

**Assessing the legality of the coalition air strikes targeting the  
Islamic State in Iraq and the Levant “ISIS” in Syria under  
international law**

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**Submitted in accordance with the requirements for the degree  
Magister Legum in International Law with Specialization in  
International Humanitarian and Human Rights Law in Military  
Operations**

**In the Faculty of Law, University of Pretoria**

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**Mach 2016**

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# ***I. Introduction***

## ***1. Background***

The massive terrorist attacks on the World Trade Center and the Pentagon on 11 September 2001 ... led to a fundamental reappraisal of the law on self-defence. The US response was to announce ‘a different kind of war against a different kind of enemy’, a global war on terrorism. But it is open to question how far any change in the law on the use of force has resulted from the terrorist attacks and their aftermath.<sup>1</sup>

In August 2014, the United States of America (hereinafter the US) built a coalition of partner countries to target the terrorist Islamic State in Iraq and the Levant (hereinafter ISIS) in the Middle East.<sup>2</sup> On 10 September 2014 President Barak Obama announced that the coalition would target ISIS in Syria, designating the ISIS threat as “the greatest”.<sup>3</sup>

President Obama considered that if these terrorists were “left unchecked” they “could pose a growing threat beyond that region, including being a threat to the United States”.<sup>4</sup> He went on to

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1 Christine Gray, *International Law and the Use of Force*, (2008) at 193.

2 There are different acronyms of this terrorist group such as: ISIL, Daesh, ISIS or IS, and quotations may vary; for convenience sake, ISIS will be the acronym used in this dissertation.

3 Barack Obama (2014), Statement on ISIL, available at: <<http://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1>> (accessed 27 January 2015), (hereinafter Obama statement).

4 *Ibid.*

declare that his administration would “hunt down terrorists who threaten” the US regardless of their whereabouts.<sup>5</sup> He stated that he would “not hesitate to take action” against ISIS in Syria and Iraq. He also announced that the “core principle” of his presidency is, “If you *threaten* America, you will *find no safe haven*.”<sup>6</sup>

President Obama portrayed the threat that ISIS poses as the greatest threat to the Middle East region and beyond. He, thus, granted the US-led coalition a mandate to fight terrorists in Syria and Iraq in “Operation Inherent Resolve: targeted operations against ISIL terrorists.”<sup>7</sup> According to the US “Department of Defense”:

The president has authorized US Central Command to work with partner nations to conduct targeted air strikes of Iraq and Syria as part of the comprehensive strategy to degrade and defeat the Islamic State of Iraq and the Levant.<sup>8</sup>

The legal reasoning behind the coalition air strikes was expressed in the US permanent representative’s letter to the United Nations (hereinafter the UN). In the letter, it was highlighted that the US and its partners are fighting ISIS “in accordance with the inherent right of

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<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid*, emphasis added.

<sup>7</sup> Available at: <[http://www.defense.gov/home/features/2014/0814\\_iraq/](http://www.defense.gov/home/features/2014/0814_iraq/)> (accessed 27 January 2015).

<sup>8</sup> For more information regarding the operation inherent resolve visit: <[http://www.defense.gov/home/features/2014/0814\\_iraq/](http://www.defense.gov/home/features/2014/0814_iraq/)> (accessed 27 January 2015).

individual and collective self-defense, as reflected in Article 51 of the Charter.”<sup>9</sup>

It is almost universally accepted that ISIS poses a threat to international peace and security. The claim of self-defence by the US is, however, at the very least, open to question. ISIS has not launched attacks from the Syrian territories targeting the coalition countries, nor could the acts of ISIS be imputed to the Syrian government.<sup>10</sup> The US has, furthermore, not yet “detected specific plotting” against it.<sup>11</sup> All the aforementioned issues raise the question about the legality of targeting ISIS in the Syrian territories under international law.

This dissertation will address the issue of the cross-border or extraterritorial targeting of non-state actors. It will try to answer the question of whether targeting ISIS in the Syrian territories meets the required criteria in international law, or, indeed, whether the coalition’s air strikes violate international law.

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9 UN document S/2014/695.

10 Dire Tladi, for example, questioned the right to use force against non-state actors in the territory of another State when the acts of non-state actors cannot be attributed to that State. See Dire Tladi, “The Non-consenting Innocent State: The Problem With Bethlehem’s Principle 12”, (2013) 107 *The American Journal of International Law* 570 at 572.

11 Obama statement, *supra* n 3.

## **2. Research questions**

This study will address the following main questions:

- What are the conditions under which international law permits the use of force against non-state actors in the territories of another sovereign State?
- Do air strikes against ISIS in Syria meet the necessary legal requirements?
- Has terrorism created a new paradigm of self-defence?

## **3. Research aims**

The general rule of the prohibition of use of force, as articulated in article 2(4) of the Charter, is a fundamental norm of international law that is widely accepted as having the character of *jus cogens*.<sup>12</sup> It

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<sup>12</sup> The International Court of Justice relied on the statements of States' representatives and the work of the International Law Commission (hereinafter the ILC) to state that "the International Law Commission... expressed the view that 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*.'... Nicaragua in its Memorial stated that the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations 'has come to be recognized as *jus cogens*.' The United States... found it material to quote the views of scholars that this principle is a 'universal norm', a 'universally recognized principle of international law', and a 'principle of *jus cogens*.'" *Military and Paramilitary Activities case, Nicaragua v. United States of America, ICJ Reports 1986, 14 at para 190*; moreover, the ILC specified that necessity "cannot excuse the breach of a peremptory norm," and identified the following norms as peremptory norms: "Prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination." UN document

is the “cornerstone” of the UN Charter,<sup>13</sup> (hereinafter the Charter) and a rule of customary international law,<sup>14</sup> and as such, it cannot be derogated from under any circumstances.<sup>15</sup>

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(A/56/10), International Law Commission Draft articles on Responsibility of States for Internationally Wrongful Acts, With commentaries 2001, Commentaries to draft article 26; in addition, on the academic level, the overwhelming majority of legal scholars accepts that the prohibition of use of force is a *jus cogens* norm; for example, Simma noted that “the prohibition enunciated in Article 2(4) of the Charter is part of *jus cogens*, i.e., it is accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted.” Bruno Simma, “NATO, the UN and the Use of Force: Legal Aspects”, (1999) 10 *The European Journal of International Law* 1 at 3; Henkin stated “the Charter remains the authoritative statement of the law on the use of force. It is the principal norm of international law of this century. The crucial norm is set forth in article 2(4).” Louis Henkin, *Right V. Might: International Law and the Use of Force*, (1991) at 38; Dugard provided that States recognize the prohibition of use of force as “a fundamental principle of the contemporary international legal order, as a norm with the status of *jus cogens*.” John Dugard, *International Law: A South African Perspective*, (2011) at 496; Orakhelashvili was assertive in considering that “the prohibition of the use of force is undeniably peremptory.” Alexander Orakhelashvili, “The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions”, (2005) 16 *The European Journal of International Law* 59 at 63; Schachter stated that “article 2(4) is the exemplary case of a peremptory norm (*jus cogens*).” Oscar Schachter, “In Defense of International Rules on the Use of Force”, (1986) 53 *The University of Chicago Law Review* 113 at 129.

13 *Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v. Uganda*, Judgment of 19 December 2005, *ICJ Reports* 2005, 168 (hereinafter *DRC v. Uganda* case) at para 148.

14 The International Court of Justice stated that “[a] further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law.” *Military and Paramilitary Activities case, Nicaragua v. United States of America*, *ICJ Reports* 1986, 14 (hereinafter *Nicaragua* case) at para 190.



Both the extraterritorial use of force against terrorists in general, and the ongoing and complicated conflict in Syria involving ISIS in particular, have led to questions about the nature and exceptions of this prohibition.

This dissertation aims to assess the legality of the coalition air strikes against ISIS in Syria. As a consequence, it will also explore the conditions of targeting non-state actors in the territories of a third State (the term third State will be used in the study as an equivalent to the term territorial State) under the justification of self-defence and the applicability of the criteria in international law with reference to the Syrian situation.

This study, moreover, will highlight the fact that, despite the reality that ISIS constitutes a threat to international peace and security, this threat does not warrant the unrestricted use of force against the third State.

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15 The ILC was firm in clarifying that even the six circumstances “precluding the wrongfulness of conduct that would otherwise not be in conformity with the international obligations of the State concerned” viz. consent, self-defence, countermeasures, *force majeure*, distress and necessity, cannot be relied on if it “conflicts with a peremptory norm of general international law”. UN document (A/56/10) Draft articles on Responsibility of States for Internationally Wrongful Acts, With commentaries 2001, Commentaries to Chapter V.

#### **4. Limitation of the study**

This study will address neither *Jus in bello*, the laws ruling conduct during armed conflicts, nor international human rights law. Rather, the study will focus on *Jus ad bellum*, the right to launch a war, the right of self-defence and the prohibition of the use of force in international relations. The study will, furthermore, not delve into humanitarian intervention, responsibility to protect, State responsibility and civil wars because time and space do not allow for a full assessment of these principles, and the coalition did not include any of the aforementioned issues in its legal justification for targeting ISIS in Syria. In addition, the study will not discuss targeting the “Khorasan group” by the US, as the public information regarding this group is not sufficient.<sup>16</sup>

Since the coalition air strikes against ISIS in Iraq are qualitatively different from the strikes in Syria, the study will exclude the coalition air strikes in Iraq. By the same measure, the study will not discuss the Russian air strikes targeting ISIS and other terrorist groups in Syria, because the Syrian government requested the Russian intervention to support the Syrian Arab army in combating terrorist

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<sup>16</sup> “In addition, the United States has initiated military actions in Syria against al-Qaida elements in Syria known as the Khorasan Group to address terrorist threats that they pose to the United States and our partners and allies.” UN document S/2014/695.

groups.<sup>17</sup> Although there might be a legal debate regarding intervention by invitation, time and space do not permit of doing justice to this matter, and it will, thus, not be discussed.

Finally, since the situation in Syria is evolving continuously, the time frame of this study will extend only until the 18 December 2015.

## ***5. Chapter breakdown***

The aforementioned key questions and objectives will be discussed in three chapters. The next chapter, chapter two, will outline the legal framework of the study and address the prominent legal norms related to targeting non-state actors in the territories of the third States, viz. the prohibition of the use of force and its exceptions, territorial integrity and self-defence. Although other legal norms might be related, owing to space constraints, these norms will not be discussed. In chapter three, the applicability of the studied legal principles to the Syrian case will be explored. It will, thus, be necessary to examine the legal basis presented by the US-led

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<sup>17</sup> UN document S/2015/789; the Syrian News Agency published that President Bashar al-Assad sent a letter to President Vladimir Putin in which President al-Assad requested the Russian intervention. For more information visit: <<http://sana.sy/en/?p=56308>> (accessed 17 October 2015). In addition, Russian TV published a report which stated that Damascus had invited Moscow to assist the Syrian army. For more information visit: <<https://www.rt.com/news/317041-preemptive-strike-putin-terrorism/>> (accessed 17 October 2015).

coalition for targeting ISIS in Syrian territories. The final chapter will provide a conclusion based on the foregoing chapters.

## ***II. Legal framework***

The interrelated legal norms relevant to the use of force in the territories of a third State include fundamental norms of international law that are codified in the Charter and enshrined in customary international law, viz. the prohibition of use of force, the crucial element of the third State consent,<sup>1</sup> State sovereignty and territorial integrity and, last but not least, the right of self-defence. States invoke the right of self-defence, frequently, to justify their extraterritorial use of force. Similarly, the same argument is used to justify war against terrorism.<sup>2</sup> But whether reliance on the paradigm of self-defence is justified in international law or not is subject to debate.

A secondary issue that is of particular importance with regard to both the extraterritorial use of force and the right of self-defence is the targeting of non-state actors in the territories of a third State. In this

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1 State Consent is “recognized as customary international law by all States.” Louise Arimatsu & Michael N. Schmitt, “Attacking ‘Islamic State’ and the Khorasan Group: Surveying the International Law Landscape”, (2014) 53 *Columbia Journal of Transnational Law Bulletin* 1 at 5.

2 Shah stated that “most Western scholars agree that the United States’ use of force in Afghanistan, in response to the attacks of September 11 on the basis of self defense, was legal.” Sikander Ahmed Shah, “War on Terrorism: Self Defense, Operation Enduring Freedom, and the Legality of U.S. Drone Attacks in Pakistan”, (2010) 9 *Washington University Global Studies Law Review*, 77 at 88.

case, it is safe to say that most States rely on the right of self-defence to justify their extraterritorial use of force against non-state actors.<sup>3</sup>

The norms mentioned above contour the legal framework for the extraterritorial use of force and the targeting of non-state actors in the territories of a third State without the consent of the latter, and they will be analyzed below.

## **1. Prohibition of the use of force**

### **1.1 The concept in general**

The rules governing resort to force form a central element within international law, and together with other principles such as territorial sovereignty and the independence and equality of States provide the framework for international order.<sup>4</sup>

The prohibition of the use of force is a norm situated at the heart of the international law system; the preamble of the Charter declared that one of the noble purposes of establishing the UN is the saving of “succeeding generations from the scourge of war”.<sup>5</sup> Among the Charter’s preliminary principles, therefore, was the peremptory principle of prohibition of the use of force, viz. article 2(4) which governs relations between States,

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3 Lubell listed examples in which States relied on the right of self-defence to justify their military intervention against non-state actors in third States. Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors*, (2010) at 29-30.

4 Malcolm Shaw, *International Law*, (2003) at 1013.

5 UN Charter preamble.

and is widely described as the “cornerstone” of the Charter.<sup>6</sup> This customary law rule and *jus cogens* norm states that:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.<sup>7</sup>

Article 2(4) fits perfectly into the aspiration of the Charter in beginning a new chapter in history in which peace prevails, in building a new collective security system and prohibiting the illegal resort to force. The prohibition of the use of force did not, however, come without exceptions. The Charter allowed the use of force in self-defence, as articulated in article 51, and use of force under the authorization of the UN Security Council (hereinafter the Council) to maintain or restore international peace and security.

Notwithstanding the fact that article 2(4) was tailored to control inter-State conflicts after *World War II*, the change in the nature of warfare and the emerging danger of terrorism and non-state actors put the prohibition of the use of force to the test, and stirred the ongoing debate regarding its scope and interpretation. Additionally, the brief

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<sup>6</sup> *Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v. Uganda*, Judgment of 19 December 2005, *ICJ Reports* 2005, 168 (hereinafter *DRC v. Uganda* case) at para 148.

<sup>7</sup> UN Charter art 2(4).

wording of article 2(4) left the door open for divergent interpretations of such an essential norm.<sup>8</sup>

The relatively new challenges of non-state actors operating from the territories of a third State and the serious danger of terrorism paved the way for arguments advocating for more lenient approaches towards the use of force, particularly in self-defence, so that States might take measures beyond the limits of article 2(4) and use force extraterritorially.<sup>9</sup> The two important questions are, therefore, whether the extraterritorial use of force against non-state actors in the territories of a third State violates article 2(4), or whether such use of force is permissible in the case of self-defence.<sup>10</sup>

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8 Christine Gray, *International Law and the Use of Force*, (2008) at 6.

9 For example, Daniel Bethlehem, "Self-defense Against an Imminent or Actual Armed Attack by Nonstate Actors", (2012) 106 *American Journal of International Law* 770 at 774; Jordan J. Paust, "Self-Defense Targetings of Non-State Actors And Permissibility of U.S. Use of Drones in Pakistan", (2009-2010) 19 *Journal of Transnational Law & Policy* 237 at 249; Sean D. Murphy, "Terrorism and the Concept of 'Armed Attack' in Article 51 of the U.N. Charter", (2002) 43 *Harvard International Law Journal* 41 at 51; Sean D. Murphy, "Self-defense and the Israeli Wall Advisory Opinion: An Ipse Dixit From the ICJ?", (2005) 99 *American Journal of International Law* 62 at 62-64; Christian J. Tams, "The Use of Force against Terrorists", (2009) 20 *The European Journal of International Law* 359 at 360.

10 Lubell, *supra* n 3, at 26.



## **1.2 Do extraterritorial measures against non-state actors violate article 2(4)?**

The answer, *prima facie*, seems to be that taking forcible measures without the Council authorization in the territories of a third State would violate article 2(4).<sup>11</sup> This, however, is not such a simple matter that a *prima facie* answer is sufficient. In fact, the interpretation of the two related Chapter provisions, articles 2(4) and 51, “for cases involving non-State actors is uncertain and contested.”<sup>12</sup> Similarly, the relevant literature is inconclusive and contradictory. There are, however, two leading groups of scholars in this field; the first adopts a restrictive interpretation of the Charter’s provisions, while the second adopts a permissive approach.<sup>13</sup>

As for the first approach, international law “does not allow a state to exercise criminal enforcement jurisdiction in another country without the latter state's consent.”<sup>14</sup> A State cannot, therefore, retaliate against

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11 *Ibid.*

12 Hakimi stated that “two prominent expert reports on the topic, the *Chatham House Principles of International Law on the Use of Force in Self-Defence and the Leiden Policy Recommendations on Counter-Terrorism and International Law*, recognize that the law in this area is uncertain and controversial.” Monica Hakimi, “Defensive Force against Non-State Actors: The State of Play”, (2015) 91 *International Law Studies* 1 at 2-3.

13 For a summary of the contradicting arguments see Gray, *supra* n 8, at 30-33.

14 Oscar Schachter, “The Extraterritorial Use of Force Against Terrorist Bases”, (1988-1989) 11 *Houston Journal of International Law* 309 at 311.

an armed attack by non-state actors emanating from the territories of a third State. This approach finds solid support in the jurisprudence of the International Court of Justice (hereinafter the ICJ) in two cases after 9/11; firstly, in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, the Court took a very restrictive approach and pronounced that “the use force against the territorial integrity of another State except as self-defence in response to an armed attack” is prohibited.<sup>15</sup> The Court added that article 51 of the Charter applies “in the case of armed attack by one State against another State.”<sup>16</sup> The Court, therefore, dismissed the arguments stating that the term “armed attack” could include attacks carried out by non-state actors. Then the Court commented that “Israel does not claim that the attacks against it are imputable to a foreign State.”<sup>17</sup> Consequently, the Court dismissed the applicability of article 51 against non-state actors. In the second instance, the Court took a similar approach in the case of *Armed Activities on the Territory of the Congo, (Democratic Republic of the Congo v. Uganda)*, (hereinafter the *DRC v. Uganda* case) where the Court found that “there [was] no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of

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15 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports* 2004, 136 (hereinafter *Wall Advisory Opinion* case) at para 139.

16 *Ibid.*

17 *Ibid.*

the DRC”.<sup>18</sup> Hence, the Court emphasized its position that, in the absence of attribution to the territorial State, the victim State cannot use force against non-state actors in the territories of the third State. The position of the Court in these cases, furthermore, is consistent with its previous jurisprudence in both the *Military and Paramilitary Activities case, Nicaragua v. United States of America*, (hereinafter the *Nicaragua case*),<sup>19</sup> and in the case concerning *Oil Platforms (Islamic Republic of Iran v. United States of America)*, (hereinafter *Oil Platforms case*). In the *Nicaragua case* the Court implied that, in order for the acts performed by non-state actors to amount to an armed attack, these acts “must be imputable to the authorities of the host state”.<sup>20</sup> This attribution justifies use of force in self-defence against non-state actors in the territories of the third State.<sup>21</sup> The *Nicaragua case*, thus, “indicates that the attack

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18 *DRC v. Uganda case, supra n 6*, at para 146.

19 *Military and Paramilitary Activities case, Nicaragua v. United States of America, ICJ Reports 1986*, 14 (hereinafter *Nicaragua case*) at para 195.

20 *Ibid.*

21 Dire Tladi, “The Non-consenting Innocent State: The Problem With Bethlehem’s Principle 12”, (2013) 107 *The American Journal of International Law* 570 at 571-572, in this article Tladi deduced that: “given the very clear line of reasoning by the Court that an attack by a nonstate actor without attribution to a State cannot justify the use of force against the territory of another State, any assertion that a State can exercise force in self-defence against nonstate actors, on the territory of an innocent State without the latter’s consent, must be properly probed”; *Nicaragua case, supra n 19*, at para 195.

must have been ‘by or on behalf of’ the attacking state”,<sup>22</sup> which means that non-state actors “must be under the control of [that] state.”<sup>23</sup> Not only did the Court stress the attribution factor, but it “also stressed the fundamental requirement of an armed attack.”<sup>24</sup> In the *Oil Platforms* case the Court held that:

[I]n order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as "armed attacks" within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force.<sup>25</sup>

In contrast, the opposing argument would advance that “a literal reading of Article 2(4) does not include language prohibiting every use of force,”<sup>26</sup> but rather article 2(4) stipulates that:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.<sup>27</sup>

According to this argument, therefore, the use of force against non-state actors does not violate article 2(4). From the same perspective,

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22 James A Green, *The International Court of Justice and Self-Defence in International Law*, (2009) at 48.

23 *Ibid.*

24 *Ibid* at 26.

25 *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *ICJ Reports* 2003, 161 at para 51.

26 Lubell, *supra* n 3, at 27.

27 Article 2(4) of the Charter.

supporters of this argument could advance the view that “short swift operations [against non-state actors] not involving prolonged presence in the territorial state” do not breach the territorial integrity and political independence of the territorial State.<sup>28</sup>

This argument is, however, “utterly incongruent” with the “more widely accepted interpretation... that all uses of force are unlawful, other than the recognized exceptions in the Charter.”<sup>29</sup>

Actions beyond the limits of article 2(4), coupled with generous approaches towards self-defence, will inevitably have an impact on, and most likely violate, the territorial integrity and sovereignty of the third State. The contextual reading of article 2(4) of the Charter, therefore, as a general rule, and its character as a *jus cogens* from which it allows no derogation,<sup>30</sup> are of utmost importance; mainly because article 2(4) of the Charter obliges all members of the UN to “refrain... from the threat or use of force against the territorial integrity or political independence of any state”.<sup>31</sup> In addition, territorial integrity “has been accepted as fundamental in international law and an essential foundation of legal

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28 Lubell, *supra* n 3, at 27.

29 Lubell, *supra* n 3, at 27-28.

30 UN document (A/56/10), International Law Commission Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, commentaries to draft article 26.

31 Article 2(4) of the Charter.

relations between states.”<sup>32</sup> It is enshrined in customary international law, and the ICJ has emphasized that “between independent states, respect for territorial sovereignty is an essential foundation of international relations.”<sup>33</sup>

In a nutshell, the right of territorial integrity is closely related to the prohibition of the use of force and the right of self-defence, to the extent that they could be described as forming a golden triangle. On the one hand the Charter safeguards the right of territorial integrity by imposing the prohibition of use of force in article 2(4),<sup>34</sup> and, on the other hand, legitimate self-defence protects the right of territorial integrity against any aggression.<sup>35</sup> Broadening the scope of self-defence will inevitably violate sovereignty and territorial integrity.

## **2. Self-defence**

Self-defence on the international level is generally regarded, at least by international lawyers, as a legal right defined and legitimated by international law. Governments, by and large, appear to agree. When they have used force, they have nearly always claimed self-defence as their legal justification. Governments disputing that claim have usually asserted that the legal conditions of self-defence were not met in the particular case. However,

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32 D. W. Bowett, *Self-defence in International Law*, (1958) at 29.

33 *The Corfu Channel case*, Judgment of 9 April 1949, *ICJ Reports* 1949, 4 at para 35.

34 Bowett, *supra* n 32, at 29.

35 *Ibid.*

despite the apparent agreement that self-defense is governed by law, the meaning and validity of that proposition remain open to question.<sup>36</sup>

The ancient right of self-defence preceded the establishment of any international organization, and the Charter codified this right in article 51 which provides that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>37</sup>

The simple reading of article 51 suggests that self-defence is invoked when an armed attack takes place and, therefore, when a State uses force to repel an aggression, exercising its legitimate right of self-defence, this use of force is considered legal. However, “the precise limits of the use of force in self-defence appear sufficiently malleable to attract widely divergent approaches.”<sup>38</sup> Although States agree on the right of self-defence in principle, the scope and contents of this right are

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36 Oscar Schachter, “Self-defense And The Rule of Law”, (1989) 83 *American Journal of International Law* 259 at 259.

37 UN Charter article 51.

38 Dire Tladi, “The Use of Force in Self Defence Against Non-State Actors in International Law: Recalling The Foundational Principles of International Law”, (2012) 2 *Zanzibar Yearbook of Law* 71 at 71.

far away from being a matter of agreement among States and legal scholars. The divergent approaches of States and law scholars result from different interpretations of article 51, because the statutory language of article 51 is malleable.

Several legal opinions regarding the right of self-defence look at this right through the lens of article 2(4), since “the meaning of the term 'self-defence' has remained the most vital issue relating to the legal regulation of the use of force by States.”<sup>39</sup> Accordingly, legal approaches have varied from being generous to being restrictive. On the one side, there are writers who support a restrictive interpretation of article 51.<sup>40</sup> From the point of view of their restrictive approach, article 51 is an exception to the prohibition of use of force as articulated in article

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39 Ian Brownlie, “The Use of Force in Self-defence”, (1961) 37 *The British Yearbook of International Law* 183 at 183.

40 Brownlie, *supra* n 39, at 242; Murphy listed the following views of the authors who oppose both anticipatory self-defence and preemptive self-defense “Ian Brownlie... found that ‘the view that Article 51 does not permit anticipatory action is correct and. . . arguments to the contrary are either unconvincing or based on inconclusive pieces of evidence.’ For Philip Jessup, ‘[u]nder the Charter, alarming military preparations by a neighboring state would justify a resort to the Security Council, but would not justify resort to anticipatory force by the state which believed itself threatened’. For Louis Henkin, allowing anticipatory action ‘would replace a clear standard with a vague, self-serving one, and open a loophole large enough to empty the rule.’” Sean D. Murphy, “The Doctrine of Preemptive Self-Defense”, (2005) 50 *Villanova Law Review* 699 at 708.



2(4),<sup>41</sup> and, therefore, “should be narrowly construed”.<sup>42</sup> The restrictions imposed on self-defence in article 51 “would be meaningless if a wider customary law right to self-defence survives unfettered by these restrictions.”<sup>43</sup> Moreover, the use of force in self-defence is restricted to the most exigent circumstance,<sup>44</sup> and taking defensive action against non-state actors in the territories of another State should be associated with the responsibility of that State for the ongoing attacks.<sup>45</sup> In addition, the consent of the territorial State should be obtained to target non-state actors in its territories, as consent has been “recognized as customary law by all states.”<sup>46</sup> Ultimately, the “line of

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41 Gray, *supra* n 8, at 118.

42 *Ibid.*

43 *Ibid.*

44 O’Connell stated that “[u]nless a state has received United Nations Security Council authorization, it must meet four conditions to engage in lawful self-defense: First, the defending state must be the victim of a significant armed attack. Second, the armed attack must be either underway or the victim of an attack must have at least clear and convincing evidence that more attacks are planned. Third, the defending state’s target must be responsible for the significant armed attack in progress or planned. Fourth, the force used by the defending state must be necessary for the purpose of defense and it must be proportional to the injury threatened.” Mary E O’Connell, “Lawful Self-defense to Terrorism”, (2001-2002) 63 *University of Pittsburgh Law Review* 889 at 889-890.

45 *Ibid* at 899.

46 Arimatsu & Schmitt, *supra* n 1, at 5.

reasoning of the ICJ”,<sup>47</sup> customary international law, and post-article 51 State practice led to the result that:

In assessing what is permissible and what is not permissible under the international law principle of self-defense, other principles such as territorial integrity, the prohibition on the use of force, and sovereignty must be respected. Such an assessment requires that, before force is used against nonstate actors on the territory of another state, either the consent of the territorial state is obtained or a reasonable basis exists for attributing responsibility for the initial attack to the territorial state. To hold otherwise would imply that self-defense takes priority over these foundational principles of international law, a proposition that has no basis in international law.<sup>48</sup>

On the other side, the permissive view holds that neither did art 2(4) contain any prohibition of exercising the right of self-defence as allowed under general international law, nor was the right of self-defence restricted to cases of armed attacks.<sup>49</sup> In that view the right of self-defence as it existed in customary international law permits the use of force against non-state actors in the territories of another State.<sup>50</sup> The

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47 Tladi, *supra* n 38, at 576.

48 *Ibid.*

49 Bowett, *supra* n 32, at 188.

50 The reference will mostly be made to the *Caroline* incident, available at <[http://avalon.law.yale.edu/19th\\_century/br-1842d.asp](http://avalon.law.yale.edu/19th_century/br-1842d.asp)> (accessed 27 January 2015); Lubell provided that the British forces used extraterritorial force in the territorial waters of the US, “claiming the right to self-defense in response to the acts of a non-state actor”, and he deduced that “[i]t is, therefore, apparent that even in historical terms, the concept of self-defense as a result of attacks by non-state actors has been recognized by states.” Lubell *supra* n 3, at 35; Tladi noted that “[neither Webster nor Ashburton made an issue of the fact that the initial attack to which the UK was responding was committed by non-state actors. For this reason, it has been

group of writers supporting this view would cite contemporary State practice to support its position.<sup>51</sup> Additionally, this group would advance that “article 51 goes beyond the right to respond to an armed attack on a state’s territory;”<sup>52</sup> as this article refers to the inherent right of self-defence, so it “preserves the earlier customary international law to self-defence.”<sup>53</sup> Within this group, it is advocated that article 51 of the Charter does not require the non-state actors’ armed attack to be imputed to another State to trigger the right of self-defence.<sup>54</sup> According to it, no authority in the international community, “has taken a position on whether preemptive self-defence is permissible under international law, or whether it is permissible but only under certain conditions.”<sup>55</sup> An extreme opinion in this group would depict sovereignty as a “relative

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concluded that customary international law accepts that a state can use force against non-state actors on the territory of another state for acts not attributable to the territorial state.”Tladi, *supra* n 38, at 77.

51 Jordan J. Paust, “Self-Defense Targetings of Non-State Actors And Permissibility of U.S. Use of Drones in Pakistan”, (2009-2010) 19 *Journal of Transnational Law & Policy* 237 at 241 and 249; Rafaël Van Steenberghe, “Self-Defence in Response to Attacks by Non-state Actors in the Light of Recent State Practice: A Step Forward?”, (2010) 23 *Leiden Journal of International Law* 183 at 187; Sean D. Murphy, “Self-defense and the Israeli Wall Advisory Opinion: An Ipse Dixit From the ICJ?”, (2005) 99 *American Journal of International Law* 62 at 67-69.

52 Gray, *supra* n 8, at 117.

53 *Ibid.*

54 Sean D. Murphy, “Self-defense and the Israeli Wall Advisory Opinion: An Ipse Dixit From the ICJ?”, (2005) 99 *American Journal of International Law* 62 at 64.

55 Sean D. Murphy, “The Doctrine of Preemptive Self-Defense”, (2005) 50 *Villanova Law Review* 699 at 702.

term”,<sup>56</sup> and would advocate a very permissive self-defence approach to which “there is no geographic limitation”.<sup>57</sup> Consequently, according to this group practising the right of self-defence against the armed attacks of non-state actors does not require the consent of the territorial State.<sup>58</sup> The suggestion that the “UN Charter framework is dead” is not a novel language among ardent supporters of this group as well.<sup>59</sup>

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56 Jordan J. Paust, “Relative Sovereignty and Permissible Use of Armed Force”, (2011-2012) 20 *Michigan State University International Law Review* 1 at 2.

57 Paust also argues that “[n]othing in the language of the Charter requires a conclusion lacking in common sense that a State being attacked can only defend itself within its own borders. General patterns of practice over time and general patterns of legal expectation concerning the propriety of self-defense confirm these recognitions.” Jordan J. Paust, “Self-Defense Targetings of Non-State Actors And Permissibility of U.S. Use of Drones in Pakistan”, (2009-2010) 19 *Journal of Transnational Law & Policy* 237 at 241; Paust, *supra* n 56, at 7.

58 Paust, *supra* n 56, at 8; also, Paust stated that “nothing in the language of Article 51 of the United Nations Charter or in customary international law reflected therein or in pre-Charter practice ... requires consent of the State from which a non-state actor armed attack is emanating and on whose territory a self-defense action takes place against the non-State actor.” Paust, *supra* n 57, at 249; Daniel Bethlehem, “Self-defense Against an Imminent or Actual Armed Attack by Non-state Actors”, (2012) 106 *American Journal of International Law* 770 at 774.

59 Anthony Clark Arend, “International Law and the Preemptive Use of Military Force”, (2003) 26 *The Washington Quarterly* 89 at 101.

It is worth noting that a number of law scholars rely on the phrase “inherent right” to justify an expanded interpretation of self-defence, supposedly, as it existed in customary international law.<sup>60</sup>

The word ‘inherent’, however, simply refers to the right of self-defence as it existed in customary law. In addition, in fact, as much as it has been relied on for an expansive interpretation, it can also be used to restrict the right to self-defence owing to the identification of the elements of self-defence in the *locus classicus Caroline* incident,<sup>61</sup> which is considered the “formative case in the development of the rules of self-defense,”<sup>62</sup> and it is, mostly, “referred to as defining the parameters for the right of self-defence under customary international law.”<sup>63</sup> It is worth noting, however, that self-defence at the time of the Caroline incident was “regarded either as synonymous with self-preservation or

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60 For example Bowett considered that the significance of the “reference to an ‘inherent’ right... lies in its indication that the right is an existing right, independent of the Charter and not the subject of an express grant.” Bowett, *supra* n 32, at 187.

61 “In this correspondence the U.S. Secretary of State Webster required the British Government to show the existence of: necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.” Ian Brownlie, “International Law and the Use of Force by States Revisited”, (2002) 1 *Chinese Journal of International Law* 1 at 4.

62 Lubell, *supra* n 3, at 35.

63 *Ibid.*

as a particular instance of it.”<sup>64</sup> The *Caroline* incident, thus, did not make any changes to the legal system existing then.

But the usefulness of the *Caroline* incident as a standard should be assessed in the context of the developments of international law in the twentieth and twentyfirst centuries. That international law did not prohibit the use of force at the time of the *Caroline* incident means that justification for the use of force, in particular on the grounds of self-defense, was often advanced for ‘political expediency’ and ‘to secure the moral high ground,’ rather than to provide a shield against legal wrongfulness.<sup>65</sup>

In the *Caroline* incident, however, according to the exchange of letters between the two foreign ministers of the UK and the US, in the years 1838-1842, there should exist necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.<sup>66</sup> Nevertheless, developments closer to the era of the Charter are more relevant in customary international law. The reference here is made to the Kellogg-Briand Pact of 1928, which was the “foundation of the State practice” at that time including the case of the *International Military Tribunals in Nuremberg and Tokyo*.<sup>67</sup>

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64 James Crawford, *Brownlie's Principles of Public International Law*, (2012) at 751.

65 Tladi, *supra* n 21, at 573.

66 *Ibid* at 4.

67 Brownlie *supra* n 61, at 5.

## **2.1 Is it permissible to target non-state actors under self-defence?**

“The most restrictive position in the literature would permit defensive force only if the initial attack were attributable” to the territorial State. Otherwise, it would prohibit such use of force.<sup>68</sup>

Proponents of the generous interpretation of article 51 would assert that article 51 does not require the attribution factor to trigger the right of self-defence. Supporters of this opinion argue that the wording of article 51 would have reflected such a restriction clearly had it been the intention of the Charter’s writers.<sup>69</sup> This group of scholars relies on the generous interpretation of article 51 and contemporary State practice to support its position.<sup>70</sup>

There are, however, possible “grounds” for which defensive use of force against non-state actors in the territories of the third State are permissible according to Hakimi:

(1) the territorial State actively harbors or supports the non-State actors, or lacks governance authority in the area from which they operate, (2) the territorial State is unable or unwilling to address the threat that the non-State actors pose, and (3) the threat is located in the territorial State.<sup>71</sup>

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68 Hakimi, *supra* n 12, at 4.

69 See *supra* n 51.

70 See *supra* n 51.

71 Hakimi, *supra* n 12, at 8.

Hakimi also noted that it is better if these grounds are “conceived as concentric circles” owing to the overlap among them.<sup>72</sup>

States may claim that they may target non-state actors in the territories of a third State under the notions of anticipatory self-defence and pre-emptive self-defence. In the case of anticipatory self-defence, a State may claim a “palpable and imminent threat”,<sup>73</sup> while in the case of pre-emptive self-defence the State will “point only at an attack as a possibility”.<sup>74</sup> These two notions will be briefly studied below.

## **2.2 Anticipatory self-defence**

Anticipatory self-defence is still a matter that gives rise to debates and divides legal scholars into two groups. The first lot of supporters maintains that the phrase “inherent right” preserves the right of anticipatory self-defence as it existed in customary international law.<sup>75</sup> They claim that anticipatory self-defence is a necessity to meet the challenges imposed by tremendous changes in the nature of warfare

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<sup>72</sup> *Ibid.*

<sup>73</sup> John Dugard, *International Law: A South African Perspective*, (2011) at 501.

<sup>74</sup> *Ibid.*

<sup>75</sup> Dugard listed many legal scholars who support this argument among viz. Bowett, M McDougal and Judge Schwebel in his dissenting opinion in the Nicaragua case. John Dugard, *International Law: A South African Perspective*, (2011) at 501.



and weapons.<sup>76</sup> On the other hand, the opponents of anticipatory self-defence advance the view that self-defence, as stated in article 51 of the Charter, is exclusively triggered by an armed attack and not by the existence of a palpable and imminent threat. They, thus, declare the anticipatory notion illegal.<sup>77</sup>

There are many examples that illustrate the notion of anticipatory self-defence which were widely condemned by the Council. Israel's attack on the Iraqi nuclear reactor at Osrig in 1981, which was condemned unanimously by the Council in resolution 487 (1981),<sup>78</sup> is a good example. Similarly, Israel's attack against Egypt in 1967, at the beginning of the six-day war, under the pretext that Egypt had mobilized its forces on the border with occupied Palestine is another example. The Egyptian move was considered by Israel to be a 'threat' that demanded anticipatory self-defence. As a result, the Council issued the famous resolution 242 (1967), which became the centerpiece of the deceased peace process in the Middle East, wherein the Council underlined that

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<sup>76</sup> *Ibid.*

<sup>77</sup> See *supra* n 40.

<sup>78</sup> UN document S/RES/487 (1981), available at: <<http://unispal.un.org/UNISPAL.NSF/0/6C57312CC8BD93CA852560DF00653995>> (accessed 20 October 2015).

all member States, when they accepted the Charter, “have undertaken a commitment to act in accordance with Article 2 of the Charter.”<sup>79</sup>

“Even during the nineteenth century there were some attempts to restrict the right to go to war to cases of direct and immediate danger.”<sup>80</sup> In the *Caroline* incident the British government had to “show the existence of necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”<sup>81</sup> Many international law scholars both prior to and subsequent to “the *Caroline incident* regarded self-defence as an instance of self-preservation and subsequently discussed the *Caroline* under that rubric.”<sup>82</sup>

In any case, the overwhelming rejection of the notion of anticipatory self-defence by the Council “reinforces” that the Charter “seems to preclude any open-ended use of anticipatory self-defense.”<sup>83</sup>

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79 Available at: <<http://unispal.un.org/UNISPAL.NSF/0/7D35E1F729DF491C85256EE700686136>> (accessed 20 October 2015).

80 Brownlie, *supra* n 39, at 186.

81 *Ibid.*

82 *Ibid.*

83 Jules Lobel, “The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan”, (1999) 24 *Yale Journal of International Law* 537 at 541.

### ***2.3 Preemptive self-defence***

The “broader” notion of self-defence, which has attracted even more controversy, is the concept of preemptive self-defence, labelled as the “Bush doctrine” by most.<sup>84</sup>

This notion emerged practically in the aftermath of 9/11, when President Bush announced a new National Security Strategy in which he adopted the notion of preemptive self-defence.<sup>85</sup>

There are arguments which defend this notion. The main justification behind them is that the Charter “framework is dead”,<sup>86</sup> and the Charter “paradigm does not describe contemporary international law relating to the recourse to force.”<sup>87</sup> The ICJ, nevertheless, has a restrictive approach towards the right of self-defence, and it does not support the notion of

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84 Arend, *supra* n 59, at 91, 96, 97 and 101; Mikael Nabati, “International Law at a Crossroads: Self-Defense, Global Terrorism, and Preemption (A Call to Rethink the Self-Defense Normative Framework)”, (2003) 13 *Transnational Law & Contemporary Problems* 771 at 789.

85 For further details check the strategy at <<http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss5.html>> (accessed 12 February 2015).

86 Arend, *supra* n 59, at 101.

87 Arend, *supra* n 59, at 102.

preemptive self-defence.<sup>88</sup> Consequently, in the absence of any Council authorization, the use of force in self-defence should be “limited to the most exigent circumstances”.<sup>89</sup>

## ***2.4 Collective self-defence***

The notion of a collective right of self-defence has always been accepted by States, and it is contained in the General Assembly Resolution 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.<sup>90</sup> Even though the Charter “testifies to the existence of the right of collective self-defence in customary international law”,<sup>91</sup> there is no “clear indication in the Charter as to what precise situation the right of ‘collective self-defence’ envisages.”<sup>92</sup> “Collective self-defence”, as used in the Charter, furthermore, only “recognizes that members may exercise collectively what is their

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88 The Court clearly pronounced that the right of self-defence is triggered only in the case of an armed attack: “In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this.” *Nicaragua case, supra* n 19, at para 195.

89 O’Connell, *supra* n 44, at 889.

90 Available at: <<http://www.un-documents.net/a25r2625.htm>> (accessed 11 November 2015).

91 *Nicaragua case, supra* n 19, at para 193.

92 Bowett, *supra* n 32, at 200.

individual right.”<sup>93</sup> It does not, thus, mean that collective self-defence “becomes an assistance” by a State which does not enjoy the right of self-defence to a victim State exercising its right of self-defence, without authorization from the UN.<sup>94</sup> The two reasons for this are, firstly, the right of self-defence is an exception of the general rule of the prohibition of use of force, and, secondly, such “assistance” is not compatible with the “central” collective security system of the Charter,<sup>95</sup> since the assistance is not a notion of self-defence, but an action to “redress the violation of international law, not to protect its [a state’s] own right.”<sup>96</sup>

The Charter did establish a collective security system to maintain international peace and security, and it vested this responsibility in the Council. Hence, the Charter did not establish a collective self-defence system, although such notion is popular in provisions of regional agreements.<sup>97</sup>

It might be argued that the notion of collective self-defence emerged because of the inability of the Council to take measures under chapter

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93 Bowett, *supra* n 32, at 216.

94 *Ibid.*

95 Bowett, *supra* n 32, at 218.

96 *Ibid.*

97 North Atlantic Treaty Organization, the Arab League, and Organization of American States, etc.

VII of the Charter, owing to the veto by the permanent members.<sup>98</sup> A deficiency in the collective security system, *per se*, does not, however, bestow legality on an exceptional measure.

### ***2.5 Line of reasoning of the International Court of Justice***

In this section, the key aspects of the jurisprudence of the International Court of Justice regarding self-defence will be studied.

The ICJ has shed light on the right of self-defence and its “contents” in many cases. The Court addressed the right of self-defence and delved into its content in the *Nicaragua* case.<sup>99</sup> The Court rightly observed that the provisions of the Charter refer to “pre-existing customary international law”, and this is clearly illustrated in article 51 of the Charter.<sup>100</sup> The Court provided that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence.”<sup>101</sup>

Consequently, the Court found that Article 51 of the Charter is merely “meaningful on the basis that there is a ‘natural’ or ‘inherent’ right of self-defence, and it is hard to see how this can be other than of a

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98 Hans Kelsen, “Collective Security and Collective Self-defence Under the Charter of the United Nations”, (1948) 42 *American Journal of International Law* 783 at 795.

99 *Nicaragua* case, *supra* n 19, at para 193.

100 *Nicaragua* case, *supra* n 19, at para 176.

101 Article 51 of the Charter.

customary nature.”<sup>102</sup> The Court indicated that the language of the Charter does not cover all aspects of the right of self-defence. Therefore, the Court relied on prevalent norms in customary international law and, in particular, the criteria of proportionality and necessity.<sup>103</sup> The Court, in addition, highlighted the conditions for the exercise of the right of self-defence in the *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, (hereinafter *Nuclear Weapons Advisory Opinion*) where it provided that the "submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law."<sup>104</sup> Moreover, the Court relied on its jurisprudence in the aforementioned cases and restated, in the *Oil Platforms* case, that the conditions of proportionality and necessity are “well settled” in customary international law.<sup>105</sup> This opinion was re-emphasized in the *DRC v. Uganda* case.<sup>106</sup>

The Court went even further by stating that rules of customary international law “exist alongside treaty law”.<sup>107</sup> Treaty law and

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102 *Nicaragua* case, *supra* n 19, at para 176.

103 *Ibid.*

104 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, 226 at para 41.

105 *Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ Reports 2003, 161 at para 76.

106 *DRC v. Uganda* case, *supra* n 6, at para 148.

107 *Ibid.*

customary law do not, therefore, “overlap”, and rules of either sources “do not have the same content.”<sup>108</sup>

The Court affirmed that the wording of article 51 of the Charter, the inherent right (or *droit naturel*), applies to both individual and collective self-defence.<sup>109</sup> Simultaneously, the Court underlined that this right is possessed in the “event of an armed attack”,<sup>110</sup> and that “[r]eliance on collective self-defense ... does not remove the need for” an armed attack.<sup>111</sup> The Court, however, avoided defining the armed attack, and instead it relied on “article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX)”<sup>112</sup> and considered that this description “may be taken to reflect customary international law”.<sup>113</sup> The Court provided that:

There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State

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108 *Ibid.*

109 *Ibid.*

110 *Ibid.*

111 *Nicaragua case, supra* n 19, at para 195.

112 *Ibid.*

113 *Ibid.*



of such gravity as to amount to" (*inter alia*) an actual armed attack conducted by regular forces, "or its substantial involvement therein".<sup>114</sup>

The Court identified the condition of the gravity of the armed attack to trigger self-defence, and it considered that providing "assistance to rebels" could be "regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States."<sup>115</sup>

Most importantly, the ICJ clearly stated that the right of self-defence is not boundless. In the *Nuclear Weapons Advisory Opinion*, the ICJ clearly stated that the right of self-defence does not warrant boundless measures.<sup>116</sup> The "entitlement of this right" is circumscribed by certain "constraints" some of which are "inherent in the very concept of self-defence. Other requirements are specified in Article 51."<sup>117</sup> Not only did the Court confirm the same observation in the *DRC v. Uganda* case but it also underlined resorting to the Council as an available legal remedy for the victim State. The Court provided that:

Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived

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114 *Ibid.*

115 *Ibid.*

116 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, 226 at para 40.*

117 *Ibid.*

security interests beyond these parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council.<sup>118</sup>

The ICJ addressed self-defence in response to attacks carried out by non-state actors in the *Nicaragua* case. In this case, the Court implied that in order for the acts performed by non-state actors to amount to an armed attack, these acts “must be imputable to the authorities of the host state”.<sup>119</sup> This attribution justifies the use of force in self-defence against non-state actors in the territories of the third State.<sup>120</sup> In other words, taking defensive action against another State should be associated with the responsibility of that State for the ongoing attacks by non-state actors.

### ***3. United Nations Security Council authorization to use force***

The Charter established a new framework for collective security in which it bestowed the “primary responsibility for the maintenance of

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118 *DRC v. Uganda* case, *supra* n 6, at para 148.

119 *Nicaragua* case, *supra* n 19, at para 195.

120 *Nicaragua* case, *supra* n 19, at para 195; Tladi, *supra* n 21, at 571-572. Tladi deduced that “given the very clear line of reasoning by the Court that an attack by a nonstate actor without attribution to a State cannot justify the use of force against the territory of another State, any assertion that a State can exercise force in self-defense against nonstate actors, on the territory of an innocent State without the latter’s consent, must be properly probed.”

international peace and security” upon the Council.<sup>121</sup> Member States, thus, accept that the Council performs its “duties under this responsibility on their behalf.”<sup>122</sup> For this aim, the Charter endowed the Council with powers stated in chapters VI, VII, VIII, and XII.<sup>123</sup> According to the Charter, the Council has the discretion to “determine the existence of any threat to the peace, breach of the peace, or act of aggression”.<sup>124</sup> Additionally, the Council is entitled to make recommendations on basis of article 39.<sup>125</sup>

When it comes to the powers of the Council, perhaps the most important Chapter is Chapter VII of the Charter which delineates the framework within which the Council may take “measures”. These measures could be divided in two categories, the non-military measures on the basis of article 41,<sup>126</sup> which include, for example, economic sanctions, severance of diplomatic relations, assets freeze, travel ban, arms embargo, etc., and the military measures or use of armed forces on the basis of article 42 when necessary to maintain international

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121 Article 24 of the Charter.

122 *Ibid.*

123 *Ibid.*

124 Article 39 of the Charter.

125 *Ibid.*

126 Article 41 of the Charter.

peace and security.<sup>127</sup> The Charter,<sup>128</sup> furthermore, entitled the Council to “utilize ... regional arrangements or agencies for enforcement action under its authority”.<sup>129</sup>

It is worth noting that, while the Council has adopted measures on the basis of article 41 on many occasions, it has resorted less frequently to imposing measures on the basis of article 42.<sup>130</sup>

Simply to mention a number of examples from a relatively long list,<sup>131</sup> the Council imposed a range of economic sanctions on Rhodesia,<sup>132</sup> while it imposed “the most comprehensive range of economic sanctions” upon Iraq after it had invaded Kuwait in 1990.<sup>133</sup> The Council, furthermore, imposed a “relatively restricted range of sanctions upon Libya due to the latter's refusal to renounce terrorism” and comply with

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127 Article 42 of the Charter.

128 Article 53 of the Charter.

129 “[T]he military operations in Libya to implement resolution 1973 were led by the North Atlantic Treaty Organisation (NATO), while the operations in Cote d’Ivoire to implement Resolution 1975 were led by UN Operations in Cote d’Ivoire (UNOCI) assisted by French forces.” Dire Tladi, “Security Council, the use of force and regime change: Libya and Cote d’Ivoire”, (2012) 37 *South African Yearbook of International Law* 22 at 22.

130 Tladi, *supra* n 129, at 2.

131 See Shaw, *supra* n 4, at 1125-1133.

132 Security Council resolutions 216 (1965) and 217 (1965); Shaw, *supra* n 4, at 1125.

133 Shaw, *supra* n 4, at 1126. Later on the Council authorized the use of force against Iraq.

its resolution 731 (1992) to “extradite suspected bombers to the UK or US”.<sup>134</sup>

On the other hand, owing to competition between the permanent five members,<sup>135</sup> adopting resolutions authorizing the use of force were fairly limited. The list of such resolutions is, thus, rather short, viz. the recent and controversial resolution 1973 (2011) which led to military operations in Libya,<sup>136</sup> resolution 1975 (2011) regarding the situation in Cote d’Ivoire,<sup>137</sup> resolution 794 (1992) which authorized use of force in Somalia,<sup>138</sup> the famous resolution 678 (1990) which authorized use of force against Iraq in the wake of its invasion of Kuwait,<sup>139</sup> and resolution 84 (1950) which authorized use of force against North Korea.<sup>140</sup> In addition, “the Council has authorised the use of force *ex post facto* in the case of Kosovo.”<sup>141</sup>

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134 Shaw, *supra* n 4, at 1127.

135 Shaw, *supra* n 4, at 1086.

136 Tladi, *supra* n 129, at 2.

137 *Ibid.*

138 Tladi, *supra* n 129, at 23.

139 *Ibid.*

140 *Ibid.*

141 Tladi stated that “the US (and the UK) argued [that the invasion of Iraq] had been authorised by the Council, while for most the invasion was unauthorised.” Tladi, *supra* n 129, at 2.

To ensure that force is used “in the interest and under the control of the international community and not individual countries”,<sup>142</sup> the Council has, therefore, to maintain “strict control over the initiation, duration and objectives of the use of force in international relations.”<sup>143</sup> For this purpose, authorization by the Council for the use of force should be “explicit and not implicit”,<sup>144</sup> the authorization “should clearly articulate and limit the objectives for which force may be employed”,<sup>145</sup> and the authorization must come to an end “with the establishment of a permanent cease-fire unless explicitly extended by the Security Council.”<sup>146</sup>

As has been mentioned earlier, the Council has authorized the use of force in many instances. Sometimes, the Council authorization of use of force was implicit, for example, the military intervention in Northern Iraq to provide humanitarian aid to the Kurds “partly on the basis of

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142 Jules Lobel and Michael Ratner, “Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime”, (1999) 93 *American Journal of International Law* 124 at 125.

143 *Ibid.*

144 *Ibid.*

145 *Ibid.*

146 *Ibid.*

ambiguous authority in Resolution 688” (1991).<sup>147</sup> This was the case even though the resolution did not “mention of military force, nor was it intended to authorize such force.”<sup>148</sup> Similarly, the Economic Community of West African States (ECOWAS) “intervened militarily in Liberia in 1990 without any explicit authorization by the Security Council.”<sup>149</sup> In such a scenario the use of force is implied according to the individual interests of certain States. The other problem that ambiguous authorization raises is the wide interpretation of the mandate to use force. Consequently, this will give States the discretion to interpret the mandate as they wish.<sup>150</sup> Ultimately, the whole operation might not serve the initial purpose sought by the Council.

In the Syrian situation, however, the Council adopted many resolutions in this regard. The next chapter will address resolution 2249, which it is safe to label as the resolution regarding the Syrian situation that has given rise to the greatest amount of debate.

In conclusion, the prohibition of the use of force not only governs inter-State relations, but also extends to govern non-state actors operating in

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147 Resolution 688 (1991) available at: <<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/596/24/IMG/NR059624.pdf?OpenElement>>; Lobel & Ratner, *supra* n 142, at 126.

148 Lobel & Ratner, *supra* n 142, at 126.

149 *Ibid.*

150 *Ibid.*

the territories of a third State. Despite the fact that there are divergent interpretations of the prohibition of use of force, articles 2(4), and self-defence, article 51, the reasoning of the ICJ shows undoubtedly that the Court supports the restrictive interpretation of the right of self-defence, which keeps this right within the restricted confines delineated in the Charter. The Court clearly pronounced that the right of self-defence is triggered only in the case of an armed attack; thus, the Court “may have impliedly excluded anticipatory self-defense from the ambit of Article 51.”<sup>151</sup> In the case of non-state actors operating from the territory of the third State, the attribution factor to the third State is a necessity.<sup>152</sup> Consequently, the use of force except as exercising the legitimate right of self-defence in response to an armed attack, or acting according to an explicit authorization from the Council violates the Charter and the fundamental norms of international law.

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151 Crawford, *supra* n 64, at 751.

152 Green, *supra* n 22, at 26.



### ***III. Application of the legal principles to the use of force in Syria***

#### ***1. Introduction***

This chapter will address the applicability of the legal principles identified in chapter II to the Syrian case. The point of departure will be the prohibition of the use of force, as articulated in article 2(4) of the Charter, and its exceptions with regard to self-defence and the authorization of the use of force by the Council to maintain or restore international peace and security, since these areas of law are inextricably related to the extraterritorial use of force.

This chapter will explore the validity of the legal basis advanced by the US-led coalition for the military action in Syria. Before doing that, however, it is worth recalling that Syria did not grant consent to the US-led coalition military intervention for such action.

The US advanced its legal justification in a letter addressed to the UN Secretary General by the US permanent representative to the UN.<sup>1</sup> In her letter, Ambassador Power outlined the legal basis for the US-led coalition military intervention in Syria.<sup>2</sup> It was underlined that Iraq had requested

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1 UN document S/2014/695.

2 *Ibid.*

help in fighting against ISIS and had asked the US to lead international “efforts to strike ISIL sites and military strongholds,”<sup>3</sup> with “express consent”.<sup>4</sup> According to the letter, ISIS posed a serious threat to States in the Middle East region and beyond.<sup>5</sup> States, including the US and its partners, should be able to defend themselves “in accordance with the inherent right of individual and collective self-defence” as articulated in article 51 of the Charter.<sup>6</sup> The letter added that the “Syrian regime has shown that it cannot and will not confront” ISIS “safe havens” in its territory.<sup>7</sup>

The aforementioned letter sketched the legal framework for the US-led coalition military action in Syria. In the following section, the legal validity of the aforesaid points will be assessed.

## ***2. The Iraqi request and consent***

As a starting point, it is important to note that, while Iraq requested help in fighting ISIS and expressed its consent, Iraq reiterated that the coalition air strikes should be carried out “with due regard for complete national

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<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

sovereignty and the Constitution.”<sup>8</sup> The aforesaid Iraqi statement indicates that Iraq was asking for targeting of ISIS within its territory, especially that ISIS seized swathes of land in Iraq.<sup>9</sup> It would not have been necessary, otherwise, to reiterate that the military action should not violate the sovereignty of Iraq. In fact, in the notion of collective self-defence, the coalition is simply “entitled to conduct military operations in Iraq as a member of an *ad hoc* coalition led by the United States.”<sup>10</sup> Iraq “retains the right to limit the conditions for the use of force on its territory” and may

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8 “Although Iraq is in great need of the assistance of its friends in combatting this evil terrorism, it nonetheless attaches great importance to preserving its sovereignty and its ability to take decisions independently, both of which must be honoured in all circumstances... It is for these reasons that we, 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.” UN document S/2014/691.

9 “[T]he Islamic State in Iraq and the Levant (ISIL), an entity that is included in the international list of terrorist organizations, took control of the ancient city of Mosul, the capital of Ninawa governorate. It then pushed south towards towns and villages where Iraqis had exercised their democratic right to vote;” “[i]n other parts of our country, particularly the western governorate of Anbar, ISIL is carrying out organized military operations across the Syrian border and controls a number of border crossings. The threat of ISIL is not new to us. Iraq has been subjected to terrorist attacks for nearly a decade by Al-Qaida, which has renamed itself ISIL.” UN document S/2014/440.

10 Arimatsu & Schmitt gave the example of the Australian military personnel who were sent to Iraq to “assist in the operation [but] remained in the United Arab Emirates waiting for further clearance from the Iraqi government. The right of the Iraqi government to set the terms by which foreign powers might assist was made unequivocal by the Iraqi Foreign Minister’s comment that ‘[w]e are absolutely against foreign military bases and the presence of foreign military forces. Yes, we did ask for help, but it concerned air cover.’” Louise Arimatsu & Michael N. Schmitt, “Attacking ‘Islamic State’ and the Khorasan Group: Surveying the International Law Landscape”, (2014) 53 *Columbia Journal of Transnational Law Bulletin* 1 at 8; Gabrielle Chan, Australian Military Role Unclear as Iraq Minister Rejects Idea of Foreign Troops, available at: <<http://www.theguardian.com/australia-news/2014/oct/15/australian-military-role-unclear-as-iraq-minister-rejects-idea-of-foreign-troops>> (accessed 7 January 2016).

withdraw its consent at whatever time.<sup>11</sup> Consequently, the use of force “inconsistent with the terms of consent by the territorial State would constitute an ‘act of aggression’ against that State.”<sup>12</sup> On the other hand, Iraq explicitly delineated the aim of the air strikes to “arm Iraqi forces and enable them to regain control of Iraq’s borders.”<sup>13</sup> Such an outcome could not in reality be achieved by targeting ISIS in Syria.

The aforementioned points are essential in any consideration of the notion of collective self-defence, not only because a victim State retains the right to set the limits of the coalition’s military actions, but also because they indicate that Iraq did not really ask the coalition to intervene militarily in Syria. The coalition air strikes are legal in Iraq, but, when it comes to Syria, the legality of these strikes is, at the least, dubious.

### ***3. Self-defence***

The main legal basis presented by the US-led coalition was the right of self-defence. To examine its applicability to the Syrian case it is, thus, necessary to go back to the basics of this right.

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11 Louise Arimatsu & Michael N. Schmitt, “Attacking ‘Islamic State’ and the Khorasan Group: Surveying the International Law Landscape”, (2014) 53 *Columbia Journal of Transnational Law Bulletin* 1 at 8.

12 *Ibid.*

13 UN document S/2014/691.

### **3.1 Individual self-defence**

Although the US letter to the UN stated that individual self-defence is applicable to the situation in Syria, the analysis provided in the previous chapter, drawing on the ICJ jurisprudence, shows clearly that it is very difficult for any State, apart from Iraq,<sup>14</sup> to claim an individual right of self-defence,<sup>15</sup> since none of the coalition States is a victim of a grave ISIS armed attack,<sup>16</sup> nor has any specific plot against the coalition States been detected.<sup>17</sup> Any exercise of self-defence must, thus, be based on the notion of collective self-defence.

### **3.2 Collective self-defence**

The notion of collective self-defence is derived from the individual right of self-defence of the victim State, and it is invoked when the latter State

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14 If Turkey had not been complicit and actively involved in supporting the so-called “armed opposition”, it could have been a possible candidate for description as a victim state. For more information visit: <<http://tass.ru/en/world/848312>> (accessed 7 January 2016); <<http://sana.sy/en/?p=65811>> (accessed 7 January 2016); <[http://www.todayszaman.com/diplomacy\\_report-turkey-arms-trains-syrian-opposition\\_281182.html](http://www.todayszaman.com/diplomacy_report-turkey-arms-trains-syrian-opposition_281182.html)> (accessed 28 November 2015); <<http://in.reuters.com/article/uk-mideast-crisis-training-turkey-idINKBNOLL21P20150218>> (accessed 7 January 2016); <<http://www.theguardian.com/world/2015/nov/24/vladimir-putin-turkey-isis-terrorists-warplane-analysis>> (accessed 28 November 2015).

15 According to the legal reasoning of the ICJ, both individual and collective self-defence are invoked by an armed attack which has exceeded an armed attack threshold. *Military and Paramilitary Activities case, Nicaragua v. United States of America*, ICJ Reports 1986, 14 (hereinafter *Nicaragua* case) at para 195.

16 The study excludes Paris attacks, as the study’s limitation identified.

17 Barack Obama (2014), Statement on ISIL, available at: <<http://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1>> (accessed 27 January 2015), (hereinafter Obama statement).

requests assistance.<sup>18</sup> As such, the imperative question of whether Iraq had requested assistance or not is answered in the two letters Iraq sent to the UN in this regard. In the letter dated 25 June 2014, Iraq requested the assistance of the international community in fighting ISIS.<sup>19</sup> In another letter, dated 22 September 2014, Iraq pointed out that ISIS had “established a safe haven outside Iraq’s borders”.<sup>20</sup> It, then, requested the “United States of America to lead international efforts to strike ISIL sites and military strongholds, with our express consent.”<sup>21</sup>

According to these letters, therefore, the condition of appeal for help by the victim State is fulfilled. This, however, means only that one key pre-condition of collective self-defence has been satisfied. There are, yet, other conditions to be met.

As has been mentioned earlier, the right of collective self-defence is “derivative of the right of the State that has been the victim of an armed attack”.<sup>22</sup> The right of the coalition’s cross-border use of force against ISIS, therefore, “depends on whether Iraq enjoys a right of individual self-defence” against ISIS in Syria or not.<sup>23</sup> This takes the argument back to the

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18 “Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.” *Nicaragua case, supra* n 15, at para 195.

19 UN document S/2014/440.

20 UN document S/2014/691.

21 UN document S/2014/691.

22 Arimatsu & Schmitt, *supra* n 11, at 23; *Nicaragua case, supra* n 15, at para 195.

23 Arimatsu & Schmitt, *supra* n 11, at 24.

two opposing interpretations of self-defence. At first, however, it is worth noting that, on the test of the gravity of the armed attack,<sup>24</sup> there is no doubt that the attacks launched by ISIS against Iraq meet the gravity criterion,<sup>25</sup> discussed in the previous chapter, as set out by the ICJ.<sup>26</sup>

As was mentioned earlier, there are numbers of scholars who support a permissive interpretation of self-defence. From their perspective, the coalition operations in Syria are legal since Iraq has the right to use extraterritorial force against ISIS in Syria without Syria's consent. While, for the opposing group of scholars who support a restrictive interpretation of self-defence, the coalition air strikes in Syria are unlawful. The writer agrees with the latter group, especially because the US depends on the development of customary international law since 2001, and overlooks the fact that the absence of an agreement between States shows that there is no new customary rule and no *opinio juris*.<sup>27</sup>

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24 For example ISIS seized the city of Ramadi and defeated the elite units of the Iraqi armed forces, available at: <<http://www.independent.co.uk/news/world/middle-east/isis-seizes-ramadi-after-iraq-s-worst-defeat-in-the-war-with-the-islamic-militants-battle-now-is-to-10259457.html>> (accessed 7 December 2015); ISIS destroyed city of Nimrud, available at: <<http://www.dailymail.co.uk/news/article-3035534/Video-Islamic-State-group-destroys-ancient-ruins-Nimrud.html>> (accessed 7 December 2015).

25 *Nicaragua case*, *supra* n 15, at para 195.

26 *Ibid.*

27 In the *Military and Paramilitary Activities* case the Court re-emphasized its approach in the *North Sea Continental Shelf* case and noted that “for a new customary rule to be formed, not only must the acts concerned ‘amount to a settled practice’, but they must be accompanied by the *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it must have behaved so that their conduct is ‘evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief. i.e., the

The majority of States are, moreover, reluctant to articulate their views regarding the legal basis of the coalition military intervention in Syria which reflects a certain level of doubt and indicates that these States do not wish to acknowledge their acquiescence publicly, at least to a generous interpretation of article 51.

Accordingly, as a matter of law, collective self-defence, although disputed, could be advanced as the legal basis for the coalition air strikes. This, however, is not the problem; the problem is whether, firstly, Iraq and, secondly, the coalition are entitled to take extraterritorial military action in self-defence when the acts of terror are not imputable to the territorial State. One questions whether ‘the unwilling and unable’ criteria could be invoked to justify such use of force.

### ***3.3 Use of Force in the territories of a third State***

#### **3.3.1 The unwilling and unable**

The US invoked the standard of the ‘unwilling and unable’ to justify its military intervention in Syria.<sup>28</sup> This standard is “controversial” because it is in favour of the victim State at the expense of the territorial State’s

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existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.” *Nicaragua case*, *supra* n 15, at para 207; *North Sea Continental Shelf*, Judgment, *ICJ Reports* 1969, p.3 at para 77; Russia: air strikes must be agreed with Syria or will fuel tension, available at: <<http://www.reuters.com/article/us-syria-crisis-air-strikes-russia-idUSKCN0HI00U20140923>> (accessed 23 October 2015).

28 The US letter to the UN provided that “[t]he Syrian regime has shown that it cannot and will not confront these [ISIS] safe havens effectively itself.” UN document S/2014/695.



sovereignty.<sup>29</sup> Under the umbrella of this standard, it could be claimed that “even when the territorial State exercises governance authority and actively tries to suppress the violence”, the victim State may still use force because the territorial State’s measures are just “ineffective”.<sup>30</sup> It seems that the US-led coalition adopts this view.

At the outset, it goes without saying that, if it were not for the Syrian Arab Army, ISIS would have seized the whole country to establish its so-called “Caliphate” in the Middle East.<sup>31</sup> The Syrian Army is fighting ISIS fiercely on several fronts.<sup>32</sup> The ‘unwilling’ argument cannot, therefore, be invoked.

At the extreme end of the standard of the unwilling and unable, it could be argued that the victim State may take measures against non-state actors if it launches attacks from areas that are out of the control of the territorial State.<sup>33</sup> This suggests, therefore, that the operation will be limited and precise. This, however, is not the case in the US-led coalition air strikes

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29 Monica Hakimi, “Defensive Force against Non-State Actors: The State of Play”, (2015) 91 *International Law Studies* 1 at 13.

30 *Ibid.*

31 For more information about the military operations of the Syrian Army against ISIS visit: <<http://sana.sy/en/?p=56477>>; <<http://sana.sy/en/?p=56925>>; <<https://www.rt.com/news/321470-syria-airport-siege-lifted/>>; <<http://www.theguardian.com/world/2015/nov/11/syria-army-breaks-through-year-long-isis-siege-of-key-aleppo-air-base>>.

32 Everyone wrote off the Syrian army. Take another look now, available at: <<http://www.independent.co.uk/voices/with-russias-help-the-syrian-army-is-back-on-its-feet-and-fiercer-than-ever-a6698866.html>> (accessed 3 January 2016).

33 Hakimi, *supra* n 29, at 10.

against ISIS in Syria. Syria complained that the US-led coalition was targeting the infrastructure and causing significant damage.<sup>34</sup>

With regards to the ‘unable’ claim, it appears that the US and its partners did not take into consideration the element of good faith on the part of the Syrian government.<sup>35</sup> The coalition should have, at least, ascertained Syria’s effort and considered the fact that Syria is combatting ISIS attacks by all means at its disposal. As O’Connell properly stated:

If the state or states where the terrorist group is found happens to be making a good faith effort to stop the terrorist group and has some basic ability to do so., then the victim state cannot hold the territorial state responsible for the acts of terrorism and may not respond with armed force on the territory of that state.<sup>36</sup>

Consequently, the coalition should have given the Syrian government a “meaningful opportunity to cooperate with the operation,”<sup>37</sup> and should have requested coordination in the fight against ISIS. Such cooperation is a common remedy in the Council counter-terrorism resolutions. Without this, the US, and the rest of the coalition countries, could be considered to be taking matters into their own hands regardless of legal norms. As such,

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34 UN Document S/2015/851.

35 Jason S. Wrachford, “The 2006 Israeli Invasion of Lebanon: Aggression, Self-defense, or a Reprisal Gone bad?”, (2007) 60 *Air Force Law Review* 29 at 63.

36 Mary O’Connell, *International Law and the Use of Force Cases and Materials*, (2005) at 319; Jason S. Wrachford, “The 2006 Israeli Invasion of Lebanon: Aggression, Self-defense, or a Reprisal Gone bad?”, (2007) 60 *Air Force Law Review* 29 at 63-64.

37 Hakimi, *supra* n 29, at 16.

their military intervention could be interpreted as an act of aggression or reprisal.

### 3.3.2 Non-state actors and the attribution question

When a territorial State harbours or supports non-state actors, extraterritorial use of force against non-state actors, and accordingly against that State, is permitted. As such, “the victim State cannot plausibly rely on the territorial State to contain the threat.”<sup>38</sup> In this case, not only is the territorial State part of the problem, but the element of attribution is also evident.

As was discussed in the previous chapter, the jurisprudence of the ICJ offers solid support for the prohibition of extraterritorial use of force against non-state actors when the acts of the latter are not imputable to the territorial State.<sup>39</sup> Consequently, in the absence of such attribution of ISIS actions to the Syrian government, the US-led coalition ought not to have targeted ISIS in the Syrian territories without obtaining the consent of the Syrian government or without the express Council authorization of the use of force in Syria. There are measures “other than self-defense” that could

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38 Hakimi, *supra* n 29, at 8.

39 The Court implied that, in order for the acts performed by non-State actors to amount to an armed attack, these acts “must be imputable to the authorities of the host State.” *Military and Paramilitary Activities case, Nicaragua v. United States of America*, ICJ Reports 1986, 14 (hereinafter *Nicaragua case*) at para 195, emphasis added; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, 136 (hereinafter *Wall Advisory Opinion case*) at para 139; *Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v. Uganda*, Judgment of 19 December 2005, ICJ Reports 2005, 168 (hereinafter *DRC v. Uganda case*) at para 146.

have been taken by the victim State,<sup>40</sup> namely the “criminal law enforcement approach, which can be backed up by countermeasures.”<sup>41</sup>

#### ***4. United Nations Security Council authorization to use force***

The Council is endowed with powers to execute its primary responsibility in restoring or maintaining international peace and security. In order to perform that responsibility, the Council has the discretion to determine the existence of any threat or breach to international peace and security or any act of aggression.<sup>42</sup> Once such a determination has been made, the Council may make recommendations,<sup>43</sup> or take “measures”, either non-military or military measures.<sup>44</sup> The Council may, furthermore, “utilize ... regional arrangements or agencies for enforcement action under its authority”.<sup>45</sup>

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40 Mary E O’Connell, “Lawful Self-defense to Terrorism”, (2001-2002) 63 *University of Pittsburgh Law Review* 889 at 899.

41 *Ibid* at 908.

42 Article 39 of the Charter.

43 *Ibid*.

44 Article 42 of the Charter.

45 Article 53 of the Charter; for example, “the military operations in Libya to implement resolution 1973 were led by the North Atlantic Treaty Organisation (NATO), while the operations in Cote d’Ivoire to implement Resolution 1975 were led by UN Operations in Cote d’Ivoire (UNOCI) assisted by French forces.” Dire Tladi, “Security Council, the use of force and regime change: Libya and Cote d’Ivoire”, (2012) 37 *South African Yearbook of International Law* 22 at 22.

#### **4.1 Resolution 2249 (2015)**

It is beyond doubt that terrorism constitutes a serious threat to international peace and security. Recently the world has witnessed several terrorist attacks carried out by ISIS.<sup>46</sup> The Council, therefore, as a guardian of international peace and security, adopted resolution 2249 (2015) unanimously, which was a new resolution in the series of the Council counter-terrorism resolutions.

The Council reaffirmed, in the preamble to the resolution, a number of previous counter-terrorism resolutions, the “principles and purposes of the Charter”, “respect for the sovereignty, territorial integrity, independence and unity of all States in accordance with purposes and principles” of the Charter.<sup>47</sup> The Council, moreover, stated explicitly that ISIS “constitutes a global and unprecedented threat to international peace and security.”<sup>48</sup> As such, the Council expressed its determination “to combat by all means this unprecedented threat.”<sup>49</sup> This kind of language is not novel in counter-terrorism resolutions. It does not, therefore, really require much of a discussion.

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46 The Council “[u]nequivocally condemns in the strongest terms the horrifying terrorist attacks perpetrated by ISIL also known as Da’esh which took place on 26 June 2015 in Sousse, on 10 October 2015 in Ankara, on 31 October 2015 over Sinai, on 12 November 2015 in Beirut and on 13 November 2015 in Paris, and all other attacks perpetrated by ISIL.” S/RES/2249 (2015).

47 UN document S/RES/2249 (2015).

48 *Ibid.*

49 *Ibid.*

What does, however, require discussion, is whether resolution 2249 authorized the use of force or not, and whether it provided a solid legal basis for such a use of force.

#### ***4.2 Does Resolution 2249 authorize the use of force?***

While it is obvious that resolution 2249 highlighted the looming threat of terrorism, it is important to note that the resolution was not adopted under Chapter VII, whereas in the majority of counter-terrorism resolutions the Council was acting under chapter VII of the Charter.<sup>50</sup> This, nevertheless, does not mean that a non-chapter VII resolution is not binding.<sup>51</sup> As the ICJ has clearly provided that the Council resolutions are binding even if they were not adopted under chapter VII.<sup>52</sup> This, however, is not the problem; the problem is whether or not the resolution authorizes the use of force against ISIS in Syria. There is a certain level of ambiguity which may support the view that resolution 2249 authorizes the use of force. The same

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50 For example security council resolutions 1267 (1999), 1373 (2001), 1904 (2009), 1989 (2011), 2161 (2014), 2170 (2014) and 2199 (2015). UN documents: S/RES/1267 (1999), S/RES/1373 (2001), S/RES/1904 (2009), S/RES/1989 (2011), S/RES/2161 (2014), S/RES/2170 (2014) and S/RES/2199 (2015) respectively.

51 Dapo Akande and Marko Milanovic, "The Constructive Ambiguity of the Security Council's ISIS Resolution", available at: <<http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/>> (accessed 20 December 2015).

52 The ICJ stated that "It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to "the decisions of the Security Council" adopted in accordance with the Charter." *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16 at para 113.

ambiguity, nevertheless, supports a valid counter interpretation, and as such it is extremely doubtful that the resolution supports the notion of use of force, or offers a proper legal basis for such notion. This leads to the discussion whether resolution 2249 does indeed authorize use of force. Perhaps the novelty of resolution 2249 is that the language of the resolution, in particular operative paragraph 5 (hereafter paragraph 5), could be interpreted as “suggest[ing] [that] there is Security Council support for the use of force against IS.”<sup>53</sup> It is, consequently, necessary to analyze paragraph 5, which provides that the Council:

Calls upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da’esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL also known as Da’esh as well as ANF, and all other individuals, groups, undertakings, and entities associated with Al Qaeda, and other terrorist groups, as designated by the United Nations Security Council, and as may further be agreed by the International Syria Support Group (ISSG) and endorsed by the UN Security Council, pursuant to the Statement of the International Syria Support Group (ISSG) of 14 November, and to eradicate the safe haven they have established over significant parts of Iraq and Syria.<sup>54</sup>

It is of significant importance to note that the Council opted to use “calls upon” member States as a starting phrase in the main operative paragraph instead of ‘authorizes’ or ‘decides’. Despite the fact that the Council used the phrase “take all necessary measures” which is usually interpreted as the formula for the use of force, the Council did not really authorize taking such

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53 Akande & Milanovic, *supra* n 51.

54 UN document S/RES/2249.

measures clearly. This phrase as it stands on its own, therefore, does not constitute the authorization of the use of force. The Council still needs either to ‘authorize’ or ‘decide’ the use of force. Should it not do so, the phrase “calls upon” means an encouragement of member States to take all necessary measures, but it is not an explicit mandate to take such measures.<sup>55</sup> Simply put, “explicit and not implicit Security Council authorization is necessary before a nation may use force”,<sup>56</sup> unless this State is exercising its right of self-defence as articulated in article 51.

This conclusion is arrived at by examining the Council’s resolutions where it has authorized the use of force. In these resolutions, the Council referred to chapter VII, decided or authorized action and used the phrase ‘take all necessary measures’ or ‘use all necessary means’.<sup>57</sup> It is noteworthy that the Council, in resolution 2249, deliberately chose to include the phrase “take all necessary measures” unaccompanied by the other two common phrases it uses when authorizing the use of force.<sup>58</sup> As such, the Council

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55 De Wet, for example, is of the opinion that “[i]n order for the Security Council to remain in control for a military operation, the use of force must be explicitly recognised in a Security Council resolution.” Erika de Wet, *The Chapter VII Powers of the United Nations Security Council*, (2004) at 268; Jules Lobel and Michael Ratner, “Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime”, (1999) 93 *American Journal of International Law* 124 at 125.

56 Jules Lobel and Michael Ratner, “Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime”, (1999) 93 *American Journal of International Law* 124 at 125.

57 For example resolution 1973 (2011) which led to military operations in Libya, resolution 1975 (2011) with respect to the situation in Cote d’Ivoire, resolution 794 (1992) which authorized use of force in Somalia, resolution 678 (1990) which authorized use of force against Iraq.

58 UN document S/RES/2249.



deliberately wrapped this resolution in a veil of ambiguity which has left room for debate and divergent interpretations.

The writer, however, takes cognizance of two counter arguments. Firstly, States have justified their use force relying on the Council's implicit authorization.<sup>59</sup> Secondly, the Council's resolutions, namely 1368 and 1373 (2001),<sup>60</sup> in the aftermath of 9/11 were considered examples where the Council merely referred to the use of force and did not explicitly authorize it.<sup>61</sup>

Two points could be made regarding the latter argument. Firstly, the Council did not refer to the right of self-defence in resolution 2249, while it reiterated this right in resolutions 1368 and 1373 (2001). The Council did not, however, authorize the use of force in resolutions 1368 and 1373 (2001). Rather, the Council gave a "stamp of legitimacy" to military actions in Afghanistan.<sup>62</sup>

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59 Blokker stated that resolutions 688 (Iraq), 1199 and 1203 (Kosovo) are "-usually fiercely- disputed whether or not the Security Council has implicitly authorized the use of force" in these resolutions. Niels Blokker, "Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'", (2000) 11 *European journal of international law* 541 at 546; resolution 688 (1991) available at: <<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/596/24/IMG/NR059624.pdf?OpenElement.>>; UN document S/RES/1199 (1998); UN document S/RES/1203 (1998).

60 UN documents S/RES/1368 (2001) and S/RES/1373 (2001) respectively.

61 Akande & Milanovic, *supra* n 51.

62 *Ibid.*

Secondly, the “US attacks on Afghanistan were not attacks on al-Qaida; they were attacks on Afghanistan,”<sup>63</sup> since Afghanistan, under Taliban authority, provided sanctuary and training for al-Qaida members,<sup>64</sup> and as such there were elements of complicity, responsibility and attribution. The attribution element, in particular, was reiterated in the speeches of President George W. Bush after 9/11.<sup>65</sup> The aforementioned resolutions could, therefore, not be advanced as examples of the Council’s implicit authorization to use force extraterritorially against non-state actors. There was a different legal basis for the extraterritorial forcible measures.

The Council went on to stipulate that the aforesaid measures should be taken “in compliance with international law, in particular with the United Nations Charter.”<sup>66</sup> The simple interpretation of this language provides that these measures should comply with rules of international law, namely, the prohibition of use of force, as articulated in article 2(4) of the Charter, and *jus ad bellum*. States, furthermore, must act in conformity with other foundational principles of international law, viz. sovereignty, territorial

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63 Dire Tladi, “The Use of Force in Self Defence Against Non-State Actors in International Law: Recalling The Foundational Principles of International Law”, (2012) 2 *Zanzibar Yearbook of Law* 71 at 84.

64 UN document S/RES/1267 (1999).

65 In his speeches after 9/11 President George W. Bush stated that, “we will make no distinction between the terrorists who committed these acts and those who harbor them.” Available at: <<http://www.presidency.ucsb.edu/ws/?pid=58057>> (accessed 20 January 2016). “By aiding and abetting murder, the Taliban regime is committing murder.” Available at: <<http://edition.cnn.com/2001/US/09/20/gen.bush.transcript/>> (accessed 20 January 2016).

66 UN document S/RES/2249.

integrity and political independence. Consequently, this could be interpreted as having a restrictive effect on the measures which might be taken by member States. As a result, these measures should not include the use of force.

The Council, moreover, required compliance with “international human rights, refugee and humanitarian law”, a wording that is frequently used in counter-terrorism resolutions which did not authorize use of force.<sup>67</sup> This wording, however, does not really broaden the scope of the measures that could be taken by States. Instead it focuses on the importance of these rules while fighting terrorism.

Successively, after sending mixed messages, the Council called upon States to “redouble and coordinate their efforts to prevent and suppress terrorist acts committed” by ISIS and other groups affiliated with Al-Qaida.<sup>68</sup> This invitation is a vague invitation, and it does not require, or specify, the taking of tangible action by States, especially because the Council had denoted specific measures or sanctions in other counter-terrorism resolutions, viz. 1267 (1999), 1333 (2000), 1390 (2002), 1989 (2011) and 2161 (2014).<sup>69</sup>

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67 For example security council resolutions 1267 (1999), 1904 (2009), 1989 (2011) and 2178 (2014). UN documents S/RES/1267 (1999), S/RES/1904 (2009), S/RES/1989 (2011) and S/RES/2178 (2014) respectively.

68 UN document S/RES/2249.

69 UN documents S/RES/1267 (1999), S/RES/1333 (2000), S/RES/1390 (2002), S/RES/1989 (2011) and S/RES/2161 (2014).

In conclusion, what is unambiguous about resolution 2249 is its innovative ambiguity. The Council is blurring the line between the authorization of the use of force, if there is any, and expressing political support for fighting terrorism. On one hand, it does not explicitly authorize the use of force. On the other, the Council seems to compliment the taking of “all necessary measures” by States to suppress terrorist acts without providing a sufficient legal basis. Whether the resolution authorizes the use of force or not will, thus, continue to be a point of disagreement. States taking military actions in Syria will continue their actions and they will advance different legal bases to justify such actions.

## ***IV. Conclusion***

This dissertation has sought to assess the legality of the US-led coalition military intervention to target ISIS in Syria according to international law. Its legal compass has been the lofty ideals of the UN Charter and rules of international law. One of the main topics on which the dissertation has focused is the extraterritorial use of force against non-state actors and its relation to both the prohibition of use of force and self-defence. The special focus has been on the case in which the extraterritorial use of force was conducted without obtaining the consent of the territorial State and in the absence of Security Council authorization. The study has, thus, tried to answer the thorny question of whether the extraterritorial use of force constitutes a violation of the prohibition of use of force, or, rather, whether the use of force is permitted under the umbrella of the right of self-defence.

The law in this area is a long way from being settled. It has its black and white areas in addition to multiple shades of grey areas. For this reason, the study has examined a wide range of legal opinions and the legal basis presented by the US-led coalition for its military action in Syria.

The principle norm related to the issue is the prohibition of the use of force, as articulated in article 2(4). This norm is the “cornerstone” of the Charter and generally regarded a *jus cogens* norm. State practice that

deviates from this norm, therefore, “qualifies as law only if the practice is as robust and supported as Article 2(4) itself.”<sup>1</sup> This trend in the behaviour of States does not, however, “evinced a sufficiently robust practice and *opinio juris* to stray from the ICJ’s pronouncements.”<sup>2</sup>

There were arguments in support of relying on State practice as a way of interpreting the law regarding the extraterritorial use of force and in a bid to justify such practice against non-state actors in third States. There are many cases, apart from the Syrian case, where States have resorted to extraterritorial use of force, and, in those cases, the international community did not condemn the action loudly, or at least it was sharply divided in this regard.<sup>3</sup> State practice, however, although important, cannot show the way forward when States are “still struggling over the law’s proper content,”<sup>4</sup> and when they are still not able to coalesce around unified norms to govern the extraterritorial use of force.<sup>5</sup>

The main guidelines in State practice, however, provide that the majority of States “endorsed defensive operations against non-State

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1 Monica Hakimi, “Defensive Force against Non-State Actors: The State of Play”, (2015) 91 *International Law Studies* 1 at 30.

2 *Military and Paramilitary Activities case, Nicaragua v. United States of America*, ICJ Reports 1986, 14 at para 207; *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p.3 at para 77; Hakimi, *supra* n 1, at 30-31.

3 Hakimi, *supra* n 1, at 30-31.

4 *Ibid.*

5 *Ibid.*

actors” in a third State which harbours or supports non-state actors.<sup>6</sup> The same position was held by the majority of States when non-state actors operated from areas out of the control of the territorial State.<sup>7</sup> Most States, nevertheless, did not express their approval of cross-border operations, but rather kept silent regarding them.<sup>8</sup> This silence, however, does not bestow legality on such operations.

The study has shown that the justification of self-defence, as advanced by the US-led coalition, is tenuous and based on shaky legal grounds. It is clear that the attacks do not meet the required criteria under international law. There might be arguments that suggest otherwise, but mainstream legal opinion and the reasoning of the ICJ confirm that self-defence is an exception to the general rule, the prohibition of use of force. The right of self-defence, as an exception, should be practised within the restricted limits defined in the Charter.<sup>9</sup> These limits are delineated in interaction with other foundational rights in international law, such as territorial integrity, sovereignty, political independence and equality. Giving the right of self-defence priority over the other foundational rights has no legal basis in international law.

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<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v. Uganda*, Judgment of 19 December 2005, *ICJ Reports* 2005, 168 at para 148.

The UN collective security system serves the main purpose of saving “succeeding generations from the scourge of war”;<sup>10</sup> the Council was, therefore, endowed with the mission of maintaining or restoring international peace and security on behalf of the UN members. Since the Council may authorize the use of force, this authorization should be explicit and well defined if it is to serve the purpose of maintaining international peace and security and resolve conflicts between States peacefully.

The study has shown that the Council neither authorized “Operation Inherent Resolve” initially, nor did it do so *ex post facto* when it adopted resolution 2249 (2015). What the Council offered was political support for the ongoing operations and a deliberate ambiguity regarding the authorization of use of force.

The saga of the war on terror has no basis in international law. States may defend themselves against imminent and actual threats but not against speculations of a claimed threat. Besides this, self-defence should be practised within the restricted confines delineated in the Charter. Acting otherwise will only destroy the world order and undermine its peace and security, contrary to the claims by such States that their actions will maintain international peace and security. International law “does not require the victim to turn the other cheek

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<sup>10</sup> UN Charter preamble.



when terrorist outrages occur”.<sup>11</sup> On the contrary, it allows the use of force “to the extent necessary and proportionate.”<sup>12</sup> To turn a blind eye to these standards could destroy our “deepest moral values of our common interest in achieving a more decent world.”<sup>13</sup>

The argument advanced by the coalition, while using the language of international law, ignored the most fundamental principles of international law relating to the use of force and cannot, therefore, bestow legality on the air strikes. Coalition air strikes targeting ISIS in Syria, thus, turned a blind eye to the prohibition of use of force and ignored the fact that the acts of ISIS are not imputable to the Syrian government. This is not even to take into account the reality that the coalition ignored the fact that the Syrian government is fighting ISIS.

In a nutshell, the legal study has shown that, in the absence of consent by the Syrian government and without obtaining an explicit authorization from the Council, the legal justification presented by the coalition is weak and does not bestow legality on the coalition air strikes targeting ISIS in Syrian territories. These air strikes represent a violation

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11 Oscar Schachter, “The Extraterritorial Use of Force Against Terrorist Bases”, (1988-1989) 11 *Houston Journal of International Law* 309 at 316.

12 *Ibid.*

13 *Ibid.*

of international law, and they violate the sovereignty and territorial integrity of Syria.

## V. Bibliography

- **Books**

Christine Gray, *International Law and the Use of Force*, 3rd Edition, (Oxford, Oxford University Press, 2008).

D W Bowett, *Self-defense in International Law*, (Manchester, Manchester University Press, 1958).

Erika de Wet, *The Chapter VII Powers of the United Nations Security Council*, (Oxford, Hart Publishing, 2004).

Ian Brownlie, *International Law and the Use of Force by States*, (Oxford, Oxford University Press, 1963).

James A Green, *The International Court of Justice and Self-defense in International Law*, (Oxford, Hart Publishing, 2009).

James Crawford, *Brownlie's Principles of Public International Law*, (Oxford, Oxford University Press, 2012).

John Dugard, *International Law: A South African Perspective*, 4<sup>th</sup> Edition, (Cape Town, Juta, 2011).

Louis Henkin, Stanley Hoffmann, Jeane J. Kirkpatrick, Allan Gerson, William D. Rogers and David J. Scheffer, *Right V. Might: International Law and the Use of Force*, 2nd Edition, (New York, Council on Foreign Relations Press, 1991).

Malcom N Shaw, *International Law*, 5<sup>th</sup> Edition, (Cambridge, Cambridge University Press, 2003).

Mary E O'Connell, *International Law and the Use of Force Cases and Materials*, 2<sup>nd</sup> Edition, (New York, Foundation Press, 2009).

Noam Lubell, *Extraterritorial Use of Force Against Non-state Actors*, (Oxford, Oxford University Press, 2010).

Thomas M Franck, *Recourse to Force State Action Against Threats and Armed Attacks*, (Cambridge, Cambridge University Press 2002).

- **Articles**

Abraham D Sofaer, "On the Necessity of Pre-emption", (2003) *The European Journal of International Law* 209.

Alexander Orakhelashvili, "The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions", (2005) 16 *The European Journal of International Law* 59.

Anthony Clark Arend, "International Law and the Preemptive Use of Military Force", (2003) 26 *The Washington Quarterly* 89.

Christian J. Tams, "The Use of Force against Terrorists", (2009) 20 *The European Journal of International Law* 359.

Daniel Bethlehem, "Self-defense Against an Imminent or Actual Armed Attack by Nonstate Actors", (2012) 106 *American Journal of International Law* 770.

Dapo Akande and Marko Milanovic, "The Constructive Ambiguity of the Security Council's ISIS Resolution", available at: <<http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/>>.

David Wippman, “The Nine Lives of Article 2(4)”, (2007) 16 *Minnesota Journal of International Law* 387.

Dire Tladi, “Security Council, the use of force and regime change: Libya and Cote d’Ivoire”, (2012) 37 *South African Yearbook of International Law* 22.

Dire Tladi, “The Non-consenting Innocent State: The Problem With Bethlehem’s Principle 12”, (2013) 107 *The American Journal of International Law* 570.

Dire Tladi, “The Use of Force in Self Defence Against Non-State Actors in International Law: Recalling The Foundational Principles of International Law”, (2012) 2 *Zanzibar Yearbook of Law* 71.

D. W. Bowett, “Collective Self-defence Under the Charter of the United Nations”, (1955-1956) 32 *British Year Book of International Law* 130.

Hans Kelsen, “Collective Security and Collective Self-defense Under the Charter of the United Nations”, (1948) 42 *American Journal of International Law* 783.

Ian Brownlie, "International Law and the Use of Force by States Revisited", (2002) 1 *Chinese Journal of International Law* 1.

Ian Brownlie, “The Use of Force in Self-defense”, (1961) 37 *The British Yearbook of International Law* 183.

Jason S. Wrachford, “The 2006 Israeli Invasion of Lebanon: Aggression, Self-defense, or a Reprisal Gone bad?”,(2007) 60 *Air Force Law Review* 29.

Jordan J. Paust, “Relative Sovereignty and Permissible Use of Armed Force”, (2011-2012) 20 *Michigan State University International Law Review* 1.

Jordan J. Paust, “Self-Defense Targetings of Non-State Actors And Permissibility of U.S. Use of Drones in Pakistan”, (2009-2010) 19 *Journal of Transnational Law & Policy* 237.

Jules Lobel and Michael Ratner, “Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime”, (1999) 93 *American Journal of International Law* 124.

Jules Lobel, “The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan”, (1999) 24 *Yale Journal of International Law* 537.

Kimberley N Trapp, “Back to Basics: Necessity, Proportionality, and the Right of Self-Defense Against Non-State Terrorist Actors”, (2007) 56 *International and Comparative Law Quarterly* 141.

Louise Arimatsu & Michael N. Schmitt, “Attacking ‘Islamic State’ and the Khorasan Group: Surveying the International Law Landscape”, (2014) 53 *Columbia Journal of Transnational Law Bulletin* 1.

Mary E O’Connell “Enhancing the Status of Non-State Actors Through a Global War on Terror” (2004-2005) 43 *Columbia Journal of Transnational* 435.

Mary E O’Connell, “Lawful Self-defense to Terrorism”, (2001-2002) 63 *University of Pittsburgh Law Review* 889.

Mary E O’Connell “When Is a War Not a War? The Myth of the Global War on Terror” (2005-2006) 12 *ILSA Journal of International & Comparative Law* 535.

Michael N Schmitt, “Preemptive Strategies in International Law”, (2002-2003) 24 *Michigan Journal of International Law* 513.

Michael N Schmitt, "The Syrian Intervention: Assessing the Possible International Law Justifications", (2013) 89 *International Law Studies* 744.

Monica Hakimi, "Defensive Force against Non-State Actors: The State of Play", (2015) 91 *International Law Studies* 1.

Niaz A Shah, "Self-defence, Anticipatory Self-defence and Pre-emption: International Law's Response to Terrorism", (2007) 12 *Journal of Conflict and Security Law* 95.

Oscar Schachter, "In Defense of International Rules on the Use of Force", (1986) 53 *The University of Chicago Law Review* 113.

Oscar Schachter, "Self-defense And The Rule of Law", (1989) 83 *American Journal of International Law* 259.

Oscar Schachter, "The Extraterritorial Use of Force Against Terrorist Bases", (1988-1989) 11 *Houston Journal of International Law* 309.

Rafaël Van Steenberghe, "Self-Defence in Response to Attacks by Non-state Actors in the Light of Recent State Practice: A Step Forward?", (2010) 23 *Leiden Journal of International Law* 183.

Sean D. Murphy, "Self-defense and the Israeli Wall Advisory Opinion: An Ipse Dixit From the ICJ?", (2005) 99 *American Journal of International Law* 62.

Sean D. Murphy, "Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter" (2002) 43 *Harvard International Law Journal* 41.

Sean D. Murphy, "The Doctrine of Preemptive Self-Defense", (2005) 50 *Villanova Law Review* 699.

Sikander Ahmed Shah, “War on Terrorism: Self Defense, Operation Enduring Freedom, and the Legality of U.S. Drone Attacks in Pakistan”, (2010) 9 *Washington University Global Studies Law Review* 77.

- ***International treaties and convention***

*The Charter of the United Nations, signed on 26 June 1945, in San Francisco.*

*The Vienna Convention on the Law of Treaties, signed on 23 May 1969, in Vienna.*

- ***Other international documents***

*Caroline Incident*, available at: <[http://avalon.law.yale.edu/19th\\_century/br-1842d.asp](http://avalon.law.yale.edu/19th_century/br-1842d.asp)>.

Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, UN document (A/56/10), Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001).

Identical letters dated 14 October 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 document S/2015/789.

Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General, UN document S/2014/440.

Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, UN document S/2014/691.



Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN document S/2014/695.

Security Council resolutions 216 (1965), UN document S/RES/216 (1965).

Security Council resolution 487 (1981), UN document S/RES/487 (1981).

Security Council resolution 678 (1990), UN document S/RES/678 (1990).

Security Council resolution 794 (1992), UN document S/RES/794 (1992).

Security Council resolution 1267 (1999), UN document S/RES/1267 (1999).

Security Council resolution 1373 (2001), UN document S/RES/1373 (2001).

Security Council resolution 1904 (2009), UN document S/RES/1904 (2009).

Security Council resolution 1973 (2011), UN document S/RES/1973 (2011).

Security Council resolution 1975 (2011), UN document S/RES/1975 (2011).

Security Council resolution 1989 (2011), UN document S/RES/1989 (2011).

Security Council resolution 2161 (2014), UN document S/RES/2161 (2014).

Security Council resolution 2170 (2014), UN document S/RES/2170 (2014).

Security Council resolution 2178 (2014), UN document S/RES/2178 (2014).

Security Council resolution 2199 (2015), UN document S/RES/2199 (2015).

Security Council resolution 2249 (2015), UN document S/RES/2249 (2015).

- **Cases**

*Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v. Uganda*, Judgment of 19 December 2005, *ICJ Reports* 2005, 168.

*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, *ICJ Reports* 1971, 16.

*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, *ICJ Reports* 2004, 136.

*Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, *ICJ Reports* 1996, 226.

*Military and Paramilitary Activities case, Nicaragua v. United States of America*, *ICJ Reports* 1986, 14.

*Oil Platforms (Islamic Republic of Iran v. United States of America)*, *ICJ Reports* 2003, 161.

*The Corfu Channel case*, Judgment of 9 April 1949, *ICJ Reports* 1949, 4.

- **Miscellaneous newspaper articles and news**

Australian Military Role Unclear as Iraq Minister Rejects Idea of Foreign Troops, *The Guardian*, available at: <http://www.theguardian.com/australia-news/2014/oct/15/australian-military-role-unclear-as-iraq-minister-rejects-idea-of-foreign-troops>.

Everyone wrote off the Syrian army. Take another look now, available at: <http://www.independent.co.uk/voices/with-russias-help-the-syrian-army-is-back-on-its-feet-and-fiercer-than-ever-a6698866.html>.

Govt forces halt 2-year ISIS siege of key airbase in northern Syria – media, available at: <https://www.rt.com/news/321470-syria-airport-siege-lifted/>.

ISIS hit hard by Russian and Syrian air strikes, more terrorists killed in various areas, available at: <http://sana.sy/en/?p=56477>.

Isis seizes Ramadi: After Iraq's worst defeat in the war with the Islamic militants, battle is on to defend the road to Baghdad, available at: <http://www.independent.co.uk/news/world/middle-east/isis-seizes-ramadi-after-iraq-s-worst-defeat-in-the-war-with-the-islamic-militants-battle-now-is-to-10259457.html>.

Is Vladimir Putin right to label Turkey 'accomplices of terrorists'?, available at: <http://www.theguardian.com/world/2015/nov/24/vladimir-putin-turkey-isis-terrorists-warplane-analysis>.

More ISIS positions destroyed by Russian and Syrian air strikes in Aleppo and Homs, available at: <http://sana.sy/en/?p=56925>.

Operation inherent resolve, available at: [http://www.defense.gov/home/features/2014/0814\\_iraq/](http://www.defense.gov/home/features/2014/0814_iraq/).

President Barak Obama (2014), Statement on ISIL, available at: <http://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1>.

President Bashar al-Assad (2015), request for the Russian intervention, available at: <<http://sana.sy/en/?p=56308>>.

President George W. Bush (2001), Address to the Nation on the Terrorist Attacks, available at: <<http://www.presidency.ucsb.edu/ws/?pid=58057>>.

Shock new video shows ISIS thugs smashing historic Iraqi city of Nimrud with barrel bombs, bulldozers and jackhammers in orgy of destruction slammed as a war crime by the United Nations, available at: <<http://www.dailymail.co.uk/news/article-3035534/Video-Islamic-State-group-destroys-ancient-ruins-Nimrud.html>>.

Russian TV (2015), Damascus invited Moscow to assist the Syrian army, available at: <<https://www.rt.com/news/317041-preemptive-strike-putin-terrorism/>>.

Russia: air strikes must be agreed with Syria or will fuel tension, available at: <<http://www.reuters.com/article/us-syria-crisis-airstrikes-russia-idUSKCN0HI00U20140923>>.

Syria army breaks through year-long Isis siege of key Aleppo air base, available at: <<http://www.theguardian.com/world/2015/nov/11/syria-army-breaks-through-year-long-isis-siege-of-key-aleppo-air-base>>.

UN Security Council to discuss weapons delivery from Turkey to Syria at Russia's request, available at: <<http://tass.ru/en/world/848312>>.

U.S., Turkey soon to sign Syrian opposition train-and-equip deal, available at: <<http://in.reuters.com/article/uk-mideast-crisis-training-turkey-idINKBN0LL21P20150218>>.