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The Pen and the Sword: Legal Justifications for the United States' Engagement Against the Islamic State of Iraq and Syria (ISIS)

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Olivia Gonzalez

Abstract

Part I of this Comment will lay out the potential arguments the United States could make to justify its engagement against ISIS under international law, *jus ad bellum*. This Part will also present existing commentary on the strengths and weaknesses of the available legal justifications. Part II will lay out the legal justifications under US law and discuss their nexus to the United States' international obligations. Finally, Part III will argue that the United States' engagement is appropriately classified as an instance of collective self-defense under international law. This Part will discuss what new AUMF would be needed in order to be consistent with United States international law obligations.

KEYWORDS: International Law; Engagement against ISIS; War Powers Resolution; ISIS; United nations; Collective Self-Defense; Individual; Pre-emptive; Conflict; Sunset Provision

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COMMENT

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*Olivia Gonzalez**

“The effectiveness of the global collective security system, as with any other legal order, depends ultimately not on the legality of decisions but also on the common perception of their legitimacy- their being made on solid evidentiary grounds and for the right reasons, morally as well as legally.”

- Gareth Evans¹

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1. GARETH EVANS, THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL 139 (2008).

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INTRODUCTION

The stone walls of the Great Mosque in Mosul, Iraq are over eight centuries old.² On a balmy July afternoon in 2014, these historic walls encircled the new leader of the Islamic State of Iraq and Syria (“ISIS”), shrouded in black robes, as he prepared to give his first formal address as the self-proclaimed caliph.³ That day, children looked on as cars burned in Mosul’s streets.⁴ Black clouds of smoke ballooned above homes and the carcasses of police cars sat ablaze on highways.⁵ The Iraqi military had “crumbled” at the hands of the jihadists, who roamed the villages brandishing weapons.⁶ Families fled and Iraqi soldiers shed their uniforms as Islamic State militants

2. *Great Mosque, Mosul*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/place/Great-Mosque-Mosul-Iraq> (discussing the age and location of the Great Mosque of Mosul); *see also Mosul – Minaret of the Great Mosque of Nur al-Din*, CULTURAL PROPERTY TRAINING RESOURCE, <http://cchag.org/html/09476/iraq05-047.html> (last visited Aug. 20, 2015) (discussing the history of the Great Mosque).

3. *See Isis Chief Abu Bakr al-Baghdadi Appears in First Video*, BBC NEWS (July 5, 2014), <http://www.bbc.com/news/world-middle-east-28177848> (showing a video recording of Abu Bakr al-Baghdadi’s sermon in the Great Mosque at Mosul); Hannah Strange, *Islamic State Leader Abu Bakr al-Baghdadi Addresses Muslims in Mosul*, THE TELEGRAPH (July 5, 2014), <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/10948480/Islamic-State-leader-Abu-Bakr-al-Baghdadi-addresses-Muslims-in-Mosul.html> (discussing the ISIS leader’s sermon at the Mosul Great Mosque).

4. *See* Suadad al-Salhy and Tim Arango, *Sunni Militants Drive Iraqi Army Out of Mosul*, N.Y. TIMES, June 10, 2014, <http://www.nytimes.com/2014/06/11/world/middleeast/militants-in-mosul.html> (describing the destruction of Mosul and showing a photograph of children beside a burning car); *see also* Robert Mackey, *Glimpses of Mosul in Islamist Hands on YouTube*, N.Y. TIMES, June 10, 2014, <http://www.nytimes.com/2014/06/11/world/middleeast/glimpses-of-mosul-in-islamist-hands-on-youtube.html> (describing a YouTube video where police cars are seen burning and abandoned).

5. *See* Mackey, *supra* note 4 and accompanying text; *see also* al-Salhy & Arango, *supra* note 4 and accompanying text.

6. *See* al-Salhy & Arango, *supra* note 4 and accompanying text; Mackey, *supra* note 4 and accompanying text.

robbed banks and overtook police stations.⁷ Flying over Mosul's government buildings was the black flag of Islamic State of Iraq and Syria.⁸

After the Islamic State had taken Mosul, Abu Bakr al-Baghdadi climbed the ancient steps to a podium in the city's most treasured landmark to give his first sermon as leader.⁹ He placed his left hand below his ribs as he approached the podium in the Great Mosque.¹⁰ He raised his eyes to his audience and his hand curled into a fist as he declared the Islamic State a caliphate. "God has granted your brothers, the *mujahideen*, a victory."¹¹

The fall of Mosul into the hands of the Islamic State marked a turning point in the United States' foreign policy, necessitating both a military strategy and a legal justification for it.¹² This Comment will evaluate the applicable legal arguments under international and US law for justifying the engagement against ISIS, paying special attention to the use of an Authorization for Use of Military Force ("AUMF"). First, in crafting a military response to the threat posed by ISIS, the United States had to reconcile its obligations under international laws of war with its own laws constraining military engagement.¹³ The legality of the US engagement against ISIS and the manner in which this engagement was carried out remain hotly contested.¹⁴ In order to explore the legal justifications for engagement

7. See al-Salhy & Arango, *supra* note 4 and accompanying text; Mackey, *supra* note 4 and accompanying text.

8. Martin Chulov, *Isis Insurgents Seize Control of Iraqi city of Mosul*, THE GUARDIAN, June 10, 2014, <http://www.theguardian.com/world/2014/jun/10/iraq-sunni-insurgents-islamic-militants-seize-control-mosul> (stating that the black flag of ISIS was raised above civic buildings); see al-Salhy & Arango, *supra* note 4 and accompanying text.

9. See *Isis Chief Abu Bakr al-Baghdadi Appears in First Video*, *supra* note 3 and accompanying text; Strange, *supra* note 3 and accompanying text.

10. See *Isis Chief Abu Bakr al-Baghdadi Appears in First Video*, *supra* note 3 and accompanying text; Strange, *supra* note 3 and accompanying text.

11. See *Isis Chief Abu Bakr al-Baghdadi Appears in First Video*, *supra* note 3 and accompanying text; Strange, *supra* note 3 and accompanying text.

12. See, e.g., Chulov, *supra* note 8 (stating that Baghdad asked Washington for "missiles and artillery."); Faith Karimi and Laura Smith-Spark, *ISIS Militants Still Pressing Forward in Iraq*, CNN NEWS (June 14, 2014, 5:56 AM), <http://www.cnn.com/2014/06/13/world/meast/iraq-violence/> (stating that "the spreading violence prompted U.S. President Barack Obama to say the beleaguered government required assistance").

13. See, e.g., U.S. CONST. art II. See generally, U.N. Charter art. 2(4).

14. See, e.g., Charlie Savage, *White House Invites Congress to Approve ISIS Strikes, But Says it Isn't Necessary*, N.Y. TIMES, Sept. 10, 2014, <http://www.nytimes.com/2014/09/11/world/middleeast/white-house-invites-congress-to-approve-isis-strikes-but-says-it-isnt-necessary.html> (quoting competing opinions by scholars on the legality of engagement against

against ISIS, some background on the United States' response to ISIS is necessary.

When ISIS took power in the summer of 2014, the White House and US President Barack Obama began devising a plan to respond to the growing military violence in Iraq.¹⁵ The response did not involve a formal declaration of war by Congress.¹⁶ Instead, it was an executive action that consisted of three main “legs:” air strikes in Iraq, the arming of Syrian rebels, and the formation of an international coalition.¹⁷

The need for military engagement against ISIS grew out of the rampant violence, growing territorial dominion, and the humanitarian crisis of the Yazidis.¹⁸ The Yazidis, an ethno-religious group in Iraq, were victims of persecution and ethnic cleansing by ISIS militants in the summer of 2014.¹⁹ As ISIS grew in power, the Yazidis fled to a

ISIS); Spencer Ackerman, *Obama's Legal Rationale for ISIS Strikes: Shoot First, Ask Congress Later*, THE GUARDIAN, Sept. 10, 2014, <http://www.theguardian.com/world/2014/sep/11/obama-isis-syria-air-strikes-legal-argument> (arguing against the use of the 2001 AUMF as legal justification for engaging against ISIS).

15. Barack Obama, President of the United States, Speech on ISIL (Aug. 7, 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/08/07/statement-president>) [hereinafter Speech on ISIL] (announcing the response to ISIS); Senior Administration Official, Background Conference Call on the President's Address to the Nation (Sep. 10, 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/09/10/background-conference-call-presidents-address-nation>) (explaining the planned military response to ISIS).

16. Barack Obama, President of the United States, Speech on Combating ISIS and Terrorism (Sep. 10, 2014) (transcript available at <http://www.cnn.com/2014/09/10/politics/transcript-obama-syria-isis-speech/>) [hereinafter Speech on Combating ISIS] (calling on Congress to grant further authority to engage against ISIS); Josh Earnest, White House Press Secretary, The White House, Press Briefing (Sep. 12, 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/09/12/press-briefing-press-secretary-josh-earnest-9122014>) (stating that congressional authority is not required and asserting the President's inherent powers).

17. Speech on Combating ISIS, *supra* note 16 and accompanying text; Senior Administration Official, *supra* note 15 (explaining the three legs of the planned military response to ISIS); Earnest, *supra* note 16 and accompanying text.

18. Speech on ISIL, *supra* note 15 (announcing the need for humanitarian aid to civilians trapped on a mountain in Iraq); Raya Jalabi, *Who Are the Yazidis and Why is ISIS Hunting Them*, THE GUARDIAN, Aug. 11, 2014, <http://www.theguardian.com/world/2014/aug/07/who-yazidi-isis-iraq-religion-ethnicity-mountains> (detailing the rampant violence of ISIS against the Yazidis); Kathy Gilsinan, *The Many Ways to Map the Islamic 'State'*, THE ATLANTIC, Aug. 27, 2014, <http://www.theatlantic.com/international/archive/2014/08/the-many-ways-to-map-the-islamic-state/379196/> (describing the territorial expansion of ISIS).

19. Speech on ISIL, *supra* note 15 (announcing the need for humanitarian aid to civilians trapped on a mountain in Iraq); Jalabi, *supra* note 18 and accompanying text.

mountain in Iraq where they awaited near-certain death by encroaching ISIS militants.²⁰

In light of the Yazidi humanitarian crisis, President Obama cited humanitarian intervention as the first justification for engagement against ISIS.²¹ In a statement given on August 7, 2014, President Obama authorized two operations in Iraq.²² These operations consisted of “targeted airstrikes to protect our American personnel, and a humanitarian effort to help save thousands of Iraqi civilians who are trapped on a mountain without food and water and facing almost certain death.”²³

While humanitarian intervention was the first justification given by the Obama Administration, this justification waned and was eclipsed by other legal arguments.²⁴ One argument put forth by the Obama Administration was that the President could authorize engagement against ISIS under the 2001 Authorization for Use of

20. Isabel Coles & Saif Zamir, *Islamic State advances against Yazidis on Iraq's Sinjar mountain*, REUTERS, Oct. 21, 2014, <http://www.reuters.com/article/2014/10/21/us-mideast-crisis-iraq-sinjar-idUSKCN0IA1ZQ20141021> (describing the ISIS persecution of the Yazidis on Mount Sinjar); Jalabi, *supra* note 18 and accompanying text.

21. Speech on ISIL, *supra* note 15 (announcing the need for a humanitarian reaction to the Yazidi crisis); see Louis Henkin, *Kosovo and the Law of Humanitarian Intervention*, 93 AM. J. INT'L L. 824, 824 (1999) (discussing the legal implications of humanitarian intervention); see also Paul R. Williams & Meghan E. Stewart, *Humanitarian Intervention: The New Missing Link In the Fight to Prevent Crimes Against Humanity and Genocide?*, 40 CASE W. RES. J. INT'L L. 97, 98 (2008) (providing an overview of requirements for the humanitarian intervention classification).

22. Speech on ISIL, *supra* note 15 (authorizing two operations in Iraq); Helene Cooper, Mark Landler, & Alissa J. Rubin, *Obama Allows Limited Airstrikes on ISIS*, N.Y. TIMES, Aug. 7, 2014, <http://www.nytimes.com/2014/08/08/world/middleeast/obama-weighs-military-strikes-to-aid-trapped-iraqis-officials-say.html> (discussing airstrikes authorized by President Obama against ISIS).

23. Speech on ISIL, *supra* note 15 (authorizing targeted airstrikes against ISIS); Jeremy Stahl, *President Obama Authorizes Airstrikes in Iraq*, SLATE, Aug. 7, 2014, http://www.slate.com/blogs/the_slatest/2014/08/07/airstrikes_in_iraq_president_barack_obama_announces_authorization_of_strikes.html (summarizing the President's authorization of targeted airstrikes against ISIS).

24. See, e.g., Earnest, *supra* note 16 (stating that the President can legally engage ISIS without congressional authorization); see also Senior Administration Official, *supra* note 15 (answering a question about the legal grounds for engagement with ISIS by asserting the President's statutory and constitutional authority).

Military Force (“2001 AUMF”).²⁵ However, no clear justification under international law was offered.²⁶

In order for the US engagement against ISIS to be justified, the United States must comply with international law as well as with its own laws.²⁷ The instant analysis will address US legal constraints dealing primarily with presidential war powers under the U.S. Constitution.²⁸ Constitutionally, the President can only authorize military engagement in two cases.²⁹ Either the President must have statutory authority from Congress in the form of an AUMF, or the engagement must be inherent in the President’s War Powers under Article II of the U.S. Constitution.³⁰ In this case, the Obama Administration argued the former.³¹ Critics pushed back on this, arguing that the legal justifications given by White House lawyers were entirely incorrect.³² Some have argued that the 2001 AUMF was too outdated to serve as statutory authority in the current conflict.³³ Other critics argue that it is problematic for federalism, dealing too

25. Earnest, *supra* note 16 (stating that the President has authority to engage ISIS under the 2001 AUMF); Senior Administration Official, *supra* note 15 (citing the 2001 AUMF as the source for the President’s authority to conduct airstrikes against ISIS).

26. Earnest, *supra* note 16 (stating that the President has authority to engage ISIS under the 2001 AUMF but not giving a justification under international law); Senior Administration Official, *supra* note 15 (citing the 2001 AUMF as the source for the President’s authority to conduct air strikes against ISIS and omitting any discussion of international law justifications).

27. *See, e.g.*, U.N. Charter art. 2(4); U.S. CONST. art. II; War Powers Resolution of 1973, 50 U.S.C. § 1541 (2006).

28. *See, e.g.*, U.S. CONST. art. II; War Powers Resolution of 1973, 50 U.S.C. § 1541 (2006).

29. U.S. CONST. art. II.

30. *Id.*

31. Earnest, *supra* note 16 (stating that the President has authority to engage ISIS under the 2001 AUMF); Senior Administration Official, *supra* note 15 (citing the 2001 AUMF as the source of the President’s authority to conduct airstrikes against ISIS).

32. Krishnadev Calamur, *Obama Has Support for Syria Strikes, But Are They Legal?*, NPR, Sept. 25, 2014, <http://www.npr.org/blogs/parallels/2014/09/25/351433505/obama-has-support-for-syria-strikes-but-are-they-legal> (quoting several critiques of the Administrations use of the 2001 AUMF); *see, e.g.*, Bruce Ackerman, *Obama’s Betrayal of the Constitution*, N.Y. TIMES, Sept. 11, 2014, <http://www.nytimes.com/2014/09/12/opinion/obamas-betrayal-of-the-constitution.html> (arguing that the Obama Administration’s legal justification for fighting ISIS was incorrect).

33. *See, e.g.*, Ankit Panda, *A Bad Idea: Using the 2001 AUMF as Legal Rationale For Striking ISIS*, THE DIPLOMAT, Sept. 11, 2014, <http://thediplomat.com/2014/09/a-bad-idea-using-the-2001-aumf-as-legal-rationale-for-striking-isis/> (arguing that the 2001 AUMF should have been repealed); *see also* Paul Kawika Martin, *Is There An Alternative to War with ISIS?*, MSNBC, Feb. 12, 2015, <http://www.msnbc.com/msnbc/alternative-war-isis> (asserting that the 2001 AUMF is outdated and should be repealed).

broad a grant of power to the executive branch.³⁴ Some critique the use of the 2001 AUMF on grounds of legislative intent, arguing that it was intended to apply to al-Qaeda, not ISIS.³⁵

In addition to being legally sound under its own laws, the United States' engagement must be in compliance with international law since the United States is party to the United Nations Charter and sits on the United Nations Security Council.³⁶ In international law, there are two branches of the laws of war that would apply to the United States in military engagement: *jus ad bellum* and *jus in bello*.³⁷ The first deals with legal justifications for going to war and the second deals with the laws that govern the combat itself.³⁸ The instant analysis will focus primarily on the former as it applies to the US justifications for engaging against ISIS. Moreover, this Comment will evaluate the legal tools in the US executive toolbox, specifically focusing on the US obligations under the UN Charter as well as under US law.

Part I of this Comment will lay out the potential arguments the United States could make to justify its engagement against ISIS under international law, *jus ad bellum*. This Part will also present existing commentary on the strengths and weaknesses of the available legal justifications. Part II will lay out the legal justifications under US law and discuss their nexus to the United States' international obligations.

34. Jack Goldsmith, *Obama's Breathtaking Expansion of a President's Power to Make War*, TIME, Sept. 11, 2014, <http://time.com/3326689/obama-isis-war-powers-bush/> (arguing that the 2001 AUMF is too expansive a grant of executive power); Bruce Ackerman, *supra* note 32 (arguing that President Obama went beyond his Constitutional powers in engaging against ISIS in this manner). For a discussion of the tension between the executive and legislative branches in matters of national security, see Celidon Pitt, *Fair Trade: The President's Power to Recover Captured U.S. Servicemembers and the Recent Prisoner Exchange with the Taliban*, 83 FORDHAM L. REV. 2837, 2841 (2015) (discussing the Bergdahl prisoner exchange as "most recent example of the tension between the executive and legislative branches over the conduct and funding of national security-related matters").

35. Brett Logiurato, *Congressman: Obama's Expansion of His ISIS Campaign Is 'Illegal'*, BUSINESS INSIDER (Sept. 24, 2014, 3:38 PM), <http://www.businessinsider.com/obama-isis-legal-aumf-congress-2014-9> (arguing that ISIS is not connected to perpetrators of 9/11 and cannot be fought under the 2001 AUMF); Ackerman, *supra* note 32 (arguing that ISIS is not an affiliate of al-Qaeda and thus the 2001 AUMF does not apply).

36. See generally U.N. Charter.

37. See Steven R. Ratner, *Jus Ad Bellum and Jus in Bello After September 11*, 96 AM. J. INT'L L. 905, 906 (2002) (laying out the difference between *jus ad bellum* and *jus in bello*); Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus Ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 48 (2009) (explaining the types of legal justification for war).

38. See Ratner, *supra* note 37; Sloane, *supra* note 37.

Finally, Part III will argue that the United States' engagement is appropriately classified as an instance of collective self-defense under international law. This Part will discuss what new AUMF would be needed in order to be consistent with United States international law obligations.

I. *US ENGAGEMENT AGAINST ISIS UNDER INTERNATIONAL LAW*

This Part will discuss the relevant international law provisions applicable to the United States engagement against ISIS. One of the main sources of international law binding the United States here is the UN Charter.³⁹ Most pertinently, under Article 2(4) of the UN Charter, UN member States must refrain 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.”⁴⁰ Thus, member States cannot use force except in certain circumstances with permission of the UN Security Council.⁴¹

As of December 2014, the United States does not have explicit authorization from the UN Security Council for military engagement against ISIS.⁴² The United States then has two options in order to be compliant with Article 2(4) of the UN Charter.⁴³ First, it can seek authorization from the Security Council to use force.⁴⁴ Second, the United States can argue that it falls under one of the two exceptions in the UN Charter which permits use of force *without* Security Council authorization.⁴⁵ These two exceptions are the use of force for purposes of individual or collective self-defense.⁴⁶

This Part lays out the paths open to the United States in justifying its engagement under international law. Part I.A explores the first option open to the United States, namely, the pursuit of a UN Security Council Resolution authorizing the use of force against ISIS. Part I.B discusses collective self-defense, the first of the two

39. *See generally* U.N. Charter.

40. U.N. Charter art. 2(4).

41. *Id.*

42. *See generally* Security Council Resolutions in 2014 (showing that as of December 2014, no Security Council Resolution gave explicit resolution for military engagement against ISIS).

43. *See* U.N. Charter art. 2(4).

44. *See* U.N. Charter art. 51.

45. *Id.*

46. *Id.* ¶ 1.

exceptions under Article 51 of the UN Charter that would permit the United States to use force without UN authorization. Part I.C explores individual self-defense, the second exception under Article 51 that would exempt the United States from the requirement to seek authorization. Part I.D will address pre-emptive self-defense, a notion rooted in international case law that the United States could argue justifies its engagement against ISIS. Finally, Part I.E will lay out the “ongoing conflict” argument, which posits that ISIS is the most recent development in an ongoing conflict in the Middle East in which the United States is *already* involved.

A. United Nations Security Council Resolution

The first path the United States could take to justify its engagement against ISIS involves seeking an authorization for use of force from the United Nations by way of a Security Council Resolution.⁴⁷ Chapter VII of the UN Charter governs state action with respect to threats to the peace, breaches of the peace, and acts of aggression.⁴⁸ Under Chapter VII, Article 39, the UN Security Council must first determine that a threat or breach of the peace has occurred.⁴⁹ The UN Security Council has already done this in Resolution 2178, passed on September 24, 2014.⁵⁰ The purpose of Resolution 2178 was to stop home-grown terrorists in member States from radicalizing and being recruited by ISIS.⁵¹ In this resolution, the Security Council declares ISIS a terrorist group and notes that terrorism is, “one of the most serious threats to international peace.”⁵² Thus, the first element for legal authorization is met since ISIS is described as a threat to the peace. Next, the Security Council would need to authorize the use of force in order to combat ISIS.⁵³

To authorize the use of force, the Security Council typically employs the language “all necessary means” to signal such

47. See U.N. Charter art. 39; Ashley Deeks, *U.S. Airstrikes Against ISIS in Syria? Possible International Legal Theories*, LAWFARE BLOG (Aug. 23, 2014, 3:04 PM), <http://www.lawfareblog.com/2014/08/u-s-airstrikes-against-isis-in-syria-possible-international-legal-theories/> (laying out the possible legal theories the United States could posit to justify engaging against ISIS).

48. U.N. Charter art. 39.

49. *Id.*

50. S.C. Res. 2178, ¶ 1 (Sep. 24, 2014).

51. *Id.*

52. *Id.*

53. U.N. Charter art. 39.

authorization.⁵⁴ Resolution 2178, however, does not use this language and does not deal with engaging against ISIS directly.⁵⁵ Indeed, this resolution focuses specifically on stopping the “flow of foreign terrorist fighters” *within* member States that radicalize and go on to work for ISIS.⁵⁶ The purpose of this resolution is to encourage countries to exercise control over potential home-grown terrorists within their countries.⁵⁷ It does not necessarily authorize the United States or other member States to use force to “degrade and destroy” ISIS in Iraq and Syria.⁵⁸

Since the only existing resolution on ISIS, Resolution 2178, does not confer authorization for use of force, the United States must explicitly request authorization from the Security Council.⁵⁹ However, some scholars suggest that the Security Council will not authorize force against ISIS (specifically in Syria) for political reasons.⁶⁰ Specifically, if the United States sought Security Council authorization to engage against ISIS, the United States and its allies would need consensus from the permanent five members of the Security Council who retain a veto power: China, Russia, the United States, France, and the United Kingdom.⁶¹ Specifically, it is suggested that Russia or China would oppose the resolution, nullifying the unanimity among the permanent five Security Council members

54. *See, e.g.*, S.C. Res. 678, ¶ 2 (Nov. 29, 1990) (authorizing the use of “all necessary means” to combat the Iraqi invasion of Kuwait); *see also* Rob McLaughlin, *An Assessment of the Authority for Australia to Use Force Under United Nations Security Council Resolutions Concerning Iraq*, 51 *NAVAL L. REV.* 252, 264 (2005) (discussing the “all necessary means” language in Gulf War resolutions).

55. S.C. Res. 2178, (Sep. 24, 2014).

56. *Id.* ¶ 24.

57. *Id.* ¶ 4.

58. *Id.*

59. U.N. Charter art. 39.

60. *See, e.g.*, Josh Rogin, *White House Has NO International Legal Justification for Hitting ISIS in Syria*, *THE DAILY BEAST* (Sep. 23, 2014), <http://www.thedailybeast.com/articles/2014/09/15/white-house-has-no-international-legal-justification-for-hitting-isis-in-syria.html> (stating that Russia would be “sure to veto” a Security Council Resolution authorizing force against ISIS); *see also* Deeks, *supra* note 47 (suggesting that the option for a Security Council Resolution was a “dead letter” in 2012 because Russia and China would not oppose the Syrian regime).

61. *See The Security Council*, UNITED NATIONS WEBSITE, <http://www.un.org/en/sc/> (describing the veto power of the permanent five members of the Security Council); *see also Current Members*, UNITED NATIONS WEBSITE, <http://www.un.org/en/sc/members/> (listing the five permanent members of the Security Council).

required for a resolution.⁶² Russia or China may veto this request for authorization for various geopolitical reasons.⁶³ For example, the United States has stated that its foreign policy includes arming the Syrian rebels so that they also fight against the regime of Bashar al-Assad.⁶⁴ Since Russia and China have aligned politically with Syria, it is possible that they would veto any resolution opposing the Syrian regime.⁶⁵ For these reasons, a Security Council resolution authorizing engagement against ISIS explicitly is at a high risk of being vetoed.

The United States then has a few other paths it could pursue to obtain international legal justification.⁶⁶ It could argue that it does not need Security Council Authorization to engage against ISIS because the engagement qualifies as self-defense.⁶⁷ There are two kinds of self-defense recognized under Article 51 of the UN Charter that would exempt the United States from needing to seek Security Council authorization for use of force: collective and individual self-defense.⁶⁸ The US could also argue that this is an instance of pre-emptive self-defense, a concept rooted in international case law, but collective and individual self-defense are the only two exceptions listed in the UN Charter.⁶⁹

62. See, e.g., Rogin, *supra* note 60 and accompanying text; see also Deeks, *supra* note 47 (suggesting that the option for a Security Council Resolution was a “dead letter” in 2012 because Russia and China would not oppose the Syrian regime).

63. Russia and China frequently align to veto together; for instance, in May 2014, they aligned to strike down a resolution referring Syria to the International Criminal Court. They have also vetoed in tandem three other resolutions related to the Middle East and Syria since 2011. *Security Council Veto List*, DAG HAMMARSKJÖLD LIBRARY, <http://research.un.org/en/docs/sc/quick> (last visited Dec. 19, 2014); see, e.g., *UN: Russian and Chinese Vetoes of Syria ICC Resolution ‘Callous’*, AMNESTY INTERNATIONAL, <http://www.amnesty.org/en/news/un-russian-chinese-vetoes-syria-icc-resolution-callous-2014-05-22> [hereinafter *Russian and Chinese Vetoes*] (quoting Amnesty International’s Middle East and North Africa Programme Director who referred to the veto as a “callous political move”).

64. Senior Administration Official, *supra* note 15.

65. *Security Council Veto List*, *supra* note 63; see, e.g., *Russian and Chinese Vetoes*, *supra* note 63.

66. See, e.g., U.N. Charter art. 51 (stating the exceptions under which a State could use force without Security Council authorization).

67. *Id.*

68. *Id.*

69. See, e.g., U.N. Charter art. 51. See generally James A. Green, *Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense*, 14 CARDOZO J. INT’L & COMP. L. 429, 435 (2006); Abraham Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT’L L. 209, 210 n.2 (2003).

B. *Collective Self-Defense*

The alternative to gaining Security Council authorization is to demonstrate that the use of force against ISIS falls within one of the two self-defense exceptions recognized under Article 51 of the UN Charter, collective or individual self-defense.⁷⁰ A situation of *collective* security is one where the “protection of the rights of the states, the reaction against the violation of the law, assumes the character of a collective enforcement action.”⁷¹ There are two ways of framing the collective self-defense argument. The first envisions collective self-defense as a situation where one country could ask for assistance in its own self-defense.⁷² An example of this type of collective self-defense lies in Article 5 of the North Atlantic Treaty Organization (“NATO”) Treaty, which states that members of the collective will fight in response to an armed attack against any member.⁷³ This understanding of collective self-defense has one important limitation, namely, that it would geographically limit the United States’ engagement against ISIS to Iraqi territory since Syria has not consented to assistance from the United States and its NATO allies.⁷⁴ Furthermore, this approach would be contingent on Iraqi consent to the international community’s assistance.⁷⁵ Iraq could withdraw this consent and easily invalidate this collective self-defense argument.⁷⁶ The second framing for a collective self-defense argument is that an attack on one country is an attack on all members of the collective.⁷⁷ This is the typical understanding of collective self-defense and the one NATO uses in its charter, the North Atlantic

70. See U.N. Charter art. 51 (stating the exceptions under which a State could use force without Security Council authorization).

71. Hans Kelsen, *Collective Security and Collective Self-Defense Under the Charter of the United Nations*, 42 AM. J. OF INT’L L. 783, 783 (1948) (defining collective security); see also Deeks, *supra* note 47 (suggesting that Iraq’s request for assistance from other states could constitute self-defense).

72. Deeks, *supra* note 47 (explaining that Iraqi consent is necessary for collective self-defense).

73. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

74. Deeks, *supra* note 47.

75. *Id.*

76. *Id.*

77. See e.g., Robert J. Delahunty, *Paper Charter: Self-Defense and the Failure of the United Nations Collective Security System*, 56 CATH. U. L. REV. 871, 887 (2007) (discussing the typical understanding of collective self-defense); Eustace Chikere Azubuike, *Probing the Scope of Self-defense in International Law*, 17 ANN. SURV. INT’L & COMP. L. 129, 158 (2011) (stating that NATO encouraged all member States to invoke collective self-defense in response to 9/11).

Treaty.⁷⁸ The key distinction between the first and second framings of collective self-defense is that the first explicitly requires the consent of the country suffering the attack.⁷⁹ It is unclear whether the second requires the consent of the attacked country.⁸⁰ The importance of this distinction will be discussed in Section III.

C. Individual Self-Defense

Another exception to the authorization of the use of force also lies in the UN Charter Article 51 and requires that the United States demonstrate that engaging against ISIS is necessary for its individual self-defense.⁸¹ There are a number of legal constraints to invoking either individual or collective self-defense.⁸² As stated in Article 51, a State can invoke self-defense only in the event of an “armed attack.”⁸³ Even where an armed attack takes place, the engagement must only go on “until the Security Council has taken measures necessary to maintain international peace and security.”⁸⁴ As such, the threshold question is whether the activities of ISIS amount to an “armed attack” against the United States.⁸⁵

There are two potential readings of Article 51: a strict textualist reading and a broader purposivist reading.⁸⁶ This Comment discusses both interpretations of Article 51 in turn and explores any arguments the United States could make under each interpretation. Under the strict textualist reading, a State would need an armed attack before it

78. North Atlantic Treaty, *supra* note 73, art. 5.

79. Deeks, *supra* note 47 (explaining that Iraqi consent is necessary for collective self-defense).

80. *See e.g.*, Delahunty, *supra* note 77, at 887 (discussing the typical understanding of collective self-defense without mention of consent on behalf of the attacked state); Chikere Azubuike, *supra* note 77, at 158 (stating that NATO invoked collective self-defense before the U.N. Security Council after 9/11 and encouraged collective self-defense on behalf of all member states).

81. U.N. Charter art. 51.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*; *see e.g.*, Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 HARV. INT’L L.J. 41, 45 (2002) (analyzing the definition of an “armed attack”).

86. *See* Stuart G. Baker, *Comparing the 1993 U.S. Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, 24 GA. J. INT’L & COMP. L. 99, 109 (1994) (discussing the two ways of interpreting Article 51); *see also* Thomas K. Plofchan, Jr., *Article 51: Limits on Self-Defense?*, 13 MICH. J. INT’L L. 336, 340 (1992) (outlining the debate on the two interpretations of Article 51).

could respond in self-defense.⁸⁷ Article 51 seems to indicate that a State must wait to be attacked in order to exercise its right to self-defense.⁸⁸ This textualist interpretation of Article 51 and the question of whether its requirement is so strict are subject to some controversy.⁸⁹ Under this reading, it may be too late to exercise a right of self-defense if a State has to wait to be attacked.⁹⁰ This strict reading could erode at the concept of a right to self-defense because it could require States to wait until a point where they can no longer defend themselves.⁹¹ Alternatively, the purposivist approach encourages a broader understanding of Article 51.⁹² Under this reading, Article 51 was designed to preserve the State's right to self-defense and, thus, if excessive waiting would jeopardize a State's ability to defend itself, Article 51 should be read to allow a carve-out for self-defense before a State suffers an armed attack.⁹³

Whether or not a State is entitled to self-defense also turns on how the term "armed attack" is defined.⁹⁴ Under a strict understanding of Article 51, the United States could argue that the brutal murders of James Foley, Steven Sotloff, and other US

87. See Murphy, *supra* note 85 and accompanying text; see also Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT'L L. 599, 604 (2003) (discussing changing notions of self-defense and the interpretation of Article 51).

88. See Murphy, *supra* note 85 and accompanying text; see also Sapiro, *supra* note 87 and accompanying text.

89. Murphy, *supra* note 85 and accompanying text; Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT'L L. 576, 584 (2003) (discussing the implications of reading Article 51 for justifying pre-emptive self-defense).

90. See Murphy, *supra* note 85 (arguing for a reading of Article 51 that preserves a right to self-defense before territorial attack); see also Sapiro, *supra* note 87 and accompanying text.

91. See Murphy, *supra* note 85 (arguing for a reading of Article 51 that preserves a right to self-defense before territorial attack); see also Sapiro, *supra* note 87, at 604 (discussing changing notion of self-defense and the interpretation of Article 51); Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J. L. & PUB. POL'Y 539, 547 (2002) (discussing narrow constructions of "armed attack" under Article 51).

92. See Murphy, *supra* note 85 (arguing for a reading of Article 51 that preserves a right to self-defense before territorial attack); see also Sapiro, *supra* note 87 (discussing changing notion of self-defense and the interpretation of Article 51).

93. See Carsten Stahn, *Terrorist Acts as "Armed Attack": The Right to Self-Defense, Article 51(1/2) of the UN Charter, and International Terrorism*, 27 FALL FLETCHER F. WORLD AFF. 35, 38 (2003) (discussing the risks and benefits of a broad interpretation of Article 51); Murphy, *supra* note 85 (arguing for a reading of Article 51 that preserves a right to self-defense before territorial attack).

94. See Stahn, *supra* note 93 and accompanying text; see Murphy, *supra* note 85 (arguing for a reading of Article 51 that preserves a right to self-defense before territorial attack).

journalists meet the definition of an “armed attack” against the United States as required by Article 51.⁹⁵ The case governing the definition of an armed attack is *Nicaragua v. United States*, brought before the International Court of Justice (“I.C.J.”).⁹⁶ *Nicaragua* states that an armed attack does not only consist of an action by regular armed forces but could also include the sending of violent bands or groups which use force with enough gravity to constitute an armed attack.⁹⁷ While there has not yet been a territorial attack against the United States by ISIS forces, the killing of American journalists may suffice to meet the definition of “armed attack” as it is interpreted by *Nicaragua*.⁹⁸ However, if a narrower definition of “armed attack” is used, the United States may not meet the definition of “armed attack” for purposes of Article 51 and may not claim individual self-defense.⁹⁹

If the United States does not meet the definition for having suffered an “armed attack” under Article 51, it may be able to justify engaging against ISIS under the international law theory of pre-emptive self-defense.¹⁰⁰ Pre-emptive self-defense is a concept rooted

95. U.N. Charter, art. 51; *see also* Amir Abdallah, *Urgent Video: Peter Kassig Beheaded by ISIS with 16 Syrians*, IRAQI NEWS (Nov. 16, 2014), <http://www.iraqinews.com/features/urgent-video-peter-kassig-beheaded-isis-16-syrians/> (showing the beheading of Peter Kassig by ISIS); Chelsea Carter & Ashley Fantz, *ISIS Video Shows Beheading of American Journalist Steven Sotloff*, CNN (Sep. 9, 2014), <http://www.cnn.com/2014/09/02/world/meast/isis-american-journalist-sotloff/> (discussing the brutality of ISIS violence against American journalist Steven Sotloff). The murders of journalists like Sotloff were conducted overseas and thus may not qualify as an armed attack if the “attack” in question must be a territorial attack upon the continental United States.

96. *See generally* Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), Judgment, 1986 I.C.J. 14 (June 27) (defining an armed attack).

97. *Id.* (defining an armed attack as including “the sending by or on behalf of a State of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to” an armed attack).

98. *See* Baker, *supra* note 86 and accompanying text; Plofchan, Jr., *supra* note 86 and accompanying text.

99. *See e.g.*, Glennon, *supra* note 91, at 546 (discussing narrow constructions of “armed attack” under Article 51); *see also* Stahn, *supra* note 93 and accompanying text.

100. Green, *supra* note 69, at 435 (providing the history and origins of pre-emptive self-defense and describing the Caroline case in international law); Sofaer, *supra* note 69, at 226 (arguing for the concept of pre-emptive self-defense).

in international case law.¹⁰¹ It is entirely separate from Article 51 and the concept even pre-dates the United Nations by nearly a century.¹⁰²

D. Pre-emptive Self-Defense

The doctrine of pre-emptive self-defense is credited to former American Secretary of State, Daniel Webster, who articulated it in 1842 after the infamous Caroline Incident.¹⁰³ In 1837, the British destroyed a US ship called the Caroline because they believed it was being used to support Canadian forces in a rebellion against the crown.¹⁰⁴ Daniel Webster, then Secretary of State, corresponded with British Foreign Minister Lord Ashburton in letters that would later be credited as recognizing the doctrine of pre-emptive self-defense.¹⁰⁵ Under Webster's understanding of self-defense, a State can pre-emptively defend itself if there is a need that is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."¹⁰⁶ Webster also added a "proportionality" requirement and crystalized this notion of pre-emptive self-defense into what is now known as the "Caroline Test."¹⁰⁷

This proportionality element requires that a State only do what is absolutely necessary in its self-defense, and nothing more excessive.¹⁰⁸ The Caroline Test was recognized by the Nuremberg

101. Green, *supra* note 69 (discussing the Caroline case and analyzing pre-emptive self-defense in international case law); Sofaer, *supra* note 69, at 226 (arguing for the validity of the concept of pre-emptive self-defense).

102. Green, *supra* note 69 (exploring the Caroline doctrine and its historical roots); Sofaer, *supra* note 69, at 226 (arguing for the concept of pre-emptive self-defense).

103. Green, *supra* note 69 (providing the history and origins of pre-emptive self-defense and describing the Caroline case in international law); Sofaer, *supra* note 69, at 226 (arguing for the concept of pre-emptive self-defense).

104. Green, *supra* note 69 (providing the history and origins of pre-emptive self-defense and describing the Caroline case in international law); Sofaer, *supra* note 69, at 226 (arguing for the concept of pre-emptive self-defense).

105. Green, *supra* note 69 (providing the history and origins of pre-emptive self-defense and describing the Caroline case in international law); Sofaer, *supra* note 69, at 226 (arguing for the concept of pre-emptive self-defense).

106. Green, *supra* note 69 (providing the history and origins of pre-emptive self-defense and describing the Caroline case in international law); Sofaer, *supra* note 69, at 226 (arguing for the concept of pre-emptive self-defense).

107. James Denver & John Denver, *Making Waves: Refitting the Caroline Doctrine for the Twenty-First Century*, 31 QUINNIPIAC L. REV. 165 (2013) (explaining the basic tenets of the Caroline Test); Timothy Kearley, *Raising the Caroline*, 17 WIS. INT'L L.J. 325, 331 (1999) (outlining the history of the Caroline Test).

108. Denver, *supra* note 107 (explaining the basic tenets of the Caroline Test); Kearley, *supra* note 107 (outlining the history of the Caroline Test).

Tribunal when it judged Germany's invasion of Norway in World War II.¹⁰⁹ It has been applied most recently to the US policy regarding cyber attacks as well as US responses to terrorism in the Middle East.¹¹⁰ Unlike the theory of self-defense under Article 51 of the UN Charter, pre-emptive self-defense does not require the same kind of immediacy.¹¹¹ Pre-emptive self-defense allows for responses to imminent threats before they materialize into immediate attacks.¹¹²

In order to engage against ISIS under pre-emptive self-defense, the United States would need to demonstrate necessity and proportionality, the requirements of the Caroline test stated above.¹¹³ The United States could argue that engagement is necessary since ISIS has directly targeted and killed American journalists in order to send a message to the United States, threatening further violence.¹¹⁴

The growing wealth and territorial expansion of ISIS has led the United States to view it as a credible national security threat.¹¹⁵ In a letter to Congress on August 17, 2014, President Obama also pointed to dangers posed to "US personnel and facilities, including the US

109. Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J. L. & PUB. POL'Y 559, 585 n.91 (2002) (stating that the Caroline Test was applied by the Nuremberg Tribunal); Green, *supra* note 69, at 447 (discussing the application of the Caroline Test in the Nuremberg Tribunal).

110. John Denver & James Denver, *Cyberwarfare: Attribution, Preemption, and National Self-defense*, 2 J.L. & CYBER WARFARE 25, 37 (2013) (applying the Caroline Test to cybersecurity); *see also* Denver, *supra* note 107; Thomas R. Anderson, *Legitimizing the New Imminence: Bridging the Gap Between the Just War and the Bush Doctrine*, 8 GEO. J.L. & PUB. POL'Y 261, 265 (2010) (discussing the Caroline Test in the modern context).

111. *See* Denver, *supra* note 107, at 193; Kearley, *supra* note 107, at 331 (outlining the history of the Caroline Test).

112. *See e.g.*, Denver, *supra* note 107; *see also* Anderson, *supra* note 107, at 265 (discussing the Caroline Test in the modern context).

113. Denver, *supra* note 107 (explaining the basic tenants of the Caroline Test); Kearley, *supra* note 107, at 331.

114. *See e.g.*, Abdallah, *supra* note 95 (showing ISIS's targeting of Americans like Peter Kassig); *see also* Carter & Fantz, *supra* note 95 (showing the beheading of an American journalist by ISIS). *See generally*, Deeks, *supra* note 47 (explaining that the necessity argument would be rooted in preventing further violence by ISIS).

115. Letter from Barack Obama, President of the United States, to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, (Aug. 17, 2014), <http://www.whitehouse.gov/the-press-office/2014/08/17/letter-president-war-powers-resolution-regarding-iraq> (stating that actions against ISIS are in the interest of national security); *see also* Senior Administration Official, *supra* note 15 (detailing the plan to combat ISIS and prevent further violence).

Embassy in Baghdad.”¹¹⁶ More broadly, if ISIS were to establish enough power to dominate the region and (in the worst of cases) acquire more destructive weapons, the United States may be a primary target.¹¹⁷ ISIS’s attacks on American journalists and its continuing threats to increase violence against the United States may provide sufficient basis to find a need for self-defense.¹¹⁸ Evidence of credible threats by ISIS against the United States strengthens the necessity argument for pre-emptive self-defense.¹¹⁹

The necessity element is met if the need for defensive action is imminent, “instant” and “overwhelming” under the Caroline Test.¹²⁰ The defensive action must occur in the last possible window of time before an almost certain attack.¹²¹ Under this prong of the Caroline test, the United States could argue that ISIS had already taken over Mosul and was poised to gain further territory in Iraq.¹²² Moreover,

116. Letter from Barack Obama, *supra* note 115 (stating that ISIS poses a threat to US personnel and facilities); *see also* Senior Administration Official, *supra* note 15 (detailing the plan to combat ISIS and prevent further violence).

117. *See, e.g.*, Carter & Fantz, *supra* note 114 (showing ISIS’s targeting of United States journalist); *see* Abdallah, *supra* note 114 (showing attacks by ISIS that deliberately target United States citizens).

118. *See* Thomas R. Anderson, *Legitimizing the New Imminence: Bridging the Gap Between the Just War and the Bush Doctrine*, 8 *GEO. J.L. & PUB. POL’Y* 261, 265 (2010) (discussing the Caroline test for pre-emptive self-defense); Deeks, *supra* note 47 (explaining possible United States arguments for why combating ISIS is necessary); *see also*, Denver, *supra* note 107, at 173-74 (explaining the basic tenets of the Caroline Test).

119. Deeks, *supra* note 47 (arguing that “the more specific, serious, and tangible those threats, the stronger the case for anticipatory air strikes”); *see* Denver, *supra* note 107 (explaining the basic tenets of the Caroline Test, which determines the validity of a self-defense argument); Anderson, *supra* note 118 (discussing the Caroline test for pre-emptive self-defense).

120. *See* James A. Green, *Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense*, 14 *CARDOZO J. INT’L & COMP. L.* 429, 435 (2006) (explaining pre-emptive self-defense and describing the Caroline case in international law); *see also*, Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 *EUR. J. OF INT’L L.* 209 (2003) (arguing for the concept of pre-emptive self-defense).

121. Michael N. Schmitt, *U.S. Security Strategies: A Legal Assessment*, 27 *HARV. J.L. & PUB. POLY.* 737, 755-56 (2004) (stating that the inquiry is “whether the defensive action occurred during the last possible window of opportunity in the face of an attack that was almost certainly going to occur.”). *See generally* Green, *supra* note 120 (explaining pre-emptive self-defense and describing the Caroline case in international law).

122. *See, e.g.*, Sarah Almkhtar & Jeremy Ashkenas et al., *The Front Line Between ISIS and Iraqi Forces in Tikrit*, *N.Y. TIMES*, Mar. 30, 2015, <http://www.nytimes.com/interactive/2014/06/12/world/middleeast/the-iraq-isis-conflict-in-maps-photos-and-video.html> (showing through informational graphics the territory gained by ISIS); *see also* Barbara Starr & Susanna Capelouto, *Plan to Retake Mosul from ISIS Emerges*, *CNN*, Nov. 29, 2014, <http://www.cnn.com/2014/11/29/middleeast/isis-mosul/index.html>.

the aforementioned attacks against American journalists had already been carried out.¹²³ The United States would have needed to argue that waiting any longer to respond to ISIS would have resulted in further deaths and territorial acquisition, which threatens United States personnel or global peace.¹²⁴

International case law suggests that the United States would need to exhaust all peaceful remedies before pre-emptive self-defense is warranted.¹²⁵ For instance, the UN Security Council rejected a pre-emptive self-defense made by Israel when it failed to exhaust all peaceful remedies first.¹²⁶ In 1981, Israel had destroyed a nuclear reactor near Baghdad, arguing that Iraq was building a weapon to use against Israel.¹²⁷ The United Nations rejected Israel's pre-emptive self-defense argument on the grounds that Israel had not exhausted all peaceful means before resorting to force.¹²⁸ Former State Department Legal Advisor William H. Taft highlighted in a memorandum that the UN Security Council unanimously condemned the attack, despite Israel's preemptive self-defense argument.¹²⁹ UN member States pointed to the fact that the Iraqi reactor was in full compliance with

cnn.com/2014/11/28/world/meast/mosul-attack-plan/ (stating the United States response to ISIS overtaking Mosul).

123. See Abdallah, *supra* note 114 (showing attacks by ISIS that deliberately target United States citizens); see, e.g., Carter & Fantz, *supra* note 114 (showing ISIS's targeting of United States journalist).

124. See Green, *supra* note 120 (explaining pre-emptive self-defense and describing the Caroline case in international law); see also Sofaer, *supra* note 120.

125. See Memorandum from William H. Taft, Legal Adviser, Dep't of State, to Members of the ASIL-CFR Roundtable (Nov. 18 2001), <http://www.cfr.org/international-law/legal-basis-preemption/p5250> (discussing the legal basis for preemption and explaining the Israel case). See generally, S.C. Res. 487, (June 19, 1981) (detailing the United Nations' condemnation of violent extremism and serving as an example of one kind of peaceful remedy the United States has sought, namely, Security Council condemnation).

126. See Memorandum from William H. Taft, *supra* note 125; see, e.g., S.C. Res. 2178 (Sep. 24, 2014) (detailing the UN's condemnation of violent extremism and serving as an example of one kind of peaceful remedy the United States has sought, namely, a Security Council condemnation).

127. See Memorandum from William H. Taft, *supra* note 125.

128. See *id.* See generally S.C. Res. 487, *supra* note 125 (detailing the UN's condemnation of violent extremism and serving as an example of one kind of peaceful remedy the United States has sought, namely, Security Council condemnation).

129. See Memorandum from William H. Taft, *supra* note 125; see also S.C. Res. 487, *supra* note 125 (detailing the UN's condemnation of violent extremism and serving as an example of one kind of peaceful remedy the United States has sought, namely, Security Council condemnation).

treaty obligations and that the threat to Israel was too tenuous.¹³⁰ Thus, Israel's destruction of the plant was considered neither proportional nor necessary, as is required for a preemptive self-defense argument.¹³¹

Israel's case differs from the United States' engagement against ISIS in a number of ways.¹³² First, the United States has already exhausted several peaceful remedies.¹³³ It formed an international coalition and sought a Security Council resolution condemning ISIS (though not authorizing force).¹³⁴ Second, ISIS is a non-state actor and a terrorist organization without a diplomatic body, eliminating diplomacy as a possible resource.¹³⁵

In the Israeli case, by contrast, Israel was exerting force against a sovereign state, namely, Iraq.¹³⁶ In this case, the United States and the international coalition have received permission from Iraq to assist in the retaliation against ISIS.¹³⁷ While Israel may have had a legitimate

130. See Memorandum from William H. Taft, *supra* note 125; see also S.C. Res. 487, *supra* note 125 (detailing the UN's condemnation of violent extremism and serving as an example of one kind of peaceful remedy the United States has sought, namely, Security Council condemnation).

131. See Taft Memorandum, *supra* note 125, (discussing the legal basis for preemption and explaining the Israel case); see also S.C. Res. 487, *supra* note 125 (detailing the UN's condemnation of violent extremism and serving as an example of one kind of peaceful remedy the United States has sought, namely, Security Council condemnation).

132. Compare Taft Memorandum, *supra* note 125 (stating that the Security Council rejected the Israeli argument because Israel had not exhausted peaceful means), with S.C. Res. 2178, (Sep. 24, 2014) [hereinafter S.C. Res. 2178] (expressing the UN's condemnation of violent extremism).

133. Compare Taft Memorandum, *supra* note 125 (stating that the Security Council rejected the Israeli argument because it did not exhaust peaceful means), with S.C. Res. 2178, *supra* note 132, (detailing the UN's condemnation of violent extremism and serving as an example of one kind of peaceful remedy the United States has sought, namely, a Security Council condemnation).

134. Background Conference Call on the President's Address to the Nation (Sep. 10, 2014), <http://www.whitehouse.gov/the-press-office/2014/09/10/background-conference-call-presidents-address-nation> [hereinafter Background Conference Call] (stating the United States' establishment of an international coalition); see also S.C. Res. 2178, *supra* note 132 (detailing the UN's condemnation of violent extremism and serving as an example of one kind of peaceful remedy the United States has sought, namely, Security Council condemnation).

135. See S.C. Res. 2170 (calling ISIS a "terrorist organization"); Background Conference Call, *supra* note 134 (calling ISIS a "terrorist organization" that will require "different tools" in response).

136. Compare Taft Memorandum, *supra* note 125 (stating that Israel's military action was against Iraq), with S.C. Res. 487, *supra* note 125 (condemning Israel's military action).

137. Deeks, *supra* note 47 (explaining that Iraq has given consent for engagement against ISIS which it "could withdraw"); Missy Ryan, *U.S. urges Iraq to ensure coalition aid is effective against Islamic State*, THE WASHINGTON POST, Mar. 9, 2015, <http://www>.

State interest in pre-empting an Iraqi attack, the United Nations is founded on principles of deference toward State sovereignty and thus Israel had an uphill battle in justifying its use of force against a state.¹³⁸ The United States, by contrast, would be engaging against a terrorist non-state actor, condemned by the very country it has taken as its host.¹³⁹

The Israeli case also differs from the US engagement against ISIS because the threat against Israel was more remote, according to the United Nations. The Iraqi reactor had not yet been put to any use against Israel according to the United Nations.¹⁴⁰ The remoteness of the threat made the pre-emptive self-defense argument too weak to withstand Security Council scrutiny.¹⁴¹ ISIS has been waging a violent campaign for months and this may be sufficient to withstand Security Council scrutiny as to the proximity of the threat.¹⁴²

In addition to showing the imminence of the threat, the United States must show that the use of force is proportional under the Caroline test.¹⁴³ The seminal case explaining proportionality is the *Nicaragua* case discussed above.¹⁴⁴ In the *Nicaragua* case, the court

washingtonpost.com/world/middle_east/us-urges-iraq-to-ensure-coalition-aid-is-effective-against-islamic-state/2015/03/09/8ef90302-c67a-11e4-b2a1-bed1aaea2816_story.html (quoting Iraqi Defense Minister Khaled al-Obeidi as saying that Iraq has “asked for help from many countries that [it] has a strategic relationship with, and that includes the United States”).

138. See U.N. Charter art. 59 (articulating the prohibition on use of force); see also U.N. Charter art. 2 (laying out the foundational principles of sovereignty).

139. Compare Taft Memorandum, *supra* note 125 (stating that Israel’s military action was against Iraq), with S.C. Res. 2178, *supra* note 132 (detailing the UN’s condemnation of violent extremism and serving as an example of one kind of peaceful remedy the United States has sought, namely, Security Council condemnation).

140. Compare Taft Memorandum, *supra* note 125 (stating that Iraqi reactor had not been put to use against Israel), with S.C. Res. 487, *supra* note 125 (condemning Israeli response to Iraqi reactors).

141. Taft Memorandum, *supra* note 125 (stating that Israel’s pre-emptive self-defense argument was rejected); S.C. Res. 487, *supra* note 125 (condemning Israeli response to Iraqi reactors).

142. Compare Taft Memorandum, *supra* note 125 (stating that Israel’s pre-emptive self-defense argument was rejected), with S.C. Res. 2178, *supra* note 132 (detailing the UN’s condemnation of violent extremism and serving as an example of one kind of peaceful remedy the United States has sought, namely, Security Council condemnation).

143. Denver, *supra* note 107 (explaining the basic tenets of the Caroline Test); Kearley, *supra* note 107, at 331 (outlining the history of the Caroline Test).

144. Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Judgment, 1986 I.C.J. 14 (June 27) (evaluating the proportionality of a United States military action); see also Armed Activities On the Territory of the Congo (*Dem. Rep. Congo v. Uganda*), Judgment, 2005 I.C.J. 116 (Dec. 19) (reinforcing the *Nicaragua* standard for proportionality).

relied heavily on whether there was an armed attack in order to discern whether the response of the United States was proportional.¹⁴⁵ The *Nicaragua* interpretation of proportionality involves the assessment of whether the counter-attack is proportionate to the attack itself *and* to the needs of self-defense.¹⁴⁶ Thus, the United States' argument for proportionality may hinge on whether ISIS is found to have conducted an "armed attack" against the United States and whether that attack warrants the United States tripartite response measures: air strikes, arming Syrian rebels, and the creation of an international coalition.¹⁴⁷

One challenge the United States may face in relying on the preemptive self-defense argument is that the United States would be geographically confined to fighting ISIS only in Iraq because its engagement in Syria may not be supported by the *Nicaragua* ruling.¹⁴⁸ In *Nicaragua*, the United States provided arms, financial assistance, and training to the Contras, the Nicaraguan opposition forces.¹⁴⁹ This is factually similar to what the United States would be doing in Syria, namely, arming Syrian rebels so that they oppose the Syrian regime and fight ISIS.¹⁵⁰ In *Nicaragua*, the I.C.J. held that the United States' self-defense argument for arming the Nicaraguan

145. *Nicar. v. U.S.*, 1986 I.C.J. (evaluating the proportionality of a United States military action); *see also* *Dem. Rep. Congo v. Uganda*, 2005 I.C.J. (reinforcing the *Nicaragua* standard for proportionality).

146. Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 767 (2008) (arguing that proportionality depends on self-defense needs); *see also* *Dem. Rep. Congo v. Uganda*, 2005 I.C.J. (Dec. 19) (reinforcing the *Nicaragua* standard for proportionality).

147. *See* Franck, *supra* note 146, at 767 (arguing that proportionality depends on the self-defense needs); *see also* *Dem. Rep. Congo v. Uganda*, 2005 I.C.J. (reinforcing the *Nicaragua* standard for proportionality).

148. *Compare* *Nicar. v. U.S.*, 1986 I.C.J. (describing the United States' arming of the Nicaraguan opposition forces), *with* Earnest, *supra* note 16 (describing the United States plan to arm Syrian rebels) *and* Senior Administration Official, Background Conference Call on the President's Address to the Nation (Sep. 10, 2014) <http://www.whitehouse.gov/the-press-office/2014/09/10/background-conference-call-presidents-address-nation> (describing the United States plan to arm Syrian rebels).

149. *Compare* *Nicar. v. U.S.*, 1986 I.C.J. (describing the United States' arming of the Nicaraguan opposition forces), *with* Josh Earnest, *supra* note 16 (describing the United States plan to arm Syrian rebels), *and* Senior Administration Official, *supra* note 15 (describing the United States plan to arm Syrian rebels).

150. *Compare* *Nicar. v. U.S.*, 1986 I.C.J. (describing the United States' arming of the Nicaraguan opposition forces), *with* Earnest, *supra* note 16 (describing the United States plan to arm Syrian rebels), *and* Senior Administration Official, *supra* note 15 (describing the United States plan to arm Syrian rebels).

rebels could not be sustained.¹⁵¹ If the United States wants to engage against ISIS by arming the Syrian rebels they would need to argue that it is a justified pre-emptive self-defense measure distinguishable from the one in *Nicaragua*.¹⁵²

There are several ways this argument can be made. First, there are historical differences that may make the United States' argument against ISIS stronger than the one struck down in *Nicaragua*.¹⁵³ In *Nicaragua*, the United States supported Nicaraguan rebels so as to overthrow the existing political leader.¹⁵⁴ Unlike *Nicaragua*, the United States' engagement against ISIS is motivated by national security concerns and a desire to deter international terrorism.¹⁵⁵ Moreover, in the *Nicaragua* case, the I.C.J. ruled against the United States because the United States did not declare itself to be attacked, as required for an argument of individual self-defense.¹⁵⁶ The argument that the United States was acting in self-defense held no water, according to the I.C.J.¹⁵⁷ If the United States were to use the theory of pre-emptive self-defense to engage ISIS by arming Syrian rebels, there would be no need to declare the United States attacked.¹⁵⁸ This is because the purpose of a pre-emptive strike would be to prevent the attack in question.¹⁵⁹ Third, the fact that ISIS is a non-state actor and Nicaragua is a State makes the instant situation

151. *See* *Nicar. v. U.S.*, 1986 I.C.J. (rejecting the United States' self-defense claim).

152. *Id.*

153. *Compare* *Nicar. v. U.S.*, 1986 I.C.J. (describing the United States' arming of the Nicaraguan opposition forces), *with* Earnest, *supra* note 15 (describing the United States plan to arm Syrian rebels), *and* Senior Administration Official, *supra* note 16 (describing the United States plan to arm Syrian rebels).

154. *Compare* *Nicar. v. U.S.*, 1986 I.C.J. (describing the United States' arming of the Nicaraguan opposition forces), *with* Earnest, *supra* note 16 (describing the United States plan to arm Syrian rebels), *and* Senior Administration Official, *supra* note 15 (describing the United States plan to arm Syrian rebels).

155. *Compare* *Nicar. v. U.S.*, 1986 I.C.J. (describing the United States' arming of the Nicaraguan opposition forces), *with* Earnest, *supra* note 16 (describing the United States plan to arm Syrian rebels), *and* Senior Administration Official, *supra* note 15 (describing the United States plan to arm Syrian rebels).

156. *Nicar. v. U.S.*, 1986 I.C.J. (ruling against the United States' self-defense argument since they did not declare themselves attacked).

157. *Id.*

158. Taft, *supra* note 125 (explaining pre-emptive self-defense). *Compare* *Nicar. v. U.S.*, 1986 I.C.J. (describing the United States' arming of the Nicaraguan opposition forces), *with* Earnest, *supra* note 16 (describing the United States plan to arm Syrian rebels), *and* Senior Administration Official, *supra* note 15 (describing the United States plan to arm Syrian rebels).

159. Taft, *supra* note 125; Deeks, *supra* note 47 (laying out a pre-emptive self-defense argument the United States could make).

dissimilar to that of *Nicaragua*.¹⁶⁰ Nicaragua's statehood makes diplomacy a possible option, which is not the case in dealing with terrorist organizations like ISIS.¹⁶¹ These distinguishing factors may show that arming Syrian rebels would be a justifiable pre-emptive self-defense measure that would pass scrutiny under international law.¹⁶²

E. Ongoing Conflict

The final possible legal justification under international law is one that frames the hostility with ISIS as the most recent development in an "ongoing conflict" against al-Qaeda in the Middle East.¹⁶³ The implications of this are twofold.¹⁶⁴ First, if the United States' engagement against ISIS is part of an ongoing conflict with al-Qaeda, the United States may not need renewed Security Council authorization for an armed conflict that has been going on since 2001.¹⁶⁵ Secondly, framing the engagement against ISIS as part of an "ongoing conflict" would mean that President Obama might not need additional justification under United States law to combat ISIS apart from the existing 2001 Authorization for Use of Military Force.¹⁶⁶

160. *Compare* *Nicar. v. U.S.*, 1986 I.C.J. (describing the United States' arming of the Nicaraguan opposition forces), *with* Earnest, *supra* note 16 (describing the United States plan to arm Syrian rebels), *and* Senior Administration Official, *supra* note 15 (describing the United States plan to arm Syrian rebels).

161. *See* Taft, *supra* note 124 (discussing the legal basis for preemption); *see also* *Nicar. v. U.S.*, 1986 I.C.J. ¶ 14 (June 27).

162. *Compare* *Nicar. v. U.S.*, 1986 I.C.J. ¶ 14 (describing the United States' arming of the Nicaraguan opposition forces), *with* Earnest, *supra* note 16 (describing the United States plan to arm Syrian rebels), *and* Senior Administration Official, *supra* note 15 (describing the United States plan to arm Syrian rebels).

163. Deeks, *supra* note 47 (laying out the "ongoing conflict" argument briefly). *See generally* Senior Administration Official, *supra* note 15 (describing the United States plan to combat ISIS).

164. *See* Brett LoGiurato and Hunter Walker, *Congressman: Obama's Expansion of His ISIS Campaign is 'Illegal'*, BUSINESS INSIDER, Sep. 24, 2014, <http://www.businessinsider.com/obama-isis-legal-aumf-congress-2014-9> (evaluating Administration officials' claim that "ISIS falls under the 2001 AUMF because of its previous affiliation with al-Qaeda."); *see also* Deeks, *supra* note 47 (explaining the international law implications of the "ongoing conflict" argument).

165. Deeks, *supra* note 47 (stating that using the "ongoing conflict" argument as an international legal theory would force the United States to "confront the sovereignty/territorial issues involved in using force against ISIS in a foreign state"). *See generally* U.N. Charter art. 2 ¶ 4 (making no mention of protocol for requests to use force for a new hostility in an ongoing conflict).

166. *See* Senior Administration Official, *supra* note 15 (citing the 2001 AUMF as the source of authority under United States law for the President's engagement against ISIS). *But*

Accordingly, the “ongoing conflict” argument would affect both the international law justifications and the US law justifications for engaging against ISIS.¹⁶⁷

There are a number of challenges associated with United States reliance on the “ongoing conflict” argument. First, the idea that ISIS is the latest chapter in an ongoing conflict with al-Qaeda is factually dependent on whether or not ISIS is actually related to al-Qaeda in some way.¹⁶⁸ Whether or not ISIS is sufficiently affiliated with al-Qaeda to qualify as being part of an “ongoing conflict” is subject to some debate.¹⁶⁹ Another challenge associated with this argument is that it leaves unclear the United States’ obligations to the Security Council.¹⁷⁰ Under the UN Charter, it is unclear whether the United States would still be obligated to seek a Security Council resolution for its use of force against ISIS, even if it is part of an ongoing conflict.¹⁷¹

As of the time of publication of this Comment, the United States’ obligations before the Security Council remain in limbo if the United States uses the “ongoing conflict” argument.¹⁷² Though the United States does not yet have Security Council authorization, the

cf., LoGiurato, *supra* note 164 (evaluating Administration officials’ claim that “ISIS falls under the 2001 AUMF because of its previous affiliation with al-Qaeda.”).

167. *See* LoGiurato, *supra* note 164 (evaluating Administration officials’ claim that “ISIS falls under the 2001 AUMF because of its previous affiliation with al-Qaeda.”); *see also* Deeks, *supra* note 47 (explaining the international law implications of the “ongoing conflict” argument).

168. *See* LoGiurato, *supra* note 164 (discussing the claim of whether ISIS is sufficiently affiliated with al-Qaeda); *see also* Deeks, *supra* note 47 (proposing legal arguments under domestic law and exploring the international law implications of the “ongoing conflict” argument).

169. *See e.g.*, LoGiurato, *supra* note 164 (explaining the effect of ISIS’ affiliation with al-Qaeda on the “ongoing conflict” argument); *see also* Deeks, *supra* note 47 (explaining the international law implications of the “ongoing conflict” argument).

170. *See generally* U.N. Charter art. 2 ¶ 4 (making no mention of protocol for requests to use force for a new hostility in an ongoing conflict). *See also* U.N. Charter art. 51 (making no mention of an exception to the prohibition on use of force for new developments in ongoing conflicts).

171. *See generally* U.N. Charter art. 2 ¶ 4 (setting forth international obligations for laws of war, but omitting discussion of when countries may use force for a new hostility in an ongoing conflict). *See also* U.N. Charter art. 51 (describing exceptions to the prohibition against use of force but making no mention of an exception for new developments in ongoing conflicts).

172. *See generally* U.N. Charter art. 2 ¶ 4 (making no mention of protocol for requests to use force for a new hostility in an ongoing conflict). *See also* U.N. Charter art. 51 (making no mention of an exception to the prohibition on use of force for new developments in ongoing conflicts).

engagement against ISIS has already begun.¹⁷³ This leaves questions open about what role a Security Council resolution would play in this specific scenario.¹⁷⁴ As mentioned above, it could be reduced to a diplomatic veneer, rather than a hard source of legal authority.¹⁷⁵ Additionally, it could leave questions open about what transnational action would be authorized with and without a Security Council resolution.¹⁷⁶ While the United Nations has not given authorization for use of military force against ISIS, Resolution 2178 does seem to internalize the “ongoing conflict” argument and extend it to engagement in the Levant in several ways.¹⁷⁷ The resolution refers to the relevant entities as “the Islamic State in Iraq and the Levant (‘ISIL’), the Al-Nusrah Front (‘ANF’) and other cells, affiliates, splinter groups or derivatives of Al-Qaida.”¹⁷⁸ Notably, the resolution seems to imply some connection between ISIS and Al-Qaeda, a principle which fundamentally underpins the “ongoing conflict” argument.¹⁷⁹ Additionally, by referring to it as ISIL, the resolution imbues the group with a transnational quality extending to the Levant, which includes Syria.¹⁸⁰ This means that the authority granted in the resolution extends to all engagement within the Levant including Syria.¹⁸¹ This is one material way in which the “ongoing conflict” argument differs from the other arguments, discussed above, that the executive branch could make. Nevertheless, the “ongoing conflict” argument, and ultimately the United States’ strategy for developing an

173. See Josh Rogin, *White House Has No International Legal Justification for Hitting ISIS in Syria*, THE DAILY BEAST, Sep. 23, 2014, <http://www.thedailybeast.com/articles/2014/09/15/white-house-has-no-international-legal-justification-for-hitting-isis-in-syria.html> (pointing out the lack of United States international law justifications); see also Deeks, *supra* note 47 (explaining the international law implications of the “ongoing conflict” argument).

174. See Rogin, *supra* note 173 (pointing out the lack of United States international law justifications); see also Deeks, *supra* note 47 (explaining the international law implications of the “ongoing conflict” argument).

175. See Rogin, *supra* note 173 (stating that the United States provided no international law justifications); see also Deeks, *supra* note 47 (laying out the implications of using the “ongoing conflict” argument).

176. See Rogin, *supra* note 173 (arguing that the United States should have provided an international law justification for engaging ISIS); see also Deeks, *supra* note 47 (explaining the international law implications of the “ongoing conflict” argument as well as other pathways for international justification).

177. S.C. Res. 2178, U.N. Doc. S/RES/2178 (Sept. 24, 2014).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

international law justification would depend on whether the US Congress passes a new ISIS AUMF.¹⁸²

No matter what legal justification the United States chooses, its legal basis under US law for engaging against ISIS must be consistent with the United States' obligations under international law.¹⁸³ The US Congress would ultimately need to pass an AUMF consistent with the provisions of international law to which the United States is bound.¹⁸⁴ The following section will discuss the justifications under US law that the President could use to engage against ISIS and their implications for the United States' international commitments.¹⁸⁵

II. JUSTIFICATIONS UNDER UNITED STATES LAW FOR ENGAGEMENT AGAINST ISIS

This Part will deal with the potential legal theories under US law that would justify the President's engagement against ISIS. It will also examine how potential AUMFs would interact with international law. The key issue is whether a new AUMF would be consistent with the United States' arguments under international law.

In order to establish justification under US law, the White House had two choices.¹⁸⁶ First, the President could seek Congressional authorization for military engagement.¹⁸⁷ Second, he could proceed under the argument that involvement was authorized under the President's executive powers, as granted by Article 2 of the United States Constitution.¹⁸⁸ The White House ultimately chose the latter and argued that the President did not need Congressional authorization because the operation fell under his Article 2 Presidential powers and because he was granted statutory authority under the 2001 AUMF.¹⁸⁹ The White House's use of the 2001 AUMF as a source of legal justification is subject to debate since the 2001

182. *See generally infra* Part II.

183. *See e.g.*, U.N. Charter art. 2(4) (stating the United States' obligations under the U.N. charter regarding use of force); *see* Rogin, *supra* note 173 (pointing out the lack of United States international law justifications).

184. *See generally infra* Part II. *See e.g.*, U.N. Charter art. 2(4) (stating the United States' obligations under the U.N. charter regarding use of force).

185. *See generally infra* Part II.

186. *See generally infra* Part II.

187. U.S. CONST. art. II.

188. *Id.*

189. *See id.*; *see also* Senior Official, *supra* note 15 (citing the 2001 AUMF as justification for engaging against ISIS).

AUMF was designed only to grant the President power to respond to organizations associated with the terrorist attacks of September 11, 2001.¹⁹⁰ Critics argue that ISIS is a distinct group unrelated to the groups that engineered the September 11 attacks, and thus that the 2001 AUMF alone does not grant the President the necessary authority to engage ISIS.¹⁹¹

In the Fall of 2014, a number of new AUMFs were proposed by Congress to supply the President with the requisite US law justification.¹⁹² This section will discuss the use of the 2001 AUMF as a form of legal justification under US law. It will also explore what a new AUMF might need to comport with US and international law. Part II.A discusses the War Powers Resolution (“WPR”) and explores the sources of authority within the United States government for engaging against ISIS. Part II.B discusses the role of a sunset provision in an AUMF, clearly marking the expiration date of the authority it grants. Part II.C will discuss the geographic bounds of the engagement against ISIS that a new AUMF might propose. Finally, Part II.D will discuss how the international law justifications discussed in Part I would impact a new AUMF.

A. Determining the Source of Authority: The War Powers Resolution

The threshold legal question here relates to the federal balance of powers: who has the authority to authorize engagement against ISIS?¹⁹³ On the one hand, the President can authorize engagement under his Article 2 Commander-in-Chief powers.¹⁹⁴ On the other hand, Congress has the constitutional power to declare war under Article 1.¹⁹⁵ Congress did not use its power to declare war and the

190. See e.g., Logiurato, *supra* note 164 (arguing that the AUMF does not suffice as legal justification); Deeks, *supra* note 47 (discussing possible critiques to the AUMF as legal justification).

191. See e.g., Logiurato, *supra* note 164 (arguing for the insufficiency of the 2001 AUMF as legal justification to engage ISIS); Deeks, *supra* note 47 (discussing possible problems with using the 2001 AUMF as legal justification).

192. Matthew C. Weed, Cong. Research Serv., R43760, *A New Authorization for Use of Military Force Against the Islamic State: Comparison of Current Proposals in Brief*, (2014) (laying out AUMFs proposed by Congress); see e.g., H.R.J. Res. 128, 113th Cong. (2014) (proposing an authorization for use of force against ISIS that would incorporate international law provisions).

193. See U.S. CONST. art. II (granting presidential powers); see also U.S. CONST. art. I (granting congressional powers).

194. U.S. CONST. art. II.

195. U.S. CONST. art. I.

President exercised his executive powers to engage against ISIS.¹⁹⁶ Since the authorization of engagement against ISIS came from the President, the WPR is the relevant legislation in determining whether the President properly exercised his executive powers to engage ISIS.¹⁹⁷

The WPR interprets the President's Commander-in-Chief powers as granted by the Constitution.¹⁹⁸ It limits Presidential exercise of military force to the following three situations: "1) a declaration of war, 2) specific statutory authorization, or 3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."¹⁹⁹ As there has been no declaration of war against ISIS, the first prong of the WPR would not apply in this case.²⁰⁰ According to the Obama Administration, the second prong applies here because the 2001 AUMF grants sufficient statutory authority for the President to authorize engagement against ISIS.²⁰¹

The manner in which the US government interprets its obligations under international law affects its Presidential Powers argument under the WPR in several ways.²⁰² For instance, if the United States argues to the United Nations that there has been an "armed attack" for purposes of Article 51 authorization of force under international law, the United States may still retain ability to use the third prong of the WPR.²⁰³ The third prong grants justification for Presidential authorization of force in the case of a national emergency brought about by an attack on the United States.²⁰⁴ One reason the United States might not choose this argument is because there was no

196. Letter from Barack Obama, *supra* note 115 (explaining the President's engagement against ISIS); *see also* U.S. CONST. art. II (granting presidential powers).

197. War Powers Resolution of 1973, 50 U.S.C. § 1541 (2006).

198. *Id.*

199. *Id.* If none of these prongs apply, the War Powers Resolution's reporting requirements are triggered and the President must notify Congress within 48 hours of committing armed forces to military action. Additionally, the President must forbid armed forces from remaining for more than 60 days, unless one of the three prongs above applies.

200. *Id.*

201. Background Conference Call, *supra* note 15 (citing the 2001 AUMF as a source of authority); Letter from Barack Obama, *supra* note 115 (explaining the President's engagement against ISIS).

202. *See generally supra* Part I.E.

203. 50 U.S.C. § 1541 (2006).

204. *Id.*

territorial attack on the United States, its territories or possessions.²⁰⁵ However, the United States might still be interested in making a self-defense argument before the United Nations.²⁰⁶ This would require a showing that an “armed attack” occurred against the United States in the form of the murders of American journalists.²⁰⁷ If the United States can argue before the international community that an “armed attack” occurred for purposes of Article 51 of the UN Charter, it would have to make the same argument to establish justification under US law using the third prong of the War Powers Act.²⁰⁸ Otherwise, the United States’ international justification would be inconsistent with its justification under US law.²⁰⁹

If none of the three prongs of the WPR apply, the WPR reporting requirements and timetable would be triggered.²¹⁰ This timetable limits the President’s authority to engage in hostilities to a maximum of 60 days.²¹¹ After these 60 days, the engagement would lose its legal force.²¹² If none of these three exceptions under the WPR are deemed applicable, the timetable would have already expired as of the publication of this Comment.²¹³ Thus, the President would be in breach.²¹⁴ However, the current position of the Obama Administration is that the President has specific statutory authority under the 2001 AUMF.²¹⁵ Accordingly, it is the Obama

205. Cf. Abdallah, *supra* note 95 (showing the beheading of Peter Kassig by ISIS). See also Carter & Fantz, *supra* note 15 (discussing the brutality of ISIS violence against American journalist Steven Sotloff).

206. See generally *supra* Part I.

207. See, e.g., Abdallah, *supra* note 95 (showing the beheading of Peter Kassig by ISIS); see also Carter & Fantz, *supra* note 95 (discussing the brutality of ISIS violence against American journalist Steven Sotloff).

208. War Powers Resolution of 1973, 50 U.S.C. § 1541 (2006); see also U.N. Charter art. 51. The argument that an armed attack occurred for purposes of Article 51 would authorize the exercise of executive powers without triggering the War Powers Resolution’s reporting requirements if the presence of ISIS rose to the level of a “national emergency” as required by this prong.

209. See 50 U.S.C. § 1541 (2006); see also U.N. Charter art. 51.

210. 50 U.S.C. § 1544(b)(1) (1973).

211. *Id.*

212. *Id.*

213. *Id.*

214. 50 U.S.C. § 1541.

215. *Id.*

Administration's position that no breach could occur because prong two of the WPR applies.²¹⁶

The use of the 2001 AUMF as statutory justification has inspired several critiques.²¹⁷ One main critique is that the statute is thirteen years old and, as mentioned above, was intended for al-Qaeda and its progeny.²¹⁸ In Secretary of State John Kerry's testimony before Congress, he defended the use of the 2001 AUMF as a source of legal justification.²¹⁹ Congressman Menendez replied to Kerry's defense of the 2001 AUMF as follows:

At least from the chair's perspective, you're going to need a new AUMF. And it will have to be more tailored because I don't want to be part of [it] 13 years later and multitude of countries that have been used in this regard for that to be the authority.²²⁰

Congress thus saw the President's unilateral action against ISIS as an illegal use of the 2001 AUMF.²²¹ Nevertheless, the Administration has welcomed the initiation of a new AUMF from Congress that would be specifically tailored to combating ISIS.²²² There are

216. Background Conference Call, *supra* note 15 (citing the 2001 AUMF as a source of authority); *see also* Letter from Barack Obama, *supra* note 115 (explaining the President's engagement against ISIS).

217. *See e.g.*, Logiurato, *supra* note 164 (arguing that the AUMF does not suffice as legal justification); Deeks, *supra* note 47 (discussing possible critiques to the AUMF as legal justification).

218. *See e.g.*, Logiurato, *supra* note 164 (discussing the merits of the 2001 AUMF and concluding that the statute is too outdated to be applied to ISIS); Deeks, *supra* note 47 (discussing problems with using the 2001 AUMF as justification for engaging against ISIS).

219. Susan Jones, *Kerry: Obama Administration Listening to 'Good Lawyers' Rather Than Congress*, CNS NEWS (Sept. 18, 2014), <http://cnsnews.com/news/article/susan-jones/kerry-obama-administration-listening-good-lawyers-rather-congress> (quoting Congressman Menendez's critique of the use of the 2001 AUMF); *see e.g.*, Logiurato, *supra* note 164 (arguing that the AUMF does not suffice as legal justification); Deeks, *supra* note 47 (discussing possible critiques to the AUMF as legal justification).

220. Jones, *supra* note 219 (quoting Congressman Menendez's critique of the use of the 2001 AUMF); *see, e.g.*, Logiurato, *supra* note 164 (arguing that the AUMF does not suffice as legal justification); Deeks, *supra* note 47 (discussing possible critiques to the AUMF as legal justification).

221. Jones, *supra* note 219 (quoting Congressman Menendez's critique of the use of the 2001 AUMF); *see, e.g.*, Logiurato, *supra* note 164 (arguing that the AUMF does not suffice as legal justification).

222. Letter from Barack Obama, *supra* note 115 (stating that actions against ISIS are in the interest of national security); *see also* Senior Administration Official, *supra* note 15 (detailing the plan to combat ISIS and prevent further violence).

currently seven such proposed ISIS AUMFs as of November 2014.²²³ The following subsections describe some of the principal legal differences between the proposed AUMFs, specifically with regards to how they comport with international law.

B. Sunset Provision: The Duration of Authorized Force

One of the main AUMF provisions argued for by scholars is a sunset provision that would clearly mark when the authorization of force would expire.²²⁴ Indeed, one reason the Obama Administration was able to rely on the September 2001 AUMF was because it contained no sunset provision.²²⁵ A sunset provision would not require the withdrawal of military forces before the objectives of the mission were completed.²²⁶ However, it would allow Congress to reconsider at a later date the conditions upon which it would continue to support the evolving conflict.²²⁷ This sunset provision would need to take into account international law limitations for the timetable of the engagement.²²⁸ These limitations would vary depending on which of the above international law justifications the United States uses.²²⁹

If the United States chooses the individual or collective self-defense justifications under international law, the following may be

223. Weed, *supra* note 192 (laying out AUMFs proposed by Congress); *see also* H.R.J. Res. 128, 113th Cong. § 3 (2014) (proposing an authorization for use of force against ISIS that would incorporate international law provisions).

224. *See* Jennifer Daskal & Stephen Vladeck, *After the AUMF*, 5 HARV. NAT'L SEC. J. 115, 142-44 (2014); *see also* Weed, *supra* note 192, at 4-5 (laying out AUMFs proposed by Congress).

225. *See* Goldsmith, *supra* note 34 (arguing that the 2001 AUMF is too expansive a grant of executive power); *see also* LoGiurato, *supra* note 164 (arguing that ISIS is not connected to perpetrators of 9/11 and cannot be fought under the 2001 AUMF).

226. Rosa Brooks et. al., *Principles to Guide Congressional Authorization of the Continued Use of Force Against ISIL*, JUST SECURITY (2014), <http://justsecurity.org/wp-content/uploads/2014/11/ISIS-AUMF-Statement-FINAL.pdf> (listing principles needed for a new AUMF); *see* Daskal, *supra* note 224, at 142 (discussing the legal needs with regards to a new AUMF).

227. Brooks et. al., *supra* note 226 (discussing guiding principals for the drafting of a new AUMF); *see* Daskal, *supra* note 224, at 142 (discussing the legal needs with regards to a new AUMF).

228. Brooks et. al., *supra* note 226 (listing principles needed for a new AUMF); *see* Daskal, *supra* note 224, at 143 (explaining potential considerations in the drafting of a new AUMF).

229. Brooks et. al., *supra* note 226 (listing relevant principles to the drafting of a new AUMF for engaging against ISIS); *see* Daskal, *supra* note 224 (exploring ways to draft a new AUMF for ISIS).

relevant considerations applicable to an AUMF sunset provision.²³⁰ Under Article 51 of the UN Charter, a State may only exercise its right to self-defense only “until the Security Council has taken measures necessary to maintain international peace and security.”²³¹ This poses the question of when a State’s right to self-defense ceases.²³² The most generous timeframe given among the seven proposed AUMFs is a sunset provision of three years after the date of enactment provided by Senate Joint Resolution 42.²³³ It would be difficult to discern when the United Nations has taken actions sufficient to override the United States’ stake in its own self-defense or the coalition’s collective self-defense.²³⁴ Indeed, it is unclear whether the United Nations would have to simply take measures or whether those measures would have to be proven successful in order to terminate the state’s right to self-defense.²³⁵ A sunset provision may need to take into account this limitation under international law.²³⁶ Otherwise, the situation may arise where the President has authority under US law to continue engagement but no authority under international law.²³⁷

C. Geographic Limitation: The Bounds of Engagement

Of the new AUMFs proposed, only two have provisions articulating a geographic limitation to engagement against ISIS.²³⁸ House Joint Resolution 125 proposes that “authority . . . shall be confined to the territory of the Republic of Iraq and the Syrian Arab

230. Brooks et. al., *supra* note 226 (listing principles needed for a new AUMF); *see* Daskal, *supra* note 224, at 136-37 (discussing the legal needs with regards to a new AUMF).

231. U.N. Charter art. 51.

232. *Id.*

233. S.J. Res. 42, 113th Cong. (2013-2014).

234. *See* Brooks, *supra* note 226 (listing principles needed for a new AUMF); Vladeck, *supra* note 224 (discussing the legal needs with regards to a new AUMF); *see also* U.N. Charter art. 51 (making no mention of when a country’s right to self-defense ceases); U.N. Charter art. 2, ¶ 4.

235. *See* U.N. Charter art. 51 (making no mention of when a country’s right to self-defense ceases); *see also* U.N. Charter art. 2, ¶ 4.

236. *See* U.N. Charter art. 51 (laying out the exceptions for the prohibition on use of force and making no mention of when a right to self-defense would cease); *see also* U.N. Charter art. 2, ¶ 4.

237. *See* U.N. Charter art. 51 (listing the two self-defense exceptions to the prohibition against use of force); *see also* U.N. Charter art. 2, ¶ 4.

238. *See* S.J. Res. 44, 113th Cong. § 2 (2014); H.R.J. Res. 125, 113th Cong. § 2 (2014) (proposing an authorization for use of force against ISIS); Weed, *supra* note 192, at 13 (laying out AUMFs proposed by Congress).

Republic.”²³⁹ However, under this AUMF, the limitation would not apply to foreign military training activities.²⁴⁰ The second AUMF containing a provision is Senate Joint Resolution 44, which would also confine the authorization to Iraq and Syria.²⁴¹ However, as articulated above, there may be geographic limitations to United States involvement imposed by international law.²⁴² While Senate Joint Resolution 44 and House Joint Resolution 125 allow for engagement within Syrian territory, the United Nations has not as of the publication of this Comment.²⁴³

While Iraq has consented to international assistance in fighting ISIS, Syria has not given consent.²⁴⁴ The authorization to violate Syrian sovereignty would thus have to be authorized by the United Nations.²⁴⁵ Indeed, Senate Joint Resolution 44 not only authorizes the use of force against Syria but clarifies that “[n]othing in this resolution shall be construed as . . . authorizing support for force in support of, or in cooperation with, the national government of Syria . . . or its security services.”²⁴⁶ Thus, any authorized engagement under Senate Joint Resolution 44 would be by definition adverse to the Syrian government.²⁴⁷ Unlike House Joint Resolution 125, Senate Joint Resolution 44 requires that the United States act in conjunction with an international coalition.²⁴⁸ This proposed AUMF is preoccupied with maintaining the international character of the

239. H.R.J. Res. 125 § 2(b) (proposing an authorization for use of force against ISIS); *see* Weed, *supra* note 192, at 13 (laying out AUMFs proposed by Congress).

240. H.R.J. Res. 125 § 2(c) (proposing an authorization for use of force against ISIS); *see* Weed, *supra* note 192, at 13 (discussing limitations on use of military force in AUMFs proposed by Congress).

241. S.J. Res. 44 § 2(a) (proposing an authorization for use of force against ISIS); *see* Weed, *supra* note 192, at 13 (laying out AUMFs proposed by Congress).

242. *See supra* Part I.

243. S.J. Res. 44 § 2(a) (proposing an authorization for use of force against ISIS); H.R.J. Res. 125 § 2(b) (proposing an authorization for use of force against ISIS); *see* Weed, *supra* note 192 (laying out AUMFs proposed by Congress).

244. *See* Deeks, *supra* note 47. *See generally* Weed, *supra* note 192 (laying out AUMFs proposed by Congress); U.N. Charter art. 2, ¶ 4.

245. *See* U.N. Charter, art. 2, ¶ 4; *see also* U.N. Charter art. 51.

246. S.J. Res. 44, 113th Cong. § 6(1) (2014); *see* Weed, *supra* note 192, at 14 (laying out AUMFs proposed by Congress).

247. *See* S.J. Res. 44 (proposing an authorization for use of force against ISIS); Weed, *supra* note 192, at 14 (laying out AUMFs proposed by Congress).

248. *Compare* S.J. Res. 44 § 2(a) (requiring that the United States act in conjunction with an international coalition), *with* H.R.J. Res. 125, 113th Cong. § 2(a) (2014) (proposing an alternative AUMF); *see* Weed, *supra* note 192, at 16 (laying out AUMFs proposed by Congress).

engagement against ISIS. The use of the international coalition helps the United States retain its argument that engagement may be legal under customary international law, even without a United Nations resolution.²⁴⁹ However, while there may be policy reasons for sanctioning this adverse use of force in Syria, it might not pass legal muster under international standards discussed in Part I.²⁵⁰

D. *The International Coalition: “The Enemy of my Enemy”*

The legality of these proposed AUMFs may also depend on whether the United States relied on a collective self-defense argument for international legal justification.²⁵¹ If so, cooperation with other countries would be required under international law by definition.²⁵² However, it is unclear whether some of these proposed AUMFs would require cooperation with other States or whether the AUMFs simply presume it.²⁵³ For example, the international provision under House Resolution 5415 states that the President may use force “with the close consultation, coordination, and cooperation with NATO and regional allies.”²⁵⁴ This is a narrower view of the requisite international cooperation than the one in other proposed AUMFs, which ask for United States cooperation with the broader international community including allies in the Middle East.²⁵⁵ A UN Security Council Resolution may determine this to be an engagement of global importance meriting the most expansive international involvement possible.²⁵⁶ Thus, a Security Council resolution, if produced, could be

249. Compare S.J. Res. 44 § 2(a) (requiring that the United States act in conjunction with an international coalition), with H.R.J. Res. 125 § 2(a) (proposing an alternative AUMF); see Weed, *supra* note 192, at 16 (laying out AUMFs proposed by Congress).

250. See generally *supra* Part I (discussing international law provisions applicable to the United States engagement against ISIS).

251. See *supra* notes 66-68 and accompanying text; see generally *supra* Part I.B.

252. See *supra* Part I.B.

253. Compare S.J. Res. 44, 113th Cong. § 2(a) (2014) (requiring that the United States act in conjunction with an international coalition), with H.R.J. Res. 125, 113th Cong. § 2(a) (2014) (proposing an alternative AUMF); see Weed, *supra* note 192, at 16 (laying out AUMFs proposed by Congress).

254. H.R. 5415, 113th Cong. § 2(a) (2014).

255. Compare H.R. 5415 § 2(a) (requiring that the United States act in conjunction with NATO allies), with H.R.J. Res. 125 § 2(a) (proposing an alternative AUMF); see Weed, *supra* note 192, at 16 (laying out AUMFs proposed by Congress).

256. Compare S.C. Res. 2178, U.N. Doc. S/RES/2178 ¶¶ 1, 15 (Sep. 24, 2014) (detailing the UN’s condemnation of violent extremism and deeming it an issue of international concern), with H.R. 5415 § 2(a) (requiring only that the United States act in conjunction with NATO allies).

in tension with a US AUMF that limits the United States' international partnerships.²⁵⁷

The only resolution that takes into account the possibility of a UN Security Council Resolution is House Joint Resolution 128.²⁵⁸ This proposed AUMF would track the orders of a UN Security Council Resolution and authorize the President to act accordingly.²⁵⁹ Under House Joint Resolution 128, if there is *no* UN Security Council Resolution, the President would be limited to military engagement that does not involve American boots on the ground.²⁶⁰ Moreover, the reporting requirements under House Joint Resolution 128 would be different depending on whether or not there is a UN Security Council Resolution.²⁶¹ If there is none, the President would have to show that the United States sought but did not receive a Security Council resolution authorizing the use of force.²⁶² Additionally, the President would have to 1) show that the United States is still working to build a broad international coalition to counter ISIS and 2) present a strategy before Congress for combatting ISIS.²⁶³

All proposed AUMFs would have to pass muster under US law as well as international law.²⁶⁴ In addition to the international concerns articulated above, there are several other US policy questions these AUMFs must deal with.²⁶⁵ For example, an AUMF would have to decide whether the preceding 2001 and 2002 AUMFs should be repealed.²⁶⁶ Another concern would be whether this authorization of force should be limited to ISIS in its current form or whether it would grant authorization for any changes in ISIS's structure.²⁶⁷ For instance, new AUMFs might consider whether an

257. Compare S.C. Res. 2178, *supra* note 257, ¶¶ 1, 15 (detailing the UN's condemnation of violent extremism and deeming it an issue of international concern), with H.R. 5415, 113th Cong. § 2(a) (2014) (requiring only that the United States act in conjunction with NATO allies).

258. H.R.J. Res. 128, 113th Cong. § 3 (2014); see Weed, *supra* note 192, at 12.

259. See H.R.J. Res. 128 § 3(a)(2); Weed, *supra* note 192, at 12.

260. See H.R.J. Res. 128 § 4(a); Weed, *supra* note 192, at 19.

261. H.R.J. Res. 128 §§ 3, 4; see Weed, *supra* note 192, at 14-15.

262. See H.R.J. Res. 128 § 4(b); Weed, *supra* note 192, at 14-15.

263. See H.R.J. Res. 128 § 4(a)(1)(B), (b)(2); Weed, *supra* note 192, at 14-15.

264. See U.N. Charter art. 2, ¶ 4 (detailing U.S. obligations under international law); Brooks, *supra* note 226, ¶ 5.

265. See generally Brooks, *supra* note 226 (suggesting principles for drafting new AUMFs; Weed, *supra* note 192 (laying out AUMFs proposed by Congress)).

266. See Brooks, *supra* note 226, ¶ 4; Weed, *supra* note 192, at 9.

267. See Brooks, *supra* note 226, ¶ 1; Weed, *supra* note 192, at 7-8.

AUMF should authorize engagement against ISIS if they cross borders and infiltrate other States aside from Iraq and Syria.²⁶⁸

There are also some questions that arise related to the precedent this AUMF will set.²⁶⁹ For instance, it is unclear whether a new AUMF would repudiate the President's original position when he cited the 2001 AUMF as legal authority.²⁷⁰ The way in which Congress handles the passing of a new AUMF and the way in which the United States complies with international law could determine much of the *jus ad bellum* jurisprudence going forward for combatting terrorist groups and non-state actors.²⁷¹

In summary, a new AUMF would consider several issues such as whether a sunset provision should be included and whether developments in the US international law justification should be considered.²⁷² As of the publication of this Comment, only House Joint Resolution 128 takes into account the possibility of a Security Council resolution.²⁷³ Part III will discuss what the best course of action would be for the United States so that it stays true to its obligations under international and US law.

III. LEGAL LEGITIMACY AND FUTURE QUESTIONS

Abram Chayes, a Kennedy-era legal scholar, spoke of the Cuban Missile crisis in the following terms, equally applicable to the engagement against ISIS:

We were armed, necessarily, with something more substantial than a lawyer's brief. But though it would not have been enough merely to have the law on our side, it is not irrelevant which side the law was on. The effective deployment of force, the appeal for world support, to say nothing of the ultimate judgment of history, all depend in significant degree on the reality and coherence of the case in law for our action. It is worthwhile, I think, to set out that legal case and to examine some of its implications.²⁷⁴

268. See Brooks, *supra* note 226, ¶ 2; see also Weed, *supra* note 192, at 8.

269. See generally *supra* Part II.B.

270. See *supra* Part II.B.

271. See *supra* Part I.

272. See generally *supra* Part II.

273. See H.R.J. Res. 128, 113th Cong. §§ 3, 4 (2014); Weed, *supra* note 192, at 12-13 (laying out AUMFs proposed by Congress).

274. Abram Chayes, *Law and the Quarantine of Cuba*, 41 FOREIGN AFF. 550, 550 (1963) (discussing the legality of events surrounding the Cuban Missile Crisis).

In keeping with Chayes' philosophy, the legitimacy and legality of the United States engagement against ISIS is not only important for its own sake, but as a strategy to bolster the effectiveness of international relations.²⁷⁵ The US response to ISIS is important because the extent to which the United States complies with its own law will serve as a litmus test for United States' integrity in the face of war.²⁷⁶ More broadly, the adherence of the international community to fundamental principles of international law will reinforce the legitimacy of rules established to keep the world in order during a time of hostility.²⁷⁷ Considering the tools available in the executive branch's toolbox as laid out in Parts I and II, Part III will make a normative argument for which justification under international and US law is most appropriate for the engagement against ISIS. Barring certain circumstantial changes discussed below, the international law theory of collective self-defense is most appropriate.

A. International Law

The appropriate justification under international law for engaging against ISIS depends on whether the United States intends to seek a Security Council resolution, and whether that resolution could survive a veto by one of the permanent five members.²⁷⁸ Without a resolution, the United States would still have a strong collective self-defense argument and could probably proceed in Iraq under Article 51 without Security Council authorization.²⁷⁹ However, the United States' actions would be confined to Iraq.²⁸⁰ For any action in Syria, the United States would need to pursue Security Council authorization in order to be in accord with international law.²⁸¹ Without authorization from the Security Council to engage in Syria, the United States would need to rely on customary international law as the legal basis for engaging ISIS in Syria by arming the Syrian rebels.²⁸²

275. *See generally supra* Part I.

276. *See generally supra* Part II.

277. *See generally supra* Part II.

278. *See The Security Council*, UNITED NATIONS, <http://www.un.org/en/sc/> (last visited Sept. 8, 2015) (describing the veto power of the five permanent members of the Security Council); *see also* U.N. Charter art. 51.

279. *See supra* Part I.B; U.N. Charter art. 51.

280. *See supra* Part I.B; U.N. Charter art. 51.

281. *See generally supra* Part I; U.N. Charter art. 51.

282. *See supra* Part I; *see also* U.N. Charter art. 51.

First, it is important to establish why an individual self-defense argument is unlikely to be appropriate in this case.²⁸³ While the United States' national security interests are at play, it likely has not suffered a sufficient "armed attack" as required for an individual self-defense argument under Article 51.²⁸⁴ Indeed, the murders of the American journalists and personnel abroad allow for some argument to be made about the United States suffering an "armed attack" by ISIS.²⁸⁵

However, it is unclear whether this is sufficient to rise to the standard of an "armed attack" as laid out by the *Nicaragua* case.²⁸⁶ Even if it were, the United States would be bound to respond proportionally.²⁸⁷ If the "armed attack" in this case is the killing of a number of American journalists, the American air strikes, arming of Syrian rebels, and forming of an international coalition arguably are not proportional responses.²⁸⁸ If the United States relied on an individual self-defense argument, it would likely be in violation of *jus in bello*.²⁸⁹ Given the strong transnational policy reasons for engaging against a violent force like ISIS, an argument of collective self-defense under Article 51 would be more appropriate.²⁹⁰

While the United States has its own national security interests that may motivate engagement against ISIS, that does not keep this from being an instance of collective rather than individual self-defense.²⁹¹ As discussed in Part I, the engagement in Iraq against ISIS has the trappings of a collective self-defense situation because Iraq has consented to the involvement of other nations in quelling a rogue non-state actor.²⁹² Indeed, the United States is only one of many nations involved in engaging against ISIS.²⁹³ Since there is no UN

283. See generally *supra* Part I.C; U.N. Charter art. 2, ¶ 4.

284. See *supra* Part I.C; U.N. Charter art. 51.

285. See U.N. Charter art. 51; see, e.g., Abdallah, *supra* note 95 (showing the beheading of Peter Kassig by ISIS); Carter & Fantz, *supra* note 95 (discussing the brutality of ISIS violence against American journalist Steven Sotloff).

286. See *supra* notes 96-100 and accompanying text (analyzing the definition of "armed attack" in *Nicaragua*).

287. See Denver, *supra* note 107, at 325 (explaining the basic tenets of the Caroline Test); see also Kearley, *supra* note 107, at 174 (outlining the history of the Caroline Test).

288. See Denver, *supra* note 107 (explaining the basic tenets of the Caroline Test); see also Kearley, *supra* note 107 (outlining the history of the Caroline Test).

289. See *supra* Part I.C.

290. See *supra* Part I.B.

291. See *supra* Part I.B.

292. See *supra* Part I.B.

293. See *supra* Part I.B.

Security Council resolution in effect permitting the entire international coalition to engage against ISIS, each state would have to come up with its own self-defense argument if this were not an instance of collective self-defense.²⁹⁴

If defined as an instance of collective self-defense, engaging against ISIS would be justified under *Nicaragua* because an “armed attack” against Iraq has occurred.²⁹⁵ The “armed attacks” are clear: ISIS has overtaken cities, engaged in human rights violations, and violently killed civilians.²⁹⁶ Moreover, the military measures taken by the United States and the international coalition in response to ISIS’s gross violations of international law are likely to be considered necessary and proportional.²⁹⁷ The violence of ISIS and the damage it has inflicted on Iraq likely suffice to say that it is necessary to respond. The response is proportional because the United States-led international coalition has primarily used air strikes in Iraq to target key leaders. Since the United States has yet to engage ISIS with boots on the ground and has thus far only used air strikes, the response likely meets the proportionality requirement under international law.²⁹⁸

Defining the engagement against ISIS as an instance of collective self-defense would not erase the role of the UN Security Council.²⁹⁹ Under Article 51, the inherent right of self-defense here would only last until the United Nations took measures to restore the peace.³⁰⁰ The exercise of the inherent right to collective self-defense by the international coalition—and therefore the United States—would not undermine the involvement of the United Nations.³⁰¹ It would also not leave the international community at the mercy of a Security Council veto, potentially by Russia or China.³⁰² This would

294. *See supra* Part I.C.

295. *See supra* notes 296-97.

296. *See* U.N. Charter art. 51; *see, e.g.,* Abdallah, *supra* note 95 (showing the beheading of Peter Kassig by ISIS); Carter & Fantz, *supra* note 95 (discussing the brutality of ISIS violence against American journalist Steven Sotloff).

297. *See* U.N. Charter art. 51; Denver, *supra* note 107, at 5 (explaining the basic tenets of the Caroline Test); *see, e.g.,* Abdallah, *supra* note 95 (showing the beheading of Peter Kassig by ISIS); Carter & Fantz, *supra* note 95 (discussing the brutality of ISIS violence against American journalist Steven Sotloff).

298. Denver, *supra* note 107. *See generally supra* Part I.

299. *See generally supra* Part I.

300. U.N. Charter art. 51.

301. *See id.* *See generally supra* Part I.

302. *See supra* notes 61-65 and accompanying text.

also still leave open the question of whether engagement against ISIS in Syria—or in territories beyond Iraq—can be justified under international law.³⁰³

One answer to this question would rely on customary international law.³⁰⁴ For geopolitical reasons involving a Russian alliance with the Syrian regime, the Security Council would likely veto a resolution authorizing the arming of Syrian rebels.³⁰⁵ In order to argue that the international coalition can arm the Syrian rebels, the international coalition would have to show that under customary international law, the engagement is legal.³⁰⁶ This argument would be made stronger if the coalition could show as a factual matter that arming the Syrian rebels is a compelling if not necessary means to defeating ISIS in Iraq.³⁰⁷

Moreover, to be justified under customary international law, the engagement would have to meet two criteria.³⁰⁸ First, it would have to be ubiquitously agreed to—as is likely the case by the mere presence of the international coalition against ISIS. Second, the members of the international coalition would have to be acting in a way they believe is legal.³⁰⁹ As of November 12, 2014, the countries in the international coalition engaging against ISIS have taken active measures ranging from air strikes to the distribution of humanitarian aid.³¹⁰ Since a large part of the international community acquiesced to engaging against ISIS without an explicit grant from the Security Council, it is likely that they believe their behavior to be legal.³¹¹

Moreover, if States believe themselves to be acting in collective self-defense of Iraq, they would be acting under the color of law, believing to be justified under Article 51.³¹² If the engagement of the

303. See generally *supra* Part I.

304. See generally *supra* Part I.

305. See *supra* notes 61-65 and accompanying text.

306. See *supra* Part I.B-D.

307. See *supra* Part I.B-D.

308. See *Customary IHL*, International Committee of the Red Cross, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin [hereinafter *Customary IHL*] (explaining the two main elements of customary international law); see also Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031, 1055, 33 U.N.T.S. No. 993 [hereinafter I.C.J. Statute].

309. See *Customary IHL*, *supra* note 308 (laying out the elements of customary international law); see also Statute of the International Court of Justice art. 38, ¶ 1(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

310. See *supra* Part I.

311. See generally *supra* Part I; I.C.J. Statute, *supra* note 308, art. 38, ¶ 1(b).

312. See I.C.J. Statute art. 38(1)(b); U.N. Charter art. 51.

international coalition were illegal, the UN Security Council would have condemned the response.³¹³ Thus, it is likely that the engagement against ISIS is legal under customary international law.³¹⁴ As discussed above, if there is a strong argument for the necessity of arming Syrian rebels in order to combat ISIS in Iraq, the United States and the international community's arming of the Syrian rebels may also be legal under customary international law.³¹⁵ As Professor Harold Koh would call it, justifying the engagement against ISIS in Syria might be an example of "transnational legal process."³¹⁶ In this case, international law governs not with treaties formally negotiated, but with "the dynamic interaction of private and public actors in a variety of national and international fora to generate norms and construct national and global interests."³¹⁷

B. Legal Justification under US Law

The 2001 AUMF serves as insufficient statutory justification for the United States' engagement against ISIS.³¹⁸ Even if it is factually determined that ISIS and al-Qaeda are linked enough to both come under the 2001 AUMF, it would be inconsistent to argue that the President needs no further grant of authority to combat ISIS.³¹⁹ This is because, under international law, the President would need renewed Security Council authorization if the United States were not acting under one of the Article 51 exceptions.³²⁰ Since fighting ISIS would involve a separate military enterprise than the one the United States used to combat al-Qaeda, the United States would need separate Security Council authorization.³²¹ It would be inconsistent if the United States argued that it needed no further statutory authority from Congress because ISIS is part of an "ongoing conflict" but simultaneously asked for a separate grant of authority from the

313. *See* I.C.J. Statute art. 38(1)(b); U.N. Charter art. 51.

314. *See* I.C.J. Statute art. 38(1)(b); U.N. Charter art. 51.

315. *See* I.C.J. Statute art. 38(1)(b); U.N. Charter art. 51.

316. Harold Hongju Koh, Legal Advisor, U.S. State Dep't, Remarks at Georgetown University Law Center (Oct. 17, 2012) (transcript available at <http://www.state.gov/s/l/releases/remarks/199319.htm>) (discussing the incentives that motivate international law).

317. *Id.*

318. *See supra* Part II.

319. *See supra* Part II.

320. *See supra* Part I.A; U.N. Charter art. 51.

321. *See supra* Part I.A; U.N. Charter art. 51.

Security Council.³²² For these reasons, the use of the existing AUMF could potentially lead the United States to adopt this inconsistent legal standpoint.³²³ Either that or the United States would be forced to argue that it is engaging against ISIS on grounds of individual self-defense and thus requires no further UN authorization.³²⁴ This argument is likely to fail for the reasons laid out in Part III.A.³²⁵

Congress' new AUMF would need to be consistent with international law.³²⁶ Moreover, the existence of a UN resolution authorizing engagement against ISIS remains a moving target as of the publication of this Comment.³²⁷ Out of the AUMFs drafted by Congress, House Joint Resolution 128 is the AUMF most likely to withstand scrutiny under international law because it tracks the existence of a UN Resolution.³²⁸ It also leaves room for the United States to argue that it is engaging against ISIS as a matter of collective self-defense.³²⁹ One of the main issues with House Joint Resolution 128 would be that it gives a broad grant of power to the President, enabling him to engage against ISIS in the Levant generally.³³⁰

This may lead to a situation where the President has authority under US law to engage against ISIS in Syria without having international authority.³³¹ This is precisely why the collective self-defense argument under international law is the one best suited to the United States in this situation.³³² Practically, it would leave open the door for the United States to argue that engagement in Syria is either necessary for collective self-defense or justified under customary international law.³³³

If House Joint Resolution 128 were coupled with an international law justification that required Security Council authorization, the President's US law authorization would then be in

322. *See generally supra* Part I.

323. *See generally supra* Part I.

324. *See supra* Part I; *see also supra* Part III.A.

325. *See supra* Part III.A.

326. *See supra* Parts I.A, II.A.

327. *See supra* Part I.A.

328. *See* H.R.J. Res. 128, 113th Cong. (2014); *see also supra* Part III.A.

329. *See supra* Part I.B; *see also* U.N. Charter art. 51.

330. *See* H.R.J. Res. 128, 113th Cong. (2014); *see also supra* Part III.A; U.N. Charter art. 51.

331. *See generally supra* Parts I, III.A. *See also* U.N. Charter art. 51.

332. *See supra* Parts I, III.A; *see also* U.N. Charter art. 51.

333. *See supra* Parts I, III.A; *see also* U.N. Charter art. 2, ¶ 4.

tension with international law.³³⁴ If the Security Council decided not to authorize engagement in Syria, a question of legislative supremacy would arise.³³⁵ If Congress gave the President a broad grant of power to engage in the Levant generally (including Syria), it is unclear whether international law would trump US law.³³⁶ This may be a problematic situation because it would lead to a crisis of legitimacy for the Security Council and it would make the United States appear to be violating international law with impunity.³³⁷

Finally, as discussed in Part II, any new AUMF would need to take into account compliance with other realms of international laws of war such as *jus in bello*.³³⁸ House Joint Resolution 128 is one example of an AUMF that would incorporate the language of “necessary and appropriate” force, which triggers US compliance with international law.³³⁹ Congress should ensure consistency with international law by authorizing “necessary and appropriate force.”³⁴⁰ This would constitute an implicit authorization for the President to use those means of force that are “fundamental and accepted incidents of war by universal agreement and practice.”³⁴¹ This language would mean that the United States would be bound to comply with international treaties like the UN Charter, but also customary international law.³⁴² This would be a US incorporation of international law regarding principles of *jus in bello* like proportionality, precaution, and distinction.³⁴³ It would also act as a legal stopper against violations of the laws of war, reinforcing the consistency between United States law and international obligations.³⁴⁴

In conclusion, ISIS presents unique problems for the United States’ *jus ad bellum* jurisprudence.³⁴⁵ It will also set important precedents because the United States engagement against ISIS

334. See H.R.J. Res. 128, 113th Cong. (2014); see also U.N. Charter art. 2, ¶ 4.

335. See generally *supra* Parts I, III.A.

336. See generally *supra* Parts I, III.A.

337. See *supra* Parts I, III.A.; see also U.N. Charter art. 2, ¶ 4.

338. See *supra* Parts II, III.A.; see also U.N. Charter art. 2, ¶ 4.

339. See H.R.J. Res. 128, 113th Cong. (2014); see also *supra* Part III.A.

340. See Brooks, *supra* note 226, ¶ 5. See generally Daskal & Vladeck, *supra* note 224 (discussing the legal needs with regards to a new AUMF).

341. Brooks, *supra* note 226, ¶ 5.

342. See *supra* Part III.A.; U.N. Charter art. 2, ¶ 4.

343. See *supra* Part III.A.; U.N. Charter art. 2, ¶ 4.

344. See *supra* Part III.A.; U.N. Charter art. 2, ¶ 4.

345. See *supra* Part III.A.; U.N. Charter art. 2, ¶ 4.

represents a turning point in how US foreign policy deals with non-state actors in international crises.³⁴⁶ How the United States responds in this instance will also have important implications for how Presidential war powers are construed and how the United States incorporates international law into its own federal law going forward. Accordingly, the AUMF passed by Congress should take into account the argument the United States makes to the international community in justifying its engagement against ISIS.

346. *See supra* Part I; U.N. Charter art. 2, ¶ 4.

