



2-1-2018

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The Use of Force Against Perpetrators of International Terrorism

Dr. Waseem Ahmad Qureshi[†]

ABSTRACT:

The Islamic State of Iraq and Syria (ISIS), also known as Islamic State of Iraq and the Levant (ISIL), emerged in 2014 from a faction of Al-Qaeda and captured portion of territories of Iraq and Syria. Since then, it has generated serious threats to the security of the United States and European, Asian, and Middle Eastern countries. In response, the threatened states have the right to use force in self-defense as guaranteed by Article 51 of the UN Charter. However, uncertainties arise related to the legality of the use of force against ISIS, because the stronger factions of this group are residing in Syrian territory and military operations by the U.S. against ISIS will imply the use of force within Syrian territory, which may constitute an infringement of its sovereignty. Nonetheless, the sovereignty of the Syrian state has already been violated when ISIS captured part of Syria. Furthermore, Syria has also failed to fulfill its responsibility to protect its citizens from grave human rights violations committed by ISIS. This leads to the possibility that the Syrian state might be unwilling or unable to counter and terminate the ISIS threat. Hence, this situation invites the application of the “unwilling or unable test” to justify the use of force against ISIS within Syrian territory; however, the legality of this consequence is arguable and uncertain. Furthermore, the UN Charter also does not provide guidance regarding an armed conflict between a non-state actor, i.e., ISIS, and a state, i.e., the United States, within another state, i.e., in Syria. Therefore, if the threat is still overlooked by the UN or the international community, then there are chances that the threat-affected states may become involved in proxy wars for the protection of their security and interests.

Keywords: Article 51, Responsibility to Protect (R2P), nonstate actors (NSA), self-defense, use of force, unwilling or unable test.

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I. INTRODUCTION

United Nations General Assembly Resolution 40/61 of December 9, 1985, “[u]nequivocally condemns all acts, methods, and practices of terrorism wherever and by whoever committed including those which jeopardize friendly relations among states and their security.”¹ However, there is confusion in international law concerning the use of force in response to an armed terrorist attack waged by a non-state actor against one state from the territory of another state. The terrorist assaults by ISIS on EU countries and other regions are the most recent examples of such an armed terrorist attack. ISIS occupied Mosul, border regions of Syria, and almost the entirety of northern Iraq in June 2014 and has developed a rudimentary governance system in the territories it has captured in the Levant.² Its pursuit to gain control and use force is much more extreme than anything ever before exhibited by other jihadist groups, and it poses a major threat to regional as well as international peace and security.³

The UN Charter clearly recognizes the inherent right of states’ individual or collective self-defense. The right of self-defense is inherent in natural law⁴ and is limited by the customary principles of imminence, necessity, and proportionality. It is regulated by Article 51 of the Charter.⁵

However, if a state is attacked by non-state actors operating from another state, then this restricts the use of force in self-defense for the victim state until the other state fulfills its state responsibility. As per the principle of state responsibility, not only are all states required to protect their own citizens from human rights violations and atrocities of non-state actors, but they are also under an obligation to ensure that no armed threat from their territory is launched by such non-state actors against other states.⁶

¹ G.A. Res. 40/61, ¶ 1 (Dec. 9, 1985).

² MALCOLM RUSSELL, *THE MIDDLE EAST AND SOUTH ASIA* 163 (48th ed. 2014).

³ ANDERS JÄGERSKOG & ASHOK SWAIN, *EMERGING SECURITY THREATS IN THE MIDDLE EAST* 23-24 (2016).

⁴ DEREK W. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 150-152 (1958); see also Anthony D’Amato, *Israel’s Air Strike upon the Iraqi Nuclear Reactor*, 77 AM. J. INT’L L. 584-585, 584 (1983); see also: ADEMOLA ABASS, *REGIONAL ORGANIZATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY* 129 (2004).

⁵ MURRAY C. ALDER, *THE INHERENT RIGHT OF SELF-DEFENSE IN INTERNATIONAL LAW* 79 (2013).

⁶ Int’l Law Comm’n. Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/49, at 2 (2001),

http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

The United States launched airstrikes against al-Qaeda and ISIS targets in Syria but it is pertinent to mention that the US was never asked by the Syrian government to attack those non-state actors in its territory. As far as the airstrikes on Iraq are concerned, they are justified because the Iraqi government itself asked for military intervention to tackle the threat of non-state actors in its territory. So the military operations in Syria were not legal because they lacked the consent of the Syrian government and were not even approved by the UN Security Council.

This Article argues that the unwilling or unable rationale does not fulfill the standard conditions of right of self-defense and concludes that said rationale is a new norm of *jus ad bellum* in the making and is the best option for the victim state in order to combat non-state actors.⁷

This Article will set out the complexities related to the legal frameworks for the use of force against non-state actors. In this regard, the first section of this Article will set out the threat posed by ISIS to the United States and, more particularly, Europe in the wake of recent terror attacks by ISIS in Paris and other EU cities. The inadequacy of international law in defining possible countermeasures to protect states from ISIS and similar terrorist groups will be discussed in the second section, along with the responsibilities applied by international law on every sovereign state. The third section includes an elaboration of humanitarian law, and the fourth section includes an explanation of the recently emerged “unwilling or unable test framework” and an application of it to ISIS.

II. THE ISIS THREAT

A. *Emergence of ISIS*

In chaos-stricken Syria in 2014, Al-Qaeda’s rival jihadi group, ISIS (the Islamic State of Iraq and Syria), also called ISIL (the Islamic State of Iraq and the Levant),⁸ managed to capture a significant portion of territory in Syria and established a capital at al-Raqqah.⁹ The same year, in June, it occupied lands in Northern Iraq and Syria and, then, developed a

⁷ Hereinafter “non-state actor(s)” will shorthand referred to as NSA(s).

⁸ JOHN MUELLER & MARK STEWART, CHASING GHOSTS: THE POLICING OF TERRORISM 45 (2016).

⁹ CHARLES CARIS & SAMUEL REYNOLDS, INST. FOR THE STUDY OF WAR, MIDDLE E. SEC. REP. 22- ISIS GOVERNANCE IN SYRIA 4 (2014).

makeshift rule in the territories it captured in the Levant region.¹⁰ The representativeness of this new “government” is a matter of immense debate, especially considering the fact that the group primarily uses force to gain territory.

ISIS operates under a doctrine of total war, often engaging in beheadings and gruesome murders.¹¹ In this context, it is morally and legally permissible for the international community to respond to the massive violations of human rights committed by ISIS. While the Iraqi government itself has sought help from the international community, external intervention in Syria seems quite problematic.¹² The two main arguments that the proponents of intervention advance are based on the premise that action in Syria is necessary for the collective self-defense of Iraq, Syria, and the U.S. from the threats posed by ISIS.¹³ Furthermore, in contexts such as this, the “responsibility to protect” may be invoked to safeguard the citizens of Syria, Iraq, and connected Levant regions from facing violations of human rights. Since 2012, Syria has seen approximately 400,000 deaths,¹⁴ half of which have been in 2014, indicating the high magnitude of human rights violations that have occurred in this region in a very short tenure.¹⁵ The majority of these atrocities have allegedly been committed by ISIS, which in total has up to an estimated 30,000 militants.¹⁶

With such a high number of trained and armed terrorists, ISIS is disseminating chaos and fear in the Levant region and challenging the very authority of the Iraqi and Syrian governments, and is planning to extend this fear toward

¹⁰ *Islamic State and the Crisis in Iraq and Syria in Maps*, BBC (Oct. 21, 2017), <http://www.bbc.com/news/world-middle-east-27838034>.

¹¹ JESSICA STERN & J. M. BERGER, *ISIS: THE STATE OF TERROR* (2015).

¹² HELEN DUFFY, *THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW* 308 (2015).

¹³ DAVID FRENCH, JAY SEKULOW, JORDAN SEKULOW, & ROBERT W. ASH, *RISE OF ISIS: A THREAT WE CAN’T IGNORE* (2014).

¹⁴ John Hudson, *U.N. Envoy Revises Syria Death Toll to 400,000*, FOREIGN POLICY (Apr. 22, 2016), <http://foreignpolicy.com/2016/04/22/u-n-envoy-revises-syria-death-toll-to-400000/>.

¹⁵ RAMESH THAKUR & WILLIAM MALEY, *THEORISING THE RESPONSIBILITY TO PROTECT*, 169 (2015).

¹⁶ HANS BINNENDIJK, *FRIENDS, FOES, AND FUTURE DIRECTIONS: U.S. PARTNERSHIPS IN A TURBULENT WORLD*, 100-150 (Rand Corporation, 2016); see also Richard Norton, *Up To 30,000 Foreign Fighters Have Gone to Syria and Iraq Since 2011 – Report*, GUARDIAN (November 17, 2015), <http://www.Theguardian.com/world/2015/nov/17/20000-foreign-fighters-syria-iraq-2014-terrorism-report>.

America and European countries.¹⁷ It has claimed responsibility for the terror attacks in Paris,¹⁸ Istanbul, and Ankara,¹⁹ and at Brussels Airport,²⁰ which took place in 2016 and caused the deaths of several innocent civilians. In addition to threatening non-Muslim states with hostile circumstances detrimental to their peace and security, it has also issued threats to Muslim²¹ states who do not submit to ISIS's ideology.

B. Threat to International Peace and Security

As mentioned above, ISIS is a threat not just to Syria and Iraq (and their people) but also to the global community²² and thus armed intervention against ISIS in the Levant will simply be an exercise in self-defense. ISIS has issued threats related to launching direct attacks on the international community. ISIS leader Al-Adnani uploaded a video speech that included a direct threat:

*O Americans, and O Europeans, the Islamic State did not initiate a war against you, as your governments and media try to make you believe.... You will pay the price when your economies collapse. You will pay the price when your sons are sent to wage war against us and they return to you as disabled amputees, or inside coffins, or mentally ill. You will pay the price as you are afraid of traveling to any land.... You will not feel secure even in your bedrooms. You will pay the price when this crusade of yours collapses, and thereafter we will strike you in your homeland, and you will never be able to harm anyone afterwards. You will pay the price, and we have prepared for you what will pain you.*²³

In another instance, he directed his subordinates to launch attacks on European and American civilians as well as on other countries:

¹⁷ DAVID RUDENSTINE, *THE AGE OF DEFERENCE* 20 (2016).

¹⁸ ERSEL AYDINLI, *VIOLENT NON-STATE ACTORS: FROM ANARCHISTS TO JIHADISTS* 145 (2016).

¹⁹ DENIZ EROGLU, IBRAHIM SIRKECI, & JEFFREY COHEN, *TURKISH MIGRATION 2016 SELECTED PAPERS* 280 (Eroglu et al. eds. 2016).

²⁰ DAVID ORLO, *THE JERUSALEM PROTOCOL* (2016).

²¹ TAMARA SONN, *ISLAM: HISTORY, RELIGION, AND POLITICS* 178 (2016).

²² French, *supra* note 13; see also Kinga Tibori-Szabó, *The 'Unwilling or Unable' Test and the Law of Self-defense*, in *FUNDAMENTAL RIGHTS IN INTERNATIONAL AND EUROPEAN LAW* 94 (Christophe Paulussen, Ben Van Rompuy, Tamara Takács, & Vesna Lazi eds., 2015).

²³ ROBERT SPENCER, *THE COMPLETE INFIDEL'S GUIDE TO ISIS*, Chpt. 2 (2015).

If you can kill a disbelieving American or European, especially the spiteful and filthy French, or an Australian, or a Canadian, or any other disbeliever from the disbelievers waging war, including the citizens of the countries that entered into a coalition against the Islamic State [ISIS], then rely upon Allah, and kill him in any manner or way however it may be. Do not ask for anyone's advice and do not seek anyone's verdict. Kill the disbeliever whether he is civilian or military, for they have the same ruling. Both of them are disbelievers.... Both of their blood and wealth is legal for you to destroy, for blood does not become illegal or legal to spill by the clothes being worn.²⁴

In response to the U.S.-led coalition against ISIS, Al-Adnani re-issued the warning to the United States by stating that it would be the last campaign of the United States because it would not survive after the campaign.²⁵ He also threatened to raid the United States after the operation against ISIS:

[W]e will raid you thereafter, and you will never raid us.²⁶

These speeches point toward the direct threat that looms over the citizens of America, Europe, the Levant, and other countries, as is evident from the recent attacks by ISIS in Paris, Ankara, Istanbul, and other cities, which claimed the lives of many civilians, further indicating how deeply the ISIS threat has penetrated into European countries.

Furthermore, it is pertinent to mention here that ISIS spreads terror worldwide by using the internet, i.e., it uploads terrifying videos of its barbaric atrocities on public forums, e.g., YouTube, to terrorize the masses.²⁷ It uploaded the videos of the beheadings of American journalists Steven Sotloff and James Foley in August and September 2014, the setting on fire and killing of Jordanian Air Force pilot Moath Kasasbeh, and the

²⁴ HASSAN HASSAN & MICHAEL WEISS, *ISIS: INSIDE THE ARMY OF TERROR* 263 (2016); *see also* BRIGITTE NACOS, *TERRORISM AND COUNTERTERRORISM* 28 (2016); *see also* JOHN STAPLETON, *TERROR IN AUSTRALIA: WORKERS' PARADISE LOST* (2015).

²⁵ *Id.*; *see also* DAVID COOK, *UNDERSTANDING JIHAD* 241 (2015).

²⁶ *Id.*

²⁷ MAJEED KHADER, *COMBATING VIOLENT EXTREMISM AND RADICALIZATION IN THE DIGITAL ERA* 34 (2016); *see also* MALCOLM NANCE, *DEFEATING ISIS: WHO THEY ARE, HOW THEY FIGHT, WHAT THEY BELIEVE* 384 (2016).

execution of Japanese journalist Kenji Goto,²⁸ as well as the enslaving and selling of Iraqi children, the killings of Muslim scholars who refused to submit to ISIS leaders, the abduction and rape of girls in Syria and Iraq, and the killings of non-Muslims and Shias in the Levant region after kidnapping and torturing them; yet these are only some of the instances of inhuman brutality of ISIS.²⁹ ISIS also uses social networking websites including Twitter and Facebook to promote its specific hashtags for spreading terror. Such actions have terrified the global international community as the threats are not targeted to a specific country but to all of the international community.³⁰

The question arises here is whether international law actually permits the use of force against an NSA, i.e., ISIS, within or near the territory of another sovereign state, i.e., Syria? A number of contemporary scholars and policymakers contend that, since the rules on the use of force in the United Nations Charter are inadequate to deal with today's problems, particularly since the 9/11 terrorist attacks, the use of force becomes necessary in certain instances as a self-defense mechanism.³¹ Nonetheless, it is a matter of fact that the U.S. and other countries can play an important role in preventing attacks from ISIS and in curbing the ISIS threat permanently by sharing intelligence and using force against ISIS as it will directly harm its power.³² Deeming this to be anticipatory and preventive self-defense and working in response, the U.S. and some other EU countries including Turkey, France, the U.K., and Russia have started launching counterattacks on ISIS in the Syrian border regions.³³ However, the counterattacks have not diminished the threat posed by ISIS,³⁴ probably because of the fact that the counterattacks are not as forceful as they ought to be or perhaps owing to the restrictions and limitations from

²⁸ SHAKIRA HUSSEIN, FROM VICTIMS TO SUSPECTS: MUSLIM WOMEN SINCE 9/11 (2016); *see also* SAMI MOUBAYED, UNDER THE BLACK FLAG: AT THE FRONTIER OF THE NEW JIHAD 137 (2015).

²⁹ Eliza Griswold, *Is This the End of Christianity in The Middle East?*, N.Y. TIMES (July 22, 2015).

³⁰ MARK WHEELER & PETROS IOSIFIDIS, PUBLIC SPHERES AND MEDIATED SOCIAL NETWORKS IN THE WESTERN CONTEXT AND BEYOND 273 (2016).

³¹ Samantha Arrington Sliney, *Right to Act: United States Legal Basis Under the Law of Armed Conflict to Pursue the Islamic State in Syria*, 6 U. MIAMI NAT'L SEC. & ARMED CONFLICT L. REV. 1, 2-3, 23 (2015).

³² ARNOLD SCHUCHTER, ISIS CONTAINMENT & DEFEAT (2015).

³³ THAKUR, *supra* note 15, 169.

³⁴ HABIB TILIOUINE, THE STATE OF SOCIAL PROGRESS OF ISLAMIC SOCIETIES: SOCIAL, ECONOMIC, POLITICAL, AND IDEOLOGICAL CHALLENGES 199 (Richard Estes ed., 2016).

international law in approving and endorsing such counterattacks.³⁵ Therefore, this paper will look to explore and explain the justifications for the use of force against ISIS in the Levant region, particularly in Syria.

III. ARMED ATTACK AND THE USE OF FORCE

A. *Armed Attack*

In order to evaluate whether the threats and terrorist attacks from ISIS qualify as an armed attack, we will first clarify the definition of an armed attack. In this regard, Resolutions 1368 and 1373, which were passed by the United Nations Security Council in 2001 after the 9/11 attacks, define armed attack in following words:

*[The] large-scale attacks by non-state actors can qualify as “armed attacks” within the meaning of Article 51.*³⁶

In this context, the threats from ISIS against the United States and other countries can be considered threats of armed attacks. Furthermore, the recent terrorist attacks conducted by ISIS in European countries can actually be regarded as large-scale attacks, because they resulted in the killings of significant numbers of people and caused huge financial losses to the damaged and attacked areas.³⁷ Therefore, such large-scale armed attacks are paving the way toward a perpetual armed conflict between ISIS NSAs and the states of Europe and America.

The aforementioned resolutions of the United Nations also endorse the rights to use force to respond to such armed attacks. In this regard, Resolution 1368 further endorses the targeted use of force against any entity—whether a state or non-state group—involved in promoting or harboring the armed

³⁵ JULIAN RUDOLPH & KYLE HACKEL, *POLITIGUIDE 2016: UNDERSTAND THE ISSUES, STAY INFORMED, JOIN THE DISCUSSION, EMPOWER YOURSELF* 63 (2016).

³⁶ *See* S. C. Res. 1368 (Sep. 12, 2001); *see also* MICHAEL SCHARF, *CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE* 209 (2013); *see also* *INTERNATIONAL LAW AND TRANSNATIONAL ORGANIZED CRIME* 374 (Pierre Hauck & Sven Peterke eds., 2016).

³⁷ ANDREW FIALA & BARBARA MACKINNON, *ETHICS: THEORY AND CONTEMPORARY ISSUES* 529 (2016).

attacks.³⁸ A military operation against the involved characters would be recognized as an act of self-defense by the victim state for countering the terrorist threat.³⁹ However, this does not imply that the UN Resolutions 1368 and 1373 endorse unilateral attacks by one state against a group of NSAs residing within the territory of another state.⁴⁰ Furthermore, nothing in these resolutions suggests that a unilaterally decided action of use of force by a state would be recognized as a universally acceptable and legitimate action;⁴¹ there have been examples in recent history in which the use of force by a state against an NSA in the territory of another state was not approved by the United Nations Security Council. For instance, the use of force by Israel in Syrian territory in 2003 to destroy a Palestinian armed group's training center was denounced by the UN Security Council despite the fact that Israel presented a self-defense argument against that armed group.⁴² This indicates that a state has to take into consideration the international bodies, among which the United Nations Security Council is the most esteemed, whose endorsement of the "use of force" against a state or NSAs will be considered universally acceptable and legally approved. This has become a norm in customary international law for justifying the use of force against another state or against an NSA in another state.⁴³ The attack against Al-Qaeda in Afghanistan in 2001 is an application of this norm.⁴⁴

On the other hand, it is pertinent to mention, here, that many scholars argue that the use of force in self-defense pursuant to Article 51 does not require the approval of the Security Council. Rather, as scholars further argue, states can use their inherent right to self-defense without the approval of any international body, including the UN Security Council, because there is nothing in the language of Article 51 that requires states to gain approval from any international body prior to exercising their right of self-defense.⁴⁵ As the

³⁸ *Id.*

³⁹ KIMBERLEY TRAPP, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM 59 (2011).

⁴⁰ COUNTER-TERRORISM AND THE POST-DEMOCRATIC STATE 122 (Colleen Lewis & Jenny Hocking eds., 2007) [hereinafter COUNTER-TERRORISM].

⁴¹ *Id.*

⁴² TRAPP, *supra* note 39, at 58.

⁴³ AFRICA AND THE RESPONSIBILITY TO PROTECT 92 (Dan Kuwali & Frans Viljoen eds., 2013).

⁴⁴ *Id.*; see also NIGEL WHITE, ADVANCED INTRODUCTION TO INTERNATIONAL CONFLICT AND SECURITY LAW 41 (2014).

⁴⁵ YASSIN EL-AYOUTY, PERSPECTIVES ON 9/11 57 (2004).

International Court of Justice (ICJ) noted in the *Nicaragua* case:⁴⁶

*There is nothing in the language of the Article 51 that prevents the victim state from exercising its inherent right to self-defence.*⁴⁷

Hence, if a victim state wants to unilaterally exercise its right to self-defense by waging a military operation against NSAs residing in another state that may or may not sponsor the NSA, then the use of force against the NSA by the victim state should be recognized as in accordance with Article 51 of the UN Charter and therefore regarded as a legitimate action.⁴⁸

However, despite this provision, the UN Security Council intervenes in order to evaluate the legitimacy of any unilateral attack waged by a victim state against another state. This is done in order to prevent any victim state from becoming an aggressor, because the UN Charter does not allow any state to act in a similar manner. Therefore, gaining approval from the UN Security Council for the use of force acts as a criterion for legitimizing the use of force, in addition to Article 51 of the UN Charter and on the basis of self-defense.⁴⁹ While adhering to the aforementioned normative practice, a state can use force against another state that is harboring terrorism or against the NSAs that have gained control over an independent or sovereign territory, if the use of force is in accordance with exercising the inherent right of self-defense.⁵⁰

B. The Use of Force in International Law

1. Uncertainty in International Law

International law does not give clear guidance on the recommended and suitable action in a situation of armed conflict between a state and a non-state group residing in another state's territory. This makes it challenging to adjudicate whether the use of force in self-defense by state X against a non-

⁴⁶ LARISSA VAN DEN HERIK & NICO SCHRIJVER, COUNTER-TERRORISM STRATEGIES IN A FRAGMENTED INTERNATIONAL LEGAL ORDER 288 (2015).

⁴⁷ See TOM RUYS, ARMED ATTACK AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE, 484 (2010); see also ANNYSSA BELLAL, THE WAR REPORT: ARMED CONFLICT IN 2014 402 (2016).

⁴⁸ *Id.*

⁴⁹ AFRICA AND THE RESPONSIBILITY TO PROTECT, *supra* note 43, at 92.

⁵⁰ BELINDA HELMKE, UNDER ATTACK 44 (2016).

state group residing in state Y is legally justifiable. As a result, we also need to identify if state Y is a weak or failed state that cannot control the NSAs from their violent activities or if state Y is sponsoring the NSA against state X. Should force be used within the territorial limits of state Y or should it be kept at its borders to maintain the sovereignty of that state? These aspects need to be evaluated for consolidating arguments in favor of the use of force against an NSA in state Y.

As a result, though Article 51⁵¹ approves a victim state's use of force in self-defense, it does not provide guidance on the use of force against NSAs residing in a state that has no intention of causing harm to the victim state. If a group of NSAs launches terrorist activities from the territory of one state against another and the NSA is not connected politically with the host state, then there is no provision of the UN Charter that could provide guidance on the using force against the NSA within the territory of another state. On the other hand, another scholarly position argues that since Article 51 approves the use of force as a mechanism of self-defense, then force can be used against any entity, including an NSA, that may threaten the security of a state.⁵²

The main contention is that if international law or the UN Security Council permits using force against the NSA residing or using the territory of a state that is also against the NSA, then the use of force or a military operation against the NSA within the territory of the host state⁵³ can infringe the sovereignty of the host state. However, we must also consider the fact that the sovereignty of the host state has already been violated when the NSA captured some of the territory of that state and launched terrorist activities from there against the victim state. In such an instance, it is the inherent right of the victim state to protect itself from the attacks waged on it from the host state territory;⁵⁴ for this purpose of self-defense, the victim state can also use arms against attack from the host state territory.

Thus, in such an instance, we can infer that clearly the use of force in self-defense by the victim state against NSAs in another state can stand in accordance with Article 51 and thus the action would be regarded as legitimate. The only contention

⁵¹ U.N. Charter art. 51, ¶ 8 (1945).

⁵² Evan Criddle & William Banks, *Customary Constraints on The Use of Force: Article 51 With an American Accent*, 7 LEIDEN J. OF INT'L L. 29 (2015).

⁵³ The "host state" is the state where the NSA resides or from where the NSA is launching terrorist attacks against the victim state.

⁵⁴ U.N. Charter art. 51, ¶ 9.

is the apparent violation of the sovereignty of the host state. This makes it difficult to pronounce either state the “victim state,” since one state is the victim of terrorist threats or attacks from the NSA, while the second state can become the victim of the use of force by the first in response to the attacks and threats from the NSA.

On the other hand, if the host state does not have the capacity to counter the threats of the NSA, then that state may be regarded as a “weak” state. Furthermore, if such a state is unable to firmly maintain and implement the obligations of the international treaties within its territory and is unable to secure its territory from being captured by NSAs, then the weak state can be declared a “failed” state.⁵⁵

Furthermore, a political or institutional vacuum there can lead to the involuntary collapse of that state and, consequently, can make it a safe haven for the NSA to launch more attacks on the victim state.⁵⁶ To counter such a possibility, and to defend itself from such attacks, we can infer that the victim state should use force against the NSA within the territory that may originally have been part of the weak or failed state but is now controlled by the NSA. In this regard, the aforementioned situation cannot be regarded as equivalent to when the host state has the ability to regain control of its lost territory from the NSA as in that situation the host state cannot be regarded as a weak or failed state. However, the UN Charter does not provide any explanation or recommendation of a countermeasure for a situation where the host state is overlooking the existence of the NSA and is neglecting the threat posed by the NSA to another state or if it is also reluctant or unwilling to take severe action against the NSA.

2. *The Use of Force and Self-Defense*

Such an act of using force in order to preserve self-defense can be explained in the following lines, as stated by the International Court of Justice (ICJ):⁵⁷

The right of self-defence is a right to use force to avert an attack. The source of the attack, whether a State or a

⁵⁵ DAMIEN KINGSBURY, *POLITICAL DEVELOPMENT* 169 (2007).

⁵⁶ *Id.*

⁵⁷ LOUISE ARIMATSU, MICHAEL SCHMITT, & TIM MCCORMACK, *YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW – 2010 20* (2011).

*non-state actor, is irrelevant to the existence of the right.*⁵⁸

Consequently, force can also be used within the territory of the host state where the NSA is safely residing in and controlling a portion of territory. The host state would be targeted if it is neither willing nor able to take serious action against the NSA, because an unwilling state is considered to be cooperating with the NSA, whereas the inability of the host state brands it a failed state that can disrupt international peace by becoming a safe haven for terrorists. In this regard, force, i.e., the military operations, against such rogue states or against the NSA must not harm the general population in that state.

3. *Individual and Collective Self-Defense*

The Preamble to the UN Charter demonstrates its resolve to uphold fundamental human rights.⁵⁹ The International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, along with the International Bill of Rights, encompass contemporary principles of human rights. These are supplemented by regional treaties and conventions, such as the European Convention on Human Rights, 1950.⁶⁰ Human rights lawyers in the recent past have increasingly tried to enforce human rights laws on armed action, although traditionally international humanitarian law has been used to limit the excesses of war.

In addition to customary law on self-defense, Article 51 of the UN Charter is the most important provision that endorses individual as well as collective self-defense.⁶¹ It grants modern states the right to respond with force to any breach of their security.⁶² The right to self-defense can be invoked both in response to an actual armed attack and also in retaliation to the threat of an imminent attack⁶³—the latter is referred to as anticipatory self-defense.

⁵⁸ WILLIAM C. BANKS, COUNTERINSURGENCY LAW: NEW DIRECTIONS IN ASYMMETRIC WARFARE 263 (2013); *see also* JACQUES-YVAN MORIN & SIENHO YEE, MULTICULTURALISM AND INTERNATIONAL LAW 465 (2009).

⁵⁹ *See generally* U.N. Charter (1945).

⁶⁰ *See generally*, Eur. Convention on Human Rights (1950).

⁶¹ PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 317 (2002).

⁶² U.N. Charter art. 5.

⁶³ Christian Tams, *The Use of Force against Terrorists*, 20:2 EUR. J. INT'L L. 359, 359-360 (2009).

More significantly, states have the right to collective self-defense, which is “the sum of individual rights to self-defense in a scenario where threats to a state’s security are linked to those of another.”⁶⁴ Collective self-defense can be exercised in a scenario where a “proximate relationship” exists between the self-defense of two or more entities.⁶⁵ Collective security is one of the fundamental principles⁶⁶ upon which the UN Charter rests its prohibition of force and its encouragement of the peaceful settlement of disputes.⁶⁷ Enforcement operations involving the use of force can be authorized by the Security Council to target a specific state or entity.⁶⁸ These entities may range from a government to an armed group that possesses territory.

IV. THE RESPONSIBILITY TO PROTECT

The Responsibility to Protect (R2P) is a doctrine that implies that states have the essential responsibility to protect their population from every kind of threats, whether cross-border invasion or intra-state conflict.⁶⁹ The underlying purpose is to assure peace and security to the general population; however, if the state fails to do so owing to its inability or unwillingness to protect the public, then the responsibility falls to the international community to be responsible for protecting the population of that state.⁷⁰ This doctrine was presented by the International Commission on Intervention and State Sovereignty (ICISS) in 2001.⁷¹

Furthermore, R2P also endorses humanitarian intervention in a situation where the citizens of a state are facing violations of human rights and the state is unable or unwilling to eliminate harm to the citizens.⁷² In such a

⁶⁴ GABRIELA MARIA KUTTING, CONVENTIONS, TREATIES AND OTHER RESPONSES TO GLOBAL ISSUES 40 (2009).

⁶⁵ See Tams, *supra* note 63.

⁶⁶ CHIE KOJIMA & RUDIGER WOLFRUM, SOLIDARITY: A STRUCTURAL PRINCIPLE OF INTERNATIONAL LAW 174 (2010); see also: KUTTING, *supra* note 64, at 40.

⁶⁷ ANN KARIN LARSEN & DAG HENRIKSEN, POLITICAL RATIONALE AND INTERNATIONAL CONSEQUENCES OF THE WAR IN LIBYA 248 (2016).

⁶⁸ *Id.*

⁶⁹ JOHN DAVIS, THE ARAB SPRING AND ARAB THAW 61-86 (2016).

⁷⁰ DUBRAVKA ZARKOV & HELEN HINTJENS, CONFLICT, PEACE, SECURITY AND DEVELOPMENT: THEORIES AND METHODOLOGIES 238 (2014).

⁷¹ *Id.*; see also DANIEL SILANDER & DON WALLACE, INTERNATIONAL ORGANIZATIONS AND THE IMPLEMENTATION OF THE RESPONSIBILITY TO PROTECT: THE HUMANITARIAN CRISIS IN SYRIA 19 (2015).

⁷² GUNTHER HELLMANN, JUSTICE AND PEACE 29 (2013); see also INGRID DETTER, THE LAW OF WAR 110 (2016).

situation, R2P assigns responsibility to other states and international organizations to violate the sovereignty of the unable or unwilling state in order to protect the civilians from facing human rights violations and further harm.⁷³

In this section of the paper, we will analyze the legality of the R2P doctrine and the reactionary stance of the international community to the application of R2P, as some scholars largely accept it, while others apply limits to it.

A. *Strong R2P*

The R2P doctrine is regarded as “Strong R2P” when states consider it without seeking approval from the UN Security Council to use force within the territory of a state that is unable or unwilling to protect its citizens from harm. The fact that the approval from the UNSC is not required is actually based on the consequence when one or more members of the Security Council vetoes the use of force against a state and the Security Council is unable to decide or approve the legitimacy of the use of force.⁷⁴ Therefore, to avert such a dependency, the Strong R2P notion is suggested. Such an action has been exercised by states by using the collective self-defense or collective humanitarian interventions procedures.⁷⁵

B. *Limited R2P*

After the instigation of Strong R2P, many states and scholars opposed it, leading to the adoption of the Limited R2P notion. This concept rejects any use of force by states without the approval of the Security Council.⁷⁶ Moreover, it also requires states to present first the legal, pragmatic, and authentic justification for force within a state.⁷⁷ Furthermore, it also applies limits to the categories of harm that may be regarded to invoke R2P.

C. *Norms of the R2P Doctrine*

⁷³ See ZARKOV & HINTJENS, *supra* note 70; see also DETTER, *supra* note 72, at 110.

⁷⁴ AIDAN HEHIR, HUMANITARIAN INTERVENTION: AN INTRODUCTION 125 (2013).

⁷⁵ See THOMAS G. WEISS, MILITARY-CIVILIAN INTERACTIONS: HUMANITARIAN CRISES AND THE RESPONSIBILITY TO PROTECT 209 (2005).

⁷⁶ VESSELIN POPOVSKI, NEW PERSPECTIVES ON HUMAN SECURITY 213 (Aland Hunter & Malcom McIntosh eds., 2010).

⁷⁷ See WEISS, *supra* note 75.

In addition to the formation of the Strong and Limited R2P doctrines, there are two norms found within the R2P framework. These are the “Prescriptive norm” and the “Permissive norm.”

1. *Prescriptive Norm*

This norm within the R2P framework urges states to use force within a state where the civilians are facing human rights violations,⁷⁸ and actually approves intervention as obligatory in this situation.⁷⁹ The word “prescriptive” has been used for this norm because it actually associates the use of force as a prescription for human rights violations in a state that has failed to protect its citizens from harm.⁸⁰

2. *Permissive Norm*

This norm is related to the permission to use force within the territory of a state to protect its citizens from human rights violations. This norm makes it mandatory for states to get approval from the UN Security Council.⁸¹ This norm is related to the Limited R2P doctrine and it is favored by most states and scholars. Although this norm approves the importance of collective intervention within the territory of a state where civilians are facing human rights violations, it suggests that the use of force or military operations should be the last option and other peaceful options ought to be attempted before applying it.⁸² This norm was also endorsed by former Secretary-General of the UN Kofi Annan in the 2005 World Summit.⁸³

The international community has largely favored and accepted the Limited R2P and Permissive norm instead of

⁷⁸ ADEMOLA ABASS, *COMPLETE INTERNATIONAL LAW: TEXT, CASES, AND MATERIALS* 409 (2014).

⁷⁹ PHILIPP KASTNER, *LEGAL NORMATIVITY IN THE RESOLUTION OF INTERNAL ARMED CONFLICT* 102 (2015); *see also* Jonah Eaton, *An Emerging Norm - Determining the Meaning and Legal Status of the Responsibility to Protect*, 32 *MICH. J. INT’L L.* 765, 801 (2011).

⁸⁰ Jonah Eaton, *An Emerging Norm - Determining the Meaning and Legal Status of the Responsibility to Protect*, *MICH. J. INT’L L.* 765, 770 (2011).

⁸¹ DAN KUWALI, *THE RESPONSIBILITY TO PROTECT: IMPLEMENTATION OF ARTICLE 4(H) INTERVENTION* 141-143 (2011).

⁸² *See* ABASS, *supra* note 78, at 409.

⁸³ *Id.* at 408.

endorsing the Strong R2P and Prescriptive norm.⁸⁴ Therefore, to use force within the territory of a state for a just cause, permission has to be given by the UN Security Council in order to satisfy the permissive norm of R2P.⁸⁵

D. Responsibilities of a Sovereign State

The idea of sovereign responsibilities was universally accepted in the Universal Declaration of Human Rights in 1948⁸⁶ and it has much in common with R2P.⁸⁷ The sovereign responsibilities idea implies that every state has the responsibility to protect its population from human rights violations, ethnic conflicts and cleansing, and severe crimes.⁸⁸ Moreover, it is also an essential responsibility of states to protect their population's freedom and fundamental human rights.⁸⁹

The International Law Commission added more implications to the notions of sovereign responsibilities and published the additions with the new title of "Responsibility of States."⁹⁰ According to the International Law Commission, the concept of state responsibility implies that a state is responsible for the actions, and their consequences, of every individual or group residing within its territory and acting on its behalf of or with its support.⁹¹ This implies that a state will be held responsible for terrorist attacks that NSAs launch from its territory against another sovereign state, if it is sponsoring their activities. Moreover, if the state is harboring terrorism it will be, in fact, a violator of the sovereignty of the victim state against which the terrorists are launching attacks. Therefore, the victim state has the inherent right to use force in self-defense to

⁸⁴ See KUWALI, *supra* note 81, at 141–43.

⁸⁵ *Id.*

⁸⁶ RODNEY BRUCE HALL, REDUCING ARMED VIOLENCE WITH NGO GOVERNANCE 21 (2013); see also LUKE GLANVILLE, SOVEREIGNTY AND THE RESPONSIBILITY TO PROTECT: A NEW HISTORY 167 (2013).

⁸⁷ PAUL JACKSON, HANDBOOK OF INTERNATIONAL SECURITY AND DEVELOPMENT 378 (2015).

⁸⁸ ERIC PATTERSON & JAMES TURNER JOHNSON, THE ASHGATE RESEARCH COMPANION TO MILITARY ETHICS 90 (2016).

⁸⁹ GLANVILLE, *supra* note 86, at 167.

⁹⁰ See Articles on Responsibility for State for Internationally Wrongful Acts, art. 8, U.N. Doc. A/56/10 (2001).

⁹¹ *Id.*

counter such a threat⁹² and force is justifiable and in accordance with international law.⁹³

However, the situation becomes complicated when the state is not harboring terrorism and the NSAs are acting independently to cause harm to another state. There are two alternatives here. The first is that the state is willing and able to dismantle the terrorist activities of the NSAs residing in its territory; the second is that the state is willing but unable to do so. In both situations, it is the explicit responsibility of the state to take effective measures to eliminate the terrorist threats from its territory. Let us consider the situation in Syria as an illustration of the responsibility of the state and the use of force. We can apply these two situations to Syria.

Here, in the first alternative, i.e., if the Syrian state has the ability to counter the terrorist activities, then it must use force by launching military operations against ISIS NSAs within its territorial limits and borders, and it must ensure that its steps are concrete enough to override the threats from ISIS. In such an event, the use of force by the victim state, i.e., the United States and EU countries, on the basis of self-defense is not required because the host state, i.e., the Syrian government, would already be acting on behalf of the victim state in self-defense. However, unfortunately, this is not the reality as the Syrian government has not cooperated with the United States, or with other states that have been victims of ISIS. Although the Syrian government has repeatedly confirmed that it wants to eliminate the threat of ISIS from the region, it has not been able to do so.⁹⁴

This leads to the second alternative, i.e., if the Syrian state is unable to control its territory from being used by ISIS, then this creates a difficult situation that makes it tricky to authorize the use of force against it. Some scholars even argue that it is unreasonable to declare a state responsible for terrorist actions that it is neither doing nor aiding;⁹⁵ therefore, launching an attack against that state would be deemed an attack against the sovereignty of that state.

Furthermore, the actual situation here is that the territory of that state, i.e., Syria, is exploited by the NSA for launching terrorist attacks against another state, and therefore

⁹² See DOUGLAS LOVELACE & KRISTEN BOON, TERROR-BASED INTERROGATION 100 (2010).

⁹³ See *id.*

⁹⁴ BRYAN FREDERICK, DAVID STEBBINS, OMAR AL-SHAHERY, & WILLIAM YOUNG, SPILLOVER FROM THE CONFLICT IN SYRIA 43 (2014).

⁹⁵ WHITE, *supra* note 44, at 41.

this suggests that the sovereignty of that state has already been infringed by the NSA.⁹⁶ Here, again, the question arises: whether the Syrian state—which is unable in terms of economic or weaponry infrastructure to counter the NSA—should be considered responsible for the attacks.⁹⁷ The questions arise here are what action would be recommended for the victim state for its self-defense? Should it use force against the state from which the terrorist attacks were launched? Will it violate the sovereignty of the host state in a manner that constitutes a violation of the international legal obligations and what responsibility applies on the host state, i.e., Syria?

In such an event, the International Law Commission describes the responsibility of states as:

*The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.*⁹⁸

This argument is relatable to the situation in Syria and the Levant region, where ISIS has captured some territories of Iraq and Syria and subsequently is exercising authoritative control over these territories.⁹⁹ ISIS has posed as a threat not only to the neighboring state of Iraq, but also to the United States and to European countries,¹⁰⁰ where it has also launched terrorist attacks.¹⁰¹ The details of the threat from ISIS are mentioned in the first section of this paper. These threats and the authoritative control of ISIS in the Levant region, accompanied by the denial by the Syrian government under President Bashar Al-Assad of launching attacks on ISIS, creates a situation in which Article 9 of the Responsibility of States draft is fully applicable because the Syrian government has not performed effective measures to eliminate the ISIS threat to

⁹⁶ *Id.* at 43.

⁹⁷ COUNTER-TERRORISM, *supra* note 40, at 122.

⁹⁸ *Report of the Commission to the General*, Ch. 1 Art. 9 [2001] 2 Y.B. Int'l L. Comm'n 49, U.N. Doc. A/CN.4/SER.A/2001.

⁹⁹ JÄGERSKOG & SWAIN, *supra* note 3, at 23.

¹⁰⁰ RUDENSTINE, *supra* note 17, at 20.

¹⁰¹ Filiz Göktuna Yaylaci, Mine Karakus Yetkin & Melis Karakus, *Migration and Security: Three Capitals and Three Terrorist Attacks as Reflected in the Press*, in *TURKISH MIGRATION 2016 SELECTED PAPERS* 280 (Eroglu et al. eds. 2016).

other states, probably because it is unable to do so. Therefore, the Syrian government has fulfilled neither its state responsibility nor the international obligations to curb the terrorist havens.¹⁰² Furthermore, the apparent neglect by the Syrian Government regarding the activities of ISIS has facilitated ISIS in terms of spreading its militancy and stronghold in the Levant region; hence, the neglect has occurred as an indirect sponsoring of ISIS. Therefore, in accordance with the principles of state responsibility, the Syrian state's government shares the responsibility for the terrorist attacks that are organized, planned, and launched by ISIS from Syrian territory against Syrian,¹⁰³ Iraqi, and European citizens and for threats that are generated by ISIS to the United States.

Thus, an implication can be inferred that necessitates the use of force by the victim state in the territory of the state that is unable to control the NSA in its territory because that state has already failed to comply with international obligations to prohibit terrorist organizations to take hold of its territory. Additionally, as sovereignty of the host state has already been violated by the NSA by taking hold of some territory of host state, it further suggests that, if a robust military operation is not launched against the NSA, then the NSA may penetrate further into the territory of that state to take control of more territory in that state. This would be harmful not only for the unity of the host state but also for the self-defense of the victim state. Therefore, the use of force would be justifiable and legitimate against the NSA in that state to destroy the NSAs' stronghold, whether the relevant military operation may harm the government, administration, or dominion of the host state within its territory.¹⁰⁴

Thus, the eventual response from the victim state would be to use its inherent right of self-defense to approve the use of force to counter the attacks of NSAs because the host state is not cooperating or does not have the capacity to cooperate effectively with the victim state.¹⁰⁵ As a consequence, here, the principle of state responsibility, which prevents a state from violating the territory of another state is naturally and legitimately overshadowed and superseded by the principle of self-defense.

¹⁰² See Barry A. Feinstein, *Combating Terrorism Through International Law*, in *FIGHTING TERRORISM IN THE LIBERAL STATE* 67 (2006).

¹⁰³ SILANDER & WALLACE, *supra* note 71, at 197.

¹⁰⁴ WHITE, *supra* note 44, at 42–43.

¹⁰⁵ CRISTINA GABRIELA BADESCU, *HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT* 57 (2010).

If a state fails to fulfill its responsibilities, then it would be considered to have failed to protect its citizens or to have been involved in the human rights violations. This implies that, if a state is assisted or attacked by the international community for the purpose of safeguarding the basic human rights of its population and protecting the population from atrocities committed in the territory either by that state or by some NSAs, then the sovereign responsibilities would appear to be upheld. Therefore, sovereignty is neither desecrated nor vandalized.¹⁰⁶

Scholars tend to agree that the protection of citizens' fundamental human rights is of higher importance than respecting the state's sovereignty, and if that state is involved in violating human rights then that state is not fulfilling its sovereign responsibilities. Therefore, its sovereignty should not be considered equivalent to the sovereignty of other states.¹⁰⁷ Therefore, force can be used to protect that state's citizens from harm to their fundamental human rights.¹⁰⁸ In order to further evaluate the legality and pragmatism associated with the use of force against a state within its territory, we can apply the "unwilling or unable test."

V. THE UNWILLING OR UNABLE TEST FRAMEWORK

The unwilling or unable test framework was presented by Ashley Deeks in 2012 to assess the use of force in relation to the willingness or ability of the host state to counter the threat of an NSA.¹⁰⁹ We have already discussed two situations, in which the host state was either willing and able to conduct strikes against NSAs or willing but unable to do so. Now we will evaluate the situation when the host state is unwilling and unable to punish the terrorist NSAs.

When a state is unwilling or unable to prevent violations of human rights in its territory and does not protect its citizens, or when it is either unwilling or unable to break down the safe havens of NSAs that are launching terrorist attacks against another state, then the "unable or unwilling test" provides a pragmatic framework for justifying the use of force within the

¹⁰⁶ Alex J. Bellamy, *Kosovo and the Advent of Sovereignty as Responsibility*, in *KOSOVO, INTERVENTION AND STATEBUILDING* 40 (Aidan Hehir ed., 2010).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See Ashley Deeks, "Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense, *VA. J. INT'L L.* 483, 491 (2012)

territory of the unwilling state against NSAs.¹¹⁰ Furthermore, as mentioned in earlier sections, the state that harbors terrorist NSAs can be dealt with by force by victim states; therefore, if a state is unwilling to counter NSA threats, then it can be conceived as harboring the NSA.

A. Steps for Implementation of the Unwilling or Unable Test

In order to devise a pragmatic framework to punish the state that is unwilling or unable to launch attacks against the NSA, we will analyze the following steps for implementing the unwilling or unable test framework, which contains some guidelines and rules for the use of force.¹¹¹

1. Consent or Collaboration

The first step of implementing the “unwilling or unable test” is to acquire permission from the host state to use force within its territorial grounds against the NSA.¹¹² If permission is granted by the host state, then the issue is resolved and there is no need for the next steps of the test. On the other hand, if permission is not granted, then the victim state can request that the host state take collaborative action against the NSA in the form of launching joint military operations against the NSA, which would be followed according to guidelines provided by the host state and the unable or unwilling test.¹¹³ Such a collaborative operation against the NSA would safeguard the sovereignty of the host state and would adhere to the demands of the victim state to preserve its right of self-defense. Furthermore, such an operation would also carry a joint military cooperation and a joint information sharing mechanism between the states against the NSA,¹¹⁴ which would ensure availability of effective information of the NSA’s safe havens, allowing both states to destroy the safe havens permanently.

¹¹⁰ *Id.*; see also Dawood Ahmed, *Defending Weak States Against the “Unwilling or Unable” Doctrine of Self-Defense*, 18. J. INT’L L. & INT’L REL. 18 (2013).

¹¹¹ See Deeks, *supra* note 109, at 519.

¹¹² *Id.*

¹¹³ *Id.*; see also MARCO ROSCINI, *CYBER OPERATIONS AND THE USE OF FORCE IN INTERNATIONAL LAW* 85 (2016).

¹¹⁴ See Deeks, *supra* note 109, at 520–21.

2. *Evaluation of Threat*

It is also essential to estimate the extent of the threat, i.e., assessing the strength of the NSA,¹¹⁵ the number and variety of weapons possessed by the NSA, the quantity of resources owned or captured by the NSA, the number of the NSA's armed men, etc., as well as evaluating the geographical terrain of the conflict, the atmospheric or climatic conditions that may act as factors of advantage for the NSA, and the strength of the army and weaponry infrastructure of the host state. These are some of the aspects that are necessary for a victim state to consider prior to launching any attack against the NSA with or without the collaboration of the host state.¹¹⁶ This is because the more influential the climatic and geographical situations in the region and the more substantive ownership of sophisticated weapons of the NSA, the more challenging it would be for the victim state to conclusively launch a military operation against the NSA in the territorial grounds of the host state, while also ensuring that no significant harm is done to the civilians of the host state during the launch of the operation.

In this regard, a collaborative joint operation would prove to be more effective because the host state would be providing guidelines and sharing information with the victim state to face the geographical, climatic, and other innate factors of the region properly, as well as to avoid populated regions to prevent casualties of local civilians.¹¹⁷

3. *Request to the Host State*

The victim state can also request that the host state unilaterally take action against the NSA in its territory.¹¹⁸ Such a request can be made by the victim state in a situation where the host state rejects the request for a joint military operation against the NSA and does not grant permission for the victim state to use force against the NSA unilaterally; this would indicate the relevant unwillingness or inability of the host state to counter the threat posed by the NSA to the victim state.¹¹⁹ If the host state accepts the request from the victim state to carry

¹¹⁵ *Id.*; see also ROSCINI, *supra* note 113, at 85.

¹¹⁶ See Deeks, *supra* note 109, at 521.

¹¹⁷ *Id.*

¹¹⁸ CHIA-JUI CHENG, A NEW INTERNATIONAL LEGAL ORDER 81 (2016).

¹¹⁹ See Deeks, *supra* note 109, at 521.

out the operation against the NSA on its own, then it will preserve its territorial sovereignty as well as eliminate the threats of the NSA.¹²⁰ Moreover, such a situation would be beneficial for the continuation of friendly bilateral relations between the victim and host state.

On the other hand, if the host state again rejects the request of the victim state to launch operation against the NSA, then such a noncooperative stance would be taken by the international community as an indication that the host state is harboring terrorist NSAs within its territory. Furthermore, the victim state should also give the host state a reasonable amount of time to decide about the request of the victim state to use force within the host state's territory against the NSA.¹²¹ If this is done, the request from the victim state to use force against the NSA within the host state's territorial limits would be considered justified and legitimate.

4. *Evaluation of the Host State's Capability*

It is also essential for the victim state to analyze the capabilities of the host state in measuring and countering the threats posed by the NSA.¹²² In this regard, the capabilities should be judged in both situations, i.e., when the host state has agreed to a joint military operation against the NSA and when it has adopted the stance to counter the threat unilaterally. In both situations, the victim state needs to consider whether the host state has the adequate military capacity in terms of sophisticated weaponry infrastructure and adequately trained military to counter the threat from the NSA effectively. If the capacity is lacking, then the victim state can provide assistance to the host state in meeting the deficiencies in countering the NSA threat.

In most situations, the host state may not reveal its military incapacities openly because doing so would tarnish the international reputation of their military strength. In such a circumstance, the victim state would need to collect accurate information about the military capabilities of the host state in countering the NSA threat on its own and then choose either to convince the host state to let the victim state join the operation

¹²⁰ *Id.* at 523.

¹²¹ *Id.* at 525.

¹²² *Id.*; see also ROSCINI, *supra* note 113, at 85.

against the NSA or to launch it unilaterally according to its own military planning and weaponry capacities.¹²³

5. *Anticipation of Means to Use Force*

Prior to launching any military operation against the NSA for self-defense, the victim state needs to first evaluate and finalize the arrangements, i.e., the adequate means to counter the threat.¹²⁴ In this regard, the victim state must choose the means to use force reasonably and justifiably so that its actions will not be regarded as aggressions on the soil of the host state.¹²⁵ To gain the support of the international community for its decision to use force, the victim state can also share its proposed means to counter the NSA threat with the world by either publicly announcing them in a codified manner or through diplomatic channels.¹²⁶ For instance, some of the anticipated means might be by targeted aerial bombardments on terrorist safe havens or by conducting ground operations to track down terrorists and capture them alive to interrogate them about the source of their financial and weaponry support.

6. *Consideration of Former Interactions*

The victim state's former interactions with the host state also play an important role in finalizing arrangements for cooperation between the victim state and the host state.¹²⁷ That is, if there has been a history of hostility between the host state and the victim state, which has caused hostile interactions in the past, then the chances of cooperation between the two states are slight.

In contrast, a common history of collaborative interactions will most probably facilitate effective cooperation for joint information sharing and launching joint use of force against the NSA in the territory of the host state. Therefore, the victim state needs to consider the historical interactions before making a request to the host state for use of force in its territory;¹²⁸ that is, the victim state needs to utilize more diplomatic channels, i.e., bilateral peaceful dialogues or interactions of the leaders of

¹²³ *Id.*

¹²⁴ *See* Deeks, *supra* note 109, at 529.

¹²⁵ *Id.* at 531.

¹²⁶ *Id.*

¹²⁷ *See* Ahmed, *supra* note 110, at 17.

¹²⁸ *Id.*

both states on international public forums or at bilateral public events to initiate a cordial atmosphere between the two states, and then, eventually, convince the host state to agree to the use of force against the NSA in its territory. This would neutralize the effects of past hostile interactions between the two states and would urge them to cooperate and act mutually against the NSA.

On the other hand, in the aftermath of failure of utilization of diplomatic efforts, the victim state can publicly make requests to the host state to either use force unilaterally or accept the request for a joint operation in collaboration with the victim state against the NSA. If the host state agrees to neither request, then the victim state can get support from the international community regarding its stance to use force against the NSA for self-defense in the light of the unwilling or unable position shown by the host state to cooperate with the victim state.¹²⁹ The eventual international support will endorse the use of force against the NSA as legitimate.¹³⁰

These six steps of the unwilling or unable test enable the victim state to use force in a reasonable and justified manner. Moreover, these steps also urge the host state to decide pragmatically to take up arms against the NSA within its own territory and set out the criteria to judge the unwillingness or inability of the host state to counter the NSA threat. These steps also discourage the victim state from using force unilaterally without acquiring permission from the host state or without the support of the international community. Owing to their pragmatic, justified, and rationale approach, these steps have been molded into a single framework for the implementation of the unable or unwilling test in an armed conflict between a victim state and NSAs.

B. Historical Roots of the Test

The historical roots of the unwilling or unable test can be found in the law of neutrality, which is considered a universally established principle.¹³¹ The law of neutrality was first introduced in 1907 in the Hague Convention in order to create a

¹²⁹ See Deeks, *supra* note 109, at 531.

¹³⁰ See Ahmed, *supra* note 110, at 28–29.

¹³¹ See Michael W. Lewis, & Peter Margulies, *Interpretations of IHL in Tribunals of the United States*, in APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES 415, 431 (Derek Jinks et al. eds., 2014); see also: Deeks, *supra* note 109, at 483.

framework for states to remain neutral in a regional or international armed conflict.¹³² This law has become an essential component of customary international law,¹³³ and it is also included in the military guidelines and rules of Belgium, Switzerland, Canada, the United States, and the United Kingdom.¹³⁴ Under this law, for a state to stay neutral, its territorial grounds must not facilitate a regional or international armed conflict.¹³⁵ To explain this, we can assert that the territory of the neutral state must not be used for such armed activities that may promote or demote the armed conflict in any manner, i.e., the territory must not allow the transportation of weapons or armed men of any party to the conflict, and must not facilitate or allow any party to launch attacks from its territory or from the border of its territory against any party to the conflict.¹³⁶

It is pertinent to mention here that the neutrality principle inherent in the neutrality law urges the neutral state to take strict action if any party, notably a NSA, crosses into its territory and attempts to use its territory to launch armed attacks against a party to the conflict.¹³⁷ In such an event, if the neutral state does not prevent, say, NSAs to launch an attack against, say, a victim state, then the neutrality of the state would be suspected to be biased and favoring the NSAs over the victim state.¹³⁸ The neutrality of the state would also be at risk if the NSAs strengthened their existence by either acquiring armed support from factions within the neutral state, by gaining supplies of food or financial assistance from the neutral state, or by using the territory of the neutral state to transport weapons etc. In order to preserve its neutrality, the state would be

¹³² STEPHEN NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY* 194 (2005); *see also* MAARTJE ABBENHUIS, *AN AGE OF NEUTRALS* 3 (2014); *see also* Yves Sandoz, *Rights, Powers, and Obligations of Neutral Powers Under the Conventions*, in *THE 1949 GENEVA CONVENTIONS: A COMMENTARY* 85, 89 (Andrew Clapham, Paola Gaeta, & Marco Sassòli eds., 2015).

¹³³ Sanoz, *supra* note 132, at 89; *see also* ABBENHUIS, *supra* note 132, at 3.

¹³⁴ ROB McLAUGHLIN, *UNITED NATIONS NAVAL PEACE OPERATIONS IN THE TERRITORIAL SEA* 174 (2009); *see also* ABBENHUIS, *supra* note 132, at 4.

¹³⁵ Emanuele Salerno, *Stare Pactis and Neutrality*, in *WAR, TRADE AND NEUTRALITY: EUROPE AND THE MEDITERRANEAN IN THE SEVENTEENTH AND EIGHTEEN CENTURIES* 188, 188 (Franconelli ed., 2011).

¹³⁶ Sarah Radin, *The Current Relevance of the Recognition of Belligerency*, in *ARMED CONFLICT AND INTERNATIONAL LAW: IN SEARCH OF THE HUMAN FACE* 115, 148 (Brigit Toebes, Marcel Brus, & Mariëlle Matthee eds., 2013).

¹³⁷ Paul Seger, *The Law of Neutrality*, in *THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT* 248, 249 (Andrew Clapham & Paola Gaeta ed., 2015).

¹³⁸ *See* Radin, *supra* note 136, at 148.

required to prevent the NSAs from taking control of its territory and from launching attacks against the victim state.¹³⁹

On the other hand, if the neutral state is unwilling or unable to prevent the NSAs from launching attacks against the victim state from within its territory, then the state will no longer be regarded as neutral as its presence benefits the NSA and harms the victim state facing the terrorist attacks launched from the territory of the (so-called) neutral state.¹⁴⁰ In such a situation, the unwilling or unable test becomes relevant and can be applied by the victim state to uphold its right of self-defense and to curb the bilateral, regional, and global threat from the NSA.

C. Proposed Goals of the Test

Ashley Deeks suggested three goals of the unwilling or unable test.¹⁴¹ The first is to limit the use of force by the victim state so that it is used only as a last resort. This also implies that other peaceful options for cooperating with the host state must be tried by the victim state prior to settling on using force in the territory of the host state. The second goal is to clarify how force is to be used and the victim state's plan of action so as to garner support from the international community for the justified means of use of force and to avert any allegation by the host state that the victim state used illegal weaponry, e.g., chemical weapons, as the means of force.¹⁴²

The third and most important goal of the test is to establish a set of rules and criteria through which the victim state and the host state can decide on the use of force against the NSAs within the territory of the host state.¹⁴³ This will pave the way toward acceptance of the unwilling or unable test as a standard for the use of force in an armed conflict.

D. Application of the Test and the ISIS Crisis

As mentioned earlier, ISIS has posed a great threat to the United States, European countries, and neighboring Islamic countries in the Middle East. To the United States, it has given verbal threats that amount to a breach of the sovereignty and

¹³⁹ *Id.*; see also Seger, *supra* note 137.

¹⁴⁰ *Id.*

¹⁴¹ See Deeks, *supra* note 109, at 489.

¹⁴² *Id.*

¹⁴³ *Id.*

safety of the United States. In response, the United States has to perform a preliminary action for its self-defense before too much time passes and ISIS becomes successful in its plans to launch attacks on the United States.¹⁴⁴ However, because ISIS resides in Syrian territory and nearby lands, if the United States uses force against ISIS it will automatically enter Syrian territory.

Thus, according to the principles defined in the responsibilities of state mentioned above in Section 2, Syrian sovereignty has already been breached by ISIS, and in response the Syrian government has been unable or unwilling to take back the land captured by ISIS. Therefore, it has also not fulfilled its sovereign responsibilities as its neglect over ISIS presence in Syria and the Levant is strengthening ISIS, as explained in Section 2 of this paper.

Moreover, as illustrated above, the Syrian government has also been unable or unwilling to counter or mitigate the threat generated by ISIS or to protect its citizens from becoming victims of human rights violations by ISIS. Many Syrian people have been killed by ISIS, and young girls have been kidnapped by ISIS members.¹⁴⁵ Thus, the Syrian state has been unable to fulfill its “responsibility to protect” its citizens,¹⁴⁶ which implies that the responsibility now falls to the international community to protect the innocent civilians of Syria and of the bordering Levant region. In this situation, we will first apply the unwilling or unable test to justify the use of force by the United States against ISIS in Syrian territory.

The first step of the unwilling or unable test is to require consent from the host state,¹⁴⁷ and here the United States has not asked for the consent of the host state, i.e., Syria.¹⁴⁸ Recently, the Syrian government has expressed stern disapproval and has strictly opposed the use of force by the United States in Syrian territory.¹⁴⁹ In 2014, statements from some Syrian ministers, including Foreign Minister Waleed Al-

¹⁴⁴ See Sliney, *supra* note 31.

¹⁴⁵ ADDULLAHI ALAZREG, *ISIS: MANAGEMENT OF SAVAGERY* 149 (2016).

¹⁴⁶ DEBRA L. DELAET, *The Global Struggle for Human Rights: UNIVERSAL PRINCIPLES IN WORLD POLITICS* 222 (2014).

¹⁴⁷ See Deeks, *supra* note 109, at 520–21.

¹⁴⁸ Jean d’Aspremont, *The Decay of Modern Customary International Law in Spite of Scholarly Heroism*, in *THE GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE* 2014 10 (Giuliana Ziccardi Capaldo ed., 2015).

¹⁴⁹ Katie Reilly, *Bashar al-Assad Criticizes U.S. as ‘Not Serious’ About Defeating ISIS*, *TIME* (July 14, 2016), <http://time.com/4405881/bashar-al-assad-syria-interview-isis/>.

Moallem were interpreted by the United States as expressing tacit consent for the United States' use of force against ISIS in Syrian territory,¹⁵⁰ but the contemporary nature of hostility and censure expressed by the Syrian government over the use of force by the United States in Syrian territory has negated all previous, incorrect interpretations and has confirmed that there has been no consent granted by the Syrian government to the United States.¹⁵¹ This implies that the Syrian government is unwilling to collaborate with the United States over using force against ISIS NSAs in Syrian and Levant territory. This leads us to the second step of the unwilling or unable test.

The second step is to assess the ISIS threat and its contemporary implications, which the United States has evaluated to a great extent, inducing it to deploy its resources to launch a remote military operation against ISIS.¹⁵² However, scholars argue that the United States ignored the ISIS threat to a great extent in 2014–15, when ISIS took hold of the Levant region.¹⁵³ Furthermore, the United States has not assessed the threat with precision, which is the reason behind the current persistent spread of the ISIS NSA organization.¹⁵⁴ For instance, the United States' estimates of the number of ISIS group members were seven times lower than they are at the present.¹⁵⁵ An accurate assessment of the threat is required in order to create an effective plan to counter and terminate the threat permanently.

The third step is to request that the host state counter the threat.¹⁵⁶ The United States has already requested on numerous occasions that the Syrian government use force against ISIS, but somehow the Syrian government has been unable to use force effectively to terminate the threatening existence of ISIS in the

¹⁵⁰ See Sliney, *supra* note 31, at 12–13.

¹⁵¹ See d'Aspremont, *supra* note 148, at 10.

¹⁵² Paul Cruickshank, *Learning Terror: the Evolving Threat of Overseas Training to the West*, in *Understanding Terrorism Innovation and Learning: Al-Qaeda and Beyond* 137, 141 (Magnus Ranstorp & Magnus Normark eds., 2015).

¹⁵³ Eytan Gilboa, *Public Opinion and Obama's Foreign Policy*, in *US Foreign Policy and Global Standing in the 21st Century* 63, 73–74 (Efraim Inbar & Jonathan Rynhold eds., 2016); *see also* Dick Morris & Eileen McGann, *Armageddon: How Trump Can Beat Hillary* 106 (2016).

¹⁵⁴ *Id.*

¹⁵⁵ Laura Westra, Satvinder Juss & Tulli Scovazzi, *TOWARDS A REFUGEE ORIENTED RIGHT OF ASYLUM* 98 (2016).

¹⁵⁶ CHENG, *supra* note 118, at 81.

region.¹⁵⁷ This leads to the fourth step of the unable or unwilling test, which is related to assessing the military capabilities of the Syrian state.¹⁵⁸ The United States has estimated the difficult nature of countering the ISIS threat and therefore it has maintained that the Syrian government will not be able to deal with such a threat. Therefore, it has decided to use force against ISIS.¹⁵⁹

The fifth step is to finalize the means to counter the ISIS threat.¹⁶⁰ The United States is using air combat as a means to launch attacks on ISIS camps.¹⁶¹ However, the effectiveness of these air strikes is debatable as they have not resulted in ending the ISIS threat, probably because the strikes have not been robust so far.¹⁶² Ground-based military operations have not been launched by the United States Army so far owing to the complex nature of the ISIS threat. The United States has kept track of ISIS strongholds and has launched attacks by drone or jet fighter planes carrying missiles. It has also supported anti-ISIS groups, i.e., Kurdish militants and the coalition forces of European countries, militarily against ISIS.¹⁶³

The sixth and final step of the unwilling or unable test is to evaluate the former interactions of the United States with the Syrian state. Unfortunately, the past interactions between the states, particularly during the presidency of Bashar Al-Assad and his family, have not been cordial.¹⁶⁴ Under the Assad regime, Syria has shown more political inclination toward Russia by becoming its ally alongside Iran and thus contributing toward a polarization in the Middle Eastern region that expresses an antagonistic posture toward the United States, particularly on the Syrian side.¹⁶⁵ Furthermore, historically, the Syrian state was in the Soviet bloc against the United States

¹⁵⁷ Yoram Dinstein, *ISRAEL YEARBOOK ON HUMAN RIGHTS* 275 (BRILL, 2016); see also FREDERICK, *supra* note 94, at 43.

¹⁵⁸ ROSCINI, *supra* note 113, at 85; see also Deeks, *supra* note 109, at 525.

¹⁵⁹ See d'Aspremont, *supra* note 148, at 10–12.

¹⁶⁰ See Deeks, *supra* note 109, at 529.

¹⁶¹ ROBERT SINGH, *AFTER OBAMA: RENEWING AMERICAN LEADERSHIP, RESTORING GLOBAL ORDER* 32 (2016).

¹⁶² *Id.*

¹⁶³ See generally BINNENDIJK., *supra* note 16, 100–50.

¹⁶⁴ ROBERT KAUFMAN, *DANGEROUS DOCTRINE: HOW OBAMA'S GRAND STRATEGY WEAKENED AMERICA* 120 (2016).

¹⁶⁵ Carolyn Kissane, *The Quest for Energy Security in the Central Asian "Neighborhood,"* in *CHINA, THE UNITED STATES, AND THE FUTURE OF CENTRAL ASIA: U.S.-CHINA RELATIONS* 379 (David Denoon ed., 2015).

during the Cold War.¹⁶⁶ Additionally, the Arab–Israeli conflicts after 1967 and during the 1970s provoked the hostility of Syria against Israel and its ardent supporter, the United States.¹⁶⁷ Such hostile past interactions discourage a collaboration between the states over the ISIS threat.

The aforementioned steps and their inferences imply that the unwilling or unable test fully applies to the armed conflict between ISIS and the United States. The United States can use force against ISIS in self-defense. However, it also needs to acquire consent from the Syrian government to use force against ISIS in Syrian territory¹⁶⁸ according to the unwilling or unable test framework¹⁶⁹ and in order to legitimize its use of force according to the principles of international law related to an armed conflict.¹⁷⁰ Curbing the ISIS threat is in the interest of not only the United States and European nations, but also the Syrian government, Iraq, and other Middle Eastern countries in ISIS's neighborhood, because the ISIS has posed a horrendous threat to all of these regions.¹⁷¹ Furthermore, the United States should properly assess the ISIS threat in order to devise an effective strategy for countering as well as terminating the threat permanently.

VI. CONCLUSION

It is evident from history that the international community responds to a regional or international armed conflict in a multifaceted and unclear manner.¹⁷² That is, the international community criticizes the use of force by one state in the territory of another. Such force is an apparent breach of territorial sovereignty of the host state when the military actions by the victim state are launched against NSAs in the territory of the host state and when the host state has not given express and open consent to the victim state to use force in its

¹⁶⁶ WILLARD BELING, *THE MIDDLE EAST: QUEST FOR AN AMERICAN POLICY* 158 (1973).

¹⁶⁷ ZAKY SHALOM, *BEN-GURION'S POLITICAL STRUGGLES, 1963-1967: A LION IN WINTER* 78 (2006).

¹⁶⁸ See d'Aspremont, *supra* note 148, at 11.

¹⁶⁹ See Deeks, *supra* note 109, at 533.

¹⁷⁰ See Sliney, *supra* note 31, at 12.

¹⁷¹ Tibori-Szabó, *supra* note 22, at 94.

¹⁷² See, e.g., Heike Krieger, *Conclusion: Where States Fail, Non-State Actors Rise?*, in *INDUCING COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW* 550 (2015).

territory.¹⁷³ This weakens support for the stance of the victim state. As a result, its right of self-defense would appear to be at stake, despite this right having been recognized by Article 51 of the United Nations Charter.

Furthermore, it is pertinent to mention here that modern technology can also help NSAs to grow stronger¹⁷⁴ because it can assist NSAs to act in a more organized manner; for instance, using fast communication tools,¹⁷⁵ the Internet, sophisticated weaponry, location trackers, and other technological tools¹⁷⁶ can help them strategically to hold their presence for a longer time.

NSAs that are more advanced in military capacity as well as in organization can capture natural resources and can use them for financial support. For instance, ISIS has captured the oil wells near the Iraq and Syrian borders¹⁷⁷ and has allegedly been found to be earning around a million dollars a day from exporting oil to some countries.¹⁷⁸ The seizure of such resources can make NSAs, like ISIS, grow stronger and states, like Syria, grow relatively weaker when their territory is captured by NSAs; therefore, the nature of the ISIS threat is getting stronger. Consequently, in a situation where NSAs are growing stronger and are generating threats to states globally, but the international community remains undecided about approving the use of force against them, there can arise the possibility of victim states indulging in proxy wars in host states.¹⁷⁹

As it is the inherent right of the victim state to use force in its self-defense,¹⁸⁰ the victim state may choose to act either by launching a direct attack against NSAs within the territory of a

¹⁷³ See, e.g., LADISLAS BIZIMANA, *CONFLICT IN THE AFRICAN GREAT LAKES REGION* 26 (1999).

¹⁷⁴ Muhammad Shamim, *Terrorism v/s Secularism*, 1 EPILOGUE 6 (May 2009).

¹⁷⁵ Marc Goodman, *How Technology Makes Us Vulnerable?*, CNN (last updated July 29, 2012), <http://www.cnn.com/2012/07/29/opinion/goodman-ted-crime/index.html>.

¹⁷⁶ Erica Fink, Jose Pagliery, & Laurie Segall, *Technology and the fight against terrorism*, CNNTECH (Nov. 24, 2015, 6:47 AM), <http://money.cnn.com/2015/11/24/technology/targeting-terror-intelligence-isis/index.html>.

¹⁷⁷ Joby Warrick, *The So-Called Islamic State of Iraq and Syria*, in *REPORTS FROM MIDDLE EAST CONFLICT REGIONS* 181–82 (Heinz-Dietrich Fischer ed., 2016); see also DOUGLAS LOVELACE, *TERRORISM: COMMENTARY ON SECURITY DOCUMENTS* 109 (2016).

¹⁷⁸ HENRY BOLANOS, *HI-JACKED ISLAM: WAHHABISM AND TERRORISM* 107 (2015).

¹⁷⁹ See Andrew Mumford, *PROXY WARFARE* 1961 (2013) (explaining factors contributing to proxy wars).

¹⁸⁰ U.N. Charter art. 51 (1945).

host state or by punishing them through another NSA group that may not be officially identified as having associations with the victim state. In either case, the victim state would be using force to exercise its inherent right of self-defense. However, such a situation would cause severe damage to the peace and stability of the region, particularly in a situation when the victim state chooses to act surreptitiously by supporting a NSA group to fight against another NSA group threatening the security of the victim state from within the host state's territory. Moreover, it may also lead to severe human rights violations in which local civilians might also face significant harm, because NSAs do not follow any obligations of international law, despite the fact that the UN Charter and customary international law applies to them.¹⁸¹ Furthermore, any of the two fighting NSAs may attempt to create a state of its own in the territory captured and controlled by it.¹⁸²

Thus, the main concern is that a divorce between international law and contemporary reality is harmful and becomes imminent in the aforementioned armed conflict, which can convince the victim states to use subversive means to respond in order to preserve their self-defense. These concerns are compelling because international law does not provide guidance particularly in the event of an armed conflict between a state and an NSA residing in another sovereign state; furthermore, there are no particular laws but only inferences from the principles of international law that can suggest or endorse possible reactions for preserving victim states' right of self-defense. Such a situation can impel victim states to behave outside their legal obligations when they do not find any part of international law favoring their self-defense stance. Hence, ignoring the problems such as armed conflict between a state and an NSA in another state can cause ambiguousness in international law and, at times, can lead to its disregard by the international community, which may choose to act outside the law to safeguard their self-defense or to protect their interests.

There is an urgent need for international law to evolve in a manner that would provide effective and pragmatic regulations covering all kinds of conflicts and issues, whether between states or between a state and an NSA. Furthermore,

¹⁸¹ Andrew Clapham, *Weapons and Armed Non-State Actors*, in *WEAPONS UNDER INTERNATIONAL HUMAN RIGHTS LAW* 171 (Stuart Casey-Maslen ed., 2014).

¹⁸² S.I. Keethaponcalan, *Trajectories of Security Sector in Sri Lanka*, in *Peacebuilding and Security Sector Governance in Asia* 127 (Yuji Uesugi ed., 2014).

international armed conflicts should be regulated in relation to addressing the sovereignty of the states involved in the conflict. Finally, international law also needs to provide effective and pragmatic recommendations for dealing with weak or failed states in such a manner that protects their sovereignty, particularly for those states that are directly or indirectly involved in an armed conflict. Such guidelines, if provided, would result in protecting the sovereignty of states from infringement by NSAs like ISIS.