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HOW DISINGENUOUS INTERPRETATIONS OF INTERNATIONAL LAW HAVE CREATED OPPORTUNITIES FOR MIMICRY AND ABUSE

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JCSP 49

Exercise Solo Flight

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JCSP 49 - PCEMI n° 49
2022 - 2023

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INTRODUCTION

International law is the overarching body of rules that governs the conduct and interactions of states and international organizations to ensures that their common interests and aims are respected and protected.[1] The right to inherent self defence is a critical principle entrenched in international law in the United Nation's (UN) Charter under Article 51. The concept, in its purest form, is to ensure a state does not become victim to another State's aggression while the international community comes to an agreement on whether action should be taken. However, what happens when a state's desired action does not clearly fit into the existing customary definition of the law? What happens when a state interprets the law in a manner that could be viewed as disingenuous to the intent of the law, and the international community appears to tacitly accept?

The global West's actions surrounding their intervention into Syria to combat the Islamic State of Iraq and Syria (ISIS) have been the subject of intense scrutiny over the years. And when looking to answer the questions above, it has raised another question: 'Has the West's employment of pre-emptive self defence and the right to collective self-defence to justify its use of force in previous conflicts such as Afghanistan/Pakistan, Iraq & Syria set the conditions for adversarial states to use similar justifications for their actions?' The author will demonstrate that the US and UK's interpretations and expansion of Article 51, the inherent right to self defence, have undermined international law and have created an opportunity where states like Russia and China can utilize the same interpretation to attack the global world order.[2]

Throughout this essay, the author will examine how states have interpreted international law to justify their military actions on the international stage, which can erode the intent behind international law. This essay will focus on the legal justification for the conflict against ISIS in Iraq and Syria. First, we will examine and analyse the US and UK's perspective on their legal right to intervene in the conflict. Second, we will examine some of the counter arguments made by legal scholars and specialists. Finally, we will examine the current and possible dangers resulting from the political-legal justification that was used, and how the same concept is currently being employed by Russia for its invasion into Ukraine. Before delving into the legal analysis of the issue, a succinct background on the Iraq-Syrian conflict is necessary.

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[1] Emily F. Carsaco, 'International Law', in *The Canadian Encyclopedia* (The Canadian Encyclopedia, 5 February 2012), https://www.thecanadianencyclopedia.ca/en/article/international-law.

[2] It should be noted the perspective that International Law and Articles of the UN Charter are applicable against non-state actors are still being debated and is beyond the scope of this paper. Although, this notion of applicability will be assumed when exploring the usability of International Law or UN Charter articles.

CONFLICT BACKGROUND - ISIS

The creation of the ISIS began in Iraq under the backdrop of a repressed and marginalized group of former Baathist regime soldiers after the overthrow of Saddam Hussein's government by the US.[3] Originally an independent, regional subgroup working with al-Qaeda, over the next several years ISIS morphed into a serious transnational threat until 2014.[4]

ISIS was a non-state actor (NSA) or terrorist organization in Iraq whose focus was combating the US and coalition presence until the US' withdrawal starting in 2010.[5] They went operationally dormant in Iraq until the turmoil of the Syrian Civil strife created a unique opportunity for them to move into Syria, regroup, organize, and grow over the next few years.[6] There, ISIS rapidly recruited and expanded their influence until, at its peak, it controlled approximately one-third of Syrian territory.[7]

At this stage ISIS turned its sights on fully re-establishing itself in Iraq.[8] The rapid success of ISIS continued as they advanced seemingly unimpeded by retreating Iraqi Security Forces. As a result, ISIS was able to seize Mosul, Iraq's second largest city by June 2014 and on 29 June 2014, ISIS announced the establishment of a new caliphate.[9] With ISIS possessing safe havens, both inside and outside Iraq, access to funds, equipment and training to conduct terrorist operations across Iraq, on 20 Sept 2014 the Iraqi government sent a letter to the United Nations Security Council where it requested the US to lead an international effort to target and strike ISIS locations.[10] In legal terms, Iraq had consented to the international communities' use of force within its sovereign territory. However, it also requested support for the use of force against the non-state actors (ISIS) in the neighbouring state of Syria.

Iraq's plea to the international community for support was stifled at the UNSC by Russian vetoes until ISIS conducted a series of five terrorist attacks across several

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[3] Michael Scharf, 'How the War Against ISIS Changed International Law', *Case Western Reserve Journal of International Law* 48 (2016): 6.

[4] Ibid, 6.

[5] Brian L. Steed, ed., *ISIS: The Essential Reference Guide* (Santa Barbara, California: ABC-CLIO, 2019), xv–xviii.

[6] Ibid, xviii-xx.

[7] Michael P. Scharf, Milena Sterio, and Paul R. Williams, *The Syrian Conflict's Impact on International Law*, 1st ed. (Cambridge University Press, 2020),10. https://doi.org/10.1017/9781108863650.

[8] Michael Scharf, 'How the War Against ISIS Changed International Law', *Case Western Reserve Journal of International Law* 48 (2016): 6.

[9] Brian L. Steed, ed., *ISIS: The Essential Reference Guide* (Santa Barbara, California: ABC-CLIO, 2019), xxii.

[10] Iraq, 'Letter Dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations Addressed to the President of the Security Council', 20 September 2014.

countries from 26 June to 13 Nov 2015. [11, 12] These events united the international community to adopt UNSC resolution (Res) 2249, where ISIS was identified as a global threat to the international world order. The UN called upon nations to take all necessary measures, in compliance with international law, to eradicate ISIS safe havens in Iraq and Syria.[13]

WESTERN INTERVENTION – LEGAL AND ILLEGAL

From an international law perspective, there is little debate or concern over the international community's intervention and use of force in Iraq. As a sovereign state, Iraq requested support to defeat ISIS in their 2014 letter to the UNSC and therefore authorized the use of force in their territory. Where concern begins to develop is on their request to strike ISIS targets within another state's (Syria) sovereign territory without consent. As such, there is debate in the international legal community on the legality of the strikes or action taken by western states within Syrian territory. In the sections below, this paper examines:

- the justification of two of the prominent western countries, the United States (US) and the United Kingdom (UK), that their use of force in Syria was *legal*; and
- the legal and scholarly perspectives that their use of force was *illegal*.

Western Justification

In reviewing Western justification there are three main sources of international law or principles that are referenced or reflected. They are – self defence; responsibility to protect (R2P); and the UNSC Res 2249.

The primary justification for intervention and the use of force within the sovereign territory Syria is one of the core principles of the UN Charter: the inherent right to self defence. In the UN Charter, the use of force by a state is limited by the UN Charter under Article 2(4) in which members shall refrain from the threat or use of force against another state. [14] Exceptions to this are found in the case of self or collective defence under Article 51 stipulates that nothing shall prevent a state from the inherent right of individual or collective self defence if they or a member of the UN are subject to an armed attack.[15] The aspects of both collective and individual self defence were used in US and UK's legal justification.

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[11] Michael Scharf, 'How the War Against ISIS Changed International Law', *Case Western Reserve Journal of International Law* 48 (2016): 9-10.

[12] United Nations, 'UNSC Resolution 2249', Pub. L. No. S/Res/2249 (2015), 1, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2249.pdf.

[13] Ibid, 2.

[14] United Nations, 'United Nations Charter (Full Text)', United Nations, accessed 28 March 2023, https://www.un.org/en/about-us/un-charter/full-text.

[15] Ibid.

Collective Self-Defence

In their 2014 Article 51 letters to the UNSC, the US and UK justify their military action into Syria to proportionately end the continued attack on Iraq, to protect Iraqi citizens and to re-establish its territorial sovereignty by striking ISIS military sites.[16, 17] In a 2018 Report to congress, the US stated "as a matter of international law, necessary and proportionate use of force in national and collective self-defense against ISIS in Syria…"[18] as the justification for their military operation in Syria. In a 2015 Article 51 letter, the UK states "ISI[S] is engaged in an ongoing armed attacked against Iraq, and therefore action against ISI[S] in Syria is lawful in the collective self-defence of Iraq".[19] Additionally, in the UK PM's response to Parliament, it was stated that sufficient evidence was present to establish a direct link between ISIS activities in Syria and the attacks in Iraq.[20]

The information above explains why the US and UK perceived they were legitimate in the right to act under international law under article 51, but it only works in the context of the use of force in Iraq. It does not explain how or why they believed they were authorized to conduct operations in Syria, a non-consenting state. For action in Syria, the US employed the interpretation of unwilling and unable. The US stipulated that right to self defence in a non-consenting nation is valid under article 51 when "… the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks." [21]

The unwilling or unable standard refers to when a state harbours or supports non-state actors, lacks control over its territory where the non-state actors are functioning, and/or the state is incapable or chooses not to mitigate the threat to itself or other states.[22] The US employed the broad interpretation of this standard as part of Article 51 stating

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[16] United States, 'Letter Dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary General', Article 51 Letter, 23 September 2014.

[17] United Kingdom, 'Identical Letters Dated 25 November 2014 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the Secretary General and the President of the Security Council', UNSC Article 51 Letter, 25 November 2014.

[18] United States, 'Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations', 2018, 6, https://www.state.gov/wp-content/uploads/2019/10/Report-to-Congress-on-legal-and-policy-frameworks-guiding-use-of-military-force-.pdf.

[19] United Kingdom, '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', UNSC Article 51 Letter, 7 September 2015.

[20] Great Britain, 'Memorandum to the Foreign Affairs Select Committee - Prime Minister's Response to the Foreign Affairs Select Committee's Second Report of Session 2015-16: The Extension of Offensive British Military Operations to Syria' (Great Britain, November 2015), 16.

[21] United States, 'Letter Dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary General', Article 51 Letter, 23 September 2014.

[22] Monica Hakimi, 'Defensive Force against Non-State Actors: The State of Play', *Michigan International Law Studies,* 91 (2015): 12, https://repository.law.umich.edu/articles/1380.

"[t]he Syrian regime has shown that it cannot and will not confront these safe havens effectively itself."[23] Therefore, the US and coalition allies were permitted to take collective self-defence action against the non-state actors even though the Syrian Regime was actively engaged in suppressing ISIS, - because it was ineffective in supressing ISIS.[24]

Individual Self-Defence and Pre-Emptive Self-Defence

The legal justification for the use of force in Syria against ISIS was further argued through individual self-defence. Although the US and coalition force's actions were in response to Iraq's request for collective self defence, and later in 2015 supported by the UNSC resolution, many states viewed that ISIS posed a threat to their nation.

The 2015 draft authorization for the use of military force (AMFU) proposed by the US Obama administration uses two phrases pointing to the use of self defence against planned attacks and attacks that have occurred against its citizens. It states, "ISIL leaders have stated that they intend to conduct terrorist attacks internationally, including against the United States, its citizens, and interests" and "ISIL is responsible for the brutal murder of innocent United States citizens, including James Foley, Steven Sotloff, and Abdul-Rahman Peter Kassig."[25] Similar language was used in their 2014 Article 51 letter to the UN where it states that ISIS threat extends beyond the conflict area and poses a direct national threat to the US.[26]

The UK employed similar language to that of the US where it points to threats against the nation and its citizens. In their 2015 Article 51 UN letter where they claimed legal right for individual self-defence in the execution of air strikes against a target that was known to be coordinating imminent armed attacks against the UK.[27] The PM's 2015 response to Parliament, provides additional justification by identifying that security services have disrupted at least seven plots to strike the UK, whilst also highlighting the deaths of British citizens in several ISIS-attributed terrorist attacks.[28]

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[23] United States, 'Letter Dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary General', Article 51 Letter, 23 September 2014.

[24] Monica Hakimi, 'Defensive Force against Non-State Actors: The State of Play', *Michigan International Law Studies,* 91 (2015): 13, https://repository.law.umich.edu/articles/1380.

[25] United States, 'Draft Senate Joint Resolution - To Authorize the Limited Use of the United States Armed Forces against the Islamic State of Iraq and the Levant', 11 February 2015, 2, https://www.foreign.senate.gov/imo/media/doc/AUMF%20As%20Reported.pdf.

[26] United States, 'Letter Dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary General', Article 51 Letter, 23 September 2014.

[27] United Kingdom, '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', UNSC Article 51 Letter, 7 September 2015.

[28] Great Britain, 'Memorandum to the Foreign Affairs Select Committee - Prime Minister's Response to the Foreign Affairs Select Committee's Second Report of Session 2015-16: The Extension of Offensive British Military Operations to Syria' (Great Britain, November 2015), 3.

The legal justification for the US and UK's action in the conflict under individual self-defence follows the same logic that was identified for collective self-defence. Iraq permitted entry and use of force, yet Syria was unwilling or unable to act, therefore the nations were justified from their perspective to act. The same customary international law for use of force under the UN's Article 51 applies as well; however, in this case, the use of force was not in support of Iraq, but in reaction to any known planned terrorist plots, or any attributable terrorist attacks against the two states or its citizens.

In international law, the use of force is lawful when employed in a response to an armed attack.[29] Where ambiguity begins to arrive is that both countries engaged in the conflict employing the justification of individual self-defence, yet neither nation had necessarily been the victim of an armed attack, or the attacks had not necessarily met the threshold of an armed attack against the state. As such, both nations leaned on the Chatham House Principles' view and the Customary law from the Caroline case which stipulate that states have the right to act in self-defence to mitigate the threat of an imminent attack. [30] It could be viewed that the rapid expansion of ISIS from 2014 to 2015 increased the threat that ISIS posed internationally as a terrorist organization, and in this sense, they would be justified in their employment of pre-emptive self-defence.

Responsibility to Protect

The second way in which the US and UK could justify their intervention is based on the international principle of 'Responsibility to Protect' (R2P). The embodiment of the principle dictates that states have a responsibility to take collective action in a state, where the state in question is unable to protect its citizens against war crimes, genocide, ethnic cleansing, and breaches of international humanitarian law.[31] Although not explicitly outlined in their letters to the UNSC, the widespread reporting of atrocities and injustice towards minorities within governmental, public, and international organizations[32] provided more than enough evidence for them to intervene. Furthermore, the US alluded to the concept in their justifications to their domestic governing body by including the statements that ISIS has committed acts of violence and mass executions against Muslims, threatened genocide and violence against religious and ethnic minority

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[29] V. Upeniece, 'Conditions for the Lawful Exercise of the Right of Self-Defence in International Law', *SHS Web of Conferences* 40 (2018): 2, https://doi.org/10.1051/shsconf/20184001008.

[30] Elizabeth Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence', *International and Comparative Law Quarterly* 55, no. 4 (October 2006): 4, https://doi.org/10.1093/iclq/lei137.

[31] Arabella Lang, 'Briefing Paper 7404 - Legal Basis for UK Military Action in Syria' (UK House of Commons Library, 1 December 2015), 21, https://commonslibrary.parliament.uk/research-briefings/cbp-7404/.

[32] Imdad Ullah, '"Responsibility to Protect" and the Failure to Prevent the Rise of the Islamic State', *Strategic Studies* 36, no. 3 (Autumn 2016): 105, 111, https://www.jstor.org/stable/10.2307/48535963; United Nations, 'S/RES/2170(2014)', UN Documents (United Nation, 15 August 2014), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/508/49/PDF/N1450849.pdf?.

groups, and had targeted women and girls with abduction, enslavement, torture, rape and forced marriage.[33]

Although it is generally viewed that R2P requires authorization of the UNSC, as mentioned in a briefing paper for the UK House of Commons Library, the UK has previously argued that R2P intervention in absence of UNSC authorization is permitted if three conditions are established:

- "Strong evidence of extreme and large-scale humanitarian distress;
- no practicable alternative to the use of force; and
- the proposed use of force is necessary, proportionate, and the minimum necessary."[34]

If employing the criteria above, then both states would be justifiable in their application of the use of force under the international principle of R2P.

The United Nations Security Council Resolution 2249

There are three accepted instances where a state has the legal basis for the use of force as an exception to Article 2(4) of the UN Charter: Self-defence, consent or invitation, and Security Council authorization.[35] Prior to the adoption of UNSC Res 2249, the UNSC had been unable to provide guidance or direction on the how the international community should approach the transnational challenge of ISIS. The US and UK drew upon key phrasing in the resolution to justify their actions. UNSC Res 2249 states that the Security Council *calls upon* able member states *to take all necessary measures to redouble and coordinate efforts* to neutralize ISIS *in Syria* and Iraq.[36] In their interpretation, the UNSC had authorized the use of force against ISIS in Syria by directing them to take all necessary measures, and to redouble their efforts to supress ISIS. UNSC Resolutions are binding, and therefore all states signatory to the UN Charter are obligated to act. In this sense, regardless of whether Syria consents or not, the US and UK are legally authorized in their use of force.

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[33] United States, 'Draft Senate Joint Resolution - To Authorize the Limited Use of the United States Armed Forces against the Islamic State of Iraq and the Levant', 11 February 2015, 2, https://www.foreign.senate.gov/imo/media/doc/AUMF%20As%20Reported.pdf.

[34] Arabella Lang, 'Briefing Paper 7404 - Legal Basis for UK Military Action in Syria' (UK House of Commons Library, 1 December 2015), 21, https://commonslibrary.parliament.uk/research-briefings/cbp-7404/.

[35] Ibid, 5.

[36] United Nations, 'UNSC Resolution 2249', Pub. L. No. S/Res/2249 (2015), 2, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2249.pdf.

Contrasting Views - Scholarly and Law Perspectives

The lens the UK and US used in analysing international law may be tinted with realism, self-interest, and self-preservation, while the viewpoints of independent lawyers or scholars of international law may be relatively clearer, albeit tinted by their own biases. They tend to view the law through the purity and intent for which it was created, rather than as a tool to be interpreted to meet one's needs. That said, there are diverging opinions on the legality of the US and UK's justification for action against ISIS in Syria. This section of the paper will examine the perspectives contrary to the US and UK's interpretations and will focus on the unwilling or unable standard, pre-emptive self defence and imminency, R2P as a principle and not a law, and the more conservative interpretation of the UNSC Res 2249.

Self-Defence - The Unwilling & Unable Test

There are two predominate themes that challenge the foundation of the unable and unwilling test, and therefore its legitimacy. First, the test is based on a wider interpretation of the right to self-defence under Article 51, which risks lowering the threshold for the use of force and thus opens the concept for abuse. The second is the lack of acceptance of the test by the greater international community. This prevents its consideration as part of customary international law, and thus erodes its credibility as a legal justification.

One issue with international law is that it is underdeveloped regarding non-state actors (NSA). Because international law is developed within the context of minimizing the risk of state-on-state use of force, the issue is that NSAs generally operate in the ungoverned territory of a state and without its consent. Evolving existing international law to consider these transnational actors comes with a risk of lowering the threshold of acceptance for the use of force.

As previously mentioned, according to Article 2(4) of the charter, "members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state"[37], except in self-defence, consent is provided, or a UNSC Resolution is adopted.[38] Additionally, when looking at a pure interpretation of Article 51 of the UN Charter, an armed attack must be directly or indirectly attributable to a state. [39] Furthermore, according to International Court of

[37] United Nations, 'United Nations Charter (Full Text)', United Nations, accessed 28 March 2023, https://www.un.org/en/about-us/un-charter/full-text.

[38] Arabella Lang, 'Briefing Paper 7404 - Legal Basis for UK Military Action in Syria' (UK House of Commons Library, 1 December 2015), 5, https://commonslibrary.parliament.uk/research-briefings/cbp-7404/.

[39] Gabor Kajtar, 'The Use Of Force Against Isil In Iraq And Syria - A Legal Battlefield', *The Wisconsin International Law Journal* 34, no. 3 (March 2017): 571.

Justice in the Nicaragua case, a state is not responsible for the actions of an NSA, if they are non-attributable to the state.[40]

In analysing this information, one can conclude that Syria was not legally responsible for the attacks executed by ISIS, even though they stem from its territory, and Syria did not consent to US strikes or involvement against ISIS in its territory.[41] Additionally, the subject on whether Syrian government was unwilling or unable to suppress ISIS is both open to interpretation and highly debated.[42]

As such, acceptance of the unable and unwilling test risks providing too much freedom towards the victim state, e.g., the US or UK in this case, to act independently without due regard for the sovereignty or interests of the territorial state, e.g., Syria.[43] Secondly, it risks setting a precedent where, if a state is arbitrarily determined to be unwilling or unable to mitigate a threat posed by an NSA, then any outside state is justified in the use of force in self-defence without consent or respect for territorial sovereignty.[44] Finally, the broadening of Articles 2(4) and 51 of the UN Charter, and the undermining of territorial sovereignty through the application of unable or unwilling test, creates the opportunity for abuse by states who seek to pursue their own interest.[45]

The second issue with the unwilling and unable test is its lack of international support. In analysing the number of states that joined in the US' efforts to support the use of force to suppress ISIS, a majority of the participants refrained from using the 'unwilling or unable' language in their UN correspondence. Indeed, the Arab states refused to endorse the argument.[46] The fact that only a small number of states (US, Turkey, UK, Canada and Australia) utilized the unwilling and unable test as legal

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[40] International Court of Justice, Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgement. I.C.J. Reports (27 June 1986), 61-63.

[41] Laurie O'Connor, 'Legality of the Use of Force in Syria against Islamic State and the Khorasan Group', *Journal on the Use of Force and International Law* 3, no. 1 (2 January 2016): 77, https://doi.org/10.1080/20531702.2016.1169773.

[42] Samantha Sliney, 'Right to Act: United States Legal Basis Under the Law of Armed Conflict to Pursue the Islamic State in Syria', *University of Miami National Security & Armed Conflict Law Review* 6, no. 1 (30 November 2015): 20, https://repository.law.miami.edu/umnsac/vol6/iss1/1.

[43] Monica Hakimi, 'Defensive Force against Non-State Actors: The State of Play', *Michigan International Law Studies,* 91 (2015): 13, https://repository.law.umich.edu/articles/1380.

[44] Naz K. Modirzadeh and Pablo Arrocha Olabuenaga, 'A Conversation between Pablo Arrocha Olabuenaga and Naz Khatoon Modirzadeh on the Origins, Objectives, and Context of the 24 February 2021 "Arria-Formula" Meeting Convened by Mexico', *Journal on the Use of Force and International Law* 8, no. 2 (3 July 2021): 12, https://doi.org/10.1080/20531702.2021.1997514.

[45] Gabor Kajtar, 'The Use Of Force Against Isil In Iraq And Syria - A Legal Battlefield', *The Wisconsin International Law Journal* 34, no. 3 (March 2017): 578.

[46] Olivier Corten, 'The "Unwilling or Unable" Test: Has It Been, and Could It Be, Accepted?', *Leiden Journal of International Law* 29, no. 3 (September 2016): 782–83, https://doi.org/10.1017/S0922156516000315.

justification, shows the test has not yet been accepted as customary international law.[47, 48] Finally, there is a difference between a state merely tolerating operations and legally condoning them.[49] Many states may have supported the military action against ISIS, but could still be legally opposed to the actions of the US and UK into their own sovereign territory.

Pre-Emptive Self-Defence and Imminency

The next area of international law in which the community of scholars and lawyers have challenged the legality of the US and UK's justification is the pre-text of pre-emptive self-defence. As noted earlier, there is a view that although Article 51 states self-defence is in response to an armed attack, it would be unfair that states would have to wait for the attack to occur - especially if it was known. Under customary international law, the Caroline test permits for pre-emptive self-defence in the case where a state is threatened with an 'imminent' armed attack and only when necessary.[50] The Chatham House principles extend this concept of self-defence against NSAs, but emphasizes that the importance of imminence and that it be employed only in the most compelling emergency.[51]

The question is, was the US or UK under an "imminent" threat so dire that it justified violating the sovereign territory of another nation? What is meant by imminence is not clearly defined, as some look at it as a temporal aspect, while other argue that wider circumstances of the threat must be analysed. [52, 53] An additional criterion of imminence is that a state must believe that delaying any further in its action to mitigate the treat will prevent the state from defending itself.[54] It is understandable to believe that pre-emptive and immediate action is required in the collective defence of Iraq, but it would be more difficult to believe with their technology and security improvements since

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[47] Gabor Kajtar, 'The Use Of Force Against Isil In Iraq And Syria - A Legal Battlefield', *The Wisconsin International Law Journal* 34, no. 3 (March 2017): 575.

[48] Naz K. Modirzadeh and Pablo Arrocha Olabuenaga, 'A Conversation between Pablo Arrocha Olabuenaga and Naz Khatoon Modirzadeh on the Origins, Objectives, and Context of the 24 February 2021 "Arria-Formula" Meeting Convened by Mexico', *Journal on the Use of Force and International Law* 8, no. 2 (3 July 2021): 3-5, https://doi.org/10.1080/20531702.2021.1997514.

[49] Monica Hakimi, 'Defensive Force against Non-State Actors: The State of Play', *Michigan International Law Studies,* 91 (2015): 14, https://repository.law.umich.edu/articles/1380.

[50] Arabella Lang, 'Briefing Paper 7404 - Legal Basis for UK Military Action in Syria' (UK House of Commons Library, 1 December 2015), 15, https://commonslibrary.parliament.uk/research-briefings/cbp-7404/.

[51] Elizabeth Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence', *International and Comparative Law Quarterly* 55, no. 4 (October 2006): 13, https://doi.org/10.1093/iclq/lei137.

[52] Ibid, 8.

[53] Arabella Lang, 'Briefing Paper 7404 - Legal Basis for UK Military Action in Syria' (UK House of Commons Library, 1 December 2015), 16, https://commonslibrary.parliament.uk/research-briefings/cbp-7404/.

[54] Elizabeth Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence', *International and Comparative Law Quarterly* 55, no. 4 (October 2006): 9, https://doi.org/10.1093/iclq/lei137.

9/11, that the US or UK was under such an imminent threat to its existence to justify pre-emptive individual self defence.

R2P – A Principle, Not Law

One might find it surprising that in their Article 51 letter to the UN, the US and UK did not mention their intervention was based on humanitarian purposes or a responsibility to protect. Although it was referred to in the public or domestic governance discourse, the reason it was not included in their legal justification was due to the fact that it is a principle or rule that is not legally binding.[55] Although it has endorsement of the UN General Assembly and Security Council, in the legal sense it is not part of any treaty or customary international law that permits the legal use of force. [56, 57] Finally, humanitarian intervention is only lawful when authorized under a Chapter VII UNSC Resolution[58] using Article 42. This article authorizes the UNSC our delegated members to take necessary action by land, sea or air in order to maintain or restore international peace and security.[59] UNSC Res 2249 does not authorize force for humanitarian intervention under Article 42 of Chapter VII.

UNSC RES 2249 – Noncommittal on the Use of Force

UNSC Res 2249 was written in a manner that employed confusing and somewhat contradictory language. [60] Unsurprisingly, this has led to an array of interpretations or perspectives on whether the UNSC unambiguously authorized the use of force, was noncommittal on the matter, or did not authorize the use of force. The US interpreted the UNSC Res 2249 as an authorization for the use of force, while the majority of scholarly literature disagrees with this interpretation and views that the resolution *does not* authorize the use of force in Syria.[61]

In analysing the language used, and in comparison to previous UNSC Resolutions, scholars note that UNSC Res 2249 appears to condone action against IS, but

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[55] Arabella Lang, 'Briefing Paper 7404 - Legal Basis for UK Military Action in Syria' (UK House of Commons Library, 1 December 2015), 21, https://commonslibrary.parliament.uk/research-briefings/cbp-7404/.

[56] Imdad Ullah, '"Responsibility to Protect" and the Failure to Prevent the Rise of the Islamic State', *Strategic Studies* 36, no. 3 (Autumn 2016): 95–112, https://www.jstor.org/stable/10.2307/48535963, 98.

[57] British House of Commons, 'Global Britain: The Responsibility to Protect and Humanitarian Intervention', Session 2017-2019 (British House of Commons, 5 September 2018), 8.

[58] Michael Scharf, 'How the War Against ISIS Changed International Law', *Case Western Reserve Journal of International Law* 48 (2016): 48.

[59] United Nations, 'United Nations Charter (Full Text)', United Nations, accessed 28 March 2023, https://www.un.org/en/about-us/un-charter/full-text.

[60] Peter Hilpold, 'The Fight against Terrorism and SC Resolution 2249 (2015): Towards a More Hobbesian or a More Kantian International Society?', *Indian Journal of International Law* 55, no. 4 (December 2015): 536, https://doi.org/10.1007/s40901-016-0028-1.

[61] Gabor Kajtar, 'The Use Of Force Against Isil In Iraq And Syria - A Legal Battlefield', *The Wisconsin International Law Journal* 34, no. 3 (March 2017): 569.

does not authorize any use of force. [62] In paragraph 5 of the resolution, it uses the softer language of 'calls upon', as compared to 'authorize' or 'decide' or 'under Chapter VII,' language which is explicitly seen in other resolutions that were binding under Article 42 of the UNSC Chapter VII authority.[63, 64] Furthermore, the resolution refers back to its principle of respecting sovereignty through article 2(4) when it clearly outlines that any action taken must be "in compliance with international law, in particular with the United Nations Charter."[65, 66] Lastly, after the UNSC Res 2249 was unanimously adopted, a surprising number of states were reluctant to rely on the it as justification in their use of force letters to the UNSC. France, Germany, Denmark, the Netherlands, Norway, Belgium, and most surprisingly the UK (initially), relied on self-defence under article 51 as their legal basis for justification for the use of force in Syria.[67,68]

Similar to the perspective under the 'unwilling and unable' discussion, UNSC Res 2249 can be viewed as a way for the UNSC to provide tacit political support for the military action of states, without providing a clear legal authority from the Security Council for the use of force in Syria.[69]

AN OUTSIDE PERSPECITVE

We often think of law as black and white, as things are viewed as either legal or illegal, but in reality international law becomes grey as diverging opinions over legalities of actions clash. The US and UK's involvement into Syria to combat ISIS plays on this concept. Their interpretations of laws, principles, and UNSC Resolutions to justify their 'legal' actions are at odds with scholarly interpretations that view the same sources as demonstrating US and UK actions as 'illegal'. In analysing the two perspectives using the distinct lenses of international law, morals, and security, it will be demonstrated that the US and UK's military action into Syria were illegal, but correct from a moral and security standpoint.

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[62] Dapo Akande and Marko Milanovic, 'The Constructive Ambiguity of the Security Council's ISIS Resolution', Blog (EJIL: Talk!, 21 November 2015), https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/.

[63] Ibid.

[64] Laurie O'Connor, 'Legality of the Use of Force in Syria against Islamic State and the Khorasan Group', *Journal on the Use of Force and International Law* 3, no. 1 (2 January 2016): 76, https://doi.org/10.1080/20531702.2016.1169773.

[65] United Nations, 'UNSC Resolution 2249', Pub. L. No. S/Res/2249 (2015), 2, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2249.pdf.

[66] Gabor Kajtar, 'The Use Of Force Against Isil In Iraq And Syria - A Legal Battlefield', *The Wisconsin International Law Journal* 34, no. 3 (March 2017): 568-569.

[67] Ibid, 569.

[68] Laurie O'Connor, 'Legality of the Use of Force in Syria against Islamic State and the Khorasan Group', *Journal on the Use of Force and International Law* 3, no. 1 (2 January 2016): 76, https://doi.org/10.1080/20531702.2016.1169773.

[69] Dapo Akande and Marko Milanovic, 'The Constructive Ambiguity of the Security Council's ISIS Resolution', Blog (EJIL: Talk!, 21 November 2015), https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/.

With limited knowledge and exposure to international law, it can be difficult to navigate and understand the diverging interpretations of the different sources used to justify the US and UK actions against ISIS in Syria. Yet, having limited knowledge may allow for a more simplistic view of the laws, possibly more in line with their original intent. When analyzing the right to self-defence, whether individual or collective, the use of the 'unwilling and unable' clause seems disingenuous to the original intent as it relies on an expanded definition of Article 51. The right for the US and UK to strike ISIS in collective and individual self defence is not being challenged. What is being contested is the notion that Syria was 'unwilling and unable', therefore outside parties have the 'legal' right to intervene. Agreeing with the perspective of the country of Mexico on this matter, "regardless of a particular conflict, as a general interpretation of Article 51, we reject the notion of 'unwilling and unable' because it goes beyond what the Charter has established."[70] They point out that the US and UK interpretation is 'general' and the concept of unwilling and unable is not in the language of the UN's Charter for Article 51.[71] Therefore, when analysing the justification of self-defence used by the US and UK, versus the language and intent of Article 51, it can be deduced that their interpretations were contrary to the intent the Article. Therefore, action taken under this premise in Syria is illegal.

From a moral perspective, most individuals would not argue with the concept of taking action to supress ISIS under the context of minimizing the death and suffering of Iraqi and Syrian citizens. Also, few would argue the importance of protecting a nation from a threat external to them. Unfortunately, from an international law perspective, R2P is not binding or customary law at this stage. Although nations may feel a moral obligation to take action, imposing this principle on a nation that openly rejected help from western nations is incorrect. Therefore, any justification provided for taking action against ISIS in Syria may be morally correct, but fails on legal grounds.

Lastly, in looking at the justification for action through a security lens, Iraqi and coalition forces would not have been able to mitigate the ISIS threat to Iraq by operating only within Iraqi state territory. Terrorism is considered a transnational challenge which can be defined as a complex issue that does not respect territorial borders, and affects national, regional or global security.[72] To combat terrorism and other transnational issues, both whole of government and cross-border support is required. To this end, it would have been critical for the international community to operate, in multiple capacities or roles within Syrian territory, to safely address the ISIS situation. This included military action to suppress the threat ISIS posed, and to establish the conditions for non-governmental organizations to safely operate. In applying this logic, military operations into Syria against ISIS were logical and necessary from a security perspective to set the

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[70] Naz K. Modirzadeh and Pablo Arrocha Olabuenaga, 'A Conversation between Pablo Arrocha Olabuenaga and Naz Khatoon Modirzadeh on the Origins, Objectives, and Context of the 24 February 2021 "Arria-Formula" Meeting Convened by Mexico', *Journal on the Use of Force and International Law* 8, no. 2 (3 July 2021): 14, https://doi.org/10.1080/20531702.2021.1997514.

[71] Ibid, 13.

[72] Julia McQuaid, Pamela G. Faber, and Zack Gold, 'Transnational Challenges and U.S. National Security: Defining and Prioritizing Borderless Threats' (CNA, 2017), 5.

conditions for non-military intervention; however, by not receiving Syrian consent, military actions were illegal.

From an outside perspective, the military actions of the US and the UK may be condoned from a moral and security aspect, but the infringement on Syrian sovereignty through their interpretations of international law justifiably raised concerns within the international community. Aside from the danger of developing a broader interpretation of the article, the risk feared by most was the establishment of a precedence in international law; [73] "The threat of ISIS is very grave, but our concern is that even though you are doing this today for that reason, if you open the door to these exceptions, the precedent you set goes beyond ISIS, and raises questions of whether you can intervene on other grounds." [74]

CURRENT AND FUTURE DANGERS

The initial fears voiced by Latin America over concerns of a precedence opening the doors for intervention under 'unwilling and unable' were highlighted in 2019 when President Trump used the 'unwilling and unable' language to describes Mexico's Armed Forces and their ability to staunch the flow of migrants at the border.[75] Later that year the US Secretary of State stated that Hezbollah was operating in Venezuela, and that the US had an obligation to reduce the risk for America.[76] These statements highlight how use of a wider interpretation of international law, whether they have been accepted or not, can be used in the political forum to threaten or justify actions.

The dangers came to light on 24 February 2022 when Russia launched a full-scale invasion into the sovereign territory of Ukraine. It did so using similar pretexts that western nations had used in the past: the right to individual and collective self-defence, as well as R2P. The intent of this section is not to discuss the legalities of their arguments, [77] rather it is to examine the overlaps with previous western justification.

Russia's main justification is based on Article 51 in self-defence of itself from NATO and the US, as well as in collective self-defence for the Donetsk and Lugansk

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[73] Naz K. Modirzadeh and Pablo Arrocha Olabuenaga, 'A Conversation between Pablo Arrocha Olabuenaga and Naz Khatoon Modirzadeh on the Origins, Objectives, and Context of the 24 February 2021 "Arria-Formula" Meeting Convened by Mexico', *Journal on the Use of Force and International Law* 8, no. 2 (3 July 2021): 12, https://doi.org/10.1080/20531702.2021.1997514.

[74] Julian Borger, 'Latin Americans Fear Precedent Set by Legal Justification for Syria Intervention', *The Guardian*, 2 April 2019, sec. World news, https://www.theguardian.com/world/2019/apr/02/latin-americans-fear-precedent-set-by-legal-justification-for-syria-intervention.

[75] Ibid.

[76] Ibid.

[77] Oona A. Hathaway, 'How Russia's Invasion of Ukraine Tested the International Legal Order', *Brookings* (blog), 3 April 2023, https://www.brookings.edu/on-the-record/how-russias-invasion-of-ukraine-tested-the-international-legal-order/.

People's Republic.[78, 79] Russia's individual self-defence argument is centered around pre-emptive self-defence due to the imminent threat that NATO, the US, and Ukrainian neo-Nazi nationalists pose to Russia, the two new people's republics, and any Russian citizens.[80] The loose association with an imminent threat can be paralleled to the interpretation that the US and UK used to justify their actions in Syria.

Examining the other nexus to Article 51, collective self-defence, Russia stated that their actions are in support of a Donbass region request to protect it from the threats identified above.[81] Assuming the regions are actually independent, it can be interpreted that Russia is just looking to provide additional justification, using collective self-defence, to enhance the overall argument for action. They are not only defending themselves, but other 'sovereign' entities who are under threat, painting itself in the light of a noble defender.

The final justification employed, also similar to the US and UK's justification for Syria, is R2P. In their letter, Russia states that their reason for intervention is also for the purposes of protecting the people of Luhansk and Donetsk from abuse and genocide by Ukrainian neo-Nazi nationalists.[82] It was already mentioned that R2P is not part of any treaty or Customary international law, but it shows how Russia is using similar language to what western states have previously used in justifying their actions in Syria.

There are similarities, but there are also stark differences, between the situation in Syria and the situation in Ukraine, Nonetheless, Russia is drawing on language and motives that the US and UK have used in their justification for counter-ISIS operations in Syria. As pointed out by author Kieran, "Nebenzya throughout several of the emergency sessions in the UNGA and UNSC, has commented on the precedence of Article 51 to the Russian case, making it the prime legal defence of the Russian diplomatic corps."[83]

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[78] On the Evening of 21 February 2022, Russia unilaterally recognized the independence and sovereignty of the Donetsk and Luhansk regions from Ukraine. Although the wider international community did not recognize them, and they do not possess the title of state, this move provided Russia the pre-text for collective self-defence in support of these 'independent states. Kieran O'Meara, 'Understanding the Illegality of Russia's Invasion of Ukraine', *E-International Relations* (blog), 13 March 2022, 1, https://www.e-ir.info/2022/03/13/understanding-the-illegality-of-russias-invasion-of-ukraine/.

[79] Elizabeth Wilmshurst, 'Ukraine: Debunking Russia's Legal Justifications', Chatham house (Chatham house, 24 February 2022), https://www.chathamhouse.org/2022/02/ukraine-debunking-russias-legal-justifications.

[80] Russian Federation, 'Letter Dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General', 1 March 2022, 1–5, https://digitallibrary.un.org/record/3959647.

[81] Elizabeth Wilmshurst, 'Ukraine: Debunking Russia's Legal Justifications', Chatham house (Chatham house, 24 February 2022), https://www.chathamhouse.org/2022/02/ukraine-debunking-russias-legal-justifications.

[82] Russian Federation, 'Letter Dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General', 1 March 2022, 1–5, https://digitallibrary.un.org/record/3959647.

[83] Kieran O'Meara, 'Understanding the Illegality of Russia's Invasion of Ukraine', *E-International Relations* (blog), 13 March 2022, 8, https://www.e-ir.info/2022/03/13/understanding-the-illegality-of-russias-invasion-of-ukraine/.

Russia's action emphasizes the concerns voiced by Latin America over what can happen when states employ expanded interpretations of law.

CONCLUSION

Pablo Arrocha Olabuenaga, the legal adviser to the Mexican UN mission, said in a discussion surrounding the unable and unwilling interpretation - "What people missed when making these arguments and assessments about ISIL [sic] in Syria and elsewhere, is that once you bend the law, then you have no control of what the scenario will be the next time you want to apply that same standard or test."[84]

International law is a dynamic process that should evolve to reflect the modern environment.[85] However, that process must be deliberate, and not hastened through interpretations to permit desired outcomes for one or more states. The US and UK's use of force against ISIS in Syria was based on an expanded interpretation of self-defence, the *principle* of responsibility to protect, and an ambiguous UNSC Resolution. Although their actions may have been correct from a moral and security perspective, legal scholars perceive their actions into Syria as *illegal* from an international law perspective. Furthermore, their disingenuous interpretation of Article 51 has undermined international law and has created an opportunity for other states to utilize a similar interpretation to assail the current global world order.

[84] Naz K. Modirzadeh and Pablo Arrocha Olabuenaga, 'A Conversation between Pablo Arrocha Olabuenaga and Naz Khatoon Modirzadeh on the Origins, Objectives, and Context of the 24 February 2021, pg 13

[85] James Larry Taulbee and Gerhard Glahn, 'The Nature of International Law', in *Law Among Nations: An Introduction to Public International Law*, 0 ed. (London: Routledge, 2017), 4–5, https://doi.org/10.4324/9781315534138.

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