ASSESSING THE LEGALITY OF COALITION AIR STRIKES TARGETING THE ISLAMIC STATE IN IRAQ AND THE LEVANT (ISIS) IN SYRIA UNDER INTERNATIONAL LAW

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Introduction

In August 2014 the United States of America (hereinafter the US) built a coalition of partner countries to target the terrorist group 'Islamic State in Iraq and the Levant' (hereinafter ISIS) in the Middle East.[1] On 10 September 2014 US President Barack Obama announced that the coalition would target ISIS in Syria and Iraq and designated ISIS the 'greatest' threat.[2] He also reasoned, if the ISIS terrorists were 'left unchecked', they 'could pose a growing threat beyond that region, including being a threat to the United States'.[3] The US highlighted that the coalition would be fighting ISIS 'in accordance with the inherent right of individual and collective self-defence, as reflected in article 51' of the United Nations Charter (hereinafter the Charter).[4]

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1 There are different acronyms for this terrorist group such as: ISIL, Daesh, ISIS or IS, and quotations may vary; for convenience' sake 'ISIS' will for be the acronym used in this article; the group is listed on the Consolidated United Nations Security Council Sanctions List, available at https://www.un.org/sc/suborg/sites/www.un.org.sc.suborg/files/consolidated.pdf (accessed 23 May 2016).

2 B Obama (2014) 'Statement by the President on ISIL', available at http://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1 (accessed 27 January 2015) (hereinafter Obama statement).

3 Ibid.

4 UN document S/2014/695.

While it is almost universally accepted that ISIS poses a threat to international peace and security, the claim of self-defence by the US at the very least should be open to scrutiny. This article explores the conditions for targeting non-state actors in the territories of a third state under international law,[5] and the applicability of international law criteria with particular reference to the targeting of ISIS in Syria. The targeting of ISIS in Iraq, though not beyond the scope of this article, raises a distinctly separate question as Iraq gave consent to the coalition forces, thus will not be discussed.

The legal rules relevant to the use of force in the territories of a third state include fundamental norms of international law that are codified in the Charter and enshrined in customary international law. These include rules on the prohibition of use of force, state sovereignty and territorial integrity and the right to self-defence. These norms provide the contours of the legal framework for the extraterritorial use of force. In the next section we set out the basic framework for the use of force in self-defence, including the rules relating to exceptions. In the third section we consider whether the coalition air strikes in Syria are consistent with the framework developed. Finally, we offer some concluding remarks.

International law on the prohibition of the use of force

The general framework

Article 2(4) of the Charter, regarded as a fundamental norm of international law and the 'cornerstone' of the Charter,[6] provides as follows

> 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.

In addition to being a treaty rule the prohibition contained in article 2(4) is also a rule of customary international law.[7] Furthermore, this rule

5 The term 'third state' will be used as an equivalent to the term 'territorial state'.

6 *Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v Uganda* (Judgment) (2005) ICJ Rep 168 (hereinafter *DRC v Uganda* case) para 148. See, however, MJ Glennon 'The limitations of traditional rules and institutions relating to the use of force' in M Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (2015) who generally adopts the view that the decision to use force is a practical matter not governed by international law.

7 The International Court of Justice stated: '[a] further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4 of the Charter of the United Nations

is widely accepted as having the character of *jus cogens*[8] and, as such, cannot be derogated from under any circumstances.[9]

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may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law'. *Military and Paramilitary Activities case (Nicaragua v United States of America)* (1986) ICJ Rep 14 (hereinafter *Nicaragua* case) para 190.

8 The ICJ relied on the statements of states' representatives and the work of the International Law Commission (hereinafter the ILC) to state: 'the International Law Commission ... expressed the view that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*". Nicaragua in its Memorial stated that the principle prohibiting the use of force embodied in art 2, para 4, of the Charter of the United Nations "has come to be recognized as *jus cogens*". The United States found it material to quote the views of scholars that this principle is a "universal norm", a "universally recognized principle of international law", and a "principle of *jus cogens*".' *Nicaragua* case (note 7 above) para 190; moreover, the ILC specified that necessity 'cannot excuse the breach of a peremptory norm' and identified the following norms as peremptory norms: 'Prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination'. UN document A/56/10, International Law Commission draft articles on responsibility of states for internationally wrongful acts, with commentaries (2001), Commentaries to draft article 26. In addition, on an academic level the overwhelming majority of legal scholars accepts that the prohibition of use of force is a *jus cogens* norm, for example, Simma notes that 'the prohibition enunciated in art 2(4) of the Charter is part of *jus cogens*, i.e., it is accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted'. B Simma 'NATO, the UN and the use of force: Legal aspects' (1999) 10 *The European Journal of International Law* 1 3; Henkin states 'the Charter remains the authoritative statement of the law on the use of force. It is the principal norm of international law of this century. The crucial norm is set forth in Article 2(4)'. L Henkin et al *Right v Might: International Law and the Use of Force* 2 ed (1991) 38; Dugard declares that states recognise the prohibition of use of force as 'a fundamental principle of the contemporary international legal order, as a norm with the status of *jus cogens*', J Dugard *International Law: A South African Perspective* 4 ed (2011) 496; Orakhelashvili asserts that 'the prohibition of the use of force is undeniably peremptory': A Orakhelashvili 'The impact of peremptory norms on the interpretation and application of United Nations Security Council Resolutions' (2005) 16 *European Journal of International Law* 59 63; Schachter states that '[a]rticle 2(4) is the exemplary case of a peremptory norm *jus* cogens': O Schachter 'In defense of international rules on the use of force' (1986) 53 *University of Chicago Law Review* 113 129. See also N Schrijver 'The ban on the use of force in the UN Charter' in Weller (note 6 above) especially 487.

9 The ILC is firm in clarifying that even the six circumstances 'precluding the wrongfulness of conduct that would otherwise not be in conformity with the international obligations of the state concerned' namely, consent, self-defence, countermeasures, force majeure, distress and necessity, cannot be relied on if it 'conflicts with a peremptory norm of general international law'. UN document

However, both doctrine and case law identify two exceptions to this basic prohibition: first, a state may use force in self-defence if an armed attack has taken place;[10] second, force may be used in cases where the UN Security Council, acting under Chapter VII, authorises the use of force.[11] Although article 2(4) was tailored to control interstate conflicts after World War II, factors such as the change in the nature of warfare, the emerging danger of terrorism and the growing role of nonstate actors have put a strain on the traditional interstate understanding on the prohibition of the use of force.

With the rules of international law regarding the use of force being highly contested, the relevant literature is contradictory: some commentators seek to restrict the prohibition, whereas others seek a broad interpretation. Nowhere is this contestation more obvious than in relation to the law on self-defence.

The right to use force in self-defence

The right to use force in self-defence is enshrined in the United Nations Charter. Article 51 of the Charter provides as follows

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

States frequently invoke the right of self-defence to justify their extraterritorial use of force. Therefore, it is not surprising that the US advanced self-defence as a legal justification for the use of force against ISIS in Syria in a letter addressed to the UN Secretary-General.[12] The right to use force in self-defence is recognised as a rule of customary international law.[13]

A/56/10 Draft articles on responsibility of states for internationally wrongful acts with commentaries (2001), Commentaries to Chapter V.

10 See art 51 of the United Nations Charter. See for discussion C Kreß 'The International Court of Justice and the "principle of non-use of force"' in Weller (note 6 above) 578 et seq.

11 See art 42 read with art 24 of the United Nations Charter.

12 UN document S/2014/695.

13 See the *Nicaragua* case (note 7 above) para 176 where the ICJ states the following:

While the notion of self-defence under international law is recognised as part of the body of international law 'the precise limits of the use of force in self-defence appear sufficiently malleable to attract widely divergent approaches'.[14] The scope and contents of this right are far from being a matter of agreement among states and international law scholars.[15] As a result, some scholars adopt a generous approach to article 51, granting states a wide margin of discretion as to when and under which circumstances force may be used in self-defence.[16] Other commentators, adopt a narrow approach to article 51, emphasising the prohibition on the use of force.[17] In many instances the debate revolves

'As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter, the convention to which most of the United States argument is directed, by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the "inherent right" (in the French text the "droit naturel") of individual or collective self-defence, which "nothing in the present Charter shall impair" and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter.'

14 D Tladi 'The use of force in self defence against non-state actors in international law: Recalling the foundational principles of international law' (2012) 2 *Zanzibar Yearbook of Law* 71.

15 'Self-defense on the international level is generally regarded, at least by international lawyers, as a legal right defined and legitimated by international law. Governments, by and large, appear to agree. When they have used force, they have nearly always claimed self-defense as their legal justification. Governments disputing that claim have usually asserted that the legal conditions of self-defense were not met in the particular case. However, despite the apparent agreement that self-defense is governed by law, the meaning and validity of that proposition remain the subject of debate.' See O Schachter 'Self-defense and the rule of law' (1989) 83 *American Journal of International Law* 259.

16 For example, D Bethlehem 'Self-defense against an imminent or actual armed attack by nonstate actors' (2012) 106 *American Journal of International Law* 769 774; JJ Paust 'Self-defense targetings of non-state actors and permissibility of US use of drones in Pakistan' (2009-2010) 19 *Journal of Transnational Law & Policy* 237 249; SD Murphy 'Terrorism and the concept of "armed attack" in article 51 of the UN Charter' (2002) 43 *Harvard International Law Journal* 41 51; SD Murphy 'Self-defense and the Israeli Wall Advisory Opinion: An ipse dixit from the ICJ?' (2005) 99 *American Journal of International Law* 62 62–64; CJ Tams 'The use of force against terrorists' (2009) 20 *European Journal of International Law* 359 360.

17 I Brownlie 'The use of force in self-defence' (1961) 37 *British Yearbook of International Law* 183 242; Murphy lists the following views of authors who oppose both anticipatory self-defence and pre-emptive self-defence: Ian Brownlie:

around the elements of proportionality and necessity — important requirements for lawful self-defence. The debate, especially in recent times, has focused on whether self-defence can be relied upon to justify the use of force prior to an armed attack having occurred — generally known as pre-emptive or preventive self-defence.

The jurisprudence of the International Court of Justice, however, has tended to adopt a restrictive approach to the use of force in self-defence. The court in the *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (hereinafter *Nuclear Weapons Advisory Opinion*), for example, stated that the right of self-defence is not boundless.[18] The 'entitlement' of the right of self-defence is circumscribed by certain 'constraints', some of which are 'inherent in the very concept of self-defence'.[19] Similarly in the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (hereinafter the *DRC v Uganda* case), the court recalled that article 51 justifies the use of force 'only within … strict confines' and that it 'does not allow the use of force … to protect perceived security interests'.[20]

In the context of the use of force in Syria, keeping in mind the debate concerning a generous or restrictive interpretation, the main question is whether force may be used against non-state actors in self-defence in the territory of a third state without that state's consent. While the interstate character of the law on the prohibition of the use of force may suggest that a state may not use force against non-state actors in the territory of third states, a number of authors have sought to argue that international law does permit such a use of force in self-defence.[21] These authors put forward two arguments to support this broad interpretation. First,

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'the view that Article 51 does not permit anticipatory action is correct and … arguments to the contrary are either unconvincing or based on inconclusive pieces of evidence'; Philip Jessup: '[u]nder the Charter, alarming military preparations by a neighboring state would justify a resort to the Security Council, but would not justify resort to anticipatory force by the state which believed itself threatened'; Louis Henkin: allowing anticipatory action 'would replace a clear standard with a vague, self-serving one, and open a loophole large enough to empty the rule'. SD Murphy 'The doctrine of preemptive self-defense' (2005) 50 *Villanova Law Review* 699 708.

18 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996) ICJ Rep 226 para 40.

19 Ibid.

20 *DRC v Uganda* case (note 6 above) para 148.

21 See generally Bethlehem (note 16 above) 770, Paust (note 16 above) 237, Murphy (note 16 above) 41, R van Steenberghe 'Self-defence in response to attacks by non-state actors in the light of recent state practice: A step forward?' (2010) 23 *Leiden Journal of International Law* 183; See also CJ Tams (note 16 above) who adopts a nuanced perspective.

article 51 provides for the 'inherent' right to use force in self-defence.[22] The word 'inherent' requires that we look beyond article 51 to determine the precise contours of self-defence. Second, it is argued that article 51 provides for the use of force in self-defence against an 'armed attack' not an 'armed attack from a state'.[23] To resolve these issues, it is suggested that state practice be examined.[24] The *Caroline* incident is often referred to as the basis of pre-Charter customary international law to which the 'inherent' in article 51 refers.[25]

In the *Caroline* incident, it would appear that both states accepted that it was, in principle, permissible for the United Kingdom to use force against the *Caroline* in US waters if it was in self-defence. The only issue concerned whether, in that particular case, force was necessary. However, it should be noted that the *Caroline* precedent arose before the international law prohibition on the use of force came about and, as such, the *Caroline* principle cannot be seen as a statement of law. In addition, 'the usefulness of the *Caroline* incident as a standard should be assessed in the context of the developments of international law in the twentieth and twenty-first centuries'.[26]

The International Court of Justice has repeatedly held that the use of force in self-defence, under international law, is permitted only in response to an armed attack by a state or an attack that is attributable to a state. In the *Nicaragua* case, the court explained that 'an armed attack must be understood as including not merely action by regular armed forces' but also 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force'.[27] This view was reiterated in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (*Advisory Opinion), where the court took a restrictive approach and pronounced that 'the use of force

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22 For example, DW Bowett *Self-Defense in International Law* (1958).

23 Lubell: British forces used extraterritorial force in the territorial waters of the US, 'claiming the right to self-defense in response to the acts of a non-state actor'. He deduces, '[i]t is, therefore, apparent that even in historical terms, the concept of self-defense as a result of attacks by non-state actors has been recognized by states.' N Lubell *Extraterritorial Use of Force Against Non-State Actors* (2010) 35.

24 Tladi (note 14 above) 80–86.

25 The *Caroline* incident involves an exchange in 1842 between the United States and the United Kingdom, concerning a United Kingdom attack on a boat, the *Caroline*, in US waters, purportedly in self-defence. See for the text of the exchange of the letters: JB Moore *Digest of International Law as Embodied in Diplomatic Discussions, Treaties and Other International Agreements* (1906) vol II 409–413.

26 D Tladi 'The nonconsenting innocent state: The problem with Bethlehem's principle 12' (2013) 107 *American Journal of International Law* 570 573.

27 *Nicaragua* case (note 7 above) para 195.

against the territorial integrity of another State except as self-defence in response to an armed attack' is prohibited.[28] The court added that article 51 of the Charter applies 'in the case of armed attack by one State against another State'.[29] The court, therefore, dismissed the arguments stating that the term 'armed attack' could include attacks carried out by non-state actors. Similarly, in a case concerning *Oil Platforms (Islamic Republic of Iran v United States of America)*, the court held that 'in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible'.[30] In the *DRC v Uganda* case, the court found that 'there [was] no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC'.[31] Hence, the court affirmed, in the absence of attribution to the territorial state, the victim state cannot use force against non-state actors in the territories of the third state. From the above it is reasonable to conclude that international law as it currently stands does not permit the use of force in self-defence on the territory of a third state without that state's consent unless there is some form of attribution to the territorial state. As previously stated

> In assessing what is permissible and what is not permissible under the international law principle of self-defense, other principles such as territorial integrity, the prohibition on the use of force, and sovereignty must be respected. Such an assessment requires that, before force is used against non-state actors on the territory of another state, either the consent of the territorial state is obtained or a reasonable basis exists for attributing responsibility for the initial attack to the territorial state. To hold otherwise would imply that self-defense takes priority over these foundational principles of international law, a proposition that has no basis in international law.[32]

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

29 Ibid.

30 *Oil Platforms (Islamic Republic of Iran v United States of America)* (2003) ICJ Rep 161 para 51.

31 *DRC v Uganda* case (note 6 above) para 146.

32 Tladi (note 26 above) 576.

The permissibility of the use of force in Syria

Evaluating the claims of self-defence

It is useful to begin this analysis by referring to the US letter to the Secretary-General in which the US sought to justify the use of force in Syria and Iraq.[33] The US stated, addressing specifically the question of the use force in the territory of non-consenting third states, that the 'Syrian regime has shown that it cannot and will not confront ISIS "safe havens" in its territory'.[34] This argument suggests that the territorial state is unwilling or unable effectively to deal with non-state actors.

As a doctrinal point, as explained above, the International Court of Justice has consistently held that a state may use force in self-defence in the territory of a third state only for an armed attack by the latter state or an armed attack by a non-state actor imputable to that state.[35] Thus, for the acts of non-state actors to be attributable to the territorial state the non-state actor 'must be under the control of the [territorial] State'.[36] Here the court advanced a high threshold for attribution, providing that 'assistance to [non-state actors] in the form of the provision of weapons or logistical or other support' is not sufficient to establish attribution.[37] Some scholars suggest a lighter attribution test. Hakimi, for example, deduces if a territorial state harbours or supports non-state actors, extraterritorial use of force against non-state actors and, accordingly against that state, is permitted.[38] As such, 'the victim State cannot plausibly rely on the territorial State to contain the threat'.[39] Whatever the standard of attribution, it is arguable that under international law, as it currently stands, the use of force against non-state actors in the territory of third states is permitted only if the conduct of non-state actors somehow can be imputed to the territorial state.

However, in addition to being inconsistent with doctrine, the reliance on the 'unwilling or unable' standard is problematic from a normative perspective. It places the interests of the state under attack from the non-state actor above the interest of the territorial state's sovereignty and its right not to be subject to an armed attack.[40] It is particularly

33 UN document S/2014/695.
34 Ibid.
35 *Nicaragua* case (note 7 above) para 195.
36 JA Green *The International Court of Justice and Self-Defence in International Law* (2009) 48.
37 *Nicaragua* case (note 7 above) para 195.
38 M Hakimi 'Defensive force against non-state actors: The state of play' (2015) 91 *International Law Studies* 1 8.
39 Ibid.
40 Id 13.

problematic since it permits a state to use force in the territory of another state 'even when the territorial state exercises governance authority and actively tries to suppress the violence'.[41] The victim state may still use force because the territorial state's measures are 'ineffective'.[42] It is not clear, if a state attempts to halt the activities of a non-state actor, why another state should be permitted to violate the territorial integrity and sovereignty of the territorial state. As O'Connell observes

> If the state or states where the terrorist group is found happens to be making a good faith effort to stop the terrorist group and has some basic ability to do so, then the victim state cannot hold the territorial state responsible for the acts of terrorism and may not respond with armed force on the territory of that state.[43]

On the basis of the above, the coalition air strikes against ISIS in Syria do not meet the test of self-defence under international law as it currently stands. As a doctrinal matter this position is supported by the consistent line of reasoning in the jurisprudence of the International Court of Justice. Although ISIS constitutes a serious threat to the international community of states as a whole, the appropriate course of action ought to have been to have sought the consent of Syria, as occurred in Iraq. It is understandable, given the current diplomatic relations between the United States and Syria, that the aforesaid course of action was, and remains, unlikely. In that case the possibility of a UN Security Council authorisation should have been explored. It is to this option that we now turn our attention.

United Nations Security Council resolutions

As mentioned above, the right to self-defence is not the only recognised exception to the prohibition on the use of force. The use of force pursuant to a Security Council (SC) authorisation also falls in the bounds of lawful action. The SC is endowed with powers to execute its primary responsibility, restoring or maintaining international peace and security.[44] In order to perform its responsibility the SC has the discretion to determine the existence of any threat to or breach of international peace and security or any act of aggression.[45] Once such a determination has

41 Ibid.
42 Ibid.
43 M O'Connell *International Law and the Use of Force: Cases and Materials* (2005) 319; JS Wrachford 'The 2006 Israeli invasion of Lebanon: Aggression, self-defense, or a reprisal gone bad?' (2007) 60 *Air Force Law Review* 29 63–64.
44 Art 25 of the UN Charter.
45 See art 39 of the UN Charter.

been made the SC may make recommendations[46] or take 'measures', either non-military according to article 41 of the Charter or military measures according to article 42. It is worth noting, although the SC has adopted measures on the basis of article 41 on many occasions,[47] it has resorted less frequently to imposing measures on the basis of article 42 as a result of the dynamics in the SC amongst the five permanent members.[48] However, in recent times the SC has authorised the use of force on a number of occasions.[49]

In order to ensure that force is used 'in the interest and under the control of the international community and not individual countries', the SC has to maintain 'strict control over the initiation, duration and objectives of the use of force in international relations'.[50] For this purpose, authorisation by the SC for the use of force should be 'explicit and not implicit',[51] the authorisation 'should clearly articulate and limit the objectives for which force may be employed',[52] and it must come to an end 'with the establishment of a permanent cease-fire unless explicitly extended by the Security Council'.[53]

With regard to the Syrian ISIS situation, although the SC adopted many resolutions in this regard,[54] only UN Security Council resolution 2249 (2015) is relevant to the question of the permissibility of the use of force. Therefore, it is worth considering whether this resolution provides a basis for lawful intervention against ISIS in Syria.

Resolution 2249 (2015), unanimously adopted, was a new resolution in the SC's counter-terrorism series. The SC reaffirmed in the preamble a number of previous counter-terrorism resolutions, the 'principles and purposes of the Charter' and 'respect for the sovereignty, territorial integrity, independence and unity of all States in accordance with

46 Ibid.

47 See MN Shaw *International Law* 7 ed (2014) 903 for some examples of Security Council action under Chapter VII.

48 See R Thakur 'Reconfiguring the UN system of collective security' in M Weller (note 6 above) 182.

49 See for discussion D Tladi 'Security Council, the use of force and regime change: Libya and Côte d'Ivoire' (2012) 37 *South African Yearbook of International Law* 22.

50 J Lobel & M Ratner 'Bypassing the Security Council: Ambiguous authorizations to use force, cease-fires and the Iraqi inspection regime' (1999) 93 *American Journal of International Law* 124 125.

51 Ibid.

52 Ibid.

53 Ibid.

54 Resolution 2258 (2015), UN document S/RES/2258; resolution 2199 (2015), UN document S/RES/2199; resolution 2178 (2014), UN document S/RES/2178; resolution 2170 (2014), UN document S/RES/2170.

purposes and principles' of the Charter.[55] Most importantly, the resolution stated explicitly that ISIS 'constitutes a global and unprecedented threat to international peace and security'.[56] As such the SC expressed its determination 'to combat by all means this unprecedented threat'.[57] This kind of language, in general, is not novel in counter-terrorism resolutions.

It is obvious that resolution 2249 highlights the looming threat of terrorism, nevertheless it is important to note that the resolution does not purport to be a Chapter VII resolution; the majority of earlier counter-terrorism resolutions saw the SC acting under Chapter VII of the Charter.[58]

However, the real novelty of resolution 2249 can be found in paragraph 5 which provides that the UN Security Council

> [c]alls upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law ... on the territory under the control of ISIL in Syria and Iraq ... .[59]

There are arguments that paragraph 5 is ambiguous and may be seen as 'suggest[ing] [that] there is Security Council support for the use of force against IS' in Syria and Iraq.[60] While that may be the case, it should be recalled that under international law the use of force is permitted in the case of self-defence or where the UN Security Council has *authorised* the use of force. Thus, it is not sufficient for the SC merely to support such use of force: the use of force must be authorised. Whether paragraph 5 provides authorisation is to be determined by an analysis of the resolution.

The first point to make is that paragraph 5 refers to the 'taking of all necessary measures'. This terminology routinely is used to authorise the use of force. However, to constitute an authorisation under article 42 the paragraph has to be 'binding', otherwise actions pursuant to it will not be protected in law. In general this means that the Council, if it seeks to authorise use of force, must use the verbs 'authorise' or 'decide'. The verb phrase 'call upon', in international resolutions, denotes a request

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

56 Ibid.

57 Ibid.

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

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

60 D Akande & M Milanovic 'The constructive ambiguity of the Security Council's ISIS resolution' (21 November 2015), available at http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/ (accessed 20 December 2015).

or encouragement. This usage suggests that the resolution does not authorise the use of force. It should be recalled further in this regard that 'explicit and not implicit Security Council authorization is necessary before a nation may use force' other than in self-defence.[61] More importantly, whatever the words 'call[s] upon' states to 'take all necessary measures' may mean, the resolution further qualifies it using the term 'in compliance with international law'. This means that whatever action is taken must, on its own strength, be in compliance with international law as articulated in article 2(4) of the Charter. When these facts are looked at together, with the fact that the resolution does not express itself to be under Chapter VII, it seems clear that the resolution does not authorise the use of force.

In conclusion, what is unambiguous about resolution 2249 is its innovative ambiguity. There clearly is a reason for the ambiguity. On the one hand, the SC for political and geopolitical reasons is not prepared to authorise the use of force; on the other, the SC is well aware that based on a right to self-defence some states already have started using force. The course of action that the SC opts for is to recognise that force is being used, but not to take a position on whether the use of force is lawful or not. The unfortunate result is that we are back to square one, grappling with the law on self-defence.

The relevance of resolution-related practice

Several states have already launched attacks in Syria invoking the language of resolution 2249. In addition to the United States, these include France, Belgium, Germany, Canada and Australia.[62] Since these

61 Lobel & Ratner (note 50 above) 125.

62 See for example the letter dated 31 March 2015 from the Chargé d'Affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council (S/2015/221); letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain addressed to the President of the Security Council (S/2015/688); letter dated 23 September 2014 to the UN Secretary-General; letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council (S/2015/963); identical letter dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council (S/2015/745); letter dated 24 July 2015 from the Charge d'Affairs a.i of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council (S/2015/563); letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council; letter dated 3 June from the Permanent Representative of Norway to the United Nations addressed to the President of the Security Council (S/2016/513); letter dated 10 December 2015 from the

states do not rely on resolution 2249 as *the basis* for the use of force, it may well be argued this practice is relevant for the interpretation of article 51. Article 31(3) of the Vienna Convention on the Law of Treaties provides that, in the interpretation of treaties, 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' shall be taken into account. It is important to emphasise, however, that the duty is not to apply subsequent practice but only to take into account. In other words, although the subsequent practice is not dispositive, it remains a factor to be taken into account in the search for interpretation of article 51. Moreover, the subsequent practice relevant for the purposes of article 31(3) of the Vienna Convention is specifically defined.

To qualify as subsequent practice for the purposes of article 31(3), the practice must 'establish the agreement of the parties regarding' the interpretation of the relevant treaty. Thus, to constitute an authentic interpretation of parties under article 31(3)(b) of the Vienna Convention, it must be shown that the practice in question establishes the agreement of *all the parties* to the UN Charter as to the interpretation of article 51. Unlike practice for the purposes of customary international law it is not sufficient to establish widespread practice (or widespread agreement with the practice); it must be shown that the practice establishes the agreement of all the parties. Moreover, it must establish the agreement of all the parties *regarding the interpretation of* article 51. Political support of particular conduct is insufficient; the support should be linked to the interpretation of article 51. Thus, even more than with the formation of customary international law the attitude of the silent majority is an essential element of any attempt at establishing that a particular conduct or series of actions constitutes subsequent practice for the purposes of article 31(3)(b) of the Vienna Convention.

Finally, it may also be pointed out in this respect that judicial practice, particularly of the International Court of Justice, may also serve as an important element for weighing the evidence of interpretation of rules of international law, including the weight of certain conduct as practice.[63]

The use of force in Syria, certainly constituting practice for the purposes of interpretation, cannot be said to establish the 'agreement of the parties' to the United Nations. Moreover, in the past, states have expressed objection to the use of force against non-state actors in third

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Charge d'Affairs a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council (S/2015/946).

63 Art 38(1)(d) of the Statute of the International Court of Justice provides that 'judicial decisions' are a 'subsidiary means for the determination of the rules of law'.

states.[64] For example, with respect to the Turkish incursion into Northern Iraq in response to attacks by the Kurdistan Workers Party, the European Union, the Secretary-General of the United Nations and Australia amongst others, questioned the legality of the use of force.[65] The US attacks against a pharmaceutical factory in Sudan, in response to the bombings of American embassies in Kenya and Tanzania, similarly were the subject of negative responses by other states.[66] In the case of the Colombian use of force against the Revolutionary Armed Forces of Colombia 'FARC', the Permanent Council of the Organisation of American States determined that that action amounted to 'a violation of the sovereignty and territorial integrity of Ecuador and of principles of international law'.[67] Thus, there may well be examples of states using force on the territory of another in response to attacks by non-state actors. However, the negative reaction from states suggests that these acts cannot qualify as subsequent practice for the interpretation of article 51.

Conclusion

This article has sought to assess the legality of the US-led coalition's military intervention to target ISIS in Syria according to international law. The article focused on the extraterritorial use of force against non-state actors and its relation to both the prohibition of use of force and self-defence. In the case of Syria, extraterritorial use of force was conducted without obtaining the consent of the territorial state and in

64 See for discussion Tladi (note 14 above).

65 See M John 'EU's Solana: Turkey incursion "not best response"' *Reuters* (22 February 2008), available at http://www.reuters.com/article/idUSL22479277 (last accessed 8 August 2016); DW 'EU voices concern over Turkish military incursion into Iraq' *DW* (22 February 2008), available at http://www.dw.com/en/eu-voices-concern-over-turkish-military-incursion-into-iraq/a-3143907 (last accessed 8 August 2016). See further 'Australia urges Turkey to pull troops from Iraqi Kurdistan' *Ekurd Daily* (24 February 2008), available at http://ekurd.net/mismas/articles/misc2008/2/turkeykurdistan1684.htm (last accessed 8 August 2016).

66 K Vick 'US, Sudan trade claims on factory' *The Washington Post* (25 August 1998), available at https://www.washingtonpost.com/archive/politics/1998/08/25/us-sudan-trade-claims-on-factory/b85afb93-83fb-4186-a49d-e5cb080a0187/ (last accessed 24 July 2016). The reaction to the attacks was divided, largely, along ideological lines. For a list of which states supported and which denounced the attack, see 'Muslims, Yeltsin denounce attacks' (21 August 1998), available at https://web.archive.org/20020817231051/http://edition.cnn.com/WORLD/africa/9808/21/strikes.word.reax.02/ (last accessed 24 July 2016).

67 Permanent Council of American States, Convocation of the Meeting of Consultations of Ministers of Foreign Affairs and Appointment of a Commission, 5 March 2008, CP/Res.930 (1632/08).

the absence of UN Security Council authorisation. In that context this article deliberated on the thorny question of whether the extraterritorial use of force constitutes a violation of the prohibition on the use of force or whether such force can be justified on the basis of the right to self-defence.

The limitations on the right to use force in self-defence and, as a corollary, the prohibition on the use of force have been under strain for some time, with some arguing for a broad and permissive right to use of force in self-defence. The situation in Syria, it seems, has given impetus to those arguing for a near-limitless right to use force unilaterally. It is important in order to maintain the integrity of international law that the scope of the right to use force in self-defence be interpreted in accordance with the normal canons of interpretation and with the guidance of the jurisprudence of the International Court of Justice. Practice, including the current use of force in Syria, can only be relevant as authentic interpretation of the Charter rules if it reflects the agreement of all the members of the United Nations. Moreover, the trend towards a permissive approach to the use of force presents a real and present danger and may undermine the collective security rules of the United Nations. Those who argue for an (almost) unrestricted right to use force often present us with the choice between a right to use force unilaterally or allowing terrorists to act with impunity; the situation in Syria, however, illustrates that this is a false choice. States wanting to tackle ISIS, even in Syria, have at least two choices that are consistent with international law: they can seek the consent of the territorial state and advance a co-operative approach to fighting the scourge of terrorism or they can approach the UN Security Council to seek authorisation for the use of force. In the case of Syria neither of these choices was pursued,[68] but this does not mean that they are unavailable.

[68] Russia's use of force in Syria's territory, with Syrian consent, is not based on self-defence and therefore falls beyond the scope of the article.