

A TWO-PART ANALYSIS OF THE USE OF FORCE BY THIRD STATES IN SYRIA: EXAMINING THE LEGALITY OF FORCE AGAINST THE SYRIAN GOVERNMENT AND ISLAMIC STATE IN SYRIA

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I. INTRODUCTION

SINCE 2011, THE SYRIAN CIVIL WAR has witnessed numerous political and military developments, which have given rise to a diverse range of issues in international law. In this short article, I focus on two specific developments: the increasingly pronounced role taken on by third states (in various capacities) and the rise of Islamic State of Iraq and the Levant (ISIL) in Syria.

This article will be divided into two main sections. Firstly, I examine the legality of the use of force by third states to overthrow the Syrian government. To this end, I identify the orthodox position on the use of force, before analysing the legality of relying on a doctrine of humanitarian intervention, given that protection of Syrian civilians is the main justification relied upon by third states in using force to overthrow the Syrian government.

Secondly, I consider the use of force by third states against ISIL in Syria without the consent of the Syrian government. I will analyse various legal issues that arise out of the key legal justification relied upon for using force in this context, that is, *self-defence*.

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I argue that there is no legal right for third states to use force to overthrow the Syrian government or protect civilians in Syria, because of the prohibition in Article 2(4) of the UN Charter and the fact that orthodox justifications—self-defence and authorisation by the UN Security Council (UNSC)—do not apply. Furthermore, any justification on the basis of humanitarian intervention has not received sufficient support by States to constitute customary international law (CIL). While the crisis has raised normative questions on whether international law should adapt to better handle such situations, it remains that there is currently no legal justification for such uses of force.

Further, while the position is murkier for the second question, it is likely that third states lack a legal right to use force against ISIL in Syria without the consent of the government. The problems that arise out of a reliance on self-defence—the definition of “armed attack”, anticipatory self-defence, “unwilling or unable”, necessity and proportionality—have not been satisfactorily resolved and cast significant doubt on the legality of such action.

II. PART 1: THE USE OF FORCE TO OVERTHROW THE SYRIAN GOVERNMENT AND PROTECT CIVILIANS

When examining the use of force in international law, the starting point is Article 2(4) of the UN Charter, which is part of CIL.¹ It states that:

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

A. ORTHODOX POSITION

Prima facie, it appears that Article 2(4) represents an absolute prohibition on the use of force. The effect of Article 2(4) is to ban the use of force without express UNSC authorisation (with the only exception being that of individual and collective self-defence, as provided for by Article 51). Further, in *DRC v Uganda*,² the ICJ distinguished between States lawfully in the DRC at the invitation of the government and those unlawfully assisting opposition forces to overthrow

¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1984] ICJ Rep 392.

² *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* (Merits) [2005] ICJ Rep 168.

the government. This is reinforced by the *Friendly Relations Declaration*, which states that every State has the duty to refrain from “organising, instigating, assisting or participating in acts of civil strife in another State” and not to “foment, incite or tolerate subversive or armed activities directed towards the violent overthrow of the regime of another State”.³ Finally, *Nicaragua v USA* demonstrates that it is unlawful to forcefully intervene to overthrow the government in another country.⁴ On this analysis, there is no legal basis for the use of force by third states against the Syrian government or to protect civilians, and these acts of violence in support of opposition forces in a civil conflict are clearly banned.

(i) UNSC Authorisation of the Use of Force

Chapter VII of the UN Charter sets out the framework for the UNSC’s enforcement powers; in particular, it empowers it to authorise the use of force. This power was first exercised during the Iraqi invasion of Kuwait, where the phrase “all necessary means”⁵ was used to indicate such authorisation, and has subsequently been used in various contexts, like the protection of civilians⁶ and restoration of democracy.⁷

However, from the outset, it may be established that there has been no UNSC authorisation to use force against the Assad regime or for the protection of civilians in Syria. Nowhere in any UNSC resolution on Syria does such language appear, and the furthest that any resolution goes is to decide “in the event of future non-compliance with resolution 2118 (which set out the framework for the elimination of chemical weapons) to impose measures under Chapter VII of the [UN] Charter”. To date, no such measures have actually been implemented, in large part due to Russia’s use of the veto against intervention efforts by the UNSC, such as the veto against a US-drafted resolution to renew an international inquiry into the use of the chemical weapons in Syria.⁸ Therefore, the UNSC has hitherto not authorised any use of force against the Syrian government for the protection of civilians or to retaliate against the use of chemical weapons.

³ UNGA Res 2625 (1970) GAOR 25th Session Supp 28.

⁴ *Paramilitary Activities* (n 1).

⁵ UNSC Res 678 (20 November 1990) SCOR Resolutions and Decisions 27.

⁶ UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

⁷ UNSC Res 1529 (29 February 2004) UN Doc S/RES/1529.

⁸ Michelle Nichols, ‘Russia casts 10th UN veto on Syria action, blocking inquiry renewal’ *Reuters* (London, 16 November 2017) <<https://uk.reuters.com/article/uk-mideast-crisis-syria-chemicalweapons/russia-casts-10th-u-n-veto-on-syria-action-blocking-inquiry-renewal-idUKKBN1DG2WD>> accessed 29 March 2018.

(ii) Self-Defence

Relying on self-defence, pursuant to Article 51 of the UN Charter, is similarly unviable. The central obstacle to a claim of self-defence is simply that Syria has not instigated an “armed attack” against another State. Self-defence may be used as a justification only when a State has been the victim of an armed attack (which covers attacks not just by regular forces but also irregular forces and mercenaries),⁹ but in this case, Syria has neither attacked nor threatened to attack any other State. It is true that Syria’s use of chemical weapons is illegal as a matter of international law, but for the purposes of self-defence, this is legally immaterial because a State may not use force against another State which has violated international law unless the latter has attacked the former. For instance, the US’s claim that the 2017 missile attacks were in response to the Syrian government’s chemical weapons attack is legally irrelevant given that the attack was not directed at the US (or any other State).

Therefore, there is no basis for a claim of self-defence, and under the orthodox position in international law, there is no legal right for a third state to use force against the Syrian government. Both lethal aid¹⁰ and military strikes against the government are accordingly illegal.

B. HUMANITARIAN PURPOSES

While Article 2(4) has generally been interpreted as imposing an absolute ban on the use of force, States have occasionally relied on a narrow interpretation of Article 2(4) to justify their use of force. Under this narrow interpretation, Article 2(4) allows for the use of force for aims which are consistent with the purposes of the UN or where the territorial integrity and political independence of another State is not harmed. For example, in the *Corfu Channel* case, the UK argued that its forcible intervention in Albanian waters did not violate Article 2(4) as it did not threaten Albania’s territorial integrity and political independence.¹¹ Further, Bowett supports such an interpretation on the basis that the words of Article 2(4) should be read according to their “plain meaning”, which would produce the aforementioned conclusion.¹² Under this analysis, it may be possible to justify the use of force on the basis that it intended to protect civilians and remedy gross breaches of international law, which is in line with the purposes of the UN.¹³

⁹ *Paramilitary Activities* (n 1).

¹⁰ See *Armed Activities on the Territory of the Congo* (n 2).

¹¹ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)* ICJ Pleadings Vol III.

¹² Derek Bowett, *Self-Defence in International Law* (Praeger 1958) 154–155.

¹³ After all, the use of chemical weapons has already been expressly condemned by the UN.

However, it is unlikely that this argument will succeed. This narrow interpretation is rarely used by States, suggesting that it is not part of CIL (given the paucity of corroborating State practice). In fact, while the ICJ did not specifically consider the UK's argument in the *Corfu Channel* case, its overall condemnation of its actions implicitly suggests a lack of acceptance. Brownlie notes that the *travaux préparatoires* show that Article 2(4) was not intended to have a narrow interpretation;¹⁴ this conclusion is supported by the Friendly Relations Declaration¹⁵ (see specifically, the Section on the Principle on the Use of Force),¹⁶ which does not outline any such qualification on this prohibition and elaborates on the duty of States to refrain from acts of reprisal involving the use of force. Therefore, it is unlikely that this interpretation is part of international law.

More crucially, it may be possible to rely on a doctrine of humanitarian intervention to justify the use of force against the Syrian government, which (by most accounts) has been illegally using chemical weapons against its own civilians, representing a humanitarian crisis.¹⁷ The crux of the issue is whether there is even an independent doctrine of humanitarian intervention. Most notably, the UK has developed a detailed framework for humanitarian intervention, outlining three conditions (emphasis in italics added):

- (i) there is convincing evidence, generally accepted by the international community as a whole, of *extreme humanitarian distress* on a large scale, requiring immediate and urgent relief;
- (ii) it must be objectively clear that there is *no practicable alternative* to the use of force if lives are to be saved; and
- (iii) the proposed use of force must be *necessary and proportionate* to the aim of relief of humanitarian need and must be *strictly limited in time and scope to this aim* (i.e. the minimum necessary to achieve that end and for no other purpose).¹⁸

¹⁴ Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963) 122–123.

¹⁵ UNGA Res 2625 (n 3).

¹⁶ *ibid* Annex, “The principle that States 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”.

¹⁷ UNSC Res 2118 (27 September 2013) UN Doc S/RES/2118; UNSC Res 2139 (22 February 2014) UN Doc S/RES/2139; UNSC Res 2209 (6 March 2015) UN Doc S/RES/2209.

¹⁸ ‘Chemical weapon use by Syrian regime: UK government legal position’ (Prime Minister’s Office, 29 August 2013) <<https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version>> accessed 18 December 2017.

Further, it has been argued that all conditions have been met in Syria, due to the “overwhelming humanitarian necessity”, given the large-scale use of chemical weapons by the Syrian government and the failure of efforts to pursue alternative solutions. If such a doctrine does exist in international law in the form defined by the UK, it will then be highly likely for the use of force to be justified in this context. Even if it does not exist in this exact form, it remains likely that the humanitarian situation in Syria is sufficiently grave to warrant such intervention.

NATO’s military intervention in Kosovo in 1999 may provide additional support for this line of argument. While NATO did not clearly state the legal basis for its military action, a few States relied on arguments stemming from humanitarian intervention. Apart from the UK, Belgium (which made one of the most comprehensive arguments among the NATO members) argued that the campaign was an action to “forestall an ongoing humanitarian catastrophe” and that the “armed humanitarian intervention” was compatible with Article 2(4).¹⁹ As Koh notes, “nineteen NATO members (accepted) the legality of some form of humanitarian intervention without [UNSC] approval”.²⁰ Therefore, if the intervention in Kosovo is to be taken as a precedent for humanitarian intervention, this would strengthen the case for the use of such a doctrine as justification for the use of force in Syria.

However, this is ultimately unlikely. Even among NATO states, only a minority of States relied on a doctrine of humanitarian intervention to justify the legality of their actions (in fact, only a few States actually developed a clear argument). For instance, Germany and France emphasised that the operation was unique and should not be treated as a precedent for future humanitarian intervention. Further, State practice in general reveals a lack of acceptance of unilateral or collective humanitarian intervention (that is unauthorised by the UNSC). Russia and China are among the many States which condemned the operation as illegal, and in 2000, the G77 adopted its Declaration of the South Summit, stating that the “so-called “right” of humanitarian intervention [has] no legal basis in the [UN] Charter or in the general principles of international law”. Therefore, the NATO intervention in Kosovo arguably fails to provide a precedent for such action.

More generally, it is highly unlikely that an independent doctrine of humanitarian intervention exists, in spite of the UK’s efforts. There is little State practice that supports the existence of such a doctrine: in the examples commonly cited as precedents of humanitarian

¹⁹ UNSC Verbatim Record (24 March 1999) UN Doc S/PV/4385.

²⁰ Harold Hongju Koh, ‘Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)’ (Just Security, 2 October 2013) <<https://www.justsecurity.org/1506/koh-syria-part2/>> accessed 18 December 2017.

intervention (for example, Tanzania's intervention to overthrow Idi Amin's regime in Uganda), the States involved never actually invoked such a doctrine as justification for their actions. Even during the Gulf War, when the US, UK and France intervened in Iraq and established no-fly zones without the UNSC's authorisation, only the UK relied upon such a justification, and France even withdrew its support for the use of the doctrine later. Many States, including China and Russia, refused to accept the legality of the no-fly zones. As such, it is clear that there is little State practice that justifies the conclusion that there is an independent doctrine of humanitarian intervention in international law; if anything, the Kosovo incident only reinforced the absence of such a doctrine.

Koh has argued that the situation in Syria presents a strong case for intervention and "a law-making moment to crystallise a limited concept of humanitarian intervention".²¹ This is possibly supported by Crawford and Viles's argument that by virtue of the unique nature of international law as a dynamic body of law determined by the practice of the very parties governed by it, we can only discern the content of the law on a given day after that day.²² This suggests that it is possible that on hindsight, humanitarian intervention in the Syrian Civil War would be regarded as actually having been lawful, but ultimately, the example provided by Crawford and Viles (the Truman proclamation) cannot be analogically applied here, given the overwhelming opposition to this doctrine and the status of Article 2(4).

Regardless of the normative arguments in favour of the doctrine, there remains a clear distinction between the "legal regime banning force outside self-defence and Council authorisation"²³ and decisions made by policymakers. Therefore, while an argument may be made that international law should change to accommodate a doctrine of humanitarian intervention, this is materially different from saying that such a doctrine already exists. Given the atrocities committed against Syrian citizens, it is well worth starting a discussion about whether international law should move in the direction encouraged by Koh, but as it stands, there is clearly no such legal doctrine.

²¹ *ibid.*

²² James Crawford and Thomas Viles, 'International Law on a Given Day', in James Crawford (ed), *International Law as an Open System* (Cameron Books 2002).

²³ David Kaye, 'Harold Koh's Case for Humanitarian Intervention' (Just Security, 7 October 2013) <<https://www.justsecurity.org/1730/kaye-kohs-case/>> accessed 19 December 2017.

III. PART 2: THE USE OF FORCE AGAINST ISIL IN SYRIA

The justification most commonly relied upon by States using force against ISIL without the Syrian government's consent is self-defence. The US, which leads the coalition against ISIL (which lacks the Syrian government's consent), has justified its operations in Syria on the basis of individual and collective self-defence. In a letter to the UN Secretary-General,²⁴ then Permanent Representative of the USA to the UN Samantha Power referred to the "inherent right of individual and collective self-defence" (under Article 51) to justify the actions of USA and its allies. For this to succeed, several legal issues must be resolved.

A. "ARMED ATTACK"

Firstly, there must be an "armed attack" against a State. An armed attack may stem from irregular forces, bands and mercenaries, which ISIL certainly qualifies as. The issue is whether these forces have to be operating under the control of a sovereign government (the Syrian government). This is the position adopted in *Nicaragua v USA* and the *Palestinian Wall Advisory Opinion*,²⁵ which states that an "armed attack" must emanate from another State, as opposed to groups of insurgents or terrorists operating from other States but not under the control of the "host" State. On this analysis, it would appear that an "armed attack" has not occurred for the purposes of Article 51, given that the Syrian government is hostile towards ISIL, as evidenced by its willingness to cooperate with other States like Russia to defeat it.

However, this is not necessarily the case. The comment in *Wall* was put forward by the majority without full analysis of the expounded principle, so it is unclear if this rule has a bona fide basis in international law. Further, in *DRC v Uganda*, while the ICJ did not consider whether Uganda could resort to armed force in DRC by way of self-defence, Judges Kooijmans and Simma addressed this issue in their separate opinions, suggesting that the right to self-defence may extend to "armed attacks" by non-state actors where they emanate from territory with an "almost complete absence of governmental authority". This reflects the ambiguity over the definition of "armed attack" in international law, suggesting that there may indeed be a case to be made that self-defence is available.

²⁴ UNSC 'Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General' (23 September 2014) UN Doc S/2014/695.

²⁵ *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* [2004] ICJ Reports 136.

This is reinforced by post-9/11 developments. In the wake of the 9/11 attacks, the US instituted *Operation Enduring Freedom*, on the basis of self-defence, and with the aim of preventing Afghanistan from being used for terrorist activities. Similarly, collective self-defence organisations like NATO and the Organisation of American States (OAS) held that the 9/11 incident constituted an “armed attack” for the purposes of collective self-defence.

This received further support from the likes of the EU, China and Russia (which noticeably opposes action by the coalition against ISIL), with only Iran and Iraq expressly challenging the legality of such a claim. More tellingly, in the preambles of Resolutions 1368²⁶ (which condemned the terrorist attacks) and 1373²⁷ (which implemented counter-terrorism measures), the UNSC recognised the right of self-defence (for the first time in a terrorism context). The corollary of this is that the ambiguity over whether terrorist attacks not conducted under the auspices of any government can be considered an “armed attack” has potentially been resolved (in the context of terrorism) by the overwhelming support (or at least, the lack of express criticism bar two States) of other State parties. If so, ISIL’s activities may constitute an “armed attack”.

It is admittedly uncertain if the recognition of the right of self-defence goes beyond the exceptional circumstances of 9/11, but it could be argued that the actions of ISIL have progressed to a stage where it is possible to analogically extend the right of self-defence to the situation here. The 9/11 attacks were exceptional principally because it was an egregious attack on US soil itself. Similarly, in recent years, ISIL has claimed responsibility for attacks outside Syria and the Middle East, such as the 2015 Paris attacks. These incidents are similar to 9/11 in that they also occurred on the territory of the States (or their allies) which claim the right of self-defence. While these attacks occurred on a much smaller scale, it is nevertheless the case that if 9/11 represents a recognition of this right in these circumstances, such a right should also exist here. However, the legal significance of the support offered in the wake of 9/11 remains unclear, especially in light of the reduced support for a claim of self-defence here (with States like Russia no longer offering such support). Therefore, while a case may be made that the attacks of ISIL constitute an armed attack, considerable uncertainty still exists.

²⁶ UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368.

²⁷ UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

B. ANTICIPATORY OR PRE-EMPTIVE SELF-DEFENCE

Secondly, the right to self-defence claimed is largely anticipatory, by virtue of the nature of terrorist attacks- unlike regular armed conflicts, where an attack is part of a larger series of attacks, terrorist attacks are generally one-off incidents. Once the initial attack has ended, it would be difficult to invoke self-defence, because the State would no longer be defending itself but retaliating. This point was implicitly recognised by the US and UK in their letters to the UNSC after 9/11, where the US's aim was to deter further attacks and the UK's to "avert the continuing threat of attacks from the same source". Similarly, in this context, States like the US²⁸ and UK²⁹ have argued that there is a right of self-defence against an "imminent" attack, with a proposed legal framework being Sir Daniel Bethlehem's set of principles, which includes factors like the nature and immediacy of the threat, probability of the attack and whether the anticipated attack is part of a "concerted pattern of continuing armed activity".³⁰ The US has even gone further and claimed a right of pre-emptive self-defence in the absence of a threat of imminent attack,³¹ but this has received little support elsewhere.

Despite these formulations, it remains unlikely that such a doctrine exists. Although many States accepted the legality of *Operation Enduring Freedom*, it is unclear if this acceptance extended to a general acceptance of the doctrine of anticipatory self-defence. Generally, the right of anticipatory self-defence has not received much support;³² before 9/11, only the US and Israel had claimed such a right. Further, even though several States have notified the UNSC with relation to the exercise of their right of self-defence against ISIL (Annex I, p 15 below),³³ only a few have expressly claimed a right of self-defence against an imminent attack. In *Nicaragua* and *DRC*, the ICJ deliberately left this matter unresolved. Therefore, given the widespread objections (or at least,

²⁸ Brian Egan, 'International Law, Legal Diplomacy and the Counter-ISIL Campaign' (Just Security, 1 April 2016) <<https://www.justsecurity.org/wp-content/uploads/2016/04/Egan-ASIL-speech.pdf>> accessed 22 December 2017.

²⁹ Jeremy Wright, 'Attorney-General's Speech at International Institute for Strategic Studies' (Attorney General's Office, 11 January 2017) <<https://www.gov.uk/government/speeches/attorney-generals-speech-at-the-international-institute-for-strategic-studies>> accessed 22 December 2017. In this speech, the Attorney General discusses the modern law of self-defence.

³⁰ Daniel Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defence Against an Imminent or Actual Armed Attack by Non-State Actors' [2012] AJIL 106.

³¹ The White House (Washington), 'The National Security Strategy of the United States of America' (2002) 41 International Legal Materials 1478.

³² For example, most States interpreted *Oil Platforms Islamic Republic of Iran v United States of America* [1996] ICJ Rep 803 as a total rejection of anticipatory self-defence.

³³ Wright (n 29).

a low level of express support), uncertain legal significance of the approval of Operation Enduring Freedom and the lack of judicial resolution on the matter, State practice has not evolved to a point where it is clear that such a doctrine exists, meaning that it has no basis in international law.

C. “UNWILLING OR UNABLE”

Thirdly, another argument relied upon by States is the “unwilling or unable” doctrine, which states that the “use of force in self-defence against a non-state actor on the territory of a third State, without the consent of that third State, may be lawful under international law if the non-state actor has undertaken an armed attack against the State and the third State is itself unwilling or unable to address the threat posed by the non-state actor”.³⁴ A few States have endorsed this doctrine (Annex II, p 16 below)³⁵ and several States which have claimed a right of self-defence against ISIL have made a reference to it. However, several problems are attendant upon reliance on this.

The doctrine remains controversial in international law- even “leading proponents” of the doctrine admit that its “contours are not well-defined and the basic rule itself may not even enjoy [CIL] status”.³⁶ Further, there have been no cases where States have clearly asserted that they follow the test “out of a sense of legal obligation”³⁷ or where the doctrine has been recognised. This indicates that the doctrine’s place in international law is far from certain—in fact, it is arguably more likely that it is not part of international law. Ultimately, only a few States have endorsed it.

Further, even if the doctrine is an established or emerging rule of CIL, it is difficult to see how the test is met. The Assad government is clearly willing to fight ISIL³⁸ and while there may have been areas outside its control (particularly at the height of ISIL’s powers), as noted above ISIL now controls only around 5% of Syria. This shows that its resources and strength have been significantly depleted, and correspondingly it would be difficult to show that the Assad regime is

³⁴ Elena Chachko and Ashley Deeks, ‘Who is on Board with “Unwilling or Unable”?’ (Lawfare, 10 October 2016) <<https://www.lawfareblog.com/who-board-unwilling-or-unable>> accessed 27 December 2017.

³⁵ *ibid.*

³⁶ Ryan Goodman, ‘International Law- and the Unable or Unwilling Test- for US Military Operations in Syria’, (Just Security, 12 September 2014) <<https://www.justsecurity.org/14949/international-law-unwilling-unable-test-military-operations-syria/>> accessed 27 December 2017.

³⁷ Ashley Deeks, “‘Unwilling or Unable’: Toward a Normative Framework for Extraterritorial Self-Defence’ [2012] VJIL 52.

³⁸ UNSC ‘Sixth report of the Analytical Support and Sanctions Monitoring Team submitted pursuant to resolution 2160 (2014) concerning the Taliban and other associated individuals and entities constituting a threat to the peace, stability and security of Afghanistan’ (26 August 2015) Security Council Report UN Doc S/2015/648.

unable to fight ISIL (particularly with Russia's help, which is regarded by one commentator as a "godsend for Assad, greatly boosting the regime's sagging morale and that of its armed forces").³⁹ Even when ISIL was at its strongest, the Assad regime had largely maintained a willingness to fight it. Therefore, notwithstanding the challenges in showing that the doctrine is even part of international law, the situation in Syria does not seem to meet the requirements of the test.

D. RESOLUTION 2249

Fourthly, it may possibly be argued that Resolution 2249,⁴⁰ adopted in the wake of the Paris attacks, provides an unprecedented legal basis for the use of force against ISIL in Syria. The main operative paragraph is Paragraph 5, which states that the UNSC "*Calls upon* Member States that have the capacity to do so to take all necessary measures, in compliance with international law... on the territory under the control of ISIL..." Its significance lies in the fact that it calls upon States to "take all necessary measures", which when used in UNSC resolutions refers to the use of force. Further, although the resolution was not adopted under Chapter VII of the UN Charter, *Namibia Advisory Opinion*⁴¹ indicates that the lack of such reference does not mean that the resolution lacks legal effect. As such, it appears that the UNSC has authorised use of force against ISIL in Syria via Resolution 2249.

However, closer scrutiny reveals that this is not the case. Resolution 2249 does not provide any further *legal* authority for States to use force against ISIL in Syria; at most, it provides *political* support for military action, but qualifies this support by preserving existing legal constraints. There are two key reasons for this.

Crucially, UNSC has not actually authorised "all necessary measures"; instead, it calls upon States to take such measures. This careful choice of language shows that while the UNSC contemplates or considers the viability of the use of force, it has not expressly authorised it yet. For a resolution to be legally binding, the UNSC must actually decide to do something or to authorise something, which it has (carefully and intentionally) omitted to do.

Further, Resolution 2249 calls for these measures to be undertaken in compliance with international law, meaning that any steps would have to be taken in compliance with existing rules

³⁹ Ranjit Gupta, 'Understanding the War in Syria and the Roles of External Players: Way Out of the Quagmire?' [2016] CJI 105.

⁴⁰ UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249.

⁴¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* [1971] ICJ Rep 16.

of international law, like the *jus ad bellum* rules of the Charter. Therefore, given the lack of any direct precedents—the affirmation of the right of individual and collective self-defence was recognised only in the *preambles* of Resolutions 1368 and 1373, for instance—and the careful wording of Resolution 2249, it is clear that the resolution does not support arguments for the use of force against ISIL in Syria.

E. NECESSITY AND PROPORTIONALITY

Finally, the requirements of necessity and proportionality have to be met.⁴² This is particularly thorny when it comes to force used in anticipatory self-defence, given the difficulties in calculating the level of “blameworthiness” where no attack has been committed. For instance, Operation Enduring Freedom lasted for 13 years, raising doubts that the destruction caused over such a long period was either proportionate to the threat posed by Al-Qaeda or necessary to stop it. Therefore, even if the aforementioned obstacles are cleared, it remains difficult to conclude with certainty that any use of force against ISIL without the Syrian government’s consent is lawful.

In summary, it is unlikely that an argument stemming from the right of self-defence can be sustained. The arguments put forth have not received sufficiently widespread State support, and supposed precedents remain ambiguous. This points towards the likelihood that the legal principles espoused by these States have not been incorporated into international law, by custom or otherwise, making it unlawful for force to be used against ISIL without the consent of the Syrian government.

⁴² *Paramilitary Activities* (n 1); *Armed Activities on the Territory of the Congo* (n 2).

IV. CONCLUSION

Throughout the course of the Syrian Civil War, many States have opted to intervene forcefully, proclaiming their use of force to be lawful. However, after cutting through the rhetoric and closely scrutinising their claims, it is clear that the legality of their actions falls short of the confidence with which it has been declared.

That being said, it is well worth considering this: while the rule of law should never give way to political expediency, international law, much like any area of law, does not, and should not stand still. International law is important not because it is the immutable code of yesterday, but because it can adapt and evolve to respond to the dangers of today. The Syrian Civil War has been, and remains, a chastening chapter in our recent history, and has perhaps exposed the inadequacies of international law when it comes to the fundamental protection of the vulnerable.

ANNEX I.**States which have notified the UNSC about the exercise of their right to self-defence against ISIL:**

S/N	State	Reference Number
01.	United States of America	S/2014/695 ⁴³
02.	United Kingdom	S/2014/691, ⁴⁴ S/2015/688, ⁴⁵ S/2015/928 ⁴⁶
03.	Turkey	S/2015/127, ⁴⁷ S/2015/563 ⁴⁸
04.	Canada	S/2015/221 ⁴⁹
05.	France	S/2015/745 ⁵⁰
06.	Australia	S/2015/693 ⁵¹
07.	Germany	S/2015/946 ⁵²
08.	Denmark	S/2016/34 ⁵³
09.	Norway	S/2016/513 ⁵⁴
10.	Belgium	S/2016/523 ⁵⁵

⁴³ UNSC (n 23).

⁴⁴ UNSC 'Letter dated 20 September 2014 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.

⁴⁵ UNSC 'Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council' (8 September 2015) UN Doc S/2015/688.

⁴⁶ UNSC 'Letter dated 3 December 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council' (3 December 2015) UN Doc S/2015/928.

⁴⁷ UNSC 'Identical letters dated 22 February 2015 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General and the President of the Security Council' (23 February 2015) UN Doc S/2015/127.

⁴⁸ UNSC 'Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council' (24 July 2015) UN Doc S/2015/563.

⁴⁹ UNSC 'Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council' (31 March 2015) UN Doc S/2015/221.

⁵⁰ UNSC 'Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council' (9 September 2015) UN Doc S/2015/745.

⁵¹ UNSC 'Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council' (9 September 2015) UN Doc S/2015/693.

⁵² UNSC 'Letter dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council' (10 December 2015) UN Doc S/2015/946.

⁵³ UNSC 'Letter dated 11 January 2016 from the Permanent Representative of Denmark to the United Nations addressed to the President of the Security Council' (13 January 2016) UN Doc S/2016/34.

⁵⁴ UNSC 'Letter dated 3 June 2016 from the Permanent Representative of Norway to the United Nations addressed to the President of the Security Council' (3 June 2016) UN Doc S/2016/513.

⁵⁵ UNSC 'Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council' (9 June 2016) UN Doc S/2016/523.

ANNEX II.

Countries which have given explicit endorsement of the ‘unwilling or unable’ doctrine:

S/N	Country
01.	United States of America
02.	United Kingdom
03.	Germany
04.	The Netherlands
05.	Czech Republic
06.	Canada
07.	Australia
08.	Russia
09.	Turkey
10.	Israel

Countries which have given implicit endorsement of the ‘unwilling or unable’ doctrine:

S/N	Country
01.	Belgium
02.	Iran
03.	South Africa