

ABSTRACT

Shortly after the beginning of the Syrian Civil War, the Islamic terror group ISIS captured the world's attention with their rapid advance through Iraq and acts of severe brutality. In short order, the group captured large swaths of territory in Iraq and Syria and declared the formation of an Islamic State. With the integrity of Iraq in the balance, the United States committed to taking military action against ISIS but quickly discovered that as pressure was put on ISIS in Iraq they retreated into Syrian lands, where U.S. warplanes could not go.

This article explores the legal justifications for the use of military force that the United States may invoke to take military action against ISIS in Syria. Beginning first with a history of the Islamic State in Iraq and Syria as an outgrowth of al-Qaeda and tracing its actions through the Middle East, the article finds three justifications for using force in Syria to halt the advance of ISIS. Under customary international law the article finds a possible avenue under the long-standing principles of express and implied consent. Second, the article explores the consequences of proceeding under United Nations Security Council authorization, absent the consent of Bashar al-Assad. Finally, the article explores the intricacies of proceeding under various notions of self-defense under Article 51 of the United Nations Charter.

Right to Act: United States Legal Basis Under the Law of Armed Conflict to Pursue the Islamic State in Syria

Samantha Arrington Sliney *

I. INTRODUCTION.....	1
II. HISTORY OF THE ISLAMIC STATE	4
III. THE ISLAMIC STATE’S IDEOLOGY	6
IV. TAKE OVER OF SYRIA AND IRAQ, JUNE 2014 TO PRESENT: AN OVERVIEW	9
V. LEGAL BASES UNDER THE LAWS OF ARMED CONFLICT.....	11
1. <i>Consent</i>	12
2. <i>U.N. Security Council Authorization</i>	14
3. <i>Article 51</i>	17
a. Collective Self-Defense	19
b. Preventive Self-Defense	22
VI. WAY FORWARD.....	23

I. INTRODUCTION

On September 21, 2014, Abu Mohammed al-Adnani, an Islamic State in Iraq and Syria (ISIS) spokesman, broadcasted on Twitter a speech entitled “Indeed, You Lord is Ever Watchful,” calling upon ISIS followers to,

If you can kill a disbelieving American or European, especially the spiteful and filthy French, or an Australian, or a Canadian, or any other disbeliever from the disbelievers waging war, including the citizens of the countries that entered into a coalition against the Islamic State, then rely upon Allah, and kill him in any manner

* Samantha Arrington Sliney graduated *cum laude* from North Carolina Central School of Law in May 2013. She is currently working towards her L.L.M. in Homeland and National Security Law at Western Michigan University Thomas M. Cooley School of Law. She is licensed to practice law in Florida and the District of Columbia and is currently serving as a Judge Advocate General (JAG) in the United States Air Force.

or way however it may be. Do not ask for anyone's advice and do not seek anyone's verdict. Kill the disbeliever whether he is civilian or military, for they have the same ruling. Both of them are disbelievers. Both of them are considered to be waging war [the civilian by belonging to a state waging war against the Muslims]. Both of their blood and wealth is legal for you to destroy, for blood does not become illegal or legal to spill by the clothes being worn.¹

This speech was a direct message to ISIS followers to launch attacks on civilians in countries opposing ISIS.²

In his speech, al-Adnani declared the military intervention by the U.S.-led coalition forces as the "final campaign of the crusaders."³ "It will be broken and defeated, just as all your previous campaigns were broken and defeated, except that this time we will raid you thereafter, and you will never raid us," al-Adnani stated.⁴ Al-Adnani urged all "Muslims to take action and show their support for ISIS through violence."⁵ In concluding the nearly 43-minute speech, al-Adnani "promised retribution for [the coalition forces] intervention, and to bring the war to their soil."⁶

O Americans, and O Europeans, the Islamic State did not initiate a war against you, as your governments and media try to make you believe. It is you who started the transgression against us, and thus you deserve blame and you will pay a great price. You will pay the price when your economies collapse. You will pay the price when your sons are sent to wage war against us and they return to you as disabled amputees, or inside coffins, or mentally ill. You will pay the price as you are afraid of traveling to any land. Rather you will pay the price as you walk on your streets, turning right and left, fearing the Muslims. You will not feel secure even in your bedrooms. You will pay the price when this crusade of yours collapses, and thereafter we will strike you in your

¹ *ISIS Audio Urges Muslims Everywhere to Kill 'Unbelievers,'* HUFFINGTON POST (Nov. 21, 2014, 5:59 AM), http://www.huffingtonpost.ca/2014/09/21/isis-audio-threat-canada_n_5859062.html.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

homeland, and you will never be able to harm anyone afterwards. You will pay the price, and we have prepared for you what will pain you.⁷

Threats from the Islamic State (IS) have become increasingly more profound and numerous over the past couple of years.⁸ IS has not stopped at verbal threats but has also acted out against the United States (U.S.) and other coalition forces through physical acts of violence.⁹ These threats and acts of violence have plagued American news outlets seemingly uninterrupted for the past year. These actions have included the burning of a Jordanian pilot, Lt. Moath Al-Kasasbeh, in February of 2015,¹⁰ the execution of American journalists James Foley and Steven Sotloff in August 2014,¹¹ the sale of Iraqi children as slaves,¹² and the enslavement, rape, and sale of female captives who were described as “nonbelievers.”¹³

While the world looks on at the catastrophe that consumes the Middle East, many Americans may find themselves wondering why the U.S. is not being more proactive in dealing with the atrocities being committed by IS. Why does it seem that the U.S. is sitting idly by waiting for IS to strike again and again? What many Americans do not know or understand is that the U.S. and other coalition forces have laws on how and when they can engage with terrorist groups such as IS.

It is not as simple as the President of the United States quickly and single-handedly deciding to react to the threats and acts of violence by IS. In making any decision to act, the President must comply with all international laws, the laws of armed conflict, and domestic laws.¹⁴ These laws provide the legal basis by which the U.S. and other States

⁷ *Id.*

⁸ The Islamic State of Iraq and Syria (ISIS) and The Islamic State (IS) are different names for the same organization. The changes in name are discussed in section II.

⁹ *See infra* notes 10-13.

¹⁰ Walid Shoebat, *Jordanian Pilot Burned Alive by ISIS- Will Not Submit!*, FREEDOM OUTPOST (Feb. 3, 2015), <http://freedomoutpost.com/2015/02/jordanian-pilot-burned-isis-will-not-submit/>.

¹¹ Kacie Yearout, *ISIS vs ISIL- What's the Difference*, WCSH6 (Sept. 11, 2014, 8:04 PM), <http://www.wcsh6.com/story/news/local/2014/09/10/isis-vs-isil-islamic-state-iraq-syria/15403133/>.

¹² Faith Karimi & Greg Botelho, *ISIS Putting Price Tags on Iraqi Children, Selling Them as Slaves, U.N. Says*, CNN (Feb. 6, 2015, 4:26 PM), <http://www.cnn.com/2015/02/06/world/isis-children-torture/>.

¹³ *Id.*

¹⁴ This article will not focus on whether the United States has domestic authorization to act in Syria against the Islamic State. Instead, this article will focus on whether the United States has a legal basis under the laws of armed conflict to act in Syria against the Islamic State.

may react to threats and acts of violence by other State and non-State actors, including when they may act, and even how they may react. One step outside the bounds of these laws could leave the U.S. and other coalition forces walking a very thin line between what is and is not lawful under international law, potentially resulting in vast devastation for U.S. international relations and for the safety of American troops abroad.

To understand the current situation between the U.S. and IS, this article will first describe the history of IS and its ideology, while tracking its movements and actions through Iraq and Syria since June 2014. Next, this article answers the question of whether the U.S. has a legal basis under the laws of armed conflict to act against IS in Syria. In answering this question, this article analyzes each of the three options that allow for action under international law: consent, United Nations Security Council (UNSC) authorization, and self-defense under Article 51 of the United Nations (U.N.) Charter. Lastly, this article lays out the way forward for the U.S. in dealing with the continuing presence of and threats by IS.

II. HISTORY OF THE ISLAMIC STATE

IS has an interesting history in comparison to other terrorist organizations because the organization can be traced back to its origination. While it is difficult to trace the roots of many terrorist organizations, IS can be directly traced back to the Sunni terrorist organization al-Qaeda, and specifically the Iraq faction, al-Qaeda in Iraq (AQI).¹⁵ This faction of al-Qaeda, previously led by Abu Musab al-Zarqawi, “was responsible for scores of bombings, kidnappings and beheadings in Iraq following the U.S. invasion” in 2003.¹⁶ Al-Zarqawi was subsequently killed by an American airstrike in 2006, leaving AQI without a leader.¹⁷ Zarqawi’s successor, Abu Hamza al-Muhajir, also known as Abu Ayyub al-Masri, formed the Islamic State of Iraq (ISI) and appointed Abu Omar al-Baghdadi as the leader.¹⁸ In 2010, U.S. and Iraqi forces killed al-Masri in Tikrit.¹⁹ Following the deaths of al-Masri

¹⁵ Lee Ferran & Rym Momtaz, *ISIS Trail of Terror*, ABC NEWS (last updated Feb. 23, 2015), <http://abcnews.go.com/WN/fullpage/isis-trail-terror-isis-threat-us-25053190>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ COL. S.C. DHIMAN (RET'D.), *ISLAMIC STATE OF IRAQ AND SYRIA (ISIS) RECONCILIATION, DEMOCRACY AND TERROR* 130 (2015).

¹⁹ *2 Most Wanted Al-Qaeda Leaders in Iraq Killed by U.S., Iraqi Forces*, FOX NEWS (Apr 19, 2010), <http://www.foxnews.com/world/2010/04/19/iraqi-al-qaeda-leader-killed-countrys-intelligence-team-pm-maliki-says/>.

and Omar al-Baghdadi, a well-known and experienced Iraqi fighter named Abu Bakr al-Baghdadi took over leadership of AQI/ISI.²⁰

In 2007, a large alliance of Iraqi Sunni tribes supported by U.S. forces fought against the jihadist group in what is now known as the “Sunni Awakening.”²¹ AQI/ISI was significantly weakened after this fight, becoming seemingly non-existent until 2011.²² In an attempt to regain its power and expand its ranks in 2011, amidst the Syrian Civil War, AQI/ISI moved into Syria.²³ From 2011 to 2013, AQI/ISI regained power under the leadership of Abu Bakr al-Baghdadi, and was able to re-establish influence in Iraq.²⁴ At the same time in 2013, al-Baghdadi changed the group’s name from AQI/ISI to the Islamic State in Iraq and Syria to “reflect[] its greater regional ambitions.”²⁵

In April 2013, al-Baghdadi “called upon all jihadis in Iraq and the ‘Levant’ to unite under his organization, ISIS, and form an Islamic state.”²⁶ Abu Muhammad al-Joulani, leader of Jabhat al-Nusra in Syria, rejected the merger and re-affirmed his allegiance directly to al-Qaeda leader, Ayman al-Zawahiri.²⁷ In an attempt to intervene and prevent any unrest between the jihadist groups, al-Zawahiri gave Syria to al-Joulani and Jabhat al-Nusra, and Iraq to al-Baghdadi and ISIS. However, this attempt to avoid fracturing failed, which left a wide division among ISIS, Jabhat al-Nusra, and al-Qaeda.²⁸ While ISIS’s goals and ideology remain very similar to those of al-Qaeda, the two groups are not affiliated and do not share a coordinated command relationship or command structure.²⁹ In fact, there is severe tension and competition between Jabhat al-Nusra and ISIS for local control in Syria.³⁰

In February 2014, al-Zawahiri, on behalf of al-Qaeda, formally renounced any involvement with ISIS.³¹ Al-Zawahiri’s renunciation stemmed primarily from the attempts of ISIS to set up mini-Islamic

²⁰ Ferran & Momtaz, *supra* note 15 (noting that Abu Bakr al-Baghdadi is also known by the name Abu Du’a).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Dhiman, *supra* note 18, at 131.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Mark Memmott, *Al-Qaida Says It Has No Ties With One Syrian Rebel Force*, NAT’L PUB. RADIO (Feb. 3, 2014, 9:42 AM), <http://www.npr.org/blogs/thetwo-way/2014/02/03/270937603/al-qaida-says-it-has-no-ties-with-one-syrian-rebel-force>. This complete renunciation came after al-Zawahiri had warned ISIS to stop its activities in Syria a year prior.

states in Iraq and Syria and the imposition of harsh rules on the local population by ISIS.³² On June 29, 2014, ISIS again changed its name to the “Islamic State” after “declaring a new caliphate with Abu Bakr al-Baghdadi as Caliph Ibrahim and ‘leader of Muslims everywhere.’”³³ IS demanded allegiance from all active jihadist groups, putting IS in direct competition with al-Qaeda and its affiliated groups.³⁴

III. THE ISLAMIC STATE’S IDEOLOGY

On September 10, 2014, the President of the United States stated, “Now let’s make two things clear: ISIL is not ‘Islamic.’ No religion condones the killing of innocents.”³⁵ This statement is somewhat inaccurate as IS does follow Islam; however, it is a very extreme interpretation of the Islamic religion that many other Muslims do not condone or follow.³⁶ Perhaps, statements and understandings such as this demonstrate the U.S.’s misunderstanding of IS and why the group acts the way it does.³⁷ It is important to understand IS’s theology and ideology in order to truly understand IS’s motivations and ultimately determine if IS poses a threat to the U.S.

IS is very much Islamic. IS follows a movement in Islamic political thought known as Jihadi-Salafism, or jihadism;³⁸ which it describes as “the Prophetic methodology.”³⁹ This methodology includes “following the prophecy and example of Muhammad, in punctilious detail.”⁴⁰ IS adheres explicitly to this movement.⁴¹ In fact, “The movement is predicated on an extremist and minoritarian reading of Islamic scripture that is also textually rigorous, deeply rooted in a pre-modern theological

³² *Id.*

³³ Dhiman, *supra* note 18.

³⁴ *Id.*

³⁵ Barack Obama, Pres. of the United States, Statement by the President on ISIL (Sept. 10, 2014, 9:01 PM), *available at* <https://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1>.

³⁶ See Cole Bunzel, *From Paper State to Caliphate: The Ideology of the Islamic State*, BROOKINGS INSTITUTION (2015), <http://www.brookings.edu/~media/research/files/papers/2015/03/ideology-of-islamic-state-bunzel/the-ideology-of-the-islamic-state.pdf>; See also Graeme Wood, *What ISIS Really Wants*, THE ATLANTIC (March 2015), <http://www.theatlantic.com/features/archive/2015/02/what-isis-really-wants/384980/>.

³⁷ *Id.*

³⁸ Bunzel, *supra* note 36, at 7.

³⁹ Wood, *supra* note 36.

⁴⁰ *Id.*

⁴¹ *Id.*

tradition, and exclusively elaborated by a recognized cadre of religious authorities.”⁴²

A portion of the movement can be traced back to the Muslim Brotherhood.⁴³ The Brotherhood believed in “the restoration of the caliphate as the ideal system of government for the Islamic world, a popular theme in the earlier 20th century.”⁴⁴ While the Brotherhood spoke at length about the caliphate and the need for the Muslim community to unite under one leader of an Islamic state, in practice, the Brotherhood did not actually restore a caliphate and, in fact, seemed indifferent to the idea.⁴⁵ The connection between IS and the Brotherhood is evidenced by IS’s June 2014 declaration of al-Baghdadi as Caliph Ibrahim and leader of Muslims everywhere.⁴⁶ For IS, uniting the Muslim community under one leader, creating the Islamic State, and restoring the caliphate was, and is, an immediate goal of the organization.

The second part of IS’s ideology is traced back to Salafism, “a primarily theological movement in Sunni Islam”⁴⁷ Accordingly, “Salafism focuses on eliminating idolatry (*shirk*) and affirming God’s Oneness (*tawhid*).”⁴⁸ Salafis consider themselves to be the only true Muslims.⁴⁹ IS follows the theology of Salafi and exemplifies the Salafi character of the jihadi movement; however, in contrast to al-Qaeda, who also follows the same theology, IS does so with greater severity.⁵⁰ In fact, IS is unwavering in its absolute and uncompromising views on doctrinal matters, “prioritizing the promotion of an unforgiving strain of Salafi thought.”⁵¹ IS’s extreme adherence to this version of Jihadi-Salafism can be traced to al-Zarqawi, the founder of AQI, “who studied theology with the prominent jihadi scholar Abu Muhammad al-Maqdisi.”⁵² The Salafi influences have been present in IS since its inception, tracing back to al-Baghdadi, al-Muhajir, and the current spokesperson for IS, al-Adnani.⁵³

IS emphasizes numerous Salafi doctrinal concepts, but the most prominent is that “all Muslims must associate exclusively with fellow

⁴² Bunzel, *supra* note 36, at 7.

⁴³ *Id.*

⁴⁴ *Id.* at 8.

⁴⁵ *Id.* (quoting statements that “Building a caliphate was more a long-term goal than an immediate goal.”).

⁴⁶ Wood, *supra* note 36.

⁴⁷ Bunzel, *supra* note 36, at 8.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 9.

⁵¹ *Id.*

⁵² *Id.* at 10.

⁵³ *Id.*

true Muslims and dissociate from anyone not fitting this narrow definition; failure to rule in accordance with God's law constitutes unbelief; all Shi'a Muslims are apostates⁵⁴ deserving of death; and the [Brotherhood] and Hamas are traitors against Islam."⁵⁵ Compared to al-Qaeda, IS is much more unbending in its application of Salafism, resulting in the increased acts of extreme and arbitrary violence, such as gruesome beheadings.⁵⁶

IS also differs from al-Qaeda in that it promotes offensive and defensive jihad.⁵⁷ Contrarily, al-Qaeda focuses on defensive jihad, promoting only what it classifies as defensive military acts.⁵⁸ Offensive jihad focuses on the "the uprooting of *shirk*, idolatry, wherever it is found."⁵⁹ In 2007, al-Baghdadi stated, "the end to which fighting the unbelievers leads is no idolater (*mushrik*) remaining in the world."⁶⁰ Al-Baghdadi also emphasized the importance of offensive jihad by stating, "going after the apostate unbelievers by attacking [them] in their home territory, in order to make God's word most high and until there is no persecution."⁶¹

Finally, IS follows the Islam practice of *takfir*, or excommunication.⁶² IS has committed its organization "to purifying the world by killing vast numbers of people."⁶³ Muslim apostates are the most common victims, and any Christians who resist the IS government or creation of an Islamic State are also targeted.⁶⁴ Anyone who does not adhere to their interpretation of Islam are considered nonbelievers and are thus subjected to becoming targets.⁶⁵

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 11.

⁵⁷ *Id.* at 10.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* (defining persecution as meaning idolatry).

⁶² *Id.* at 30.

⁶³ Wood, *supra* note 36.

⁶⁴ *Id.*

⁶⁵ *Id.*

IV. TAKE OVER OF SYRIA AND IRAQ, JUNE 2014 TO PRESENT: AN OVERVIEW

On June 10, 2014, IS overtook the Iraqi city of Mosul.⁶⁶ Shortly after this, IS officially declared itself the Islamic State, due to the number of captured Iraqi and Syrian territories over which it maintained control.⁶⁷ At this time, IS also executed a number of clerics in Mosul because they would not pledge their allegiance to IS.⁶⁸ On June 23, 2014, IS also overtook the northern city of Tal Afar and an airport in Iraq, which ignited the IS expansion into northern Iraq.⁶⁹ Throughout July 2014, IS grew and captured more land in Iraq.⁷⁰

During these months, IS also increased its presence in Syria.⁷¹ IS began to sell oil and gas products from captured Syrian oil fields to Iraq, attempting “to supply electricity and build state funds in the appointed ‘capital’ of the Islamic State, Raqqa, Syria.”⁷² Accordingly, “All the cities between Deir Ezzor city and the Iraq border” fell to IS by July 3, 2014.⁷³ Furthermore, IS claimed to have killed 270 people after seizing the Shaer gas field of al-Omar.⁷⁴

On August 7, 2014, the President of the United States authorized airstrikes against IS after the U.S. learned of the threat to the Yazidi minority, who were trapped in deplorable and life-threatening conditions on Mt. Sinjar, Iraq.⁷⁵ The airstrike allowed tens of thousands of Yazidis to escape the mountain, but thousands remained trapped as IS continued its push into northern Iraq.⁷⁶ Following this event, airstrikes continued

⁶⁶ AWR Hawkins, *U.S. Escalates Military Action in Iraq: A Timeline*, BREITBART NEWS NETWORK (Aug. 24, 2014), <http://www.breitbart.com/national-security/2014/08/24/u-s-escalates-military-action-in-iraq-a-timeline/>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* (explaining that the U.S. increased surveillance over Baghdad due to IS’s growth, anticipating an attack against the capital city. Drone flights over Baghdad increased from one drone flight a day to 50).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *ISIS Fast Facts*, CNN, <http://www.cnn.com/2014/08/08/world/isis-fast-facts/> (last updated July 20, 2015).

⁷⁴ *Id.* Al-Omar is the largest oil field in Syria, producing roughly 75,000 barrels of oil daily. *Group: ISIS Takes Major Syrian Oil Field*, CNN, <http://www.cnn.com/2014/07/03/world/meast/syria-isis-oil-field/> (last updated July 3 2014).

⁷⁵ Hawkins, *supra* note 66 (explaining that IS deemed the Yazidis “devil worshippers” and chased the Yazidis up Mt. Sinjar in an attempt to extinguish the religious minority. The only choice the Yazidis had was to stay on the mountain and die of starvation or thirst or descend the mountain and be slaughtered by the awaiting IS militants).

⁷⁶ *Id.*

with the U.S. strategically targeting IS in various locations.⁷⁷ The airstrikes reportedly destroyed or damaged “multiple [IS] ‘fighting positions’ and ‘checkpoints,’ as well as numerous ‘armed vehicles,’ ‘armored personnel carriers,’ and a ‘vehicle-mounted anti-aircraft gun,’ amongst other things.”⁷⁸

On August 19, 2014, IS released footage of the beheading of captured American journalist, James Foley.⁷⁹ IS stated “his beheading was brought about by Obama’s decision to strike IS positions and pledged that they would behead others if the strikes continued.”⁸⁰ At that time, IS held another American journalist, Steven Sotloff, captive and indicated he would be next if the U.S. continued the airstrikes.⁸¹ Unfortunately, on September 2, 2014, IS released yet another video, this time of the beheading of Sotloff.⁸² Then again, on September 13, 2014, IS posted a video that showed the execution of British aid worker, David Haines.⁸³ In the video, IS warned the British Prime Minister David Cameron that the destruction would continue as long as Britain continued its “evil alliance with America.”⁸⁴ At the end of the video, IS threatened the life of Alan Henning, another British citizen held captive by IS.⁸⁵ On October 3, 2014, IS released yet another video showing the beheading of Henning.⁸⁶ IS threatened the life of another American aid worker, Peter Kassig, also known as Abdul-Rahman Kassig.⁸⁷ On November 16, 2014, IS reported that it beheaded Kassig as it had promised in earlier videos.⁸⁸

IS continued to plague Iraq throughout November 2014, allegedly killing 322 members of the Albu Nimr tribe near the town of Hit.⁸⁹ In

⁷⁷ *Id.*

⁷⁸ *Id.* (reporting that during this time, IS also secured the Iraqi city of Shingal. During the raid of Shingal, IS took 500 girls and women as “war booty.” IS drove the young, attractive women out of the city in trucks to be slaves, and killed the older women, dumping their bodies in the streets).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² ISIS FAST FACTS, *supra* note 73.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* (reporting that IS blamed the beheading on the United Kingdom’s partnering with the U.S. in the bombing campaign against IS in Syria and Iraq).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* In September 2014, the Central Intelligence Agency announced that U.S. analysts estimated IS to have reached the size of 20,000 to 31,500 fighters across Iraq and Syria. *ISIS Can ‘Muster’ Between 20,000 and 31,500 Fighters, CIA Says*, CNN, <http://www.cnn.com/2014/09/11/world/meast/isis-syria-iraq/> (last updated Sept. 12, 2014).

late January 2015, IS demanded \$200 million from Japan for the release of two Japanese hostages, Kenji Goto and Haruna Yukawa.⁹⁰ Later in January 2015, IS posted a video online showing Goto holding a picture of the beheaded Yukawa.⁹¹ A voice in the video demanded the release of the terrorist suspect Sajida al-Rishawi from Jordan, in exchange for the release of Goto.⁹² On January 31, 2015, IS released a video showing the decapitated body of Goto.⁹³

Yet again, on February 3, 2015, IS released a video online depicting the Jordanian military pilot, Moath al-Kasasbeh, being burned alive while confined in a cage.⁹⁴ This atrocity sparked Jordanian airstrikes against IS positions in Syria that reportedly damaged or destroyed IS training centers and arms and ammunition caches in the de facto capital of Raqqa.⁹⁵ IS threats and acts of violence continued throughout February 2015, with the confirmation of the death of American hostage, Kayla Jean Mueller, the beheading of 21 Egyptian Christians on a Libyan beach, and the parading of 21 Kurdish Peshmerga fighters in cages down Iraqi streets.⁹⁶

In March 2015, IS continued its devastation of Iraq and Syria by destroying antiquities at the Mosul Museum, throwing a man off a building in Raqqa for allegedly being homosexual, and bulldozing the site of the ancient city of Nimrud.⁹⁷ To make matters worse, on March 7, 2015, Abubakar Shekau, leader of Boko Haram, pledged allegiance to IS.⁹⁸ Only a few days later, on March 12, 2015, al-Adnani announced that the caliphate had expanded into western Africa and that al-Baghdadi had accepted Boko Haram's pledge of allegiance.⁹⁹ That same day, IS bombed the Iraqi army headquarters in north Ramadi, killing at least 40 Iraqi soldiers.¹⁰⁰

V. LEGAL BASES UNDER THE LAWS OF ARMED CONFLICT

Now that it is clear who IS is, the ideology it follows, and the devastation it has caused in the Middle East since June 2014, this article

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

turns to addressing whether the U.S. has a legal basis under the laws of armed conflict to pursue IS in Syria. Under the law of armed conflict, to pursue IS within the borders of Syria, the U.S. must either have the consent of Syria to enter its country, the authorization to use force by the U.N. Security Council, or a legal basis under one of the theories of self-defense under Article 51 of the U.N. Charter. This article first addresses the basis of consent.

I. Consent

Generally, the use of force by a State in the territory of another State is prohibited under the U.N. Charter and customary international law. Article 2(7) of the U.N. Charter states:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.¹⁰¹

Simply put, this means that if a State requests the assistance of a fellow State or ally, that fellow State or ally is free to use force within the boundaries of the requesting nation.

Currently, Syria has not expressly given the U.S. permission to go after IS within its borders.¹⁰² In fact, in a press conference held on August 25, 2014, the Syrian foreign minister, Walid al-Moallem, warned the U.S. “not to conduct airstrikes inside Syria against the Islamic State without the Syrian government’s consent,” stating that “any such attack would constitute an act of aggression.”¹⁰³ While these comments seemed to pre-empt any U.S. action in Syria, al-Moallem also stated that “Syria is ready to co-operate and co-ordinate on the regional and international level in the war on terror, but any effort to combat terrorism should be co-ordinated with the Syrian government.”¹⁰⁴

It remains clear that Syria has not expressly given consent for the U.S. to act within its borders. However, some legal scholars argue that

¹⁰¹ U.N. Charter art. 2, para. 7.

¹⁰² Seina Karam, *Syria Warns U.S. Against Bombing ISIS Without Permission*, NATIONAL POST (Aug. 25, 2014, last updated Jan. 24, 2015, 8:35 PM), http://news.nationalpost.com/2014/08/25/syria-warns-u-s-against-bombing-isis-without-permission/#__federated=1.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

Syria may have given implied consent¹⁰⁵ based on statements from Syrian government spokespersons, that “we are facing an enemy. We should cooperate.”¹⁰⁶ To support this argument, international legal scholars point to the fact that “Syria has made no effort to interfere with the operations in spite of the US notifying it of the attacks prior to their launch.”¹⁰⁷ In fact, in late 2014, Syria submitted several letters to the U.N. complaining about bombings by Israel, hostile actions by Turkey within its borders, U.N. support for non-government organizations providing humanitarian assistance, and the arming and training of rebel groups within its borders, but Syria failed to complain about the U.S. airstrikes against IS.¹⁰⁸ The absence of complaints to the U.N. over U.S. airstrikes coupled with statements from Syrian government officials, like “U.S.-led air strikes against militants are going in the ‘right direction’ because the [Syrian] government had been informed before they started and they were not hitting civilians or Syrian military targets,” demonstrates that Syria may very well be implying consent based on its actions, or inability to act, and statements.¹⁰⁹

Additionally, on September 29, 2014, al-Moallem addressed the U.N. General Assembly and many observers stated that his comments “appeared to give tacit approval of U.S. and Arab airstrikes in Syria.”¹¹⁰ Al-Moallem specifically stated that IS was “unleashed like a monster against Syria, Iraq, and Lebanon. Let us together stop this ideology and its exporters.”¹¹¹ Anything that remained tacit in al-Moallem’s September 29, 2014 comments to the U.N. Assembly became much clearer in an interview with Associated Press on that same day. In that interview, al-Moallem stated that “the U.S.-led bombing campaign should be expanded to target other militant groups besides the Islamic State group, noting that the fight against terrorism has aligned the Syrian

¹⁰⁵ Implied Consent, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/implied+consent> (last visited June 24, 2015, 6:35 PM) (Consent that is inferred from signs, actions, or facts, or by inaction or silence).

¹⁰⁶ *Another Long War*, THE ECONOMIST (last updated Sept. 29, 2014), <http://www.economist.com/news/briefing/21620220-americas-bombing-raids-so-called-islamic-state-syria-have-greatly-increased-its>.

¹⁰⁷ Louise Arimatsu and Michael Schmitt, *The Legal Basis for the War Against ISIS Remains Contentious*, THE GUARDIAN (Oct. 6, 2014, 4:00 PM), <http://www.theguardian.com/commentisfree/2014/oct/06/legal-basis-war-isis-syria-islamic-state>.

¹⁰⁸ Ryan Goodman, *Taking the Weight Off of International Law: Has Syria Consented to US Airstrikes?*, JUST SECURITY (Dec. 23, 2014, 10:46 AM), <http://justsecurity.org/18665/weight-international-law-syria-consented-airstrikes/>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

regime with its Western and Arab opponents in a fight against a common enemy.”¹¹²

Furthermore, U.S. strikes against IS obviously benefit Syria because IS continues to be one of the Syrian government’s most powerful opponents; therefore, it is reasonable to conclude that the Syrian government does not vehemently oppose the U.S. operations taking place within its borders.¹¹³ It must be noted that making an argument based on implied consent would be very contentious amongst the international community, as the theory of implied consent is not codified in international law and the theory is not widely accepted by the international legal community.¹¹⁴ Interestingly enough, the U.N. General Secretary, Ban Ki-Moon, addressing the U.S. basis for airstrikes in Syria on September 23, 2014, stated “I am aware that today’s strikes were not carried out at the direct request of the Syrian Government, but I note that the Government was informed beforehand.”¹¹⁵

All in all, the U.S. relationship with Syria, particularly with regard to the issue presented by IS, is murky at best. One thing is very clear: Syria has not expressly consented to U.S. action within its borders against IS. On another note, there is an argument to be made that based upon Syria’s actions, or inability to act, public statements, and acquiesce to U.S. airstrikes in Syria, Syria has effectively given implied consent for the U.S. to act within its borders to pursue IS. Whether the international legal community would largely accept this argument remains a mystery, but the U.S. does have a compelling argument based upon the evidence that exists of Syria’s acquiesce to U.S. action.

2. *U.N. Security Council Authorization*

The second basis under which a State may enter another sovereign State, and act without consent, is pursuant to UNSC authorization. Article 24 of the U.N. Charter states “Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their own behalf.”¹¹⁶ Article 43 states “All Members of the [U.N.], in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a

¹¹² *Id.*

¹¹³ *See* Arimatsu & Schmitt, *supra* note 107.

¹¹⁴ *See Id.*

¹¹⁵ Joshua Holland, *Obama’s War on Terror Moves to Syria – Here’s What You Need to Know*, BILLMOYERS.COM (Sept. 25, 2014), <http://billmoyers.com/2014/09/25/syria/>.

¹¹⁶ U.N. Charter art. 24, para. 1.

special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.”¹¹⁷ In short, the UNSC maintains international peace and security throughout the world and, in return, Member States agree to abide by and carry out UNSC resolutions.¹¹⁸

The UNSC has not issued a United Nations Security Resolution (UNSCR) directly giving Member States of the U.N. Charter the authority to use force in Syria against IS; however, the UNSC has issued a couple other resolutions that deal primarily with the continuing presence of IS in the Middle East. What is missing from these resolutions is the ever important language of “all necessary means to restore international peace and security and request[s] all States to provide appropriate support to do so.”¹¹⁹ When this language is present in a Security Council resolution, the Member States are authorized to use force to carry out the central intent of the resolution.¹²⁰ Without this language, the Member States are not authorized to use force. If they seek to use force, it must be justified by one of the other two legal bases provided for by the law of armed conflict, or they risk being in violation of international law.

On August 15, 2014, the UNSC passed UNSCR 2170, dealing directly with extremist groups located in Iraq and Syria.¹²¹ This was one of the few resolutions passed since 2014, in an effort to combat the overwhelming and disastrous presence of extremist groups in Iraq and Syria, specifically IS. This Resolution expressly provided for “all United Nations Member States to act to suppress the flow of foreign fighters, financing and other support to Islamist extremist groups in Iraq and Syria.”¹²² The UNSC “condemn[ed] in the strongest terms what it called ‘gross, systematic and widespread abuse’ of human rights by the Islamic State of Iraq and the Levant.”¹²³ This resolution was unanimously adopted by the Member States.¹²⁴

In addition to calling on Member States to “take national measures to suppress the flow of foreign terrorist fighters” and the UNSC’s willingness to issue sanctions for any States found to be in violation of

¹¹⁷ U.N. Charter art. 43, para. 1.

¹¹⁸ See U.N. Charter art. 24, para 1; see also U.N. Charter art. 25.

¹¹⁹ See GEOFFREY S. CORN ET AL., *THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH* 18 (Wolters Kluwer, 1st ed. 2012).

¹²⁰ *Id.*

¹²¹ S.C. Res. 2170, ¶1, U.N. Doc. S/RES/2170 (Aug. 15, 2014).

¹²² Press Release, Security Council, Security Council Adopts Resolution 2170 (2104) Condemning Gross, Widespread Abuse of Human Rights by Extremist Groups in Iraq, Syria, U.N. Press Release SC/11520 (Aug. 15, 2014).

¹²³ *Id.*

¹²⁴ *Id.*

the Resolution, UNSCR 2170 also added six persons to its terrorist sanctions list.¹²⁵ Al-Baghdadi, the leader of IS, was not included on the list, because he has been on the terrorist sanctions list since 2011.¹²⁶ UNSCR 2170 included bold language cautioning the extremist groups in Iraq and Syria to stop the deplorable actions they were committing against humanity, and urging the other Member States to stop any assistance, whether directly or indirectly, to these groups.¹²⁷ However, what this Resolution did not provide for was the right to use force against the extremist groups for the crimes they were committing against humanity.

Most recently, the UNSC passed UNSCR 2199 on February 12, 2015.¹²⁸ This Resolution targets funding streams for the Islamic State.¹²⁹ The UNSC urged “global cooperation ‘to impair, isolate and incapacitate’ terrorist threats.”¹³⁰ The UNSC condemned those buying oil from the Islamic State, banned all trade in looted antiquities from Iraq and Syria, and called upon States to end ransom payments.¹³¹ The Russian-led resolution was adopted unanimously, garnering the support of 35 countries.¹³² Jackie Northam, reporter for National Public Radio, characterized this Resolution as “a rare show of unity between the U.S. and Russia, which is the measure’s primary sponsor.”¹³³ Russia’s ambassador to the U.N., Vitaly Churkin, said, “the resolution was an important step to suppressing the terrorist threat that’s felt far beyond Syria, Iraq and other nations in the Middle East.”¹³⁴

The Resolution condemns any trade, directly or indirectly, with the extremist group, particularly trade of oil, oil products and modular refineries.¹³⁵ The UNSC emphasized that any trade by a country with IS would be interpreted as support by that country of IS and that country would face possible sanctions from the UNSC.¹³⁶ The UNSC further recognized that “oilfields, as well as other infrastructure such as dams

¹²⁵ See S.C. Res. 2170 *supra* note 121 at ¶8 & annex.

¹²⁶ See Press Release, *supra* note 122.

¹²⁷ See generally S.C. Res. 2170 *supra* note 121.

¹²⁸ S.C. Res. 2199, U.N. Doc. S/RES/2199 (Feb. 12, 2015).

¹²⁹ *Id.*

¹³⁰ *Id.*; see also *Security Council Approves Resolution Targeting Sources of Financing for ISIL*, UN NEWS CTR. (Feb. 12, 2015) <http://www.un.org/apps/news/story.asp?NewsID=50067#.VQ3HrVyLB1I>.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Jackie Northam, *U.N. Security Council Passes Resolution Targeting ISIS Revenue*, NAT'L PUB. RADIO (Feb. 15, 2015, 5:00 PM), <http://www.npr.org/2015/02/15/386544373/u-n-security-council-passes-resolution-targeting-isis-revenue>.

¹³⁴ *Id.*

¹³⁵ See S.C. Res. 2199, *supra* note 128 at ¶1.

¹³⁶ UN NEWS CTR., *supra* note 130.

and power plants, controlled by ISIL . . . ‘are generating a significant portion of the groups’ income, alongside extortion, private foreign donations, kidnap ransoms and stolen money from the territory they control.’¹³⁷

The UNSC has taken steps to combat the issues present in Iraq and Syria due to the overwhelming presence of IS and other extremist groups in the region. However, it has failed to go so far as to authorize the use of force in the fight against IS in Iraq and Syria. While it is clear that the Council is directing its efforts at combating IS in the most civil and non-hostile way possible, ultimately, the resolutions it has passed do not seem to be affecting the operations of IS, as it continues to plague Syria and Iraq. IS continues to overrun Syria, continues to recruit foreign fighters to build its militia, and continues to cause the death of innocent civilians in the name of Islam. Furthermore, there has not been any indication by the UNSC thus far, regarding if and when an authorization for the use of force will occur.

3. *Article 51*

Article 51 states “[n]othing in this present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the [U.N.], until the Security Council has taken measures necessary to maintain international peace and security”¹³⁸ Article 51 requires that an armed attack occur before a State can act in self-defense.¹³⁹ But that begs the question, what is an “armed attack?” While there is no agreed upon definition, it is important to look at the facts and circumstances of each individual attack to assess whether an armed attack has occurred.¹⁴⁰ For example, the International Court of Justice (ICJ) “decided that Nicaragua’s provision of arms to the opposition in El Salvador was not an armed attack.”¹⁴¹ To qualify as an armed attack, the attack must be more than isolated criminal acts against a state’s citizens no matter how brutal the attacks may be.¹⁴²

Some members of the international legal community, to include the United States, also support a position that a State can attack in self-

¹³⁷ *Id.*; See *U.N. Security Council Adopts a Resolution to Halt ISIS’s Financial Support*, INTERNATIONAL RELATIONS INSIGHTS & ANALYSIS (Feb. 13, 2015), <http://ir-ia.com/news/un-security-council-adopts-a-resolution-to-halt-isis-financial-support/>.

¹³⁸ U.N. Charter art. 51.

¹³⁹ See CORNET AL., *supra* note 119, at 25.

¹⁴⁰ *Id.* (noting that “States seem to agree that not all armed military actions equate to an armed attack.”).

¹⁴¹ *Id.* at 25 (citing *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 181 (June 27)).

¹⁴² See Arimatsu & Schmitt, *supra* note 107.

defense when an armed attack is imminent, but has not yet occurred.¹⁴³ The debate of what does or does not constitute an “armed attack” is not the focus of this article. For the purposes of this article, it is important to know and understand what Article 51 states and how that language plays into the analysis of whether self-defense is appropriate in any given situation, specifically whether the U.S. has a legal basis to enter Syria to pursue IS.

There are varying theories of self-defense such as the inherent right to self-defense, anticipatory self-defense, interceptive self-defense, preventive self-defense and collective self-defense.¹⁴⁴ This section will focus primarily on collective and preventive self-defense, as those are the most likely bases for the legal justification to use force in Syria by the U.S. against IS. This article will not address the inherent right of self-defense by the U.S. to use force against IS within Syria because at this point the U.S. has not expressed a concern that IS has facilitated an armed attack against the U.S. or that there is an imminent threat of an armed attack against the U.S. by IS. In fact, the U.S. has repeatedly claimed that IS does not present an immediate threat to the U.S. homeland.¹⁴⁵ Furthermore, “many experts note that the Islamic State, despite its clever anti-U.S. bluster to lure the United States into attacking it, is more a threat to the Middle East and neighboring countries than it is to U.S. territory” because IS “is focused on establishing an Islamic state in Iraq and Syria rather than attacking the U.S.”¹⁴⁶

This same argument applies to the theory of anticipatory self-defense.¹⁴⁷ Without evidence that IS poses an imminent threat to the U.S., the U.S. does not have the right to claim anticipatory self-defense against IS within the borders of Syria.¹⁴⁸ Without an armed attack or an imminent armed attack, the U.S. has no legal justification to rely on the inherent right of self-defense or anticipatory self-defense to use force

¹⁴³ CORN ET AL., *supra* note 119, at 23-24.

¹⁴⁴ *Id.* at 22-25.

¹⁴⁵ Josh Rogin, *White House Has No International Legal Justification for Hitting ISIS in Syria*, THE DAILY BEAST (Sept. 23, 2014), <http://www.thedailybeast.com/articles/2014/09/15/white-house-has-no-international-legal-justification-for-hitting-isis-in-syria.html>.

¹⁴⁶ Ivan Eland, *Legal Basis for U.S. War in Iraq and Syria Is Thin*, THE HUFFINGTON POST (Sept. 29, 2014, 12:19 PM), http://www.huffingtonpost.com/ivan-eland/legal-basis-for-us-war-in_b_5900984.html.

¹⁴⁷ CORN ET AL., *supra* note 119, at 22 (stating that the theory of anticipatory self-defense does not require a state to wait until an armed attack has occurred, instead “the potential victim can act in defense by anticipating the attack and taking action in advance of the attack.” The armed attack must be imminent under this theory).

¹⁴⁸ Eland, *supra* note 146.

against IS within the Syrian borders. For these reasons, these two theories are not addressed in detail as part of this article.

In discussing these varying bases for self-defense, it is important to remember that the U.S. has articulated on many occasions that it believes there exists an international legal basis for the U.S. to act in Syria against IS. For example, Samantha Power, U.S. ambassador to the U.N., stated “the United States has the legal right to launch Syrian strikes without the [U.N. Security Council’s] explicit backing.”¹⁴⁹ Consistent with the U.N. Charter, we [think] – it would depend on the facts and circumstance of any particular strike in Syria – that we have the legal basis we need.”¹⁵⁰ National Security Council spokesperson, Caitlin Hayden also stated, “with respect to international law, the specific basis will depend on the particular facts and circumstances related to any specific military actions, but we believe that we will have a basis for taking action.”¹⁵¹ In addition, statements made by Iraqi and U.S. representatives to the U.N. indicated “the current operations in Syria against ISIS are being justified on the basis of collective self-defen[s]e.”¹⁵²

a. Collective Self-Defense

Article 51 of the U.N. Charter recognizes a right of collective self-defense.¹⁵³ Collective self-defense is applicable when a State, who has the right to act in inherent self-defense, requests the assistance of another State because the requesting State is unable or unwilling to exercise its inherent right of self-defense on its own.¹⁵⁴ To exercise the right of collective self-defense, the State entitled to act in inherent self-defense must explicitly request assistance from other States.¹⁵⁵ The ICJ in the *Nicaragua* case discussed briefly above, “refused to acknowledge the U.S.’s claim to collective self defense because El Salvador had not officially requested such help.”¹⁵⁶ The ICJ stated:

¹⁴⁹ *US Has ‘Legal Basis’ For Strikes Against ISIS in Syria, Power Says*, THE HILL, <http://thehill.com/policy/defense/218435-power-us-has-legal-basis-for-strikes-in-syria> (last visited Mar. 21, 2015).

¹⁵⁰ *Id.*

¹⁵¹ Rogin, *supra* note 145.

¹⁵² Arimatsu & Schmitt, *supra* note 107.

¹⁵³ U.N. Charter art. 51.

¹⁵⁴ See George K. Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, 31 Cornell Int’l L.J., 321, 350-53 (1998).

¹⁵⁵ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 181 (June 27) (referencing the prohibition of the use of force, and the right of self-defense ¶¶ 187 to 201).

¹⁵⁶ CORN ET AL., *supra* note 119, at 24.

It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defense on the basis of its own assessment of the situation. Where collective self-defense is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.¹⁵⁷

The U.S. government received a request from the Iraqi government explicitly requesting assistance from the U.S. to fight against IS.¹⁵⁸ According to the U.S. notification to the U.N., Iraq specifically requested assistance from the U.S. to “lead international efforts to strike [IS] sites inside Syria to suppress continuing attacks on Iraq and protect Iraqi citizens.”¹⁵⁹ Based on the request from Iraq, the U.S. is acting in self-defense on behalf of Iraq against the ongoing threat posed by IS.¹⁶⁰ The threat largely emulates from IS forces within the borders of Syria and Syria’s seemingly inability or unwillingness to address the IS problem within its own border.¹⁶¹

The question of whether Syria is unable or unwilling to deal with the threat posed by IS is highly debated. Although Syria has not expressly stated that it is “unable or unwilling” in dealing with the threat posed by IS, as stated in the section of this article dealing with consent, its inaction to deal with the threat posed by IS does suggest that it is *unable* to.¹⁶² The “unable or unwilling test” is a controversial part of international law, though it is considered a well-settled part of the U.S. government’s legal position.¹⁶³ In fact, the U.S. relied on this theory when it entered Pakistan, without approval, during the operation to kill Osama bin Laden.¹⁶⁴ In a letter dated September 23, 2014, addressed to the U.N. Secretary General, the U.S. demonstrated support for the “unable or unwilling” test, by stating that “states must be able to defend themselves,

¹⁵⁷ *Nicar v. U.S.*, 1986 I.C.J., 14 ¶¶ 187 – 201.

¹⁵⁸ Jennifer Daskal et al, *Strikes in Syria: The International Law Framework*, JUST SECURITY (Sept. 24, 2014, 8:01 AM), <http://justsecurity.org/15479/strikes-syria-international-law-framework-daskal-deeks-goodman/>.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Ryan Goodman, *International Law on Airstrikes against ISIS in Syria*, JUST SECURITY (Aug. 28, 2013, 12:27 PM), <http://justsecurity.org/14414/international-law-airstrikes-isis-syria/>.

¹⁶⁴ *Id.*

in accordance with the inherent right of individual and collective self-defense as reflected in Article 51 of the U.N. Charter, when, as is the case here, the government of the state where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.”¹⁶⁵

Comments like those made by Ban Ki-Moon, in his statement on September 23, 2014, admitting that “the strikes took place in areas no longer under the effective control of that [Syrian] Government,” support the position that Syria is unable to deal with the threat posed by IS.¹⁶⁶ Ki-Moon further stated, “I think it is undeniable – and the subject of broad international consensus – that these extremist groups pose an immediate threat to international peace and security.”¹⁶⁷ U.S. Secretary of State, John Kerry, recognized the inability of the Syrian government to handle the continued threat posed by IS within its borders, stating “We [U.S.] are going to do what they [Syria] haven’t done, what they had plenty of opportunity to do, which is to take on ISIL and to degrade it and eliminate it as a threat.”¹⁶⁸ While the U.S. may have an uphill battle in persuading the international legal community to accept this argument, there is evidence to support the argument that Syria is unable to handle the threat posed by IS within its borders.

Because Iraq has requested U.S. assistance in combating the threat posed by IS, and there exists a strong argument that Syria is *unable* to combat the threat posed by IS within its borders, the U.S. has a strong legal argument that it can pursue IS in Syria, relying on the theory of collective self-defense.¹⁶⁹ “So long as the force used is necessary to protect against the direct threat that [IS] posed to Iraq, and that the amount and nature of force is proportionate to suppressing that threat,” then U.S. actions in Syria are legally supportable under the law of armed conflict.¹⁷⁰ Given that IS has rapidly advanced in Iraq, due in large part to the support flowing into Iraq from Syria, and the Syrian government is unable to handle IS on its own, there exists a necessity for the U.S. to act in defense of Iraq.¹⁷¹

¹⁶⁵ Marty Lederman, *The War Powers Resolution and Article 51 Letters Concerning Use of Force in Syria Against ISIL and the Khorasan Group*, JUST SECURITY (Jun. 17, 2015, 7:15 PM) <http://justsecurity.org/15436/war-powers-resolution-article-51-letters-force-syria-isil-khorasan-group/>.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Rebecca Kaplan, *John Kerry: “We are at war” with ISIS*, CBS NEWS (Sept. 14, 2014, 9:04 AM), <http://www.cbsnews.com/news/john-kerry-we-are-at-war-with-isis/>.

¹⁶⁹ See Daskal et al., *supra* note 158.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

At first, the U.S. only targeted IS bases, training camps, and IS-controlled transit points into Iraq.¹⁷² These strikes and any other strikes on similar targets are and would be proportionate to suppressing the threat posed by IS to Iraq.¹⁷³ However, since January 2015, the U.S. has conducted airstrikes and targeted IS controlled areas of Syria that are not near the Iraq-Syria border.¹⁷⁴ This raises the question of whether this is legally permissible under the basis of collective self-defense.

Under this theory, it is quite clear that the U.S. can do what is necessary to secure Iraq's border with Syria and protect Iraqi civilians from IS. However, it becomes more complex when determining whether the U.S. may act in Syria. As discussed previously, because it is extremely likely that Syria is unable to combat IS on its own, this provides the U.S. the ammunition to argue that it has a legal basis to act on behalf of Syria under the theory of collective self-defense. This theory allows the U.S. to act within Syria's borders so long as the attacks meet the other requirements of international law. While the U.S. has not expressly stated upon which basis it is acting under in conducting airstrikes in Syria, neither the UNSC nor any other country or international group have questioned its actions, to include the Syrian government. If questions were to be raised, it is likely that the U.S. has a good argument under the theory of collective self-defense to justify its actions in Syria.

b. Preventive Self-Defense

The theory of preventive self-defense applies when a State "acts to prevent a potential attack before it is imminent or even capable of being launched."¹⁷⁵ While Israel justified its use of force against Iraq in 1981 using this theory of self-defense, it was not widely accepted by the international community until twenty years later, when President George W. Bush articulated U.S. support of preventive self-defense in the 2002 U.S. National Security Strategy.¹⁷⁶ The strategy stated:

We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends . . . We must adapt the concept of imminent threat to the capabilities and

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Operation Inherent Resolve*, U.S. DEP'T of DEF. (last visited July 14, 2015), http://www.defense.gov/home/features/2014/0814_iraq/.

¹⁷⁵ CORN ET AL., *supra* note 119, at 23-24.

¹⁷⁶ *Id.* at 23.

objectives of today's adversaries . . . The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.¹⁷⁷

Even though preventive self-defense appears to be a viable option at first glance, due to previous overreaching and abuse of this doctrine by the Bush Administration during the unprovoked invasion of Iraq in 2002, present reliance on preventive self-defense to justify the use of force is frowned upon by the international community due to the high probability of abuse.¹⁷⁸ This would not be a viable option for the U.S. since there would likely be much turmoil and animosity in the international community over the U.S.'s use of this theory to re-enter a Middle Eastern country, when there is not an apparent armed attack or imminent threat of attack against the U.S.

VI. WAY FORWARD

The current state of affairs between the U.S., Syria, Iraq, IS, other coalition forces, and the U.N. is in a constant state of flux. On any given day, the relationship between all of these parties could drastically change, causing the facts to provide a legal basis for intervention under the inherent right of self-defense, anticipatory self-defense, or the issuance of UNSCR.¹⁷⁹ The analysis under any one of these distinct bases is very fact and circumstance dependent. Due to the facts and circumstances that currently present themselves, the two legitimate arguments that can be made under international law by the U.S. to act in Syria to pursue IS are: 1) Syria has given implied consent to the U.S. to act within its borders to combat IS; or 2) the U.S. has the right to use collective self-defense on behalf of Iraq. Now, it is important to keep in

¹⁷⁷ *Id.* at 23-24. (citing U.S. National Security Council, *National Security Strategy* (Sept. 2002)), available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss5.html> (last visited Mar. 21, 2015).

¹⁷⁸ *Id.*

¹⁷⁹ Ashley Deeks, *U.S. Airstrikes Against ISIS in Syria? Possible International Legal Theories*, LAWFARE BLOG (Aug. 23, 2014, 3:04 PM), <http://www.lawfareblog.com/2014/08/us-airstrikes-against-isis-in-syria-possible-international-legal-theories/>.

mind that acting under collective self-defense presents limited options of what the U.S. may do to further Iraq's security. In sum, the U.S. has a legal basis under the law of armed conflict to act within Syria's borders to combat the ongoing threats posed by IS.