

## **WEIGHING THE PRINCIPLE OF PROHIBITION OF USE OF FORCE AGAINST MODERN DAY TRANSNATIONAL CHALLENGES: A SPECIAL ANALYSIS OF THE ISIS SITUATION**

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### **ABSTRACT**

*The ISIS has in the recent years evolved from a local threat to a global one, aiming to cause havoc and destruction. Counter-terrorism operations have been the modern method for tackling with such groups and the current situation has developed nations resorting to the same. The difference in this crisis however, is the unique circumstances which ignite a debate demanding the revaluation of traditional customary principles of international law revolving around the usage of force. This essay explores the concept of the use of force, its general viewpoint held in international law with special reference to the counter terrorism operations undertaken in countries primarily tackling the ISIS crisis. It questions the legality of the same, providing reasons as put forth by nations seeking to discover a solution that counters the problem while confining to the prescribed norms of international law.*

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## INTRODUCTION

*'Defence is the stronger form of waging war'*

- Carl von Clausewitz

On 22<sup>nd</sup> March 2016, the European city of Brussels witnessed a series of horrific attacks, with its International Airport being the primary target causing the death of several innocent civilians. This attack brought to light the growing capabilities of what was fathomed to be a localised threat in the war-torn regions of Syria and Iraq i.e. the Islamic State or more notoriously known as ISIS. While the ISIS has previously claimed responsibility over the attacks on Paris and has been associated with other inspired attacks across nations worldwide, the Brussels incident carries a unique significance since it is where the NATO headquarters are located. The significance is relevant because such an attack in the city wherein one of the most prominent military alliances is headquartered paints a picture of an attack that perhaps may be construed as an attempt directed to rattle the Western world, as a whole. With its expanding network and increased capabilities, ISIS has now emerged as the new global terrorist threat in a world that had already embarked onto the path of combating terrorism through national initiatives, post 9/11. Measures exhibiting an element of force, historically in the form of war has been a practice that has been explicitly restricted to a large extent in customary international law. The UN Charter, which is often recognised as the most esteemed document governing the behaviour of states in the international sphere has reiterated the principles of sovereignty, mutual cooperation etc; among states to combat threats to international peace and security, without resorting to any destructive means against one other, a value which can be traced back to even the Treaty of Westphalia.

The usage of force amongst nation states or more so its prohibition has grown in its complexity making it a much debated topic in academic circles. With significant and common threats such as terrorism lurking in the shadows, the legality surrounding the question of ensuring the security of one at the cost of compromising on the sovereignty of those grappling more closely with the menace along with clearing the ambiguity revolving around the self-defence argument used when dealing with non-state actors are queries which require exploration. This paper shall examine the concept of the usage of force and its prohibition under customary international law, the dynamic nature of counter-terrorism and its related measures with a special reference to the situation brought forth by the ISIS. By putting forth the accepted interpretation of the concept of the use of force and its prohibition along with the flexibility it may have undergone in the modern world in order to combat

international terrorism, the author shall seek to conclude by providing a standpoint on the plausible manner on which ISIS may be dealt within the currently existant restraints imposed by principles of customary international law.

## I. EXPLORING THE CONCEPT 'USE OF FORCE'

The social contract theory stemmed from the idea that man wished to depart from his state of chaos to a civilised form of existence within an orderly structure consisting the state. A perpetual trait existant in inter-state behaviour is the trait of exhibiting force or aggression whenever threatened by another, which has as history shows us lead to catastrophe when this violence goes unchecked.

The prohibition on the 'use of force' has been explicitly mentioned in the UN Charter (hereinafter the Charter), in an attempt toward ensuring that no state loses its territorial integrity in the process of execution of any act of force or as a result of any such threat toward that effect.<sup>1</sup> It is a treaty based rule, which has been incorporated in several other treaties of regional scope as well.<sup>2</sup> As a principle of international law, the provision of Art.2(4) of the Charter has been afforded interpretation in the 1970 Declaration on Principles of International Law.<sup>3</sup> A clear emphasis in the interpretation of the aforesaid provision is laid on excercising abstinence by states from resorting to any measure that may very well hamper and threaten the sovereignty of states. This line of thought has been carried on from the *Peace of Westphalia*<sup>4</sup> in 1648 to the Kellogg-Briand pact<sup>5</sup> of 1928 as well. It is pertinent to note that the insertion of such a prohibition in adherence to the aims of the United Nations is a big indicator of the presumption of illegality which surrounds the usage of any kind of force.<sup>6</sup> Such an expansive stance increases the complexity of the legality which surrounds the counter terrorism operations undertaken. However, the Charter itself recognizes exceptions to the aforesaid rule, in order to meet situations which demand immediate action.

The Security Council is the official determinor of whether or not something may be construed as a threat to peace etc; accordingly after which adequate measures are to be taken toward resolving such threat if found to be existing.<sup>7</sup> While the Security council is the final authority which determines the course of action to be adopted, Article 51 of the Charter finds relevance for it recognises the inherent right of self-defence of nations individually or

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<sup>1</sup>U.N. Charter art.2, para 4.

<sup>2</sup>Olivier Corten, *The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate*, 16EJIL, 801 (2006)

<sup>3</sup>G.A. Res. 2625(XXV), U.N. GAOR, 25<sup>th</sup> Sess., Supp. No. 28/ UN Doc. A/8028(1970)121.

<sup>4</sup>Bardo Fassbender, *Westphalia, Peace of (1648)*, OXFORD PUBLIC INTERNATIONAL LAW(Jun. 3, 2016, 7:24:08 PM) available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e739?prd=EPIL>

<sup>5</sup>The Editors of Encyclopaedia Britannica, *Kellogg-Briand Pact, France-United States [1928]*, ENCYCLOPAEDIA BRITANNICA(Jun 3,2016 7:37:19 PM) available at <https://www.britannica.com/event/Kellogg-Briand-Pact>.

<sup>6</sup> TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 63, (Michael N. Schmitt ed.,2013)

<sup>7</sup>Art. 39, *supra* note 1.

collectively. This permits a nation or a group of nations to act against a threat before the Security council executes the ordinary prescribed course of procedure.<sup>8</sup> Self-defence as well as collective self-defence find much relevance when analysing the issue of counter terrorism and shall be discussed elaborately in the forthcoming parts of this essay.

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<sup>8</sup> Art 51, *supra* note 1.

## II. EVALUATING THE CIRCUMSTANCES PERMITTING THE USAGE OF FORCE:

Art.2(4) of the Charter is to be applicable to any use of force, regardless of the weapon that may be employed.<sup>9</sup> In modern day warfare, that understanding may even be attributed to the usage of drones or cyber warfare. The main exception which is usually resorted to by nation states in justifying their acts of force is the inherent right of self-defence as enshrined under Article 51 of the Charter. Interestingly, its language presents a view that such right may be invoked only in situations of armed attacks.

The notion of an armed attack presupposes at least a use of force in the context of Art.2(4).<sup>10</sup> However, in a modern world wherein terrorist groups do not necessarily threaten nations only through traditional forms of an armed attack, an expansive understanding of the same becomes essential.

Armed attacks have been granted a wide scope of interpretation in the ICJ's delivery of the *Nicaragua*<sup>11</sup> judgment. Herein, the "scale & effect" methodology was adopted which seeks to accommodate and deem an event to be an armed attack only if it exceeds what may be otherwise construed to be simply an act of using force. Clearly, this appears to be a rather ambiguous stance and therefore can be replaced by the lucid definition provided by the International Group of Experts which deems any use of force killing or injuring persons or damaging or destroying property to be identified as an armed attack.<sup>12</sup> This definition is acceptable, especially in today's modern world plagued by terrorist activities since such events tend to create the kind of disruption that has been described. Additionally, if one was to assess the gravity of such attacks conducted by ISIS and other terrorist groups as advised by the *Nicaragua* judgment, individually or collectively even they may be arguably equated to an armed attack due to the kind of destruction caused by such attacks.<sup>13</sup>

In the modern day scheme of things however, wherein the enemies are no more nations but groups such as ISIS which spread widespread fear across nations by undertaking destructive operations, the question of usage of force against such non-state actors requires special perusal.

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<sup>9</sup>TALLINN, *supra* note 6 at 42.

<sup>10</sup>*supra* note 6, at ¶ 5, p.56.

<sup>11</sup>Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S), Merits, Judgment, 1986 I.C.J. Reports 14.

<sup>12</sup>*supra* note 6, at ¶ 6, p.56.

<sup>13</sup>*supra* note 6, at p.47.

## II. THE SELF-DEFENCE ARGUMENT – JUSTIFYING COUNTER-TERRORISM OPERATIONS

While analysing the general interpretation of the language of Article 51, it may be concluded to be an acceptable means within the scope of customary international law for invoking the inherent right of self-defence of sovereign states. The dilemma however, arises when nations attempt to invoke such right in the process of dealing with terrorist groups. An additional aspect to this dilemma is the absence of clear consensus on the issue of invoking such right while not facing with an immediate threat of an armed attack but faced instead with the continuing threat posed by groups such as ISIS. Before dwelling into these queries it is necessary to first address the task of studying the evolution of the self-defence argument before understanding the current position with respect to counter-terrorism operations.

Article 51 of the Charter, acts as an exception to the prohibition levied on the usage of force. Nations in their quest to combat terrorism usually employ two methods to deal with terrorists as captured on their national territory. First is the ‘law enforcement’ method which largely deals with the terrorist to be a criminal who must be brought to trial in accordance to the domestic criminal laws in place. The second however, appears to be more controversial yet favoured option in today’s situation for it extends the powers of nations to ensuring the termination of such terrorists and their affiliated groups.<sup>14</sup>

The law enforcement approach has for long been the effective tool for recourse due to it ensuring that due process of law is followed escaping any kind of arbitrariness, as was displayed in the landmark trial of *Ajmal Kasab*<sup>15</sup> in India. However, while dealing with groups as advanced as the Al Qaeda or ISIS, due to their widespread network, it is challenging to confirm the defeat of each member or affiliate through the law enforcement approach. Not only do the corrupt bureaucracies existing in these nations obstruct this process but also the lack of guarantee to vanquish the group in its totality makes it an unsuitable methodology to follow.

The armed attack method, while not being affected by such hindrances is still required to be executed while in full compliance with customary international laws concerning state responsibility & anticipatory self-defence.<sup>16</sup>

The International Law Commission’s Articles on State Responsibility which provide a regulation determining inter-state behaviour with respect to acting in self-defense, highlights

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<sup>14</sup>Greg Travalio, John Altenberg, *Terrorism, State Responsibility, and the Use of Military Force*, 4, Chi. J. Int’l L., 97, 98 (2003).

<sup>15</sup> Mohd. Ajmal Amir Kasab v. State of Maharashtra, (2012) 9 S.C.C. 01 (India).

<sup>16</sup>*Supra* note 15, at 100.

principles of sovereignty etc; which deserve to be taken into account by nations undertaking military actions in foreign territories while invoking such right. The generally accepted mindset prevalent in the global community condemned any kind of action which exhibited aggression in territory of another state which was supposedly considered the breeding ground for such terrorists. The same has been reiterated in various resolutions adopted by the UN in connection to such acts of aggression undertaken by countries such as the United States of America or Israel.<sup>17</sup>

This recalcitrant behaviour however, underwent a serious change subsequent to the 9/11 attacks. With the realisation that the Al-Qaeda was in fact an entity equipped with destructive capabilities and possessing the will and ability to spread havoc throughout the world, it seemed as if nations felt the increasing need to expand the scope of the self-defense argument itself. This sentiment was greatly emphasised upon in the series of resolutions passed by the UN Security Council, in response to the 9/11 attacks.<sup>18</sup> While previously, as was reiterated by judgments rendered in the *Iran hostages crisis*<sup>19</sup> or *Nicaragua*<sup>20</sup>, the scope of attacking terrorist groups in regions wherein they were believed to live/train/amass their weapons was greatly limited. Such a stance, would not hold water since nations today are threatened by groups having a worldwide reach, capable of cause massive levels of destruction. Therefore, it was no surprise when the 9/11 attacks took place that the Security Council has instructed states to refrain from showing any form of support to such groups be it active or passive.<sup>21</sup>

Specifically looking at the USA's reaction toward tackling Al-Qaeda for its involvement in the 9/11 attacks, has been extensively debated amongst scholars of international law for it sought to change the way in which the Articles on State Responsibility were to be interpreted.<sup>22</sup> With the almost absent opposition to the stance adopted by the Bush administration by nations worldwide to the obvious approval put forth by the UNSC's resolutions allowing for states to take all steps identified as necessary to suppress and prevent further attacks,<sup>23</sup> acted as a general precedent to be set which would henceforth recognise terrorist attacks as armed attacks, sufficient for invoking the inherent right of self-defence as enshrined in Art.51. This view also gained the blessing of the International Group of Experts, thereby allowing for nations to conduct self-defence measures against entities when either in

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<sup>17</sup> S.C. Res.573, ¶ 1, U.N.Doc.S/RES/573 (Oct 4,1985).

<sup>18</sup>S.C. Res 1377, U.N.Doc.S/RES/1377 (Nov 12,2001).

<sup>19</sup>United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J Reports 1980, 3.

<sup>20</sup> Military, *supra* note 11 at 19.

<sup>21</sup>S.C. Res 1373, ¶ 2(a), U.N.Doc.S/RES/1373 ( Sept 28,2001).

<sup>22</sup>See Art.8, ILC.

<sup>23</sup> *Id.*



the originator state or the victim state's territory, high seas, airspace etc.<sup>24</sup> However, the situation then was rather different from the current problem posed by the case of ISIS, considering this group largely operates in regions grappling with issues of civil war, lacking stable governments.

### III. COMBATING ISIS: ARE COUNTER-TERRORISM OPERATIONS ENTIRELY LEGAL?

The international viewpoint with respect to Art. 2(4) of the Charter has been propounded to be that the first duty of states is to refrain from organising/ participating or even acquiescing in organised activities within its territory directed towards commission of acts involving any kind of use of force.<sup>25</sup> Undoubtedly, the attitude on handling terrorist groups with an aim of completely ending their existence has undergone a marked transition since 9/11. The threats posed by ISIS however, bring about different dimensions to the debate revolving around the legality of counter-terrorism operations undertaken on foreign land.

When discussing the concept of state responsibility, with respect to conducting counter terrorism operations, certain factors are to be strictly satisfied. The current position, as has been discussed recognises even mere acquiescence of activities of terrorist groups, within one's territory as a violation. In the case of ISIS, which is largely known to operate from the nations of Iraq and the Syrian Republic, it cannot be denied that their governments in whatever existant form identify its presence.

This alone, does not validate the actions of nations conducting operations in the areas of these countries for factors such as necessity, proportionality, imminence of the threat and consent demand satisfaction. Speaking of necessity and proportionality, the idea of such requirements stems from the historic *Caroline* incident which revolved around the dispute caused by the attack initiated by the British on an American vessel which was met with retaliation by the latter.<sup>26</sup> The significant lesson taken from this incident set the rules of customary international law concerning matters of self-defence to "*illustrate mandatorily the urgency for implementing self-defence measures, in such pressing situations leaving no moment for any kind of deliberation.*"<sup>27</sup>

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<sup>24</sup>TALLINN, *supra* note 6 at ¶ 22, 60.

<sup>25</sup>S.C.Reso 748, U.N. Doc.S/RES/748 (Mar 31 1992).

<sup>26</sup>James Denver, John Denver Jr., *MAKING WAVES: REFITTING THE CAROLINE DOCTRINE FOR THE TWENTY-FIRST CENTURY*, 31 *Quinnipac L.Rev.* 165,168 (2013).

<sup>27</sup>*Id* at 174.

In the ISIS crisis, what nations such as the USA and UK are exercising is an anticipatory form of self-defence. This means that these nations are indulging in making calculations of the possible course of action that the ISIS plans to take, which in their view threatens national security. There lacks any kind of unanimous opinion on when such anticipatory self-defence may be invoked making it a discretionary matter for the states involved.<sup>28</sup> Anticipatory self-defence, has been the justification by and large for conducting counter-terrorism operations in foreign territories by the USA, largely since its adoption of the Bush doctrine since 9/11. President George W. Bush Jr., while propounding such doctrine, explicitly even stated that such doctrine would allow for preventing rogue nations that may harbour or assist terrorists in acquiring even weapons of mass destruction.<sup>29</sup> This has ever since, been the basis for any kind of counter-terrorism operation undertaken by the USA, involving unilateral pre-emptive attacks and the plan on combating ISIS is no different. The USA has been involved in conducting various drone strikes on ISIS training camps, which while eliminating these terrorists cannot escape the inherent risk it carries of killing innocent civilians as well. Undeniably so, is also the risk the adoption of the Bush doctrine entails since it ignores completely the aspect of 'imminence of attack', thereby allowing states to participate in the chaotic exercise of conducting pre-emptive attacks.<sup>30</sup>

While ISIS may have been identified as a threat to international peace and security collectively recognising that the significant control ISIS holds over territories of Syria and Iraq presents a global danger<sup>31</sup>, these operations seriously undermine the principles of sovereignty the nations plagued by ISIS enjoy, a value which is highly revered in the rules concerning prohibition on usage of force.

The next important consideration for allowing such operations is that of immediacy. This can be arrived at only if it may be reasonably concluded that further attacks may follow upon an attack being executed, allowing the victim-state to continue to act in self-defence.<sup>32</sup> The reasonableness test is no doubt discretionary but still provides clarity when it specifies that the decision of initiating action lies on the victim-state alone, implying only the state that has directly faced the destruction caused by such attack. This would serve as a legitimate answer for clarifying the position of international law on matters of self-defence, for instance in the

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<sup>28</sup>MALCOLM N. SHAW, *INTERNATIONAL LAW*, 1029 (Cambridge University Press, 5<sup>th</sup> ed.,2003).

<sup>29</sup>Tomas Iwanek, *The 2003 Invasion of Iraq: How the System Failed*, 15 J. CONFLICT & SECURITY L. 89,113 (2010).

<sup>30</sup>*MAKING WAVES*, *supra* note 26 at 181.

<sup>31</sup>S.C.Reso 2249, U.N.DocS/RES/2249 ( Nov 20,2015).

<sup>32</sup>TALLINN, *supra* note 6, at 66.

case of the Paris attacks which was found to be the brain child of the ISIS,<sup>33</sup> France would be justified to undertake such actions of self-defence. However, the situation is far more complex since ISIS is not being hunted down only by one nation but many others, bringing in the concept of collective self-defence. In light of this particular topic, two kinds of collective self-defence requires perusal. The first being collective self-defence exercised individually while the other is carried out collectively.<sup>34</sup> A classic example of the latter would be the workings of NATO, whose members view any attack on one ally as an attack against all allies.<sup>35</sup> Prof. Dinstein's explanation of this concept is of particular relevance in studying the operations conducted against ISIS for he does so in the context of superpowers being involved. He observes that due to these nations being termed as superpowers (USA, UK etc) they often tend to view themselves as messiah figures for the rest of the world. In such mindsets, an armed attack occurring anywhere attracts the involvement of such nations for they view it as their responsibility to save the world and protect their national interests in the process.<sup>36</sup> Furthermore, the usage of the idea of collective self-defence in justifying such aggressive approaches as adopted, escapes the shade of illegality for it has been recognised not only within the interpretation of Art.51 of the Charter but also in customary international law.<sup>37</sup> However, it cannot be dismissed that the notion of collective self-defence emanates from the right of the victim state itself.<sup>38</sup> The ISIS situation, brings the consent requirement at the epicentre of this discussion. The International Court of Justice, has opined that in the situation wherein acts of non-state actors cannot be attributed to host states, the use of force by a victim state without obtaining the host state's consent would be illegal.<sup>39</sup>

ISIS has been found to largely operate in areas of Iraq and Syria, thereby bringing in the necessity of consent given out by the legitimate governments of these two nations to those states participating in conducting operations such as '*Inherent Resolve*'.<sup>40</sup>

The conducting of such operations is found to have a legitimate basis in the territories of Iraq, for such military actions against ISIS forces have been consented to by the Iraqi

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<sup>33</sup>Vivienne Walt, *ISIS Claims Responsibility for Paris Attacks as Arrests are Made*, TIME ( Jun.11,2016, 3:13:03 PM), <http://time.com/4112884/paris-attacks-isis-isil-france-francois-hollande/>.

<sup>34</sup>YORAM DINSTEIN, *WAR, AGGRESSION and SELF-DEFENCE* 224-25 (Cambridge University Press, 3<sup>rd</sup> edn.,2001).

<sup>35</sup>Washington Treaty Art.5, available at [http://www.nato.int/cps/en/natolive/official\\_texts\\_17120.htm](http://www.nato.int/cps/en/natolive/official_texts_17120.htm).

<sup>36</sup>YORAM, *supra* note 34.

<sup>37</sup>MILITARY, *supra* note 11, at ¶ 4,102.

<sup>38</sup>*Id.*

<sup>39</sup> *Armed Activities on the Territory of the Congo ( Democratic Republic of Congo v. Uganda)*, Judgment,2005 I.C.J Reports 168.

<sup>40</sup> US DEPARTMENT OF DEFENSE, *Operation Inherent Resolve: Targeted Operations Against ISIL Terrorists*, ( Jun 15,2016 5:21:37 AM) available at [http://www.defense.gov/News/Special-Reports/0814\\_Inherent-Resolve](http://www.defense.gov/News/Special-Reports/0814_Inherent-Resolve).

government.<sup>41</sup> The problem in establishing a legitimate justification for such operations arise when attention is shifted toward Syria. For a long time now Syria has been engulfed with civil strife, making it a modern day battlefield. Not only is there constant conflict between the rebels and the government of Bashar Al Asad, it now also faces the problem of tackling a group of bigotry figures such as the ISIS.

Due to such state of chaos and uncertainty prevailing in Syria, an explicit consent from its government has not been received toward permitting the conducting of air strikes or other operations in its territory. In order to fill the gap presented by this unique situation, the US government which leads a major military coalition against the ISIS has to the Security council painted the Syrian government to be unable and even unwilling to address the ISIS problem on its own. In a letter presented to the Council, the US has played the ‘unwilling’ angle dimension thereby justifying its role in the conflict.<sup>42</sup> Due to the lack of any explicit consent issued by the Syrian government, speculation of an implied form of consent has also been generated. Scholars believe that the ambiguity surrounding this consent is due to the indirect benefit the regime accrues by the ISIS being overpowered through such operations conducted and hence, there has been no obvious objection to the same.<sup>43</sup> While that may have been the case initially, if such theory is to be believed, it no longer seems to be the kind of attitude the Syrian government wishes to exhibit in this matter. In a recent letter to the Secretary General, the Syrian representative has vehemently expressed his government’s dismay at the far-fetched interpretation of Art.51, which is being relied upon by countries such as the USA to justify their operations.<sup>44</sup> If theories are to be made about the silence that was at display before, this blatant rejection of the self-defence argument goes far in correctly presenting the lack of consent existing on part of the Syrian government.

Another aspect to the debate regarding the legality of these operations in Syria and Iraq is the disagreement surrounding the status of the kind of attacks that the ISIS has been involved in. The main conflict in this context is whether the acts of the ISIS in fact constitute armed attacks, thereby appropriately allowing for the self-defence argument to stand. If reference is to be drawn to the self-defence argument that was made by nations such as UK while

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<sup>41</sup> Michael John Garcia, Jennifer K. Elsea, *US Military Action Against the Islamic State: Answers to the Frequently Asked Legal Questions*, (Cong. Research Serv. Order Code R43720 Sept 9 2014), 18 available at <http://fpc.state.gov/documents/organization/231787.pdf>.

<sup>42</sup> Letter, 23<sup>rd</sup> Sept 2014 from the Permanent representative of the USA to the UN addressed to the Secretary General, S/2014/695 (Sept.23,2014).

<sup>43</sup> Louise Arimatsu, Michael N. Schmitt ‘ *Attacking “ Islamic State” and the Khorasan Group: Surveying the International Law Landscape*’, Colum. J TRANSAT’LL. BULLETIN, 53:1, 8.

<sup>44</sup> Letter, 21<sup>st</sup> Sept 2015 from the Permanent Representative of the Syrian Republic addressed to the Secretary General and President of the Security Council, S/2015/719, (Sept.21,2015).

combating the Al-Qaeda regime, the rationale behind the undertaking of such operations was to avert the threat of continued attacks from the same source,<sup>45</sup> as was witnessed previously. It is then no surprise that the USA as well as the UK continue to furnish such rationale to justify their actions against the ISIS on foreign land today. The American position has been consistently maintained to be of continuing counter-terrorist operations in Syrian territory merely because the ISIS has in its belief been a continuing threat and such operations are necessary to protect the vital interests and security of American citizens.<sup>46</sup>

To shed light on when and what kind of attacks even in case of non-state actors such as ISIS meting them out may very well attract the application of the self-defence argument, attention is to be shifted on the ‘scales and effects and gravity of the attack’<sup>47</sup> criterion. In opinions rendered by the ICJ, there is a clear understanding between what are more grave forms of attacks (those categorised as armed attacks) and what are less grave forms.<sup>48</sup> Tragic as it is that the ISIS has managed to murder in cold blood several US and UK citizens on numerous occasions, terming them as an armed attack is a contentious issue. The scale and effects argument has been subject to criticism however, relying on the established opinion, beheadings would amount to border incidents inadequate in allowing the application of the self-defence argument in the Syrian territory.<sup>49</sup> Logically too, the counter-terrorism operations are designed in a manner which aims to completely remove the threat of such groups itself and not simply rescuing citizens, therefore even though a state may exercise its right to self defence with the object of rescuing its nationals abroad, this argument also doesn’t hold in the Syrian situation.<sup>50</sup> Next, if one was to judge the entire predicament on the basis of the imminence criteria as was the main principle churned out of the *Caroline event*, the Syrian situation falls short. While the ISIS has been responsible for individual attacks in countries such as the UK, the whole notion of whether there really exists any kind of actual, impending threat confronting the nations exercising this right is dicey. Even if the anticipatory self-defence argument is used to put an end to such confusion considering that attacks have taken place in these countries, the absence of material relied upon by nations to

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<sup>45</sup>Letter from the Charge d’Affaires of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council (Oct. 7, 2001).

<sup>46</sup>Letter from the President – War Powers Resolution Regarding Iraq, 23<sup>rd</sup> Sept, 2014, addressed to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, available at <https://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-iraq>.

<sup>47</sup>TALLINN, *supra* note 6.

<sup>48</sup>*supra* note 6 at 101.

<sup>49</sup>*supra* note 6.

<sup>50</sup>Louise Arimatsu, Schmitt *supra* note 43 at 27.

conclude in this manner of their actually being a threat is subject to much scrutiny and does not escape the doubt of arbitrariness which surrounds the arrival of such conclusions. Absurd claims of individual self-defence made by the UK previously, upon its decision of conducting drone strikes against ISIS without much evidence being provided to the public in further explaining the reasons for such killings heightens the sentiment of doubt.<sup>51</sup>

If specific attention is to be paid toward the attacks conducted by the USA in Syrian territory against the Khorasan group, which it believes to be an offshot of the Al-Qaeda, the argument it uses of individual self-defence in this case may be entertained due to the previous record of Al-Qaeda actively engaging in a series of attacks directed towards the USA itself besides other western countries regardless of whether it actually is engaging now in an armed attack or not.<sup>52</sup> However, stretching such an argument to combating ISIS alongside would make the USA seem disturbingly paranoid. The operations in Iraq escape any accusations of violation of international law however in the case of Syria, even if the argument of collective self-defence is to be used it would not be valid entirely. Since this argument gains support from the consent of the victim state i.e Iraq which has consistently faced attacks even from the ISIS bases in Syria, the moment Iraq revokes its decision of applying the collective self-defense doctrine, the operations conducted in Syrian territory must end.<sup>53</sup>

From a global standpoint however, UNSC Resolution 2249 has presented a view that not only opens new means by which nations may combat ISIS but also challenges the traditional principles established with respect to self-defence and use of force. Lacking any explicit mention of Chapter VII of the Charter or related exceptions enshrined under Article 42 of the Charter, it neither permits or prohibits any kind of action taken by states threatened by ISIS in the territory of Syria.<sup>54</sup> This entails further ambiguity for although it calls for a political solution to be arrived at it also appeals to member states to pursue all methods which may successfully suppress the ISIS.

This would mean that there does not exist an explicit prohibition for affected parties to carry on counter terrorism operations in Syria but neither does it provide clarity on the extent or manner in which such operations may be carried out.

Even if the US would seek to defend its operations by terming it as a humanitarian intervention largely because the oppression which Syrians are facing due to activities of the

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<sup>51</sup> Arabella Lang, *UK Drone Attack in Syria: Legal Questions*, House of Commons Library Research Paper, 15/7332, 20 October 2015, pp. 10-11.

<sup>52</sup> Louise Arimatsu, Schmitt *supra* note 43, at 14.

<sup>53</sup> Louise Arimatsu, Schmitt *supra* note 43, at 23.

<sup>54</sup> S.C. Reso 2249, U.N.Doc/S/RES/2249(Nov 20<sup>th</sup> 2015).

ISIS are not attributable to the state and it would be rather naïve to imagine that such operation was conducted in order to ameliorate the conditions of the Syrians and not protect critical national interests. In fact, taking up such an argument would create a serious lapse in the self-defence argument and would result in the restriction of the kind of missions that may be conducted. Furthermore, the ICJ while discussing the question of combating non-state actors has made it abundantly clear that extraterritorial attacks may only be permissible if the acts of the non-state actors are attributed in this case to Syria.<sup>55</sup> There is no substantial evidence of the Syrian government of being in any manner, involved in the commission of acts undertaken by the ISIS, therefore the states participating in this exercise of self-defence appear to have been served with a weak hand in terms of showing legality in their actions.

#### IV. CONCLUSION – CARVING THE LEGAL ROUTE TO TACKLE ISIS:

Our planet today has travelled the distance from being an abode to the medieval man whose only aim was to expand his knowledge on his surroundings to being an abode of men and nations wishing to compete in every arena, until the other succumbs. Amidst all this greed and shades of progress, a malignant force i.e. terrorism has plagued the world community today. In an effort to counter this menace, one cannot help but notice the united front put up by several nations as a collective effort to counter terrorism. Since the 9/11 attacks rocked America and the world, the scope of international law on the matters concerning the use of force has changed remarkably.

Today, as two nations grapple with a terrorist threat such as ISIS, a kind never been witnessed before, it has ignited a debate predominantly between two schools of thought : one, consisting of the rather radically enthusiastic one which believes that actions must meet the demands of difficult situations in spite of such actions being contradictory to set standards of the law. The other, consists of the traditionalists which believe that even in the face of disaster, the foundations of the law regulating such action cannot be shaken. The ISIS situation possesses the potential of turning into a virulent attack for the entire world, if left uncontrolled. While this is and must continue to be the attitude of the entire global community, at this difficult hour it becomes all the more necessary for the word of the law to be respected. If one was to study the psyche of these terrorist organisations, more than often it is found to be the outcome of the hegemony prevailing. For too long now, countries such as the USA & UK, have dominated the world often bullying smaller nations to bow down to

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<sup>55</sup>Armed activities, *supra* note 39.

their actions. It is undisputed that ISIS has been actively engaging in conducting attacks against these nations, giving them naturally their right to self-defence, however, their actions cannot go unchecked. The Syrian Arab Republic, deserves due respect toward its sovereignty, a principle that is uncompromisable in international law. The consent factor from its side has to be taken into serious consideration while adjudging the legality of Operations such as Inherent Resolve. Furthermore, the world community needs to unitedly demand a certain level of transparency when such nations assert the results of the calculations made by their national agencies which predict pre-mediated terrorist attacks. While terrorism needs to be eradicated, principles of sovereignty, mutual respect for territorial integrity cannot be part of the compromise for they are fundamental elements of the law governing inter-state behaviour. The approach instead must be of intensifying regional cooperation etc; in the region which will help and assist Syria in eradicating the problem of ISIS, if it appears averse to direct foreign action. The United Nations as an organisation itself, was the product resulting from a war that terrorised more than half of the world. If global leaders succumbed to this power-play now, the day of similar doom shall not be far. Articles enshrined in the Charter, must be adhered to in its most accurate sense, while dealing with such world crisis. By resorting to arbitrary measures, which these operations largely entail, countries are forming enemies amongst themselves which provide a fertile ground for these terrorist organisations to flourish. The need of the hour today, is for countries to work on methods that shall assist nations closely tackling with ISIS to defeat it right at its roots. As Former UN Secretary General Kofi Annan famously stated once, that security and development collectively depend on commitment to furthering human rights and respect for the rule of law, the ISIS situation today should not be dealt in oblivion to the law. If counter-terrorism operations showcase legality, only then can it be used as a tool to tackle with the bigger illegality which is terrorism. If not, the world shall be left in a state of conflict awaiting more negotiations while the enemy continues to thrive.