

The Legality of the Use of Force against Terrorists: An Examination of the United States' Air Strikes against the Islamic State in Syria

Catherine Stark

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Faculty of Law, University of Cape Town

Supervisor: Dr Hannah Woolaver, Department of Public Law

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So long as there are nations – which is likely to be for a very long time – their pursuit of the national interest will continue; and where that interest habitually runs counter to a stated international legal norm, it is the latter which will bend and break.

(Thomas M Frank)¹

ABSTRACT

The traditional substantive framework of the use of force in international law has been challenged by recent developments involving non-state actors. This dissertation considers the legality of the use of force against non-state actors, specifically terrorists, where the terrorist acts are not attributable to the territorial state. The United States' air campaign against the Islamic State in Syria is examined to determine whether the United States' conduct constitutes a lawful exercise of the use of force in international law.

The substantive framework of the use of force in international law is first analysed, which includes an explanation of the scope of the prohibition of the use of force in international law and the various exceptions to this prohibition.

This is followed by a description of the focus of this paper, terrorism and counterterrorism, and of the development of the use of force against terrorists in international law. The current status of the use of force against terrorists in international law is elucidated.

The United States' use of force against the Islamic State in Syria is contextualised through the provision of a brief history of the conflict in Syria and the emergence of the Islamic State as a terrorist threat. Possible legal justifications regarding United States' use of force in Syria are examined to conclude whether the air strikes are lawful in terms of international law on the use of force.

It is hoped that this paper will contribute to the growing debate about the legality of the use of force against terrorists and eventually, to a clearer framework on the use of force in international law.

¹ Thomas M Franck 'Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States' (1970) 64 *The American Journal of International Law* 809 at 837.

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INTRODUCTION

The substantive framework of the use of force in international law has been challenged by state practice in the wake of developments running parallel to, and not within, the traditional framework. The development contemplated in this dissertation is the use of force by a state against non-state actors, specifically a terrorist organisation, where the terrorist acts are not attributable to the territorial state. This development does not fit comfortably within the traditional substantive framework.

Potential legal justifications for the use of force by the United States against the Islamic State (IS) in the territory of Syria will be examined. Following an evaluation of the various justifications, it will be established whether the conduct of the United States is lawful in terms of international law on the use of force. The International Court of Justice (ICJ) confirmed that the substance of international law may be determined through the examination of state practice and *opinio juris*. It is therefore crucial to examine the conduct of the United States in order to clarify the current substantive content of the rules surrounding the use of force.²

The Islamic State of Iraq emerged from the Iraqi al-Qaeda regime in 2006 and, after declaring its allegiance to Jabhat Al-Nusra in 2013, the Islamic State of Iraq and Levant (ISIL) emerged.³ The leader of Jabhat Al-Nusra believed this to be an attempted coup and, supported by the leader of al-Qaeda, renounced the merger.⁴ ISIL later became known as the Islamic State of Iraq and Syria (ISIS), or Daesh,⁵ and after declaring the creation of an Islamic caliphate, ISIS leader Abu Bakr al-Baghdadi renamed the group Islamic State (IS).⁶ The new name sought to embody the extraterritorial aim of creating a 'global Islamic empire'.⁷ Although these names are used interchangeably, this dissertation will refer to the group as the Islamic State (IS).

² *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)* [1985] ICJ Rep 13 para 27.

³ Woodrow Wilson International Center for Scholars 'Timeline: Rise and Spread of the Islamic State' *Wilson Center* 14 January 2016. Jabhat Al-Nusra is also known as the Nusra Front, a Syrian branch of al-Qaeda.

⁴ Richard Spencer 'Iraq crisis Q & A: Who or what is ISIS? Is it part of al-Qaeda?' *The Telegraph* 11 June 2014.

⁵ Faisal Irshaid 'Isis, Isil, IS or Daesh? One group, many names' *BBC News* 2 December 2015. 'Daesh' is an Arabic term which has not gained the support of the jihadist group.

⁶ Woodrow Wilson International Center for Scholars op cit note 3.

⁷ Cole Bunzel 'From Paper State to Caliphate: The Ideology of the Islamic State' (2015) 19 *The Brookings Project on US Relations with the Islamic World* at 4.

A ‘proto-caliphate’ was founded by the Islamic State in Iraq through the acquisition of territory by force,⁸ following which the Iraqi government requested the United States’ intervention to defeat IS.⁹ In August 2014 United States President Barack Obama announced that assistance would be provided to the Iraqi government and Kurdish forces to defeat the Islamic State.¹⁰ In addition to this, targeted air strikes against Islamic State convoys in Iraq were authorised.¹¹

In the same month the Islamic State killed several foreign nationals and instructed Islamic State militants to attack American and French citizens, as well as foreigners from states attempting to destroy IS.¹² On 23 September 2014, President Obama announced that air strikes had been conducted in Syria as part of the plan to combat the Islamic State and that these were part of a broader plan to address the threat of the terrorist group.¹³ The air strikes in Syria are distinguishable from those in Iraq – the United Nations Security Council (UNSC) was notified of Iraq’s request for assistance from the United States but a request for assistance from Syria was not forthcoming.¹⁴

The aim of this dissertation is to examine the legality of the use of force against terrorists and to determine whether the United States’ air campaign against the Islamic State in Syria was lawful in terms of international law on the use of force.

To accomplish this, the substantive framework of the use of force in international law will be examined in Part I. A brief history will be followed by an explanation of the provision central to the prohibition of the use of force in international law – Article 2(4) of the Charter of the United Nations.¹⁵ The scope of Article 2(4) and exceptions to Article 2(4) will be discussed to delineate the scope of the prohibition of the use of force.¹⁶

⁸ Ibid.

⁹ Woodrow Wilson International Center for Scholars op cit note 3.

¹⁰ United States White House, Office of the Press Secretary, *Statement by the President* (7 August 2014). Also see United States Department of Defense, *Statement on Iraq by Secretary of Defense Chuck Hagel* (7 August 2014).

¹¹ Ibid.

¹² Woodrow Wilson International Center for Scholars op cit note 3.

¹³ United States White House, Office of the Press Secretary, *Statement by the President on Airstrikes in Syria* (23 September 2014).

¹⁴ United Nations, *Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General*, UN Doc. S/2014/440 (25 June 2014).

¹⁵ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

¹⁶ Ibid.

Part II will describe the current status of international law on the use of force against terrorism. A working definition of terrorism will be adopted for the purpose of this dissertation and aspects of counterterrorism will be explored. Developments in the field of the use of force against terrorists will be examined and counterterrorism trends will be identified.

The United States' air strikes against the Islamic State in Syria will be contextualised in Part III – a brief history of the conflict in Syria and the emergence of the Islamic State as a terrorist threat will be discussed. Possible legal justifications regarding the use of force by the United States against the Islamic State in Syria will be examined and evaluated to conclude whether the air strikes were lawful in terms of international law on the use of force.

I SUBSTANTIVE FRAMEWORK: THE USE OF FORCE

a) The Prohibition of the Use of Force

The passage of time has transformed the international approach to the use of force, culminating in the prohibition of the use of force with limited exceptions. The historical context of the prohibition of the use of force will be canvassed in order to determine the course and developments in this area of law. This will be followed by a discussion of the scope of Article 2(4) of the Charter of the United Nations (the Charter) and the exceptions to the prohibition of the use of force.

St Augustine's just war doctrine (AD 418) was of historic importance because it was accepted in the context of Christian pacifism – the doctrine permitted the use of force where a just cause existed.¹⁷ Peace was considered a just cause and led philosophers, notably Aristotle, to surmise that war was justifiable in the pursuit of peace.¹⁸ This marked a significant change from earlier thinking where the use of force to maintain order was considered unacceptable. Arguably, this change in thinking paved the way for the use of increasingly forcible measures by states.¹⁹ Under the just war doctrine, the use of force was limited to establishing peace and retrieving stolen land, people or property – the use of force for power or retribution was not considered just.²⁰

Thomas Aquinas (1225–1274), a philosopher and theologian, formulated three criteria for a just war, further developing the just war doctrine.²¹ A just war required the declaration of war by a person with authority, a just cause and the right intent by those initiating war.²² The Thirty Year's War (1618–1648) challenged the just war doctrine, where both the Protestant and Catholic rulers considered their causes to be just.²³ In response, Grotius introduced the concept of objective justice and, in doing so, 'preserved' the doctrine.²⁴

¹⁷ Mary Ellen O'Connell *International Law and the Use of Force: Cases and Materials* (2005) at 106.

¹⁸ Joachim von Elbe 'The Evolution of the Concept of the Just War in International Law' (1939) 33 *AJIL* 665 at 666.

¹⁹ *Ibid.*

²⁰ Mary Ellen O'Connell *op cit* note 17 at 107.

²¹ *Ibid* at 108.

²² Joachim von Elbe *op cit* note 18 at 669.

²³ Mary Ellen O'Connell *op cit* note 17 at 111.

²⁴ *Ibid.* The limitation of the use of force for just causes (which required objectivity) was expounded upon by Grotius and largely included in the Peace of Westphalia of 1648, which marked the end of the Thirty Years' War.

Various states continued to justify their use of force in colonising areas in the nineteenth century under the Grotian just war doctrine, despite growing disparity between the just war doctrine and state practice – objective justice (as required by Grotius) was absent in state practice.²⁵ The Hague Convention for the Pacific Settlement of International Disputes sought to encourage recourse to mediation before the use of force.²⁶ Following the First World War, the Covenant of the League of Nations recognised the importance of maintaining peace.²⁷

The United States was not party to the Covenant and, in response to mounting pressure to renounce war, the Kellogg-Briand Pact was adopted.²⁸ The Pact required parties to refrain from waging war and to engage in pacific settlement of disputes, allowing for the exception of individual or collective self-defence.²⁹ Some commentators considered the Pact to constitute a ‘realistic and comprehensive legal regime’, leading to a belief that the Pact was foundational to the formulation of the Charter.³⁰ Commendation of the Pact has been questioned on the basis of the outbreak of the Second World War, leading critics to remark on the Pact’s inefficacy at preventing war³¹ and the ensuing description of the Pact as a ‘completely useless paper instrument’.³² Despite criticism, the Pact played a role, however small, in the development of customary international law on the use of force – state practice was guided by the Pact on numerous occasions leading up to the Second World War.³³

The conclusion of the Second World War welcomed the establishment of the United Nations Organisation (the UN) and the adoption of the Charter, which came into force on 24 October 1945.³⁴ Although originally intended for states that declared war against the Axis powers (Germany, Japan and Italy), the Charter became a global treaty.³⁵

²⁵ Mary Ellen O’Connell op cit note 17 at 120.

²⁶ *Hague Convention for the Pacific Settlement of International Disputes*, 18 October 1907, 6 UKTS (1971) Cmd. 4575.

²⁷ League of Nations, *The Covenant of the League of Nations* (1919).

²⁸ *The General Treaty for the Renunciation of War* (1928) 94 LNTS 57. This treaty is also known as the Kellogg-Briand Pact or the Pact of Paris.

²⁹ Ian Brownlie *Principles of Public International Law* 7 ed (2008) at 731.

³⁰ *Ibid* at 730–31.

³¹ Robert J Delahunty & John C Yoo ‘Peace through Law? The Failure of a Noble Experiment’ (2007) 106 *Mich L Rev* 923 at 932.

³² Jonathan Zasloff ‘Law and the Shaping of American Foreign Policy: The Twenty Years’ Crisis’ (2004) 77 *S Cal L Rev* 583 at 629.

³³ Ian Brownlie op cit note 29 at 731. The Pact was invoked several times by the US in disputes involving China and the Soviet Union in 1929, China and Japan in 1931, and Peru and Ecuador in 1933.

³⁴ Ian Brownlie op cit note 29 at 731.

³⁵ Lori Damrosch, Louis Henkin, Sean D Murphy et al *International Law Cases and Materials* 5 ed (2009) at 1142–143.

The Preamble of the Charter is indicative of the objective of the United Nations – ‘to save succeeding generations from the scourge of war’.³⁶ The purpose of the United Nations is outlined in Article 1 – one of the primary purposes is to maintain international peace and security.³⁷ To realise both the object and purpose of the United Nations, Article 2(4) of the Charter prohibits the unilateral use of force:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.³⁸

Established by the United Nations, the Security Council is tasked with the maintenance of international peace and security.³⁹ In ensuring international peace and security, the Security Council is authorised to determine threats to peace, breaches of peace or acts of aggression and make recommendations or provide authorisation for the use of non-forcible or forcible measures.⁴⁰

The authority conferred to the Security Council regarding the maintenance of international peace and security is known as the ‘collective security mechanism’ of the United Nations.⁴¹ The collective security mechanism, which constitutes an exception to the prohibition of the use of force, was largely ineffective due to the veto powers of the permanent members of the Security Council during the Cold War.⁴² Security Council decisions rely on the affirmative votes of nine members, which include the permanent members’ concurring votes or abstentions.⁴³ The five permanent members (China, Russia, the United Kingdom, France and the United States) are able to vote negatively in order to veto a decision.⁴⁴ The conflicting interests of the permanent members during the Cold War led to the extensive use of veto power, resulting in a ‘paralysis’ of the Security Council.⁴⁵

³⁶ *Charter of the United Nations* op cit note 15.

³⁷ *Ibid* at Article 1(1).

³⁸ *Ibid* at Article 2(4).

³⁹ *Ibid* at Article 24.

⁴⁰ *Ibid* at Article 39.

⁴¹ Lori Damrosch, Louis Henkin, Sean D Murphy et al op cit note 35 at 1144.

⁴² *Ibid*.

⁴³ *Charter of the United Nations* op cit note 15 at Article 27.

⁴⁴ *Ibid* at Article 23.

⁴⁵ W Michael Reisman ‘The Constitutional Crisis in the United Nations’ (1993) 87 *The American Journal of International Law* 83 at 84.

The deadlock in the Security Council during the Cold War rendered the collective security mechanism largely ineffective.⁴⁶ Self-defence is the other recognised exception to the prohibition of the use of force and is codified in Article 51 of the Charter.⁴⁷

The Charter recognises the collective security mechanism and self-defence as the sole exceptions to the prohibition of the use of force but developments in this area have introduced other possible exceptions. The doctrine of humanitarian intervention and the Responsibility to Protect (R2P) will also be considered due to their growing prominence in customary international law. Following an outline of the scope of Article 2(4), the exceptions to the prohibition of the use of force will be discussed in more detail.

b) The Scope of Article 2(4) of the Charter of the United Nations

Described as ‘one of the bedrocks of [the] modern day international order’,⁴⁸ Article 2(4) of the Charter represents universal agreement on the prohibition of the use of force.⁴⁹ In the case concerning *Military and Paramilitary Activities in and against Nicaragua* (the *Nicaragua* case), the International Court of Justice (ICJ) recognised Article 2(4) as constituting customary international law after considering submissions by the International Law Commission, Nicaragua and the United States; the submissions made reference to Article 2(4) as *jus cogens*, a peremptory norm of international law.⁵⁰ The text and subsequent interpretations of Article 2(4) have defined the scope of the prohibition of the use of force, which will be described below.

i) *International Relations*

Article 2(4) refers to members ‘refrain[ing] in their international relations from the threat or use of force’ – the provision primarily applies to relations between states.⁵¹ This aspect of the provision has proven controversial – although relations between states constituted the principal concern at the time of the drafting of the Charter, the ‘inter-state’ nature of conflict has

⁴⁶ Lori Damrosch, Louis Henkin, Sean D Murphy et al op cit note 35 at 1144.

⁴⁷ *Charter of the United Nations* op cit note 15.

⁴⁸ Noam Lubell ‘Extraterritorial Use of Force against Non-state Actors’ (2010) at 26.

⁴⁹ *Charter of the United Nations* op cit note 15.

⁵⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)* [1986] ICJ Rep 14 at 190.

⁵¹ International Bar Association *International Terrorism Legal Challenges and Responses* (2003) at 15.

changed.⁵² There has been an increase in the number of civil wars and fewer inter-state wars since the Second World War.⁵³

In addition to this, the emerging role of non-state actors in international relations tests the traditional inter-state approach and relates to one of the challenges addressed in this dissertation – whether Article 2(4) should be applied when the use of force against terrorists is concerned. The legality of the use of force against non-state actors is controversial in international law because the Charter does not offer guidance on the issue.⁵⁴ State practice indicates that a variety of elements have informed a state’s use of force against non-state actors (commentators suggest that internationality, magnitude of the attacks, intention and the organisational structure of the non-state actors are possible examples of such elements), but none of these have proven decisive and uncertainty prevails.⁵⁵

ii) Attribution

‘Force’ is understood as ‘armed force’ in terms of Article 2(4) and has been restricted to a narrower interpretation – economic coercion and other forms of force are rather contemplated in terms of the principle of non-intervention.^{56,57} The ICJ interpreted ‘force’ to include both direct and indirect force – the ‘effective control of military or paramilitary operations’ would suffice and constitutes the use of force by a state.⁵⁸

Although not dealing with the threshold of state attribution in terms of the use of force, the Appeals Chamber of the International Criminal Tribunal of Yugoslavia (ICTY) dealt with the international or non-international character of an armed conflict in the case of *The Prosecutor v Tadić* (the *Tadić* case).⁵⁹ The ICTY did not find the ‘effective control’ test to be persuasive,⁶⁰ but found that proof of ‘overall control’ over a group was sufficient to characterise a conflict as international.⁶¹ The threshold of ‘overall control’ is less burdensome than

⁵² Christine Gray ‘The Use of Force and the International Legal Order’ in Malcolm D Evans (ed) *International Law* 3ed (2010) at 618.

⁵³ *Ibid* at 617.

⁵⁴ International Bar Association *op cit* note 51 at 23.

⁵⁵ Gregor Wettberg *The International Legality of Self-defence Against Non-state Actors: State Practice from the UN Charter to the Present* (2007) at 63–6.

⁵⁶ Bruno Simma *The Charter of the United Nations: A Commentary* 2 ed (2002) at 118.

⁵⁷ *Nicaragua* case *supra* note 50 para 245.

⁵⁸ *Ibid* para 115.

⁵⁹ *Prosecutor v. Dusko Tadić (Appeal Judgment)* [15 July 1999] ICTY Case IT-94-1-A, 38 ILM 1518 para 120.

⁶⁰ *Ibid* para 115. The ICTY did not find the ‘effective control’ test (as elucidated in the *Nicaragua* case) persuasive on the bases of two grounds: that the unnecessarily high threshold imposed by the ‘effective control’ test was not consonant with the Law on State Responsibility (para 116–17) and that judicial and state practice did not demand the degree of control as required by the ‘effective control’ test (para 124).

⁶¹ *Ibid* para 131.

‘effective control’. ‘Overall control’ requires state involvement through the equipping, financing and general coordination of military activity, but does not include the issuance of instructions as required under the ‘effective control’ threshold.⁶²

The ICJ expressed a preference for the ‘effective control’ test in the *Case Concerning Armed Activities on the Territory of the Congo* (the *Armed Activities* case), citing the *Nicaragua* case.⁶³ In addition to the *Nicaragua* case, the *Armed Activities* case⁶⁴ relied on the International Law Commission *Draft Articles on Responsibility of States for Internationally Wrongful Acts*.⁶⁵ Article 8 of the Draft Articles stipulates that where the person is acting under the instructions of, or under the direction or control of, the state, the conduct of the person is attributable to that state.⁶⁶ This provision reflects the element of state control evident in the ‘effective control’ and ‘overall control’ tests.

In a separate opinion to the *Armed Activities* judgment, Judge Kooijmans criticised the approach, asserting that the ICJ should have determined whether the *Nicaragua* approach is compatible with contemporary international law and questioning whether state attribution is a stringent requirement for the use of force in self-defence.⁶⁷ Judge Kooijmans’ criticism reflects his separate opinion in the *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (the *Wall Advisory Opinion*), which similarly disapproved of the majority’s reliance on state involvement as a requirement for an armed attack.⁶⁸ The majority in the *Wall Advisory Opinion* did not refer to the effective control test or the overall control test, instead cementing the requirement of state involvement by referring to an armed attack ‘by one State against another State’.⁶⁹

The cases cited above confirm that state responsibility may ensue if a state enables armed force by another entity.⁷⁰ This principle is confirmed in the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in*

⁶² Ibid.

⁶³ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 201 para 160.

⁶⁴ Ibid.

⁶⁵ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001, UN Doc. A/56/10.

⁶⁶ Ibid at Article 8.

⁶⁷ Separate Opinion of Judge Kooijmans in *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 201 paras 25–7.

⁶⁸ Separate Opinion of Judge Kooijmans in *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136 para 35.

⁶⁹ *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136 para 139.

⁷⁰ See *Nicaragua* supra note 50, *Tadić* supra note 59, *Armed Activities* supra note 63, *Wall Advisory* ibid.

accordance with the Charter of the United Nations (the Declaration on Friendly Relations), which asserts that direct or indirect intervention by a state violates international law.⁷¹ In turn, internationally wrongful state conduct attracts international responsibility.⁷² The threat of force is impermissible where the use of the force threatened would be impermissible.⁷³

iii) *Territorial Integrity and Political Independence*

The use of force ‘against the territorial integrity and political independence of any state ... or in any manner inconsistent with the Purposes of the United Nations’ is prohibited and indicates one of the purposes of the prohibition of the use of force – to protect the sovereignty of states.⁷⁴ In the *Corfu Channel Case*, the ICJ emphasised the importance of respect for territorial sovereignty in response to the United Kingdom’s minesweeping operations in Albanian territorial waters, ignoring the United Kingdom’s attempts to interpret Article 2(4) narrowly.⁷⁵

iv) *Exceptions*

The prohibition of the use of force ‘in any manner inconsistent with the purposes of the United Nations’ indicates that exceptions under the Charter – namely self-defence and Chapter VII authorisation – may justify the use of force.⁷⁶

c) *Exceptions to Article 2(4) of the Charter of the United Nations*

The Charter recognises Article 51 self-defence and Chapter VII Security Council authorisation as the sole exceptions to the prohibition of the use of force. Despite this, developments in international law have introduced other potential exceptions.⁷⁷ The other exceptions that will be considered include the doctrine of humanitarian intervention and the Responsibility to Protect (R2P), a principle evolving in the wake of the doctrine of humanitarian intervention.⁷⁸ These two principles will be examined to determine whether they constitute lawful exceptions to the prohibition of the use of force, which may be relevant in considering the legality of the use of force against terrorists. In the *North Sea Continental Shelf Cases*, the ICJ elucidated the

⁷¹ UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625(XXV).

⁷² International Law Commission op cit note 65.

⁷³ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 para 47.

⁷⁴ *Charter of the United Nations* op cit note 15 at Article 2(4).

⁷⁵ *Corfu Channel Case (United Kingdom v. Albania) (Merits)* [1949] ICJ Rep at 35.

⁷⁶ *Charter of the United Nations* op cit note 15 at Article 2(4).

⁷⁷ *Ibid* at Article 51 and Chapter VII.

⁷⁸ For the doctrine of humanitarian intervention, see Ian Brownlie *Principles of Public International Law* op cit note 29 at 742–45. For the source of the principle of R2P, see International Commission on Intervention and State Sovereignty ‘The Responsibility to Protect’ (December 2001) at 16–7.

two conditions necessary for a principle to gain the status of customary international law – the conduct must constitute a settled practice and it must be accompanied by *opinio juris*, the belief that the conduct is obligatory.⁷⁹

An understanding of the exceptions to the prohibition of the use of force is important for the proper evaluation of whether the United States' air strikes on the Islamic State in Syria are lawful in international law. A discussion of the exceptions to Article 2(4) follows and will provide a useful background to the various potential justifications proposed in defence of the United States' air campaign against the Islamic State in Syria.

d) Self-defence

The 'automatic reference to self-defence'⁸⁰ and the way that self-defence is 'systematically invoked'⁸¹ are indicative of its appeal as a justification for the use of force by a state.⁸² The popularity of the exception of self-defence has evoked questions about the legal parameters of the exception, leading to uncertainty about various aspects of self-defence.⁸³

Self-defence has been described as the 'main exception' to Article 2(4)⁸⁴ and is stated in Article 51 of the Charter:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁸⁵

i) Armed Attack

An 'armed attack' has been labelled the 'crucial threshold' – once a state has experienced an armed attack, it may invoke its right to self-defence.⁸⁶ The precise meaning of 'armed attack' remains uncertain due to limited consensus in the international community.⁸⁷ An armed attack

⁷⁹ *North Sea Continental Shelf Cases (Federal Republic of Germany v. The Netherlands) (Judgment)* [1969] ICJ Rep 3 para 77.

⁸⁰ Gregor Wettberg op cit note 55 at 68.

⁸¹ Tarcisio Gazzini *The Changing Rules on the Use of Force in International Law* (2005) at 180.

⁸² Gregor Wettberg op cit note 55 at 68.

⁸³ Lori Damrosch, Louis Henkin, Sean D Murphy et al op cit note 35 at 1173.

⁸⁴ Christine Gray 'The Use of Force and the International Legal Order' op cit note 52 at 625.

⁸⁵ *Charter of the United Nations* op cit note 15 at Article 51.

⁸⁶ Gregor Wettberg op cit note 55 at 20.

⁸⁷ International Bar Association op cit note 51 at 16.

is the ‘most grave form of the use of force’.⁸⁸ A single attack may constitute an ‘armed attack’⁸⁹ and the ICJ appeared to accept the possibility of continuous attacks constituting an armed attack in the *Case Concerning Oil Platforms*.⁹⁰ The ICJ has referred to the ‘scale and effects’ of an incursion in determining whether an armed attack occurred,⁹¹ although this has been met with resistance for being overly strict.⁹² It is generally accepted that a state is required to declare that it has been the victim of an armed attack – the burden of proof lies with the victim state.⁹³

ii) Attribution

Article 51 specifies the threshold of ‘armed attack’, but the nature of the parties involved is not stipulated by the provision.⁹⁴ As mentioned above, the ICJ has interpreted the provision in terms of an ‘armed attack by one State against another State’, emphasising the importance of inter-state conflict.⁹⁵ The Court similarly focussed on the requirement of state attribution in the *Armed Activities (Democratic Republic of the Congo v Uganda)* case.⁹⁶ Although the ICJ has expressed that state attribution is required to trigger Article 51 self-defence, the *Caroline* incident, the separate opinions following ICJ judgments, and the more recent Security Council Resolutions concerning self-defence against terrorist groups indicate that state attribution may not be a stringent requirement for the lawful exercise of self-defence. Whether Article 51 allows for self-defence against non-state actors is an important factor in determining the legality of the use of force against terrorists.

The 1837 *Caroline* incident involved the United Kingdom’s destruction of a steamboat carrying armed rebels in American territory (The *Caroline*). Despite preceding the Charter by over a century, several academics have considered it a source valuable to the development of international law owing to the decisive content of its norms.⁹⁷ The *Caroline* incident is prominent not only for its dictum on self-defence against non-state actors, but also because it

⁸⁸ *Nicaragua* case supra note 50 para 191.

⁸⁹ *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* [2003] ICJ Rep 803 para 72.

⁹⁰ *Ibid* para 64.

⁹¹ *Nicaragua* case supra note 50 para 195.

⁹² International Bar Association op cit note 51 at 17.

⁹³ *Case Concerning Oil Platforms* supra note 89 para 57.

⁹⁴ *Charter of the United Nations* op cit note 15 at Article 51.

⁹⁵ *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* supra note 69 para 139.

⁹⁶ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)* [2006] ICJ Rep 168 at 146–47.

⁹⁷ Martin A Rogoff & Edward Collins, Jr ‘The *Caroline* Incident and the Development of International Law’ (1990) 16 *Brook J Int’l L* 493 at 493.

is considered the origin of the customary international law of the right to self-defence.⁹⁸ As a result, many scholars have turned to the *Caroline* incident to determine the content of the Article 51 ‘inherent right’ to self-defence.⁹⁹ The *Caroline* incident illustrated that self-defence was available against non-state actors; that is, lawful self-defence was not limited to inter-state relations.¹⁰⁰ Although this approach is not reflected in later ICJ judgments, it provides evidence that state attribution was not always considered a strict requirement of the customary law right to self-defence.

As indicated above, the ICJ confined Article 51 to cases involving state attribution in the *Wall Advisory Opinion*.¹⁰¹ In a separate opinion, Judge Higgins stated that the Article 51 qualification requiring state attribution was the result of the interpretation of the provision in the *Nicaragua* case and that the provision itself did not suggest this qualification.¹⁰² Judge Kooijmans echoed this sentiment in his separate opinion. He stated that, despite the traditional interpretation of Article 51, the provision did not exclude cases where state attribution was not proven and that the Court had missed an opportunity to address the issue decisively.¹⁰³

Judge Kooijmans also commented on Security Council Resolutions 1368 and 1373 in his separate opinion to the *Wall Advisory Opinion*.¹⁰⁴ Security Council Resolution 1368 responded to the terrorist attacks of 11 September 2001 against the United States (hereafter referred to as 9/11) and recognised the ‘inherent right of individual or collective self-defence’.¹⁰⁵ Security Council Resolution 1373 similarly alludes to self-defence in the wake of terrorism.¹⁰⁶ Judge Kooijmans asserted that the resolutions did not make reference to state involvement in an armed attack, commenting that this was ‘the completely new element in these resolutions’ which the ICJ should have taken into consideration.¹⁰⁷ More recent state practice has suggested a shift away from the stringent requirement of state attribution (especially after 9/11); accordingly, many commentators believe that self-defence may be invoked against non-state

⁹⁸ Gregor Wettbeg op cit note 55 at 28.

⁹⁹ *Charter of the United Nations* op cit note 15.

¹⁰⁰ Noam Lubell op cit note 48 at 35. The US Secretary of State accepted that the lawful use of force against non-state actors was possible if the UK government could satisfy certain requirements.

¹⁰¹ *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* supra note 69 para 139.

¹⁰² Separate Opinion of Judge Higgins in *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136 para 33.

¹⁰³ Separate Opinion of Judge Kooijmans op cit note 68 para 35.

¹⁰⁴ *Ibid.*

¹⁰⁵ Security Council Res no 1368 (2001), adopted by the Security Council at its 4370th meeting.

¹⁰⁶ Security Council Res no 1373 (2001), adopted by the Security Council at its 4385th meeting.

¹⁰⁷ Separate Opinion of Judge Kooijmans op cit note 68 para 35.

actors.¹⁰⁸ Despite state practice, there is reticence to completely abandon the requirement of state attribution and questions of attribution frequently arise following the use of force in self-defence. Cases concerning the use of force against terrorism will be examined in Chapter II and illustrate the varied approaches to the state attribution requirement of the use of force in self-defence.

iii) *Necessity and Proportionality*

Conditions for the proper exercise of the right to self-defence were expressed in the exchange of letters between former United States Secretary of State Daniel Webster and Lord Ashburton of Britain following the *Caroline* incident.¹⁰⁹ The series of letters detailed two requirements for the use of force in self-defence – necessity and proportionality.¹¹⁰ The ‘Webster formulation’ included a description of necessity and proportionality, which specified that a state exercising self-defence would have to prove that the need for self-defence was ‘instant, overwhelming, leaving no choice of means, and no moment of deliberation ...’¹¹¹

The relevance of the Webster formulation endures as the requirements of necessity and proportionality have been considered as customary international law in several cases.¹¹² In the *Nicaragua* case, the ICJ explicitly pronounced this, stating that the two conditions were ‘well established in customary international law’.¹¹³

In elucidating the content of customary international law, the ICJ stated that self-defence would be permitted only if ‘measures are proportional to the armed attack and necessary to respond to it’.¹¹⁴ The principle of proportionality requires a comparison between the severity of the original armed attack and the defensive force used by a state.¹¹⁵ The defensive use of force should result in the restoration of the *status quo ante*.¹¹⁶ The complexity of the condition of proportionality was illustrated in the *Oil Platforms* case where the ICJ held that the

¹⁰⁸ Noam Lubell op cit note 48 at 35.

¹⁰⁹ Gregor Wettberg op cit note 55 at 29.

¹¹⁰ Gregor Wettberg *ibid.* The ‘Webster formulation’ refers to the statements made regarding the right of self-defence by Daniel Webster.

¹¹¹ Great Britain Foreign and Commonwealth Office, *British and Foreign State Papers: 1840–1841 Volume 29 (1857)* at 1138.

¹¹² Christine Gray op cit note 52 at 626. Necessity and proportionality have been recognised as criteria for the exercise of the right of self-defence in several cases, including the *Nicaragua* case supra note 50 para 176 and 194; the *Nuclear Weapons* Advisory Opinion supra note 73 para 41; the *Armed Activities* case (*Democratic Republic of the Congo v. Uganda*) supra note 63 para 147; the *Case Concerning Oil Platforms* supra note 89 para 76.

¹¹³ *Nicaragua* case supra note 50 para 176.

¹¹⁴ *Ibid.*

¹¹⁵ Gregor Wettberg op cit note 55 at 217.

¹¹⁶ *Ibid.* at 217.

proportionality of defence measures cannot be considered in isolation to the armed attack and the ‘scale of the whole operation’ cannot be ignored.¹¹⁷

iv) Anticipatory Self-defence

Necessity and proportionality relate to the nature of self-defence whereas the temporal aspect of self-defence is restricted by Article 51 – self-defence is limited to circumstances where an armed attack has occurred.¹¹⁸ A state must have suffered from an armed attack before acting in self-defence.¹¹⁹ State practice indicates a form of self-defence where this temporal link is absent – anticipatory self-defence refers to the use of force in anticipation of an imminent attack.¹²⁰

The doctrine of anticipatory self-defence has not been clarified in United Nations General Assembly resolutions or international case law, seemingly owing to its controversial nature.¹²¹ It is unlikely that the doctrine of anticipatory self-defence is justifiable under Article 51 (which stipulates that an armed attack must have occurred) but it may be justifiable under customary international law.¹²²

The permissibility of anticipatory self-defence was alluded to in the exchange of letters following the *Caroline* incident where it was stated that self-defence may be taken where the need was ‘instant’ and left ‘no moment for deliberation’.¹²³ The ICJ did not decide on the exercise of the right to self-defence when the threat of force is imminent in the *Nicaragua* case¹²⁴ and did not refer to anticipatory self-defence in the *Oil Platforms* case.¹²⁵ Academic debate is divided. On the one hand, states should be able to respond to an imminent attack, especially when that attack would affect the ability of the victim state to respond to the attack.¹²⁶ On the other hand, it has been argued that the drafters of the Charter did not intend to include an imminent attack as a trigger to the right to self-defence.¹²⁷

¹¹⁷ *Case Concerning Oil Platforms* supra note 89 para 77.

¹¹⁸ *Charter of the United Nations* op cit note 15 at Article 51.

¹¹⁹ *Ibid* at Article 51.

¹²⁰ Christine Gray op cit note 52 at 628.

¹²¹ *Ibid* at 628–29.

¹²² Lori Damrosch, Louis Henkin, Sean D Murphy et al op cit note 35 at 1182.

¹²³ Great Britain Foreign and Commonwealth Office, *British and Foreign State Papers: 1840–1841* op cit note 111.

¹²⁴ *Nicaragua* case supra note 50 para 194.

¹²⁵ *Case Concerning Oil Platforms* supra note 89.

¹²⁶ D W Bowett ‘Self-defence in International Law’ (1958) at 188–192.

¹²⁷ Louis Henkin ‘How Nations Behave’ 2 ed (1979) at 141–42.

There has been a gradual shift post-9/11 towards an acceptance of anticipatory self-defence as indicated in a United Nations High Level Panel Report¹²⁸ and in the acceptance of this finding by the United Nations Secretary-General.¹²⁹ ‘Imminence’ has emerged as a requirement for anticipatory self-defence and was included in a statement by the British Foreign Secretary which proclaimed that ‘self-defence applies ... where an attack is imminent’.¹³⁰

v) *Pre-emptive Self-defence*

‘Pre-emptive self-defence’ is often used interchangeably with ‘anticipatory self-defence’ although the terms have different meanings.¹³¹ Pre-emptive self-defence is the use of force prior to a ‘suspected attack’ – it is ‘future orientated’.¹³² This form of self-defence is not in response to an armed attack (or an imminent armed attack) but is preventative in nature.¹³³ The National Security Strategy of the United States was adopted in 2002, following 9/11, and included recognition of the right to pre-emptive self-defence – the United States would ‘if necessary, act pre-emptively’.¹³⁴ Despite United States’ acceptance of the doctrine, the United Nations Secretary-General High-level Panel rejected pre-emptive self-defence.¹³⁵

vi) *Reporting Requirement*

Article 51 requires that states using force in self-defence are required to report the use of force to the Security Council and to discontinue the use of force if the Security Council takes steps to address the threat or use of force.¹³⁶ This provision provides for oversight to ensure that the self-defence exception is not abused by states. Despite this control, there have been ‘countless abusive claims’ of self-defence and, to a large extent, parameters remain indeterminate.¹³⁷

¹²⁸ Report of the Secretary-General’s High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565 para 188.

¹²⁹ United Nations Secretary-General, *In Larger Freedom*, UN Doc. A/59/2005 (2005) para 124.

¹³⁰ United Kingdom, *Response of the Secretary of State for Foreign and Commonwealth Affairs to the Foreign Affairs Committee Second Report on Foreign Policy Aspects of the War against Terrorism*, Session 2002–3, Cm. 5739 para (s).

¹³¹ Noam Lubell op cit note 48 at 55.

¹³² Tarcisio Gazzini op cit note 81 at 201.

¹³³ International Bar Association op cit note 51 at 20.

¹³⁴ United States White House, *National Security Strategy* (2002) 41 ILM 1478 at 15.

¹³⁵ Report of the Secretary-General’s High-level Panel on Threats, Challenges and Change op cit note 128.

¹³⁶ *Charter of the United Nations* op cit note 15.

¹³⁷ Lori Damrosch, Louis Henkin, Sean D Murphy et al op cit note 35 at 1205 and 1173.

vii) Collective Self-defence

‘Consent’ may be subsumed in the category of collective self-defence¹³⁸ or the principle of non-intervention¹³⁹ – a territorial state is permitted to request military assistance from another state and the responding state is permitted to use force at the request of the territorial state.¹⁴⁰ The ICJ clarified that lawful collective self-defence required an armed attack, a declaration of the armed attack by the victim state and an invitation to assist.¹⁴¹ The use of force in response to a request from a victim state has also been recognised in the Draft Articles on Responsibility of States for Internationally Wrongful Acts¹⁴² and in General Assembly Resolution 3314 (XXIX) Definition of Aggression.¹⁴³

viii) The Unwilling or Unable Doctrine

Another more controversial doctrine that is based on the right to self-defence has emerged, but its existence has not been expressly confirmed by members of the international community. The ‘unwilling or unable doctrine’ supports the case that, where a state is unwilling or unable to suppress non-state actor threats itself, another state may intervene.¹⁴⁴ It has been suggested that this doctrine could constitute customary international law as it could be an implicit justification for the use of force against terrorist groups in numerous cases. Examples of such cases include the use of force by Russia against Chechen rebels, Israel’s incursions into Lebanon against the PLO and Hezbollah, and Turkey’s forcible measures against the PKK in Iraq.¹⁴⁵ These cases have been presented as examples of the unwilling or unable doctrine in practice.¹⁴⁶

The growing popularity of the unwilling or unable doctrine is attributed to the apparent shift in international law from the concept of sovereignty as control to sovereignty as responsibility.¹⁴⁷ Since states have the responsibility to protect citizens and foreigners from threats emanating in their territory, failure to do so may attract the use of force by another state

¹³⁸ Christine Gray op cit note 52 at 632.

¹³⁹ Oscar Schachter ‘The Right of States to Use Armed Force’ (1984) 82 *Mich L Rev* 1620 at 1645.

¹⁴⁰ *Ibid.*

¹⁴¹ *Nicaragua* case supra note 50 para 199.

¹⁴² International Law Commission op cit note 65 at Article 20.

¹⁴³ UN General Assembly, *Definition of Aggression*, 14 December 1974, A/RES/3314 at Article 3(e).

¹⁴⁴ Ashley Deeks “‘Unwilling or Unable’: Toward a Normative Framework for Extraterritorial Self-Defence” (2012) 52 *Virginia Journal of International Law Association* 483 at 486.

¹⁴⁵ *Ibid* at 486–87.

¹⁴⁶ *Ibid.*

¹⁴⁷ Kimberley N Trapp ‘Actor-pluralism: The “turn to responsibility” and the *jus ad bellum*: “unwilling or unable” in context’ (2015) 2:2 *Journal on the Use of Force and International Law* 199 at 209.

in self-defence.¹⁴⁸ According to champions of the doctrine, the exercise of the right to self-defence would be justified by the unwilling or unable doctrine in these circumstances.¹⁴⁹

The precise content of the unwilling or unable test is uncertain. Ashley Deeks, a proponent of the unwilling or unable doctrine, attributes the ambiguity of the test's contents to a lack of academic engagement on the subject.¹⁵⁰ She believes the doctrine is ingrained state practice and proposes that it should include the following foundational principles: consent from the territorial state should be a priority; the threat posed by the non-state actor should be of a specific nature; the intervening state should request the territorial state to address the threat posed; the ability of the territorial state should be assessed; a plan should outline means to quash the threat; and relations between the states should be assessed.¹⁵¹

The unwilling or unable doctrine has met criticism from commentators. Although Deeks states that the doctrine originates from neutrality law,¹⁵² critics argue that the law of neutrality governs the conflict between belligerent states and does not accommodate non-state actors.¹⁵³ Critics have also claimed that the unwilling or unable doctrine is not a stand-alone justification for the use of force in another state – all the requirements of self-defence or another recognised justification are mandatory.¹⁵⁴

Despite the criticism, the concept behind the unwilling or unable doctrine has been echoed numerous times, if not explicitly: the use of force in another state may be permissible if the territorial state will not or cannot prevent terrorist activities – the victim state may then be able to take forcible measures in self-defence.¹⁵⁵ The unwilling or unable doctrine will be explored in more detail in Chapter III.

¹⁴⁸ Ibid at 221.

¹⁴⁹ Ibid.

¹⁵⁰ Ashley Deeks op cit note 144 at 487.

¹⁵¹ Ibid at 519–532.

¹⁵² Ibid at 497.

¹⁵³ Kevin Jon Heller 'Ashley Deeks' Problematic Defense of the "Unwilling or unable test" *Opinio Juris* 15 December 2011.

¹⁵⁴ Jordan J Paust 'Permissible Self-defense Targeting and the Death of Bin Laden' (2011) 39 *Denver Journal of International Law and Policy* 569 at 581.

¹⁵⁵ Noam Lubell op cit note 48 at 42; International Bar Association op cit note 51 at 25; Gregor Wettberg op cit note 55 at 210; Yoram Dinstein *War, Aggression and Self-defence* 4 ed (2005) at 245; Vaughan Lowe *International Law* (2007) at 280; Kimberley N Trapp op cit note 147 at 222.

e) Chapter VII Authorisation

As mentioned above, the Charter states that the Security Council has the responsibility for the maintenance of international peace and security.¹⁵⁶ Initially it was envisaged that a standing army would be at the disposal of the Security Council to maintain international peace and security.¹⁵⁷ The standing army did not materialise and states failed to make armed forces available to the Security Council in terms of Article 43 of the Charter.¹⁵⁸ The Security Council impasse during the Cold War led to the conclusion of the Uniting for Peace Resolution by the General Assembly, which allowed the General Assembly to formulate recommendations addressing the ‘threat to peace, breach of peace, or act of aggression’ when the Security Council failed to uphold its responsibility for the maintenance of international peace and security.¹⁵⁹ The General Assembly decisions are recommendatory in nature and consent of the host state is necessary for the lawfulness of the use of force.¹⁶⁰

The use of the permanent members’ veto in the Security Council declined after the Cold War, resulting in a more active Security Council. Chapter VII has been utilised by the Security Council, as envisaged during the drafting of the Charter. The Security Council may determine the existence of threats to peace, breaches of peace and acts of aggression and authorise non-forcible or forcible measures to maintain international peace and security.¹⁶¹ Non-forcible measures, including the imposition of trade and arms embargoes, have been authorised by the Security Council in terms of Article 41.¹⁶² The Security Council has developed the practice of authorising forcible measures in terms of Article 42 as the result of a flexible interpretation of the Charter after the failure to establish a standing army.¹⁶³ It has become practice for the Security Council to authorise the use of ‘all necessary means’ – this phrase denotes the authorisation of the use of force.¹⁶⁴

¹⁵⁶ *Charter of the United Nations* op cit note 15 at Article 24.

¹⁵⁷ Christine Gray op cit note 52 at 633.

¹⁵⁸ Christine Gray ‘International Law and the Use of Force’ 2 ed (2004) at 195.

¹⁵⁹ UN General Assembly, *Uniting for peace*, 3 November 1950, A/RES/377.

¹⁶⁰ *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 151 at 17; Diana Amn eus, ‘Has Humanitarian Intervention Become Part of International Law under the responsibility to Protect Doctrine?’ in Julia Hoffman and Andr e Nollkaemper (eds) *Responsibility to Protect: From Principle to Practice* (2012) at 162.

¹⁶¹ *Charter of the United Nations* op cit note 15 at Article 39.

¹⁶² Christine Gray op cit note 52 at 634–35.

¹⁶³ *Ibid* at 635. Security Council practice relating to terrorist attacks will be expounded upon in Chapter II.

¹⁶⁴ *Ibid* at 636.

f) The Doctrine of Humanitarian Intervention and the Responsibility to Protect

The doctrine of humanitarian intervention – the use of force by a state to protect human rights – captured the international community’s attention in 1999 when NATO conducted an air campaign in Yugoslavia.¹⁶⁵ States defended their conduct on the dual bases of implied Security Council authorisation and the doctrine of humanitarian intervention.¹⁶⁶ The justification of humanitarian intervention divided states – some expressed strong support for the doctrine while others criticised it as an unjustifiable violation of Article 2(4) of the Charter.¹⁶⁷ The NATO air strikes were found to be ‘illegal, yet legitimate’.¹⁶⁸

Following the events that transpired in Kosovo, former Secretary-General Kofi Annan acknowledged that states had employed the use of force without Security Council authorisation, but that forcible measures may sometimes be ‘legitimate in the pursuit of peace’.¹⁶⁹ The International Commission on Intervention and State Sovereignty (ICISS) was established by the General Assembly in 2000 to address the growing need for a concerted approach towards protecting citizens when governments fail to do so.¹⁷⁰ The ICISS recognised that NATO’s intervention in Kosovo was necessary but unjustifiable in terms of existing law, agreeing that a doctrine should be developed to fill this lacuna.¹⁷¹

The Responsibility to Protect (R2P) was formulated as a ‘political mechanism and moral imperative’¹⁷² with an important caveat – intervention for the protection of human rights must be authorised by the Security Council.¹⁷³ The importance of the involvement of the Security Council was not articulated by the ICISS but the R2P has been interpreted this way; the need for Security Council authorisation was echoed in the Secretary-General’s Report in 2009.¹⁷⁴

¹⁶⁵ Ibid at 621.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Independent International Commission on Kosovo ‘The Kosovo Report: Conflict, International Response, Lessons Learned’ (2000) at 186.

¹⁶⁹ United Nations Secretary General, ‘Secretary-General Says Renewal of Effectiveness and Relevance of Security Council Must Be Cornerstone of Efforts to Promote International Peace in Next Century’, UN Press Release SG/SM/6997.

¹⁷⁰ International Commission on Intervention and State Sovereignty op cit note 78 at 16–7.

¹⁷¹ Ibid at VII.

¹⁷² Michael N Schmitt ‘The Syrian Intervention: Assessing the Possible International Law Justifications’ (2013) 89 *Int’l L Stud* 744 at 753.

¹⁷³ UN General Assembly, *2005 World Summit Outcome*, 24 October 2005, A/RES/60/1 paras 138–39. The Resolution states that there is a responsibility to protect citizens from genocide, war crimes, ethnic cleansing and crimes against humanity. If peaceful means to protect citizens fail, action should be taken in terms of the Security Council’s Chapter VII authorisation.

¹⁷⁴ UN General Assembly, *Implementing the Responsibility to Protect, Report of the Secretary-General*, 12 January 2009, A/63/677 para 11.

At its inception, the R2P principle was promising because it presented a more structured version of the doctrine of humanitarian intervention. Since Security Council authorisation was a prerequisite, it appeared to fall within the Charter exceptions. The international community's optimism about R2P did not last, however; this was expressed by the United States in 2011 after the failure to adopt a Security Council resolution addressing the R2P in Syria.¹⁷⁵ The US condemned the vetoes of China and Russia which both states justified on the basis of the indeterminate scope of the R2P.¹⁷⁶ It has been suggested that suspicion relating to the doctrine of humanitarian intervention has been transferred to the principle of R2P, casting doubt on the viability of the principle.¹⁷⁷

Although it constitutes a development of the doctrine of humanitarian intervention, R2P has been considered separately from the doctrine of humanitarian intervention, which is solely based on customary international law.¹⁷⁸ Outward support for the doctrine of humanitarian intervention is absent, perhaps because unqualified acceptance of the doctrine may invite 'disingenuous or abusive claims' of humanitarian intervention by a state furthering its own agenda.¹⁷⁹ Apart from concerns that the doctrine will be abused, criticism of the doctrine is also based on the ICJ's strict interpretation of the Article 2(4) prohibition of the use of force¹⁸⁰ and the lack of recognition of the doctrine in the General Assembly's Declaration on Friendly Relations.¹⁸¹

Supporters of the doctrine previously relied on Article 2(4) of the Charter, claiming that the use of force for humanitarian purposes did not violate a state's territorial integrity or political independence, thus making it acceptable in terms of Article 2(4).¹⁸² Commentators suggest that supporters have shifted from sovereignty-based reasoning into the human rights domain to justify the legality of a humanitarian intervention.¹⁸³

¹⁷⁵ Christine Gray 'The use of force for humanitarian purposes' in White and Henderson (eds) *Research Handbook on International Conflict and Security Law* (2013) at 254.

¹⁷⁶ UN Security Council 6627th meeting, *The Situation in the Middle East*, 4 October 2011 UN Doc. S/PV 6627 (2011).

¹⁷⁷ Christine Gray 'The use of force for humanitarian purposes' op cit note 175 at 255.

¹⁷⁸ Michael N Schmitt op cit note 172.

¹⁷⁹ Lori Damrosch, Louis Henkin, Sean D Murphy et al op cit note 35 at 1205.

¹⁸⁰ Christine Gray 'The use of force for humanitarian purposes' op cit note 175 at 230.

¹⁸¹ *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* op cit note 71.

¹⁸² Christine Gray op cit note 175 at 229.

¹⁸³ *Ibid* at 230.

Although states infrequently demonstrate express support for the doctrine, state practice is indicative of a degree of acceptance.¹⁸⁴ The use of force in Kosovo has been described as the ‘paradigm case’ for the doctrine, although the requirements for a humanitarian intervention are not easily deduced from the events that unfolded.¹⁸⁵

The United Kingdom has been a more vocal proponent of the doctrine than the United States, attempting to create a framework to inform the legality of the use of force for the protection of human rights.¹⁸⁶ This was confirmed recently when the United Kingdom released a statement following the chemical attacks in Syria. Stating that the three conditions for a humanitarian intervention had been satisfied, the United Kingdom declared that the use of force in Syria was justifiable.¹⁸⁷ The criteria included evidence of ‘extreme humanitarian distress on a large scale’, an absence of alternatives to the use of force and the need for the force to be necessary and proportionate.¹⁸⁸

g) Chapter Synopsis

The substantive framework of the use of force has been formed through developments in this area of international law and, due to persistent inter-state and other conflict, is expected to develop further. The history of the use of force prompted many of these developments, including the implementation of the Charter. The prohibition of the use of force in Article 2(4) of the Charter has been widely interpreted and has contributed to the broad scope of the prohibition. Despite attempts by states to introduce new exceptions, the two core exceptions to the prohibition of the use of force endure – self-defence and Chapter VII Security Council authorisation. The doctrine of humanitarian intervention and the Responsibility to Protect have been considered acceptable in some circumstances; however, it appears that acceptance of these potential exceptions is case-specific, largely political and cannot be considered norms of customary international law. The role of non-state actors, specifically terrorists, will be introduced to the substantive framework of the use of force in the following chapter

¹⁸⁴ Christine Gray op cit note 52 at 621–23.

¹⁸⁵ Christine Gray op cit note 175 at 237.

¹⁸⁶ United Kingdom Prime Minister’s Office, *Chemical weapon use by Syrian regime: UK government legal position* (29 August 2013).

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

II COMBATTING TERRORISM THROUGH THE USE OF FORCE

a) Defining Terrorism

The substantive framework of the use of force in international law accommodates matters arising between states in their international relations. As shown above, conflict was traditionally inter-state at the time of the drafting of the Charter.¹⁸⁹ Inter-state conflict ameliorates a difficult issue – the question of responsibility is more easily solved when a conflict is categorised as inter-state. Non-state attacks are often ‘clandestine’ and victim states may struggle to prove the responsibility of non-state actors.¹⁹⁰ The non-state actors examined in this dissertation are limited to terrorists; it is important, therefore, to formulate a working definition of terrorism.

Reisman, an American law professor, states that ‘definitions establish a focus’.¹⁹¹ Defining terrorism is important because it ‘shapes states’ understanding of the problem, delimits their responses to it, and helps to distinguish lawful from unlawful responses to it’.¹⁹² In addition to this, issues of jurisdiction and extradition are simplified if a single definition is accepted by many states.¹⁹³ Following the adoption of a working definition, counterterrorism and the development of the use of force against terrorists will be described. This will illustrate the current status of international law on the use of force against terrorists.

Defining terrorism has proved to be a challenging task and international consensus on a definition of terrorism is found wanting.¹⁹⁴ Many of the difficulties associated with the definition are political rather than legal and, as a result, difficulties are not limited to international law and are shared with domestic law.¹⁹⁵ Various reasons have been attributed to the inability to define terrorism, including a lack of interest associated with limiting the parameters of terrorism (and as a result, limiting the parameters of state response) and uncertainty surrounding the legality of struggles of national liberation.¹⁹⁶ In addition to this, the concept of terrorism and terrorist practices evolve over time – common perceptions of

¹⁸⁹ International Bar Association op cit note 51 at 15.

¹⁹⁰ Mary Ellen O’Connell op cit note 17 at 276.

¹⁹¹ W Michael Reisman ‘International Legal Responses to Terrorism’ (1999) 22 *Houston Journal of International Law* 3 at 9.

¹⁹² Reuven Young ‘Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation’ (2006) 29 *B C Int’l & Comp L Rev* 23 at 26.

¹⁹³ Ibid at 31.

¹⁹⁴ Gregor Wettberg op cit note 55 at 50.

¹⁹⁵ Ibid at 50–2.

¹⁹⁶ International Bar Association op cit note 51 at 2.

terrorism have shifted from terrorists leading decolonisation movements to terrorists motivated by religious and political ideology.¹⁹⁷ It has therefore become difficult to define a concept that is constantly in flux.

Defining terrorism was problematic as early as the 1970s during the Cold War – the Ad Hoc Committee on International Terrorism was established by the General Assembly¹⁹⁸ and the 1973 Committee Report illustrated the conflicting approaches to defining terrorism that representatives adopted.¹⁹⁹ The various approaches indicated that the target, purpose, motive and lawfulness of terrorists are likewise factors which cannot alone define terrorism.²⁰⁰ As a result of the uncertainty, the Ad Hoc Committee did not provide a definition of terrorism in its report in 1979, recognising that while some states believed a definition to be necessary, others believed that a single definition would not be comprehensive enough.²⁰¹

The term ‘terrorism’ was also avoided in the *Nicaragua* case,²⁰² despite references to acts committed which are commonly associated with terrorism.²⁰³ The Security Council increasingly cited terrorism as a threat to international peace and security following hostage-taking and aircraft attacks in the 1970s and 1980s, nevertheless failing to provide a comprehensive definition of what constituted terrorism.²⁰⁴

¹⁹⁷ Reuven Young op cit note 192 at 28.

¹⁹⁸ UN General Assembly, *Measures to Prevent International Terrorism*, 18 December 1972, A/RES/3034(XXVII).

¹⁹⁹ UN General Assembly, *Report of the Ad Hoc Committee on International Terrorism* (1973) Twenty-Eighth Session, Supplement No. 28 (A/9028) at 11–16.

²⁰⁰ Ibid. Also see Rosalyn Higgins ‘The General International Law of Terrorism’ in Rosalyn Higgins and Maurice Floy (eds) *Terrorism and International Law* (1997) at 15–6.

²⁰¹ UN General Assembly, *Report of the Ad Hoc Committee on International Terrorism* (1979) Thirty-Fourth Session, Supplement No. 37 (A/34/37) para 34. The General Assembly subsequently adopted the Report: UN General Assembly, *Measures to Prevent International Terrorism*, 17 December 1979, A/RES34/146.

²⁰² *Nicaragua* case supra note 50.

²⁰³ Rosalyn Higgins op cit note 200 at 20.

²⁰⁴ See Security Council Resolution no 286 (1970), adopted by the Security Council at its 1552nd meeting; Security Council Resolution no 579 (1985), adopted by the Security Council at its 2637th meeting. Also see Rosalyn Higgins op cit note 200 at 20.

In 1996 the General Assembly set up a new Ad Hoc Committee to create a wide-ranging convention on terrorism.²⁰⁵ The Ad Hoc Committee established a working group that defined terrorism as follows:

Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:

- (a) Death or serious bodily injury to any person; or
- (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
- (c) Damage to property, place, facilities, or systems referred to in para. 1 (b) of this article, resulting or likely to result in major economic loss,

When the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or abstain from doing any act.²⁰⁶

Following the 9/11 terrorist attacks, the Security Council denounced the attacks and encouraged states to intensify efforts to combat terrorism.²⁰⁷ Resolution 1373 called on states to act against terrorists and to comply with certain domestic obligations to do so.²⁰⁸ Resolution 1373 has been described as a ‘lost opportunity’ – despite its focus on terrorism, the resolution fails to define the term.²⁰⁹ This failure was somewhat remedied in 2004 in Resolution 1566 which sought to address terrorism:

Recalls that criminal acts ... committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror ..., intimidate a population or compel a government or an international organization to do or to abstain from doing any act ..., are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature ...²¹⁰

Although the above description is a product of compromise within the Security Council, commentators believe that this may represent the Security Council’s definition of terrorism.²¹¹

²⁰⁵ UN General Assembly, *Measures to Eliminate International Terrorism*, 17 December 1996, A/RES/51/210.

²⁰⁶ Report of the Working Group Fifty-sixth session, *Measures to Eliminate Terrorism*, 29 October 2001, UN Doc. A/C.6/56/L.9.

²⁰⁷ Security Council Resolution no 1368 (2001) op cit note 105.

²⁰⁸ Security Council Resolution no 1373 (2001) op cit note 106.

²⁰⁹ Reuven Young op cit note 192 at 44.

²¹⁰ Security Council Resolution no 1566 (2004), adopted by the Security Council at its 5053rd meeting.

²¹¹ Reuven Young op cit note 192 at 45.

Key elements of this definition include death or bodily harm, provocation of terror and the intimidation of a population or compulsion of a government by individuals (non-state actors).

For the purposes of this dissertation, terrorism will be defined as ‘acts of violence intended to create a climate of terror within the population or to coerce governments or international organisations into given conduct’.²¹² Although simplified, it includes the key elements of terrorism which have been included in other definitions.

Note that references to individuals as terrorists are inherently controversial, which has been highlighted by the popular adage ‘one man’s terrorist is another man’s freedom fighter’.²¹³ For this reason, ‘terrorist’ will be classified in terms of the perception of the victim state and consensus among the international community.

b) Counterterrorism

Counterterrorism refers to state responses to terrorism. Counterterrorism measures have been implemented in international, regional and national spheres, and numerous bodies mandated with combatting terrorism have been established. An examination of counterterrorism measures will illustrate the codified approach to combatting terrorism in international law, primarily reviewing conventions and legislation addressing terrorism. Following this, the development of the use of force against terrorists will be discussed, with a focus on actual state practice to determine more recent counterterrorism trends.

Terrorism has been on the international agenda for several decades – the League of Nations adopted two conventions to address the growing problem of terrorism in 1937.²¹⁴ Due to an insufficient number of ratifications, the conventions never came into force.²¹⁵ A sole convention does not illustrate the international response to terrorism – states have been unable to agree on a single, comprehensive convention for several reasons, including the largely reactive (and not pre-emptive) approach to terrorism.²¹⁶ Instead, there has been a proliferation

²¹² Tarcisio Gazzini op cit note 81 at 181.

²¹³ Gerald Seymour *Harry's Game: A Novel* (1975) at 62.

²¹⁴ League of Nations, International Conference on the Repression of Terrorism, *Convention for the prevention and punishment of terrorism* (1937) Geneva: League of Nations. League of Nations, International Conference on the Repression of Terrorism *Convention for the creation of an international criminal court* (1937) Geneva: League of Nations.

²¹⁵ Lyal S Sunga *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (1997) at 195.

²¹⁶ Antonio Cassese ‘The International Community’s “Legal” Response to Terrorism’ (1989) 38 *The International and Comparative Law Quarterly* 589 at 591.

of multilateral conventions addressing various aspects of terrorism, including specific acts of terrorism.

The first international convention addressing terrorist conduct was the Convention on Offences and Certain Other Acts Committed on Board Aircraft, which came into force in 1969.²¹⁷ This was the first of a plethora of conventions addressing a variety of concerns, including airplane hijackings,²¹⁸ sabotage of airplanes,²¹⁹ attacks on ‘internationally protected persons’,²²⁰ the taking of hostages,²²¹ ship hijackings,²²² explosives,²²³ bombings,²²⁴ financing of terrorists²²⁵ and nuclear terrorism.²²⁶ The series of conventions has been referred to as ‘a sort of evolving code of terrorist offences’.²²⁷

One of the common core obligations in international counterterrorism conventions requires states to domesticate the conventions, which circumvents many jurisdiction and extradition issues.²²⁸ The legal principles of universal jurisdiction and *aut judicare aut dedere* – either extradite or prosecute – are thus promoted.²²⁹ Since international terrorism is global in nature, cooperation among states is an important theme in the counterterrorism conventions.²³⁰

The United Nations ‘selectively engaged’ with certain aspects of terrorism, but the 9/11 attacks transformed the global response to terrorism.²³¹ The Security Council adopted a particularly vigorous role after relative inactivity in the field of counterterrorism, responding

²¹⁷ United Nations, *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, 14 September 1963, 704 UNTS 219.

²¹⁸ United Nations, *Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, 860 UNTS 105.

²¹⁹ International Civil Aviation Organization (ICAO), *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 23 September 1971, 974 UNTS 177.

²²⁰ United Nations General Assembly, *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, 14 December 1973, 1035 UNTS 167.

²²¹ United Nations General Assembly, *International Convention against the Taking of Hostages*, 17 November 1979, 1316 UNTS 205.

²²² United Nations General Assembly, *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 10 March 1988, 1678 UNTS 201.

²²³ International Civil Aviation Organization (ICAO), *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, 1 March 1991, 30 ILM 721.

²²⁴ United Nations General Assembly, *International Convention for the Suppression of Terrorist Bombings*, 15 December 1997, 2149 UNTS 256.

²²⁵ United Nations General Assembly, *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, 39 ILM 270.

²²⁶ United Nations General Assembly, *International Convention for the Suppression of Acts of Nuclear Terrorism*, 13 April 2005, 2445 UNTS 89.

²²⁷ Daniel O’Donnell ‘International Treaties Against Terrorism and the Use of Terrorism during Armed Conflict and by Armed Forces’ (2006) 88 *International Review of the Red Cross* 853 at 855.

²²⁸ *Ibid* at 856–57.

²²⁹ Antonio Cassese *op cit* note 216 at 593.

²³⁰ Daniel O’Donnell *op cit* note 227 at 857–58.

²³¹ Kent Roach *The 9/11 Effect: Comparative Counter-Terrorism* (2011) at 21.

to 9/11 with Resolutions 1368 and 1373. Resolution 1373 has been described as the ‘cornerstone of the United Nations’ counterterrorism effort’.²³² Adopted under Chapter VII of the Charter, Resolution 1373 established the Counter-Terrorism Committee (CTC).²³³

The resolution was ‘unprecedented’²³⁴ – it was binding on all members, unlike other counterterrorism conventions that were binding on parties only, and required states to report back to the CTC on their enactment of counterterrorism laws.²³⁵ The CTC was later required to ensure the implementation of Resolution 1624, which prohibited incitement to commit acts of terrorism.²³⁶ Following the adoption of the United Nations Global Counter-Terrorism Strategy in 2006,²³⁷ the CTC was mandated with assisting states with the implementation of counterterrorism strategies.

The Security Council has continued to play a more active role in combatting terrorism, adopting Resolution 1540 which requires states to prevent the development or acquisition of nuclear, chemical or biological weapons of mass destruction by non-state actors.²³⁸ A series of resolutions condemning terrorism have been adopted subsequent to various terrorist attacks.²³⁹

In response to the Security Council’s activism and growing concern for human rights violations in the pursuit of combatting terrorism, human rights organisations have become increasingly involved in an attempt to regain ‘institutional balance’.²⁴⁰ The Security Council has subsequently recognised the complementary nature of effective counter-terrorism measures and the protection of human rights in Resolution 1963.²⁴¹

²³² Eric Rosand ‘Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism’ (2003) 97 *The American Journal of International Law* 333 at 333.

²³³ Security Council Resolution no 1373 (2001) op cit note 106.

²³⁴ Eric Rosand op cit note 232 at 163.

²³⁵ Security Council Resolution no 1373 (2001) op cit note 106 para 6.

²³⁶ Security Council Resolution no 1624 (2005), adopted by the Security Council at its 5261st meeting.

²³⁷ UN General Assembly, *The United Nations Global Counter-Terrorism Strategy*, 20 September 2006, A/RES/60/228.

²³⁸ Security Council Resolution no 1540 (2004), adopted by the Security Council at its 4956th meeting.

²³⁹ Examples include: Security Council Resolution no 1530 (2004), adopted by the Security Council at its 4923rd meeting; Security Council Resolution no 1611 (2005), adopted by the Security Council at its 5223rd meeting; Security Council Resolution no 2249 (2015), adopted by the Security Council at its 7565th meeting.

²⁴⁰ Oren Gross & Fionnuala Ní Aoláin *Law in Times of Crisis: Emergency Powers in Theory and Practice* (2006) at 407; Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism and Counter-terrorism* (2007) Fact Sheet No. 32 Geneva: United Nations; Kent Roach op cit note 231 at 70–2.

²⁴¹ Security Council Resolution no 1963 (2010), adopted by the Security Council at its 6459th meeting para 10.

Incremental development has led to a fragmented international approach to counterterrorism.²⁴² This has resulted in uncertainty, which has filtered down to the regional and national spheres that subsequently have been deprived of a solid foundation to counterterrorism.

Regional efforts to combat terrorism have been likened to international efforts – regional instruments are ‘no more specific than international instruments in place today’.²⁴³ Similarly, regional conventions fail to define terrorism and, consequently, are vague and tend to be based on specific acts of terrorism.²⁴⁴ Some regional conventions have been criticised on the basis of the defined scope of ‘terrorism’, which is alleged to be excessively broad and to criminalise ordinary offences as terrorism.²⁴⁵ Despite their specificity, regional conventions have proved to be of value to the international community as they often contribute to the beginnings of a legal framework for new or topical areas of law.²⁴⁶

The Organization of American States (OAS) drafted the first regional convention on terrorism in 1971,²⁴⁷ followed by the European Union in 1977.²⁴⁸ Several organisations have since concluded treaties to address the threat of terrorism, including the South Asian Association for Regional Cooperation,²⁴⁹ the League of Arab States,²⁵⁰ the Organisation of Islamic States,²⁵¹ the Organisation of African Unity²⁵² and the Commonwealth of Independent States.²⁵³

Apart from the ratification of international and regional conventions, terrorism was seldom addressed at a national level prior to 9/11.²⁵⁴ When terrorism was included in the legal

²⁴² Kent Roach *ibid* at 231.

²⁴³ Cindy C Combs *Terrorism in the Twenty-First Century* 7 ed (2015) at 232.

²⁴⁴ *Ibid*.

²⁴⁵ Ben Saul ‘Terrorism as a Legal Concept’ in Genevieve Lennon and Clive Walker (eds) *Routledge Handbook of Law and Terrorism* (2015) at 29.

²⁴⁶ Cindy C Combs *op cit* note 243 at 233.

²⁴⁷ Organization of American States (OAS), *Convention to prevent and punish the acts of terrorism taking the form of crimes against persons and related extortion that are of international significance* 2 February 1971, 27 UST 3949, TIAS 8413.

²⁴⁸ Council of Europe, *European Convention on the Suppression of Terrorism* 27 January 1977, 1137 UNTS 93, ETS No. 90.

²⁴⁹ South Asian Association for Regional Cooperation (SAARC), *Regional Convention on the Suppression of Terrorism*, 4 November 1987, UN GAOR, 44th Sess., UN Doc. A/51/136.

²⁵⁰ League of Arab States, *Arab Convention on the Suppression of Terrorism*, 22 April 1998.

²⁵¹ Organisation of the Islamic Conference (OIC), *Convention of the Organisation of the Islamic Conference on Combating International Terrorism*, 1 July 1999, Annex to Resolution No: 59/26-P.

²⁵² Organisation of African Unity (OAU), *OAU Convention on the Prevention and Combating of Terrorism*, 14 June 1999, OAU Doc AHG/Dec. 132 (XXXV).

²⁵³ Commonwealth of Independent States, *Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism*, 1999, 4 June 1999.

²⁵⁴ Ben Saul *op cit* note 245 at 30.

framework of a national jurisdiction prior to 2001, it was often in pursuit of political objectives – terrorism was formerly associated with public order disruptions and was countered in order to maintain authority.²⁵⁵ Examples include the promulgation of the Terrorism Act in South Africa, which attempted to criminalise the conduct of liberation movements during apartheid,²⁵⁶ and the Terrorist and Disruptive Activities (Prevention) Act in India, which sought to address insurgent activities.²⁵⁷

The events of 9/11 prompted legislative changes, many of which were in response to Resolution 1373 (which required national action).²⁵⁸ Due to the uncertainty surrounding aspects of counterterrorism in international law, states have experienced difficulty in defining ‘terrorism’ and commentators have expressed human rights concerns over ‘excessively wide national definitions of terrorism’.²⁵⁹

Counterterrorism approaches post-9/11 varied among states. The United States promulgated the Patriot Act,²⁶⁰ but its counterterrorism efforts were largely achieved by the ‘aggressive assertion of executive power’.²⁶¹ Unlike the United States, the United Kingdom initiated a ‘legislative war on terrorism’.²⁶² Despite the culture of change following 9/11, some states implemented few or no changes. Egypt’s longstanding battle with terrorism was revealed in its report to the CTC, whereby it sought to rely on counterterrorism legislation from 1992.²⁶³ Syria similarly relied on old laws,²⁶⁴ leading commentators to remark on the concerning convergence between counterterrorism measures of democracies and those of repressive regimes.²⁶⁵

The existing codified approach to counterterrorism has been outlined above, focussing on the international, regional and national spheres. It is evident that 9/11 marked a significant

²⁵⁵ Ibid at 30–2.

²⁵⁶ Terrorism Act 83 of 1967 (South Africa).

²⁵⁷ Terrorist and Disruptive Activities (Prevention) Act 28 of 1987 (India).

²⁵⁸ Security Council Resolution no 1373 (2001) op cit note 106.

²⁵⁹ Ben Saul op cit note 245 at 32.

²⁶⁰ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107–56, 115 Stat. 272 (2001).

²⁶¹ Kent Roach op cit note 231 at 161.

²⁶² Ibid at 230 and 309.

²⁶³ United Nations, *Letter dated 20 December 2001 from the Permanent Representative of Egypt to the United Nations addressed to the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism*, UN Doc. S/2001/1237 at part I. Also see Kent Roach op cit note 231 at 84.

²⁶⁴ United Nations, *Letter dated 13 December 2001 from the Permanent Representative of the Syrian Arab Republic to the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism*, UN Doc. S/2001/1203.

²⁶⁵ Kent Roach ibid at 231.

departure from previous attitudes towards counterterrorism measures. Owing to the varying responses to 9/11, it is possible that the change in approach has led to further fragmentation regarding counterterrorism in international law.²⁶⁶

A discussion of the development of the use of force against terrorists follows, with an emphasis on practices before and after Operation Enduring Freedom, the US response to the 9/11 attacks.

c) The Development of the International Use of Force against Terrorism

The counterterrorism measures described above, as expressed in international, regional and national conventions and legislation, do not necessarily reflect state practice. State responses to terrorism may depart from formal counterterrorism measures and many states have gone beyond freezing assets and tightening border controls to curb the threat of terrorism. In some circumstances, states have resorted to the use of force against terrorists and a variety of justifications have been put forth for this use. The growing incidence of the use of force against terrorism merits consideration.

The development of the use of force against terrorism will be analysed by examining state practice and the international response to the use of force against terrorists. Cases involving the use of force against terrorists pre-9/11, the use of force employed in Operation Enduring Freedom, and the use of force against terrorists post-9/11 will be considered. The various cases have been simplified, focussing on key players alone, to highlight the international response to the use of force against terrorists. This will reveal changes in state practice and emerging counterterrorism trends related to international law on the use of force against terrorists.

i) Cases concerning the pre-9/11 use of force against terrorism

During the Suez Canal crisis, Israel sent armed forces into the territory of Egypt in pursuit of fedayeen guerrillas (Palestinian militants operating especially against Israel).²⁶⁷ Israel claimed that armed forces were sent in self-defence in response to the fedayeen guerrillas' infiltrations and terrorist attacks in Israeli territory.²⁶⁸ Israel also claimed that Egypt was responsible for the attacks.²⁶⁹ The General Assembly found that Israel had infringed on the Israeli-Arab armistice agreements of 1949 and called on parties to 'agree to an immediate cease-fire' and to 'withdraw

²⁶⁶ Some states implemented new legislation addressing various aspects of terrorism while other states, such as Egypt and Syria, largely relied on old legislation to satisfy their Resolution 1373 obligations.

²⁶⁷ Tal Becker *Terrorism and the State: Rethinking the Rules of State Responsibility* (2006) at 186–87.

²⁶⁸ *Ibid* at 187.

²⁶⁹ *Ibid*.

all forces behind the armistice lines'.²⁷⁰ Although the General Assembly did not explicitly condemn Israel's forcible response, the international community was not sympathetic to Israel's use of force against the fedayeen guerrillas in Egypt.²⁷¹

Israel similarly resorted to the use of force against terrorists emanating from Lebanese territory in 1968, claiming that Lebanon failed to prevent the terrorist activity and that the state was actively involved with the terrorism.²⁷² Israel destroyed numerous vacant airplanes at the International Airport of Beirut in retaliation for an attack on an Israeli airplane, blaming the terrorist group operating in Beirut and claiming that it had the ostensible approval of the Lebanese state.²⁷³ The invasion was unanimously condemned by the Security Council, which found that Israel's military action was in violation of its Charter obligations and the ceasefire agreement.²⁷⁴ The premeditated invasion was considered a threat to the maintenance of peace by the Security Council.²⁷⁵

Another incident involving Israel included the Palestinian Liberation Organisation (the PLO). The PLO represents Palestinian interests – incursions into Israel were attempts by the PLO to 'liberate' those living on the West Bank and Gaza.²⁷⁶ The PLO did not distinguish between Israeli civilians and militia in its attack in the 1970s, resulting in the deaths of hundreds of civilians.²⁷⁷ In 1983, Israel countered attacks from the PLO with air strikes, leading to the invasion and occupation of Lebanese territory.²⁷⁸ The Security Council adopted a resolution demanding that Israel withdraw its military forces in Lebanon, ignoring Israel's claims of self-defence.²⁷⁹

Although the international community was unsympathetic to Israeli claims that Egypt and Lebanon were responsible for the terrorist attacks, claims of state responsibility are challenging due to evidentiary problems. Terrorist groups bombed a nightclub in West Berlin in 1986, which was widely regarded as an attack on the United States because many United States civilians frequented the nightclub.²⁸⁰ The bombing was linked to conflict between the United

²⁷⁰ UN General Assembly, *Israel's violation of the General Armistice Agreement*, 2 November 1956, GA Res 997 (ES-I), UN GAOR, 1st Emergency Spec Sess, A/RES/390.

²⁷¹ Thomas M Franck *Recourse to Force: State Action against Threats and Armed Attacks* (2002) at 56.

²⁷² Tal Becker op cit note 267 at 191.

²⁷³ Ibid at 191.

²⁷⁴ Security Council Resolution no 262 (1968), adopted by the Security Council at its 1462nd meeting.

²⁷⁵ Ibid para 2.

²⁷⁶ Gregor Wettberg op cit note 55 at 75.

²⁷⁷ Ibid at 75.

²⁷⁸ Thomas M Franck op cit note 271 at 57.

²⁷⁹ Security Council Resolution no 509 (1982), adopted by the Security Council at its 2375th meeting.

²⁸⁰ Tal Becker op cit note 267 at 198.

States and Libya. Although the Libyan leader Muammar Qaddafi denied involvement in the nightclub bombings, the United States claimed to have evidence of Libya's involvement and conducted a series of air strikes against Libya.²⁸¹ The General Assembly passed a resolution condemning the United States' attack, stating that the attacks were in violation of Charter obligations.²⁸² Some states qualified their opposition to the United States' air strikes on the basis of the failure of the United States government to prove that Libya was behind the attacks.²⁸³

In 1995, Turkey authorised the use of force in Iraqi territory against Kurdish forces.²⁸⁴ Iraq reported the raid to the President of the Security Council and claimed that the use of force amounted to a violation of its sovereignty.²⁸⁵ Turkey alleged that Iraq had relinquished control of the territory and, in order to prevent the Kurdish forces from using the territory for terrorist activities, Turkey claimed that the use of force was necessary.²⁸⁶ Despite Iraq's persistent complaints to the Security Council, the General Assembly and the Security Council did not address the complaints.²⁸⁷ This has been attributed to a general aversion to Saddam Hussein's regime in Iraq. Some commentators believe this marked a shift towards tacit acceptance of self-defence in situations in which states provide safe havens for terrorists.²⁸⁸

Three years later, United States embassies in Nairobi, Kenya and Dar-es-Salaam, Tanzania were bombed (nearly) simultaneously and mass fatalities ensued.²⁸⁹ The United States attributed the attacks to Osama Bin Laden's organisation.²⁹⁰ The Security Council condemned the attacks and labelled them the result of 'international terrorism', calling on states to cooperate with investigations and to adopt measures to combat terrorism.²⁹¹ The United States

²⁸¹ Ibid at 198.

²⁸² UN General Assembly, *Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the aerial and naval military attack against the Socialist People's Libyan Arab Jamahiriya by the present United States Administration in April 1986*, 20 November 1986, A/RES/41/38.

²⁸³ UN General Assembly, *Provisional Verbatim Record of the Seventy-Eighth Meeting* (1986) UN Doc. A/41/PV.78. Also see Tal Becker op cit note 267.

²⁸⁴ Tal Becker op cit note 267 at 202.

²⁸⁵ United Nations, *Letter dated 7 April 1995 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council*, UN Doc. S/1995/272. Also see Thomas M Franck op cit note 271 at 63.

²⁸⁶ United Nations, *Letter dated 24 July 1995 from the Charge d'Affaires A.I. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council*, UN Doc. S/1995/605. Also see Tal Becker op cit note 267 at 202.

²⁸⁷ Thomas M Franck op cit note 271 at 63.

²⁸⁸ Ibid.

²⁸⁹ Tal Becker op cit note 267 at 202.

²⁹⁰ United Nations, *Letter dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, UN Doc. S/1998/780 (1998).

²⁹¹ Security Council Resolution no 1189 (1998), adopted by the Security Council at its 3915th meeting.

engaged with authorities in Sudan and Afghanistan (as the attacks emanated from Sudanese and Afghan territory) and did not appear to impute state responsibility for the bombings to either state.²⁹²

In a letter to the Security Council, the United States stated that it had invoked its Article 51 right of self-defence against Bin Laden's organisation in response to the attacks 'in order to prevent and deter their continuation'.²⁹³ The United States took forcible measures against al-Qaeda in the territory of Sudan and Afghanistan, claiming that the Sudanese government and Afghanistan's Taliban regime had failed to take action to prevent the terrorist activities.²⁹⁴ The General Assembly and the Security Council did not respond to the forcible conduct of the United States, but the international community delivered varied responses.²⁹⁵ Opinion was largely divided: states supporting the lawfulness of the United States' use of force included Australia, France, Germany and Japan, and those rejecting the lawfulness of the use of force included China, Russia and several Arab states.²⁹⁶

The above cases represent a fraction of the number of cases involving states that have employed the use of force against terrorists in another state's territory. State practice involving the use of force against terrorists prior to 9/11 shows that, while the use of force was generally condemned, there was growing tacit acceptance of forcible counterterrorism on the basis of self-defence in limited circumstances (largely signified by the absence of condemnation of the use of force against terrorists).²⁹⁷ Wider acceptance of the use of force in self-defence against terrorists appears to correlate with proof of state attribution – if a victim state can prove state attribution, other states appear to accept the self-defence justification more readily. State practice indicates that it was not sufficient to claim state attribution (as Israel did with regards to Egypt and Lebanon), but rather state attribution had to be proven. An analysis of Operation Enduring Freedom will provide context for state practice following the 9/11 attacks.

²⁹² Tal Becker op cit note 267 at 204.

²⁹³ United Nations, *Letter dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council* op cit note 290.

²⁹⁴ Ibid.

²⁹⁵ Tal Becker op cit note 267 at 203.

²⁹⁶ Ibid at 203.

²⁹⁷ Ibid at 270.

ii) *Operation Enduring Freedom*

Four airplanes were hijacked on 11 September 2001 by 19 hijackers, resulting in over 3000 deaths at the World Trade Centre, the Pentagon and aboard the airplanes.²⁹⁸ The terrorist attacks targeting the US were alleged to have been planned and coordinated by al-Qaeda.²⁹⁹ Former US President George W Bush responded to the attacks, stating that the US would not distinguish between the ‘terrorists who committed these acts and those who harbour them’.³⁰⁰ A joint resolution was passed by the US Congress, authorising the President to use all ‘necessary and appropriate’ force in response to the 9/11 attacks.³⁰¹

The Taliban regime of Afghanistan refused to comply with US demands, which included shutting down al-Qaeda training camps in Afghanistan, surrendering al-Qaeda terrorists and submitting to US investigations.³⁰² ‘Operation Enduring Freedom’ was initiated in Afghanistan in October 2001 and the mission was concluded in December 2014 after more than 13 years.³⁰³ Despite uncertainty surrounding the extent of destruction and the exact number of fatalities resulting from the ‘war on terror’ in Afghanistan, United Nations reports indicate nearly 12 000 civilian fatalities between 2007 and 2011.³⁰⁴ The United States and other states justified the use of force in Afghanistan on the basis of self-defence in a letter to the president of the Security Council, stating that a group of states had ‘initiated actions in the exercise of its inherent right of individual and collective self-defence’.³⁰⁵

As discussed, the 9/11 terrorist attacks were condemned by the United Nations – Security Council Resolution 1368 called on states to bring justice to the perpetrators of the terrorist attack and to ‘redouble ... efforts to prevent and suppress terrorist acts’.³⁰⁶ The Security Council subsequently adopted Resolution 1373, calling on states to prevent the financing of terrorism, freeze the financial assets of those associated with terrorism, deny safe haven to

²⁹⁸ Ibid at 174.

²⁹⁹ Christine Gray op cit note 158 at 159.

³⁰⁰ United States, *Address to the Nation on the Terrorist Attacks* (11 September 2001) 37 *Weekly Comp Pres Doc* 1301 (17 September 2001).

³⁰¹ United States, S.J.Res. 23 (107th): Authorization for Use of Military Force, 107th Congress, 2001–2002.

³⁰² United States White House, Office of the Press Secretary, *Address to a Joint Session of Congress and the American People* (20 September 2001). Also see Christine Gray op cit note 157 at 159.

³⁰³ United States Department of Defense, *Obama, Hagel Mark End of Operation Enduring Freedom* (28 December 2014). Note: ‘Operation Enduring Freedom’ refers to the use of force by the United States against al-Qaeda in Afghanistan.

³⁰⁴ Susan G Chesser ‘Afghanistan Casualties: Military Forces and Civilians’ (29 February 2012) *Congressional Research Service Report R41084* at 3.

³⁰⁵ United Nations, *Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, UN Doc. S/2001/946 (2001).

³⁰⁶ Security Council Resolution no 1368 (2001) op cit note 105.

those associated with terrorism, partake in information exchanges and implement the various conventions on terrorist activities.³⁰⁷

The General Assembly similarly adopted a resolution condemning the terrorist attacks.³⁰⁸ NATO and the OAS invoked collective self-defence and several states, including Russia and China, expressed support for the use of force by the United States.³⁰⁹ Most states accepted the use of force against al-Qaeda in Afghanistan although commentators have suggested that support was largely related to geopolitical realities and strategic alignment rather than the lawfulness of the use of force.³¹⁰ Noticeably, the state attribution requirement was not proven. Iraq was one of the only states to deem this use of force unlawful.³¹¹

iii) Cases concerning the post-9/11 use of force against terrorism

Following the events of 9/11 and the United States' commitment to the 'war against terrorism', Iraq was declared an 'Axis of Evil', together with Iran and North Korea.³¹² It was alleged that Iraq was developing weapons of mass destruction and that Saddam Hussein, the leader of Iraq, supported terrorist activities.³¹³ In response, the United States, the United Kingdom and Australia employed military force against Iraq to secure disarmament through a mission named 'Operation Iraqi Freedom'.³¹⁴

This use of force against Iraq was harshly criticised. Many states voiced a preference for the use of force only following express Security Council authorisation, as required by the Charter.³¹⁵ The United States claimed that the states were acting on the basis of three Security Council resolutions (678, 687 and 1444)³¹⁶ and that Iraq's violation of disarmament obligations enabled the use of force against Iraq.³¹⁷ The 'implied or revived' authorisation of force was

³⁰⁷ Security Council Resolution no 1373 (2001) op cit note 106.

³⁰⁸ UN General Assembly, *Condemnation of Terrorist Attacks in the United States of America*, 18 September 2001, A/56/L.1.

³⁰⁹ Christine Gray op cit note 158 at 159.

³¹⁰ Sikander A Shah 'War on Terrorism: Self-defense, Operation Enduring Freedom, and the Legality of US Drone Attacks in Pakistan' (2010) 9 *Washington University Global Studies Law Review* 77 at 88 and 99.

³¹¹ Christine Gray op cit note 158 at 159.

³¹² United States White House, Office of the Press Secretary, *The President's State of the Union Address* (29 January 2002).

³¹³ Ibid. Also see Christine Gray op cit note 158 at 270.

³¹⁴ United States White House, Office of the Press Secretary, *President Discusses Beginning of Operation Iraqi Freedom* (22 March 2003); United Kingdom House of Commons, *Official Report of Debate* (18 March 2003) at columns 760–911. Also see Christine Gray op cit note 158 at 270.

³¹⁵ Christine Gray op cit note 158 at 270.

³¹⁶ Security Council Resolution no 678 (1990), adopted by the Security Council at its 2963rd meeting; Security Council Resolution no 687 (1991), adopted by the Security Council at its 2981st meeting; Security Council Resolution no 1444 (2002), adopted by the Security Council at its 4651st meeting.

³¹⁷ Christine Gray op cit note 52 at 637.

rejected by various states, including Germany, China, France and Russia, all of whom believed that express authorisation by the Security Council constituted the correct interpretation of the Chapter VII exception to the prohibition of force.³¹⁸

The use of force by the United States, the United Kingdom and Australia in Iraq was internationally condemned and remains controversial.³¹⁹ At least 160 000 Iraqi civilians were killed.³²⁰ The Chilcot Report, the result of an inquiry into former British Prime Minister Tony Blair's conduct and the United Kingdom's decision to invade Iraq, indicated that more peaceful alternatives had not been exhausted before the invasion in 2003 occurred.³²¹ Although Operation Iraqi Freedom revolved around the use of force and international obligations surrounding weapons of mass destruction, the alleged state support of terrorism and thus state attribution frequented the rhetoric of the United States.³²²

Following the attacks of 9/11, Israel's discourse mirrored that of the United States, contending that it too was involved in a war against terrorism, specifically against Hezbollah.³²³ Claiming that Syria and Lebanon were complicit in Hezbollah's terrorist activities, Israel invaded Syria in 2003 after an Israeli restaurant bombing³²⁴ and occupied Lebanon in 2006 following rocket attacks against Israel.³²⁵ Israel's reliance on self-defence was met with mixed reactions – the 2003 use of force was widely condemned as an armed reprisal,³²⁶ but the 2006 use of force was regarded as an acceptable exercise of the right to self-defence, albeit disproportionate.³²⁷ The excessive use of force was condemned by the Secretary-General in a Security Council meeting after acknowledging Israel's right to exercise self-defence – this is

³¹⁸ United Nations Security Council, *Security Council holds first debate on Iraq since the start of Military Action; Speakers call for halt to Aggression, Immediate Withdrawal*, UN Press Release SC/7705. Also see Christine Gray op cit note 52 at 638.

³¹⁹ United Nations Security Council, *Security Council holds first debate on Iraq since the start of Military Action; Speakers call for halt to Aggression, Immediate Withdrawal* *ibid.*

³²⁰ Iraq Body Count 'Documented Civilian Deaths from Violence' *Iraq Body Count* 18 July 2016.

³²¹ The Guardian 'The Chilcot Report: Key Points from the Iraq Inquiry' *The Guardian* 6 July 2016.

³²² United States White House, Office of the Press Secretary, *President Discusses Beginning of Operation Iraqi Freedom* op cit note 314.

³²³ Israel Ministry of Foreign Affairs, *Statement by Foreign Ministry Deputy DG Gideon Meir* (13 July 2006). Also see Christine Gray op cit note 158 at 172.

³²⁴ Christine Gray op cit note 158 at 174.

³²⁵ Christian J Tams 'The Use of Force against Terrorists' (2009) 20 *EJIL* 359 at 379.

³²⁶ UN Security Council 4836th meeting, *The Situation in the Middle East*, 5 October 2003, UN Doc. S/PV 4836 (2003) at 9 (Spain), 11 (Mexico), 12 (Guinea).

³²⁷ UN Security Council 5489th meeting, *The Situation in the Middle East*, 14 July 2006, UN Doc. S/PV 5489 (2006) at 17; UN Security Council 5493rd meeting, *The Situation in the Middle East*, 21 July 2006, UN Doc. S/PV 5493 (2006) at 17. Also see Christian J Tams op cit note 325 at 379.

an interesting development as the Security Council also acknowledged that the attacks were not attributable to Lebanon.³²⁸

Russia conducted air strikes in Georgia in response to attacks by Chechen rebels in 2007.³²⁹ The response from the international community varied, but outright condemnation of the use of force in Georgia did not follow Russia's air strikes.³³⁰ In 2008, Turkey invaded Northern Iraq following attacks from Kurdish PKK (Kurdistan Workers' Party) forces.³³¹ Turkey did not explicitly justify its conduct and states did not condemn the invasion outright,³³² with the exception of Iraq.³³³ In 2008, the US expressed support for the Colombian use of force against FARC (Revolutionary Armed Forces of Colombia) rebels in Ecuador,³³⁴ although a definitive response from the international community was absent.³³⁵

A marked contrast between pre-9/11 cases and post-9/11 cases is evident – changes in the response to the use of force against terrorists are reflected in the discussion of counterterrorism trends that follows.

iv) Counterterrorism Trends: The Impact of 9/11

Prior to 9/11, in the 1970s and 1980s, resorting to the use of force against terrorists was rejected 'almost systematically'.³³⁶ The use of force against terrorists was usually justified on the basis of self-defence and the General Assembly and the Security Council interpreted the right to self-defence restrictively.³³⁷ This is evident in the consistent condemnation of the use of force against terrorists prior to the 9/11 attacks – Israel's conduct in the territory of Egypt³³⁸ and

³²⁸ UN Security Council 5492nd meeting, *The Situation in the Middle East*, 20 July 2006, UN Doc. S/PV 5492 (2006) at 3.

³²⁹ United Nations, *Letter dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General*, UN Doc. S/2002/1012 (2002). Russia asserted that it was prepared to exercise its right to self-defence against Chechen rebels in territories in Georgia in 2002, claiming that the rebels were terrorists. Russia seemingly relied on this claim in 2007. Also see Christian J Tams op cit note 325 at 380.

³³⁰ Christian J Tams op cit note 325 at 380.

³³¹ The Economist 'Turkey Invades Northern Iraq' *The Economist* 28 February 2008.

³³² Tom Ruys 'Quo Vadit Jus as Bellum: A Legal Analysis of Turkey's Military Operations against the PKK in Northern Iraq' (2008) 9 *Melb J Int'l L* 334 at 345.

³³³ BBC News 'Iraq warns Turkey over incursion' 23 February 2008.

³³⁴ United States White House, Office of the Press Secretary, *Remarks by President Bush on Situation in Colombia* (4 March 2008). President Bush stated that America continued to 'stand with Colombia as it confronts violence and terror and drug traffickers'.

³³⁵ Christian J Tams op cit note 325 at 380.

³³⁶ Ibid at 367.

³³⁷ Ibid at 368.

³³⁸ UN General Assembly, *Israel's violation of the General Armistice Agreement* op cit note 270.

Lebanon³³⁹ was criticised, as were the United States' air strikes in Libyan territory.³⁴⁰ Where condemnation from the General Assembly or Security Council was absent, support was equally absent.³⁴¹

It is likely that the inactivity of the Security Council prompted many states to use force and justify it on the basis of the only other Charter-mandated exception – self-defence. Other justifications raised, including attempts to rescue nationals abroad,³⁴² the doctrine of hot pursuit³⁴³ and armed reprisals³⁴⁴ were not accepted by the international community and are products of a period characterised by restrictive interpretation.³⁴⁵

The restrictive approach is largely due to a strict interpretation of the Article 2(4) prohibition on the use of force derived from the seminal case on self-defence, the *Nicaragua* case.³⁴⁶ Self-defence was interpreted in the *Nicaragua* judgment, which expressed the stringent requirement of attribution or 'effective control' by a state.³⁴⁷ This is evident in several of the cases described above – where a state failed to prove that the territorial state was responsible for the conduct of the terrorist activity, forcible counterterrorism was rejected.³⁴⁸ In addition to

³³⁹ Security Council Resolution no 262 (1968) op cit note 274; Security Council Resolution no 509 (1982) op cit note 279.

³⁴⁰ UN General Assembly, *Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the aerial and naval military attack against the Socialist People's Libyan Arab Jamahiriya by the present United States Administration in April 1986* op cit note 282.

³⁴¹ Examples include the Turkish use of force against the PLO in Iraq (Thomas M Franck op cit note 271 at 63) and the US use of force against al-Qaeda in Afghanistan and Sudan (Tal Becker op cit note 267 at 203), both of which delivered varying responses.

³⁴² UN Security Council 1939th meeting, *Complaint by the Prime Minister of Mauritius, current Chairman of the Organization of African Unity, of the 'act of aggression' by Israel against the Republic of Uganda*, 9 July 1976, UN Doc. S/PV 1939 (1976); UN Security Council 1940th meeting, 12 July 1976, UN Doc. S/PV 1940 (1976); UN Security Council 1941st meeting, 12 July 1976, UN Doc. S/PV 1941 (1976); UN Security Council 1942nd meeting, 13 July 1976, UN Doc. S/PV 1942 (1976); UN Security Council 1943rd meeting, 14 July 1976, UN Doc. S/PV 1943 (1976). The Entebbe Incident in 1976 involved a rescue operation by Israel in Uganda following an airplane hijacking. The Security Council held several meetings to discuss the legality of the Israeli use of force to protect nationals, but failed to condemn or condone Israel's conduct.

³⁴³ Security Council Resolution no 568 (1985), adopted by the Security Council at its 2599th meeting para 4. The Security Council rejected 'racist South Africa's practice of "hot pursuit" to terrorise and destabilise Botswana and other countries in southern Africa'.

³⁴⁴ Security Council Resolution no 188 (1964), adopted by the Security Council at its 1111th meeting. The Security Council condemned reprisals as 'incompatible with the purposes and principles of the United Nations'.

³⁴⁵ Christian J Tams op cit note 325 at 371.

³⁴⁶ *Nicaragua* case supra note 50 para 115.

³⁴⁶ Christian J Tams op cit note 325 at 369.

³⁴⁷ *Nicaragua* case supra note 50 para 115.

³⁴⁸ Christian J Tams op cit note 325 at 369.

this, the ICJ held that only ‘the most grave forms’ of the use of force merited a forcible response based on the right of self-defence.³⁴⁹

The ‘accumulation theory’ (whereby ‘continuous pin-prick assaults’ occur) was rejected in Israel’s handling of the fedayeen in Lebanon. The Security Council considered Israel’s series of letters detailing the continuous nature of the attacks,³⁵⁰ but it did not accept self-defence on the basis of the accumulation theory.³⁵¹ The requirements of necessity and proportionality, coupled with a temporal link, were applied strictly to claims of self-defence and posed ‘almost insurmountable hurdles’ to those attempting to apply extraterritorial force against terrorists.³⁵²

The use of force against terrorists has become synonymous with the self-defence justification, both pre- and post-9/11. The 9/11 attacks prompted ‘a fundamental re-appraisal of the law on self-defence’³⁵³ and represented a ‘revolutionary challenge to the doctrine of self-defence’.³⁵⁴ Despite the continued application of the Article 2(4) prohibition of the use of force, it appears that terrorism may warrant a ‘military approach’ in appropriate circumstances.³⁵⁵ The military approach to terrorism may be justifiable in terms of the Charter exceptions: the Security Council has labelled terrorism a threat to peace³⁵⁶ and some academics believe it to be ‘beyond doubt’ that the Security Council can authorise forcible measures against terrorism.³⁵⁷ In addition to this, the Security Council recognised the legitimacy of self-defence against terrorism in Resolutions 1368 and 1373.³⁵⁸

State practice has departed from the pre-9/11 position of condemning the use of force against terrorists – under certain conditions, the use of force against terrorists is now accepted.³⁵⁹ This is illustrated by the lack of unequivocal condemnation of more recent uses of force against terrorism, including the use of force by Israel, Russia and Colombia in the territory of other states. Counterterrorism trends include heavy reliance on the right to self-

³⁴⁹ *Nicaragua* case supra note 50 para 191.

³⁵⁰ UN Security Council 1541st meeting, *The Situation in the Middle East*, 15 May 1970, UN Doc. S/PV 1541 (1970).

³⁵¹ Security Council Resolution no 280 (1970), adopted by the Security Council at its 1542nd meeting. Also see Barry Levenfeld ‘Israel’s Counter-Fedayeen Tactics in Lebanon: Self-defence and Reprisal under Modern International Law’ (1982) 21 *Columbia J Transnat’l L* at 21.

³⁵² Christian J Tams op cit note 325 at 371.

³⁵³ Christine Gray op cit note 158 at 159.

³⁵⁴ Christine Gray op cit note 52 at 629.

³⁵⁵ Christian J Tams op cit note 325 at 374.

³⁵⁶ Security Council Resolution no 1373 (2001) op cit note 106.

³⁵⁷ Christian J Tams op cit note 325 at 377.

³⁵⁸ Security Council Res no 1368 (2001) op cit note 105 and Security Council Resolution no 1373 (2001) op cit note 106.

³⁵⁹ Christine Gray op cit note 52 at 629–31.

defence - there has been a renewed focus on determining the appropriate levels of necessity and proportionality.³⁶⁰

Various elements of self-defence deserve reconsideration post-9/11. Attribution, an important requirement of self-defence in terms of the *Nicaragua* judgment, appears to play a less important role than it used to. As adumbrated above, although the ICJ stated that self-defence was appropriate in cases where armed attacks occurred between states in the *Israeli Wall Opinion*,³⁶¹ the Court's determination on attribution in the *Democratic Republic of Congo v Uganda* case³⁶² was criticised by Judge Kooijmans who stated that self-defence was acceptable in the absence of attribution.³⁶³ Judge Kooijmans' approach that attribution is not an essential requirement for self-defence is reflected in state practice post-9/11 where the absence of attribution has not garnered as much criticism as pre-9/11. It appears that the requirement of state attributions still exists, although states have appeared to adopt a more relaxed approach to it on a case-by-case basis. This may reflect political, rather than legal, changes in the approach to attribution.

The requirements of necessity and proportionality merit attention. The Chilcot Report indicated that more peaceful means of resolution existed in terms of the United Kingdom's conflict with Iraq and that the need for its forcible response was doubtful, depriving forcible action of the requisite necessity.³⁶⁴ The protracted use of force in Afghanistan and Iraq raises questions about proportionality – an estimated 160 000 fatalities have been linked to the Iraqi war, which was initiated on the basis of possibly flawed intelligence on weapons of mass destruction.³⁶⁵ Despite changes in the approach to the use of force against terrorism post-9/11, necessity and proportionality in exercising the right to self-defence remain important requirements.

³⁶⁰ Christian J Tams op cit note 325 at 381.

³⁶¹ *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* supra note 69.

³⁶² *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* supra note 63.

³⁶³ Separate Opinion of Judge Kooijmans in *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* supra note 67 paras 25–7.

³⁶⁴ The Guardian 'The Chilcot Report: Key Points from the Iraq Inquiry' op cit note 321.

³⁶⁵ Iraq Body Count 'Documented Civilian Deaths from Violence' op cit note 320.

Counterterrorism appears to be trending towards a more robust interpretation of the prohibition to the use of force which allows for the use of force against terrorists in certain circumstances, distinct from the restrictive approach to the use of force against terrorists which existed prior to 9/11.

d) Chapter Synopsis

Having adopted a working definition of terrorism, counterterrorism in its formal sense was considered. The international, regional and national spheres were discussed, illustrating that while there is extensive counterterrorism coverage in conventions and legislation, there is also fragmentation. This is particularly apparent post-9/11, which attracted varied responses and further contributed to the patchy counterterrorism approach. A comprehensive, coherent approach to counterterrorism across all three spheres is required.

The discussion on the development of the use of force against terrorists pre- and post-9/11, including an analysis of the events surrounding Operation Enduring Freedom, sought to illustrate changes in state practice relating to the use of force against terrorists. This is in contrast to codified counterterrorism approaches, where the use of force against terrorists does accurately reflect actual state practice. The discussion revealed that the 9/11 attacks changed the landscape of the use of force against terrorists and the concept of self-defence – the restrictive interpretation evolved into a robust interpretation of the prohibition on the use of force, as described by Professor Christian Tams.³⁶⁶

There is a growing realisation of the need to re-evaluate the legal framework of the use of force against terrorists, the result of ‘little intersection between the academic debate and the operational realities’.³⁶⁷ The change in state practice and what is regarded as the ‘lawful’ use of force against terrorism is marred with uncertainty and ambiguity. Counterterrorism in form and counterterrorism in substance are disconnected. As a result, the line between lawful and unlawful use of force is blurred by state practice. The next chapter will attempt to determine whether the United States’ air strikes against the Islamic State in Syria were lawful in terms of international law on the use of force.

³⁶⁶ Christian J Tams op cit note 325 at 364.

³⁶⁷ Daniel Bethlehem ‘Principles relevant to the scope of a state’s right of self-defense against an imminent or actual armed attack by non-state actors’ (2012) 106 *American Journal on International Law* 770 at 774.

III UNITED STATES' USE OF FORCE IN SYRIA

A brief synopsis of the Islamic State was provided in the introduction – the Islamic State emerged as an offshoot of the Iraqi branch of al-Qaeda in 2006, although its ties to al-Qaeda were later severed.³⁶⁸ The context of the United States' air strikes against the Islamic State in Syria is important in order to determine whether a legal justification for the use of force by the United States exists. To contextualise the air strikes, Syria's historical background pertaining to the emergence of the Islamic State will be explained, followed by a description of the Islamic State ideology. This will provide a background to the events leading up to the air strikes by the United States, including a description of the stated position of the United States. The potential legal justifications – limited to the justifications discussed in Part I – for the use of force by the United States will then be explored. These justifications will be evaluated to determine whether the use of force by the United States is lawful.

a) Context

i) *Background to the conflict in Syria*

Syria has a tumultuous history – after it gained independence, divisions emerged which affect and continue to contribute to the precarious position of the state. Syria gained its independence in 1946, a period characterised by political instability stemming from religious, social and political factions which have persisted to the present.³⁶⁹ Authoritarianism was introduced by the rule of Hafiz al-Assad in 1970, which was sustained by his son Bashar al-Assad after taking the presidency following his father's death in 2000.³⁷⁰

The transition period in 2000 was dubbed the 'Damascus Spring' – academics initiated a movement calling for political, judicial and social reforms.³⁷¹ Although the movement was not officially recognised by the new presidency, President Bashar al-Assad was expected to introduce reforms consistent with measures suggested by the movement.³⁷² Select economic reforms transpired, civil society organisations multiplied, hundreds of political prisoners were released and President Bashar al-Assad appeared to divest some control by conferring limited

³⁶⁸ Woodrow Wilson International Center for Scholars op cit note 3.

³⁶⁹ Encyclopaedia Britannica 'Syria' *Encyclopaedia Britannica Online* 13 June 2016.

³⁷⁰ Ibid.

³⁷¹ Carnegie Endowment for International Peace 'The Damascus Spring' *Carnegie Endowment* 2016.

³⁷² Ibid.

authority to provincial offices.³⁷³ Despite the encouraging start, changes were fleeting. Pro-reform activists were soon imprisoned and proposed reforms were declined.³⁷⁴

The Assad regime maintained a tight authoritarian grip that was strongly resisted by opposition groups prior to the 2007 election.³⁷⁵ President Bashar al-Assad claimed victory in the unopposed election which was largely denounced as farcical.³⁷⁶ Widespread anti-government protests broke out in 2011 and the government responded to the demonstrations forcibly.³⁷⁷ This was one of the core factors leading to the civil war.

The Syrian civil war is characterised by its high degree of complexity – there are several opposition groups, including IS, which differ in ideology and operation.³⁷⁸ The Syrian government and opposition groups are supported by various benefactors; for this reason, the war has been dubbed a ‘multiparty war’.³⁷⁹ As well as ignoring calls for the resignation of President Bashar al-Assad, the Syrian government has refused to meet public demands, using violence to suppress opposition.³⁸⁰ Members of the international community (including the Arab League, Turkey, EU and US) have imposed economic sanctions on Syria. In 2012, over 130 states recognised the Syrian National Coalition (and not Assad’s regime) as the legitimate representative of Syria.³⁸¹

Despite widespread non-recognition of the Assad government and mounting international pressure, the grievous violence continued. After extensive speculation from the international community, the United Nations Human Rights Council investigated and confirmed the use of chemical weapons against civilians in 2013.³⁸² While the report stated that there was insufficient evidence to name the perpetrator of the chemical attacks, the quantity, quality, expertise and equipment required to conduct the chemical attacks indicated that the source of the chemicals was the Syrian military stockpile.³⁸³

³⁷³ Ibid.

³⁷⁴ BBC News ‘Syria Profile – Timeline’ 6 May 2016.

³⁷⁵ Encyclopaedia Britannica op cit note 369.

³⁷⁶ Ibid.

³⁷⁷ Ibid.

³⁷⁸ David Cunningham, Kristian Skrede Gleditsch & Idean Salehyan ‘Non-state Actors in Civil War’ in Backer, Bhavnani & Huth (eds) *Peace and Conflict 2016* (2016) at ch 6.

³⁷⁹ Ibid.

³⁸⁰ Central Intelligence Agency ‘Syria’ *The World Factbook* 5 July 2016.

³⁸¹ Ibid.

³⁸² UN Human Rights Council, *Report of the independent international commission of inquiry on the Syrian Arab Republic*, 12 February 2014, UN Doc. A/HRC/25/65 at 18.

³⁸³ Ibid.

The United Nations supported the Geneva II conference in 2014, which aimed to bring together major players in the Syrian conflict in order to end the civil war.³⁸⁴ The talks failed and the civil war in Syria continued.³⁸⁵

President Obama commented on the ongoing crisis in Syria, stating that the United States had hitherto refrained from intervening in the Syrian civil war but that the chemical attacks changed this position.³⁸⁶ He claimed that the Assad regime was to blame for the chemical attacks.³⁸⁷ Despite threatened action, armed intervention in Syria was avoided due to an agreement brokered between the United States, Russia and Syria, which included the surrender of Syria's chemical weapons to international control for destruction.³⁸⁸

Although individual states (such as the United States and Russia) have played interventionist roles in Syria, the Security Council passed several resolutions concerning the civil war, including resolutions condemning the use of chemical weapons,³⁸⁹ urging humanitarian access by United Nations agencies³⁹⁰ and condemning the terrorist acts of the Islamic State.³⁹¹

ii) The Emergence of the Islamic State

The Islamic State is one of the key forces opposing the Assad government, rival oppositionists and Kurdish forces in the civil war in Syria.³⁹² It gained independence following its separation from the Syrian offshoot of al-Qaeda after the leader of the Nusra Front renounced the merger.³⁹³ It transpired that despite media assertions about the close links between al-Qaeda and the Islamic State, the two groups rarely communicated. By 2011, there were calls to al-Qaeda's leadership structures to dissolve relations with the Islamic State since its violent conduct was 'tarnishing al-Qaeda's name'.³⁹⁴ Following its establishment in Iraq in 2006, the Islamic State experienced a decline in support and its media communications waned.³⁹⁵ After Islamic State forces were sent to Syria in 2011 by Abu Bakr al Bagdadi (the group's new

³⁸⁴ UN News Centre 'Geneva Conference on Syria set for January, UN chief announces' *United Nations* 25 November 2013.

³⁸⁵ Central Intelligence Agency op cit note 380.

³⁸⁶ United States White House, Office of the Press Secretary, *Remarks by the President in Address to the Nation on Syria* (10 September 2013).

³⁸⁷ Ibid.

³⁸⁸ Encyclopaedia Britannica op cit note 369.

³⁸⁹ Security Council Resolution no 2118 (2013), adopted by the Security Council at its 7038th meeting.

³⁹⁰ Security Council Resolution no 2139 (2014), adopted by the Security Council at its 7116th meeting.

³⁹¹ Security Council Resolution no 2170 (2014), adopted by the Security Council at its 7242nd meeting.

³⁹² BBC News 'Syria: The Story of the Conflict' 11 March 2016.

³⁹³ Woodrow Wilson International Center for Scholars op cit note 3.

³⁹⁴ Cole Bunzel op cit note 7 at 22.

³⁹⁵ Ibid at 23.

leader), the relative inactivity of the Islamic State ceased.³⁹⁶ The Islamic State's 'dramatic rise from obscurity' drew attention to its ideology, which it was eager to spread.³⁹⁷

The ideology of the Islamic State has been described as deriving from Jihadi-Salafism, dogma existing in the Sunni Islam faith which has been adopted by minorities and extremists.³⁹⁸ The belief encourages a hardline approach to Islamic scripture and the purification of the faith.³⁹⁹ Although al-Qaeda shares the ideology of Jihadi-Salafism with the Islamic State, the latter applies principles with absolute ruthlessness.⁴⁰⁰ Principles of Jihadi-Salafism applied by the Islamic State include the exclusivity of 'true' Muslims, the belief that Shi'a Muslims are 'apostates deserving of death' and the adoption of both defensive and offensive jihad.⁴⁰¹ The inclusion of an offensive jihad approach involves actively pursuing those guilty of committing idolatry, which Jihadi-Salafism strongly condemns.⁴⁰²

In addition to these principles, restoration of the caliphate is the Islamic State's 'ultimate vision'.⁴⁰³ The envisioned caliphate includes the entire 'Muslim World' and is considered a bold mission in the light of existing divisions in Islamic populations.⁴⁰⁴ The Islamic State's involvement in Iraq and the Syrian civil war was motivated by a desire to ingrain the Jihadi-Salafism ideology, eradicate Shi'a Islam and expand its control.

The Islamic State launched several operations in Iraq during the unrest in the Middle East in 2011, including 'Breaking the Walls' which was aimed at liberating Islamic State prisoners.⁴⁰⁵ The group succeeded and launched another campaign in Iraq, 'Soldier's Harvest', which sought to weaken Iraqi forces and surrender territory to the Islamic State.⁴⁰⁶ The Islamic State succeeded in taking over Iraqi territory, including Mosul in 2014, which was considered a huge victory for the group.⁴⁰⁷ The Iraqi government responded to the onslaught by formally requesting assistance from the United States to conduct air strikes against the Islamic State.⁴⁰⁸

³⁹⁶ Woodrow Wilson International Center for Scholars op cit note 3.

³⁹⁷ Cole Bunzel op cit note 7 at 4.

³⁹⁸ Ibid at 7.

³⁹⁹ Ibid at 7–8.

⁴⁰⁰ Ibid at 9.

⁴⁰¹ Ibid at 10.

⁴⁰² Ibid.

⁴⁰³ Aymenn Jawad al-Tamimi 'The Dawn of the Islamic State of Iraq and ash-Sham' (2014) 16 *Current Trends in Islamic Ideology* 5 at 8.

⁴⁰⁴ Charles Lister 'Profiling the Islamic State' (2014) 13 *Brookings Doha Center Analysis* at 14.

⁴⁰⁵ Ibid at 12.

⁴⁰⁶ Woodrow Wilson International Center for Scholars op cit note 3.

⁴⁰⁷ Ibid.

⁴⁰⁸ United Nations, *Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General* op cit note 14.

United States President Barack Obama proceeded to authorise targeted air strikes against the Islamic State in Iraq.⁴⁰⁹

In pursuit of expansion, the Islamic State – alongside Jabhat al-Nusra – seized Raqqa in Syria in March 2013, representing the first provincial capital to succumb to opposition forces.⁴¹⁰ The Islamic State then considered Jabhat al-Nusra as its opposition and launched attacks on the group as well as other rebel groups in Syrian territories.⁴¹¹ It gained sole control over Raqqa in January 2014, proclaiming it the capital of the Islamic State emirate.⁴¹² A caliphate was declared in June 2014, with leader Baghdadi its caliph.⁴¹³ The Islamic State adopted a government-like role in the territories it controlled and ruled with violence – executions, amputations and force were used to encourage submission to its rule.⁴¹⁴

The Iraqi-sanctioned United States’ air strikes on the Islamic State in Iraq in August 2014 seemingly provoked the Islamic State and ‘altered [its] strategic calculus’ – it retaliated by uploading videos of the beheadings of Western hostages.⁴¹⁵ In September 2014, an Islamic State official instructed followers to kill Westerners globally, an instruction that was repeated on several occasions.⁴¹⁶

iii) The United States’ Involvement in Syria

The Iraqi government sent another letter to the United Nations in September 2014, requesting the United States assistance’ to combat the Islamic State and consenting to the use of force against the Islamic State in Iraq.⁴¹⁷ The letter stated that the Islamic State had established safe havens outside the borders of Iraq and remained a serious threat to Iraq since it was unable to properly defend its borders.⁴¹⁸ Iraq requested that the United States ‘lead international efforts to strike ISIL sites and military strongholds’.⁴¹⁹ The United States responded to the letter on 23 September 2014, stating to the United Nations Secretary-General that the Iraqi government

⁴⁰⁹ United States Department of Defense, *Statement by the President and Statement on Iraq by Secretary of Defense Chuck Hagel* op cit note 10.

⁴¹⁰ Woodrow Wilson International Center for Scholars op cit note 3.

⁴¹¹ Ibid.

⁴¹² Ibid.

⁴¹³ Encyclopaedia Britannica ‘Islamic State in Iraq and the Levant (ISIL)’ *Encyclopaedia Britannica Online* 16 November 2015.

⁴¹⁴ Ibid.

⁴¹⁵ Cole Bunzel op cit note 7 at 36.

⁴¹⁶ Ibid.

⁴¹⁷ United Nations, *Letter dated 22 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General*, UN Doc. S/2014/691 (22 September 2014).

⁴¹⁸ Ibid.

⁴¹⁹ Ibid.

has requested it to ‘strike ISIL sites and military strongholds in Syria’.⁴²⁰ President Obama declared that air strikes had been conducted against the Islamic State in Syria as part of the plan to defeat it.⁴²¹

The use of force by the United States against the Islamic State in Iraq is distinguished from that used in Syria because the Iraqi government consented to the use of force in its territory. The United States received considerable support for its forcible conduct in Iraq, but support for its conduct in Syria was lacking⁴²² – the Netherlands,⁴²³ France⁴²⁴ and Australia⁴²⁵ expressed doubt over the legality of the use of force in Syria without the consent of Syria. Prior to the declaration stating that the United States would conduct air strikes, the Syrian Foreign Minister commented that action in Syria would require the consent of the state, otherwise it would constitute a violation of Syria’s sovereignty.⁴²⁶

Various reasons have been proffered for the United States’ failure to coordinate conduct with Assad’s regime – coordination could have lent legitimacy to Assad’s regime, which the United States wanted to avoid after recognising the Syrian National Coalition as the legitimate representative of Syria,⁴²⁷ and the hostile history between the two governments is not one which would likely bear harmonious negotiations.⁴²⁸ Although the intention of the United States features in this enquiry, it will now be analysed whether the United States’ air strikes against the Islamic State in Syria were lawful in terms of international law.

b) United States’ Use of Force in Syria: A Lawful Exercise of the Use of Force?

In order to determine whether the United States’ air strikes against IS in Syria are lawful, the development of international law on the use of force must be considered.

⁴²⁰ United Nations, *Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General*, UN Doc. S/2014/695 (23 September 2014).

⁴²¹ United States White House, Office of the Press Secretary, *Statement by the President on Air strikes in Syria* op cit note 13.

⁴²² Christian Henderson ‘Editorial Comment: The Use of Force and Islamic State’ (2014) 1:2 *Journal on the Use of Force and International Law* 209 at 211–12.

⁴²³ Emma Rapaport ‘Dutch Parliament Commits Soldiers, F-16S to Fight ISIS in Iraq’ *NL Times* 24 September 2014.

⁴²⁴ Reuters ‘France to Strike ISIL in Iraq but not Syria’ *Al Jazeera* 18 September 2014.

⁴²⁵ Daniel Hurst ‘Tony Abbott: Military action against ISIS will cost half a billion dollars a year’ *The Guardian* 16 September 2014.

⁴²⁶ Justin Sink ‘White House won’t commit to asking Congress for Syria strike’ *The Hill* 25 August 2014.

⁴²⁷ Mark Landler, Michael R Gordon & Anne Barnard ‘U.S. will grant recognition to Syrian Rebels, Obama says’ *The New York Times* 11 December 2012.

⁴²⁸ Christian Henderson op cit note 422 at 213.

Developing international law on the use of force is necessary in order to maintain the efficacy and relevance of international law. Although it is crucial for states to uphold the international legal order, international law must respond to the ‘kaleidoscopic events of our era’ through the development of longstanding maxims.⁴²⁹ It is imperative that international law on the use of force evolves at the same pace as the challenges arising in its context.⁴³⁰ Changes to international law may be incremental or dramatic – regardless of the pace of change, the law cannot be static.⁴³¹

State practice is one of the vehicles for the development of international law. The ICJ specified that settled state practice coupled with *opinio juris* may elevate state conduct to the level of customary international law.⁴³² Just as divergent state practices indicate that the approach to the use of force against terrorists has transformed since the 9/11 attacks, state practice may indicate that the use of force against terrorists has developed to the extent that the United States’ air strikes against the Islamic State in Syria can be deemed lawful.⁴³³

In contrast to developing international law, conduct may be in breach of international law, rendering it unlawful. Although the use of force against terrorists may be original or innovative, it must be based on ‘legitimate and universal principles’ to avoid overstepping the bounds of international law.⁴³⁴

Chapter I was dedicated to describing the Article 2(4) prohibition on the use of force and the possible exceptions accepted in international law. Chapter II was confined to the application of international law to the use of force against terrorists, which included an analysis of the development of the use of force to explicate the current status of the law. Based on the information contained in the previous chapters as well as relevant law and commentary, potential justifications for the United States’ air strikes will be framed in terms of the exceptions to the prohibition on the use of force.

The justifications will be evaluated to determine whether the conduct of the United States contributes to the development or delegitimation of international law on the use of force against terrorists. Three justifications for the use of force will be evaluated: self-defence,

⁴²⁹ Oscar Schachter ‘International Law in Theory and Practice’ in Lori Damrosch, Louis Henkin, Sean D Murphy et al (eds) *International Law Cases and Materials* 5 ed (2009) at 1176.

⁴³⁰ Kimberley N Trapp op cit note 147 at 202.

⁴³¹ Mary Ellen O’Connell op cit note 17 at 580.

⁴³² *North Sea Continental Shelf Cases* supra note 79 para 77.

⁴³³ Kimberley N Trapp op cit note 147 at 146.

⁴³⁴ Kofi A Annan ‘Two Concepts of Sovereignty’ *The Economist* 18 September 1999.

Chapter VII authorisation and the doctrine of humanitarian intervention and the Responsibility to Protect. These exceptions to the use of force will be evaluated to determine whether the United States' air strikes are justifiable in international law.

c) Self-defence

The first potential justification for the United States' air strikes against the Islamic State in Syria is the exercise of the right to self-defence. As previously stated, the right to self-defence is based both in international instruments and customary international law, as evidenced by Article 51 of the Charter and the Charter's reference to the 'inherent' right of self-defence.⁴³⁵

i) *Individual Self-defence*

Self-defence may be exercised against non-state actors under certain circumstances – the use of force by the United States against al-Qaeda in Operation Enduring Freedom was widely accepted by the international community, albeit for geopolitical reasons. Self-defence against terrorists may even be traced back to the *Caroline* incident (although the incident constitutes a less explicit example).⁴³⁶

In addition to this, state practice indicates that state attribution may not be a stringent requirement for the exercise of self-defence, although the dictum of the ICJ differs from practice.⁴³⁷ Turkey's conduct in Iraq and the United States' use of force against Sudan and Afghanistan are examples of incidences where the state attribution requirement for self-defence was absent and the conduct was not internationally condemned. These should be viewed as exceptions – the state attribution question frequently arises and where states are unable to prove state attribution, the use of force against terrorists is difficult to justify. It has been found that terrorists able to mount an armed attack may attract the exercise of the right to self-defence by the victim state – an armed attack is a key requirement for the use of force in self-defence.⁴³⁸

The requirements of necessity and proportionality have received increased attention in recent years, possibly because the international community is attempting to construct the parameters of a limited right of self-defence against terrorists. Necessity and proportionality have become central to discussions concerning lawfulness, especially when the use of force

⁴³⁵ *Charter of the United Nations* op cit note 15.

⁴³⁶ Noam Lubell op cit note 48 at 33–4.

⁴³⁷ Gregor Wettberg op cit note 55 at 25.

⁴³⁸ *Ibid* at 211.

spans over lengthy periods of time. Israel's incursions into Lebanon in 2006 are an example of an incident that attracted criticism for being disproportionate.⁴³⁹

Based on the substantive framework of the right to self-defence, as well as more recent developments (such as the use of force in Operation Enduring Freedom), the use of force in self-defence may be an available justification for the use of force against terrorists.⁴⁴⁰ Apart from ensuing state practice, the Security Council resolution following the 9/11 attacks indicated that the attacks triggered the right to self-defence.⁴⁴¹

In a letter to the Secretary-General following Iraq's request for assistance, the US representative stated that 'states must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence'.⁴⁴² For a successful self-defence justification, the United States would be required to prove that it was victim to an armed attack by the Islamic State or that it received a request for assistance from a state in pursuit of collective self-defence. The Islamic State did not attack the United States directly.⁴⁴³ IS beheaded a number of American citizens, but it is doubtful that this would meet the threshold of the 'most grave form[] of the use of force'.⁴⁴⁴ In addition to this, the beheadings by the Islamic State are likely to be insufficient in terms of the required 'scale and effects' of the attack.⁴⁴⁵ It is improbable that the United States would be able to prove that it suffered from an armed attack launched by the Islamic State.

The use of force for the protection of nationals has been justified in terms of the right to self-defence, but a restrictionist approach to the Charter precludes the use of force for the protection of nationals – the use of force is prohibited except for self-defence and Chapter VII authorisation.⁴⁴⁶ State practice confirms that the use of force in self-defence for the protection of nationals has occasionally resulted in an unnecessary or disproportionate use of force,

⁴³⁹ UN Security Council 5489th meeting, *The Situation in the Middle East* op cit note 327. Several states deemed the use of force by Israel disproportionate, including the Russian Federation (7), Argentina (9), China (11), the United Kingdom (12), Congo (13), United Republic of Tanzania (13), Slovakia (16), Greece (17) and France (17).

⁴⁴⁰ Gregor Wettberg op cit note 55 at 66.

⁴⁴¹ Security Council Resolution no 1373 (2001) op cit note 106.

⁴⁴² United Nations, *Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General* op cit note 420.

⁴⁴³ Philip J MacFarlane 'Intervention in Syria: A Law-making Moment?' 1 December 2014.

⁴⁴⁴ *Nicaragua* case supra note 50 para 191.

⁴⁴⁵ *Ibid* para 195.

⁴⁴⁶ Thomas C Wingfield 'Forcible Protection of National Abroad' (2000) 104 *Dick L Rev* 439 at 461.

rendering the use of force unlawful.⁴⁴⁷ If the United States based its justification on the protection of nationals, particularly the American citizens killed or threatened by the Islamic State, the United States' air strikes would likely be considered a disproportionate response – and the determination on disproportionality would be compounded by the probability of Syrian civilian casualties. A negative finding would likely also be found in the necessity enquiry because the air strikes were not in response to an immediate threat or armed attack.

Anticipatory self-defence may instead be relied upon if the United States can prove that an armed attack was 'imminent'.⁴⁴⁸ Imminence suggests that there is an impending armed attack. Prior to the United States' air strikes on the Islamic State in Syria, the ideology and conduct of the Islamic State did not suggest that it planned to stage attacks on the Western world in the near future.⁴⁴⁹ The ideology of Islamic State centres around the formation of the caliphate and spreading Jihadi-Salafism – although disapproving of Westerners, this showed the group to be more concerned with controlling Shi'a Muslim populations.⁴⁵⁰ Even though battles over territory for caliphate expansion have been foreseen by the Islamic State, it has 'long prioritised the Middle East over the West'.⁴⁵¹

An argument in favour of anticipatory self-defence suggests that the beheadings of American citizens and the calls for violence against the West by Islamic State leaders have changed the Islamic State tactics.⁴⁵² This is based on a future-oriented assumption – the beheadings are believed to be in retaliation to the United States' intervention against the Islamic State in Iraq and thus constitute poor evidence of an *imminent* armed attack on the United States.⁴⁵³ Attacks by the Islamic State against the Western world gained considerable momentum only *after* the United States conducted air strikes in Syria.⁴⁵⁴

⁴⁴⁷ Christine Gray op cit note 158 at 127–29. Gray notes various incidents where forcible conduct was employed for the protection of nationals which has been disproportionate or unnecessary, including United States interventions in Grenada and Panama in 1983 and 1990 respectively.

⁴⁴⁸ Christine Gray op cit note 52 at 628.

⁴⁴⁹ Cole Bunzel op cit note 7 at 36.

⁴⁵⁰ Ibid at 10–11.

⁴⁵¹ Ibid at 36.

⁴⁵² Ibid.

⁴⁵³ Simone Molin Friis "'Beyond anything we have ever seen': Beheading videos and the visibility of violence in the war against ISIS' (2015) 91:4 *International Affairs* 725 at 725.

⁴⁵⁴ Woodrow Wilson International Center for Scholars op cit note 3. Also see Karen Yourish, Derek Watkins & Tom Giratikanon 'Where ISIS has Directed and Inspired Attacks around the World' *The New York Times* 22 March 2016.

It is plain that while an attack may be staged by the Islamic State in the future, the United States would have difficulty proving that an attack was imminent and that it was acting in anticipatory self-defence. The use of force in self-defence based on the future possibility of attack or as a precautionary measure is impermissible in international law – pre-emptive self-defence is unlawful and would not be justifiable.⁴⁵⁵

Although individual and anticipatory self-defence are unlikely to succeed as justifications for the use of force by the United States (based on the absence of an armed attack on the United States, actual or imminent), collective self-defence or the controversial ‘unwilling or unable doctrine’ require consideration.

ii) Collective Self-defence

Collective self-defence is justifiable if a state requests assistance – consent for the use of force on another state’s territory is mandatory for the exercise of collective self-defence.⁴⁵⁶ Collective self-defence requires an armed attack, a declaration of the armed attack by the victim state and an invitation to assist⁴⁵⁷ – the request for assistance should be express.⁴⁵⁸

The United States responded to Iraq’s request for forcible assistance; Iraq claimed that it was a victim of an armed attack and that the Islamic State represented a threat to it.⁴⁵⁹ Iraq’s invitation to assist complies with the requirements of collective self-defence – Iraq suffered from incursions of sufficient gravity to constitute an armed attack; it declared itself a victim of the attack; and it requested assistance from the United States. The use of force by the United States in the territory of Iraq would be permitted if analysed in terms of the principles of collective self-defence elucidated by the ICJ.⁴⁶⁰ The United States based its forcible conduct in Syria on Iraq’s request for assistance.⁴⁶¹

⁴⁵⁵ Report of the Secretary-General’s High-level Panel on Threats, Challenges and Change op cit note 128.

⁴⁵⁶ This principle was recognised in the International Law Commission *Draft Articles on Responsibility of States for Internationally Wrongful Acts* op cit note 65 at Article 20; and in the UN General Assembly *Definition of Aggression* op cit note 143 at Article 3(e). Also see Oscar Schachter ‘The Right of States to Use Armed Force’ op cit note 139 at 1645.

⁴⁵⁷ *Nicaragua* case supra note 50 para 199.

⁴⁵⁸ *Ibid* at 232.

⁴⁵⁹ United Nations *Letter dated 22 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General* op cit note 417.

⁴⁶⁰ *Military and Paramilitary Activities in and against Nicaragua* supra note 50 para 199. Also see Christian Henderson op cit note 422 at 215.

⁴⁶¹ United Nations, *Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General* op cit note 420.

The ICJ delivered useful dictum on this in the *Nicaragua* case:

There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.⁴⁶²

Based on the Court's judgment and on principles of non-intervention in international law, the United States could exercise collective self-defence in Syria's territory on behalf of Iraq only if Iraq had the right to use force against Syria.⁴⁶³ Iraq would have difficulty proving the state attribution link required to justify self-defence against Syria. The Syrian government is openly opposed to IS and has distanced itself from the terrorist group. As a result, it would be unlawful for the United States to use force against Syria on behalf of Iraq as it would likely be unlawful for Iraq to use force against Syria in self-defence.

In addition to the above, the Assad regime did not consent to the use of force in Syria. The United States and the Assad regime have been mutually hostile since the United States recognised the National Coalition of Syrian Revolutionary and Opposition Forces as the legitimate leaders of Syria in 2012.⁴⁶⁴ Commentators have suggested that the United States may have received a request for intervention by opposition forces.⁴⁶⁵ However, since these opposition forces are numerous, disparate and face accusations of crimes against humanity, it would be difficult for the United States to prove that a credible and lawful request for assistance was received.⁴⁶⁶ Since the United States has not received a request from the Syrian government for intervention, it would be unable to justify its use of force in Syria on the basis of Syria's consent.

There is a final aspect of self-defence which may justify the use of force by the United States against the Islamic State, but the doctrine is contemporary and highly controversial.⁴⁶⁷ The 'unwilling or unable doctrine' was described in Part I – in the event that a state is unwilling or unable to suppress terrorist threats itself, another state may intervene.⁴⁶⁸ The contentious nature of the doctrine was illustrated and, although the doctrine may not form part of customary

⁴⁶² *Nicaragua* case supra note 50 para 195.

⁴⁶³ *Ibid* para 195.

⁴⁶⁴ Mark Landler, Michael R Gordon & Anne Barnard op cit note 427.

⁴⁶⁵ Philip J MacFarlane op cit note 443 at 8.

⁴⁶⁶ *Ibid*.

⁴⁶⁷ Christian Henderson op cit note 422 at 215.

⁴⁶⁸ Ashley Deeks "'Unwilling or Unable': Toward a Normative Framework for Extraterritorial Self-defence' op cit note 144 at 486.

international law,⁴⁶⁹ it will be evaluated against the facts to determine whether the United States' air strikes against the Islamic State in Syria could be justified by the unwilling or unable doctrine.

iii) The Unwilling or Unable Doctrine

The 'unwillingness' of a state to combat terrorist forces within its territory ranges from tolerance to active participation in terrorist activities; 'unable' refers to a state's unitary inability to combat terrorist forces within its territory.⁴⁷⁰ Despite the ambiguous content of the doctrine, the government of Syria must be unwilling or unable to combat IS in order for the United States to justify its conduct in terms of the doctrine. It appears that this is a ground the United States relied on to justify the air strikes conducted in Syria.

In a letter from the United States representative Samantha Power to the United Nations Secretary-General, the United States justified its use of force detailed in the Article 51 self-defence exception on the basis of the unable and unwilling doctrine:

States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.⁴⁷¹

This statement was delivered by the United States, despite declarations from the Syrian Foreign Minister that Syria was 'ready to cooperate and coordinate on the regional and international level'⁴⁷² and that the exercise of forcible measures by the United States without Syria's permission would be regarded as aggression.⁴⁷³ The statement from the Syrian Foreign Minister indicates an overt willingness to defeat the Islamic State, which is supported by Syria's conduct against the Islamic State in the civil war. In terms of the Syrian government's ability, however, it is unclear whether the state is *able* to defeat the Islamic State and it is uncertain how a state would make this determination unilaterally. The Islamic State took control of large swathes of Syrian territory and major cities in 2014, indicating that the Syrian government was struggling

⁴⁶⁹ This dissertation does not seek to make a determination on whether the unwilling or unable doctrine constitutes customary international law.

⁴⁷⁰ Gregor Wettberg op cit note 55 at 19.

⁴⁷¹ United Nations, *Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General* op cit note 420.

⁴⁷² Justin Sink op cit note 426.

⁴⁷³ Associated Press in Beirut 'Syria offers to help fight ISIS but warns against unilateral air strikes' *The Guardian* 26 August 2014.

to restrain its expansion.⁴⁷⁴ This may indicate a degree of Syria's inability to defeat the Islamic State, although this too is controversial.

Notwithstanding Syria's apparent willingness to coordinate efforts to defeat the Islamic State, a United States State Department spokesperson asserted that the United States was not looking for the approval of Assad's regime.⁴⁷⁵ When a territorial state is willing to coordinate, but a victim state is not willing to coordinate and gain consent for the use of force, it is uncertain whether the unwilling or unable doctrine is available.⁴⁷⁶ It is unlikely that the United States could rely on the unwilling or unable doctrine without proving at least one of the elements of the controversial doctrine.⁴⁷⁷

In addition to this, since the unwilling or unable doctrine is informed by the doctrine of self-defence, the requirements for the lawful exercise of self-defence must be satisfied if the doctrine is to be relied on. It was demonstrated above that the requirements for individual and collective self-defence were not satisfied – the threshold of armed attack was not met and consent for the use of force in collective self-defence was not obtained. As a result, despite the precarious nature of the doctrine, the unwilling or unable doctrine in the context of self-defence could not justify the United States' air strikes against the Islamic State in Syria.

The self-defence exception to the use of force is the most commonly utilised justification by states, arguably because the political environment eradicates other potential justifications.⁴⁷⁸ Various aspects of the self-defence exception were explored above, including individual self-defence, the protection of nationals, anticipatory self-defence, collective self-defence and the unwilling or unable doctrine. The United States' air strikes against the Islamic State in Syria failed to meet the required thresholds of any of these defences, indicating that reliance on the self-defence exception would be an unlawful justification for the use of force against Syria.

⁴⁷⁴ Woodrow Wilson International Center for Scholars op cit note 3.

⁴⁷⁵ Justin Sink op cit note 426.

⁴⁷⁶ Christian Henderson op cit note 422 at 217.

⁴⁷⁷ United Nations, *Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General* op cit note 420.

⁴⁷⁸ Gregor Wettberg op cit note 55 at 69.

d) Chapter VII Authorisation

The Security Council may authorise the use of forcible measures by states in terms of Chapter VII of the Charter, which would constitute a justification for the United States' air strikes against the Islamic State in Syria.⁴⁷⁹ The Security Council did not do so.

In 2014 the Security Council passed various resolutions on a range of matters pertaining to terrorism, calling on parties to commit to preventing the availability of funding to terrorist groups,⁴⁸⁰ preventing terrorist activities,⁴⁸¹ condemning terrorism in 'all its forms and manifestations',⁴⁸² condemning the 'violent ideology' of the Islamic State⁴⁸³ and urging members to 'take all measures as necessary and appropriate and in accordance with their obligations under international law' to prevent Islamic State activities.⁴⁸⁴ None of these resolutions mentioned that states may take 'all necessary means', which denotes authorisation for the use of force.⁴⁸⁵ Owing to the absence of a resolution authorising force, Security Council authorisation for the use of force cannot justify the use of force by the United States against the Islamic State in Syria.

e) The Doctrine of Humanitarian Intervention and the Responsibility to Protect

Another possible exception to the prohibition on the use of force is that of humanitarian intervention – the forcible intervention by a state with the objective of protecting human rights.⁴⁸⁶ A comprehensive overview of the doctrine was provided in Chapter I, but a summary of important aspects follows in order to determine whether the doctrine and the R2P constitute a justification for the United States' use of force in Syria.

As stated above, the NATO intervention in Kosovo was justified by the need for a humanitarian intervention. Although international approval was not forthcoming, attempts at securing a Security Council resolution condemning the action failed.⁴⁸⁷ The Kosovo Report concluded that the 'NATO campaign was illegal, yet legitimate'.⁴⁸⁸

⁴⁷⁹ *Charter of the United Nations* op cit note 15 at Article 27.

⁴⁸⁰ Security Council Resolution no 2133 (2014), adopted by the Security Council at its 7101st meeting.

⁴⁸¹ Security Council Resolution no 2139 (2014) op cit note 390.

⁴⁸² Security Council Resolution no 2165 (2014), adopted by the Security Council at its 7216th meeting.

⁴⁸³ Security Council Resolution no 2170 (2014) op cit note 391.

⁴⁸⁴ *Ibid.*

⁴⁸⁵ Christine Gray op cit note 52 at 636.

⁴⁸⁶ *Ibid* at 621.

⁴⁸⁷ *Ibid* at 622.

⁴⁸⁸ Independent International Commission on Kosovo 'The Kosovo Report: Conflict, International Response, Lessons Learned' op cit note 168 at 186.

Unilateral humanitarian intervention has not garnered widespread international support and has been characterised as ‘ongoing and complex’.⁴⁸⁹ There has instead been a move towards the ‘Responsibility to Protect’ (‘R2P’), referring to the responsibility of states to protect nationals from other states when a state fails to protect its own nationals.⁴⁹⁰ This principle was developed following recognition that provision for humanitarian intervention may be necessary.⁴⁹¹ The Security Council has the duty to authorise such intervention and the importance of the Security Council’s role was reiterated in the Secretary-General’s Report in 2009.⁴⁹²

Applied to the present case, the United States did not justify its use of force on the basis of a humanitarian intervention. Instead the United States limited the scope of its protection to Iraqi citizens – the letter from the United States representative did not mention the protection of Syrians.⁴⁹³ Despite this and the controversial nature of these doctrines, the Responsibility to Protect and the doctrine of humanitarian intervention will be applied to the present case to determine whether it *could* justify the United States’ air strikes.

The Responsibility to Protect would not justify the United States’ air strikes against the Islamic State in Syria because one of the interpreted R2P requirements is the need for Security Council authorisation.⁴⁹⁴ Security Council negotiations failed to produce a resolution that authorised states to use force in Syria under the Responsibility to Protect in 2012, with some commentators labelling the Security Council inaction the ‘death knell’ for R2P.⁴⁹⁵ In 2014, Security Council resolution 2165 reaffirmed Syria’s responsibility to protect but did not authorise states to enforce this responsibility.⁴⁹⁶ Due to the inaction of the Security Council, the United States cannot rely on the Responsibility to Protect as justification for its conduct against the Islamic State in Syria.

⁴⁸⁹ Noam Lubell op cit note 48 at 28.

⁴⁹⁰ Christine Gray op cit note 52 at 623.

⁴⁹¹ International Commission on Intervention and State Sovereignty op cit note 78 at VII.

⁴⁹² UN General Assembly, *Implementing the Responsibility to Protect, Report of the Secretary-General* op cit note 174 para 11.

⁴⁹³ United Nations, *Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General* op cit note 420.

⁴⁹⁴ International Commission on Intervention and State Sovereignty op cit note 78 para 6.15. The ICISS states that ‘Security Council authorisation must in all cases be sought prior to any military intervention action being carried out’.

⁴⁹⁵ Saira Mohamed ‘Syria, the United Nations and the Responsibility to Protect’ (2012) 106 *Am Soc’y Int’l L Proc* 223 at 225.

⁴⁹⁶ Security Council Resolution no 2165 (2014) op cit note 482.

The scope of the doctrine of humanitarian intervention remains uncertain and, without the guidance of a clear framework, a ‘factor-based analysis’ should be conducted.⁴⁹⁷ Following the chemical attacks in Syria in 2013, the United Kingdom government suggested three criteria to support intervention on a humanitarian basis.⁴⁹⁸ These included evidence of ‘extreme humanitarian distress on a large scale’, an absence of alternatives to the use of force and a necessary and proportionate use of force.⁴⁹⁹ In addition to the criteria suggested by the United Kingdom,⁵⁰⁰ commentators have suggested that other criteria are relevant, such as the extensive loss of life, the ‘ongoing nature’ of the violence and the exhaustion of diplomatic avenues.⁵⁰¹

Although not directly applicable, the International Commission on Intervention and State Sovereignty (ICISS) suggested that the following six criteria be considered when deliberating over military intervention in terms of R2P: ‘right authority, just cause, right intention, last resort, proportional means and reasonable prospects’.⁵⁰² Although the doctrine of humanitarian intervention and R2P are distinct, these criteria provide useful guidance and may be applied to the present enquiry involving the doctrine. Just cause, right intention, last resort and proportional means especially are relevant factors to determining whether humanitarian intervention is justifiable. These factors will be tested in the context of the United States’ use of force against the Islamic State.

At the time of the United States’ air strikes, Syria was embroiled in a civil war – an estimated 76 000 people died in the civil war in 2014 alone.⁵⁰³ Torture, unlawful detention, refusal of access for humanitarian purposes and mass executions are some of the many human rights violations perpetrated in the Syrian civil war.⁵⁰⁴ On the basis of criteria suggested, there is evidence of ‘extreme humanitarian distress’, the first of the United Kingdom’s three proposed conditions. This is supported by the enormous loss of life, the gross violations of human rights and a growing refugee crisis, worsened by the ongoing nature of the violence. The Islamic State played a significant role in creating these conditions and usurping its power

⁴⁹⁷ Philip J MacFarlane op cit note 443 at 22.

⁴⁹⁸ United Kingdom Prime Minister’s Office, *Chemical weapon use by Syrian regime: UK government legal position* op cit note 186.

⁴⁹⁹ Ibid.

⁵⁰⁰ Ibid.

⁵⁰¹ Julie Mertus ‘Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo’ (2000) 41 *Wm & Mary L Rev* 1743 at 1780.

⁵⁰² International Commission on Intervention and State Sovereignty op cit note 78 at 32.

⁵⁰³ Rick Gladstone & Mohammad Ghannam ‘Syria Deaths Hit New High in 2014, Observer Group Says’ *The New York Times* 1 January 2015.

⁵⁰⁴ International Coalition for the Responsibility to Protect ‘The Crisis in Syria’ (2015) *Responsibility to Protect*.

would likely result in the protection of human rights. It would appear that terrorism, exacerbated by a civil war, constitutes a just cause for humanitarian intervention in Syria on the basis of human suffering and distress.

The United States would be less successful in satisfying the second condition – proving that no alternatives to the use of force exist. Forcible measures should be the last resort, which is a doubtful supposition in this case since the Assad government expressed a willingness to coordinate.⁵⁰⁵ An example of an alternative to force is diplomatic negotiations and, seemingly, diplomatic alternatives were not attempted.⁵⁰⁶

In addition to this, although the legal reasons proffered by the United States for the use of force against the Islamic State in Syria were ambiguous, an inference to humanitarian intervention as justification for the air strikes is absent. This, coupled with the fraught political relations between the United States and the Assad regime, suggests that the United States would lack the ‘right intention’ for a humanitarian intervention.

Despite failing to satisfy some of the most basic proposed criteria for a humanitarian intervention, some commentators believe that the United States could justify the air strikes on the basis of this doctrine.⁵⁰⁷ This belief is based on the notion that the reliance on humanitarian intervention could enable the United States to advance the doctrine through state practice.⁵⁰⁸

As previously stated, it is important that international law on the use of force evolves to meet new challenges in order to maintain relevance.⁵⁰⁹ The doctrine of humanitarian intervention is highly controversial and a commentator has expressed that ‘it is extremely doubtful whether state practice supports [the doctrine]’.⁵¹⁰ Due to the controversy surrounding the existence of the doctrine and general uncertainty regarding the content of the doctrine, a state would have to present a persuasive case to justify conduct on the basis of humanitarian intervention. In order to tender a compelling case, all possible requirements for the doctrine should be satisfied.

The United States’ air strikes against the Islamic State in Syria do not fulfil even rudimentary criteria allowing the use of force for humanitarian reasons – the use of force was neither the last resort, nor was it necessary and proportionate based on ensuing civilian

⁵⁰⁵ Justin Sink op cit note 426.

⁵⁰⁶ Philip J MacFarlane op cit note 443 at 23.

⁵⁰⁷ Philip J MacFarlane ibid at 24; Michael N Schmitt op cit note 172 at 755.

⁵⁰⁸ Philip J MacFarlane ibid at 25.

⁵⁰⁹ Oscar Schachter ‘International Law in Theory and Practice’ op cit note 429 at 1176.

⁵¹⁰ Christine Gray ‘The use of force for humanitarian purposes’ op cit note 175 at 229 and 237.

casualties. The United States' conduct against Syria would constitute a poor platform for the development of the doctrine of humanitarian intervention, and would stretch the bounds of international law – perhaps unlawfully so. After analysis of the doctrine and the principle of Responsibility to Protect, it is likely that both would fail as justifications for the United States' use of force against the Islamic State in Syria.

f) Chapter Synopsis

The background to the United States' air strikes against the Islamic State in Syria was elucidated by discussing Syria's history, with an emphasis on the circumstances leading to the civil war and the emergence of the Islamic State. Although the Islamic State has been operative since 2006, the group gained prominence as one of the key opposition forces to the Assad regime in the Syrian civil war. Despite early allegiance to al-Qaeda (which shares a similar ideology of Salafi-Jihadism with the Islamic State), the Islamic State later declared independence and the formation of the caliphate, central to Islamic State ideology.

The Islamic State became a growing threat in the Middle East and, in response, Iraq requested the United States' assistance in defeating the Islamic State. The United States complied with this request but included Syria in its scope of attack, raising questions of lawfulness in international law. Three justifications were analysed to determine whether the United States' air strikes against the Islamic State in Syria were lawful in international law on the use of force. Self-defence, Chapter VII authorisation and the doctrine of humanitarian intervention and the Responsibility to Protect were applied to the present case, none of which provided adequate justification for the United States' use of force.

CONCLUSION

At the outset, the substantive framework of the use of force in international law was discussed. This discussion traced the history of the use of force from St Augustine's just war doctrine to the Charter's Article 2(4) prohibition of the use of force. The scope of Article 2(4) was canvassed and exceptions to the prohibition of the use of force were outlined. Exceptions include self-defence, Chapter VII authorisation, and the doctrine of humanitarian intervention and the Responsibility to Protect.

After establishing the substantive framework of the use of force, this dissertation outlined international law on the use of force against terrorists. Difficulties associated with defining terrorism were described, which proved to be problematic since definitions assist with establishing the parameters of subject matter. A framework definition was adopted for the purpose of this dissertation, after which counterterrorism was examined. Counterterrorism in the international, regional and national sphere was outlined, leading to the observation that the general approach to formal counterterrorism efforts is fragmented. In addition to the absence of a settled definition of terrorism, an overarching convention addressing terrorism has not been adopted and states have confronted terrorism in a myriad of ways.

Despite the disparate approaches to terrorism in the formal counterterrorism domain, the use of force against terrorism has been developed through state practice. State responses to terrorism were described in the pre-9/11 period and after Operation Enduring Freedom. The impact of 9/11 on the use of force against terrorists was perceptible and several counterterrorism trends emerged. A restrictive interpretation of the use of force dominated responses to the use of force against terrorists prior to the events of 9/11. This changed after the United States utilised forcible measures against al-Qaeda in Afghanistan in 2001. Cases involving the use of force against terrorists in the period following 9/11 are generally characterised by a more robust interpretation of the use of force against non-state actors and a more willing acceptance of the military approach towards terrorism by the international community. Elucidating counterterrorism trends was important in order to determine the current status of international law on the use of force against terrorists.

Finally, the United States' air strikes against the Islamic State in Syria were examined. The background to the conflict in Syria was explained, tracing the Syrian civil war back to the historical instability of Syria and the authoritarian regime of President Bashar al-Assad. The Syrian civil war and the re-emergence of the Islamic State coincided in 2011 when the Islamic State became a key opposition force to the Assad regime and other rebel groups. This culminated in the United States' air strikes against the Islamic State in Syria, following which questions concerning the lawfulness of the use of force by the United States against the Islamic State in Syria abounded.

Concepts of self-defence, Chapter VII authorisation, and the doctrine of humanitarian intervention and the Responsibility to Protect were applied to the United States' use of force against the Islamic State in Syria to determine whether any of these exceptions to the use of force justify the United States' conduct. The forcible measures employed by the United States failed to satisfy the requirements of the various exceptions. As a result, the use of force by the United States did not comply with or develop principles related to the use of force in international law. Instead, forcible measures by the United States against the Islamic State in Syria were found to be unlawful and constitute a breach of international law on the use of force.

Professor Thomas M Franck asserted that, where the interests of a state conflict with an international legal norm, 'it is the latter which will bend and break'.⁵¹¹ This has been illustrated by the present case – the United States' interests conflicted with the Article 2(4) prohibition on the use of force and the latter has been bent and broken.

In 1970, Franck posed a question concerning states' approach to Article 2(4) that perhaps holds even more relevance today: 'Having violated [Article 2(4)], ignored it, run roughshod over it, and explained it away, can they live without it?'⁵¹²

⁵¹¹ Thomas M Franck 'Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States' *op cit* note 1 at 837.

⁵¹² *Ibid* at 810.

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