

From a Legal Point of View / Sur le plan juridique

Canada's Military Operations against ISIS in Iraq and Syria and the Law of Armed Conflict

Robert J. Lesperance*

Introduction

The starting point for any discussion about the use of force in an armed conflict against a terrorist group like *Islamic State in Iraq and Syria* (ISIS; also known as ISIL) is identifying the legal basis justifying the use of force. One must understand the theoretical and legal underpinnings of the law applicable to the conflict. These questions should be considered:

- Has an armed attack occurred?
- Where is the conflict taking place?
- Are non-state actors engaging in armed conflict and do they have control over territory?
- Is one state attacking another or is there an internal conflict over which other states choose to intervene, with or without that state's consent?
- Under what authority are foreign states seeking to intervene in that armed conflict?

Once these questions are answered, we may begin to understand the armed conflict and determine if an armed intervention is lawful.

This article will identify the *jus ad bellum rules* (the right to use force) and apply them to the use of force by Canada against ISIS in Iraq and Syria. Having established the normative legal framework that underpins Canada's right to use force, this article will argue that Canada's participation

in the US-led coalition to attack ISIS targets in Iraq is justified, but that Canada's recently announced intention to attack ISIS targets in Syria is legally problematic.

PART I - ISIS is Sophisticated and Has Established Itself in Syria and Iraq

Much is known about how ISIS was founded and its military tactics. A stalwart Sunni terrorist, Abu Musab al-Zarqawi, loyal to Osama bin Laden, is alleged to have founded ISIS in 2004.¹ ISIS was Al-Qaeda's bridgehead into Iraq. Its mission in Iraq was to specifically target US military forces, civilians, and coalition forces to pressure the US and its partners fighting the insurgency to leave Iraq.²

ISIS' military tactics have "gained a reputation for brutality and tyranny."³ Others have characterized ISIS as a jihadist group which demonstrates an unforgiving radical and systemic criminal behaviour, including the execution of prisoners, the murder of ethnic minorities and forcing women into sexual slavery.⁴ An observer of radical Islam states that ISIS has "... formed a regular army which is extremely well armed. It carries out conventional warfare as well as guerrilla warfare and suicide attacks."⁵

Composed of Sunni Muslims, ISIS members are non-state actors drawn to radical Islamist ideology and are mostly Iraqi and Syrian Arabs. However, they also attract recruits from other Middle Eastern countries,

Les opérations militaires du Canada contre le groupe L'État islamique en Irak et au Levant en Irak et en Syrie et le droit des conflits armés

Robert J. Lesperance*

Cet article présente des arguments en faveur de la participation légitime des forces armées canadiennes en Irak au sein de la coalition dirigée par les États-Unis qui combat l'organisation djihadiste radicale terroriste connue sous le nom d'État islamique en Irak et au Levant (EIIL), l'intervention militaire ayant été demandée et approuvée par l'Irak. En revanche, il y a lieu de se demander s'il est possible de justifier, au regard du droit international, les frappes aériennes visant le groupe EIIL en Syrie proposées par le Canada. En l'absence du consentement de la Syrie, il n'y a pas de résolution du Conseil de sécurité de l'ONU en vertu du Chapitre VII de la Charte des Nations Unies autorisant le recours à la force contre des cibles du groupe EIIL à l'intérieur du territoire syrien. La Syrie n'apporte aucun soutien au groupe EIIL, ni ne lui sert de refuge, et est, en fait, en conflit armé de longue durée avec celui-ci. En outre, même si les attaques criminelles isolées qui ont été perpétrées contre des militaires canadiens au Canada avaient été motivées par une idéologie ayant un lien, quoique ténu, à celle que prône le groupe EIIL, elles ne satisfont pas aux exigences de « conflit armé » pour permettre au Canada d'invoquer le droit à la légitime défense individuelle. Le Canada intervient dans le cadre de la légitime défense collective de l'Irak



e.g. Saudi Arabia, Jordan, Libya, and Yemen. ISIS seeks to overthrow the governments of Iraq, Syria, Lebanon, and Jordan and to establish an Islamic state, a new Caliphate,⁶ in the Middle East. “They are trying to create a state in the areas they have conquered, just like the Taliban did once they set out to conquer Afghanistan.”⁷

ISIS also uses sophisticated propaganda films and videos, including a recent film, *Flames of War*, to assert its Islamic state ‘brand’. This film chronicles actual battle scenes, depicting its fighters as ‘action heroes’ battling ‘enemies’, and culminates in the capture of a Syrian military base near the city of Ar Raqqa.⁸ Not only is the *Flames of War* used for recruiting members to the ISIS cause, “... it’s also a way for ISIS to establish a narrative about itself.”⁹ Through multimedia offerings, ISIS is not only extolling the virtues of its military victories and successes, but is also showcasing towns captured by ISIS depicting men happily chatting in the streets and children playing in parks. As Naheed Mustafa commented, these “are marketing efforts and they have one goal: the creation of the Islamic State’s brand.” ISIS uses beheading videos, such as the one of the American Journalist James Foley, as a means of pushing the buttons of Western audiences and states. This creates media coverage and, in turn, forces Western governments to take action against ISIS.¹⁰

Since October 2014, ISIS has overwhelmed the Iraqi conventional security forces and has been battling on the outskirts of Baghdad, gaining footholds near the city of Kobani in Syria.¹¹ ISIS has successfully gained and held territory in Iraq. It has also gained and held territory in Syria. There is general consensus among

states that ISIS is a terrorist organization and Canada has listed ISIS as a terrorist entity under the *Canadian Criminal Code*.¹² For these reasons, ISIS has garnered the attention of the Western governments.¹³

On October 3, 2014, a motion was tabled in the Canadian House of Commons, which subsequently passed, seeking support for the Canadian Government’s decision to contribute Canadian military assets to the US led coalition to fight against ISIS and terrorists allied with ISIS in Iraq for up to six months.¹⁴ Note that the Government’s motion in Parliament sought political ‘support’ rather than legal ‘authorization’ for the deployment of the Canadian Forces. This is due to the fact that the Government has constitutional authority, based on Crown Prerogative, to deploy the armed forces without Parliament’s consent.¹⁵

Canada has deployed six CF 18 Hornets (fighter-bombers), two CP140 surveillance aircrafts, one aerial tanker, and 600 supporting personnel. In addition, Special Operating Forces have been deployed to northern Iraq.¹⁶

On March 24, 2015, the Government tabled another motion in the House of Commons, which subsequently passed, seeking support for the Government’s decision to extend Canada’s military deployment into Iraq for another 12 months and expand its military operations by joining the US coalition in conducting air strikes against ISIS targets inside Syria. Here are excerpts of what the Prime Minister stated in the House of Commons:

Again, Mr. Speaker, the government is also seeking the

contre le groupe EIIL opérant à partir de la Syrie. Le présent article examine plus à fond les avis divergents des États et des spécialistes du droit international sur la question de savoir si les États, et le Canada en l’occurrence, ont le droit de se fonder sur le critère selon lequel l’État en question « ne veut pas ou ne peut pas » pour se soustraire à l’obligation d’attribuer l’attaque lancée par des acteurs non étatiques à l’État à partir duquel les acteurs non étatiques opèrent.

*Robert J. Lesperance est un associé fondateur du cabinet Lesperance Mendes de Vancouver. Ancien colonel et ancien membre de la Première réserve des Forces canadiennes, il a servi comme avocat militaire auprès du Cabinet du Juge-avocat général, de 1986 à 2014. M. Lesperance a animé de nombreuses conférences sur le droit international des conflits armés, après avoir enseigné ce sujet en tant que professeur auxiliaire à l’Université de la Colombie-Britannique, de 2004 à 2010. Courriel : rjl@lmlaw.ca

support of this House for its decision to explicitly expand that air combat mission to include Syria.

The government recognizes that ISIL’s power base, indeed the so-called Caliphate’s capital, is in Syria.

ISIL’s fighters and much of its heavier equipment are moving freely across the Iraqi border into Syria, in part for better protection against our air strikes.

In our view, *ISIL must cease to have any safe haven in Syria.*

*Let me also be clear that, in expanding our air strikes into Syria, the government has now decided that we will not seek the express consent of the Syrian government.*¹⁷

Given this complex political and military situation, what then gives Canada the right to use force in Iraq and Syria to combat the threat that ISIS poses to peace and security in the region? The starting point to answering this question is to examine when states may legitimately resort to the use of force.

PART II. *Jus ad bellum* – Canada’s Right to Use Force in Iraq and Syria

1. Prohibition Against the Use of Force

The prohibition against the use of force “is the cornerstone of the United Nations Charter”¹⁸ and therefore, “the international law on the use of force”¹⁹ – *jus ad bellum*,²⁰ the right to engage in armed conflict – is the theoretical starting point for determining when military force can be used by one state against another.²¹ Article 2(4) of the *UN Charter* limits the application of military force and mandates that “all Members [States] 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.”²² This prohibition against the use of force rule has achieved the status of customary international law.²³

International laws are created either by international treaty or customary international law. Both are sources of international law and when there is

a conflict between the two, the conflict must be resolved by looking to current state practice. This can be done by first assessing whether the would-be rule has *opinio juris*, i.e. is perceived by states to be the law. Secondly, the new rule must reflect state practice and demonstrably control the behaviour of states.²⁴

What legal basis, then, would permit Canada to lawfully engage in military operations against ISIS targets in Iraq and Syria, without violating Article 2(4) of the *United Nations Charter (UN Charter)*?

As will be demonstrated below, the legal basis for commencing air strikes against ISIS in Syria’s territory is distinguishable from the circumstances in Iraq.

2. Exceptions to the Prohibition on the Use of Force Justify the Use of Military Force

There are two express exceptions to the rule on the prohibition on the use of force that are contained in the *UN Charter*. Two other justifications, namely consent and humanitarian intervention, will also be examined. These exceptions or justifications must be examined in the light of *opinio juris* and state practice if they are to be accorded any validity in international law. This part will outline the exceptions to the prohibition on the use of force and apply them to Canada’s legal justifications for using military force against ISIS in both Iraq and Syria.

A. Security Council Authorization

The first exception is authorization to use force under a Security Council Resolution pursuant to Articles 39 and 42 of the *UN Charter*. The test

for determining whether the Security Council can act is whether there exists any threat to peace, breach of the peace, or an act of aggression in a region. Once this is answered in the affirmative, the Security Council can then decide what measures are needed in a Chapter VII *UN Charter* authorization to use all necessary means, including the use of military force, to restore peace and security to a region.

There are no UN Security Council resolutions under Chapter VII of the *UN Charter* authorizing Canada to use force to combat ISIS in either Iraq or Syria. This exception, therefore, does not apply to justify Canada’s military mission in either country.

B. Self Defence

The second exception to the prohibition on the use of force rule is under Article 51 of the *UN Charter*, which recognizes the inherent right of self-defence.²⁵ Article 51 preserves the “inherent right of the individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council takes measures necessary to maintain international peace and security.”²⁶ States claiming the right to resort to the use of force under individual or collective self-defence must report these measures to the UN Security Council.²⁷ The *UN Charter* also permits self-defence alliances, such as North Atlantic Treaty Organization (**NATO**), to exercise collective self-defence.²⁸

Individual or collective self-defence reflects customary international law as well.²⁹ A required element under Article 51 is that there must be an “armed attack” against a state.³⁰ The International Court of Justice (ICJ)



has suggested that the armed attack must be of sufficient ‘gravity’ as to ‘scale and effect’ and have cross border elements.³¹ The Court in *Nicaragua* held that it was important to establish a baseline threshold of force that would amount to an armed attack, as distinguished from other armed clashes, such as mere cross border frontier incidents.³² The existence of an armed attack is – for the ICJ – the condition *sine qua non* for lawful self-defence.³³ In other words, the armed attack must constitute a qualitatively grave use of force.³⁴ Use of force simpliciter was not enough.³⁵

The Court also concluded that if an armed attack by non-state actors was attributable to a state, then armed intervention against that state was permissible.³⁶ Further, the ICJ held that in order for the armed attack by the non-state actor to give rise to state responsibility, it would have, “to be proved that the State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”³⁷ In addition, the ICJ confirmed that it is a well-established rule of customary international law that the use of force in self-defence must be “proportional to the armed attack and necessary to respond to it.”³⁸

In summary, under the *Nicaragua* test, three conditions are necessary to resort to the use of force in individual or collective self-defence in the case of attacks by non-state actors:

1. An ‘armed attack’, on the soil of the victim state, on gravity scale that exceeds mere cross border skirmishes;
2. Attribution to the target state in circumstances where that state had ‘effective control’ over the

- non-state actors’ conduct; and,
3. The use of force must be proportional and necessary to respond to the armed attack.

In the 2005 ICJ decision in the *Congo* case, the Court found no evidence of armed attacks attributable to or ‘by or on behalf of’ the DRC justifying Uganda exercising the right of self-defence.³⁹ However, the Court did not provide any further guidance on the question of the action a state may take in the case of an armed attack by non-state actors, where attribution to the state cannot be proven. In the *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* advisory opinion,⁴⁰ the ICJ held the armed attack must be ‘imputable’ to a state. Given the uses of the phrases ‘by or on behalf of’ in both the *Nicaragua* and *Congo* cases and ‘imputable’ in the *Israeli Wall*, the ICJ confirms there must be some degree of state attribution.⁴¹

One scholar has summarized ICJ decisions on self-defence, including *Nicaragua*, *Congo* and *Israeli Wall* cases, as follows:

Yet, so far as the existing *lex lata* of self-defence may be ascertained, by examining in detail what the Court has pronounced with regard to self-defence, it can be seen that a good deal of the ICJ’s jurisprudence does in fact reflect conventional and customary international law.⁴² *Can Canada use the Rights of Individual or Collective Self Defence to Justify Attacking ISIS in Syria*

After tabling its motion, the Government announced that it would follow the US’ lead and report to the

UN Security Council that Canada was invoking individual and collective self-defence under Article 51 of the *UN Charter*.⁴³

In correspondence to the UN Secretary General, the US Ambassador stated that ISIS’ operations in Syria were a threat to Iraq and other countries including the US and these states had the inherent right of individual and collective self-defence under Article 51 of the *UN Charter*, where Syria was seen to be ‘unwilling or unable’ to prevent the use of its territory for attacks against these states. He further stated that, given Syria’s inability to prevent ISIS from using Syria as a safe haven, the US was using proportionate force to eliminate the ongoing ISIS threat to Iraq.⁴⁴ The UN Secretary General commented on the US’ letter by posting a blog on a security online forum. This acknowledgement arguably gives some support to the notion that Syria is ‘unable’ to suppress the threat posed by ISIS:

I also note that the strikes took place in areas no longer under the effective control of that government. ... It is undeniable and the subject of broad international consensus that these extremist groups pose an immediate threat to international peace and security.⁴⁵

Canada’s reporting letter to the UN Security Council under Article 51 has adopted arguments similar to the US’, including the following:

...On June 25 and September 20, 2014 Iraq wrote to the Security Council, making it clear that it was facing a serious threat of *continuing attacks* from Islamic State in Iraq and

the Levant (ISIL) emanating from safe havens in Syria. This *threat persists and the attacks* by ISIL from safe haven in Syria continue.

ISIL also continues to *pose a threat* not only to Iraq, but also to Canada and Canadians, as well as to other countries in the region and beyond. In accordance with the inherent rights of individual and collective self-defence reflected in Article 51 of the United Nations Charter, States must be able to act in self-defence when the Government of the State where a threat is located is unwilling or unable to prevent attacks emanating from its territory.⁴⁶

a. Canada's Assertion of Individual Self-Defence

Canada's reliance on individual self-defence as a justification for military action in Syria against ISIS targets is legally questionable. The deplorable killings of the two Canadian soldiers in the fall of 2014 were likely motivated by radicalized jihadist rhetoric similar to ISIS ideology. Indeed, an audio clip distributed on Twitter, showed an ISIS spokesman, Abu Muhammad al-Adnani, holding up the killing of Canadian soldiers as a model, and urging his followers to attack Canadians over the government's decision to join the anti-ISIS military coalition.⁴⁷ Threats in and of themselves, however, do not amount to an armed attack against Canada on Canadian soil on the scale contemplated by the *Nicaragua* case. ISIS is a non-state actor group and so far there is no evidence to suggest that these despicable attacks were actually linked to, sponsored or carried

out by ISIS from Syria.⁴⁸ To date, Canada has treated these two isolated and solo terrorist attacks as criminal law enforcement matters.⁴⁹

In addition, and perhaps more conclusively, for Canada to justify an attack on ISIS in Syria on the basis of individual self-defence, and absent a case for anticipatory self-defence discussed below, there must be some attribution for ISIS' conduct to the Syrian regime to justify breaching Syria's state sovereignty. The ICJ, in the *Nicaragua*, *Congo* and *Israeli Wall* cases, requires that the armed attack be *attributed* to, or be 'by or on behalf of' the state where the non-state actors are actually operating,⁵⁰ though there is some debate whether the requirement is as strict in a post 9/11 world.⁵¹ One scholar believes that post 9/11, the traditional 'effective control' attribution rule has been relaxed in favour of an emerging "harbouring" or "supporting" rule.⁵² If this emerging rule is to be accepted, the attribution for the conduct of the non-state actor is appropriate, but only in circumstances where the *nexus* between the state and the non-state actor confers a public character on the conduct in question and effectively recasts the private act as 'state action'.⁵³

The Syrian regime is locked in an internal armed conflict against ISIS. No credible argument can be made that Syria is providing a 'safe haven' or sanctuary to ISIS. Nor is the Syrian regime collaborating with, harbouring, or supportive of, ISIS, thereby enabling the latter to export or deploy its terrorist activities against other states, including Canada. Two respected scholars have stated that "... it is obvious that IS operations are not attributable to Syria..."⁵⁴

Contrast these circumstances to those leading up to the post 9/11 attacks by the US on Afghanistan. The international community accepted that the attacks against the US on 9/11 constituted an 'armed attack'.⁵⁵ The Taliban's alliance with Al-Qaeda in Afghanistan provided a safe haven or sanctuary for Al-Qaeda, permitting Osama Bin Laden to build-up Al-Qaeda's terrorist infrastructure and training camps to carry out Al-Qaeda's armed attacks against the US.⁵⁶ The Taliban's support to Al-Qaeda is ostensibly why the international community supported the US in its post 9/11 attacks against both Al-Qaeda and the Taliban in Afghanistan.

Individual self-defence, therefore does not appear to afford Canada an exception to the prohibition of the rule on the use of force as a solid legal foundation for its military attacks against ISIS in Syria.

b. The Notion of Anticipatory Self-Defence is Controversial

There is considerable academic debate about whether the right of 'anticipatory' or 'pre-emptive' self-defence⁵⁷ can be used to justify the use of force against another state. In the *Nicaragua* case, the ICJ specifically refused to express a view on whether the use of force is justified in response to an imminent threat of an armed attack.⁵⁸

The principal case relied upon to begin a review of the concept of pre-emptive self-defence or anticipatory self-defence is the *Caroline* incident. During the 1837 rebellion in Upper Canada, Canadian forces seized a US vessel in American waters, known as *The Caroline*, and destroyed it. The US protested to the United



Kingdom and in the correspondence exchanged, US Secretary of State Daniel Webster stated that preventive action by a foreign state is confined to cases in which the “necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”⁵⁹ The traditional test has always been understood to require a temporal proximity to the pending armed attack necessitating an immediate defensive armed response.

c. How Anticipatory Self-defence Is Used in the Context of Individual or Collective Self-Defence.

Again, the post 9/11 attacks against both Al-Qaeda and the Taliban in Afghanistan is an example of anticipatory self-defence being used as a legal justification for the use of force in the context of individual and collective self-defence under Article 51 of the *UN Charter*. The Taliban, who controlled all but a small part of that country – and were effectively its *de facto* government – were requested by the US to turn over Al Qaeda. The Taliban refused and made it clear that they would continue to give sanctuary to Al Qaeda.⁶⁰ While the Taliban did not ‘control’ Al Qaeda, it is clear the Taliban actively provided a safe haven in Afghanistan from which Al Qaeda could plan and launch operations.

Drawing on the *Caroline* case, both the US and the UK claimed that the intervention in Afghanistan in 2001 was the exercise of the right of anticipatory self-defence.⁶¹ After the 9/11 attacks, the UN Security Council unequivocally condemned the attacks against the US and also recognized the inherent right of self-defence.⁶² In a subsequent resolution, the Security Council also reaffirmed

the right of self-defence without specifically identifying Al Qaeda and called upon states to prevent the commission of terrorist acts.⁶³ For the first time in the history of NATO, the US invoked Article 5 of the *North Atlantic Treaty*,⁶⁴ triggering a collective defense response from NATO members.

Since the 9/11 attacks in 2001, as one scholar advances, the traditional anticipatory self-defence test as applied to non-state actors has shifted and has been replaced by one that requires the presence of three factors before force can be used:

1. A capability to conduct an armed attack;
2. An intent to launch the armed attack; and,
3. The need to act in a timely manner to ensure that the opportunity to respond is not lost.⁶⁵

Nevertheless, notion of anticipatory self-defence remains controversial. One scholar has conducted a comprehensive review of state practice and *opinio juris* on the use of force under this doctrine. He observes:

The implication is that, taking account of the [UN] Charter “baseline” and the absence of a concrete precedent in State practice which convincingly demonstrates the international community’s support for some form of anticipatory self-defence, it is impossible to identify *de lege lata*, a general right of pre-emptive – and a *fortiori* preventive – self defence.⁶⁶

[W]e may therefore conclude that the trend in State practice

has been broadly similar to that in legal doctrine: support for anticipatory self-defence has increased, but has by and large restricted this concept to imminent threats.⁶⁷

Interestingly, the *Congo* and *Israeli Wall* cases were decided post 9/11, and both require the conduct of the non-state actors to be attributed to the host state.

i. Can Canada Rely on ‘Anticipatory Self-Defence’ to Justify the Use of Force in Syria?

Leaving aside the *Nicaragua* armed attack ‘scale and effects’ threshold requirement, in order to rely on this exception Canada would have to assert that ISIS has the capability of launching an ‘imminent’ armed attack against Canada. This is largely a question of fact based on an intelligence threat analysis. The Prime Minister’s statement in the House of Commons quote above did not mention that ISIS is capable of launching a large scale attack on Canadian soil. The letter to the UN Security Council quoted above mentions only ‘threats.’ In the 2014 Public Report on the Terrorist Threat to Canada, the threat from violent extremists to Canada was portrayed as follows:

Canada, the United States of America and other countries remain focused on countering al-Qaida’s efforts to encourage Western-based individuals to conduct terrorist attacks from within Western countries. To date, such attacks have been carried out by lone individuals or by small groups, both often encouraged by al-Qaida’s violent ideology. ...

Al-Qaida remains a direct threat to Canada for the foreseeable future. Additional terrorist groups have sworn loyalty to al-Qaida, adopting its ideology and pursuing a capacity to conduct attacks in the West. Also, al-Qaida's advocacy of violence still resonates with some individuals, particularly those concerned about the conflict in Syria.⁶⁸

The feature focus of this report was a response to violent extremism and travel abroad by radicalized Canadians for terrorism-related purposes.

There certainly appears to be a basis for concluding that Canada is in danger of threats from isolated terrorists conducting individual attacks, as seen from the above Public Safety Canada threat analysis. The two attacks on Canadian soldiers in October 2014 and the ISIS spokesman's urgings outlined above, underscore the accuracy of this public intelligence report. However, the litmus test to justify an attack on Syria based on anticipatory self-defence as required by customary international law is whether ISIS is capable and intends to 'imminently' launch an armed attack on Canada from Syria and there is a need for Canada to act promptly lest these self-defence measures be lost.⁶⁹ The Canadian Government has to date not advised that its military intervention against ISIS in Syria is based on this type of threat analysis. If we accept that customary international law has evolved post *Caroline* as outlined above, Canada would still have to overcome the hurdle of attributing ISIS' attacks to Syria, or if we accept that the *Nicaragua* case attribution rule has been diluted by the post 9/11 Afghan example or even the emerging

'harbouring' or 'supporting' rule outlined above, at least prove that Syria is actively harbouring or supporting ISIS by providing it with a 'safe haven' so it can plan and launch putative armed attacks against Canada.

ii. *Canada's Assertion of Collective Self-Defence*

Canada has stated that it will also invoke collective self-defence as legal justification for its air strikes against ISIS in Syria. In correspondence to the Security Council, Iraq stated that ISIS has established a safe haven outside of Iraq's borders, making it impossible to defend its citizens against terrorist attacks.⁷⁰ Since Iraq has requested assistance from the US and other coalition countries, including Canada, to combat ISIS, the argument is that Iraq has an individual right of self-defence from armed attacks by ISIS from Syria. As one scholar posits, the "... right of States to engage in collective self-defence is derivative of the right of the State that has been the victim of the armed attack."⁷¹ The official legal position for the US to justify its attacks on Syria was put by the US Department of Defence, General Counsel as follows:

Under international law, states may defend themselves, in accordance with the inherent right of individual and collective self-defence, when they face armed attacks or the imminent threat of armed attacks and the use of force is necessary because the government of the state where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.⁷²

This arguably enables the US, and

now Canada, to invoke the right of collective self-defence.

However, the analysis does not end there. Absent the attribution rule outlined both in the *Nicaragua* and *Congo* cases, Canada will have to justify its air strikes against ISIS in Syria on the basis that that Syria is "unwilling and or unable" to prevent ISIS from launching armed attacks against Iraq from Syrian territory. Proponents of the "unwilling and or unable" doctrine argue that customary international law now permits extra-territorial attacks against non-state actors, where the territorial state is "unwilling or unable" to prevent the non-state actor's armed attacks.⁷³ A respected scholar is of the opinion that if a non-state terrorist group attacks a state from a safe haven in another state that will not or cannot take action against this terrorist group, the attacked state may employ self-defence against that terrorist group.⁷⁴ Attribution does not appear to be a requirement.

As two authors summarized the issue, "only if the doctrine properly replicates international law" would the air strikes be lawful.⁷⁵

The theory is that the "unwilling or unable test" balances the right of sovereignty against self-defence and, in this framework, collective self-defence. This test is based on the premise that states have an obligation to police their own territory to prevent non-state actors from launching an armed attack against another state. Every state "...has an obligation to not knowingly allow its territory to be used in a manner contrary to the rights of other states."⁷⁶

As proposed, the "unwilling or unable" theory requires the victim



state to assess whether the territorial state is “unwilling or unable” to suppress the threats by, among other things, attempting to obtain consent for the use of force or assessing the territorial state’s control and capacity in the relevant region as accurately as possible.⁷⁷

Assuming the proposed analysis is an accurate reflection of international law, no evidence is proffered as to what steps either the Iraqi Government, or indeed the Canadian Government, have undertaken to conduct the above analysis. In an interview published in *Foreign Affairs*, the Syrian President, Bashar al-Assad, asserts that the Syrian Government remains the legitimate authority in all parts of Syria.⁷⁸ The Canadian Prime Minister has conceded the Syria’s consent was not sought.

Since the Syrian Government does not support or harbour ISIS, and given that it is in fact locked in an internal armed conflict with ISIS, it does not appear the Syrian regime is ‘unwilling.’ The focus then becomes whether Syrian security forces are ‘unable’ to prevent ISIS from using Syria’s territory in conducting cross border attacks into Iraq. In these circumstances, the balancing of two states’ interests is succinctly put by one writer as follows:

... [W]here ... a host State is ... unable to prevent its territory from being used as a base of terrorist operations, in contravention of its obligations under customary international law, the victim State is left with little choice. Either it respects the host State’s territorial integrity at great risk to its own security, or it violates that State’s territorial integrity.⁷⁹

Mr. Assad stated in the interview that while ISIS may control some areas of Syria, “the factions you refer to control some areas, but they move from one place to another—they are not stable, and there are no clear lines of separation between different forces.”⁸⁰

What is Syria’s obligation to prevent ISIS from operating in its territory to launch attacks against Iraq? As one scholar argues, the ‘due diligence’ that must be exercised by a state in preventing the state’s territory from being misused, does not require the absolute prevention of action by the private individuals.⁸¹ Put another way, “...the duty to prevent attacks by non-state actors is an obligation of *means*, not an obligation of *results* and one which is governed by the due diligence principle”⁸² (emphasis added). In addition, the loss of effective control over part of a state’s territory does not automatically make it a ‘rogue’ or ‘failed state.’⁸³

Successfully relying on the “unwilling or unable” test is Canada’s strongest argument for justifying its use of force against ISIS targets in Syria. Canada would have to establish that customary international law has evolved away from the *Nicaragua* case attribution standard or the emerging ‘harbouring’ or ‘supporting’ rule under Article 51 of the *UN Charter* towards the “unwilling or unable” test.

However, another author observes that there are only two states that officially endorse the “unwilling or unable” test: the United Kingdom and the United States. This author is highly critical of the proponent of the “unwilling or unable” test and has taken this position:

Simply put, there is simply no “consistent practice” that supports the “unwilling or unable” test, and scholars need to be careful not to put states in the “unwilling or unable” camp simply because they are willing to use armed force against a non-state actor. Deeks has been particularly prone to this kind of over inclusiveness, *most recently arguing* that Jordan, Bahrain, Qatar, the UAE, and Iraq support the “unwilling or unable” test because they have attacked ISIL in Syria — this despite the fact that all five states are members of the Arab League, *which has specifically rejected the test* in the context of Israel’s attacks on Hezbollah in Lebanon.⁸⁴

While not evidence of state practice *per se*, it is interesting to note that in December 2014, the UK’s Government’s International Affairs and Defence section observed that, at that time, only the US and its Arab partners had participated in air strikes against ISIS in Syria:

The United Kingdom, France, the Netherlands, Belgium, Australia, Canada and Denmark have all conducted air strikes in Iraq. *All are reluctant to intervene militarily in Syria.* Iran is also reported to have conducted airstrikes in eastern Iraq, although not in coordination with the US-led coalition (emphasis added).⁸⁵

One scholar argues that the United Kingdom’s (UK) December 2014 letter to the UN Security Council under Article 51 is proof of evolving state practice:

[T]aking measures against ISIS “in support of the collective self-defence of Iraq as part of international efforts led by the United States.” The letter further stated that the UK “fully supports these international efforts, whose purpose is to end the continuing attack on Iraq, to protect Iraqi citizens, and to enable Iraqi forces to regain control of Iraq’s borders by striking ISIL sites and military strongholds in Syria, as necessary and proportionate measures.”⁸⁶

In contrast, one author observes that the ‘unwilling or unable’ doctrine is not recognized by treaty law nor the ICJ, and its existence at customary international law is debated by scholars.⁸⁷ It is thus fair to summarize that the legality of the “unwilling or unable” doctrine under international law remains, as one author has written, “unsettled.”⁸⁸ There appears to be no consensus among international law scholars, let alone states, that the ‘unwilling or unable’ test has in fact been accepted as a viable international law.⁸⁹

Nor does there appear to be any consensus that the state attribution rule has been whittled down by state practice to something less than the *Nicaragua* case’s ‘effective control’ over the non-state actor.⁹⁰ An argument can be made for quite the opposite. As suggested by one scholar, it is reasonably clear:

...[T]he ICJ requires a degree of collaboration on the part of the host state in all cases in which self-defence is invoked. *The ICJ has required more than a mere unwillingness or inability to act.*⁹¹

The use of force in another state’s territory without the attribution of an armed attack of the non-state actor to it, or at least establishing that the state was ‘harbouring’ or ‘supporting’ the non-state actors in the armed attack, remains controversial and is not yet settled.⁹²

Given the lack of consensus of both *opinio juris* and state practice, the “unwilling or unable” doctrine seems tenuous legal justification for authorizing Canadian combat air strikes against ISIS in Syrian territory.

C. Consent of a State

Another exception to the prohibition on the use of force exists when a state (the “host state”) requests a foreign state (the “acting state”) to provide military assistance in the host state’s territory in situations, for example, where non-state actors are in an internal armed conflict with the host state and have overwhelmed the host state’s security forces. In these circumstances, the host state provides consent to the acting state’s use of force against non-state actors in the host state’s territory. In the *Congo* case, the ICJ held that because Article 51 of the *UN Charter* refers to the right of individual and collective self-defence, “a State may invite another state to assist it in using force in self-defence.”⁹³

Given that the host state must request or accept military assistance, the host state cannot claim later that the acting state’s military operations in its territory constituted a violation of the host state’s sovereignty or unlawful use of force.⁹⁴ International law supports an acting state’s right to respond to requests for military assistance from a host state in situations where it is necessary to reinstate law and order

within the host state’s territory.⁹⁵ The host state is entitled to set limits on the acting state’s use of force and the duration of the military operation. The use of force must, nevertheless, be guided by the principles of distinction and proportionality.

i. Is Canada’s Participation in the Armed Conflict Against ISIS in Iraq Lawful Because Iraq Has Requested Military Assistance from Canada?

This article proposes that Canada’s participation in the mission to combat ISIS in Iraq is supported by international law. As noted above, a host state which either requests armed assistance or consents to an acting state’s military intervention effectively authorizes the use of force in the host state. This exception to the rule on the prohibition on the use of force makes the military intervention of the acting state lawful. In the motion before Canada’s House of Commons seeking Parliament’s support for Canada’s use of force in Iraq in October 2014, the motion stated that: “this House... (v) acknowledges the request from the Government of Iraq for military support against ISIL from members of the international community, including the Government of Canada.”⁹⁶

Therefore, because of Iraq’s request, the use of force in Iraq by acting states like Canada to combat ISIS is lawful.

ii. In Contrast, Syria Has Not Consented to the Use of Force in Its Territory

As noted in Part I above, the Canadian Prime Minister has stated that Canada will not seek Syria’s consent and Syria has not expressly requested Canada’s military intervention to assist Syrian security



forces in combating ISIS in Syria. In the *Foreign Affairs* interview, Mr. Assad has said that Syria was not consulted and US air strikes in its territory would be illegal.⁹⁷ Therefore, Syria has not consented to having acting states intervene militarily in its territory. Other scholars have postulated that Syria's apparent opposition is insincere because the Syrian government has stated that both Syria and coalition states are combating "one enemy" and "there should be cooperation."⁹⁸ This theory assumes that Syria has implicitly consented to foreign intervention.⁹⁹ Given Mr. Assad's public statement to the contrary, there appears to be little support for this theory.

D. Humanitarian Intervention

Another exception to the prohibition on the use of force involves military intervention by foreign states in the territory of another state to prevent crimes against humanity or genocide committed or sanctioned by that state against its own population. This has been proffered as a reason for legitimizing the use of force at international law. One author suggests that the doctrine of justifying the military intervention on humanitarian grounds is distinct from the doctrine of the Responsibility to Protect ("R2P"),¹⁰⁰ which involves collective action authorized by the UN Security Council.¹⁰¹ The two concepts are, "similar because they reject the use of 'state sovereignty' as a shield against the principle of non-intervention."¹⁰² Humanitarian intervention pre-supposes that the military intervention, which is not otherwise sanctioned by a UN Security Council resolution under Chapter VII of the *UN Charter*, is nevertheless lawful to protect fundamental human rights. Three elements are required to advance

humanitarian intervention, namely: (a) A recognized extreme humanitarian distress requiring immediate relief; (b) no practical alternative to the use of force is available; and (c) the proposed use of force must be necessary and proportional, limited by time and scope to provide the relief required and no more.¹⁰³

Critics of humanitarian intervention take the position that such a right may theoretically exist, but has not yet been widely accepted by states as a matter of customary international law. In other words, there is an 'absence of evidence' of state practice and no associated *opinio juris* – which is fundamental in establishing a rule of customary international law.¹⁰⁴

During the debates with opposition members in the House of Commons, the Minister of National Defence referred to the humanitarian crisis in Iraq and used the word 'genocide' in the context of atrocities committed by ISIS in the region.¹⁰⁵ However, the Canadian Government has not stated that it is seeking to justify its military intervention in Syria as a humanitarian intervention. In any event, as stated above, under customary international law, this doctrine is not accepted by *opinio juris* nor state practice. Under these circumstances, it would do little good to evaluate the three criteria necessary to justify intervention on this basis.

Nor has there been a Security Council Resolution authorizing collective force in Syria under R2P, therefore, intervention on humanitarian grounds does not afford Canada a legal justification.

Conclusion

There are very limited circumstances

where states are justified in using force against the territorial sovereignty of another state. This appears to be the view under both Article 2(4) of the *UN Charter* and customary international law. The only exceptions or justifications upon which there appears to be consensus among states are: (a) A Security Council authorization under Chapter VII of the *UN Charter*; (b) individual or collective self-defence under Article 51 of the *UN Charter*; or (c) consent of a state.

This article asserts that Canada is justified under customary international law in conducting military operations against ISIS targets in Iraq, given Iraq's request for military assistance in fighting ISIS and Iraq's express consent for this armed intervention.

However, Canada's lawful participation in the air strikes against ISIS targets on Syrian territory is open to debate. Syria has not consented to these air strikes on its territory and the Canadian Government's position is that Canada will not seek Syria's consent. Absent Syria's consent or a Security Council Resolution authorizing the use of force under Chapter VII of the *UN Charter*, the only viable legal justifications Canada can claim are individual and collective self-defence.

In asserting individual self-defence under Article 51 of the *UN Charter*, Canada cannot demonstrate that it has suffered an armed attack from ISIS operating out of Syria. The recent attacks on Canadian soil of Canadian soldiers are not attributable to ISIS. Even if they were, ISIS' conduct is not attributable to, or supported by, Syria. The Syrian regime itself is engaged in an internal armed conflict with ISIS forces. Syria is not

offering ISIS a 'safe haven' by harbouring or supporting ISIS' attacks. In addition, even assuming that the armed attacks satisfy the basic Article 51 threshold gravity test established by the *Nicaragua* case and customary international law, Canada has not demonstrated an imminent threat by ISIS operating from Syria, thereby justifying anticipatory defence air strikes on Syrian territory.

The case for collective self-defence seems more plausible. ISIS appears to be using Syrian territory as a base for launching armed attacks against Iraq on a significant scale. In these circumstances, the *Nicaragua* case test for the armed attack threshold has been met, enabling Iraq to invoke individual self-defence. Since Iraq has requested assistance from Canada and the US, collective self-defence may provide some justification for targeting ISIS fighters and material in Syria.

However, there is a further legal hurdle for Canada to overcome. Unless Canada can attribute ISIS' attacks in Iraq to Syria, then the question becomes whether Canada may lawfully target ISIS, as a non-state actor in Syria's sovereign territory, using the 'unwilling or unable' doctrine to prevent ISIS' extra-territoriality attacks against Iraq. This justification moves significantly away from the *Nicaragua*, *Congo* and *Israeli Wall* cases' requirement for attribution. There appears to be a lack of consensus on whether *opinio juris* and state practice have accepted the "unwilling or unable" doctrine as customary international law.

There is no escaping the conclusion that Canada's air strikes on Syria are on shaky, or at least shifting, legal ground.

**Robert J. Lesperance is founding partner at Lesperance Mendes in Vancouver. Bob is a former Colonel and member of the Primary Reserves, Canadian Armed Forces serving as a legal officer with the Office of the Judge Advocate General from 1986 to 2014. Bob has lectured extensively on the International Law of Armed Conflict while Adjunct Professor at the Faculty of Law, University of British Columbia, from 2004 to 2010. E-mail: rjl@lmlaw.ca*

Endnotes

¹ Charles Stimson, *A Framework for Authorisation for Use of Military Forces Against ISIS* (24 September 2014), online: Heritage Foundation <<http://www.heritage.org/research/reports/2014/09/a-framework-for-an-authorization-for-use-of-military-force-against-isis>>.

² Matthew G. Olsen, *Remarks at the Brookings Institution* (3 September 2014), online: <<http://www.dni.gov/files/documents/2014-09-03-remarks>>.

³ *Ibid.*

⁴ Dominic Evans and Maggie Flick, "U.N. Accuses Islamic State of Executions, Rape, Forced Child Recruitment in Iraq", Reuters (12 July 2014), online: Reuters <<http://www.reuters.com/article/2014/07/20/us-iraq-security-idUSKBN0FN27N0140720>>.

⁵ Ahmed Rashid, "The Next Debate: This is Not America's War", *The Globe and Mail*, (4 April 2015) at F3.

⁶ A Caliphate is a form of Islamic government led by a caliph, who is a person considered a political and religious successor to the prophet Muhammad and a leader of the entire Muslim community. See Wadad Kadi and Aram A. Shahin, "Caliph, Caliphate," in Gerhard Bowering, ed, *The Princeton Encyclopedia of Islamic Political Thought*, (Princeton: Princeton University Press, 2013) at 81–86.

⁷ Ahmed Rashid, *supra* note 5.

⁸ Naheed Mustafa, "Brand ISIS: The Sophisticated Marketing of the Islamic State", *The Walrus* (March 2015) 17.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Umar Farooq, "Kurds State Islamic State Militants Near Defeat in Kobani", *L.A. Times*, (17 November 2014), online: <<http://latimes.com/world/middleeast/la-fg-kobani-kurds-20141117-story.html>>.

¹² Public Safety Canada, *2014 Public Report on the Terrorist Threat to Canada*, (Ottawa:

Public Safety Canada, 2014) at 6-9.

¹³ D Kenneth Watkins, "Targeting 'Islamic State' Oil Facilities" (2014) 90 *Int'l L Stud* 499 at 500.

¹⁴ *House of Commons Debates*, 41st Parl. 2nd Sess, No 122, 3 October 2014 (Hon John Baird).

¹⁵ Alexander Bolt, "Crown Prerogative Decisions to Deploy the Canadian Forces International: A Fitting Mechanism for a Liberal Democracy", in D Michael Jackson and Philippe Lagassé, eds, *Canada and the Crown: Essays on Constitutional Monarchy* (Kingston: McGill-Queen's University Press for the School of Policy Studies, Queen's University, 2014) at 221.

¹⁶ Louisa Brooke-Holland & Clare Mills, "ISIS: the military response in Iraq and Syria", *United Kingdom House of Commons Library* (8 December 2014), online: <www.parliament.uk/briefing-papers/sn06995>.

¹⁷ *House of Commons Debates*, 41st Parl, 2nd Sess, No 188, (24 March 2015) (Rt Hon Stephen Harper) [emphasis added].

¹⁸ *Case concerning Armed Activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 168 at 223 [Congo].

¹⁹ James A Green, *The International Court of Justice and Self-Defence in International Law*, (Oxford: Hart Publishing, 2009) at 1.

²⁰ "Jus ad bellum" means rules and laws that govern the lawfulness of, or the justification for, resorting to the use of force.

²¹ Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, (New York: Cambridge University Press, 2010) at 22.

²² *Charter of the United Nations*, 1945, 9 Int. Leg 327, art 2(4) [UN Charter].

²³ "Customary International Law" means the "general practice of states which is accepted and observed as law, i.e. from a sense of legal obligation." T Meron, *Human Rights and Humanitarian Norm as Customary Law* (Oxford: Clarendon Press, 1989) at 3.

²⁴ Anthony Arend, "International Law and Preemptive Use of Military Force" (2003) 26 *The Washington Quarterly* 89 at 97.

²⁵ The term 'self-defence' can be defined as, "the use of armed coercion by a state against another state in response to a prior use of armed coercion by the other state or by a non-state actor operating from that other state." See Sean Murphy, "The Doctrine of Pre-emptive Self-Defence", (2005), 50 *Vill L Rev* 699 at 703.

²⁶ *UN Charter*, *supra* note 21, art 5.

²⁷ *Ibid.*

²⁸ Meron, *supra* note 23 at 6.

²⁹ *Military and Paramilitary Activities in and against Nicaragua*, [1986] ICJ Rep 14, at 176 [Nicaragua].



- ³⁰ Green, *supra* note 19 at 145.
- ³¹ *Nicaragua*, *supra* note 29 at 191, 195.
- ³² *Ibid* at 194.
- ³³ Green, *supra* note 19 at 30.
- ³⁴ *Ibid* at 35.
- ³⁵ *Ibid* at 139.
- ³⁶ *Nicaragua*, *supra* note 29 at 195.
- ³⁷ *Ibid*.
- ³⁸ *Ibid* at 172.
- ³⁹ *Congo*, *supra* note 18 at 146.
- ⁴⁰ (2004) ICJ Rep 135, at 139 [*Israeli Wall*].
- ⁴¹ Green, *supra* note 19 at 49.
- ⁴² Green, *supra* note 19 at 112.
- ⁴³ Steven Chase, "Commons set to debate military mission in Syria", *The Globe and Mail* (26 March 2015) at 4.
- ⁴⁴ Letter dated September 23, 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).
- ⁴⁵ Michelle Nicholls, "Exclusive: United States defends Syria airstrikes in letter to U.N. chief", *Reuters* (23 September 2014), online: *Reuters* <<http://www.reuters.com/article/2014/09/23/us-syria-crisis-un-usa-exclusive-idUSKCN0HI22120140923>>.
- ⁴⁶ Letter dated 31 March 2015 from the Deputy Permanent Representative of Canada to the United Nations addressed to the President of the Security Council, UN Doc S/2015/221 (31 March 2015) [emphasis added].
- ⁴⁷ Stewart Bell, "ISIS spokesman calls for more Ottawa-style attacks in Canada, warning 'what lies ahead will be worse'", *National Post* (26 January 2015), online: <<http://news.nationalpost.com/news/world/isis-spokesman-calls-for-more-ottawa-style-attacks-in-canada-warning-what-lies-ahead-will-be-worse>>.
- ⁴⁸ "Ottawa Shooting: No Islamic State Link Found" *BBC News* (24 October 2014), online: *BBC News* <<http://www.bbc.com/news/world-us-canada-29752077>>.
- ⁴⁹ Josh Visser, "RCMP release security footage of Michael Zahaf Bibeau during attack, say he shot soldier in back", *National Post* (23 October 2014).
- ⁵⁰ *Nicaragua*, *supra* note 29 at 195.
- ⁵¹ There is considerable academic debate as to whether the attribution rule in the *Nicaragua* case has been diluted post 9/11 events. See Michael Schmitt, "Deconstructing October 7th: A Case Study in the Lawfulness of Counterterrorism Military Operations," in Michael N. Schmitt and Gian L. Beruto, eds, *Terrorism and International Law* (Sanremo: International Institute of Humanitarian Law, 2003) at 46.
- ⁵² Derek Jinks, "State Responsibility of the Acts of Private Armed Groups" (2003) 4 *CJIL* 83 at 90.
- ⁵³ *Ibid*.
- ⁵⁴ Louise Arimatsu and Michael Schmitt, "Attacking 'Islamic State' and the Khorasan Group: Surveying the International Law Landscape" (2014) 53 *Colum J Transnat'l L* 10 at 20.
- ⁵⁵ Green, *supra* note 19 at 45.
- ⁵⁶ *The 9/11 Commission Report: Final Report on the National Commission of the Terrorist Attacks Upon the United States* (New York: WW. Norton & Co, 2004) at 66-67.
- ⁵⁷ The term 'anticipatory self-defence' refers to the use of armed coercion by a state to halt an imminent act of armed coercion by another state (or non-state actor operating from that other state). Sean Murphy insists that a likely better term instead is the use of "pre-emptive self defense" defined as: "the use of armed coercion by a state to prevent another state (or non-state actor) from pursuing a particular course of action which is not yet directly threatening, but which, if permitted to continue, could result at some future point in an act of armed coercion against the first state". See Murphy, *supra* note 25 at 703.
- ⁵⁸ *Nicaragua*, *supra* note 29 at 194.
- ⁵⁹ *The Caroline Case*, Note of August 6, 1842, 2 Moore, *Digest of International Law*, 412 [*Caroline*].
- ⁶⁰ George Aldrich, "The Taliban, al Qaeda the Determination of Illegal Combatants" (2002) 96 *AJIL* 891.
- ⁶¹ There are in fact two schools of thought on whether the use of force in these circumstances was justified on the basis of self-defence or 'anticipatory self-defence'. Most international lawyers believe that the 9/11 armed attacks justified an Article 51 self-defence response. Some scholars have asserted that the US' use of force constituted anticipatory or pre-emptive self-defence because the, "armed attack against the World Trade Center and the Pentagon was over, and no defensive action could have ameliorated its effects." Murphy, *supra* note 25 at 619-620.
- ⁶² Security Council Res 1368, UN Doc SC/7143.
- ⁶³ Security Council Res 1373, UN Doc SC/7158.
- ⁶⁴ 1949, 34 *UNTS* 243.
- ⁶⁵ Arimatsu & Schmitt, *supra* note 54 at 16-17. See also: Michael N Schmitt, "Responding to Transnational Terrorism under the Jus ad Bellum: A Normative Framework", in Michael N. Schmitt and Jelena Pejic eds, *International Law and Armed Conflict: Exploring the Faultlines* (Leiden: Martinus Nijhoff Publishing, 2007) 157.
- ⁶⁶ Tom Ruys, *Armed Attack and Article 51 of the UN Charter: Evolution in Customary Law and Practice*, (Cambridge: Cambridge University Press, 2010) at 341-342.
- ⁶⁷ *Ibid* at 336-338.
- ⁶⁸ Public Safety Canada, *supra* note 12 at 30.
- ⁶⁹ Schmitt, *supra* note 65 at 157.
- ⁷⁰ Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, UN Doc S/2014/691 (22 September 2014).
- ⁷¹ Arimatsu & Schmitt, *supra* note 54 at 23.
- ⁷² Jennifer Speech, *Policy Address by Stephen Preston, General Counsel, U.S. Department of Defense, ASIL Cables*, online: (15 April 2015) <<http://www.asil.org/blogs/policy-address-stephen-preston-general-counsel-us-department-defense#sthash>>.
- ⁷³ Ashley Deeks, "'Unwilling or Unable': Toward a Normative Framework for Extra-Territorial Self-Defense", (2012) 52 *Va J Int'l L* 483, at 486.
- ⁷⁴ Yoram Dinstein, *War, Aggression and Self-Defence*, 4th ed (Cambridge: Cambridge University Press, 2005) at 245 and 247.
- ⁷⁵ Arimatsu & Schmitt, *supra* note 54 at 21-22.
- ⁷⁶ "*Corfu Channel*" case (Merits), [1949] ICJ Rep 4 at 22.
- ⁷⁷ Deeks, *supra* note 73 at 506.
- ⁷⁸ Jonathan Tepperman, *Syria's President Speaks: A Conversation with Bashar al-Assad*, online: *Foreign Affairs* (March/April 2015), online: <<http://www.foreignaffairs.com/discussions/interviews/syrias-president-speaks>>.
- ⁷⁹ Kimberley N Trapp, "Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors", (2007) 56 *Int'l & Comp LQ* 141 at 147.
- ⁸⁰ Tepperman, *supra* note 78.
- ⁸¹ Tom Ruys & Sten Verhoeven, "Attacks by Private Actors and the Right of Self-Defense" (2005) 10 *J of Conflict and Security Law* 289 at 305.
- ⁸² *Ibid* at 318.
- ⁸³ *Ibid*.
- ⁸⁴ Kevin Jon Heller, *The Absence of Practice Supporting the "Unwilling or Unable" Test* (17 February 2015), online: *Opinio Juris*, <<http://opiniojuris.org/2015/02/17/unable-unwilling-test-unstoppable-scholarly-imagination/>> [emphasis in original].
- ⁸⁵ Louisa Brooke-Holland & Clare Mills, *supra* note 16 at 3. Of course Canada now has altered course.
- ⁸⁶ Ashley Deeks, *The UK's Article 51 Letter on Use of Force in Syria* (12 December 2014), online: *Lawfare* <<http://www.lawfareblog.com/2014/12/the-uks-article-51-letter-on-use-of-force-in-syria/>>.
- ⁸⁷ Dawood I Ahmed, "Defending Weak States Against the "Unwilling or Unable" Doctrine of Self-Defence" (2013) 9 *J Int'l L & Int'l Rel* 1 at 12.
- ⁸⁸ Jack Goldsmith, *Fire When Ready*, (19

March 2012), online: *Foreign Policy* <http://www.foreignpolicy.com/articles/2012/03/19/fire_when_ready>.

⁸⁹ Arimatsu & Schmitt, *supra* note 54 at 23-24.

⁹⁰ The following international law scholars provide divergent or varying theories about whether the attribution rule has been relaxed, which serves to underscore the lack of accepted state practice or consensus amounting to customary international law: Christian J. Tams, "The Use of Force Against Terrorists" (2009) 20 EJIL 359; T Ruys, 'Armed Attack' and Article 51 of the UN Charter: Evolution in Customary Law and Practice (Cambridge: Cambridge University Press 2010); and Kimberly N Trapp, "The Use of Force against Terrorists: A Reply to Christian J. Tams" (2010) 20 EJIL 1049.

⁹¹ Green, *supra* note 19 at 49 [emphasis added].

⁹² Tom Ruys & Sten Verhoeven, "Attacks by Private Actors and the Right of Self-Defense" (2005) 10 J Confl & Sec L 289, at 319-320.

⁹³ Congo, *supra* note 18 at 218.

⁹⁴ GA Res 56/83, Annex, art 20, UN Doc. A/RES/56/83 (28 January 2002).

⁹⁵ Nicaragua, *supra* note 29 at 171, 191 and 195.

⁹⁶ House of Commons Debates, *supra* note 17.

⁹⁷ Tepperman, *supra* note 78.

⁹⁸ Arimatsu & Michael Schmitt, *supra* note 54 at 10.

⁹⁹ *Ibid.*

¹⁰⁰ Carsten Stahn, "Between Law-Breaking and Law-Making: Syria Humanitarian Intervention and 'What the Law Ought to Be'", (2014) 19 J of Conflict & Sec L 24, at 29.

¹⁰¹ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001) [ICISS Report].

¹⁰² Carsten Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?" (2007) 101 AJIL 99, at 120.

¹⁰³ Arimatsu & Schmitt, *supra* note 54, at 25-26.

¹⁰⁴ Stahn, *supra* note 100, at 25. See also Major-General Jerry ST Pitzul, Lieutenant-Colonel Kirby Abbott and Captain Christopher K. Penny, "The Responsibility To Protect: A Military Legal Comment" (Winter 2004-2005) *Canadian Military Journal*, 35.

¹⁰⁵ Canada: House of Commons Debates, V41st Parl, 2nd Session No 188, Vol 147 (27 March 2015).

