

The legality of the use of force by the US-led coalition against IS in Syria

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1. Introduction

The Islamic State (IS), also known as the Islamic State of Iraq and Levant (ISIL) and Islamic State of Iraq and Syria (ISIS), is a transnational Sunni Islamist insurgent and terrorist group.¹ Its aim is to establish an Islamic State caliphate ruled by Sharia law. The radical group controls areas in north-western Iraq and north-eastern Syria, including areas adjacent to Syria's borders with Turkey and Iraq.

In the summer of 2014, IS made huge territorial advances into northern Iraqi territory, seizing control of major Iraqi cities and threatening the federal government in Baghdad.² The unity of the country being at risk, the Prime Minister Nouri al-Maliki asked the United States for air

¹ IS has been designated as a terrorist organization by the United Nations, the European Union, the United States and the United Kingdom amongst others; US Department of State, 'Foreign Terrorist Organisations,' accessed 31/10/14 at <http://www.state.gov/j/ct/rls/other/des/123085.htm>; Home Office 'Proscribed Terrorist Organisations,' (28/11/14) accessed 06/12/14 at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380939/Proscribed_Organisations.pdf; HM Treasury 'Financial sanctions: consolidated list of targets' (19/06/13) accessed 06/12/14 at <https://www.gov.uk/government/publications/financial-sanctions-consolidated-list-of-targets> and <http://hmt-sanctions.s3.amazonaws.com/sanctionsconlist.htm>.

² Abbas, M. 'Maliki asks for US help as ISIS expands in Iraq' (13/06/14) Al-Monitor, accessed 31/10/14 at <http://www.al-monitor.com/pulse/tr/security/2014/06/iraq-isis-expansion-mosul-maliki-us-assistance.html#>.

assistance in quelling the military uprising.³ The US in turn assembled a coalition of partner countries to combat IS and began air strikes against IS targets in Iraq in August 2014.⁴

In September 2014 the military action was extended to Syrian territory in which IS was enjoying a safe haven and secure support platform from which to regroup.⁵ The attacks were seen as a necessity in order for the US and its allies to 'degrade and ultimately destroy' the global threat of IS.⁶ Hence, starting on the 22nd September 2014, the US, Bahrain, Jordan, Qatar, Saudi Arabia and the United Arab Emirates began air strikes against about 20 IS targets in Syria.⁷

The air strikes in Syria have given rise to a debate as to whether military action against IS in Syria is a legitimate use of force. This article aims to identify possible exceptions to the laws prohibiting the use of force which may be applicable to the

³ Mitchell, A. 'Iraq Asks U.S. to Help Quell Militant Uprising' (12/06/14) NBC News, accessed 31/10/14 at <http://www.nbcnews.com/news/world/iraq-asks-u-s-help-quell-militant-uprising-n129091>; Letter from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, 22. September 2014, UN Doc. S/2014/691 accessed 07/12/14 at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/691.

⁴ However, the action in Iraq will not be discussed as the intervention was done with the consent of the Iraqi government. See: Letter from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, 20 September, UN doc. S/2014/691, accessed 17/12/14 at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_691.pdf.

⁵ BBC, 'Russia Warns US Against Strikes on Islamic State in Syria' (11/09/14), BBC News, accessed 28/10/14 through <http://www.bbc.co.uk/news/world-middle-east-29154481>.

⁶ Sherwood, Harriet, 'Attacking Isis in Iraq and Syria – the Guardian Briefing,' (16/09/14) The Guardian, accessed 28/10/14 at <http://www.theguardian.com/world/2014/sep/16/-sp-world-briefing-us-attacking-isis>.

⁷ Fox News, 'Damascus says Washington gave UN envoy advanced notice before airstrikes' (23/08/14) accessed 28/10/14 at <http://www.foxnews.com/world/2014/09/23/damascus-says-washington-gave-un-envoy-advance-notice-before-airstrikes/>

air strikes starting on the 22nd September in order to come to assess whether the air strikes are a legitimate use of force under public international law.

The discussion in this article will proceed in three parts. The first part briefly lays out the law governing the use of force, focusing on the United Nations (UN) Charter and customary international law. The second part examines the exception to the laws of armed intervention in internal conflict. The third and last section investigates whether military intervention in Syria can be justified on the basis of collective self-defence before coming to a conclusion.

2. The Prohibition of the Use of Force

The contemporary prohibition on the use of inter-state force is controlled by both treaty and customary law. The General Treaty for Renunciation of War as an Instrument of National Policy 1928, also known as the Kellogg-Briand Pact, was the first attempt to prohibit war completely, and is still in force. Under this treaty war became prohibited, except in self-defence – which emerged as an independent right.⁸ Yet since the prohibition applied to war and not use of force, the Pact was flawed: as forcible measures ‘short of war’ was eliminated from consideration. These shortcomings were redressed in the UN Charter.

⁸ Although the Pact itself made no reference to self-defence, the *travaux préparatoires* indicate that this was because the existence of such an exception was taken for granted; Dixon, M.(2013) Textbook on International Law (7th Ed), Oxford University Press, p. 323.

One of the Charter's primary purposes is, the 'suppression of acts of aggression or other breaches of the peace.'⁹ This statement is given substance in Article 2(4), which provides:

'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.'

This general prohibition on inter-State force covers any threat or use of force, avoiding the term 'war', and thus includes forcible measures 'short of war'¹⁰. The General Assembly Declaration on Friendly Relations between States¹¹ later settled that the prohibition on the use of force is limited to the use of physical force and aggression. It does not include other types of injurious conduct such as 'economic aggression'.¹²

The prohibition on the use of force embodied in Article 2(4) is also recognised as a rule of customary international law, running parallel to the Charter. It has attained the status of *jus cogens*, becoming a peremptory norm of international law from which no derogation is

⁹ Art. 1 United Nations Charter.

¹⁰ This was the particular problem under the Kellogg-Briand Pact where states hid behind claims that their behaviour did not, legally, amount to war; Klabbers, J. (2013) *International law*, Cambridge University Press, p. 190; Dinstein, Y. (2005) *War, Aggression and Self-Defence* (4th Ed), Cambridge University Press, p. 85.

¹¹ 1970, GA Res 2625 (XXV).

¹² United Nations General Assembly Resolution 3314 (XXIX), *Definition of Aggression*, 1974.

permitted.¹³ Thus all States are prima facie prohibited from the use of force against another State.

The US-led coalition's air strikes in Syria clearly amount to the use of armed force on the territory of another State. However, the operation may be considered a legitimate use of force if it can be justified on the basis of a recognised exception. At present there are three universally recognised exceptions: if authorised by the UN Security Council (SC) pursuant to article 42 of the UN Charter¹⁴; self-defence; and with the consent of the territorial state where the operations are conducted. As the SC has not authorised military action against IS in Syria this exception does not apply and will be considered no further.

The discussion will now turn to an examination of the two remaining exceptions and their possible applicability to the US-led coalition's air strikes against IS in Syria.

3. Intervention by invitation

Under customary international law the involvement of a third State in the form of armed intervention in the internal conflict of another is lawful if requested by the State's legitimate

¹³ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits)*, (1986) I.C.J Rep. 14, para. 188; Vienna Convention on the Law of Treaties 1969, Article 53.

¹⁴ Article 42 of the United Nations Charter states as follows: 'Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.' The NATO intervention in Libya in 2011 falls under this category as it was permitted under Security Council Resolution 1973.

government. This general rule was recognised in General Assembly Resolution 3314 (xxix),¹⁵ and later in the International Law Commission's Articles on State Responsibility which states:

Valid consent by a State to the commission of a given act by another 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.¹⁶

The validity of this has also been confirmed by the International Court of Justice (ICJ) in the cases of *Nicaragua*¹⁷ and *Democratic Republic of the Congo (DRC)*.¹⁸ Hence, armed intervention in the internal affairs of a state at the request of the legitimate government is a clearly established principle of customary law. Relying on an invitation from an illegitimate government however will be contrary to the prohibition on the use of force as it does not have the power to speak for the State and cannot therefore confer any rights on the intervening state.¹⁹ As observed by the ICJ in *Nicaragua*, such intervention would be prohibited as it would bear 'on

¹⁵ General Assembly Resolution on the Definition of Aggression No. 3314 (xxix), Article 3(e) provides that one instance of aggression is 'the use of armed forces which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement.'

¹⁶ 2001, Article 20.

¹⁷ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits)*, (1986) I.C.J. Rep. 14, para. 246.

¹⁸ In *Armed Activities on the Territory of Congo (Democratic Republic of the Congo v Uganda)* (2005) I.C.J. Rep.168, para. 42-54, the ICJ assumes without any discussion that a government can consent to foreign armed intervention on its territory. It focused rather on whether Congo had consented to the presence of Ugandan troops on its territory and if the consent had later been withdrawn.

¹⁹ Khayre, Ahmed A. M. (2014) Self-defence, intervention by invitation, or proxy war? The legality of the 2006 Ethiopian invasion in Somalia, *African Journal of International and Comparative Law*, 22(2), 208, p. 9; Le Mon, C. 'Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested', 35 *Journal of International Law and Policy* (2002): 741-93, at 762.

matters in which each State is permitted by the principle of State sovereignty, to decide freely...'²⁰

The air strikes conducted by the US-led coalition against IS in Syria have given rise to questions as to whether it constitutes an illegitimate use of force due to the lack of an invitation to intervene by the Assad government in Syria.²¹ However, this issue becomes more complicated in light of recent statements that the Assad regime has lost its legitimacy due to the use of brutal force against the Syrian population;²² and through state recognition of the Syrian Revolutionary and Opposition Forces, challenging the legitimacy of the Assad regime as Syria's government. Hence, in order to come to a conclusion as to whether the military action in Syria is a prohibited intervention, contrary to the principle of state sovereignty and a breach of the prohibition on the use of force, we must first investigate whether the Assad regime is truly the legitimate government of Syria, capable of issuing consent. In so doing the test for determining government legitimacy must first be examined.

3.1 The Condition of a Legitimate Government

²⁰ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) I.C.J Rep. 14, para. 205.

²¹ See for instance Channel 4 News, 'US air strikes in Syria – Q&A,' (23/09/14), accessed 06/01/15 at <http://www.channel4.com/news/us-launches-air-strikes-in-syria-q-a>; Bellamy, A., 'Legality, Legitimacy, and Humanitarian Intervention Against ISIS in Syria,' (16/19/14) IPI Global Observatory, accessed 06/01/15 at <http://theglobalobservatory.org/2014/10/legality-legitimacy-human-protection-international-intervention-isis-syria-r2p/>; The Week, 'Islamic State: are the US air strikes in Syria breaking the law?' (24/09/14), accessed 06/01/15 at <http://www.theweek.co.uk/world-news/islamic-state/60562/islamic-state-are-us-air-strikes-in-syria-breaking-the-law>.

²² See for instance the UK Government, Foreign & Commonwealth Office, 'Assad inauguration has no legitimacy, says Foreign Secretary,' Press release, accessed 06/01/15 at <https://www.gov.uk/government/news/assad-inauguration-has-no-legitimacy-says-foreign-secretary>.

Under the traditional effective control theory, government legitimacy and capacity for requesting foreign intervention does not depend on the legitimacy of its origin but whether it in fact holds the power and is the master of the nation.²³ There is a presumption under this theory that when a government exercises effective control over the territory and people of the state the government has the exclusive authority to express the will of the state, whether or not it does so with the express or tacit consent of the nation.²⁴ A government which has seized power by unconstitutional means, such as by the use of force, is a government '*de facto*'. Once such a government loses its control, although it is not actually overthrown, it also loses its capacity to express the will of the State.²⁵

State recognition under the effective control theory has been treated as relatively unimportant. This may be seen in the *Cuculla* case of 1868:²⁶ which concerned a military uprising in Mexico led by Mr Zuloaga, who overtook the capital from which the constitutional President fled.²⁷ Major European governments, and arguably the American Representative, recognised the Zuloagan

²³ It was stated in the *Dreyfus* case of 1901, at p. 188 that: 'According to a principle of international law...today universally admitted, the capacity of a government to represent the State in its international relations does not depend in any degree upon the legitimacy of its origin, so that...the usurper who in fact holds power with the consent express or tacit of the nation acts...validly in the name of the State'; quoted in Doswald-Beck, L. (1986) *The Legal Validity of Military Intervention by Invitation of the Government*, *British Yearbook of International Law*, p. 192. This approach was reaffirmed in *George W. Hopkins (U.S.A.) v United Mexican States* (1926) Reports of International Arbitral Awards, Vol.IV, para. 12.

²⁴ *Ibid*; Wippman, D. (1996) *Military Intervention, Regional Organizations, and Host-State Consent*, 7 *Duke Journal of Comparative & International Law*, p. 211-212.

²⁵ *George W. Hopkins (U.S.A.) v United Mexican States* (1926) Reports of International Arbitral Awards, Vol.IV, para. 12; Doswald-Beck, L. (1986) *The Legal Validity of Military Intervention by Invitation of the Government*, *British Yearbook of International Law*, p. 192.

²⁶ *Cuculla v Mexico*, Mexican United States Cl Com (1868); cited in Crawford, J. (2007) *The Creation of States in International Law* (2nd Ed.), Oxford University Press, p. 23.

²⁷ Doswald-Beck, L. (1986) *The Legal Validity of Military Intervention by Invitation of the Government*, *British Yearbook of International Law*, p. 192.

government.²⁸ However, the constitutional President had not lost control of the rest of the country and later retook the capital. The tribunal found that the Zuloagan regime was not a government under international law, regardless of state recognition, as recognition was based on pre-existing fact but did not create fact.²⁹

State recognition and 'de facto' control was further examined in the *Tinoco Concessions* arbitration of 1923³⁰. It was stated in this case that where recognition was based on the alleged government's 'illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight...' and such non-recognition could not outweigh the evidence of a 'de facto' government's existence.³¹ Hence, a government cannot be found to not be the legitimate government of the state on the sole basis that it was not established and maintained in accordance with the Constitution.³² The question to be asked is whether it exercises control and discharges its functions as a government, respected within its own jurisdiction, without any opposing force assuming to be a government in its place.³³

However, although State recognition alone cannot negate governmental status, it does provide evidence that the government in question has 'attained the independence and control entitling it by international law to be classed as such'.³⁴ An important development in relation to state

²⁸ *Ibid.*

²⁹ Doswald-Beck, L. (1986) *The Legal Validity of Military Intervention by Invitation of the Government*, *British Yearbook of International Law*, p. 192

³⁰ *Aguilar-Amory and Royal Bank of Canada claims (Great Britain v Costa Rica) (Tinoco Case)*(1923) Reports of International Arbitrary Awards, Vol. I, 369-399.

³¹ *Ibid.*, p. 381.

³² *Ibid.*

³³ *Ibid.*, p. 382.

³⁴ *Ibid.*, p. 381.

recognition of a government has been the inception of the UN. Almost all universally recognised states are members of the UN,³⁵ and membership gives legitimacy to the regime that individual state recognition cannot.³⁶ Further, once a regime is recognised and accepted into the UN, recognition will rarely be withdrawn, even when a government has lost control over a substantial portion of the State; as long as there is no single regime in control to take its place and it is not in imminent danger of collapse.³⁷ It is also significant if the government controls the State's capital, as in order to have effective control of a State's territory an entity must also possess the machinery of the State, which requires control of the State's capital.³⁸

It should also be mentioned here that since the end of the Cold War questions of government recognition have increasingly revolved around democratic criteria and whether it is a freely and fairly elected government.³⁹ This popular '*sovereign*' approach of democratic legitimacy is still controversial but has, in recent years, validated armed interventions with the consent of a '*de jure*' government in exile that does not exercise effective control over the territory. The most recent example is the appeal to the the Economic Community of West African States (ECOWAS) by Alassane Ouattara, who won the 2010 elections in Côte D'Ivoire, to intervene and remove the

³⁵ The Vatican City is excluded; United Nations Regional Information Centre for Western Europe, 'Being a Member of the World's Biggest Club,' accessed 03/01/15 at <http://www.unric.org/en/the-general-assembly/27007-being-a-member-of-the-worlds-biggest-club>.

³⁶ Doswald-Beck, L. (1986) The Legal Validity of Military Intervention by Invitation of the Government, *British Yearbook of International Law*, p. 199.

³⁷ Wippman, D. (1996) Military Intervention, Regional Organizations, and Host-State Consent, 7 *Duke Journal of Comparative & International Law*, p. 210; Doswald-Beck, L. (1986) The Legal Validity of Military Intervention by Invitation of the Government, *British Yearbook of International Law*, p. 199.

³⁸ Talmon, S. (2013) Recognition of Opposition Groups as the Legitimate Representative of a People, *Bonn Research Papers on Public International Law*, No.1/2013, p. 14, accessed 26/12/14 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2227615;

³⁹ Fox, G. 'Ukraine Insta-Symposium: Intervention in the Ukraine by Invitation,' (10/03/14) *Opinio Juris*, accessed 01/01/15 at <http://opiniojuris.org/2014/03/10/ukraine-insta-symposium-intervention-ukraine-invitation/>.

usurper Laurent Gbagbo who refused to leave office.⁴⁰ Taking note of Ouattara's request the SC authorised action and a peacekeeping mission to protect civilians.⁴¹ The UN and French forces subsequently attacked Gbagbo's camps and Gbagbo capitulated.⁴² However, the popular 'sovereign' approach has only been applied to cases of military coups where the 'de jure' government has been unconstitutionally overthrown and the elections were monitored by the UN, not against widespread social protests against the government.⁴³ Thus, where two opposing forces claim to represent the State and one has the genuine popular approval, the international community and international organisations is likely to prefer the popular sovereign over the one with effective control.⁴⁴ Nevertheless, in Syria there is no entity with valid expressed popular

⁴⁰ Fox, G (2014) Intervention by Invitation, *Wayne State University Law School Legal Studies Research Paper*, No. 2014-04, p. 27, accessed 23/12/14 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2407539; Gagnon, J. (2013) ECOWAS's Right to Intervene in Côte d'Ivoire to Install Alassane Ouattara as President-Elect, *Notre Dame Journal of International & Comparative Law*, Vol.3(1), Article 3.

⁴¹ UN Security Council Resolution 1962 (20 December 2010); UN Security Council Resolution 1975 (30 March 2011); UN Security Council Resolution 1980 (28 April 2011); United Nations Press Release, 'Deeply Concerned by Humanitarian Situation in Côte d'Ivoire, Secretary-general says 'Civilians are Bearing the Brunt of Violence – the Fighting Must Stop', 11 April 2011, SG/SM/13503AFR/2160, accessed 03/01/15 at <http://www.un.org/press/en/2011/sgsm13503.doc.htm>.

⁴² Fox, G. 'Ukraine Insta-Symposium: Intervention in the Ukraine by Invitation,' (10/03/14) *Opinio Juris*, accessed 01/01/15 at <http://opiniojuris.org/2014/03/10/ukraine-insta-symposium-intervention-ukraine-invitation/>. For another example see UN Security Council Resolution 940 (31 July 1994) which authorised military action to reinstate the elected President Jean-Bertrand Aristide after he had requested international action from the international community, having been overthrown by the Haitian military in 1991. Even after having been overthrown he was recognised as the State's legitimate leader; UN General Assembly Resolution on the Situation of Democracy and Human Rights in Haiti, UN Doc. A/RES/46/7, 11 October 1991, accessed 19/12/14 at <http://www.un.org/documents/ga/res/46/a46r007.htm>.

⁴³ Vaypan, G. (2014) (Un)Invited Guests: the Validity of Russia's Argument on Intervention by Invitation, *Cambridge Journal of International Comparative Law*, accessed 17/12/14 at <http://ciicl.org.uk/2014/03/05/uninvited-guests-validity-russias-argument-intervention-invitation/>.

⁴⁴ Fox, G (2014) Intervention by Invitation, *Wayne State University Law School Legal Studies Research Paper*, No. 2014-04, p. 27, accessed 23/12/14 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2407539.

approval regarded as the '*de jure*' government. Thus, the test of government legitimacy applicable in this instance is the main criterion of effective control.

3.2 The Effective Control Test Applied: is the Assad Government the Legitimate Government of Syria?

The Assad regime is not democratically elected and has kept itself in power through the use of military force against its own population.⁴⁵ However this is not relevant under the effective control test. What needs to be established is whether the Assad government exercises effective control over the territory and people of the State and performs the state functions. At present, the Syrian territory is divided between the Assad regime, mainly controlling the western and southern parts of Syria; with Kurdish forces, IS and other opposition forces and rebel groups, primarily controlling the northern and eastern parts.⁴⁶ However, although the Assad regime has lost control over a significant amount of Syria's territory, it still controls a sufficiently

⁴⁵ For the democratic illegitimacy of the Assad regime see the UK Government Press Release, 'Syria elections only designed to sustain Assad's dictatorship', 21 April 2014, accessed 27/12/14 at <https://www.gov.uk/government/news/syria-elections-only-designed-to-sustain-assads-dictatorship>; Koush, O. 'Assad won elections but has not legitimacy' (08/06/14), Middle East Monitor, accessed 27/12/14 at <https://www.middleeastmonitor.com/articles/middle-east/11961-assad-won-the-election-but-has-no-legitimacy>.

⁴⁶ See BBC News, 'Syria: Mapping the Conflict,' (11/11/14) accessed 01/01/15 at <http://www.bbc.co.uk/news/world-middle-east-22798391>.

representative part, including the capital Damascus. Additionally, it also exercises the functions of the State such as representing Syria in the UN⁴⁷ and organising governmental elections.⁴⁸

Recently the Assad government's legitimacy has been challenged in response to the regime's excessive use of force against its own population to secure its position. The UN Secretary-General told the UN General Assembly that 'it is evident that President Assad and his Government have lost all legitimacy.'⁴⁹ This view was mirrored by the former UN Secretary General, Kofi Annan, who has stated that 'the current (Assad) government has lost all legitimacy.'⁵⁰ Nevertheless, the fact that a government loses its legitimacy due to the use of force against its own population does not necessarily mean that it also loses its governmental status.⁵¹ The effective control test is the only criterion for governmental status applicable and thus, although the Assad regime has used brutal force against its own population, this does not affect its legitimacy as a government under the effective control test.⁵²

⁴⁷ Member States of the United Nations, accessed 01/01/15 at <http://www.un.org/en/members/>; Reuters, 'U.S. restricts movements of Syria's U.N. envoy Ja'afari', (05/03/14) accessed 01/01/15 at <http://www.reuters.com/article/2014/03/05/us-syria-crisis-usa-un-idUSBREA2429I20140305>; Rosen, A., Walker, H., 'Syria's Ruling Regime Liked Obama's UN Speech – Except for One 'Small Part'', Business Insider, accessed 01/01/15 at <http://www.businessinsider.com/syrian-reaction-to-obamas-un-speech-2014-9?IR=T>.

⁴⁸ See The Telegraph, 'Syria: Bashar al-Assad calls parliamentary election on May 7,' (13/03/12) accessed 02/01/15 at <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9140950/Syria-Bashar-al-Assad-calls-parliamentary-election-on-May-7.html>.

⁴⁹ Secretary-General Ban Ki-moon, 'Secretary-General's remarks to the General Assembly on the Situation in Syria,' United Nations, New York, 7 June 2012, accessed 06/01/15 at <http://www.un.org/sg/statements/index.asp?nid=6109>.

⁵⁰ Kofi Annan, 'My departing advice on how to save Syria', (02/08/12) Financial Times, accessed 06/01/15 at <http://www.ft.com/cms/s/2/b00b6ed4-dbc9-11e1-8d78-00144feab49a.html#axzz3O2Y5TemV>.

⁵¹ Talmon, S. (2013) Recognition of Opposition Groups as the Legitimate Representative of a People, *Bonn Research Papers on Public International Law*, No.1/2013, p. 20, accessed 26/12/14 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2227615;

⁵² Ibid.

Further confusion has arisen due to recent recognition of the Syrian Revolutionary and Opposition Forces (SOC). States such as the UK, France, and Germany have recognised the SOC as ‘the sole legitimate representative of the Syrian people,’ effectively withdrawing recognition from the Assad government.⁵³ However, the six members of the Gulf Co-operation Council⁵⁴, the US, Turkey, Denmark, Finland, Iceland, Latvia, Lithuania, Norway, Sweden, Estonia, the Netherlands, Belgium and Luxemburg, amongst others, have recognised the SOC as either ‘the legitimate representative’ or ‘legitimate representatives’ of the Syrian people.⁵⁵ The fact that

⁵³ Announcement by the UK Foreign & Commonwealth Office: ‘UK, Germany and France call for President Assad to stand down’, 18 August 2011, accessed 25/12/14 at <https://www.gov.uk/government/news/uk-germany-and-france-call-for-president-assad-to-stand-down>; Talmon, S. (2013) Recognition of Opposition Groups as the Legitimate Representative of a People, *Bonn Research Papers on Public International Law*, No.1/2013, p. 3, accessed 26/12/14 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2227615; BBC News, ‘Syria: France Backs Anti-Assad Coalition’, (13/11/12), accessed 26/12/14 at <http://www.bbc.com/news/world-middle-east-20319787>; BBC News, ‘Syrian Crisis: Guide to Armed and Political Opposition’, (17/10/13), accessed 25/12/14 at <http://www.bbc.com/news/world-middle-east-15798218>; for the UK Government’s stand on UK and Syria see <https://www.gov.uk/government/world/syria> (accessed 25/12/14); BBC News, ‘Syria Conflict: the UK Recognises Opposition, says William Hague,’ (20/11/12), accessed 25/12/14 at <http://www.bbc.com/news/uk-politics-20406562>; Black, I. ‘UK: Syrian Opposition ‘Sole Legitimate Representative’ of the People’, (20/11/12) *The Guardian*, accessed 26/12/14 at <http://www.theguardian.com/world/2012/nov/20/uk-syrian-opposition-sole-legitimate-representative-people>.

⁵⁴ Membership includes Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates.

⁵⁵ BBC News, ‘Syrian Crisis: Guide to Armed and Political Opposition’, (17/10/13), accessed 25/12/14 at <http://www.bbc.com/news/world-middle-east-15798218>; Aljazeera, ‘GCC Recognises New Syrian Opposition Bloc’, (12/11/12), accessed 26/12/14 at <http://www.aljazeera.com/news/middleeast/2012/11/20121112175539534504.html>; Dougherty, J. ‘Obama Recognizes Syrian Opposition Coalition,’ (12/12/12), CNN, accessed 25/12/14 at <http://edition.cnn.com/2012/12/11/world/us-syria-opposition/>; Arsu, S., Arango, T. ‘Turks Grant Recognition to Coalition of Syrians’, (15/11/12) *The New York Times*, accessed 26/12/14 at <http://www.nytimes.com/2012/11/16/world/middleeast/turkey-recognizes-new-syrian-rebel-group-as-legitimate-leader-of-syria.html>; Ministry of Foreign Affairs, Iceland, ‘Friends of Syria Meeting in Marrakech, 12 December 2012, Nordic-Baltic Intervention’, accessed 26/12/14 at <http://www.mfa.is/media/mannrettindi/Syrland-yfirlýsing-121212.pdf>; ‘Benelux-messages at group of Friends-meeting Marrakech’, December 12th 2012, accessed 26/12/14 at <http://www.rijksoverheid.nl/documenten-en-publicaties/besluiten/2012/12/13/benelux-messages-at-group-of-friends-meeting-marrakech-12-december-2012.html>; Government of the Netherlands, ‘Representative of Syrian Coalition Welcome in Benelux’, 13th of December 2012, accessed 26/12/14 at <http://www.government.nl/news/2012/12/12/representative-of-syrian-coalition-welcome-in-benelux.html>.

the National Coalition is recognised as a 'legitimate' or the 'sole legitimate' representative of the Syrian people, rather than the legitimate government of Syria, is significant as this does not replace them as the State's legitimate government.⁵⁶ Recognition of the National Coalition is political rather than legal, as made clear by several States issuing the statements.⁵⁷ The effect of political recognition is that the recognising State is willing to enter into political or other relations with the group, but it does not create any legal obligations.⁵⁸ It merely legitimises the groups struggle against the regime, provides international acceptance, allows the group to speak for the people in international organisations, and usually results in financial aid.⁵⁹ Nevertheless, it does not affect the Assad regime's existing legal rights and obligations, as governmental status is based on the pre-existing fact of effective control, not on State recognition.

Based on this discussion the Assad Government is the legitimate '*de facto*' government of Syria, as it has effective control over a sufficiently representative part of the Syrian territory, exercises

⁵⁶ Talmon, S. (2011) Recognition of the Libyan Transitional National Council, *Oxford Legal Research Paper*, No.38/2011, p. 3, accessed 25/12/14 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1868032.

⁵⁷ For instance, the head of the National Coalition, Moaz Alkhatib, urged European States to 'grant political recognition to the coalition as the legitimate representative of the Syrian people.' BBC News, 'Syria: France backs anti-Assad Coalition,' (13/12/12), accessed 27/12/14 at <http://www.bbc.com/news/world-middle-east-20319787>. Similarly, Victoria Nuland, a spokesperson for the US State Department, made the nature of the recognition clear in a Daily Press Briefing: 'This is not a legal step, this is a political step which not only allows us to give the SOC a political lift and to make it clear that they are the primary group that we will be working with, but it also allows us, as I said, to try to better channel the nonlethal assistance that we provide to the political groups that they are working with on the ground in Syria.' US State department, Daily Press Briefing, 12 December 2012, accessed 27/12/14 at <http://www.state.gov/r/pa/prs/dpb/2012/12/201930.htm#SYRIA2>.

⁵⁸ Talmon, S. (2013) Recognition of Opposition Groups as the Legitimate Representative of a People, *Bonn Research Papers on Public International Law*, No.1/2013, p. 12, accessed 26/12/14 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2227615.

⁵⁹ Talmon, S. (2011) Recognition of the Libyan Transitional National Council, *Oxford Legal Research Paper*, No.38/2011, p. 2, accessed 25/12/14 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1868032.

state functions, and there is no other opposing force assuming to be a government in its place. In particular, the Assad regime's continued presence in the UN provides strong evidence that it is the government of Syria. Indeed, so does Syria joining the UN Chemical Weapons Convention in 2012.⁶⁰ Hence, discussion will now turn to whether the government has issued a valid consent to armed intervention.

3.3 The Requirement of Valid Consent

In order for a legitimate invitation to intervene to arise, valid consent must have been expressed. Consent to armed intervention may be expressed or tacit, explicit or implicit, provided that it is clearly established.⁶¹ Before the air strikes on Syrian territory began the Assad Government did not expressly consent to military action against IS on its territory; nor has any state engaging in the operations offered consent as their legal basis for action.⁶² However, before launching air strikes within Syrian territory, the US State Department's Ambassador to the UN, Samantha Power, 'gave her Syrian counterpart an advance indication of likely military

⁶⁰ Channel 4 News, 'US air strikes in Syria – Q&A,' (23/09/14), accessed 06/01/15 at <http://www.channel4.com/news/us-launches-air-strikes-in-syria-q-a>; The Hindu, 'Syria officially joins UN Chemical Weapons Convention,' (14/10/13) accessed 07/01/15 at <http://www.thehindu.com/news/international/world/syria-officially-joins-un-chemical-weapons-convention/article5233423.ece>.

⁶¹ Ago, R. (1979) 'Eighth Report on State Responsibility', UN Doc. A/CN.4/318 and Add. 1 to 4, 2 *Yearbook of the International Law Commission*, Vol. II(1), para. 69; .

⁶² In fact, the United States Department's spokesman, Jen Psaki, stated: "We warned Syria not to engage US aircraft...We did not request the regime's permission. We did not coordinate our actions with the Syrian government. We did not provide advance notification to the Syrians at a military level, or give any indication of our timing on specific targets."; Arimatsu, L., Schmitt, M. 'The Legal Basis for the War against ISIS Remains Contentious' (06/10/14), *The Guardian*, accessed 12/11/14 at <http://www.theguardian.com/commentisfree/2014/oct/06/legal-basis-war-isis-syria-islamic-state>. The alleged basis for military action will be dealt with in part 4 of this paper.

attacks against Isis in the country – but strongly denied any military coordination’.⁶³ By so doing the US effectively declined Syria’s offer for cooperation in fighting IS, despite warnings that any action without the government’s consent would constitute an attack on Syria.⁶⁴ Even so, the Assad Government has as of yet not made any efforts to intervene with the operation.

Arguably, IS being one of the Assad regime’s most powerful opponents and the government’s failure to object more forcefully to the US action could be interpreted as an implied consent. Similarly, the government has offered formal consent by expressing a will ‘to cooperate and coordinate’ with any side in defeating IS,⁶⁵ and is also cooperating with the US-led coalition by standing down its air defences in the relevant areas of operation.⁶⁶ However, can this be said to be enough to give rise to a genuine implicit consent?

Implicit consent is difficult to establish due to its nature. One instance of implicit consent to foreign armed intervention can be found in the Second Congolese Conflict in which Uganda conducted operations in Eastern Congo with the consent of the then president of the DRC, Laurent Kabila, in 1997-98.⁶⁷ Both parties acknowledged this consent, which was not initially

⁶³ Chulov, M., Ackerman, S., Lewis, P. ‘US Confirms 14 Air Strikes Against ISIS in Syria’ (23/09/14), The Guardian, accessed 28/10/14 at <http://www.theguardian.com/world/2014/sep/23/us-launches-air-strikes-against-isis-targets-in-syria>.

⁶⁴ ‘Russia Warns US Against Strikes on Islamic State in Syria’ (11/09/14), BBC News, accessed 28/10/14 at <http://www.bbc.co.uk/news/world-middle-east-29154481>.

⁶⁵ The Guardian, ‘Syria offers to help fight Isis but warns against unilateral air strikes,’ (26/08/14) accessed 06/01/15 at <http://www.theguardian.com/world/2014/aug/26/syria-offers-to-help-fight-isis-but-warns-against-unilateral-air-strikes>.

⁶⁶ Bellamy, A., ‘Legality, Legitimacy, and Humanitarian Intervention Against ISIS in Syria,’ (16/19/14) accessed 06/01/15 at <http://theglobalobservatory.org/2014/10/legality-legitimacy-human-protection-international-intervention-isis-syria-r2p/>.

⁶⁷ *Armed Activities on the Territory of Congo (Democratic Republic of the Congo v Uganda)* (2005) I.C.J. Rep.168, para. 45.

expressed in written form. However, on 27th April 1998 the two countries concluded a Protocol on Security along the Common Border. This protocol included an agreement to ‘co-operate in order to ensure security and peace along the common border.’⁶⁸ However, the DRC later contended that these words did not constitute an ‘invitation or acceptance by either the contracting parties to send its army into the other’s territory’ since the Protocol did not expressly refer to such conduct.⁶⁹ The ICJ held that the absence of any objection to the presence of Ugandan troops in the DRC, and the subsequent signing of the Protocol, could be ‘reasonably understood’ as an expression of consent to the continuing presence of Ugandan troops. In any case, the Court held that the legal basis for authorisation was the informal agreements between the parties, predating the Protocol.⁷⁰ Thus armed intervention can be based on an implicit expression of consent.⁷¹

In the Syrian situation there is no evidence of an agreement between the two parties for military intervention. Syria has expressly stated that any intervention must be conducted in liaison with the Syrian government in order to not be considered as aggression.⁷² Hence, there is no agreement between the US-led coalition and the Syrian government. Tacitly welcoming the strikes, or a failure to resist more thoroughly, cannot on its own amount to implied legal

⁶⁸ *Ibid*, para. 46

⁶⁹ *Ibid*, Liebllich, E. (2011) Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements, *Boston University International Law Journal*, Vol. 29, 377, p. 358.

⁷⁰ *Ibid*.

⁷¹ *Armed Activities on the Territory of Congo (Democratic Republic of the Congo v Uganda* (2005) I.C.J. Rep.168, para.47; Liebllich, E. (2011) Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements, *Boston University International Law Journal*, Vol. 29, 377, p. 358.

⁷² The Guardian, ‘Syria offers to help fight Isis but warns against unilateral air strikes,’ (26/08/14) accessed 06/01/15 at <http://www.theguardian.com/world/2014/aug/26/syria-offers-to-help-fight-isis-but-warns-against-unilateral-air-strikes>.

permission. Hence, the air strikes conducted by the US-led coalition cannot be justified on the basis of an invitation of armed intervention as the legitimate government of Syria has not issued a valid consent. On this basis the air strikes will constitute a violation of the prohibition of the use of force unless it can be justified on the third universally recognised exception of self-defence.

4. Armed Intervention in Syria: A Right of Collective Self-defence against a Non-State Actor?

In a letter to the UN Secretary General, Ban Ki-moon, Samantha Power, the US Ambassador to the United Nations, justified the US-led air strikes against IS in Syria, without seeking the permission of the Syrian government or the UNSC, on the basis of 'the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations.'⁷³ Thus, the discussion will now turn to examine whether the right of collective self-defence could legitimise the airstrikes against IS. In so doing the exception of self-defence will first be examined in general, before its application to the situation at hand is discussed further.

⁷³ Letter from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc. S/2014/695, accessed 29/11/14 at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_695.pdf; Sengupta, S, Savage, C. 'U.S. Invokes Iraq's Defence in Legal Justification of Syria Strikes' (23/09/14) The New York Times, accessed 29/11/14 at http://www.nytimes.com/2014/09/24/us/politics/us-invokes-defense-of-iraq-in-saying-strikes-on-syria-are-legal.html?_r=0.

4.1 The Exception of Self-defence

Self-defence is a fundamental right under international law and allows each State to resort to force in order to defend itself from an armed attack. This do not mean that the use of force on the territory of another State in self-defence is not a violation of that State's territorial integrity or political independence, but rather that military action in self-defence excuses the violation. The right of self-defence is enshrined in Art.51 of the UN Charter which provides:

'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...'

Thus, Art.51 justifies the use of force in self-defence in response to an armed attack; and the right is both individual and collective in nature. However, any exercise of this right must be reported to the SC⁷⁴ and will only last 'until the Security Council has taken measures necessary to maintain international peace and security.'

⁷⁴ Although there is an obligation to report an exercise of self-defence to the SC it is not clear what the consequences of a failure to report are. In the case of *Armed Activities on the Territory of Congo (Democratic Republic of the Congo v Uganda)* (2005) I.C.J. Rep.168, there was a failure to report but as

The promulgation of self-defence as an ‘inherent’ right has been taken to mean that it is a pre-existing right of customary nature, existing independently of the UN Charter.⁷⁵ Thus, like the general prohibition on the use of inter-State force, the customary and conventional rights of self-defence run alongside each other, retaining a separate existence, and are applicable to all States.

Self-defence under customary law is taken to have been definitively formulated in the diplomatic correspondence between the US Secretary of State Webster and British officials over the *Caroline* incident of 1837.⁷⁶ During this correspondence, Webster indicated that for self-defence to be justified Great Britain had to ‘show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation’.⁷⁷ Further, Webster specified that the action taken must also involve ‘nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.’⁷⁸ This statement effectively defines self-defence as lawful under customary law if it is made in response to an immediate and pressing threat which could not be avoided by alternative measures and the force used was proportionate to the danger posed.⁷⁹ In other words, any use of

the claims of self-defence failed on the facts, there was no further discussion of this issue. Dixon, M.(2013) Textbook on International Law (7th Ed), Oxford University Press, p. 332.

⁷⁵ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits)*, (1986) ICJ Rep. 14, para.193-194.

⁷⁶ Dixon, M.(2013) Textbook on International Law (7th Ed), Oxford University Press, p.327; Klabbbers, J. (2013) International law, Cambridge University Press, p. 193.

⁷⁷The British–American correspondence relating to the *Caroline* incident (Note from Mr Webster to Mr Fox, 24 April 1841) in 29 BFSP 1129, 1138 (1840–41); Dinstein, Y. (2005) War, Aggression and Self-Defence (4th Ed), Cambridge University Press, p. 249.

⁷⁸ *Ibid.*

⁷⁹ Thus, self-defence will not be justified if the crisis can be avoided through diplomatic means, or if the danger is so remote as to be nothing more than a feeling of suspicion; Dixon, M.(2013) Textbook on

force in self-defence must satisfy the three requirements of immediacy, necessity and proportionality.

However, although self-defence under Art.51 and customary law retains a separate existence, the condition of proportionality and necessity applies equally to Art.51.⁸⁰

Additionally, it was held in *Nicaragua* that the exercise of self-defence under customary law is also subject to 'the State having been the victim of an armed attack.'⁸¹ Thus, in order for the right of self-defence under Art.51 or its customary equivalent to arise the conditions of an armed attack, necessity and proportionality must all be satisfied.

4.2 The Applicability of Self-defence against non-State Actors

Whilst Art.2(4) of the UN Charter refers solely to the prohibition on the use of force by one member state against 'any State', Art.51 only mentions a State as the potential target of an armed attack. This is the source of a contentious debate as to whether the right to self-defence under Art.51 only applies to an armed attack by a State, or whether it extends to attacks by non-state actors simply operating from the territory of a foreign

International Law (7th Ed), Oxford University Press , p.328. The issue of proportionality was confirmed in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) ICJ Rep. 14 where it was stated at p. 94, para. 176: "there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law".

⁸⁰ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) I.C.J Rep. 14, paras.176 and 194; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, (1996) I.C.J. Rep.226, para.41.

⁸¹ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) I.C.J Rep. 14, para. 195; Tams, C (2009) *The Use of Force Against Terrorists*, *The European Journal of International Law*, Vol.20, at 369.

state. As the air strikes in Syria are targeting IS, it is necessary to investigate whether the exception of self-defence applies to attacks by non-State actors. If it does not, the air strikes cannot be characterised as action in self-defence. In so doing, the position taken by the ICJ will first be examined before turning to look at the impact the attacks on the US in 2001 has had on this area of international law.

In the *Nicaragua* case it was held that a direct attack by a non-State actor could amount to an 'armed attack' against the target State under rules of attribution. The majority view found that the provision of weapons, finance, training facilities and general encouragement to non-State actors using armed force against another State would constitute an unlawful use of force against the victim-State by the supplier-State.⁸² The Court looked to the General Assembly's *Definition of Aggression*⁸³ as assessing the appropriate criterion for the existence of an indirect attack. The Court found that an 'armed attack' included 'not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to (*inter alia*) an actual armed attack conducted by regular forces, "or its substantial involvement therein"'.⁸⁴ Hence, a State will violate the prohibition on the use of force by sending non-State actors to commit armed attacks on the territory of another State or if the state exercised effective control over such military action. As a consequence, there is a

⁸² Blay, S, Piotrowicz, R., Tsamenyi, M. (2005) *Public International Law: an Australian Perspective* (2nd Ed.), Oxford University Press, p. 232-233; Dixon, M.(2013) *Textbook on International Law* (7th Ed), Oxford University Press, p. 330.

⁸³ UNGA Resolution 3314(XXIX), Article 3(g).

⁸⁴ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) I.C.J Rep. 14, para. 195.

right to resort to the use of force in self-defence where the attacks can be attributed to a State. However, the Court did not consider whether the activities of a non-State actor could themselves amount to an armed attack justifying the defendant's response in self-defence.⁸⁵

The issue of armed attack by a non-State actor was re-examined in the *Palestinian Wall Advisory Opinion*, in which Israel claimed that the construction of the Barrier was consistent with a right of self-defence against terrorist attacks.⁸⁶ However the majority view of the ICJ was that the attacks emanated from the Occupied Palestinian Territory in which Israel exercised control and thus self-defence could not justify the Israeli measures aimed at preventing the attacks.⁸⁷ However, Judge Buergenthal did not agree with this conclusion on the basis that Art.51 did not specify that 'its exercise is dependent on the basis of an armed attack by another state,' and that the attack came from across the Green Line⁸⁸ and did therefore not emanate from Israel proper.⁸⁹ Thus, in his view, the attacks on Israel came from across its border and must 'permit Israel to exercise its right of self-defence against such attacks, provided that the measure it takes is otherwise consistent with the legitimate exercise of that right.'⁹⁰ Similar statements were made by

⁸⁵ Van Steenberghe, R. (2010) Self-defence in Response to Attacks by Non-State Actors in the light of Recent State Practice: a Step Forward?, *Leiden Journal of International Law*, 183, p. 8.

⁸⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, [2004] ICJ Rep 131, para. 138.

⁸⁷ *Ibid.*, para.139.

⁸⁸ The line dividing Israeli territory from the Occupied Palestinian territory; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, [2004] I.C.J. Rep 131; Declaration of Judge Buergenthal, para. 6.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

Judge Higgins; accepting that action by non-State actors may amount to an armed attack giving rise to a right of self-defence.⁹¹

Later, in the *DRC* case, the Court held that attacks carried out by rebel groups, launching armed attacks from Ugandan territory into the Congo, were not attributable to the DRC.⁹² Consequently, the Ugandan military response to these attacks in the Congolese territory could not be justified under the exception of self-defence.⁹³ Subsequently the Court concluded that there was 'no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.'⁹⁴ However, in their separate opinions, Judges Kooijmans and Simma expressly accepted that self-defence was available against armed attacks by non-State actors 'even if they cannot be attributed to the territorial State', as it would be 'unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State and the Charter does not so require.'⁹⁵

To sum up, the majority of ICJ judgments have held that the right to use force in self-defence against an attack by non-State actors applies where the attack is attributable to

⁹¹ *Ibid*, separate opinion of Judge Higgins, paras. 33-34.

⁹² *Armed Activities on the Territory of Congo (Democratic Republic of the Congo v Uganda* (2005) I.C.J. Rep.168, para.146.

⁹³ *Ibid*, para.147.

⁹⁴ *Ibid*.

⁹⁵ *Armed Activities on the Territory of Congo (Democratic Republic of the Congo v Uganda* (2005) I.C.J. Rep.168, separate opinion of Judge Simma, para. 12. Similar statements were made by Judge Koojiman at para.30; Tams, C (2009) *The Use of Force Against Terrorists*, *The European Journal of International Law*, Vol.20, at 384.

the State in whose territory the group is operating. However, the ICJ seems to have failed to take a position as to whether an attack by an independent non-state actor can amount to an armed attack triggering the right of self-defence. In both *Nicaragua* and the *DRC* case the use of force was not exclusively directed at the non-State actors but also against the State from whose territory the rebel forces operated. In the *Nicaragua* case the US claimed to be primarily acting in defence of El Salvador, helping it respond to alleged armed attacks from rebel groups actively supported by Nicaragua, as justification for taking offensive measures against Nicaraguan targets.⁹⁶ In the *DRC* case on the other hand, the Court emphasised that Uganda's defensive measures were carried out against the DRC, as Ugandan military action was largely directed against towns and villages far removed from the territory from which the rebel group operated.⁹⁷ Hence, as the State was subject to the defensive measures in these two cases, the Court focused on whether the rebel group's attacks could be attributed to the State in order to assess the legitimacy of the military operations, as defensive action must be directed at the perpetrator.⁹⁸ Hence, if defensive action is taken against the State in response to armed attacks committed by non-State entities, the attacks must be attributable to the State in order for the attacks to be legitimate. However, as a consequence, the above judgments may be read as not addressing the issue of the use of force in self-defence against non-State

⁹⁶ However, the ICJ rejected this claim and found the US to have acted in contravention to the prohibition on the threat or use of force; *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) I.C.J. Rep. 14, paras. 48, 126-128, 227-228 and 238.

⁹⁷ *Armed Activities on the Territory of Congo (Democratic Republic of the Congo v Uganda)* (2005) I.C.J. Rep.168, paras. 81-86 and 147; Trapp, K. (2007) Back to Basics: necessity, proportionality and the right of self-defence against non-State actors, *International & Comparative Law Quarterly*, 56(1), p. 143.

⁹⁸ Trapp, K. (2007) Back to Basics: necessity, proportionality and the right of self-defence against non-State actors, *International & Comparative Law Quarterly*, 56(1), p. 143.

actors acting independently from the harbouring State but simply operating from the State's territory. In fact, neither in the *Nicaragua* case, the *Palestinian Wall Advisory Opinion*, nor in the *DRC* case did the ICJ rule out that an attack by private non-State actors could amount to an armed attack triggering the right of self-defence. On this basis, it can be concluded that the ICJ has never provided guidance on the circumstances under which a victim-State is entitled to use force in self-defence against independent non-State actors.

In recent years a more liberal approach to the right of self-defence under Art.51 has been adopted with state practice evidencing a tendency towards recognising the right of self-defence in response to an armed attack carried out by private non-State actors. The leading example of an armed attack by a non-State actor giving rise to the right of self-defence is the attacks against the US on 9/11. The attacks were launched from Afghan territory by the Al-Qaeda terrorist organisation, but they were not controlled by the Taliban-led State. In response, the US took countermeasures in self-defence. The existence of such a right was recognised by the Security Council, which immediately and unanimously adopted two resolutions in which it recognised the right to self-defence.⁹⁹

Hence, if the right to self-defence within Art.51 is activated, the armed attack requirement for the application of Art.51 has been satisfied.¹⁰⁰ Moreover, NATO also

⁹⁹ Security Council Resolution 1368 (2001), (2001-2) RDSC 290, 291 and Security Council Resolution 1373 (2001), (2001-02) RDSC 291, id. Through these resolutions the SC recognised 'the inherent right of individual or collective self-defence in accordance with the Charter', affirming the right of self-defence. Dinstein, Y. (2005) *War, Aggression and Self-Defence* (4th Ed), Cambridge University Press, p. 207; Klabbbers, J. (2013) *International Law*, Cambridge University Press, p. 200.

¹⁰⁰ It should be noted that the Art.51 right to use force in self-defence 'if an armed attack occurs' has been taken to mean that it is confined to cases in which an actual armed attack has commenced. However, the right to act in self-defence to prevent the threat of an imminent armed attack, referred to as

regarded it as an armed attack triggering the right of self-defence and invoked Art.5 of the 1949 (Washington) North Atlantic Treaty for the first time.¹⁰¹ Hence, the legal response by international organisations confirms that the attacks by Al-Qaeda, a non-State actor, qualified as an armed attack.

In the aftermath of the US military operation 'Enduring Freedom' in Afghanistan, several military operations have been launched in response to attacks by non-state actors with no involvement of a state. One of these was the Israeli invasion of Lebanon in 2006, aimed at putting an end to the firing of rockets by Hezbollah. Israel reported the military action to the UNSC as required by Art.51 of the UN Charter and justified it by relying on a right of self-defence.¹⁰² Israel reserved this right on the basis of the 'ineptitude and inaction of the Government of Lebanon' in controlling the insurgent group and the failure to exercise jurisdiction over its own territory for many years.¹⁰³ Many States have recognised Israel's right of self-defence in response to the attacks by Hezbollah under the law of self-defence.¹⁰⁴ However, States have also condemned Israel because of the disproportionality between the attacks committed by Hezbollah and Israel's military reaction.¹⁰⁵ This

anticipatory self-defence, is widely accepted. Chatham House, 'Principles of International Law on the Use of Force by States in Self-defence,' ILP WP 05/01, October 2005, Principle 1.

¹⁰¹ Article 5 of the North Atlantic Treaty provides that an armed attack against one or more of the Allies in Europe or North America '*shall be considered an attack on them all*'. (Emphasis added)

¹⁰² Letter from the Permanent Representative of Israel, UN Doc. A/60/937-S/2006/515, accessed 28/11/14 at <http://unispal.un.org/UNISPAL.NSF/0/E807FC933A355C94852571AA00517B18>.

¹⁰³ *Ibid.*

¹⁰⁴ This right has been expressly recognised by Argentina, the United Kingdom, Peru, Denmark, Greece, Slovakia and the United States; Security Council's 5489th Meeting, 14th July 2006, UN Doc. S/PV.5489, accessed 02/12/14 at <http://unispal.un.org/UNISPAL.NSF/0/1C362A20DB4AF1D4852571AF0060F097>; Security Council's 5493rd Meeting, 21 July 2006, UN Doc. S/PV.5493, accessed 02/12/14 at <http://unispal.un.org/Unispal.Nsf/e872be638a09135185256ed100546ae4/dc5176e809b7e73d852571f00068cdcb?OpenDocument>.

¹⁰⁵ *Ibid.*

criticism was primarily based on the indiscriminate use of force causing major casualties and suffering amongst the peaceful population, violating international humanitarian law.¹⁰⁶ However, this is a criticism of the excessive way Israel exercised its right of self-defence and thus the Israeli invasion into Lebanon may still be seen as an implicit approval of the right to respond in self-defence to attacks by non-state actors, even if no state is substantially involved in such attacks.¹⁰⁷

Similarly, in February 2008 Turkey launched a major operation into Iraq in order to stop attacks being carried out on its territory by the Kurdistan Workers' Party (PKK). Turkey did not report its military action to the UNSC but the Turkish prime minister, Recep Erdogan, stated that the operation was justified under the law of self-defence.¹⁰⁸ The Turkish action has been approved by few states.¹⁰⁹ However, even fewer States have condemned the

¹⁰⁶ *Ibid.*

¹⁰⁷ Van Steenberghe, R. (2010) Self-defence in Response to Attacks by Non-State Actors in the light of Recent State Practice: a Step Forward?, *Leiden Journal of International Law*, 183, p. 5.

¹⁰⁸ Croft, A. 'Erdogan hopes "developments" will avert incursion' (22/10/07), Reuters, accessed 28/11/14 at <http://www.reuters.com/article/2007/10/22/us-turkey-iraq-erdogan-idUSL2223032720071022>; Jones, G. 'Turkey to approve troops to Iraq in defiance of U.S.' (16/10/07) Reuters, accessed 28/11/14 at <http://www.reuters.com/article/2007/10/16/us-turkey-iraq-idUSL1354608620071016>; Van Steenberghe, R. (2010) Self-defence in Response to Attacks by Non-State Actors in the light of Recent State Practice: a Step Forward?, *Leiden Journal of International Law*, 183, p. 3.

¹⁰⁹ The Belgian Foreign Minister noted that the Turkish attacks 'was precisely targeted and aimed only at PKK targets, without harming the population of northern Iraq and local factions' (Questions et réponses écrites, Chambre des représentants de Belgique, 21 February 2008, QRVA 52 010, 1357, accessed 02/12/14 at www.dekamer.be/QRVA/pdf/52/52K0010.pdf). The Dutch Foreign Minister later observed that 'the Turkish actions appear to be restricted to specific actions against PKK targets in the border area of northern Iraq' (Verhagen, M. 'Beantwoording vragen van het lid Van Bommel over een Turkse invasie in Noord-Irak' (Ministerial Statement) (3/03/08); Ruys, T. (2008) 'Quo Vadit Jus ad Bellum? A Legal Analysis of Turkey's Military Operations against the PKK in Northern Iraq', *Melbourne Journal of International Law*, 334-365, p. 363; Van Den Herik, L, Schrijver, N. (2013) Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges, Cambridge University Press, p. 369, accessed 02/12/14 at <http://books.google.co.uk/books?id=1JNBAAAQBAJ&pg=PA396&lpg=PA396&dq=Netherlands:+Minis+terial+Statement,+3+March+2008+Turkey+Iraq&source=bl&ots=rYq0-CqK25&sig=-PP2fqLqqjU3KoKBFcTo-JIHBYk&hl=no&sa=X&ei=TOp9VN->

defensive operations, while none was directly concerned with a denial of the right of Turkey to respond in self-defence against the PKK's attacks.¹¹⁰ Additionally, many States neither condemned nor approved the operation but rather recommended that Turkey resort to proportionate force.¹¹¹ Hence, taking into account the international reaction to the operation and the lack of comment, the position of the international community is difficult to ascertain. This becomes especially difficult due to the fact that the matter was never challenged before the Security Council. However, this lack of opposition can be interpreted as tacit consent for Turkey's right to act in self-defence, but that the use of force was unlawful due to the use of disproportionate force.

In light of these two examples following Operation Enduring Freedom it seems that the right of self-defence may have been broadened to cover attacks by private non-State actors. As those actors were independent of their territorial State, the rules of attribution did not apply. Hence, it seems that military force directed at non-State actors within the territory of another State may be legitimate under the exception of self-defence, as long as force is not directed at the territorial State but the non-State entity only. Additionally,

[ZFuOv7AaHnIHIDw&ved=0CCEQ6AEwAA#v=onepage&q=Netherlands%3A%20Ministerial%20State%20nt%2C%203%20March%202008%20Turkey%20Iraq&f=false.](http://www.eu2008.si/en/News_and_Documents/CFSP_Statements/February/0225MZZturkey.html))

¹¹⁰ Van Steenberghe, R. (2010) Self-defence in Response to Attacks by Non-State Actors in the light of Recent State Practice: a Step Forward?, *Leiden Journal of International Law*, 183, p. 6.

¹¹¹ See BBC News, 'Turkey Must End Iraq Raid – Bush', (28/02/08) accessed 02/12/14 at <http://news.bbc.co.uk/2/hi/europe/7268345.stm>; Presidency of the EU, Press Release, 'EU Presidency Statement on the Military Action Undertaken by Turkey in Iraqi Territory', (25/02/08) *Slovenian Presidency of the EU 2008*, accessed 02/12/14 at http://www.eu2008.si/en/News_and_Documents/CFSP_Statements/February/0225MZZturkey.html; Deutsche Welle Staff, 'Europe again warns against Turkish intervention in Iraq' (22/10/07) *Deutsche Welle* accessed 02/12/14 at <http://www.dw.de/europe-again-warns-against-turkish-intervention-in-iraq/a-2834888>.

any measures taken against such attacks must be consistent with the exercise of the right of self-defence, namely it must be necessary and the force used must be proportionate.

The argument against the emergence of such a right is that recent state practice does not meet the conditions under which the law of self-defence may evolve. Customary law rules may change through state practice if this practice is general and accepted as law binding upon States.¹¹² However, for a customary rule to emerge, unanimous state practice is not required.¹¹³ Similarly, conventional law may evolve through interpretation of a treaty based on subsequent state practice in the application of the treaty; and if such state practice is repeated over time and approved by the other parties to it.¹¹⁴ It is correct that the military operations in Lebanon and Iraq have been condemned by members of the international community. However, as we have seen, this criticism has been based on the operations being disproportionate and thus an illegitimate exercise of military force in self-defence. Thus, recognising a right of self-defence against an attack by non-State actors is more than a one off response to the 9/11 attacks. What is being observed is an emerging tendency towards allowing states to respond in self-defence to armed attacks by non-State actors, even where the acts cannot be attributed to a State. Hence, it seems that a new rule of customary law is evolving in which the use of force against non-State actors justifies the application of the exception of self-defence. However, in order for any

¹¹² The Statute of the International Court of Justice, Article 38(1); *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) I.C.J Rep. 14, para.184-185.

¹¹³ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) I.C.J Rep. 14, para.186.

¹¹⁴ Vienna Convention on the Law of Treaties 1969, Article 30 and Article 31(3); Van Steenberghe, R. (2010) Self-defence in Response to Attacks by Non-State Actors in the light of Recent State Practice: a Step Forward?, *Leiden Journal of International Law*, 183, p. 2.

such action to be legitimate it must be recognised as such by the international community, amount to an armed attack within the meaning of Art.51, and satisfy the dual conditions of necessity and proportionality.

Having established that self-defence may justify the use of force against a non-State actor the discussion in this article will now turn to investigate the requirements of armed attack, necessity, and proportionality in light of their application to the US-led air strikes against IS in Syria.

4.3 The Concept of an Armed Attack

In *Nicaragua* the ICJ focused on the 'scale and effects' of an armed attack and a need to distinguish it from a 'mere frontier incident'.¹¹⁵ The court distinguished between 'the most grave forms of the use of force (those constituting an armed attack) from other less grave forms'.¹¹⁶ This requirement was expressly affirmed in *Oil Platforms*¹¹⁷ and makes it clear that not all armed activities can amount to an armed attack sufficient to trigger the right of self-defence.¹¹⁸ Hence, an isolated minor incident which, due to the manner in

¹¹⁵ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits)*, (1986) ICJ Rep. 14, para 195

¹¹⁶ *Ibid*, para 191.

¹¹⁷ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, (2003) I.C.J Rep. 161

¹¹⁸ Dixon, M. (2013) *Textbook on International Law* (7th Ed), Oxford University Press, p. 330.

which it takes place, cannot be mistaken for a threat to the safety of the State, does not qualify as an armed attack for the purposes of the application of self-defence.¹¹⁹

The 'scale and effect' requirements seem to imply that an act, or a series of acts, must be of a significant magnitude and intensity, and result in substantial destruction to important elements of the victim-State (meaning its people, economic and security infrastructure), governmental authority, and cause damage or deprive the state of its territory.¹²⁰ Hence, it is clear that IS's continuing attacks on Iraqi territory are of a sufficient 'scale and effect' to satisfy the gravity requirement. The group has launched a full-scale invasion into Iraq, taking control of a significant part of its northern territory, towns and cities, and has become a threat to Iraqi citizens.¹²¹ These attacks cannot be mistaken for anything but a use of armed force against the territorial integrity and political independence of Iraq.

However, although a State may have a right to use force in self-defence against a non-State actor, and the attack by the non-State actor qualifies as an armed attack for the purposes of self-defence, this does not necessarily mean that defensive operations on the territory of another State may take place.¹²² The scope of a State's right to resort to the

¹¹⁹ Zemanek, K. 'Armed Attack' (October 2013) Max Planck Encyclopedia of Public International Law, para. 7, accessed 21/11/14 at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e241>

¹²⁰ *Ibid*; Constantinou, A. (2000) The Right of Self-Defence under Customary International Law and Article 51 of the UN Charter, Athènes/Bruxelles, Ant N Sakkoulas, Bruylant, p. 63-64.

¹²¹ *Alaaldin, R., Khan, B.* 'Airstrikes on Isis Targets in Syria and Iraq are Legal under International law', (01/10/2014) London School of Economics and Political Science Daily Blog, accessed 21/11/14 at <http://blogs.lse.ac.uk/usappblog/2014/10/01/airstrikes-on-isis-targets-in-syria-and-iraq-are-legal-under-international-law/>

¹²² Arimatsu, L., Schmitt, M. 'The Legal Basis for the War against ISIS Remains Contentious' (06/10/14), The Guardian, accessed 12/11/14 at <http://www.theguardian.com/commentisfree/2014/oct/06/legal-basis-war-isis-syria-islamic-state>.

use of force in self-defence is limited by the requirements of necessity and proportionality.¹²³ These will now be looked at separately.

4.4 Applying the Condition of Necessity to Armed Attacks by non-State Actors

The necessity requirement means that any action taken in self-defence must be a measure of last resort, 'leaving no choice of means.'¹²⁴ In the words of Robert Ago, in his 8th Report to the International Law Commission on State Responsibility:

(T)he State must not, in the particular circumstances, have had any means of halting, repelling or preventing the attack other than recourse to armed force...had it been able to achieve the same result by measures not involving the use of armed force, it would have no justification for adopting conduct which contravened the general prohibition against the use of armed force. The point is self-evident and is generally recognised.'¹²⁵

¹²³ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) I.C.J. Rep. 14, paras.176 and 194; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, (1996) I.C.J. Rep.226, para.41; *Oil Platforms (Islamic Republic of Iran v. United States of America)*,(2003) I.C.J Rep. 161, paras. 51 and 74; *Armed Activities on the Territory of Congo (Democratic Republic of the Congo v Uganda)* (2005) I.C.J. Rep.168, para.147; the *Caroline* case of 1837.

¹²⁴ The British–American correspondence relating to the *Caroline* incident (Note from Mr Webster to Mr Fox, 24 April 1841) in 29 BFSP 1129, 1138 (1840–41).

¹²⁵ Ago, Roberto, Eighth Report on State Responsibility (Addendum), Yearbook of the International Law Commission 1980, Vol. II(1), 60, para 120

Hence, if there are no other practical alternatives to the proposed use of force likely to be effective in ending or averting the attack, the use of force in self-defence will satisfy the necessity requirement.¹²⁶ However, all peaceful means must have been exhausted for it to be available.¹²⁷

In order for the necessity requirement to be satisfied in relation to non-State actors operating on the territory of another State there must be some link between the harbouring State and the non-State actor. Recent practice indicates that, where the harbouring State is either unable or unwilling to suppress the activities of the non-State actor on its territory, a right to resort to the use of force in self-defence may arise.¹²⁸ For instance, in both the Israeli invasion of Lebanon in 2006 and the Turkish incursion into Iraq in 2008, the States emphasised that the territorial State had failed to abide by its obligation to prevent attacks from being conducted from its territory. These two situations show that defensive force in the territory of a harbouring State against non-State actors is sometimes necessary due to the territorial State's failure to prevent its territory from being used as a base for terrorist operations.¹²⁹ The justification for taking action under such circumstances is that the victim-State has little choice. It is faced with the dilemma of either respecting the host State's territorial integrity and sacrificing its own security, or violating that State's territorial integrity in a limited fashion and targeting

¹²⁶ Chatham House, 'Principles of International Law on the Use of Force by States in Self-defence,' ILP WP 05/01, October 2005, Principle 3.

¹²⁷ *Ibid.*

¹²⁸ Tams, C., Devaney, J. (2012) Applying Necessity and Proportionality to Anti-Terrorist Self-Defence, *Israel Law Review*, Vol. 45(1), p. 100.

¹²⁹ Trapp, K. (2007) Back to Basics: necessity, proportionality and the right of self-defence against non-State actors, *International & Comparative Law Quarterly*, 56(1), p. 147.

the defensive operations against the non-State actor only.¹³⁰ Hence, provided that the use of force is appropriately targeted, the victim-State may resort to the use of force in self-defence under Art.51. It is the State's acquiescence in or consistent failure to prevent or suppress the activities that satisfies the necessity requirement. However, it flows from this that where a state is actively countering the activities of the non-state actors, doing everything it can to prevent such acts taking place on its territory, a victim-State's use of force against that non-State actor cannot amount to a necessity to use force.¹³¹ This is because measures taken by the harbouring state against the terrorists are an alternative option, and a preferable 'choice of means' over foreign armed intervention by the victim-State.¹³²

In relation to the air strikes in Syria, the letter from Samantha Power addressed to the UN Secretary-General provided that Iraq had a valid right of self-defence against IS as the insurgent group was attacking Iraq from its safe havens in Syria and 'the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.'¹³³ It further stated that the Syrian regime had 'shown that it cannot and will not confront these safe havens effectively itself' and thus, due to the Syrian government being unable or unwilling

¹³⁰ Arimatsu, L., Schmitt, M. 'The Legal Basis for the War against ISIS Remains Contentious' (06/10/14), *The Guardian*, accessed 12/11/14 at <http://www.theguardian.com/commentisfree/2014/oct/06/legal-basis-war-isis-syria-islamic-state>.

¹³¹ Trapp, K. (2007) Back to Basics: necessity, proportionality and the right of self-defence against non-State actors, *International & Comparative Law Quarterly*, year? 56(1), p. 147.

¹³² Tams, C., Devaney, J. (2012) Applying Necessity and Proportionality to Anti-Terrorist Self-Defence, *Israel Law Review*, Vol. 45(1), p. 98.

¹³³ Letter from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc. S/2014/695, accessed 29/11/14 at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_695.pdf.

to do so, the US-led coalition 'initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq, including by protecting Iraqi citizens from further attacks and by enabling Iraqi forces to regain control of Iraq's borders.'¹³⁴

Assessing the above statements in light of the necessity requirement it seems that anything less than the use of military force would allow IS to expand its territory and commit further attacks and human rights violations. Inaction in Syria during the three-year civil war gave IS freedom to operate and grow in strength, influence and territory. Further, it was from its Syrian bases that the group was able to make their huge territorial advances into Iraqi territory in June 2014, taking control over Iraqi towns and cities. Hence, unless IS's infrastructure in Syria which supports the occupation of Iraqi territory is addressed, it would not be possible for the US-led coalition to defeat IS.¹³⁵ The group would merely retreat to its safe havens in Syria in order to regroup, regain its strength, and continue to conduct further attacks into Iraq from Syrian territory. Furthermore, such an allowance would constitute a considerable risk to both the Iraqi State and its civilians.

Additionally, the Syrian government has had two years to dismantle the militant group but has been unable or unwilling to do so, lacking both the capacity and capability. Moreover, the Iraqi government has appealed to the United Nations to recognise the threat to their territorial integrity, asking for support from the international community to

¹³⁴ *Ibid.*

¹³⁵ Weller, Mark, 'Islamic State crisis: what force does international law allow? (25/09/14), BBC News, accessed 15/10/14 at <http://www.bbc.co.uk/news/world-middle-east-29283286>.

defeat IS and protect their territory and citizens.¹³⁶ However, as of yet no military action has been authorised. Hence, it seems that all other possibilities have been exhausted and the necessity of military action has been triggered. This justification appears to have gained the support of the UN Secretary General, Ban Ki-Moon, who endorsed the strikes, noting that ‘the strikes took place in areas no longer under the effective control of that Government.’¹³⁷ Thus, Iraq, and by extension the US-led coalition, can be said to have no choice of other means in order to halt, repel or prevent the armed attacks launched by IS than the recourse to the use of force.

4.4 The Condition of Proportionality

In addition to the necessity requirement which concerns the availability of self-defence, the use of force in self-defence must also be proportionate. Under the *Caroline* formula, as mentioned above, the condition of proportionality requires ‘nothing unreasonable or excessive, since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.’ As noted in the Chatham House principles on self-defence, this requires that ‘(t)he force used, taken as a whole, must not be excessive in relation to the need to avert or bring the attack to an end.’¹³⁸ This means that self-

¹³⁶ Letter from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General, UN Doc. S/2014/440, accessed 30/11/14 at http://www.un.org/ga/search/view_doc.asp?symbol=S/2014/440.

¹³⁷ Secretary-General ‘Climate Change Summit Not about Talk, but Action, Secretary-General Says at Press Conference, Stressing ‘All of Us Can Make a Difference’ (23/09/14) United Nations, accessed 07/12/14 at <http://www.un.org/press/en/2014/sgsm16186.doc.htm>.

¹³⁸ Chatham House, ‘Principles of International Law on the Use of Force by States in Self-defence,’ ILP WP 05/01, October 2005, Principle 5.

defence must be limited to what is necessary to achieve its objective: namely to defend the victim-State and avoid future consequences.¹³⁹ Additionally, 'the physical and economic consequences of the force used must not be excessive in relation to the harm expected from the attack.'¹⁴⁰ Hence, unlike necessity, proportionality limits the scope and intensity of the military response used in self-defence.¹⁴¹

However, a number of judgments by the ICJ evidence a support for a quantitative conception of proportionality.¹⁴² This conception requires a balance between the damage caused and military means used by the attackers, and the damage caused and the military means used by the victim-State in return. This does not however necessitate that complete symmetry between the scales of attacks is required. A military response will satisfy the quantitative conception of proportionality as long as it is not manifestly out of proportion to the scale of the perpetrators' attacks.¹⁴³

¹³⁹ See for instance Tams, C., Devaney, J. (2012) Applying Necessity and Proportionality to Anti-Terrorist Self-Defence, *Israel Law Review*, Vol. 45(1), p.101.

¹⁴⁰ Chatham House, 'Principles of International Law on the Use of Force by States in Self-defence,' ILP WP 05/01, October 2005, Principle 5.

¹⁴¹ Tams, C., Devaney, J. (2012) Applying Necessity and Proportionality to Anti-Terrorist Self-Defence, *Israel Law Review*, Vol. 45(1), p. 101.

¹⁴² *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) I.C.J Rep. 14, para. 237; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, (2003) I.C.J Rep. 161, paras. 76-77; *Armed Activities on the Territory of Congo (Democratic Republic of the Congo v Uganda)* (2005) I.C.J. Rep.168, para. 147; Van Steenberghe, R. (2010) Self-defence in Response to Attacks by Non-State Actors in the light of Recent State Practice: a Step Forward?, *Leiden Journal of International Law*, 183, p. 11.

¹⁴³ Alaldin, R., Khan, B. 'Airstrikes on Isis Targets in Syria and Iraq are Legal under International law', (01/10/2014) London School of Economics and Political Science Daily Blog, accessed 21/11/14 at <http://blogs.lse.ac.uk/usappblog/2014/10/01/airstrikes-on-isis-targets-in-syria-and-iraq-are-legal-under-international-law/>.

However, rather than dividing these two approaches to the condition of proportionality they should be put together, assessing both the force used to achieve the legitimate end and the intensity of the attack in response to the threat posed.¹⁴⁴ Thus, the use of force must not be manifestly disproportionate to that used by the perpetrator *and* be proportionate to what is necessary to achieve the legitimate objective. However, if the use of force is disproportionate to that used by the perpetrator it may still satisfy the proportionality requirement if it can be shown that it was necessary to reach the legitimate objective of averting or bringing the attack to an end.

The use of force in self-defence against non-State actors, however, seems to also be considered disproportionate where it is either directed at the host state or leads to widespread harm to the civilian population.¹⁴⁵ This was clearly seen in the international response to Israel's invasion of Lebanon, which caused major harm and suffering amongst the civilian population. Similarly, the Israeli action in self-defence caused the destruction of major Lebanese bridges, fuel storage tanks at electrical power plants, civilian installations, and residential buildings.¹⁴⁶ Additionally, an air and sea blockade was imposed against Lebanon, isolating it from its surroundings and cutting off their means of

¹⁴⁴ *Ibid*; Van Steenberghe, R. (2010) Self-defence in Response to Attacks by Non-State Actors in the light of Recent State Practice: a Step Forward?, *Leiden Journal of International Law*, 183, p. 11.

¹⁴⁵ Tams, C., Devaney, J. (2012) Applying Necessity and Proportionality to Anti-Terrorist Self-Defence, *Israel Law Review*, Vol. 45(1), p. 105.

¹⁴⁶ Security Council's 5489th Meeting, 14th July 2006, UN Doc. S/PV.5489, accessed 02/12/14 at <http://unispal.un.org/UNISPAL.NSF/0/1C362A20DB4AF1D4852571AF0060F097>.

communication with the outside world.¹⁴⁷ It was this indiscriminate use of force that was criticised by the international community for being disproportionate and excessive.

The US-led air strikes in Syria target IS sites and military strongholds only; seeking to end the attacks on Iraq, protect Iraqi citizens, and regain control over Iraq's borders.¹⁴⁸

Military action has not been extended outside of IS occupied territory and has only caused minor civilian casualties.¹⁴⁹ In addition, the air strikes are clearly proportionate to the scale of IS's attacks; who have launched a full military intervention into Iraqi territory. Hence, the air strikes against IS in Syria are not manifestly out of proportion to the scale of IS attacks and are proportionate to achieve the objectives of ending the attacks, protecting Iraqi citizens, and regaining control over Iraq's borders. Thus, at present, the air strikes against IS in Syria satisfy the proportionality requirement.

6. Conclusion

The use of military force will only be lawful if it comes under an accepted exception to the prohibition on the use of force. Thus, in this article the focus has been on the only two possible

¹⁴⁷ *ibid.*

¹⁴⁸ Letter from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc. S/2014/695, accessed 29/11/14 at http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_695.pdf

¹⁴⁹ Radio Free Europe, 'U.S. Investigating Civilian Casualties in Iraq, Syrian Airstrikes,' (07/01/15) accessed 07/01/15 at <http://www.rferl.org/content/iraq-syria-air-strikes-civilian-casualties/26780561.html>.

exceptions that may turn the *prima facie* breach of the prohibition of the use of force in Syria into a legitimate armed intervention: namely an invitation to intervene by the legitimate government and collective self-defence.

In the light of the facts and arguments set out above, it is clear that the legitimate government of Syria is still the Assad regime. Even though its legitimacy has recently been challenged, the main criterion is that of effective control, a criterion that the Assad regime satisfies, as it controls a sufficiently representative part of the Syrian territory, including the capital, performs state functions, and there is no other opposing force claiming to be a government in its place. The political recognition of the SOC and illegitimacy claims on the basis of the use of armed force to keep itself in power is not sufficient to deprive the Assad regime of its governmental status. This view is supported by their continued presence in the UN, and by the recent signing of the UN Chemical Weapons Convention. Hence, due to the lack of formal consent by the Assad government, the air strikes against IS on Syrian territory cannot fall underneath this exception.

Turning to the exception of collective self-defence, its application to the situation at hand is unclear due to the uncertainty as to whether Art.51 and its customary equivalent apply against non-State actors. The traditional view favoured by the ICJ has been that of attribution.

However, due to the facts in the *Nicaragua* and *DRC* cases, in which force was used not only against non-State actors but also the harbouring State, considerations had to be given to the rules of attribution in order to come to a decision as to the defensive actions' legality. Similarly, in the *Palestinian Wall Advisory Opinion* the Court found that the attack came from within territory occupied by Israel, and therefore self-defence was not applicable. Hence, a case

concerning self-defence against independent non-State actors, operating outside the harbouring State's control, is yet to come before the Court.

There is nothing in the text of Art.51 that limits the use of force in self-defence to armed attacks conducted by another State; and state practice post 9/11 shows an emerging tendency of taking defensive action against non-State actors. The legitimacy of such practice is dependent on the harbouring State being unable or unwilling to exercise control and suppress the non-State actor's activities, giving rise to a necessity for the victim-State to take action in self-defence. This can be seen in both the Israeli and Turkish invasions, condemned for their disproportionate nature only. Hence, it seems that the international community will recognise defensive measures against non-State actors as long as the situation satisfies the conditions of an armed attack, necessity and proportionality, legitimising such action.

The IS invasion into Iraq clearly amounts to a large scale armed attack on Iraq and the Assad regime has shown itself incapable of suppressing IS activities on its territory, giving rise to a necessity for Iraq to take defensive measures in order to end the attacks. It is not possible for Iraq to counter the threat of IS if it is able to regroup and continue launching its attacks from its safe havens in Syria. Not taking action in Syria in order to respect the State's territorial integrity would be taking a great risk as to Iraqi state and citizen security. Hence, military action targeting IS in Syria is necessary. In addition, whilst IS has launched a full scale invasion into Iraqi territory, the air strikes are specifically aimed at IS targets in Syria. Thus, the defensive force used is proportionate to the force used by IS in Iraq. Similarly, the US air strikes in Syria are specifically targeted to the areas controlled by

IS and have also caused minor civilian casualties and are therefore proportionate to the objective of ending the attacks conducted by IS without being directed at the harbouring State or their population. Thus, the air strikes in Syria satisfy the conditions of self-defence.

However, although the situation in Syria satisfies the conditions under which the use of force in self-defence may be exercised, the legality of military action against a non-State actor seems to depend on states recognising it as such. In light of state practice after 9/11 it appears that there is a high possibility that the US-led air strikes against IS will end up being recognised as legal, especially in the light of a lack of criticism against the operation at present. However, as of yet it is not possible to come to a definite conclusion on this point.