at 27.
  \item Deeks, \textit{supra} note 211, at 483, 497–501.
\end{itemize}
ISIL has occupied a certain part of Syrian territory over which the Government of the Syrian Arab Republic does not at this time exercise effective control. States that have been subjected to armed attack by ISIL originating in this part of Syrian territory, are therefore justified under Article 51 of the Charter of the United Nations to take necessary measures of self-defence, even without the consent of the Government of the Syrian Arab Republic.\(^{244}\)

However, others have been unable (or unwilling) to identify consistent State practice that reflects the test.\(^{245}\) Unlike the countries mentioned above, others, such as Norway,\(^{246}\) Denmark,\(^{247}\) and France,\(^{248}\) have only invoked the right of collective self-defense in response to a request from the government of Iraq as justification for taking military action against ISIS.\(^{249}\) Interestingly enough, in its letters to the Security Council, the United Kingdom has also only resorted to the argument about collective self-defense, without invoking the “unable or unwilling” test.\(^{250}\) The “nebulous

\(^{244}\) Chargé d’Affaires a.i. of the Permanent Mission of Germany to the U.N., supra note 242.

\(^{245}\) Kevin Jon Heller, The Seemingly Inexorable March of “Unwilling or Unable” Through the Academy, OPINIO JURIS (Mar. 6, 2015, 6:44 AM), http://opiniojuris.org/2015/03/06/the-seemingly-inexorable-march-of-unwilling-or-unable-through-the-academy/ [https://perma.cc/EQ7Z-7JFE] (stating that to argue otherwise would mean to de-formalize the custom creation process, which substantiates Western interests); Heller, The Absence of Practice Supporting the “Unwilling or Unable” Test, supra note 231; Pearlstein, supra note 182; see also Flasch, supra note 178, at 52–54 (describing the “highly controversial theory that has been brewing in the discourse on the use of force for some decades is that of the ‘unwilling or unable’ test’); Ruys & Ferro, supra note 221, at 14 (explaining that European states were hesitant to make a stance initially, but they gradually recognized that the cross-border activities of ISIS “gave rise to an ‘armed attack’ triggering the right of self-defense’); Stariski, supra note 208, at 486–87 (observing that “severe doubts remain as to the lex lata status of an attribution standard based on unwillingness or inability”).


\(^{249}\) Ashley Deeks, The UK’s Article 51 Letter on the Use of Force in Syria, LAWFARE (Dec. 12, 2014, 9:53 AM), https://www.lawfareblog.com/iks-article-51-letter-use-force-syria [https://perma.cc/9AXF-RLNB] (“States such as Jordan, Bahrain, Qatar, and the UAE, which also have undertaken airstrikes in Syria, presumably are relying on the same legal theory as the United States and UK . . . states such as France, Denmark, and Belgium only have provided support to strikes against ISIS within Iraq, not Syria.’). Contra Kevin Jon Heller, Do Attacks on ISIS in Syria Justify the “Unwilling or Unable” Test?, OPINIO JURIS (Dec. 13, 2014, 11:58 AM), http://opiniojuris.org/2014/12/13/attacks-isis-syria-justify-unwilling-unable-test/ [https://perma.cc/44FY-2HKJ] (asserting that “the US and UK clearly support the ‘unwilling or unable’ test; Jordan, Bahrain, Qatar, and the UAE are likely basing their willingness to attack ISIS in Syria on Syrian consent; . . . and France, Denmark, and Belgium seem to reject the test, even if they have not done so explicitly”).

parameters" of the doctrine make measuring State practice challenging, and consensus of clear State practice (besides the acts of the United States) is fleeting.251 Indeed, the argument is made that the doctrine can be, and has been, invoked in practice by militarily strong States to push their agendas at the expense of weaker States.252 By privileging the rights of States that have been victim to non-State actor attacks that originate from weaker host States253 over the sovereignty of the host States,254 the doctrine could allow victim States to breach other States' sovereignty in a manner far greater than international law intended.255 If a host State does not consent to the plan that the victim State envisions for self-defense, the classification of the host State as "unable or unwilling" is an easy way for the victim State to proceed.256 Such concerns about sovereignty and States rushing to invoke the "unable or unwilling" test have led several scholars and practitioners to suggest that a victim State seek consent of the host State to carry out actions against the non-State actor operating in the territory of the host State before resorting to the "unable or unwilling test."257 It should also be noted that attempts to fit the test within existing international law frameworks, such as through the principle of necessity or by indirect attribution to a State's acts,258 or

251. See Williams, supra note 182, at 620 (characterizing the “unable or unwilling” test as an emerging norm).

252. Ntina Tzouvala, Symposium, TWAIL and the “Unwilling or Unable” Doctrine: Continuities and Ruptures, 109 AM. J. INT’L L. UNBOUND 266, 268 (2015) (“[I]t attempts to (re)introduce a classification of states that differentiates the degree of their sovereignty based on the way that they are internally organized and on the antiterrorist policies that they have chosen to implement.”).


254. See id. at 25 (“Even states that are not harmed by the defection of another state should have an incentive to punish states that violate the rules, for fear that violations will spread and international peace and security may be jeopardized.”).

255. See Fionnuala Ní Aoláin, International Law à la Carte: Brian Egan’s Jus ad Bellum Doctrine, JUST SECURITY (Apr. 8, 2016, 2:44 PM), https://www.justsecurity.org/30481/international-law-a-la-carte-brian-egans-ad-bellum-doctrine/ [https://perma.cc/UHE8-D6UZ] (arguing that the "unable or unable" terminology . . . when justifying action on a nation's territory without its permission . . . does not meet a threshold test for rigor or legitimacy in the law of armed conflict”).

256. See id. (quoting Brian Egan, Legal Adviser, State Department) ("[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.”).

257. See Bethlehem, supra note 175 (discussing legal dialogue with the Bush administration seeking to identify a more rigorous and transparent framework of legal inquiry for assessing whether a State had a right to use force by way of anticipatory self-defense in the face of a threat from a non-State actor); Benjamin Wittes, State Department Legal Adviser Brian Egan’s Speech at ASIL, LAWFARE (Apr. 8, 2016, 8:30 AM), https://www.lawfareblog.com/state-department-legal-adviser-brian-egans-speech-asil [https://perma.cc/EDT3-94TX] (providing a transcript of Egan’s speech); see also Horowitz, supra note 232 (explaining that seeking consent and cooperation from the host state aids in slowing down hasty reactions from the victim state); Michael Lewis, What Does the "Unwilling or Unable" Standard Mean in the Context of Syria?, JUST SECURITY (Sept. 12, 2014, 9:05 AM), https://www.justsecurity.org/14903/unwilling-unable-standard-context-syria/ [https://perma.cc/C9S3-JASN] (arguing that “the phrase ‘unable or unwilling’ describes the host/target state’s capacity to control its own territory”).

258. Flasch, supra note 178, at 54–55.
attempts to draw links and comparisons between it and the similarly legally-suspect humanitarian intervention\textsuperscript{259} have been rejected.\textsuperscript{260}

**CONCLUSION**

The United States’s war against ISIS is now in its third year. It is a “most peculiar war . . . [with] an eye-watering U.S.-to-ISIS ‘kill ratio’ of 15,000-to-1.”\textsuperscript{261} “[R]arely,” notes *Time* magazine, “has the U.S. been killing so many while risking so few.”\textsuperscript{262} Yet, despite ISIS’s recent loss of ground and territory both in Iraq and Syria, many still question the American strategy and ultimate goals in the fight against the terrorist organization.\textsuperscript{263} Not less challenging are the legal questions concerning the American military intervention, particularly in Syria and Libya, where the intervened-in State has not given its consent to such use of force in its territory.\textsuperscript{264} The military intervention raises vexing questions both on the domestic and international planes. As this Article has shown, there is a plausible case to be made that the intervention is justified by Security Council Resolution 2249. In addition, international law, as it currently stands, has clearly moved away from the position that States may not exercise their inherent right of self-defense in circumstances in which the armed attacked against them has been perpetrated by a non-State actor whose actions cannot be attributed to any other State. The option to exercise self-defense (or, more likely, collective self-defense) is available to the United States, as well as to other countries carrying the fight to ISIS, on the basis that countries such as Syria are unable or unwilling to fight ISIS.

\textsuperscript{259} See Oren Gross, *Applying the Extra-Legal Measures Model to Humanitarian Interventions: A Reply to Devon Whittle*, 26 EUR. J. INT’L L. 699, 705–06 (2015) (stating that unilateral action when a state is unwilling or unable to act violates international law and that unilateral humanitarian intervention remains illegal and is openly acknowledged as such).

\textsuperscript{260} Flasch, *supra* note 178, at 56–57; *see also* Brooks, *supra* note 201, at 727–28 (explaining that the standard is similar to humanitarian intervention because states have a responsibility to ensure lawful conduct within their borders, but that applying the standard to this doctrine “makes a mockery” of traditional state non-intervention principles); Lekas, *supra* note 180, at 348 (concluding that the “unwilling or unable rationale” is insufficient “to justify armed intervention in Syria to end the ISIS threat”); Jens David Ohlin, *The Unwilling or Unable Doctrine Comes to Life*, OPINIO JURIS (Sept. 23, 2014, 8:10 PM), http://opiniojuris.org/2014/09/23/unwilling-unable-doctrine-comes-life/ [https://perma.cc/Q76L-GYWX] (stating that the unwilling or unable test is not the current state of the law but soon may be).


\textsuperscript{262} Id.

\textsuperscript{263} *Id*. (providing examples of several U.S. generals expressing disapproval of the U.S. strategy against ISIS).
