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

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ABSTRACT

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

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

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

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

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INTRODUCTION

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

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

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

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

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

During the Arab Spring in March 2011, protests began in the city of Deraa against the Syrian government. After government forces opened fire on protesters, the violence escalated and spread to other Syrian cities. In the summer of 2011, hundreds of thousands protested the brutality of the Assad regime. The tension soon turned into a civil war and reached the two major cities in Syria: Damascus and Aleppo. The number of
deaths during the war quickly surpassed a hundred thousand,\(^6\) and the commission of war crimes were repeatedly reported.\(^7\) In August 2013, chemical weapons were deployed, killing hundreds of civilians.\(^8\) Due to imminent U.S. military intervention, the Assad regime agreed to eliminate its use of chemical weapons.\(^9\) In turn, President Obama decided against the use of force in order to prevent and halt gross human rights violations.\(^10\)

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

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\(^9\) Patrick Wintour, John Kerry gives Syria week to hand over chemical weapons or face attack, THE GUARDIAN (Sept. 9, 2013, 7:47 AM), https://www.theguardian.com/world/2013/sep/09/us-syria-chemical-weapons-attack-john-kerry;


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

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

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

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

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

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in Syria the following April.\textsuperscript{33} Finally, the Netherlands also started to attack ISIL in Iraq.\textsuperscript{34}

Turkey began targeting ISIL in Syria on July 24, 2015.\textsuperscript{35} After ISIL claimed responsibility for the deadly terrorist attacks in Paris that killed 130 civilians in November 2015,\textsuperscript{36} President Francois Hollande sent the Charles de Gaulle aircraft carrier to the eastern Mediterranean. France subsequently engaged in airstrikes against ISIL in Syrian territory.\textsuperscript{37} In early December, the House of Commons, the lower house of the Parliament of the United Kingdom, approved airstrikes against ISIL in Syria.\textsuperscript{38} One day later, Germany decided to join the international coalition against ISIL.\textsuperscript{39} By the end of 2015, the United States and its allies had carried out almost 3,000 airstrikes against ISIS in Syria.\textsuperscript{40} As military strikes continued, the Netherlands\textsuperscript{41} and Denmark\textsuperscript{42} announced


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


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


\textsuperscript{42} Denmark Tells U.N. it has Trained Radar on Syria, REUTERS (Jan. 18, 2016, 7:46 PM), http://www.reuters.com/article/us-denmark-syria-idUSKCN0UW270.
future air strikes against ISIL on Syrian territory. Belgium and Norway joined this military coalition later that year.

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

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

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

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

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

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

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

\section*{A. ISIL DOES NOT MEET ANY OF THE MONTEVIDEO CRITERIA}

The customary criteria for statehood\textsuperscript{54} are set out in Article 1 of the 1933 Montevideo Convention.\textsuperscript{55} Under the Montevideo formula, an entity fulfilling the conditions of defined territory, permanent population, effective government, and capacity to enter into relations with other

\textsuperscript{50} Id.
\textsuperscript{51} See, e.g., Obama, supra note 19.
\textsuperscript{52} S.C. Res. 2249 (Nov. 20 2015).
\textsuperscript{53} Id.
\textsuperscript{54} D. J. Harris, Cases and Materials of International Law 102 (5th ed. 1997); Malcolm N. Shaw, International Law 198 (6th ed. 2008).
\textsuperscript{55} Convention on Rights and Duties of States, art. 1, Dec. 26, 1933, 49 Stat. 3097.
States achieves the status of statehood. Therefore, recognition is not a constitutive requirement of statehood. Ostensibly, ISIL appears to satisfy all these criteria, since it controls a considerable territory with population, it administers the occupied cities and territories, and it is capable of communicating and trading with the rest of the world. Under closer scrutiny, it becomes apparent that ISIL does not, in fact, satisfy any of the Montevideo conditions.

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

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

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56 Shaw, supra note 54.
61 See Crawford, supra note 57.
victories. Although the fragmented nature of the controlled territory does not in itself preclude a claim for statehood, it renders achieving independence very difficult. Hersch Lauterpacht draws attention to the fact that recognition is postponed in State practice if serious doubts are cast on the future frontiers of the entity. The frontiers of ISIL are more than dubious, because the UN Security Council has repeatedly reaffirmed the territorial integrity of Iraq and Syria.

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

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64 LAUTERPACHT, supra note 63, at 30.

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

66 LAUTERPACHT, supra note 63, at 28.


70 Hisham al-Hashimi, Revealed: The Islamic State ‘cabinet’, From Finance Minister to Suicide Bomb Deployer, THE TELEGRAPH (Jul. 9, 2014, 1:33 PM),
The condition of effective government is closely related to additional criteria, namely independence and the capacity to enter into relations with other States. ISIL does not meet these requirements. As alluded to above, ISIL lacks a minister or ministry entrusted with managing foreign affairs. ISIL has neither the capacity nor the willingness to enter into relations with other States. The fact that no State has recognized ISIL as a State and that it is universally condemned as a terrorist organization makes it impossible for ISIL to fulfill the fourth Montevideo criteria of statehood.

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

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

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71 See Crawford, supra note 57.
72 See Christoph Reuter, Secret Files Reveal the Structure of Islamic State, SPIEGEL ONLINE (April 18, 2015, 1:17 PM), http://www.spiegel.de/international/world/islamic-state-files-show-structure-of-islamist-terror-group-a-1029274.html.
74 SHAW, supra note 54, at 198–200.
77 CRAWFORD, supra note 63, at 132.
continuing statehood of an existing state. This presumption clearly covers the political independence and territorial integrity of the given state. The United Nations (UN) has repeatedly reaffirmed the territorial integrity and political independence of Iraq and Syria. All these facts lead to the conclusion that ISIL does not fulfill the requirements for statehood under customary international law. Thus, no new State has been created by ISIL, and the territorial integrity of Iraq and Syria must be respected and protected.

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

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

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

78 Crawford, State Responsibility, supra note 57.
81 CRAWFORD, supra note 63, at 132.
82 Id.
83 Id.
85 Mortada, supra note 73.
86 Id.
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be integrated into the community of states;\textsuperscript{87} it instead aspires to be the successor of the current system.\textsuperscript{88} By and large, the Caliphate exists in a parallel universe. It is much more, or less, than a political entity: it is the vehicle for salvation.\textsuperscript{89} The “One State” given by Allah, which aims to eliminate all other existing States, never has and never will proclaim its statehood in an international law sense.\textsuperscript{90} This is highly relevant, as the existence of a State is by no means just a factual question: the State is a legal entity created by and under law. According to Lauterpacht, “[l]egal personality is a creature of law, not of nature. . . . When we assert that a State exists as a normal subject of international law by virtue of the fact of its existence, we must necessarily have in mind a State fulfilling the conditions as laid down in international law.”\textsuperscript{91}

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

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

\textsuperscript{88} Alex Johnson, ‘Deviant and Pathological’: What Do ISIS Extremists Really Want?, NBC NEWS (Sept. 3, 2014), http://www.nbcnews.com/storyline/isis-terror/deviant-pathological-what-do-isis-extremists-really-want-n194136 (“The legality of all emirates, groups, states and organizations becomes null by the expansion of the khilafah’s authority and arrival of its troops to their areas.”).
\textsuperscript{90} Id.
\textsuperscript{91} Lauterpacht, \textit{supra} note 63, at 45.
\textsuperscript{93} Shaw, \textit{supra} note 54, at 206.
goes clearly beyond the condition of effective control.\textsuperscript{94} Similarly to Rhodesia, ISIL lacks any legitimacy essential for statehood.\textsuperscript{95}

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

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

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

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

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

The principle that no State can exist as a result of a manifest violation of peremptory norms of international law further exemplifies that minimal legitimacy is an additional criterion for statehood. However, the principle of _ex injuria jus non oritur_ in itself does not bar statehood. As Crawford points out, war crimes and torture can occur during state creation. The crucial aspect is ‘‘whether the illegality is so central to the existence or extinction of the entity in question that international law may justifiably treat an effective entity as not a State, or a non-effective entity as continuing to be a State.’’

Thus, the central question is not whether _jus cogens_ norms have been violated during the creation of a State, but rather how closely the creation of the new State is linked to _jus cogens_ violations. If a territorial entity is created in violation of the right of self-determination, as was the case in Rhodesia and Bantustan, or in violation of Article 2(4) of the UN Charter, as happened in the case of the Turkish Republic of Northern Cyprus, the prohibition of recognition will prevail and, as a result, no new State will come into existence.

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

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103 Crawford, State Responsibility, _supra_ note 57.
104 _CRAWFORD, supra_ note 63, at 148.
105 Crawford, State Responsibility, _supra_ note 57.
106 See _S.C. Res. 216, ¶ 2_ (Nov. 12, 1965) (calling ‘‘upon all States not to recognize this illegal racist minority regime in Southern Rhodesia and to refrain from rendering any assistance to this illegal regime.’’).
107 _CRAWFORD, supra_ note 63, at 155.
108 See _S.C. Res. 541_ (Nov. 18, 1983) (invalidating the creation of the Turkish Republic of Northern Cyprus). _See also_ _S.C. Res. 367_ (Mar. 12, 1975); _G.A. Res. 3212_ (XXIX), (Nov. 1, 1974) (stating that Northern Cyprus is recognized only by Turkey, the occupying power).
109 _LAUTERPACHT, supra_ note 63, at 6.
110 Crawford, State Responsibility, _supra_ note 57.
automatically as part of the law of nations.” Thus, a factual situation created in violation of a *jus cogens* norm cannot claim any legal result. According to Crawford, “[b]y virtue of their primacy, then, peremptory norms may invalidate not just treaties but other inconsistent legal acts, as well as affecting the legal consequences which would otherwise flow from factual situations inconsistent with them.”

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

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

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

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111 Lauterpacht, *supra* note 63, at 410.
112 Crawford, *supra* note 63, at 102.
to Article 51,\footnote{U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense 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.”).} and (2) the use of force with the authorization of the Security Council under Chapter VII of the UN Charter (Articles 39-42).\footnote{U.N. Charter art. 42 (“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”).} However, some scholars claim a third exception: the right to humanitarian intervention.\footnote{See, e.g., Anthony D’Amato, Trashing Customary International Law, 81 AJIL 101, 104 (1987); Fernando R. Tesón: Humanitarian Intervention: An Inquiry Into Law and Morality, TRANSNATIONAL PUBL., 1988.}

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

A. INTERVENTION BY INVITATION

Before looking for any possible exception to Article 2(4), the invitation for intervention issued by Iraq and Syria should be examined, since the consent given by the territorial State precludes the violation of Article 2(4).\footnote{U.N. Charter art. 2, ¶ 4 (prohibiting the threat or use of force against the territorial integrity or political independence of any State.) In case of consent, no such threat or use of force exists. For detailed discussion, see infra Section 4.1.1.} The intervention by invitation doctrine applies to a military intervention by the troops of a State in an armed conflict ongoing in the territory of another State by the invitation of the government of the territorial State.\footnote{Nolte, supra note 94.} The doctrine raises the following preliminary issues regarding the concept itself and its applicability to the fight against ISIL in Iraq and Syria:
What is the nature and basis of the doctrine?
Was there an invitation, at all, to use force in Iraq and Syria?
What are the requirements for validity of an invitation?
Who and until when is entitled to issue an invitation?
Does the doctrine generally apply in a civil war?
If the answer is in the negative, are there possible exceptions?

1. The nature and the basis of the doctrine

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


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


128 Id.
2. The prior consent given by Iraq and Syria

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

\begin{footnotesize}
\footnotesize
\begin{enumerate}
\item U.N. Charter art. 2, ¶ 4.
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
its clear and unanimous support for the external assistance provided to the Iraqi government against ISIL.\textsuperscript{137}

By contrast, Syria publicly protested several times against the US-led airstrikes\textsuperscript{138} and also protested before the UN.\textsuperscript{139} In June 2014, the government even banned the entry of humanitarian aid without its consent.\textsuperscript{140} Further, the Assad regime emphasized that the Syrian government has the sole authority to agree or refuse to consent to the use of its territory. Syria based its argument on Article 2(7) of the UN Charter, under which even the UN is prevented to intervene into the domestic affairs of States.\textsuperscript{141} The letter demanded that the sovereignty, territorial integrity, and national unity of Syria be fully respected.\textsuperscript{142}

According to Syria, importing aid for terrorist organizations would amount to an attack against Syria in violation of the prohibition on the use of force.\textsuperscript{143}


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


\textsuperscript{143} Id.
United Nations, one that is blatantly inconsistent with the Charter.\textsuperscript{144} Syria contended that the Security Council had already taken the measures necessary to maintain international peace and security.\textsuperscript{145} According to the Syrian position, an invitation for intervention was not issued.\textsuperscript{146} Quite the opposite, Syria was effectively fighting ISIL on its territory “in accordance with its constitutional duties.”\textsuperscript{147} Syria accused Turkey, Jordan, Saudi Arabia, Qatar and “certain well-known western States” of arming and training terrorist groups.\textsuperscript{148} Only one day later, Syria accused Saudi Arabia, Turkey, and Qatar of providing support for terrorism, including funds and weapons.\textsuperscript{149} Furthermore, Syria extended its protests against unlawful intervention to the United States and Canada in light of its lack of prior consent.\textsuperscript{150} In contrast, Syria consented to Russian intervention\textsuperscript{151} and requested that Russia “provide military assistance in combating the terrorist group Islamic State in Iraq and the Levant (ISIL) and other terrorist groups operating in Syria.”\textsuperscript{152} As a response, Russia began missile strikes against terrorist organizations in Syria on September 30, 2015.\textsuperscript{153}

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

\begin{footnotesize}
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{150} Id.
\textsuperscript{154} Damascus confirms Assad asked Putin for military aid, supra note 151.
\end{footnotesize}
but was obliged to fight the terrorist organization by all means.\textsuperscript{155} In contrast, the fact that Russian airstrikes targeted Syrian opposition forces as well\textsuperscript{156} makes the evaluation of the Russian intervention more complex, which will be addressed later in more detail.

3. \textit{The requirements for issuing a valid invitation}

For consent to be valid it must satisfy four conditions: (1) it must be issued by the highest authority, (2) prior to the intervention, (3) without coercion, (4) and the assistance has to remain within the scope of the consent.\textsuperscript{157} Coercion invalidates consent by virtue of the Vienna Convention on the Law of Treaties (VCLT) Article 51-52 and most likely violates Article 2(4) of UN Charter by constituting a threat of force.\textsuperscript{158} Consent must be given prior to the intervention since an armed intervention without invitation automatically violates Article 2(4) and amounts to an act of aggression.\textsuperscript{159} In the Armed Activities case, the ICJ reaffirmed that State actions not covered by the consent of the territorial State are contrary to the UN Charter\textsuperscript{160} and constitute a violation of Article 3(e) of General Assembly Resolution on the Definition of Aggression.\textsuperscript{161}

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

\begin{itemize}
\item \textit{See e.g.} S.C. Res. 2178, (Sept. 24, 2014); S.C. Res. 2249 (Nov. 20, 2015).
\item See G.A. Res. 3314 (XXIX) ¶ 195 (Dec. 14, 1974) (defining aggression); \textit{see also.} Nicar. v. U.S., 1986 I.C.J. at ¶ 195 (showing the customary status of this resolution being reaffirmed by the ICJ).
\item G.A. Res. 3314 (XXIX), at 2 (Dec. 14, 1974) (“Any of the following acts . . . shall . . . qualify as an act of aggression . . . (c) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement . . . .”).
\item Nolte, \textit{supra} note 94, ¶ 17-18.
\end{itemize}
government either has to exercise effective control over its territory or it has to display a minimum of effectiveness and, at the same time, has to enjoy the recognition of the international community. Recent precedents reinforce these customary requirements. Tom Ruys and Luca Ferro argue that although the government in Yemen has practically lost control over all its territory, the international community still regards it as the representative of the State. On the other hand, Viktor Yanukovych, who fled Ukraine, was not recognized as a Head of State by the overwhelming majority of the international community, and thus, was not able to issue a valid invitation for intervention. In the present case, neither the Iraqi or Syrian government have lost control over their territory, and in both situations, the invitation for intervention was issued by the highest authority that was recognized by the international community. Therefore, both the Iraqi and the Syrian government were in a position to issue a valid invitation.

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

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

In Nicaragua, the ICJ declared that “it is difficult to see what would remain of the principle of non-intervention in international law if
intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition.”

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

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

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

\textsuperscript{170} Id. ¶ 246.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{174} Id. ¶ 52. See Ruys & Ferro, supra note 157.
the ICJ’s understanding of the non-invention doctrine as articulated in the Nicaragua case, that “[t]he principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference.” The non-intervention principle, thus, protects the State as the manifestation of the right to self-determination, and not the government itself. As soon as an internal strife reaches the level of a civil war, or the point when the right of self-determination of Peoples is affected, the government loses its right to invite foreign military forces. Similarly, Article 3 of the Institut de Droit International’s (IDI) 2011 report explicitly prohibits military assistance if exercised in violation of the right to self-determination of Peoples and in situations “when its object is to support an established government against its own population.” Scholarly positions also confirm that intervention by invitation is excluded in civil wars.

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

177 Id.
180 Id. at art. 1(a).
181 Id. at art. 1(b).
182 For support for the distinction between civil wars and mere local unrests see Gray, supra note 168 at 82; Nolte, supra note 94, ¶ 11.
II Additional to the Geneva Conventions of 1977.\textsuperscript{183} Irrespective of the above limitations, a government is free to consent to the use of force on its territory in case of isolated domestic violence, for the sake of rescuing nationals abroad, or for hot pursuit operations across the borders.

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

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

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

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

5. \textit{Exceptions to the prohibition of intervention in civil wars}

a. Counter-intervention

The well-established exception of counter-interventions\textsuperscript{187} is rooted in the right of self-determination. According to the Friendly

\textsuperscript{183} Institut de Droit International, Present Problems on the Use of Force in International Law: Military assistance on request, art. 2 (Sept. 8, 2011).
\textsuperscript{185} G.A. Res. 2625 (XXV), \textit{supra} note 124.
\textsuperscript{187} GRAY, \textit{supra} note 168, at 81; CORTEN, \textit{supra} note 157, at 301–02; Ruys & Ferro, \textit{supra} note 157, at 26–27; Raphael Van Steenberge, The Alleged Prohibition on Intervening in Civil Wars Is Still Alive after the Airstrikes against Islamic State in Iraq: A Response to Dapo Akande and Zachary Vermeer, \textit{EJIL: Talk!} (Feb. 12, 2015), http://www.ejiltalk.org/the-alleged-prohibition-on-
Relations Declarations of the General Assembly, “[e]very State has the
duty to refrain from any forcible action which deprives peoples . . . of
their right to self-determination and freedom and independence.”¹⁸⁸ The
exception of counter-intervention in Article 5 of the 1975 Wiesbaden
Declaration of IDI states that, “[w]henever it appears that intervention
has taken place during a civil war in violation of the preceding
provisions, third States may give assistance to the other party. . . .”¹⁸⁹

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

b. Fight against terrorism

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

¹⁸⁸ G.A. Res. 2625 (XXV), supra note 124.
¹⁸⁹ Institut de Droit International, supra note 179, at art. 5. (The Wiesbaden Declaration mentions
only three exceptions from the general prohibition of intervening in a civil war: granting
humanitarian aid, technical or economic aid not likely to have substantial impact on the outcome
of the civil war and assistance recommended or authorized by the UN in accordance of the UN.).
¹⁹⁰ Ruys & Ferro, supra note 157, at 29.
¹⁹¹ Suleiman Al-Khalidi et.al., Syria peace talks near collapse as opposition declares pause,
REUTERS (Apr. 18, 2016), http://www.reuters.com/article/us-mideast-crisis-syria-latakia-
idUSKCN0XF0VN.
¹⁹² Ruys & Ferro, supra note 157, at 26–27; Steenberge, supra note 187; Christakis & Bannelier,
supra note 178.
domination. To the contrary, the international community unequivocally has condemned ISIL as a terrorist organization. UN S.C. Resolution 2253 on the modification of the UN Sanction regime, which was adopted unanimously under Chapter VII, stated regarding ISIL that “terrorism cannot and should not be associated with any religion, nationality, or civilization.” In November 2015, the United Kingdom informed the UN about the requested intervention of the Iraqi government and noted that the intervention was only against ISIL. Canada, Australia, the Netherlands and Belgium all responded to Iraq’s invitation for intervention specifically in the context of the fight against ISIL.

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

193 G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960); G.A. Res. 3103 (XXVIII), Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist régimes (Dec. 12, 1973); G.A. Res. 2625 (XXV), supra note 124.
ministers of the EU in December 2012. Consequently, terrorist groups like ISIL or the Khorasan Group must be distinguished from insurgent groups, such as the Syrian National Coalition or the Peshmerga, given that only the latter can qualify as representative of a People.

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

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

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


207 The Khorasan Group consists of al-Qaeda members active in Syria.
Kingdom of Bahrain, the State of Qatar, the Kingdom of Saudi Arabia, the United Arab Emirates, and the State of Kuwait intervened in Yemen in response to the request of the President of the Republic of Yemen, Abd Rabbu Mansour Hadi, “for the protection of Yemen and its people and to help Yemen to counter terrorist organizations.”

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

in response to a request from the President of the Syrian Arab Republic, Bashar al-Assad, to provide military assistance in combating the terrorist group Islamic State in Iraq and the Levant (ISIL) and other terrorist groups operating in Syria. The Russian Federation began launching air and missile strikes against the assets of terrorist formations in the territory of the Syrian Arab Republic on 30 September 2015.

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

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211 Id.

212 Id.

213 See Putin: Timing of operation in Syria was right, FSB quashed groups ready to attack, TASS RUSSIAN NEWS AGENCY, (Feb. 6, 2016), http://tass.ru/en/politics/859179. President Putin’s warning in February 2016: “no one will forget that besides ISIL there are other terrorist organizations designated by the UNSC.”
Consequently, Russia’s use of force under the intervention by invitation doctrine is lawful against the terrorist groups. Russia’s use of force against the Syrian opposition forces, however, would have violated the UN Charter—even if President Assad had been entitled to issue a valid invitation in a civil war due to other states’ intervention on the side of the opposition forces.

![Diagram: Intervention by Invitation]

**Fig. 1: Intervention by invitation**

**B. AUTHORIZATION BY THE SECURITY COUNCIL**

Even in the absence of a valid invitation, the use of force in Syria could be justified by a prior and express authorization of the Security Council under Chapter VII\(^{214}\) or Article 25 of the UN Charter.\(^ {215}\) After

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

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

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

Member States are obligated under Article 25 of the Charter of the United Nations to accept and carry out the Council’s decisions . . . Decides that the United Nations humanitarian agencies and their implementing partners are authorized to use routes across conflict lines . . . in order to ensure that humanitarian assistance . . . reaches people in need throughout Syria through the most direct routes, with notification to the Syrian authorities.”.\textsuperscript{216}

\textsuperscript{216} S.C. Res. 2249 (Nov. 20, 2015).
\textsuperscript{217} Id.
\textsuperscript{218} U.N. Charter art. 39. (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”).
\textsuperscript{219} S.C. Res. 2249, ¶ 5 (Nov. 20, 2015). (“Calls upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da’esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL . . . and to eradicate the safe haven they have established over significant parts of Iraq and Syria.”).
Nations Charter,” which implies a reference to Article 2(4) and Article 51 of the Charter;

- It is clear from the political deliberations in the SC prior to the vote that its members did not aim to adopt a final binding resolution. Ambassador Vitaly Churkin, Russia’s Permanent Representative to the UN emphasized the following: “In our view, the French resolution is a political appeal, rather than a change to the legal principles underlying the fight against terrorism. We consider it a step in creating a broad anti-terrorism by marshalling comprehensive cooperation among all States to end all manifestations of terrorism and eradicate its root causes;”

- Despite the adoption of S.C. Res. 2249, France, the United Kingdom, Denmark, Norway, Belgium, and Germany all relied on the inherent right to self-defense as a legal basis of using force in Syria, and not on the resolution.

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

222 Id. at 2 (“[T]he events of 13 November were an armed aggression against France. Our military action, of which we informed the Security Council from the outset and which was justified as legitimate collective self-defence, can now also be characterized as individual self-defence, in accordance with Article 51 of the Charter of the United Nations.”).
223 House of Commons Library, Legal basis for UK military action in Syria, 2015, H.C. 7404 (U.K.).
of the resolution, however, can be read in different ways. According to Dapo Akande and Marko Milanovic, S.C. Resolution 2249 “is constructed in such a way that it can be used to provide political support for military action, without actually endorsing any particular legal theory on which such action can be based or providing legal authority from the Council itself.” The resolution “allows for continuing disagreement as to the legality of those actions,” but given the decentralized and fragmented nature of international law and the dynamics of international politics, the situation is more complex. First, the non-binding character of the resolution signals that the permanent members of the Security Council were not willing to adopt a binding resolution to solve even this “unprecedented threat to international peace and security” within the collective security system. Second, by using ambiguous language, the Security Council blurred the line between binding and non-binding decisions, which is alarming with respect to future cases, especially in light of the history and interpretations of S.C. Resolution 1441 (2003) on the U.S. intervention in Iraq. Third, the ambiguous wording of the resolution can also have a negative effect on the scope of the right to self-defense. Instead of clarifying the rules on the use of force, it potentially opened the door to interpreting situations resembling the Syrian conflict as a permanent imminence of threat, which triggers the right to self-defense, even in the absence of an ongoing or imminent armed attack.


229 Akande & Milanovic, supra note 228.
231 S.C. Res. 2249 (Nov. 20 2015).
232 Deeks, supra note 228.
233 For the detailed analysis of S.C. Res. 1441 see GRAY, supra note 168, at 356–66.
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C. RIGHT TO SELF-DEFENSE AND THE APPLICABILITY OF THE “UNABLE AND/OR UNWILLING” DOCTRINE

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

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

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

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235 U.N. Charter art. 51.
237 See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 139 (July 9); id, at ¶35 (Kojimans, J., separate opinion) (“This is the completely new element in these resolutions. This new element is not excluded by the terms of Article 51 since this conditions the exercise of the inherent right of self-defense on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years.”); see also Dem. Rep. Congo v. Uganda, Judgment, 2005 I.C.J. ¶ 28 (Dec. 19).
238 The main prohibition bans the use or threat of force between states. The well-established exception to this prohibition can possibly not be broader than the main prohibition rule. This is also reflected in the definition of aggression – which is one of the triggering act of the other exception to Article 2(4) namely that of SC authorizations and which, like armed attack, is also regarded as a more serious form of the use of force. “Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State...” G.A. Resolution 3314 (XXIX), at 143 (Dec. 14, 1974). See also Olivier Corten, The ‘Unwilling or Unable’ Test: Has it Been, and Could it be, Accepted?, 29 LEIDEN J. INT’L L., 777, 795 (2016).
practice, also confirms that some degree of state involvement is required. Contrary to the widely held view that self-defense directly against non-state actors has sufficient support in state practice, a survey of the relevant positions of States suggests otherwise. For example, regarding the invasion of Afghanistan in October 2001, the U.S. referred to the tight link between the Taliban and Al-Qaeda and did not invoke the right to self-defense against non-state actors. Similarly, Israel did not claim self-defense against non-state actors after the abduction of the IDF soldiers. Rather, Prime Minister Ehud Olmert made clear that Israel attributed the attack to Lebanon, Syria and Iran and, thus, Israel used force against those territorial States to whom the attack was attributed.

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

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

242 Olmert: This was an act of war, without any provocation, on our sovereign territory. JERUSALEM POST (July 13, 2006), http://www.jpost.com/Israel/Olmert-This-was-an-act-of-war-without-any-provocation-on-our-sovereign-territory (“This morning, actions were carried out against IDF soldiers in the North. At this time, the security forces are operating in Lebanese territory. The cabinet will convene this evening in order to approve the continuation of the activity. I want to make it clear: This morning’s events were not a terrorist attack but the action of a sovereign state that attacked Israel for no reason and without provocation. The Lebanese government, of which Hizbullah is a member, is trying to undermine regional stability. Lebanon is responsible and Lebanon will bear the consequences of its actions.”). See also Steven Erlanger, Israel Seeks Hint of Victory, N. Y. TIMES, Aug.13, 2006, http://www.nytimes.com/2006/08/13/world/middleeast/13israel.html (describing the conflict as “an Iranian Army division . . . a war conceived, organized, trained and equipped by Iran, with Iran’s goal of destroying Israel . . .”); see also Permanent Rep. of Isr. to the U.N., Identical letters dated July 12, 2006 from the Permanent Rep. of Isreal to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2006/515 (July 12, 2006) (“Responsibility for this belligerent act of war lies with the Government of Lebanon, from whose territory these acts have been launched into Israel. Responsibility also lies with the
Finally, during the incursions into Iraq, Turkey did not rely on direct self-defense against the Kurdish militants; rather its argument was based on the narrow interpretation of Article 2(4).243

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

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


why are States invoking this admittedly novel and vague concept\textsuperscript{247} to justify their actions in Syria if the right to self-defense against non-state actors is established in international law for hundreds of years, as the expansionists claim?

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

In light of the unanimously adopted S.C. Resolution 2249, the series of notifications to the Security Council reporting the use of force based on the right to self-defense, and the acquiescence of the international community, it is difficult to argue that individual self-defense by Iraq and France and collective self-defense by other States is contrary to the UN Charter. However, only some of the intervening States, such as the United States,\textsuperscript{248} the United Kingdom,\textsuperscript{249} Australia, and Canada,\textsuperscript{250} claimed that Syria was unable or unwilling to fight ISIL effectively. In contrast, neither Germany,\textsuperscript{252} Denmark,\textsuperscript{253} Norway or Belgium\textsuperscript{255} based their arguments on the unable and/or unwilling doctrine. The table below summarizes the various legal bases States invoked for their use of force on the territory of Syria.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
\textbf{State} & \textbf{Legal bases} & \\
\hline
United States & Right to self-defense & \\
\hline
United Kingdom & Right to self-defense & \\
\hline
Australia & Right to self-defense & \\
\hline
Canada & Right to self-defense & \\
\hline
Germany & Right to self-defense & \\
\hline
Denmark & Right to self-defense & \\
\hline
Norway & Right to self-defense & \\
\hline
Belgium & Right to self-defense & \\
\hline
\end{tabular}
\caption{Legal bases for use of force on territory of Syria}
\end{table}

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


\textsuperscript{250} Permanent Rep. of Austl. to the U.N., supra note 136.

\textsuperscript{251} Permanent Mission of Can. to the U.N., supra note 227.

\textsuperscript{252} Permanent Mission of Ger. to the U.N., supra note 227.

\textsuperscript{253} Permanent Rep. of Den. to the U.N., supra note 227.

\textsuperscript{254} Permanent Rep. of Nor. to the U.N., supra note 196.

\textsuperscript{255} Permanent Rep. of Belg. to the U.N., supra note 226.
In light of the above survey of State practice, it is extremely difficult to accept that the unable and/or unwilling test has found its way into customary international law. Although on its face the unable or unwilling test may sound very persuasive, legal scholarship is rightfully critical about its capacity to provide a new legal basis for using force or to serve as a test that substantially broadens the right to self-defense according to Article 51.256

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

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

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


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


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

262 Permanent Rep. of Belg. to the U.N., supra note 226.
seriously investigated the inability and/or unwillingness of that State.263

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

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264 Deeks, supra note 246, at 490.
268 Egan, supra note 248.
269 Corten, supra note 238 at 780–85.
- Permitting the use of force solely on the basis of the territorial State’s inability to address a non-state actor is very much open to abuse.\textsuperscript{270}

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

3. \textit{Fitting the inability or unwillingness of a State into the current \textit{jus contra bellum} system}

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

\textsuperscript{270} Ruys and Ferro draw attention to the fact that Molenbeek was widely regarded as safe haven for terrorist in Brussels and there were doubts whether the government had control over the territory from where the 2015 Paris attacks originated. See Ruys & Ferro, \textit{supra} note 256, at 22.
\textsuperscript{271} Peters, \textit{supra} note 228.
\textsuperscript{272} \textit{Id}.
\textsuperscript{273} Starski, \textit{supra} note 256, at 497.
\textsuperscript{274} Corten, \textit{supra} note 238, at 780, 86, 92, 95, 97, 99.
Aggression.\textsuperscript{275} The customary nature of this provision was reinforced by the ICJ, which used Article 3(g) as an analogy to find that an armed attack can be committed not only directly, but also indirectly.\textsuperscript{276} Although the ICJ in Nicaragua did not clarify the types of State conduct that can qualify as an act of aggression under Article 3(g),\textsuperscript{277} nothing excludes the possibility to interpret “substantial involvement” as the unwillingness or inability of a State to prevent attacks emanating from non-state actors present on its territory.

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

D. \textsc{Humanitarian Intervention in Syria?}

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

\begin{footnotes}
\item[276] Id.
\item[278] Id. ¶ 190.
\end{footnotes}
authorization of the Security Council. Humanitarian intervention as a separate legal ground for using force is excluded by the all-encompassing scope of Article 2(4), which prohibits any use or threat of force “against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

According to the travaux préparatoires to the UN Charter, this language was proposed by Australia and other smaller States in order to broaden the scope of the general prohibition. The U.S. representative explicitly stated that the drafters intended to create a general ban without any exceptions other than those named in the Charter. Although contrary interpretations exist, they are limited in number.

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

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

The US invasion of Grenada (1983), and later of Panama

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280 U.N. Charter art. 2(4); U.N. Charter art. 42.
281 Supra note 279.
284 See Anthony D’Amato, The Invasion of Panama was a Lawful Response to Tyranny, 84 AM. J. INT’L L. 516, 522-23 (1990).
286 Id.
287 Oliver Dörr & Albrecht Randelzhofer, Ch.I Purposes and Principles, Article 2(4), in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (Bruno Simma et al. eds., 3rd ed. 2012);
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(1989), were both based partly on humanitarian considerations and condemned by the international community as violations of international law, particularly that of the UN Charter.

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


Gray, supra note 168 at 390–91.


Gray, supra note 168, at 33-34.

Id.

Id.


In Kosovo in 1999. See Legality of Use of Force (Yugoslavia v. Belg.), Preliminary Objections of the Kingdom of Belgium, 2000 I.C.J. ¶¶ 93-113 (July 5).
have invoked the principle in such a clear situation puts an end to the debate on the status of the doctrine.\textsuperscript{297}

IV. CONCLUSION

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

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

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

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

\textsuperscript{298} S.C. Res. 2249, ¶ 5, (Nov. 20, 2015).
and non-binding SC decisions, the consequence of which will only be seen in the future.

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

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

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

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

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\(^{300}\) For the expansionist school see, e.g., Dinstein, *supra* note 168, at 189; Derek Bowett, *Self-Defence in International Law* 3 (Manchester Univ. Press 1958). For the restrictionist school see, e.g., Corten, *supra* note 157, at 94; Gray, *supra* note 168.

\(^{301}\) U.N. Charter Preamble (“We the Peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind . . . .”).
legal advisors have to decide on a case-by-case basis whether they support an extensive interpretation of the use of force or maintaining the restraints of the UN Charter. By paraphrasing Koskenniemi, this paper aimed to stress that “the gentle civilizers of nations”302 are, in fact, the international lawyers themselves, while their discipline serves only as a tool for accomplishing their task.