THE NON-STATE ACTOR LACUNA: RECONCILING ISIL AND INTERNATIONAL LAW

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A dissertation submitted in partial fulfillment of the degree Bachelor of Laws (Honours) at the University of Otago – Te Whare Wānanga o Otāgo

9 October 2015

ACKNOWLEDGMENTS

To my supervisor, Professor Kevin Dawkins, for ensuring all my "theirs" were "its" and that I always remained logical

To Jan, for removing extraneous commas and staying up with me

To my friends, flatmates and family for listening to my incessant chatter about the Middle East

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Introduction

Terrorism is not a phenomenon unknown to the international community. The particular Islamic brand of terrorism, known by the much maligned term *jihad,* is one we can trace in tangled webs across the entire globe. Yet the explosion of the Islamic State of Iraq and the Levant (ISIL) into the international consciousness in 2013 has left the global community scrambling for solutions.[1]

The project of the Islamic State began in 1999 as "The Organisation of Monotheism and Jihad" (JTJ) under the leadership of Abu Musab al-Zarqawi. In 2004, following the invasion of Iraq, Zarqawi pledged allegiance to al-Qaeda, rocketing JTJ into instant notoriety.[2] However, in an almost inconceivable move, Al-Qaeda severed ties with the now "Islamic State in Iraq" (ISI) in 2014 due to ISI's extreme violence and excessive enforcement of Sharia.[3] Unshaken, and reinvigorated by the new leadership of Abu Bakr al-Baghdadi, ISI exploited the chaos of the Syrian civil war to expand its control and declared the caliphate of the Islamic State of Iraq and the Levant in 2013.[4] Since this point ISIL has fixated global attention by employing a host of barbaric and cruel practices including mutilations, public executions, persecution of minorities, and sexual enslavement.

It is a great tragedy of the modern age that the brutality of ISIL is not unprecedented. The vicious fanaticism and utter exultation ISIL members take in their actions evokes memories of the Nazis, the Khmer Rouge, the Chinese Communist Party and Charles Taylor's regime in Liberia. However, the world has yet to take account of such brutality and such organisation from an entity that is not obviously a state. Part I of the following analysis considers ISIL's claim to statehood and concludes that due to a combination of factual shortcomings and non-recognition by the international

[1] In the interests of space, this dissertation cannot consider all legal issues relevant to ISIL. It does not consider international humanitarian law as applies between Iraq and ISIS and Syria and ISIS, or international human rights law in any real depth. Further, given the rapid pace of change in the factual scenario, it has been unable to consider issues such as the recent Russian airstrikes launched against ISIL in Syria.

[2] Aaron Y. Zelin *The War between ISIS and al-Qaeda for Supremacy of the Global Jihadist Movement* (No. 20, Washington Institute for Near East Policy, Washington, 2014) at 1.

[3] Ibid. at 2

[4] Al Jazeera "Sunni rebels declare new 'Islamic caliphate" (2014) <http://www.aljazeera.com/news/middleeast/2014/06/isil-declares-new-islamic-caliphate-201462917326669749.html>

community, ISIL is not a state, regardless of its claims. However, as a non-state actor, ISIL falls into a legal lacuna. International law has yet to comprehensively develop the rules that apply to non-state actors, and thus ISIL's status confuses the scope of legal responses that may be taken against it.

Nonetheless, some action has been taken against ISIL. A United States-led coalition has been conducting airstrikes since 2014, as well as providing limited administrative support in Iraq. However prima facie, the airstrikes are an archetypal breach of the prohibition on the use of force found in Article 2(4) of the United Nations (UN) Charter, and therefore are illegal. Part II analyses the exceptions to Article 2(4) of the UN Charter of Security Council authorisation, consent, self-defence and the invariably contested humanitarian intervention. Although forcible actions taken in Iraq can clearly be justified on the basis of consent, no straightforward exception applies to justify the airstrikes in Syria. Part II argues that the justification of collective self-defence is viable, however ISIL's status as a non-state actor means such a claim by no means is unanimously accepted. Part II further concludes that humanitarian intervention led by a regional force could be a possible legal avenue to confront ISIL, however any action must be taken within Syria as a whole, rather than exclusively against ISIL.

It is incontrovertible that no diplomatic avenue for confronting ISIL exists. As a group, it exhibits a level of barbarism and fanaticism that is beyond negotiation. Thus, in the short-term, military measures must be taken to contain its advance. However, it is essential to bear in mind that ISIL was conceived during the illegal and inordinate invasion of Iraq, and regenerated by the disintegration of Syria into civil war.[5] Two important consequences arise from this observation. First, as argued in Part II, international law must evolve in conjunction with contemporary realities. It is unrealistic to expect states to tolerate groups such as ISIL simply because of their non-state actor status. However, if states are granted more legal capacity to respond to non-state actors with force, they must also meticulously adhere to the rules. Adopting a "might is right" position and forgoing international law, simply hands ISIL a legitimate reason to disregard the rules as well. Secondly, as addressed briefly in Part

[5] Jessica Stern and J.M. Berger *ISIS: The State of Terror* (HarperCollins, New York, 2015) at 177, 238.

III, ISIL leadership must be held legally accountable through a fair and transparent mechanism. ISIL, at its core, is an ideology and cannot be obliterated by military force. Further, history proves that attempts to physically destroy jihadist groups, without provision for accountability or a rebuild of the society they have originated in, only produces martyrs and the rejuvenation of the jihadi doctrine in a more dangerous and shrewd manifestation.

PART 1

STATUS OF ISIL UNDER INTERNATIONAL LAW

Since the birth of ISIL from the ashes of the Iraq War and the flames of the Syrian conflict, it has been steadfast in its desire to construct an "Islamic State." In June 2014, ISIL announced the establishment of an Islamic caliphate in the territory of Iraq and Syria and declared Abu Bakr al-Baghdadi the "leader of Muslims everywhere." The video recording, along with an official document stated: [6]

> "The legality of all emirates, groups, states and organisations becomes null by the expansion of the caliph's authority and the arrival of its troops in their areas. Listen to your caliph and obey him. Support your state, which grows every day."

The alarming nature of this declaration is self-evident. ISIL has been accused of mass abuses of human rights abuses including conscription of minors, rape, public executions and alleged genocide against the Yazidi minority. [7] However, such denunciation does not necessarily preclude ISIL's claim to statehood; the human rights records of many established states reveal practices that rival ISIL's. [8]

The problem is that ISIL has outgrown the term "terrorist group." It may use terror as a tactic, but there is a gaping chasm between its level of organisation, funding and structure and those of its peers. [9] ISIL's claim to statehood must therefore be seriously examined, because determining its status under international law is crucial in delimiting the boundaries of managing it legally. International law is notoriously

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[6] Al Jazeera "Sunni rebels declare new 'Islamic caliphate' above n 3

[7] Independent International Commission of Inquiry *Report on the Syrian Arab Republic* A/HRC/28/69 (5 February, 2015). See also, BBC "IS Yazidi attacks may be genocide, says UN" (2015) <http://www.bbc.com/news/world-middle-east-31962755>

[8] The following nine countries have been listed as the worst human rights abusers in the world: Equatorial Guinea, Eritrea, North Korea, Saudi Arabia, Somalia, Sudan, Syria, Turkmenistan, and Uzbekistan: *See* Freedom House "Worst of the Worst 2012: The World's Most Repressive Societies" (2012) <https://freedomhouse.org/report/special-reports/worst-worst-2012-worlds-most-repressive-societies#.VeuSe9Oqqko>

[9] Audrey Kurth Cronin "Why Counterterrorism Won't Stop the Latest Jihadist Threat" (2015) Foreign Affairs <https://www.foreignaffairs.com/articles/middle-east/2015-02-16/isis-not-terrorist-group>

state-centric, and if ISIL's claim of statehood is unable to stand, the rules of engaging with it as a non-state actor are much more controversial.

Yet, the law demarcating what is and what is not a state is far from unambiguous. The International Law Commission (ILC) has rejected proposals to codify the rules of statehood, indicating that the whole concept is simply "too fraught with political implications."[10] This analysis will adopt the 1933 Montevideo Convention as the basis for an examination of ISIL's claim to statehood. It will further consider the criterion of "independence" which is widely recognised as being an essential element of statehood.

I. TWO THEORIES OF STATEHOOD

International law posits two theories for the creation of a state. The constitutive theory determines that an entity may only join the ranks of statehood via recognition by existing states.[11] In contrast, the evidentiary or declaratory theory posits that a state exists if it fulfills the criteria of statehood as a matter of fact, and recognition "is nothing more than a declaration of this existence." [12]

It is generally accepted that the declaratory theory is predominant. However, recognition as an attribute of statehood is not obsolete; it simply cannot be the *sole* attribute of statehood. With regards to emergent states, when the status of an entity seeking statehood is doubtful, non-recognition of the entity as a state "is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such." [13] As ISIL demonstrates some

[10] International Law Commission *Report on The Draft Declaration on the Rights and Responsibilities of States* (1949) 1st sess. U.N. Doc A/92/59 at [50]
[11] *Encyclopedic Dictionary of International Law* (online ed, 2009) Constitutive Theory. See also, Phillip Marshall Brown "The Effects of Recognition" (1942) 36 The American Journal of International Law 106 at 106
[12] *Deusche Continental Gas-Gesellschaft v Polish State* (1929) 5 ILR 11, 13. See generally, James Crawford "The Criteria for Statehood in International Law" (1976) British Yearbook of International Law 48 at 103; Brown, above n 10 at 106. See also Conference on Yugoslavia, Arbitration Commission (Badinter Commission) "Opinion No. 1" (1993) 92 ILR 162 at 163
[13] *Tinoco Arbitration (Great Britain v Costa Rica)* (1923) 18 AJIL 147 at 154. See also Crawford, the Criteria for Statehood above n 11 at 104

characteristics comparable to those of a state, recognition or deliberate non-recognition by the international community could prove vital in determining its status.

II. CAN ISIL CONSTITUTE A STATE? THE MONTEVIDEO CONVENTION 1933

The basic criterion for statehood is widely acknowledged as the 1933 Montevideo Convention on the Rights and Duties of States. Article 1 states:[14]

> *the state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.*

It is clear that these criteria are broad enough to permit an array of entities with differing characteristics to be classed as a state.

(A) DOES ISIL POSSESS A PERMANENT POPULATION?

A permanent population has been defined as "an aggregate of individuals who live together as a community though they may belong to different races or creeds or culture or be of different colour."[15] They must intend to inhabit that land on a permanent basis.[16]

Whether or not the population under ISIL's control is permanent depends on if they intend to remain in that territory. According to the UN, ISIL is in control of territory where an estimated eight million persons reside.[17] The number of registered refugees which have fled Syria since the beginning of the civil war is 4,015,070 along with

[14] Convention on the Rights and Duties of States (Montevideo Convention) (opened for signature 26 December 1933, entered into force 26 December 1934), art 1
[15] Robert Jennings and Arthur Watts (eds) *Oppenheim's International Law* (9th ed, Oxford University Press, Oxford, 1992) at 121
[16] David Raič *Statehood and the Law of Self-Determination* (Kluwer Law International, The Hague, 2002) at 58
[17] Ben Emmerson (Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism) *Fouth Report on the protection of human rights and fundamental freedoms while countering terrorism* U.N. Doc A/HRC/29/51 (16 June 2015) at [15]

7,600,000 internally displaced persons.[18] 369,974 refugees have left Iraq and currently 3,596,356 Iraqi's are internally displaced.[19] Recently, the United Nations stated that ISIL has forced approximately eight million people to "assimilate, flee or face death."[20] Given the civil war that has been raging in Syria since 2011, it is impossible to tell what proportion of the refugee crisis has been caused by ISIL.[21] Regardless of the cause, such a substantial exodus from ISIL-controlled territory in Syria and Iraq severely impedes a contention that ISIL fulfills the requirement of permanent population. The *Western Sahara* Opinion held that a nomadic population that moves in and out of the territory may still constitute a "permanent population."[22] However, in the case of ISIL-controlled territory, it cannot be said that there is inclination of refugees to return to their homes while that territory remains under ISIL control.

A further suggestion is that the thousands of fighters who bulk ISIL's ranks may form the permanent population of the caliphate. While estimates of the number of ISIL members have ranged from 31,500 to 200,000,[23] it is doubtful whether such a group could constitute a permanent population. As well as an estimated 20,000 foreign fighters who may yet return to their home countries,[24] the voluntary demographic of ISIL is overwhelming male. A permanent population cannot consist of almost entirely one gender.

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[18] European Commission "Humanitarian Aid and Civil Protection: Syria Crisis" <http://ec.europa.eu/echo/files/aid/countries/factsheets/syria_en.pdf>

[19] Office of the United Nations High Commissioner for Refugees "2015 UNCH country operations profile- Iraq" (2015) <http://www.unhcr.org/pages/49e486426.html>

[20] United Nations News Centre "In ISIL-controlled territory, 8 million civilians living in 'state of fear'- UN expert" (2015) <http://www.un.org/apps/news/story.asp?NewsID=51542#.VekUP9Oqqko>;

[21] Obtaining any accurate estimate for Syria is difficult due to human right monitors being denied access. However, see generally Megan Price, Anita Gohdes and Patrick Ball *Updated Statistical Analysis of Documentation of Killings in the Syrian Arab Republic* Human Rights Data Analysis Group (2014)

[22] American Law Institute *Restatement of the Foreign Relations Law of the United States* (3rd ed, 1987) at 73; See also *Western Sahara (Advisory Opinion*) [1975] ICJ Rep 12 at 342-344

[23] Jim Sciutto, Jamie Crawford and Chelsea J. Cater "ISIS can 'muster between 20, 000 and 31, 5000 fighters, CIA says" CNN (2014) <http://edition.cnn.com/2014/09/11/world/meast/isis-syria-iraq/>; Patrick Cockburn "War with ISIS: Islamic militants have army of 200,000, claims senior Kurdish leader" Independent (2014) <http://www.independent.co.uk/news/world/middle-east/war-with-isis-islamic-militants-have-army-of-200000-claims-kurdish-leader-9863418.html>

[24] Analytical Support and Sanctions Monitoring Team, Letter dated 3 November 2014 from the Analytical Support and Sanctions Monitoring Team to the Chair of the Security Council Committee concerning al-Qaida and associated individuals and entities, U.N. Doc S/2014/815 (13 May 2014)

(B) DOES ISIL POSSESS TERRITORY?

Although territory cannot be considered the most important criterion of sovereignty, its necessity lies in the fact the exercise of full government powers is dependent in the first instance on some area of territory. [25] It has been reported that ISIL controls up to half of Syria's territory, and roughly a third of Iraq's territory.[26] This includes the provinces of Anbar, Ninewa, Salah al-Din, Kikurk, Diyala, Babil and Erbil in Iraq and Aleppo, al-Raqqa, Idlib, Al-Hasakah and Dayr Az-Zawr in Syria.[27] Although this territory is not minimal, it is also not contiguous, nor can it be said have defined borders by any sense.[28] While contiguity and delimited borders are not required under international law,[29] such fragmentation and instability raises serious doubts about the independence of the entity claiming statehood.[30] Although ISIL currently retains control of many strategic locations, including major cities, dams and oil infrastructure, much of the land under its charge is desert and wilderness.[31] It has also only had what could be termed "control" of strategic locations such as Mosul, Fallujah and Raqqa for just over a year.[32] The ongoing conflict for control of these

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[25] Crawford "The Criteria for Statehood," above n 11 at 111

[26] George Packer "The Common Enemy" The New Yorker (2014) <http://www.newyorker.com/magazine/2014/08/25/the-common-enemy>; Al Arabiya News "ISIS controls half of Syrian Territory, monitor says" (2015) <http://english.alarabiya.net/en/News/middle-east/2015/05/21/ISIS-controls-half-of-Syrian-territory-monitor-says.html>

[27] Emmerson, above n 16 at [15]

[28] See Appendix 1

[29] James Crawford *The Creation of States in International Law* (2nd ed, Claredon Press, Oxford, 2002) at 47; "in order to say a state exists….it is enough that this territory has a sufficient consistency , even though its boundaries have not yet been accurately delimited, and that the state actually exercises independent public authority over that territory": *Deutsche Continental Gas-Gesellchaft v Polish State* above n 11 at 14; "there is for instance no rule that the land frontiers of a state must be fully delimited and defined…":*North Sea Continental Shelf (Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3 at 32); "There must be some portion of the earth's surface which its people inhabit and over which its government exercises authority"- but this doesn't require precise delimitation of the boundaries" Statement of United States Ambassador Jessup upon Israel's admittance to the UN, UNSCOR, 3rd Sess., 383rd mtg., UN Doc. S/PV.383 (2 December 1948) at 10

[30] Crawford *The Creation of States* above n 28 at 47

[31] Armin Rosen "What everyone is missing about ISIS' big week" (2015) Business Insider <http://www.businessinsider.com.au/isis-control-of-territory-2015-5>

[32] Fallujah captured in January 2014: Liz Sly "Al-Qaeda force captures Fallujah amid rise in violence in Iraq" (2014) The Washington Post <https://www.washingtonpost.com/world/al-qaeda-force-captures-fallujah-amid-rise-in-violence-in-iraq/2014/01/03/8abaeb2a-74aa-11e3-8def-a33011492df2_story.html>; Mosul captured in June 2014: Ziad Al-Sinjary "Mosul falls to militants, Iraqi forces flee Northern City" (2014) <http://www.reuters.com/article/2014/06/11/us-iraq-security-idUnited StatesKBN0EL1H520140611>; Raqqa fell in August 2014: Jeffrey White "Military

areas, with gains and losses reported every day, raises additional doubt as to the stability of ISIL's claim to control over territory. [33] Therefore, it appears that ISIL's control is simply too precarious to fulfill this criteria.

(C) DOES ISIL POSSESS AN EFFECTIVE GOVERNMENT?

Governance corresponds to the competence of a particular entity to govern a population in a certain territory. Crawford identifies three conclusions for an effective government: (1) the entity must possess an exclusive governance system; (2) some rudimentary maintenance of law and order and the establishment of basic institutions must exist; and (3) if the entity claiming statehood is opposed internationally, the standard of effectiveness will apply more strictly. [34]

(1) Exclusive governance system

In order to claim effective government in the territory under its control, it must be shown that ISIL governance is to the exclusion of other entities which also claim authority. It was held in the *Tinoco* arbitration that exclusive control is established when the population within the territory recognises the claiming authority's control, and no opposing force can be assumed to be the government. [35] It seems quite clear that although the Assad regime may be continuing to militarily contest ISIL's control, areas such Raqqa and Aleppo are firmly under the governance of ISIL. This stability of control certainly does not extend over all areas that ISIL claims to control, however where it has consolidated its authority, it appears ISIL has exclusive governing power.[36] It is impossible to analyse whether the population living under ISIL's control recognises its authority, as the majority of evidence comes from ISIL propaganda.

Implications of the Syrian Regime's Defeat in Raqqa (2014) The Washington Institute <http://www.washingtoninstitute.org/policy-analysis/view/military-implications-of-the-syrian-regimes-defeat-in-raqqa>

[33] On some occasions the territorial dispute has been so extensive that a separate territory cannot be defined: Rosalyn Higgens *The Development of International Law Through the Political Organs of the United Nations* (Oxford, Oxford University Press, 1963) at 18

[34] Crawford *The Creation of States* above n 28 at 59

[35] *Tinoco Arbitration* above n 12

[36] Yuval Shany, Amichai Cohen, Tal Mimran "ISIS: Is the Islamic State Really a State?" (2014) Israel Democratic Institute < http://en.idi.org.il/analysis/articles/isis-is-the-islamic-state-really-a-state/>

Due to the lack of reliable information, this analysis will proceed on the assumption that ISIL does have exclusive governance in the areas that are firmly under its control.

(2) Effective governance system

ISIL's increasing progress towards achievement of this particular attribute of statehood is distinctly alarming. Its advancement is in part due to its unprecedented level of funding. ISIL has consolidated its financial control by exploiting natural resources, especially oilfields in both Syria and Iraq, and in 2014 it was reported that ISIL had seized the reserves of the Iraqi Central Bank in Mosul.[37] Strong financial capability allows ISIL to fortify its governance structure and to exploit the economic desperation of the population.

ISIL's organisation structure consists of a formalised vertical and hierarchical command with separate wings for military, administrative and religious purposes. Al-Baghdadi is the overseer of all areas, reflecting a combination of religious authority and senior statesmanship.[38] His two deputies control operations in Syria and Iraq respectively, and beneath them are twelve supervisors who govern the *wilyats* (provinces). They also oversee the administrative wing of ISIL, which is separated into Administration and Islamic Services. [39]

The administrative departments include religious outreach programmes, aimed at indoctrinating the population with ISIL's extremist beliefs; the Al-Hisbah, or religious police; an education system; recruitment offices; and a public relations and tribal affairs department.[40] ISIL has instituted Sharia law as the sole legal authority, and has established specialised courts.[41] Despite claims of even-handedness, there have been widespread reports of arbitrary detentions by the local police, including children as young as eight.[42] With such a broad array of services, it is clear that ISIL "wants to

[37] Ibid. at [16]
[38] Charles C. Caris and Samuel Reynolds *Middle East Security Report: ISIS Governance in Syria* (Washington, Institute for the Study of War, 2014) at 9
[39] Ibid. at 14;
[40] Ibid, at 16, 17, 18, 19, 20
[41] Ibid. at 18
[42] Ibid. at 19

portray itself as a fully formed polity."[43] Additionally, by steadily developing a monopolistic level of control over basic services, ISIL is ensuring the dependency of the community on its form of governance.[44]

Secondly, ISIL has undertaken a wide array of aid and infrastructure projects under the umbrella of "Islamic Services," such as repairing water mains and power lines, and managing hospitals.[45] In Raqqa ISIL is managing the dams and power plants, whilst in Aleppo, it administers the thermal power plant.[46] ISIL also operates a wide-ranging taxation system, targeting both individuals and businesses.[47] This type of activity allows them to portray a state-like façade rather than appearing as a terrorist group. It is clear they have begun a transition from military to political control.

(3) The need for increased effectiveness needed in the face of widespread opposition

When an entity claims statehood, as opposed to an established state, the criterion of effectiveness may be more stringently applied.[48] Thus, any flaws in a governance system will militate more strongly against an emergent state than they would against a state already in existence. It is difficult to comprehensively assess the effectiveness of ISIL's governance in the territory under its control as the bulk of information originates in ISIL propaganda. Also, despite any apparent effectiveness, it must be borne in mind that ISIL's governance system uses elements of effective governance in combination with terror tactics such as public brutality and indoctrination to subdue the population.[49]

The areas in which ISIL has greater dominance are also the areas in which its level of governance may be termed effective, such as Raqqa and Aleppo. However in areas such as Deir ez-Zour, where it displays a more rudimentary presence, its authority is

[43] Ibid. at 20
[44] Emmerson, above n 16 at [19]
[45] Caris and Reynolds above n 37 at 20
[46] Ibid. at 22
[47] Cronin, above n 8
[48] Crawford, The Criteria for Statehood above n 11 at 118
[49] Emmerson, above n 16 at [19]

more perilous.[50] This variance, along with the presence of civil war, and the multiple factions fighting for power suggests that on an overall scale ISIL's governance could not meet the higher threshold of effectiveness required for emergent states.

(4) Non-democratic?

Effective government does not specifically require a certain nature or form of governance so long as basic institutions are established along with some semblance of law and order. Thus a government is not required to be a democratic one.[51] However, this position may vary with regard to a nascent state, as recent history demonstrates that the international community has required some emerging states to adopt representative governments.[52] For example, the European Community (EC) only recognised states that emerged as democracies following the breakup of Yugoslavia.[53] In 2002, the Organisation for American States (OAS) went further, declaring that existing member states must be democratic.[54] If democracy has emerged as a requirement for nascent states, it is manifest ISIL would not fulfill this criterion.

(D) CAPACITY TO CONDUCT RELATIONS WITH OTHER STATES

This capacity is regarded as the least important criterion of the Montevideo Convention.[55] It is possible that in theory ISIL could develop this capability. It has shown an ability to emulate aspects of civil governance and has a media presence that

[50] Caris and Reynolds above n 37 at 14
[51] For example, monarchies that have absolute control or substantial control include Brunei, Jordan, Kuwait, North Korea, Liechtenstein, Monaco, Morocco, Oman, Qatar, Saudi Arabia, Swaziland, Tonga, United Arab Emirates and the Vatican City. Additionally, countries with one-party governments include Cameroon, China, Cuba, Laos, Vietnam and Syria
[52] Crawford, *The Creation of States* above n 28 at 153; Karen Knop "Statehood: Territory, people, government," James Crawford et al. (ed) *The Cambridge Companion to International Law* (Cambridge, Cambridge University Press, 2012) 95 at 104
[53] European Community "Declaration on Yugoslavia and on the Guidelines on the Recognition of New States (1992) 31 *International Legal Materials* 1485 at 1485 ("readiness to recognise… those new states which, following the historic changes in the region, have constituted themselves of a democratic basis"); Antonio Cassese *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge, Cambridge University Press, 1995) at 266
[54] Declaration of Quebec City: Third Summit of the Americas, OAS 31st Sess (20-21 April 2001) at [5] ("any unconstitutional alteration or interruption of the democratic order in a state of the hemisphere constitutes an insurmountable obstacle to the participation of that states government in the Summit of America's process.")
[55] Crawford, The Criteria for Statehood above n 11 at 62

far exceeds any other terrorist group.[56] However this capacity cannot exist in a vacuum. There is not a single state that would be willing to publically engage with ISIL on a diplomatic level, and as such, it cannot be said that ISIL has or can grow to possess this capacity.

(E) A FIFTH REQUIREMENT: INDEPENDENCE

Independence, also known as state sovereignty, means that the state is the highest form of authority, and does not derive its competence from any other entity.[57] Although this requirement does not feature in the Montevideo Convention, it is widely accepted as a criterion of statehood and many writers consider it the most important.[58] Both formal and actual independence must be fulfilled before a state may be considered independent.

(1) Formal independence

Formal independence is complete when the powers of the government are vested in the separate authority of the state through either a constitution, a treaty, or a grant of sovereignty from the former state.[59] Although al-Baghdadi has declared the formal independence of ISIL as an Islamic caliphate, no legitimate transfer of authority from Syria or Iraq regarding the territory under ISIL's control has occurred. Nor has any constitution been enacted vesting the powers of the government in ISIL. Therefore ISIL has not achieved formal independence.

(2) Actual independence

Crawford describes actual independence as the "minimum degree of real government power at the disposal of the authorities of the entity that is necessary for it to qualify

[56] Shany, Cohen and Mimran above n 35
[57] Raič above n 15 at 74; *Island of Palmas (United States v Netherlands)* (1928) 2 RIAA 829, 838 ("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.")
[58] Crawford *The Creation of States* above n 28 at 62; Higgens *The Development of International Law* above n 32 at 25
[59] Crawford, *The Creation of States* above n 28 at 131

as independent."[60] In many senses ISIL could be seen as possessing actual independence. Although ISIL receives funding from outside sources, having territory and infrastructure under its control has allowed it to become self-sustaining.[61] It does not view itself as subordinate to any other state and is now quite separate from other terrorist organisations operating in the area.[62]

However, ISIL faces the critical hurdle of the illegality of its establishment. When an entity originates in violation of certain basic rules of international law a presumption against statehood exists.[63] The principle that territory may not legally be acquired by force is firmly rooted in international law, [64] and the international community has consistently refused to recognise territory acquired as such. This is reflected in the EC Guidelines, which mandate that "the community and its member states will not recognise entities which are the result of aggression."[65] It is clear that ISIL as a territorial entity came into existence through the use of military strength, by forcefully occupying areas of Iraq and Syria. In Crawford's eyes, this is practically determinative, as if the territory in question is regarded as belonging to another state, then achievement of statehood by the entity is excluded. [66]

Widespread and consistent recognition of the entity as a state can serve to rebut this presumption. [67] However, the comprehensive lack of recognition from the international community clearly demonstrates ISIL cannot fulfill the criterion of actual independence.

[60] Crawford, The Criteria for Statehood above n 11 at 126
[61] BBC "What is Islamic State?" (2015) < http://www.bbc.com/news/world-middle-east-29052144>; Cronin, above n 8
[62] Sly, above n 31
[63] Crawford, *The Creation of States* above n 28 at 74
[64] Ibid. at 131, 132; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Further Request for the Indication of Provisional Measures,)* Separate Opinion of Judge ad hoc Lauterpacht [1993] ICJ Rep 1993 at 325, 434, 440
[65] Declaration on Yugoslavia above n 52
[66] Crawford, *The Creation of States* above n 28 at 254
[67] Ibid. at 88

(F) THE RE-EMERGENCE OF THE CONSTITUTIVE THEORY

Although ISIL in some respects exhibits state-like features and is openly seeking statehood, it cannot be regarded as a state under the declaratory theory of international law. Under the Montevideo Convention, ISIL cannot claim a permanent population and its hold on territory is tenuous. Further, although it is currently operating a governance system that is more sophisticated than that of any previous terrorist group, ISIL is unable to reach the high threshold of effectiveness required for emergent states because of widespread non-recognition. Finally, ISIL is neither formally independent nor can it assert actual independence as a consequence of the substantial illegality of its origin.

If ISIL continues to grow in power, it may begin to resemble a state in more respects. In this situation, non-recognition by the international community can be a powerful tool. When Southern Rhodesia announced its independence in November 1996, not a single state or the UN recognised its claim to statehood. If such a stance is maintained in terms of ISIL, it will assist in preventing the consolidation of its position.

However, ISIL's failure to achieve statehood is not equivalent to ISIL having no legal status under international law. In short, the international legal rules still apply to ISIL. An argument that ISIL, as a non-state actor, is exempt from international law cannot be sustained in the contemporary global environment, and it is quite possible to extend the rules applicable to states to non-state actors.[68] This is the position of the UN, which professes that ISIL is "state-like" enough to be bound by international human rights law, which in general only applies to states.[69] Adaptation and concessions must be made to the state-centric focus in order to maintain international law's relevance to the contemporary reality of non-state actors.

[68] Crawford, *The Creation of States* above n 28 at 99
[69] Emmerson, above n 16 at [30]

PART II

THE PROHIBITION ON THE USE OF FORCE AND ITS EXCEPTIONS

I. OPERATION INHERENT RESOLVE

August 2014 marked the beginning of the direct use of force against ISIL[70]. An international coalition led by the United States commenced targeted airstrikes against ISIL forces in an attempt to break the siege of Mount Sinjar.[71] In October 2014, the mission against ISIL was officially designated Operation Inherent Resolve, and has since grown to include more than sixty coalition partners.[72]

More specifically, the United States, Australia, the United Kingdom, Canada, the Netherlands, France and Jordan have undertaken airstrikes in Iraq.[73] By the beginning of 2015, it was reported that over 16,000 airstrikes had been carried out in Iraq by the coalition, with the United States Air Force taking responsibility for approximately 60%.[74] The operations conducted against ISIL in Syria include Bahrain, Canada, Jordan, Saudi Arabia, Turkey, France and the United States.[75]

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[70] Lead Inspector General for Overseas Contingency Operations, "Operation Inherent Resolve," *Quarterly and Biannual Report to the United States Congress* (December 17 2014-March 31, 2015) at 1

[71] Office of the Press Secretary "Statement by the President" (transcript of video address, 7 August 2014) accessed at <https://www.whitehouse.gov/the-press-office/2014/08/07/statement-president>

[72] Not all coalition partners of this Combined Joint Task Force participate militarily. Other forms of participation include impeding the flow of foreign fighters and ISIL's financing, addressing the humanitarian crises in the region and exposing ISIL's true nature: United States Department of State "The Global Coalition to Degrade and Defeat ISIL," <www.state.gov/s/seci/>; See also, Lead Inspector General, Operation Inherent Resolve above n 69 at 2;

[73] United States Central Command "Counter-ISIL military coalition concludes operational planning conference," (2015) <http://www.centcom.mil/en/news/articles/counter-isil-military-coalition-concludes-operational-planning-conference>

[74] Aaron Mehta "A-10 Performing 11 Percent of Anti-ISIS Sorties" DefenseNews (2015) <http://www.defensenews.com/story/defense/2015/01/19/a10-strikes-isis-11-percent/21875911/>

[75] "Counter-ISIL military coalition concludes operational planning conference," above n 72; John Irish and Dominque Vidalon "France launches airstrikes against Islamic State in Syria" (2015) Reuters <http://www.reuters.com/article/2015/09/27/us-mideast-crisis-france-syria-

II. THE PRIMA FACIE BREACH OF 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.[76]

The prohibition on the use of force, enshrined in Article 2(4) of the UN Charter, is widely considered the "cornerstone of peace in the Charter."[77] The prohibition on the use of force is also universally recognised as a principle of customary international law and as an overarching peremptory norm.[78]

It is quite uncontroversial that the airstrikes undertaken by the United States-led coalition against ISIL in Iraq and Syria qualify as a use of force and thus prima facie breach both Article 2(4) of the UN Charter and customary international law. Although the airstrikes are not targeted at the governments of Iraq or Syria, the use of force on another state's territory, even if not directed against the state, breaches the prohibition.[79]

In order to legally justify the airstrikes, they must come within one of the exceptions to the prohibition against the use of force contained in both the UN Charter itself, but also customary international law. Any state which invokes an exception to justify its actions must bear the burden of proving both the international application of that exception and additionally, that its conditions were satisfied.[80] The exceptions

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idUnited StatesKCN0RR07Y20150927>; Gul Tysuz and Zeynep Bilginsoy "Ministry: Turkey joins coalition airstrikes against ISIS in Syria" (2015) CNN <http://edition.cnn.com/2015/08/29/europe/turkey-airstrikes/>

[76] Charter of the United Nations, art 2(4)

[77] C.H.M. Waldock 'The Regulation of the Use of Force by Individual States in International Law,' (1952) 81 Recueil des Cours 451 at 492

[78] Oliver Dorr, "Use of Force, Prohibition of" *Max Planck Encyclopedia of Public International Law* (online ed.) at [1]. The ICJ considers the customary prohibition as identical in content to the prohibition contained within the UN Charter: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 at 99; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* [2004] ICJ Rep 136 at 171

[79] Albrect Randelzhofer and Oliver Dorr "Article 2(4)" in Bruno Simma et al (eds) *The Charter of the United Nations: A Commentary* (3rd ed, Oxford University Press, Oxford, 2012) 200 at 216

[80] Dorr, Use of Force, above n 77 at [37]

considered in this analysis vary in their legal status from firmly established to highly debatable and thus will first be evaluated for their legal strength and then for their applicability to the airstrikes targeting ISIL in Iraq and Syria.

III. EXCEPTION ONE: AUTHORISATION BY THE UNITED NATIONS SECURITY COUNCIL

The primary responsibility of the UN Security Council is the maintenance of international peace and security.[81] To this end, it has the power to make binding resolutions upon all member-states of the UN. Importantly, the Security Council theoretically holds a monopoly on the use of force in the international system. Therefore a state may used armed force against another state if it is acting under Security Council authorisation pursuant to Chapter VII of the UN Charter.

If, under Article 39 of the UN Charter, the Security Council determines the existence of any threat to the peace, breach of the peace or act of aggression, it may take forcible measures under Article 42 UN Charter. This is provided that it has hitherto determined that non-forcible measures under Article 41 of the UN Charter would be inadequate.

As the Security Council has no armed forces at its command, it does not undertake this action itself but rather authorises a member state, or member states to implement the use of force.[82] Due to the peremptory significance of authorising a breach of Article 2(4) of the UN Charter, a legal application of the use of force under Article 42 by a state or group of states requires explicit authorisation from the Security Council.[83]

The Security Council has taken action in response to ISIL's rampage through the Middle East. Aside from adding ISIL as an alias to the Al-Qaeda sanctions list in

[81] Charter of the United Nations, art 24(1) ("in order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.")
[82] Dorr, Use of Force, above n 77 at [41]
[83] Ibid. at [42]

2013,[84] it has adopted three resolutions concerning ISIL. In sum, Resolutions 2170, 2178 and 2199 unanimously condemn the widespread atrocities committed by ISIL, call on member states to prevent the passage of foreign fighters of ISIL's ranks and stall the flow of finance, as well as condemn the destruction of historical heritage sites.[85]

Importantly, none of these three resolutions authorises the use of force. In fact Russia made it very clear in its statement in the debate prior to Resolution 2170 that the text should not be taken as authorisation for military action.[86] In 2014, Russia and China vetoed a resolution intending to refer the situation in Syria to the International Criminal Court, with Russian Permanent Representative Vitaly Churkin stating he would be "boringly predictable" as he walked into the Security Council meeting.[87] This veto was the most recent of four exercised by Russia and China with regards to the situation in Syria.[88]

The Security Council thus faces a deadlock concerning the situation of ISIL. Russia maintains a solid alliance with Bashar al-Assad, the President of Syria, and will veto any resolution proposing the use of force within the region out of concern for its own interests and relationships.[89]

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[84] United Nations "Security Council Al-Qaida Sanctions Committee Amends Entry of One Entity on Its Sanctions List" (press release, QE.J.115.04, 2013)
[85] SC Res 2178, UN Doc SC/RES/2178 (2014); SC Res 2170, UN Doc SC/RES/2170 (2015); SC Res 2199, UN Doc SC/RES/2199 (2015)
[86] United Nations "Security Council Adopts Resolution 2170 Condemning Gross, Widespread Abuse of Human Rights by Extremist Groups in Iraq, Syria" (7242nd mtg, SC/11520, 2014)
[87] Security Council "Growing Global Threats Compel Security Council in 2014 to Deploy or Reconfigure Peace Missions, Bolster Anti-Terrorism Effort, Scrutinize Working Methods" (press release, SC/11736, 14 January 2015)**;** See also BBC News "Russia and China veto UN move to refer Syria to ICC" (2014) <http://www.bbc.com/news/world-middle-east-27514256>
[88] United Nations "Security Council-Veto List" Dag Hammarskjöld Library Research Guides, accessed at <http://research.un.org/en/docs/sc/quick>
[89] The reasons for this support are diverse; Russia is protecting its last naval base outside of its territory which is located in Syria, as well as maintaining one of its last military alliances and an important trade relationship with Syria. It also strongly disagrees with the idea of "international intervention," especially when led by the West: Max Fisher "The four reasons Russia won't give up Syria, no matter what Obama does" (2013) The Washington Post <https://www.washingtonpost.com/news/worldviews/wp/2013/09/05/the-four-reasons-russia-wont-give-up-syria-no-matter-what-obama-does/>

(IV) EXCEPTION 2: CONSENT

It is important to note that the prohibition on the use of force in Article 2(4) of the UN Charter exclusively applies to states. International customary law is widely recognised as allowing a state to request foreign military in its territory to restore law and order domestically. The commentary on Article 20 of the ILC's 2001 Draft Articles on State Responsibility mandates that valid consent to the use of military force by a foreign state "precludes the wrongfulness of that act in relation to the former state to the extent that the act remains within the limits of that consent."[90]

This concept of 'intervention by invitation' is the basis of the legal justification for intervention in Iraq.[91] In a letter dated 2 September 2014, the Iraqi Prime Minister Al-Abadi granted explicit consent to the use of force in Iraq to the President of the Security Council and explicitly requested that the United States lead an international coalition to strike ISIL military strongholds on Iraq's territory.[92] Therefore, the coalition airstrikes in Iraq are legally unassailable. Nevertheless, this consent is not unlimited; Iraq retains at all time the right to circumscribe or rescind consent without notice.[93] If the coalition failed to respect this, its actions would constitute a breach of the prohibition.

However, an undisputable claim of intervention by invitation cannot be made in relation to Syria, as no *explicit* consent from Assad for the airstrikes on its territory has been forthcoming. Two distinct issues arise in considering the possibility of *implied* consent. First, whether Assad retains the authority to assent to a breach of Syria's sovereignty and secondly, whether the somewhat vague statements issued by the Syrian authorities are sufficient to amount to implied consent.

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[90] "Article 20, Materials on the Responsibility of States for Internationally Wrongful Acts" (2012) I *United Nations Legislative Materials* ST/LEG/SER.B/25 at 145. This is also supported by considerable state practice: see generally, United Nations Legislative Series *Materials on the Responsibility of States for Intentionally Wrongful Acts*, UN Doc ST/LEG/SER.B/25 (2012) at 145

[91] Claus Kreß "The Fine Line between Collective Self-Defense and Intervention by Invitation: Reflections on the Use of Force against IS in Syria" (2015) Just Security <https://www.justsecurity.org/20118/claus-kreb-force-isil-syria/>

[92] Permanent Rep. of Iraq to United Nations, Letter dated 20 September 2014, from the Permanent Rep. of Iraq to the President of the Security Council, U.N. Doc S/2014/691 (22 September 2014)

[93] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda*) *(Judgment)* [2005] ICJ Rep 168 at 197

(A) DOES ASSAD RETAIN THE AUTHORITY TO CONSENT TO THE USE OF FORCE IN SYRIAN TERRITORY?

To ensure legitimacy, a declaration of consent must be issued by the highest state organ.[94] Accordingly, a government must maintain a minimum level of effectiveness in order to possess the international legal authority to consent to foreign intervention. If a *de jure* government such as Assad's loses *de facto* control of a large proportion of the state, it forfeits the standing to invite intervention.[95]

It is quite clear that the Assad regime is struggling to maintain control of Syria. Between ISIL and the Free Syrian Army, the regime controls less than half of Syria's territory and its command is both tenuous and fluid in the areas that it retains.[96] A recent report has found that there are reasonable grounds to accuse forces under Assad's control of war crimes, crimes against humanity and other gross violations of international human rights and international humanitarian law.[97] These breaches of international law have led many states to question the legitimacy of the Assad regime in the face of the popular uprising.

Both France and the UK have officially recognised the Syrian National Council (SNC) as the legitimate representative of the Syrian people.[98] Turkish President Recep Tayyip Erdoğan has turned against Assad, stating he must relinquish power.[99] Similarly, Saudi Foreign Minister Adel al-Jubeir reiterated that "[t]here is no place for

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[94] Georg Nolte "Intervention by Invitation" *Max Planck Encyclopedia of Public International Law* (online ed.) at [12]
[95] Louise Doswald-Beck "The Legal Validity of Military Intervention by Invitation of the Government" (1985) 56 *The British Yearbook of International Law* 189 at 195-196
[96] Kheder Khaddour "The Assad Regime's Hold on the Syrian State" (2015) Carnegie Middle East Centre < http://carnegie-mec.org/2015/07/08/assad-regime-s-hold-on-syrian-state/id3k>
[97] Al Jazeera "UN report slams Assad forces for war crimes" (2012) <http://www.aljazeera.com/news/middleeast/2012/08/201281517374771847 8.html>
[98] Andrew Rettman "France recognises Syrian council, proposes military intervention" (2011) EU Observer <https://euobserver.com/defence/114380>; Daniel Tovrov "UK Recognizes Syrian Opposition (2012) International Business Times <http://www.ibtimes.com/uk-recognizes-syrian-opposition-415952>
[99] Larisa Epatko "Syria and Turkey: A Complex Relationship" (2012) PBS Newshour <http://www.pbs.org/newshour/rundown/syria-and-turkey/>

Assad in the future of Syria."[100] The United States, the most powerful player in the mix, has sent more obscure messages. In 2014, a bipartisan resolution was introduced in the Foreign Affairs Committee calling for President Obama to withdraw recognition of Assad.[101] However in early 2015, Secretary of State John Kerry stated the United States was willing to negotiate with Assad and did not repeat the standard line that Assad was no longer legitimate and must relinquish power.[102] This was later corrected by a State Department spokeswoman, who clarified that Kerry was not specifically referring to Assad, and that the United States would not negotiate with the Syrian leader.[103] At a recent Summit of the General Assembly, President Obama indicated some compromise may have to be made in order to eradicate ISIL. However he also stated that the situation requires "a managed transition away from Assad and to a new leader."[104] Other states that have publically rejected the Assad government to some degree include Libya, Spain, Egypt, Albania, Denmark, Tunisia, Italy, Bulgaria, Canada, the Netherlands, Germany, Belgium, Saudi Arabia, Qatar, Australia, Austria, Portugal, Norway, Japan and Sweden.

With such international pressure bearing on the Assad regime, it is questionable whether Assad retains the legitimacy to consent to the use of force on Syrian territory. International legal opinion on the legitimacy of consent by a leader in Assad's position is nebulous and often contradictory.[105] However it is clear that consent must be "internationally attributable to the State; in other words it must issue from a person whose will is considered, at the international level, to be the will of the State and, in

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[100] Al Jazeera "Saudi FM says 'Assad not part of the solution' in Syria" (2015) <http://www.aljazeera.com/news/2015/08/saudi-fm-assad-part-solution-syria-150811143752805.html>

[101] H.Res.520, 11 Congress (2014) (Calling for an end to attacks on Syrian civilians and expanded humanitarian access); see also, Rebecca Shabad "Lawmakers to Obama: Withdraw recognition of Assad regime" (2014) The Hill <http://thehill.com/policy/international/200885-key-lawmakers-to-obama-withdraw-recognition-of>

[102] Al Jazeera "Kerry says United States willing to negotiate with Syria's Assad" (2015) <http://www.aljazeera.com/news/2015/03/kerry-admits-negotiate-assad-150315133208807.html>

[103] Ibid.

[104] Barak Obama, President of the United States "Remarks by President Obama to the United Nations General Assembly (United Nations Headquarters, New York, 28 September 2015)

[105] In previous similar circumstances, as in the current situation, the significance of consent has been overshadowed by justifications of collective self-defence, which makes determining any past patterns of state behaviour difficult: see David Wippman "Military Intervention, Regional Organisations and Host-state Consent" (1996) 7 *Duke Journal of Comparative and International Law* 209 at 220;

addition, the person in question must be competent to manifest that will in the particular case involved."[106] With a number of powerful states withdrawing their recognition of Assad, and his precarious grip on effective control of Syrian territory, it is highly possible that Assad no longer retains enough authority to invite foreign intervention in Syria.

(B) CAN THE STATEMENTS ISSUED BY THE SYRIAN GOVERNMENT AMOUNT TO IMPLIED CONSENT?

International law does not mandate that the issue of the invitation must be explicit; consent can be "expressed or tacit, explicit or implicit, provided however, that it is clearly established."[107] This condition is reiterated in Article 20 of the ILC Draft Articles, which provides that "consent must be freely given and clearly established."[108] The reason for this requirement is obvious. Intervention of foreign forces is an exceptionally serious action and therefore "no uncertainty should be allowed to exist regarding the actual presentation of such a request by a duly constituted government."[109]

Prior to the commencement of Operation Inherent Resolve, the Syrian government publically stated, "any strike which is not coordinated with the government will be considered aggression." [110] This was subsequent to the United States rejection of Assad's offer of "coordinated action." [111] Such a statement fits neatly within Syria's right to limit and condition consent as they see fit. However, since the commencement of the strikes, Syrian protests have been conspicuously non-existent.[112] Further, some statements made by Syrian officials have indicated the possible amenability of Syria to the airstrikes. Ali Haider, the Syrian Minister for National Reconciliation, stated

[106] *Documents of the thirty-first session, Add. 1, Part 1,* [1979] Yearbook of the International Law Commission II, UN Doc A/CN.4/SER.A/1979 at 36
[107] Ibid. at 35
[108] Article 20, above n 89 at 146
[109] Report of the Special Committee on the Problem of Hungary, UN Doc A/3592 (1957) at [266]
[110] Ian Black and Dan Roberts "ISIS air strikes: Obama's plan condemned by Syria, Russia and Iran"(2014) The Guardian < http://www.theguardian.com/world/2014/sep/11/assad-moscow-tehran-condemn-obama-isis-air-strike-plan>
[111] Ryan Goodman "Taking the Weight off International Law: Has Syria Consented to United States Airstrikes?" (2014) Just Security < https://www.justsecurity.org/18665/weight-international-law-syria-consented-airstrikes/>
[112] Ibid.

that the airstrikes were "going in the right direction" because the government had been informed prior to their initiation and they did not target military bases or civilians.[113] Whether Haider has the authority to speak for the Syrian government is questionable and the United States government has denied informing Syrian officials of the airstrikes.[114] However the Syrian Foreign Minster, in his 2014 address to the General Assembly, appeared to some observers to imply approval of the airstrikes.[115] He was even more suggestive in a recent interview with the Associated Press, aligning the Assad regime with the United States-led coalition in the fight against ISIL, and denying "coordinated action" was necessary because the Assad government was satisfied with simply being informed of the strikes. [116] However in an interview early this year, Assad himself stated that as the coalition did not get permission prior to the commencement of the airstrikes, they were illegal.[117]

It seems unlikely that such disparate statements can meet the "clearly established" level of implied consent required by international law. Nonetheless, it does seem apparent that the Assad regime is in some ways tacitly acquiescing to the airstrikes targeting ISIL. Such partial consent cannot be used as the sole legal authority for the airstrikes, though it has potential to serve as a factor in a legal justification. [118] Thus the Assad regime's practical acquiescence could potentially be used by the coalition as a legal justification in combination with the more promulgated justification of collective self-defence, as explored in Part II.

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[113] Kinda Makieh "Exclusive: Syrian minister says U.S.-led airstrikes going in 'right direction' (2014) <http://www.reuters.com/article/2014/09/24/us-syria-crisis-minister-idUnited StatesKCN0HJ19S20140924>

[114] Sam Dagher, Maria Abi-Habib and Felicia Schwartz "Syria says U.S. Told It of Coming Airstrikes Against Islamic State: American Officials Deny the U.S. Told Syria of Impending Strikes" (2014) <http://www.wsj.com/articles/u-s-arab-allies-launch-airstrikes-against-islamic-state-targets-in-syria-1411467879; Jethro Mullen "Obama's Syria dilemma: Does hurting ISIS help al-Assad" (2014) <http://edition.cnn.com/2014/09/24/world/meast/syria-isis-airstrikes-assad/>

[115] United Nations "Victims of ISIL brutality 'waiting on us to act,' Syrian leader tells UN assembly" (2014) <http://www.un.org/apps/news/story.asp?NewsID=48940#.Vck0LhOqqko>. See also Goodman, above n 110

[116] Zeina Karam "Syrian Foreign Minister: The United States Said 'We Are Not After The Syrian Army' Before Airstrikes" (2014) >http://www.businessinsider.com/syrian-foreign-minister-the-us-said-we-are-not-after-the-syrian-army-before-airstrikes-2014-9?IR=T>

[117] Jonathan Tepperman "Syria's President Speaks: A Conversation With Bashar al-Assad" (2015) <https://www.foreignaffairs.com/interviews/2015-01-25/syrias-president-speaks>

[118] Nolte, above n 93 at [12]

A survey of the political situation indicates that the ambiguity of the acquiescence and the mixed messages from both Syria and the United States may be deliberate. Syria has good reason to encourage the airstrikes, as ISIL is a threatening faction in the struggle for control over Syria, and the bombing campaign may assist Assad to retain power.[119] On the other hand, while the United States has grudgingly accepted the airstrikes may be assisting Assad, this is very different from participating in "coordinated action."[120] By not claiming that Syria has consented to the bombing campaign, the airstrikes can take place under the smokescreen of confusion surrounding the plausible deniability of Syria's consent. The United States is able to target ISIL in Syria without appearing to collaborate with Assad, which would strengthen the legitimacy of his regime,[121] and Assad benefits as government troops are freed up to fight the Free Syrian Army.

(V) COLLECTIVE SELF-DEFENCE

Article 51 of the Charter of the United Nations states:

> *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.*

This provision enshrines the customary right of self-defence, and constitutes the principal exception to the prohibition on the use of force.[122] As such, it comes as little surprise that the language of self-defence has been invoked to justify the coalition

[119] Karam above n 115
[120] Kreß, above n 90
[121] Ibid.
[122] Christopher Greenwood "Self-Defence" *Max Planck Encyclopedia of Public International Law* (online ed.) at [2]

airstrikes in Syria. In a letter to the UN Secretary-General, Ban-ki Moon, Samantha Power, the U.S. Representative to the UN, stated:[123]

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

(A) IS A CLAIM OF COLLECTIVE SELF-DEFENCE JUSTIFIED?

The United States-led coalition has claimed the use of collective self-defence under Article 51 of the UN Charter to justify the prima facie breach of Article 2(4) of the UN Charter precipitated by the airstrikes. It is generally acknowledged that right of collective self-defence permits a victim state - Iraq in this instance - to request assistance in defending itself. The International Court of Justice (ICJ) in the *Nicaragua* case recognised this and delineated the bounds of collective self-defence by imposing three requirements: (1) the existence of a right to proceed in individual self-defence; (2) a declaration by the victim state that it has been subject to an armed attack; and (3) a public request for assistance from another state.[124] In a letter to the Security Council, dated 20 September 2014, Iraq declared itself subject to ongoing attacks as well as the threat of further attack from ISIL "safe havens" in Syria. It then explicitly requested assistance from an international coalition led by the United States.[125]

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[123] Permanent Rep. of the United States of America to the United Nations, Letter dated 23 September 2014, from the Permanent Rep. of the United States of America to the United Nations to the Secretary-General of the United Nations, U.N. Doc S/2014/695 (23 September 2014)

[124] Greenwood, "Self-Defence," above n 121 at [36], [37], [38]

[125] Letter from Permanent Rep. of Iraq to the President of the Security Council above n 91 ("As we noted in our earlier letter, ISIL has established a safe haven outside Iraq's borders that is a direct threat to the security of our people and territory. By establishing this safe haven, ISIL has secured for itself the ability to train for, plan, finance and carry out terrorist operations across our borders. The presence of this safe haven has made our borders impossible to defend and exposed our citizens to the threat of terrorist attacks. It is for these reasons that we, in accordance with international law and the relevant bilateral and multilateral agreements, and with due regard for complete national sovereignty and the Constitution, have requested the United States of America to lead international efforts to

(B) PRECONDITIONS AND LIMITATIONS OF THE RIGHT TO ACT IN SELF-DEFENCE

It is generally agreed that for the use of collective or individual self-defence to be legal under international law, it must: (1) be in response to an armed attack; (2) be necessary and proportionate to that armed attack (limitations which stem from international customary law); and (3) be reported to the Security Council, and cease when the Security Council takes measures to maintain international peace and security.[126] Nonetheless, the interpretation and application of these requirements divides international scholars worldwide. With regards to the ISIL situation, three particularly problematic issues arise:

1) Whether an armed attack may be perpetrated by a non-state actor, such as ISIL;
2) Whether the ISIL attacks in Iraq can be attributed to Syrian-based ISIL forces, and if not, whether an argument of anticipatory self-defence may justify the airstrikes; and,
3) Whether the coalition airstrikes are necessary and proportionate to armed attacks by Syrian-based ISIL forces.

(1) Can the Syrian-based ISIL attacks against Iraq constitute an "armed attack"?

Although the requirement of an "armed attack" is explicit in Article 51 of the Charter, no definition is provided. It first must be considered whether the nature and scale of the ISIL attacks can amount to an armed attack, and secondly whether an attack by a non-state actor such as ISIL allows for a right of self-defence to be taken against it in Syria.

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strike ISIL sites and military strongholds, with our express consent. The aim of such strikes is to end the constant threat to Iraq, protect Iraq's citizens and, ultimately, arm Iraqi forces and enable them to regain control of Iraq's borders.")

[126] Greenwood, "Self-Defence" above n 121 at [8]

(i) Do the attacks by ISIL reach the "armed attack" threshold?

The requirement that armed attacks reach a certain threshold of gravity originates from the ICJ ruling in *Nicaragua*. The Court held that use of force will not amount to an armed attack unless of a certain scale and effect, and contrasted this type of force with 'border skirmishes.'[127] It is self-evident that ISIL's military actions have crossed the *Nicaragua* threshold of "armed attack." As ISIL forces have captured large swaths of northern Iraq, mostly in the region of Anbar including key cities such as Ramadi and Mosul,[128] its actions certainly fulfill the scale and effect required by *Nicaragua*. Further, terrorist attacks by ISIL in Iraq are ongoing, leaving a trail of destruction and high levels of casualties. [129] Although not all of ISIL's attacks may reach the requisite scale and effect, many scholars have argued that a series of "pinprick" attacks may be accumulated and count together as an armed attack, should a distinctive pattern of behaviour become clear.[130]

(ii) Source of the armed attack

The predominant hurdle in establishing a right of self-defence against Syrian-based ISIL forces is the ongoing controversy regarding the use of self-defence against non-state actors. Despite ISIL's attacks in Iraq reaching the requisite threshold, any use of

[127] *Nicaragua above n 77* at 102; See also *Armed Activities* above n 92 at 223*; Oil Platforms (Islamic Republic of Iraq v United State of America*) [2003] ICJ Rep 4 at 191; *Wall Opinion* above n 77 at 194

[128] Al Jazeera "ISIL seizes control of Iraq's Ramadi" (2015) <http://www.aljazeera.com/news/2015/05/isil-overruns-iraqi-holdout-ramadi-150517142811552.html>; Al Jazeera "Iraqi forces clash with ISIL in push for Anbar" (2015) <http://www.aljazeera.com/news/2015/08/iraq-isil-anbar-150824075014717.html>

[129] Al Jazeera "ISIL claims responsibility for deadly Iraq attacks" (2015) <http://www.aljazeera.com/news/2015/08/iraq-baquba-attacks-150810180620487.html>; Al Jazeera "Deadly 'ISIL attacks' in Iraq's Fallujah and Baiji" (2015) <http://www.aljazeera.com/news/2015/08/deadly-isil-attacks-iraq-fallujah-baiji-150816123649326.html>; United Nations1368, News Centre "Violent attacks reported against civilians fleeing ISIL-controlled areas of Iraq- UN human rights office" (2015) <http://www.un.org/apps/news/story.asp?NewsID=51517#.Vd-FsROqqko>; Louisa Loveluck "Isil car bomb kills more than 100 Shia Iraqis celebrating end of Ramadan" (2015) <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/11748278/Isil-car-bomb-kills-more-than-100-Shia-Iraqis-celebrating-end-of-Ramadan.html>

[130] Yoram Dinstein *War, Aggression and Self-Defence* (5th ed, Cambridge University Press, Cambridge, 2011) at 182; Daniel Bethlehem "Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Non-State Actors" (2012) 106 A*merican Journal of International Law* 1 at 6. The ICJ has also implied that a series of incidents taken cumulatively could reach the threshold of an armed attack: *Oil Platforms* above n 126 at 192

force against ISIL bases in Syria in self-defence will necessarily violate the state sovereignty of the Syrian government, which is neither supporting the attacks nor acquiescing in ISIL's presence.

The traditional approach holds that unless the attacks can be attributed to the territorial state, the victim state has no right to respond in self-defence. ISIL has taken power in a vacuum largely uncontrolled by the Syrian government, and any attempt to attribute their actions to the Syrian government in order to fulfill the anachronistic standard conceived in *Nicaragua* is entirely inapposite. A new paradigm must therefore be considered in situations such as Syria where the government has no control over ISIL's attacks on Iraq.

(a) *The International Court of Justice's position of avoidance*

In the 1986 case of *Nicaragua,* the ICJ held that self-defence could be taken against armed attacks committed by non-state actors, but only when such attacks can be firmly attributed to the state. Thus the state must have "effective control" of the non-state actor, which in *Nicaragua* amounted to United States direction and control of the Contras.[131] It is quite clear that under this test no right of self-defence would exist against ISIL, as the Syrian government has absolutely no control over their actions and is militarily opposing their influence.

The "effective control" standard has been widely criticised.[132] In the *Tadic* case, the Appeals Chamber of the International Criminal Tribunal of the Former Yugoslavia (ICTY) accepted that a lower test of "overall control" would be acceptable for the conduct to be attributed to a state.[133] Yet in subsequent cases the ICJ has either refused to engage with the issue of non-state actors or has reverted to the *Nicaragua* "effective control" test. In the 2004 *Wall Opinion,* the majority simply noted that Article 51 applied between states, and as Israel did not impute the attacks to a state, Article 51

[131] Nicaragua above n 77 at 64. See also Antonio Cassese, "The Nicaragua and Tadic Judgments revisited in Light of the ICJ Judgment on Genocide in Bosnia" 18 *The European Journal of International Law* (2007) 649 at 653

[132] Elizabeth Wilmshurt *Principles of International Law on the Use of Force by States in Self-Defence (Chatham House Rules)* (ILP WP 05/01, Royal Institute of International Affairs, 2005) at 11

[133] *Prosecutor v Dusko Tadic (Appeal Judgment)* [1999] IT-94-1-A, International Criminal Tribunal for the former Yugoslavia at 47

had no relevance.[134] In the 2005 *Armed Activities* case, the ICJ majority determined that because the attacks on Uganda by armed groups could not be attributed to the Democratic Republic of Congo (DRC), no right of self-defence was available.[135] However the majority then went on to seemingly leave the door open as to "whether and under what conditions contemporary international law provides for a right of self-defense against large-scale attacks by irregular forces."[136] Yet, in the 2007 *Wall Opinion* the ICJ then backtracked from this slightly more open position. It rejected the "overall control" test as an unacceptable stretch of state responsibility and specifically referred to "effective control" in deciding that Serbia was responsible for the massacres at Srebrenica.[137]

The basis for the ICJ's lack of engagement with the issue of non-state actors is not easily discernable. Article 51 does not textually limit an armed attack to those made by states, and in the original customary law formulation of self-defence, originating in the *Caroline* case, it was a non-state actor which was responsible for the armed attack. The unworkability of the ICJ's position is reflected in the dissenting judgments of Judges Kooijmans and Simma in the *Armed Activities* case, who both expressly accepted a right of self-defence against non-state actors.[138] Additionally, the European Union made it clear in the General Assembly resolution adopting the *Wall Opinion* that it recognised Israel's right to respond in self-defence to a non-state actor, despite the opinion of the ICJ. [139]

(b) *Dealing with non-state actors within the bounds of the "attribution" paradigm*

Regardless of the anachronistic position of the ICJ, the international community has progressed to accept lower standards of attribution. Despite being specifically rejected in *Nicaragua,* there is widespread concurrence that a territorial state which "colludes"

[134] *Wall Opinion* above n 77 at 194;
[135] *Armed Activities* above n 92 at 223
[136] *Ibid.* at 223
[137] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 2007 at 210, 214
[138] *Armed Activities* above n 92, Sep. Opinion of Judge Simma at 337; Ibid., Sep. Opinion of Judge Kooijmans at 314
[139] European Union Delegation to the United Nations "EU Presidency Statement- The ICJ Resolution-Explanation of Vote" (2004) Europa <http://eu-un.europa.eu/articles/en/article_3693_en.htm> ("The EU will not conceal the fact that reservations exist on certain paragraphs of the courts advisory opinion. We recognise Israel's security concerns and its right to act in SD.")

with a non-state actor to commit armed attacks has no foundation to protest the use of self-defence in its territory. [140]

Subsequent to the September 11 2001 attacks, the attribution test has been broadened further to include a legitimate right to self-defence when the territorial state is "unwilling or unable" to obviate non-state actor attacks emanating from its territory.[141] This expression encompasses the situation where a government (known as the "harbouring state"[142]) is unwilling to prevent the armed attacks originating in its territory, without positively supporting the non-state actor.[143]

For example, the United States made it explicit that the justification for its use of force in self-defence against Afghanistan in 2001 was the Taliban's acquiescence to Al-Qaeda's activities on its territory. [144] Vitally, this rationalisation was bolstered by the immediate adoption of two Security Council Resolutions that specifically referenced self-defence in the context of the attacks. [145] Both the North Atlantic Treaty Organisation (NATO) and the Organisation of American States (OAS) swiftly followed suit by declaring their support for the United States to exercise its right to self-defence.[146]

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[140] This standard of attribution is accepted even by more conservative theorists, such as Christian Tams, who view such collusion as analogous to aiding and abetting on a municipal scale: Christian J. Tams "The Use of Force Against Terrorists" 20 (2009) *The European Journal of International Law* 359 at 385; See also Bethlehem above n 130 at 7

[141] Chatham House Rules above n 132 at 12 (where a state is unwilling or unable to assert control over a terrorist organisation located in its territory, the state which is a victim of the terrorist attacks would, as a last resort, be permitted to act in self-defence against the terrorist organisation in the state which it is located); Letter from Permanent Rep. of the United States, 23 September 2014, above n 122

[142] Bethlehem, above n 130 at 7.

[143] Ibid.

[144] Permanent Representative of the United States of America to the United Nations Security Council, Letter dated 7 September 2001 addresses to the President of the Security Council, UN Doc S/2001/946 (7 September 2001) ("the attacks on Sept 11 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to the allow parts of Afghanistan that it controls to be used by this organisation as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to chance its policy.")

[145] SC Res 1368, UN Doc SC/RES/1368 (2001); SC Res 1373, UN Doc SC/RES/1373 (2001). See generally Chatham House Rules above n 132 at 12

[146] North Atlantic Council "Statement of the North Atlantic Council" (press release, PR/CP(2001)122, 11 September 2001; *Terrorist Threat to the Americas* OAS Res. RC.24/RES.1/01 (21 September, 2001)

This "harbouring state" standard was not unknown in international law before the September 11 attacks. It was foreshadowed in the 1970 General Assembly's Friendly Relations Declaration, and state practice in the ten years hitherto to September 11 indicates willingness on behalf of victim states to respond with force to terrorist attacks and justify their actions based on self-defence.[147] These justifications were tacitly accepted by the international community. [148]

However, Assad is not unwilling to take action against ISIL. Although the United States rejected Assad's offer of coordinated action, the Syrian government is independently engaged in combat with ISIL. [149] Therefore, it is difficult to raise an argument that Assad is "unwilling" to prevent ISIL attacks on Iraq. Instead, the coalition must rely on the "unable" limb of the expanded attribution test in order to justify acting in self-defence in Syrian territory. A state in this situation has been described as a "reluctant host," and self-defence is available when there is a reasonable and objective basis of assessing that the territorial state is unable to prevent armed attacks originating in its territory. [150]

Of all the standards of attribution, the "unable" test remains the most controversial. Nonetheless, there has been a surge in non-state actors with the capacity and the will to commit extreme acts of force. At international law, to deny a state the right to defend itself against a large-scale attack simply because of its source is entirely unreasonable. Invocation of the "unable" standard is not unprecedented. In 2000 and 2004 Russia asserted a right to self-defence against Chechen terrorist bases in

[147] In the mid-1990's Iran argued that its use of force against the bases of Mujahedin e-Khalq Organisation in Iraq was justified through self-defence. A few years later in 1998, the United States invoked Article 51 to legitimise its bombing of a Sudanese pharmaceutical plant and Afghani terrorist base in response to attacks on its embassies. Recently in 2008, Columbian forces pursued FARC rebels into Ecuador, and defended its actions on the basis of Article 51: Tams above n 140 at 379, 380

[148] Ibid. at 367

[149] Associated Press in Beirut "Syria offers to help fight Isis but warns against unilateral airstrikes" (2015) The Guardian <http://www.theguardian.com/world/2014/aug/26/syria-offers-to-help-fight-isis-but-warns-against-unilateral-air-strikes>; Al Jazeera "Syrian army and Kurdish forces fight ISIL on two fronts" (2015) <http://www.aljazeera.com/news/2015/03/syrian-army-kurdish-forces-fight-isil-fronts-150302181423602.html>; Magdy Samaan and Louisa Loveluck "Isil launched deadly counter-offensive in Syria with attack on Kobane" (2015) The Telegraph <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/11698975/Isil-launches-deadly-counter-offensive-in-Syria-with-attack-on-Kobane.html>

[150] Bethlehem above n 130 at 7

Georgia, based on Georgia's inability to prevent terrorist attacks originating in its territory.[151] Aside from limited condemnation by the United States and the Parliamentary Council of Europe, the international community largely acquiesced to the justification of self-defence.[152] In 2006, Israel launched an attack in Lebanon against Hezbollah terrorists, justifying its actions on Lebanon's "ineptitude and inaction."[153] Despite no suggestion of a connection between Lebanon and Hezbollah, the response of the Security Council was equivocal and Israel received explicit support from the G8 and the United States.[154] Finally, the 2011 killing of Osama bin Laden in Pakistan met with mostly international support. Putting aside the questions surrounding the Pakistani authorities knowledge of bin Laden's presence, a leaked Pakistani report condemned the government for "gross incompetence," suggesting an inability to deal with the threat.[155]

Although it is possible that the right of self-defence could be justified in Syria based on Assad's inability to prevent ISIL attacks in Iraq, including Assad in the analysis of a right to self-defence in these circumstances is somewhat specious. As considered in Part I, ISIL possesses some attributes of a state, albeit not enough to qualify for legal statehood. Its control, although fluid, extends over approximately half of Syria's territory.[156] Once it has been proved that a state has lost authority over a portion of its territory, to require that armed attacks are attributed to that state to justify self-defence

[151] Russian Federation President V. V. Putin, Annex to Letter Dated 11 September 2002 from the Permanent Rep. of the Russian Federation, addressed to the United Nations addressed to the Secretary-General, UN Doc. S/2002/1012 (11 September 2002) at 2 ("[use of force would be unnecessary if Georgia] "actually controls its own territory, carries out international obligations in combating international terrorism and prevents possible attacks…")
[152] Theresa Reinold "State Weakness, Irregular Warfare, and the Right to Self-Defense Post 9/11" (2011) 105 *The American Journal of International Law* 244 at 257
[153] Tom Ruys "Crossing the thin blue line: an inquiry into Israel's recourse to self-defense against Hezbollah" (2007) 43 *Stanford Journal of International Law* 265 at 269, 284
[154] Lewis Mills "Bereft of Life: The Charter Prohibition on the Use of Force, Non-State Actors and the Place of the International Court of Justice" (2011) 9 *New Zealand Yearbook of International Law* 37 at 50
[155] Asad Hashim "Leaked Report shows Bin Laden's 'hidden life' (2013) Al Jazeera <http://web.archive.org/web/20140430164359/http://www.aljazeera.com/news/asia/2013/07/20137813412615531.html>
[156] Al Jazeera "ISIL 'controls half' of Syria's land area (2015) <http://www.aljazeera.com/news/2015/06/isil-controls-syria-land-area-150601131558568.html>

is unnecessary and absurd. [157] When non-state actors control territory to the extent of ISIL in Syria, the territorial integrity of the host state has already been significantly compromised. As such, the use of force by a victim state in self-defence should not be viewed as a transgression of the sovereignty of the host state. Therefore, it is unnecessary to attempt to attribute ISIL's attacks on Syria in order to justify a response in self-defence against ISIL. [158]

Self-defence is an inherent right and it cannot be that this right is forestalled by a claim to sovereign inviolability when the state has lost authority in the area the non-state actor is conducting armed attacks from. Further, if ISIL claims to pursue statehood, then logically it must also be compelled to adhere to the prohibition on the use of force, and face the consequences when it does not.

In such circumstances, the question becomes whether the non-state actor has requisite control of the territory to nullify any complaint of a breach of sovereignty by the territorial state against the use of self-defence by the victim state. As ISIL has effectively constituted a de facto government in the Syrian regions under its control, to the exclusion of the Syrian government, it is clear its authority has reached such a threshold. Therefore rather than straining the attribution test to allow self-defence in situations such as this, a right of self-defence may be established by virtue of an armed attack. Consequentially the focus can properly shift to one of proportionality and necessity, in considering whether the coalition airstrikes remain within the legal bounds of self-defence.

(3) *Can ISIL attacks in Iraq be properly attributed to Syrian-based ISIL groups?*

The above analysis assumes that the ISIL attacks in Iraq can be attributed to Syrian-based ISIL cells, but no evidence exists to corroborate this assumption. As pointed out by Professor Don Rothwell, a right of self-defence would be plausible with regards to "[ISIL in Syria] where it could be shown it was intent on striking at Iraqis or Iraqi territory but not [ISIL] operations entirely within Syria which were aimed at other

[157] Stephanie A. Barbour and Zoe A. Salzman "The Tangled Web: The Right of Self-Defense Against Non-State Actors in the *Armed Activities* Case" (2008) 40 *NYU Journal of International Law and Politics* 53 at 78
[158] Ibid. at 84

groups in Syria."[159] In the latter scenario, no armed attack is emanating from Syria, and thus theoretically, no right of self-defence would be available against Syrian-based ISIL forces that were only participating in armed attacks within Syria.

In reality, this is a near impossible distinction to make, as ISIL does not differentiate between its forces in Iraq and Syria. It views the area under its control as a unified caliphate and in fact has physically destroyed the boundary between the parts of Syria and Iraq that are under their control.[160] As such, it is highly likely that the movement and coordination between the cells is very fluid. A more realistic perspective is to impute the attacks in Iraq to the ISIL forces of Iraq and Syria, meaning Iraq has the right to respond domestically against ISIL forces based in Iraq and in self-defence against ISIL forces based in Syria.

(d) Anticipatory self-defence

Nevertheless, the coalition does distinguish between Iraqi and Syrian ISIL forces. As such, it has, in part, justified the airstrikes on the *threat* Syrian-based ISIL forces pose to Iraq. [161] On this account, the ongoing attacks in Iraq are predominantly attributed to Iraqi ISIL forces, while Iraq and the coalition claim the right to respond in *anticipatory* self-defence to the threat posed by Syrian ISIL forces.

A right of anticipatory self-defence permits a state to defend itself against an "imminent" attack rather than haplessly delaying self-defence until an armed attack has actually occurred. This doctrine is not without its critics. A positivist perspective maintains that Article 51 of the UN Charter explicitly limits self-defence to "when an attack occurs."[162] However a realist approach takes a more pragmatic view, which has

[159] John Kerin "Julie Bishop claims Syrian air strikes justified as self-defence of Iraq" (2015) Australian Financial Review <http://www.afr.com/news/politics/julie-bishop-insists-syrian-air-strikes-have-legal-backing-20150823-gj5kf6>
[160] Mushreq Abbas "ISIS erases Iraq-Syria border" (2014) Al-Monitor < http://www.al-monitor.com/pulse/security/2014/06/iraq-isis-control-mosul.html#>; BBC "ISIS rebels declare 'Islamic State' in Iraq and Syria' (2014) < http://www.bbc.com/news/world-middle-east-28082962>
[161] The 23 September letter to the UN also refers to the "threat" of such attacks and the "training, planning and financing" of such attacks, all of which are preliminary measures to an armed attack occurring: Letter from Permanent Rep. of the United States, above n 122
[162] Hans Kelsen *The Law of the United Nations* (2nd ed. London, Stevens and Sons, 1951) at 913-915; Dinstein above n 129 at 172

been accepted by the United Nations and much of the international community.[163] It is entirely unrealistic to expect states to await physical attack when modern technology allows them to anticipate a threat of attack.[164] Thus, Article 51 of the UN Charter should not be interpreted so that states must first suffer an armed attack before they may exercise self-defence.[165] Such a paradoxical pre-condition to the exercise of self-defence would only lead to states moving beyond international law in order to defend themselves.

The pre-conditions of a right to anticipatory self-defence remain nebulous and in flux. The original criterion of "imminence" was established by the 1837 *Caroline* case, where it was accepted that self-defence may be used prior to an armed attack when the threat of attack is "instant, overwhelming, leaving no choice of means and no moment for deliberation."[166] Yet in a contemporary context, the ongoing and widely promulgated threats of terrorist groups such as ISIL and more sophisticated methods of gathering information, render the *Caroline* formulation of "imminence" too restrictive. A state under threat need not wait until an attack is almost upon them to act; rather a state may also take into account the wider circumstances of the threat.[167] As well as its nature and immediacy, the probability of attack, likely scale of an attack, the geographical proximity of the attacker, and the damage likely to result may also be examined.[168] This formulation angles more towards whether the attack is *anticipated*, rather than whether it is *imminent*.

[163] High-Level Panel on Threats, Challenges and Change "A more secure world; Our shared responsibility" (United Nations, 2004) at [188]; United Nations Secretary- General *In larger freedom: towards development, security and human rights for all* UN Doc A/59/2005 (21 March 2005) at [124] ("Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened. Where threats are not imminent but latent, the Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security."); (21 April 2004) 660 GBPD HL col. 371
[164] Chatham House Rules above n 132 at 5
[165] Murray Colin Alder *The Inherent Right of Self-Defense in International Law* (Dordrecht, Springer, 2013) at 101
[166] Greenwood, Self-Defence above n 121 at [51]
[167] Ibid.; Chatham House Rules above n 132 at 9
[168] Chatham House Rules above n 132 at 8

However the elasticity of self-defence may only stretch so far before it transforms into a poorly constituted camouflage for naked aggression.[169] A clear and well-evidenced threat of armed attack must still exist, and anticipatory self-defence must only take place in good faith.[170] In the context of non-state actors, such caution is warranted, as the potential for anticipatory self-defence to cloak "opportunistic interventions" is entirely plausible.[171]

ISIL has been conducting ongoing, large-scale and bloody attacks on both Syrian and Iraqi territory, which appear unremitting given al-Baghdadi's declaration of the creation of an Islamic state in the territories of Iraq and Syria.[172] Syria neighbours Iraq and Iraq's capacity to defend much of its borders has been completely eroded, allowing for free movement between ISIL-controlled Syria and Iraq. This increases the likelihood that Syrian-based ISIL forces will be able to conduct armed attacks against Iraqi territory. Iraq also considers ISIL "safe-havens" in Syria a serious threat to its population and borders, as evidenced in their letter to the Security Council in September 2014.[173] This is unsurprising given ISIL's declared objective of establishing an Islamic caliphate in Iraq and Syria. Considering such demonstrable evidence of a threat from Syrian-based ISIL forces, it is certainly arguable that a right to act in anticipatory collective self-defence exists.

(2) Necessity and proportionality

The requirements of necessity and proportionality govern the exercise of the right to self-defence.[174] Necessity mandates that all peaceful means have been exhausted, leaving the use of force as the last alternative to avert an armed attack.[175] When the use of force in self-defence does take place, proportionality then limits the force used, to what is necessary to avoid or end the attack.[176]

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[169] Leo Van den hole "Anticipatory Self-Defence Under International Law" (2003) 19 *American University International Law Review* 69 at 106
[170] Ibid.,; Chatham House Rules above n 132 at 5
[171] Jackson Nyamuya Magotoa *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* (Ashgate Publishing Ltd, Hampshire, 2005) at 131.
[172] Al Jazeera, Sunni rebels declare new 'Islamic caliphate' above n 1
[173] Permanent Rep. of Iraq, Letter dated 20 September, 2014 above n 91
[174] *Legality of the Threat or Use of Nuclear Weapons [Advisory Opinion]* [1996] ICJ Rep 226 at 245; *Armed Activities* above n 92 at 223); *Nicaragua* above n 77 at 94
[175] Chatham House Rules above n 132 at 7
[176] Ibid. at 10

As of August 20 2015, the United States-led coalition had conducted 2,381 airstrikes in Syria.[177] The United States Department of Defense cites "other targets" as those most likely to be struck followed by "buildings" and "fighting positions."[178] Its list of daily updates makes it clear that the strikes are exclusively in the areas of Al Hasakah, Al Hawl, Ar Raqqah, Washiyah, Ayn Isa, Kobani and Aleppo, which are all areas under ISIL control or currently being contested for control.[179] While the United States Central Command (CENTCOM) has reported 15,000 ISIL fighters dead, it has only confirmed the deaths of two civilians.[180]

(i) Necessity

An analysis of necessity applicable specifically to non-state actors requires that measures of law enforcement would be insufficient and no other means of meeting the attack exists.[181] As ISIL publically rejects peace as a matter of principle,[182] it seems highly unlikely that ISIL would ever agree to any form of negotiations or peaceful means of ending the conflict. Furthermore, given that ISIL quasi-governs the territory under its control, there is no means of law enforcement available to prevent armed attacks or avert threatened attacks. It is also important to consider what the victim state is entitled to achieve.[183] In this case, Iraq would not only be permitted to halt attacks by ISIL but also to recover the territory under its control. Therefore, it is quite clear that military force, although a stop-gap measure, is necessary to repel ISIL's armed attacks.

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[177] United States Department of Defense "Operation Inherent Resolve" <http://www.defense.gov/News/Special-Reports/0814_Inherent-Resolve>
[178] Ibid.
[179] Ibid.; BBC "Battle for Iraq and Syria in maps" (2015) <http://www.bbc.com/news/world-middle-east-27838034>
[180] Chris Woods "United States-led airstrikes in Syria: Only two civilian deaths have been admitted to-that would be extraordinary, if it were true" (2015) Independent <http://www.independent.co.uk/voices/comment/usled-airstrikes-in-syria-only-two-civilian-deaths-have-been-officially-recognised--that-would-be-extraordinary-if-it-were-true-10438013.html>; Chris Woods *Cause for Concern: Civilians Killed in Coalition Strikes* (Airwars, 2014) at 14
[181] Chatham House Rules above n 132 at 13
[182] Graeme Wood "What ISIS Really Wants" (2015) The Atlantic <http://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/>
[183] Greenwood, Self-Defence above n 121 at [27]

(ii) Proportionality

Self-defence is not a punitive measure. When a state is acting in self-defence, it should not aim to use force equal to the harm suffered but instead proportionate to the threat faced. [184] ISIL has been perpetrating large-scale attacks within Iraq, as well as controlling a significant portion of Iraq's territory. Thus there is scope for a comprehensive yet proportionate response in collective self-defence to remedy this threat.

The coalition airstrikes have been geographically limited to territory under ISIL's control, indicating an initial consideration of a proportionate response to the threat posed by ISIL.[185] Further, on the basis of the information provided by CENTCOM it would seem the airstrikes are even further limited to specifically target ISIL bases, in a way that minimises civilian casualties.[186]

However, reports from independent monitoring groups cast doubt on how precise the airstrikes really are. Over the past eleven months, 200- 350 civilian deaths have been attributed to the coalition airstrikes. [187] There have also been reports of incidents causing mass casualties, including one on April 30, 2015 where sixty-four civilians allegedly died in a coalition airstrike.[188] Such figures diverge significantly from the

[184] For example, in the *Oil Platforms* case, the destruction of Iranian vessels and aircraft and deaths of a number of their crew, was viewed as disproportionate to the mining of a single warship: *Oil Platforms* above n 126 at 198; In the *Armed Activities* case the occupation of towns many kilometres from Uganda's border was also viewed as disproportionate to the trans-border attacks perpetrated by the rebels: *Armed Activities* above n 92 at 223. See also Chatham House Rules above n 132 at 10

[185] Greenwood, Self-Defence above n 121 at [29]; United State Dept. of Defense "Operation Inherent Resolve" above n 177

[186] When Turkey invaded Iraq in response to attacks from PKK members, it went to great lengths to limit its response to terrorist infrastructure, which in part contributed to the international community's general acquiescence to its use of force: Reinold above n 152 at 272; Lieutenant General John W. Hesterman "Department of Defense Press Briefing by Lt. Gen Hesterman Via Telephone from the Combined Air and Space Operations Center, Southwest Asia in the Pentagon Press Briefing Room" (2015) United States Department of Defense <http://www.defense.gov/News/News-Transcripts/Article/607056>

[187] Woods, *Cause for Concern* above n 180 at 14; Syrian Network for Human Rights "International Coalition Aviation Killed 225 Civilians, including 65 Children and 37 Women" (2015) <http://sn4hr.org/blog/2015/08/11/10637/

[188] Woods, *Cause for Concern* above n 180 at 16

two casualties conceded by the coalition. In addition, only Canada has regularly reported the location of its attacks.[189]

A high rate of civilian casualties and the proportionate use of self-defence are not necessarily legally irreconcilable. It has been reported that ISIL deliberately places its military bases in civilian areas in an attempt to prevent them being targeted, which the International Committee of the Red Cross (ICRC) considers illegal under customary international humanitarian law.[190] Under international humanitarian law, the principle of distinction requires a party to take all reasonable steps to ensure targets are military rather than civilian, including cases where armed groups are utilising human shields. However, international humanitarian law and the law regarding self-defence are mutually exclusive. Therefore, the principle of distinction and the number of civilian casualties does not affect an assessment of proportionality under the law of self-defence.

Nonetheless, the absence of accurate and transparent reporting by the coalition forces is a source of concern. On one hand, the barbaric and inhumane acts of ISIL far outweigh incidental civilian casualties caused by the airstrikes. On the other, a failure to conscientiously record and report the darker side of the airstrikes casts a shadow over a legitimate assertion of self-defence. Although accurate targeting may be near impossible, it has been reported that only 25% of coalition airstrikes in Syria are pre-planned.[191] If the coalition wishes to invoke the right of collective self-defence, they must also bear the burden of demonstrating they have remained within the legal boundaries.

(3) Report to the Security Council

Article 51 imposes two additional obligations on states acting in self-defence. First, states must report their actions to the Security Council and, secondly, use of force in

[189] Woods "United States-led airstrikes in Syria" above n 180; Louise Loveluck "Hundreds of civilians killed by coalition air strikes against Isil in Syria and Iraq" (2015) <http://www.telegraph.co.uk/news/worldnews/islamic-state/11779993/Hundreds-of-civilians-killed-by-coalition-air-strikes-against-Isil-in-Syria-and-Iraq.html>
[190] International Committee of the Red Cross "Rule 97. Human Shields" <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule97>; Emmerson above n 16 at [51]
[191] Emmerson above n 16 at [52]

self-defence must cease when the Security Council takes measures necessary to maintain international peace and security. This requirement is not at issue. The United States reported their actions to the Security Council in a letter dated 23 September 2014,[192] followed by the UK on 26 November 2014,[193] and Australia on 9 September 2015.[194] Additionally, the Security Council has yet to take measures necessary to restore international peace and security.[195] Although the Security Council has resolved to limit the financing of ISIL as well as prohibit states from supporting it, such action does not supplant a victim state's entitlement to self-defence. [196]

IV. HUMANITARIAN INTERVENTION

The paralysis of the Security Council, as at other points in history where P5 national interests conflict with an obligation to intervene, has revived discussion of humanitarian intervention as an exception to the prohibition on the use of force in Syria.[197] However, humanitarian intervention is by no means an established or accepted exception to Article 2(4) of the UN Charter. Its controversy stems from an underlying conflict between "setting dangerous precedents for future interventions without clear criteria to decide who might invoke those precedents and in what circumstances,"[198] and maintaining the credibility of international law in the face of mass atrocities.

[192] Permanent Rep. of the United States, Letter dated 23 September, 2014 above n 122
[193] Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the United Nations, Letters dated 25 November, 2015 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland addressed to the Secretary-General and the President of the Security Council, UN Doc S/2014/851 (25 November 2015)
[194] Permanent Rep. of Australia to the United Nations, Letter dated 9 September 2015 from the Permanent Rep. of Australia to the United Nations addressed to the President of the Security Council. UN Doc S/2015/693 (9 September, 2015)
[195] See Part 2 (III) Exception One: Authorisation by the Security Council
[196] Thomas M Franck "Terrorism and the Right of Self-Defense" (2001) 95 *The American Journal of International Law* 839, 841
[197] Louise Arimatsu and Michael N. Schmitt "Attacking "Islamic State" and the Khorasan Group: Surveying the International Law Landscape" 53 *Columbia Journal of Transnational Law* (2014) 1 at 25
[198] United Nations Secretary-General, *We The Peoples*: *The Role of the United Nations in the 21st Century* UN Doc A/54/PV.4 (20 September, 1999) at 2

(A) DEFINITION

No precise definition of unilateral humanitarian intervention exists, but it can be roughly expressed as "the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending fundamental human rights or abuses of individuals other than its own citizens, without the permission of the state within whose territory force is applied." [199] Unilateral humanitarian intervention also occurs without Security Council authorisation.

It is worth noting that humanitarian intervention is a different concept to its more recent cousin, the Responsibility to Protect (R2P), as R2P necessitates Security Council authorisation. However, the theory developed under the auspices of R2P, of a state's responsibility to protect its population, is relevant to a consideration of humanitarian intervention in the situation where Security Council authorisation is not forthcoming. Thus, when a state is either unable or unwilling to take action to protect its population, humanitarian intervention permits another state or group of states to intervene to resolve a humanitarian crisis. The territorial state has abdicated its responsibility to protect and therefore this responsibility reverts to the international community. [200]

(B) LEGALITY OF HUMANITARIAN INTERVENTION

For humanitarian intervention to be accepted as an exception to the prohibition on the use of force, it must exist as a norm either under an international treaty, or as a rule of international customary law.[201]

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[199] J.L Holzgrefe "The humanitarian intervention debate" in J.L Holzgrefe et al (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press, Cambridge, 2003) 15 at 18

[200] International Commission on Intervention and State Sovereignty *The Responsibility to Protect* (International Development Research Centre, Ottowa, 2001) at 17. See also Annex to Letter from the Rt. Hon Hugh Robertson to the Rt Hon Sir Richard Ottaway "Further Supplementary Written Evidence from the Rt Hon Hugh Robertson MP, Minister of State, Foreign and Commonwealth Office: humanitarian intervention and the responsibility to protect" (14 January 2014)

[201] International norms are binding if they are incorporated in (a) an international convention, whether general or particular, establishing rules expressly recognised by the state; (b) international custom as evidence of a general practice accepted as law: Statute of the International Court of Justice 1956 (opened for signature 26 June 1945, entered into force 24 October 1945), art 38(1)

(1) A right to humanitarian intervention and the UN Charter

Prior to the enactment of the UN Charter, a customary right to humanitarian intervention existed. Recourse to war, although a last resort, was considered within the rights of a state, and most publicists admitted that ending or averting a humanitarian crisis was a legitimate reason for initiating a war. [202]

Regardless of whether a customary right to intervention existed pre-1945, an assertion that such a right survived the enactment of the UN Charter is remote. [203] Article 2(4) of the UN Charter clearly mandates against the use of force, and is bolstered by Article 2(7), which prohibits intervention. [204] Although Article 42 of the UN Charter permits the Security Council to authorise the use of force in response to any threat to or breach of the peace, or act of aggression, as determined under Article 39, it does not permit unilateral intervention.

(2) Does a customary right to humanitarian intervention exist post-UN Charter?

Some attempts have been made to reconcile a pre-existing customary right of humanitarian intervention with the UN Charter. It has been claimed that the phrase "in any other manner inconsistent with the purpose of the United Nations" in Article 2(4) of the UN Charter permits interventions to prevent large-scale human rights violations, as protection of human rights is a primary purpose of the UN. [205] Further,

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[202] Ian Brownlie, "International Law and the Use of Force by States' Revisited" (2002) 1 *Chinese Journal of International Law* 1 at 2

[203] Holzgrefe above n 199 at 47; Christopher Greenwood "Is there a right of humanitarian intervention" (1993) 49 *The World Today* 34 at 34

[204] Charter of the United Nations, art 2(4) ("The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles, (4) 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"); Charter of the United Nations, art 2(7) ("The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles (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 Vll")

[205] Charter of the United Nations, art 1(3) ("the purposes of the United Nations are…[t]o achieve international cooperation in… encouraging respect for human rights and for

as humanitarian intervention is not intended to culminate in territorial or political conquest, it is argued that Article 2(4) of the UN Charter does not prohibit it.[206] However the *travaux préparatoires* of the UN Charter are quite explicit that Article 2(4) was intended to capture as broad a variety of force as possible. As such, interpretations that qualify the types of force that Article 2(4) of UN Charter is applicable to are unconvincing.[207]

However, it is possible that a new norm of humanitarian intervention has emerged post-1945 as an exception to Articles 2(4) and 2(7) of the UN charter. The atrophying effect of the Security Council veto on confronting situations of mass atrocities, the rise of non-international conflicts post-Cold War and the emergence of R2P as a principle are all strands of evidence that have primed the international stage for an incipient customary rule of humanitarian intervention.

For a new norm of humanitarian intervention to have emerged post-Charter, both state practice and *opinio juris* must exist.[208] Further, because the prohibition on the use of force is considered a peremptory norm, a right of humanitarian intervention must also be *jus cogens* in order to qualify as an exception to Article 2(4).[209]

Until the 1990s a claim to the right to humanitarian intervention was extremely tenuous. For example, although the outcomes of the 1971 Indian invasion of East Pakistan and the 1978 invasion of Cambodia by Vietnam had some positive impact on

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fundamental freedoms without distinction as to race, sex, language or religion."); Charter of the United Nations, art 55 ("The United Nations shall promote…universal respect for, and observance of, human rights and fundamental freedoms for all"); Charter of the United Nations, art 56 ("all members shall pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55."). See also Holzgrefe above n 199 at 37

[206] Julius Stone, *Aggression and World Order: A Critique of the United Nations Theories of Aggression* (Stevens, London, 1958) at 95; Holzgrefe above n 199 at 37

[207] Ian Hurd "Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World" *Ethics and International Affairs* 25 (2011) 293 at 298; Stone, above n 206 at 95; Holzgrefe above n 199 at 37

[208] Statute of the International Court of Justice, art 38(1)(b); *Nicaragua* above n 77 at 108 ("[e]ither the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.")

[209] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980), art 53 (identifies a peremptory norm as one which is "accepted and recognised by the international community…as a norm from which no derogation is permitted.")

the human rights situation in each country, neither India nor Cambodia justified their intervention on humanitarian grounds.[210] Further the international community rejected outright the possibility of humanitarian intervention as the basis for these invasions.[211]

However, the 1990's brought an increased reliance on humanitarian intervention as a justification for the use of force. Relying on this humanitarian rationale, the Economic Community of West African States (ECOWAS) intervened in Liberia in 1990, and Sierra Leone in 1997 without Security Council authorisation.[212] These actions met with almost no opposition from the international community, and were both retrospectively endorsed by the Security Council.[213] One year later, the UK, France and the United States intervened in northern Iraq, followed by a subsequent intervention in southern Iraq in 1992 to protect the civilian population.[214] These actions were expressly defended by the UK on humanitarian grounds and received widespread international support.[215]

Yet such examples by no means indicate consistent state practice sufficient to amount to a customary right. A variety of recent examples exist to demonstrate states failing to respond to large-scale humanitarian catastrophes.[216] Moreover, the 1999 NATO intervention in Kosovo demonstrates the profound uncertainty surrounding a right to humanitarian intervention.

The international response to the use of force in Kosovo was essentially equivocal. Commentators generally agreed that no legal basis existed for the strikes, but sidestepped terming the intervention illegal.[217] Although a resolution authorising the

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[210] Holzgrefe above n 199 at 48
[211] Greenwood "Is there a right of humanitarian intervention" above n 203 at 35
[212] Christopher Greenwood "International law and the NATO Intervention in Kosovo" 49 (2000) *International and Comparative Law Quarterly* 926 at 929
[213] Ibid.
[214] Ibid. at 930
[215] Ibid.
[216] For example, the massacre of several hundred thousand Chinese in Indonesia in the 1960s; the killing and forced starvation of almost half a mill Ibos in Nigeria in 1966-70; slaughter and forced starvation on over 1 mill Black Christians by Sudanese govt since late 1960s: Holzgrefe above n 199 at 47
[217] Michael Byers and Simon Chesterman "Changing the rules about rules? Unilateral humanitarian intervention and the future of international law" in J.L Holzgrefe et al. (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press, Cambridge, 2003) 177 at 177; Brownlie above n 202 at 16; Thomas M. Franck *Recourse to Force: State Action Against Threats and Armed Attack* (Cambridge: Cambridge

use of force was blocked by the Russian veto, a Russian-sponsored Security Council resolution condemning the airstrikes was defeated 12:3 by a coalition that included widespread geographical support.[218] Even NATO avoided justifying their actions on the basis of humanitarian intervention, as only Belgium relied on this ground during the ICJ consideration of the intervention. [219]

The mainstream interpretation of the NATO intervention is that it was illegal, but also morally permissible in the circumstances. [220] Therefore in cases of extreme necessity, when a meticulous adherence to the prohibition on the use of force would allow for mass atrocities, the Kosovo precedent indicates that the international community may tolerate a humanitarian intervention. [221]

As such, a customary right to humanitarian intervention cannot be said to exist, but cannot be ruled out either. In very precise and limited circumstances, the international community may accept, or at least tolerate, a humanitarian intervention.[222]

(C) A POSSIBLE FRAMEWORK

The issue with such a vague conception of humanitarian intervention it that it is unclear when such an intervention will be tolerated or accepted by the international community. The following requirements attempt to delineate when an alleged humanitarian intervention will be treated as such by the international community: [223]

University Press, 2002) at 170; Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects," (1999) 10 *European Journal of International Law* 1 at 11

[218] UNSCOR 54th Sess, 3989th mtg, UN Doc S/PV.3989 (26 March 1999) at 6

[219] *Legality of Use of Force (Provisional Measures)* [1999] ICJ, pleadings of Belgium, 10 May 1999, CR 99/15

[220] The Independent Commission on Kosovo concluded that NATO's action, while not strictly legal, was legitimate. Called for applicable international law to be interpreted to make it more congruent with "an international moral consensus" so to bridge the gap between morality and legitimacy: *Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford University Press, Oxford, 200) at 4, 163-98; Thomas M. Franck "Interpretation and change in the law of humanitarian intervention" in J.L Holzgrefe et al. (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press, Cambridge, 2003) 204 at 216

[221] Ibid. at 214

[222] Greenwood, International law and the NATO Intervention in Kosovo above n 212 at 931

[223] Vaughan Lowe and Antonios Tzanakopoulos "Humanitarian Intervention" *Max Planck Encyclopedia of Public International Law* (online ed.) at [39]. See also Franck, Interpretation

(1) Convincing evidence of a humanitarian emergency;

(2) The inability or unwillingness of the territorial state to resolve the humanitarian crisis;

(3) All other remedies, including appeals to the Security Council have been exhausted, and;

(4) The intervention is undertaken for exclusively humanitarian motives.

The final condition can be distilled from a collation of the international reaction to interventions over the last fifty years. Quite consistently, states have tolerated interventions where no ulterior motive on behalf of the intervening state is identifiable.[224]

One further possible condition of intervention is that it is taken by a multilateral regional force. Again, a comparison of historical incidents of intervention evinces a perception that when intervention is multilateral and regional, the motives for the intervention are less likely to be considered suspect.[225] The logic behind this is manifest: because humanitarian intervention will inherently involve a breach of Articles 2(4) and 2(7) of the UN Charter, such a momentous decision should not be made on "the whim of a single actor."[226] Further, intervention by regional agents is perceived as more legitimate due to cultural, religious, historic and ethnic similarities between the intervention force, and the state facing intervention. Thus a regional force

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and Change, above n 220 at 226; United Kingdom Prime Minister's Office *Chemical Weapon Use by the Syrian regime: UK government Legal Position* (Aug 29, 2013);

[224] For example, despite large-scale humanitarian disasters in both East Pakistan in 1971, and Cambodia in 1978, the invasions by India and Vietnam respectively were criticised as breaching international law because of a self-interested stratagem visible in their apparent humanitarian motives. This may be compared to the international silence, and subsequent commendation that greeted the interventions of Tanzania in Uganda in 1978 and ECOWAS in Liberia in 1990 and Sierra Leone in 1997, where scepticism about motives was far less apparent: Franck, Interpretation and Change, above n 220 at 217- 221

[225] Charlie Carpenter "Don't call this a Humanitarian Intervention" (2013) Foreign Policy <www.foreignpolicy.co/2013/08/30/dont-call-this-a-humanitarian-intervention/>

[226] Ibid.

is likely to have a more comprehensive understanding of the issues driving the humanitarian crisis. [227]

Sean Murphy takes this reasoning a step further.[228] He argues that international communities' accommodating response to the NATO intervention in Kosovo, and subsequent interventions by regional actors such as by the ECOWAS Cease-Fire Monitoring Group (ECOMOG) in Liberia and Sierra Leone have resulted in an implicit modification of Article 53 of UN Charter, which permits the use of force by regional agencies subject to Security Council authorisation. Due to these precedents, regional agents now have an implicit licence to bypass Security Council authorisation in Article 53 when the veto has paralysed Security Council action, and a humanitarian crisis is occurring.

(D) CAN HUMANITARIAN INTERVENTION BE UTILISED IN THE FIGHT AGAINST ISIL?

The possibility of a humanitarian intervention in Syria has been floated in the ongoing international debate, but not specifically regarding ISIL. Instead, the spotlight has been on the atrocities committed by the Assad regime, particularly the alleged use of chemical weapons. [229] The following analysis will consider whether a right to humanitarian intervention could justify any action taken against ISIL in Syria.

(1) The humanitarian situation in Syria

The inventory of Syria's humanitarian crisis is both devastating and shameful. Over 200,000 have been killed, over one million have been injured, and at such a rate that the UN has foregone attempts to provide up-to-date figures.[230] The Syrian conflict has caused the largest displacement crisis in recent years, and internally, 12.2 million people are in need of humanitarian assistance, a figure that has increased by

[227] Wippman above n 104 at 228
[228] Sean Murphy "Calibrating Global Expectations Regarding Humanitarian Intervention" (Harvard University Conference "After Kosovo: Humanitarian Intervention at the Crossroads," 14 December 2000)
[229] UK Prime Minister's Office, Chemical Weapon use, above n 223
[230] The Economist "Syria's humanitarian crisis" (2015) <http://www.economist.com/blogs/economist-explains/2015/06/economist-explains-6>

twelvefold since 2011.[231] It is estimated by the UN that development in Syria has regressed by forty years and that three out of four Syrians are living in poverty, with 54% in extreme poverty.[232] Without a resolution of the crisis, it is expected that the humanitarian emergency will only grow.[233]

(2) The inability and unwillingness of the Syrian state to control the humanitarian crisis

The Syrian regime is both unwilling and unable to relieve the ongoing humanitarian crisis in the areas under ISIL's control. First, the regime itself continues to perform military operations severely affecting the Syrian population in areas controlled by ISIL. Secondly, the Syrian regime no longer has effective control of the territory and, consequently, no ability to alleviate the civilian suffering occurring there even if it was so inclined.

(3) A lack of available remedies

Given that the UN, as the primary avenue for resolving the crisis, remains incapacitated by the Russian veto, no other response is available from the international community to address the humanitarian crisis, other than by an unauthorised and therefore illegal intervention.[234]

(4) Regional intervention

It is possible that the Arab League could take the lead in a humanitarian intervention. In March 2015, the Arab League announced the intended establishment of a Joint Arab Force, in the form of a standing army to counter extremism and political

[231] Ibid.
[232] Ibid.
[233] Ibid.
[234] A suggested alternative route would be through the 1950 General Assembly "Uniting for Peace" Resolution. This was originally developed as a mechanism to circumvent the Russia veto during the Korean War (1950-1953). However, the Resolution only provides for the General Assembly to make a recommendation to the Security Council that forcible measures be taken. It is highly unlikely that Russia would heed such a recommendation.

instability.[235] If established, such a force could intervene in Syria, in a manner similar to the interventions by the Economic Community of West African States Cease-fire Monitoring Group (ECOMOG) in Liberia in 1990 and Sierra Leone in 1997. Though undertaken without authorisation of the Security Council under Article 53 of the UN Charter, they were retroactively legitimised by Security Council Resolutions 788 and 1132,[236] and enjoyed widespread international commendation.[237]

A humanitarian intervention in Syria led by a regional agent such as the Arab League would be likely to hold the most legitimacy. The rise of ISIL is politically complex and extensively etched with various alliances and factions. Middle Eastern states are more familiar with the catalysts of such extremism, and thus possess the most expertise in determining an appropriate course of action.[238] A regional force would also prevent a perception that a humanitarian intervention in Syria is a tool of Western hegemony. Moreover, Syria is a member of the Arab League, although currently suspended due to Assad's brutal treatment of his population. The fact that Syria has consented, in part, to decision-making processes of the Arab League before its suspension would additionally augment the legitimacy of such a humanitarian intervention.

However, as Tom Farer points out, caution is warranted. It is entirely possible that one powerful state in a regional organisation can dominate the entity and use it as a cloak for implementing its own interests.[239] In the Middle East context, the nascent hegemony of Saudi Arabia would need to be monitored.

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[235] Adam Withnall "Yemen crisis: Middle East leaders agree to create first joint Arab military force" (2015) Independent <http://www.independent.co.uk/news/world/middle-east/yemen-crisis-middle-east-leaders-agree-to-create-first-joint-arab-military-force-10141777.html>

[236] SC Res 788, UN Doc S/RES/788 (1992); SC Res 1132, UN Doc S/RES/1132 (1997)

[237] Jeremy Levitt "Humanitarian Intervention by Regional Actors in Internal Conflicts: The cases of Ecowas in Liberia and Sierra Leone" (1998) 12 *Temple International and Comparative Law Journal* 333 at 339

[238] Wippman above n 104 at 228

[239] Tom Farer "Humanitarian intervention before and after 9/11:legality and legitimacy" in J.L Holzgrefe et al. (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press, Cambridge, 2003) 53 at 73; Wippman above n 104 at 228

(5) Challenges to an assertion of humanitarian intervention against ISIL

(i) A breach of Syria's sovereignty

The ubiquitous challenge that humanitarian intervention faces is the balancing of state sovereignty with the protection of human rights. Mass human rights violations by a state serves as the rationale behind using humanitarian intervention as an exception to the prohibition on the use of force.[240] Therefore, an intervention focusing on ISIL, as a non-state actor actively being targeted by the Syrian state, prima facie is unable to use this rationale to justify the breach of Syria's sovereignty. [241]

However, as argued in the earlier analysis of self-defence, Syria's sovereignty has already been diluted by ISIL's effective control over much of its territory. As an intervention targeting ISIL would take place only in the areas ISIL controls, the need to protect the qualified sovereignty of Syria would carry far less weight than the need to alleviate the ongoing humanitarian crisis.

(ii) Who caused the humanitarian crisis?

A crucial issue in arguing for a right of humanitarian intervention in ISIL-controlled Syria is the impossibility of separating ISIL's contribution to the humanitarian emergency from that of the Assad regime. Although ISIL's actions are horrific, it is the abuses perpetrated by the regime that are taking the heaviest toll on the Syrian population. A recent report released by the UN accuses the Assad regime of the use of chemical weapons and deliberately targeting civilians, as well as multiple other human rights abuses, and claims that the "apparent objective of the Government's military operations is to render life unbearable in areas out of its control."[242] Regardless of which group caused what, the hypocrisy is palpable. The international community cannot argue that a humanitarian intervention is justified in terms of ISIL, yet is unable to be taken in the wider context of the Syria conflict. [243]

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[240] Arimatsu and Schmitt above n 197 at 27
[241] Ibid.
[242] Independent International Commission of Inquiry *Report on the Syrian Arab Republic* above n 6 at [98]
[243] Arimatsu and Schmitt above n 197 at 27

(iii) Motives for a proposed intervention

An argument that a humanitarian intervention solely in ISIL-controlled territory is for purely humanitarian reasons can only be described as flimsy. As reasoned above, a humanitarian intervention limited to ISIL is inherently suspect when it would be occurring in the midst of a much larger humanitarian crisis in which the world has failed to intervene.[244] Instead, it would certainly be perceived that the intervening force would be more interested in securing regional and individual security, vis-à-vis ISIL rather than mitigating the Syrian humanitarian disaster.[245]

In addition, a push for humanitarian intervention in ISIL-controlled Syria would inevitably become entwined with the broader struggle for control. Any humanitarian intervention would most certainly struggle in defining a clear humanitarian objective that avoided a deeper intrusion into the clash between the government, the SNC, ISIL and other armed factions.

(E) CIRCLING BACK TO THE SECURITY COUNCIL

Despite the UN terming the Syrian crisis the "world's worst humanitarian catastrophe,"[246] it appears that humanitarian intervention is not a legal option against ISIL. The primary issue with justifying any forcible action in Syria against ISIL on the basis of humanitarian intervention is that it would take place in the wider context of the humanitarian crisis that has been primarily generated by the Assad regime.

Thus, if a humanitarian intervention were to take place, in order to have any legitimacy, it would need to encompass the entire Syrian conflict, including action against ISIL. It would also gain the most legitimacy if led by a regional actor such as the Arab League. It is important to note that had humanitarian intervention taken place earlier, it is entirely possible that ISIL would have been unable to gain such ascendancy and control in Syria. The steadily growing power and threat of ISIL is

[244] Ibid.
[245] Marc Weller "Islamic State crisis: What force does international law allow?" (2014) BBC <http://www.bbc.com/news/world-middle-east-29283286>
[246] Independent International Commission of Inquiry *Report on the Syrian Arab Republic* above n 6 at [1]

thus a direct reflection of the international community's dithering response to a state obviously deteriorating into calamity.

The prominent culprit is Russia. Its unwavering loyalty to the Assad regime has caused the immobilisation of the Security Council, which as the watchdog of international peace and security has left the international community with little in terms of legal avenues to deal with the Syrian crisis and the rise of ISIL. Advocating for a reform to the P5 veto is a dead-end. Article 108 of the UN Charter effectively grants P5 members a veto over any modification of the veto, and it is extraordinarily unlikely all P5 members would agree to such a change.

France, exasperated by the inability of the Security Council to achieve its intended purpose, has instead called for the establishment of a new international norm in response to the inaction regarding Syria. It is termed "responsibility not to veto" (RN2V), and would apply in situations of mass human rights abuses, such as the Syrian crisis, where the responsibility to protect (R2P) has reverted to the international community.[247] This proposal is not a panacea; it has no coercive force and arguably many normative loopholes. [248]

It is possible the norm could evolve to pressure the P5 to offer compelling reasoning when utilising the veto in situations of mass atrocities. [249] However, this proposal has been made before and it is likely, as in the past, that it will fall by the wayside.

[247] Stewart M. Patrick "How UN Members Want To Bypass a Security Council Veto" (2015) Defense One <http://www.defenseone.com/politics/2015/01/how-un-members-want-bypass-security-council-veto/103608/?oref=d-river>
[248] Ibid.; see generally Stewart M. Patrick "Limiting the Veto is Cases of Mass Atrocities: Is the Proposed Code of Conduct Workable?" (2015) Council on Foreign Relations <http://www.cfr.org/france/limiting-veto-cases-mass-atrocities-proposed-code-conduct-workable/p36019>
[249] Ibid.

PART 3

ACCOUNTABILITY MECHANISMS

Although military might is necessarily for the short-term subdual of ISIL, it is not a panacea for the extremism that has taken root in the Middle East. Winning the peace is a process that requires, amongst other things, rebuilding a belief in the rule of the law.[250] Therefore, it is apparent that the ISIL leadership must be held accountable for any violations of international law through a transparent and legitimate mechanism.[251]

I. THE INTERNATIONAL CRIMINAL COURT

The International Criminal Court (ICC) is the paramount mechanism for prosecuting crimes of an international nature. Although the ICC does not retain universal jurisdiction over all acts criminalised by the Rome Statute, jurisdiction is based on the traditional grounds of territory or nationality.[252]

In terms of territory, neither Syria nor Iraq is a member of the ICC. Thus, prima facie, the ICC has no jurisdiction over crimes committed on their territory.[253] Two possible methods of circumventing this obstacle exist. First, the governing authorities of Syria or Iraq may accept ICC jurisdiction under Article 12(3) of the Rome Statute. Despite widespread encouragement, neither state has indicated any interest in engaging with

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[250] Robert F. Carolan "An Examination of the Role of Hybrid International Tribunals in Prosecuting War Crimes and Developing Independent Domestic Court Systems: The Kosovo Experiment (2008) 17 *Transnational Law and Contemporary Problems* 9 at 29

[251] Allegations have been made that members of ISIL have committed genocide; crimes against humanity, including torture, sex crimes and enlistment of children; and war crimes: United Nations High Commissioner for Refugees *Report on human rights situation in Iraq in light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups,* UN Doc A/HRC/28/18 (2015) at [17]; Independent International Commission of Inquiry on the Syrian Arab Republic *Rule of Terror: Living under ISIS in Syria* (14 November 2014); Emmerson above n 16; Office of the High Commissioner for Human Rights and United Nations Assistance Mission for Iraq *Report on the Protection of Civilians in Armed Conflict in Iraq* (11 September-10 December 2014)

[252] Rome Statute (opened for signature 17 July 1998, entered into force 1 July 2002), art 12(2),

[253] Prosecutor of the International Criminal Court, Fatou Bensouda "Statement of the prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS (press release, 8 April 2015)

the ICC. There is a possibility that Iraq may take this step, although considering the inventory of allegations against both Assad and the SNC, neither group is likely to take such action if it wins the battle for control of Syria.[254] Secondly, under Article 13(b) of the Rome Statute, the Security Council may refer any state to the ICC if it determines there is a threat to international peace and security. Despite having already made such a determination in Resolution 2199, Russia and China vetoed a referral in 2014, and neither state seems prepared to disavow this position.[255]

It is theoretically possible that the ICC Prosecutor could open an investigation *proprio motu* based on ISIL's influx of foreign fighters, as many are nationals of ICC member states.[256] However, as of yet, the ICC Prosecutor has declined to open an investigation based on the nationality of certain ISIL members.[257] In a statement released in April 2015, the ICC Prosecutor stated that the ICC continues to believe that Iraqis and Syrians dominate the hierarchy of ISIL leadership. As the policy of the ICC is to focus on those most responsible, the prospects for Prosecutor to investigate the situation is limited.[258] Investigating only the nationals of ICC member states is inherently incongruous, as the top tier of ISIL such as al-Baghdadi, would continue to act with impunity. In addition, if foreign fighters return home, they may face charges under the domestic law of their own states.

II. AN INTERNATIONAL AD HOC TRIBUNAL

The possibility exists of establishing an ad hoc independent international tribunal, unencumbered by the Rome Statute, to dispose of the jurisdictional and political

[254] Human Rights Watch "Syria: Rebels' Car Bombs, Rockets, Kill Civilians" (2015) <https://www.hrw.org/news/2015/03/22/syria-rebels-car-bombs-rockets-kill-civilians>
[255] United Nations News Centre "Russia, China block Security Council referral of Syria to International Criminal Court" (2014) <http://www.un.org/apps/news/story.asp?NewsID=47860#.VgKCM9Oqqko>
[256] 3000 fighters come from Tunisia: Pierre Bienaime "Here's Why So Many of Tunisia's Youth Are Drawn to ISIS" (2014) Business Insider < http://www.businessinsider.com.au/heres-why-so-many-of-tunisias-youth-are-drawn-to-isis-2014-10; 2500 from Jordan: Middle East Monitor "Saudis most likely to join ISIS, 10% of group's fighters are women" (2014) <https://www.middleeastmonitor.com/news/middle-east/14758-saudis-most-likely-to-join-isis-10-of-groups-fighters-are-women>; 2000 from the states of the European Union: Richard Barrett *Foreign Fighters in Syria* (Report by the Soufan Group, 2014) at 14
[257] Statement by the Prosecutor of the International Criminal Court above n 253
[258] Ibid.

complications faced in prosecuting ISIL in the ICC. However such tribunals are mandated courts established by the Security Council under Chapter VII of the UN Charter.[259] In consequence, the establishment of an ad hoc tribunal parallels the difficulty of a referral to the ICC, as Russia would likely exercise its veto to prevent an investigation of the Assad regime.

III. A HYBRID TRIBUNAL

The option remains of establishing a hybrid tribunal, which is generally precipitated by an agreement between the national authority and the UN. The advantage of such tribunals is that grounding a court in the sovereignty of each state prevents it from being perceived as a "vehicle for foreign domination."[260] However ISIL crimes straddle the border of Iraq and Syria and have recently expanded further afield, to Yemen, Libya and parts of Afghanistan. Establishing a hybrid tribunal that spans the jurisdictions of all territories where ISIL has allegedly committed international crimes would be unorthodox and highly problematic. Further, given the current state of the domestic judicial systems in each state, and especially Syria, it must be acknowledged that this option, although viable, could only be a long-term project.

It is incontrovertible that the crimes of ISIL must not be left to scar the history of Iraq and Syria without accountability. Yet with so much of the impetus to bring ISIL leadership to account resting in the unwilling hands of Putin, it is difficult at this stage to foresee how the international community can play a part in bringing ISIL to justice.

[259] The first of these tribunals was the International Criminal Tribunal for the Former Yugoslavia (ICTY), which was established by Security Council Resolution 827, UN Doc S/RES/1827 (1993); see Antonio Cassese "The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice" (2012) 25 *Leiden Journal of International Law* 491 at 496

[260] Ali Adnan Alfeel "The Iraqi Special Tribunal under International Humanitarian Law" (2009) 11 Journal of East Asia and International Law 11 at 24

CONCLUSION

ISIL is not a state. It may control a substantial portion of territory and have initiated some features of an effective government, but the international community is beyond an era where a state may be constituted by force, by brutality and by terror. Crucially, in the case of an entity claiming statehood, the constitutive theory recoups some relevance. Even if ISIL were able to fulfill the conditions of the Montevideo Convention as a matter of fact, not a single state would recognise its claim to statehood.

However, ISIL's inability to achieve statehood is not equivalent to an ability to act outside international law. ISIL is a non-state actor, but a powerful and dangerous one nonetheless. It is yet another example of why international law needs to broaden from its state-centric nucleus to comprehensively apply to non-state actors. If it does not, it risks losing credibility as an effective and realistic regulatory system in the area of non-state actors.

Ironically, if ISIL were considered a state, the scope of legal action that could be taken against it would be far more defined. However, as ISIL is considered a non-state actor operating in the territory of Syria and Iraq, any legal action which is taken against it must necessarily take the sovereignty of these two states into account. The coalition airstrikes are therefore prima facie illegal because they breach the prohibition on the use of force against another state under Article 2(4) of the UN Charter. Unless they can be brought within an exception to this prohibition, the coalition is acting unlawfully.

Confronting ISIL in Iraq does not pose any legal difficulty. The conditions of intervention by invitation, or consent, have been fulfilled to the letter. However, there is no easy answer to Syria. It is doubtful whether Assad retains enough legitimacy to consent to airstrikes and even if so, the statements that have been issued from his regime can only be termed equivocal.

Collective self-defence is the most viable justification for the airstrikes in Syria, and indeed is the one that has been relied upon by the coalition. However a substantial proportion of international authority, including the ICJ, admit only a very narrow

right of self-defence against non-state actors, which excludes ISIL bases in Syria. This reasoning derives from the necessary violation of Syria's sovereignty that results, however it is tantamount to a denial of contemporary reality. ISIL is unlikely to be the only non-state actor to display such high levels of power and organisation and international law must formulate a paradigm that is able to cope with the undeniable threat that such groups pose. When dealing with entities such as ISIL, that control large tracts of territory and are essentially running a de facto governance system, the sovereignty of Syria should not be a primary consideration as it has already been substantially transgressed. Rather than expending energy on debating the source of an armed attack, once the threshold of an armed attack has been reaches, a more pragmatic analysis would concentrate on ensuring the state or states responding in self-defence remain within the bounds of proportionality and necessity.

Regional humanitarian intervention, possibly by the Arab League, is one further possible exception that may be utilised to confront ISIL in Syria. However putting aside the controversy as to whether a right to humanitarian intervention even exists under international law, the only way such a right would be considered legitimate would be if the intervention applied to Syria in its entirety. A humanitarian intervention limited solely to ISIL would invariably give rise to suspicions about the sincerity of the intervening force's motives.

Finally, despite the brevity of its consideration here, holding ISIL leadership accountable is essential. As proved with al-Qaeda, merely hammering ISIL militarily will only result in its shards refashioning themselves into more virulent groups.[261] However, the method of achieving this accountability is uncertain. ICC jurisdiction is presently stagnated by the non-membership of Iraq and Syria, and the Russia veto over a Security Council resolution. The Russia alliance with Assad forms a similar barrier to the establishment of an ad hoc tribunal. As of yet, the ICC prosecutor has refused to open an investigation based on nationality, given the inability of the ICC to target ISIL's top tier of leadership. The possibility exists of a hybrid tribunal, yet the disarray of the domestic courts in Iraq and Syria, and the difficulty of combining different jurisdictions also puts this method in doubt.

[261] Stern and Berger above n 4 at 235

The issue that persistently resurfaces throughout this analysis is the lack of international legal remedies available when the Security Council abdicates its responsibility to maintain international peace and security. Russia's refusal to authorise military action in Syria, and its veto of a referral to the ICC, leaves the international community with inadequate legal options. In the case of ISIL in Syria self-defence is an operable legal response, but it is not difficult to envision a situation where it is not.

As reform of the P5 veto is virtually unachievable, international law must adapt to the threat of non-state actors such as ISIL to find effective rules of law that may be utilised outside the Security Council. Whether ISIL is a state or a non-state actor, the populations of Iraq and Syria face the same terror. As stated by Paulo Pinheiro, Chairman of the Commission of Inquiry on Syria, "[c]ompassion does not and should not suffice. We cannot continue to sit for years in these rooms, writing reports and making speeches lamenting the blood that is running in Syria's streets."[262]

[262] Paulo Pinheiro, Chair of the Independent International Commission of Inquiry on the Syrian Arab Republic, Statement by Mr. Paulo Sérgio Pinheiro Chair of the Independent International Commission of Inquiry on the Syrian Arab Republic , (Office of the High Commissioner for Human Rights, 18 March 2014)

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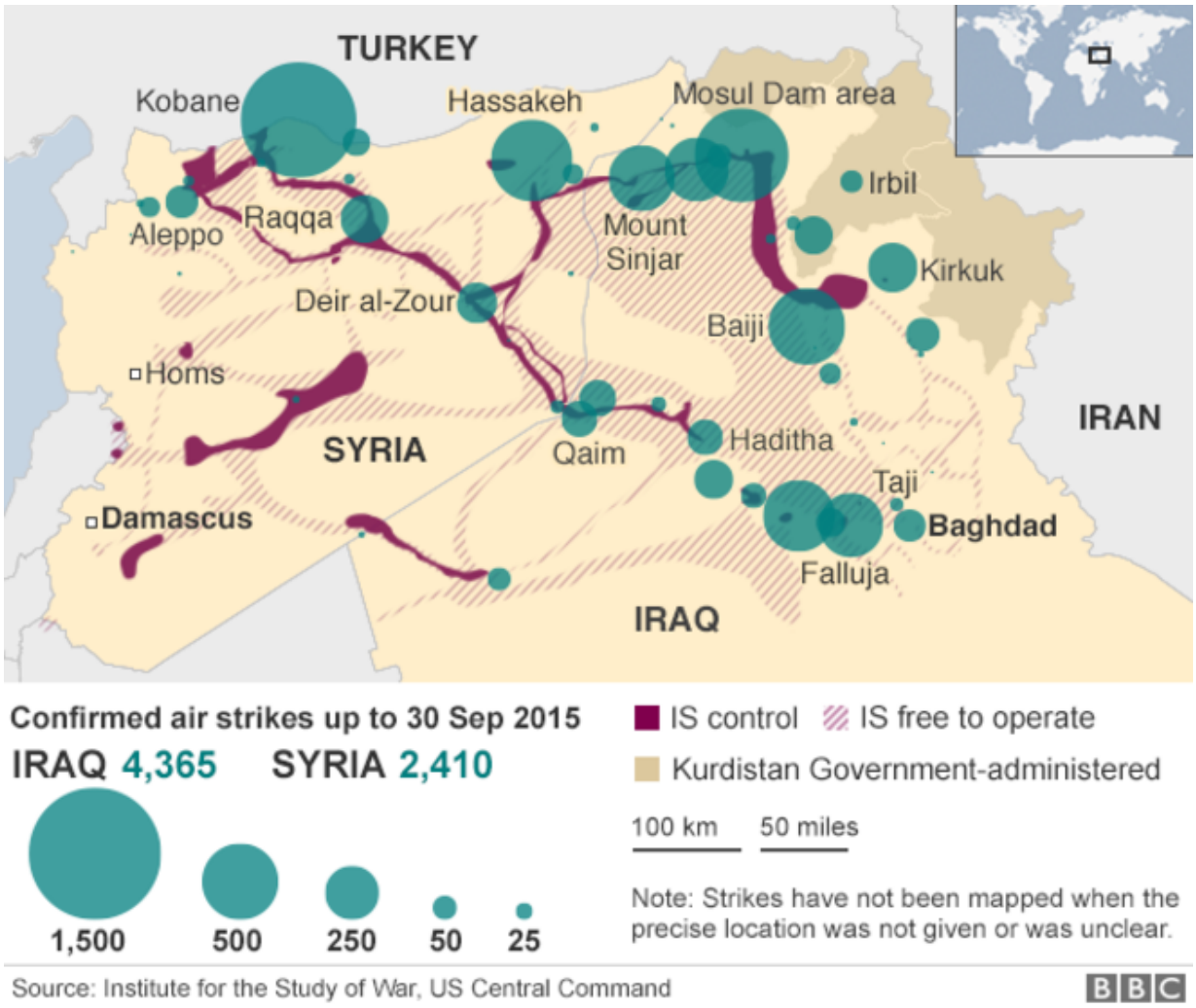

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