THE LAWFULNESS OF NEW ZEALAND'S MILITARY DEPLOYMENT TO IRAQ: "INTERVENTION BY INVITATION" TESTED

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I. Introduction

In 2014, New Zealand won its hard-fought bid for a seat on the United Nations Security Council. One of the items on the Council's agenda is the conflict in Iraq against the Islamic State of Iraq and the Levant (ISIL).[1] New Zealand is now at an important juncture in its role as a State actively concerned with international peace and security. A beleaguered Iraqi Government is proving ineffective at defending itself against ISIL. At its behest, the United States is leading a military intervention to assist in the fight against ISIL and in February 2015 New Zealand decided to join the fight by sending 143 troops and support personnel to help train the Iraqi army.

This note is not concerned with the political merits of the Government's decision to deploy troops.[2] Rather, it is concerned with the lawfulness of New Zealand's deployment under international law; namely whether Iraq's request for international assistance provides an exception to the prohibition on military intervention in another State's territory. While the US-led intervention in Syria has incited much scholarly debate, the same cannot be said for the intervention in Iraq.[3] It appears the consent of the internationally-recognised Government of Iraq renders the question of the lawfulness of foreign intervention almost moot. But the law is not so unequivocal.

In this note, I will provide a brief overview of the conflict in Iraq and the justifications provided by New Zealand and other States for their military involvement. I will analyse the law that applies to the situation in Iraq; looking at UN authorisation and the lawfulness of intervention by invitation, particularly in non-international armed conflicts (NIACs). I will argue that the Security Council has stopped short of expressly authorising the use of force in Iraq, adopting a deliberately ambiguous stance. I will also argue that

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1 Also known as the Islamic State of Iraq and Syria, ISIS, Islamic State, and Daesh, but I have used ISIL in this commentary as the term used by the United Nations [UN] and New Zealand.

2 See (24 February 2015) 703 NZPD 1813 [Hansard].

3 See for example Carsten Stahn "Syria and the Semantics of Intervention, Aggression and Punishment" (2013) 11 *Journal of International Criminal Justice* 955; Tom Ruys "Of Arms, Funding and 'Non-legal Assistance' – Issues Surrounding Third State Intervention in the Syrian Civil War" (2014) 13 *Chinese Journal of International Law* 13; see also Dapo Akande and Zachary Vermeer "The Airstrikes against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars" (2 February 2015) *EJIL: Talk!* <www.ejiltalk.org>.

the conflict is best described as an "internationalised" armed conflict and, as such, the rules prohibiting intervention in civil wars arguably do not apply. On this basis, New Zealand may have a justification in lending its support to Iraq in the exercise of Iraq's self-defence under art 51 of the UN Charter.[4] However, the law in this area is still evolving. The most certain position under international law would be clear authorisation from the UN. Given that the UN has pronounced ISIL an international threat and has supported Iraq's request for assistance in the fight against ISIL (short of express authorisation), perhaps New Zealand's involvement is best considered not *un*lawful, rather than positively lawful.[5]

But that is a political observation and so is not a satisfactory conclusion from a legal point of view. That said, the Security Council is a political body – one which uses tactical ambiguity to allow it to remain loosely united on the world's more complex crises. Taking this into account, together with the absence of a legal opinion from an authoritative institution (such as the Legal Counsel or the International Court of Justice), perhaps "not unlawful" is the best we can expect. Even so, this should not exonerate States, or the UN, from their responsibility to reach a legal conclusion based on sound analysis – whatever the political considerations.

II. Isil and Iraq's Request for Assistance

ISIL and Al-Nusra Front (ANF) are splinter groups of Al-Qaida and are listed on the UN's sanctions list.[6] They came to prominence during the Syrian conflict in 2014.[7] Large swathes of Syria's and Iraq's territory are now under the control of ISIL whose objective is to establish an Islamic caliphate in the region with Raqqa as its capital.[8] The Security Council has pronounced ISIL's "large scale offensive" a "major threat to the region".[9] The organisation sustains itself through illicit funding via oil exports, traffic of cultural antiquities, ransom payments and external donations.[10] It is conducting a successful recruitment campaign across the globe through its sophisticated use of social media.[11] Iraq's defence, undermined by corruption and an ineffective army, has not been able to withstand ISIL's

4 Charter of the United Nations, [Charter], art 51.

5 A further question that deserves exploration, but is beyond the scope of this commentary, is the law that applies to New Zealand forces while in Iraq.

6 Al-Qaida Sanctions list [Sanctions list] maintained by Security Council Committee pursuant to resolutions SC Res 1267, S/RES/1267 (1999) and SC Res 1989, S/RES/1989 (2011).

7 Cabinet Office Circular "International Response to the Threat of ISIL: Possible New Zealand Contribution" (23 February 2015) CAB (15) 71 at [23]; SC Res 2170, S/RES/2170 (2014).

8 Agencies "Sunni rebels declare new 'Islamic caliphate'" *Al Jazeera* (30 June 2014) <www.aljazeera.com>; "Battle for Iraq and Syria in maps" *BBC News* (18 May 2015) <www.bbc.com>.

9 *Statement by the President of the Security Council* S/PRST/2014/20 (2014).

10 SC Res 2199, S/RES/2199 (2015).

11 SC Res 2170, S/RES/2170 (2014).

offensive.[12] Meanwhile, at least 12,000 civilians were killed in Iraq in 2014 and over 23,000 injured. Since January 2014, over 2 million Iraqis have been internally displaced, adding to the at least 250,000 Syrian refugees currently hosted by Iraq.[13]

A US-led coalition has been conducting airstrikes against ISIL in Syria since September 2013[14] and in Iraq since August 2014.[15] New Zealand has been providing Iraq with humanitarian aid but on 24 February 2015, announced the expansion of that support to a two-year military deployment (reviewable after nine months).[16] The Government says the operation is a non-combat mission, limited to training Iraqi security forces, with the ultimate aim of creating an "independent, self-sustaining military capability for the Government of Iraq to call on."[17] It acknowledges Iraq's determination that military ground operations are to be undertaken by Iraqi forces alone.[18] The plan is to participate in a "Building Partner Capacity" mission with 106 Defence Force personnel to be deployed to Taji Military Complex together with 37 support and logistics personnel.[19] The deployment arrived in Iraq in May 2015 – New Zealand's largest since Afghanistan in 2003.[20]

New Zealand's legal argument is based on the request from the Government of Iraq and (by implication) collective self-defence.[21] In a letter addressed to the Secretary-General on 25 June 2014, Iraq requested international assistance in the form of military training, provision of weapons and advanced technology.[22] Then in September, Iraq informed the UN it had specifically requested the US "to lead international efforts to strike ISIL sites and military strongholds, with [its] express consent."[23] New Zealand's

12 *Second report of the Secretary-General pursuant to paragraph 6 of Resolution 2169 (2014)* S/2015/82 (2015).

13 *Security Council Meeting Records* S/PV.7383 (2015).

14 Craig Whitlock "U.S. begins airstrikes against Islamic State in Syria" *The Washington Post* (23 September 2014) <www.washingtonpost.com>.

15 Dan Roberts, Spencer Ackerman and Associated Press "US begins air strikes against Isis targets in Iraq, Pentagon says" *The Guardian* (8 August 2014) <www.theguardian.com>; see also US Central Command "May 21: Military Airstrikes Continue Against ISIL Terrorists in Syria and Iraq" (21 May 2015) <www.centcom.mil>.

16 Hansard, above n 2, at 1814.

17 At 1814.

18 With the exception of a small number of Advisory, Assist and Accompany missions: Cabinet Office Circular, above n 7, at [40].

19 Cabinet Office Circular, above n 7, at [6]-[9].

20 Isaac Davison "NZ soldiers arrive in Iraq" *New Zealand Herald* (12 May 2015) <www.nzherald.co.nz>; NZ Army "Afghanistan: 2003 – Present" (5 November 2015) <www.army.mil.nz>.

21 Charter, art 51.

22 Mohamad Ali Alhakim *Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General* S/2014/440 (2014).

23 Mohamad Ali Alhakim *Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council* S/2014/691 (22 September 2014) [Letter to Security Council] at 2.

call officially came on 13 February 2015 when Iraq's Minister of Foreign Affairs visited the country and welcomed further support, including military assistance.[24] According to a Cabinet Paper:[25]

> ISIL is a significant threat to international peace and security. ISIL's growth, resources, ambition and sophisticated information operations are unprecedented. Moreover, its ability to motivate Muslim radicals and recruit Foreign Terrorist Fighters to its ranks makes it a threat not only to the stability of the Middle East but also a security threat across the globe, including New Zealand.

The Government's legal argument echoes that of other coalition partners. The Australian Prime Minister has also referred to ISIL as a national security threat and that its operations in Iraq, with the Government's consent, are "perfectly legal under international law".[26] The United Kingdom invoked the right to collective self-defence under art 51 saying the request by the Government of Iraq gives the UK a "clear and unequivocal legal basis" for UK forces to take military action against ISIL.[27] President Obama, conscious of US foreign policy critics, said, "the United States cannot and should not intervene every time there's a crisis in the world … we have a mandate to help – in this case, a request from the Iraqi [G]overnment".[28] Similarly, the French Minister for Defence appealed to Iraq's sovereign right to request assistance from another State.[29]

Some States' legal justifications also pertained to the legitimacy of Iraq's Government. For example, the Canadian Foreign Minister explained to Parliament:[30]

> [t]he legal authorisation is that the *democratically elected* Government of Iraq has invited and asked for this support and assistance. The Security Council does not need to authorize it but is certainly seized with the issue in support of the initiative.

Each of the leading coalition powers rely on Iraq's request for assistance. None rely on UN authorisation.

24 Cabinet Office Circular, above n 7, at [19]; "Iraq asks NZ for help to fight jihadists" *Radio New Zealand News* (13 February 2015) <www.radionz.co.nz>.

25 Cabinet Office Circular, above n 7, at [2].

26 Hon Tony Abbott "Statement to Parliament on Iraq" (Parliament House, Canberra, 1 September 2014) <www.pm.gov.au>.

27 Policy Paper "Summary of the government legal position on military action in Iraq against ISIL" (25 September 2014) <www.gov.uk>; see also Mark L Grant *Identical letters dated 25 November 2014 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council* S/2014/851 (2014).

28 Statement by the President, The White House, Office of the Press Secretary (7 August 2014) <www.whitehouse.gov>.

29 Compte Rendu Intégral, Présidence de M Jean-Pierre Bel, Séance du 24 septembre 2014 <www.senat.fr>.

30 (6 October 2014) 147 GBPD HC 1105 at 1225.

III. Lawfulness of Foreign Military Intervention in Iraq

A. Security Council Authorisation?

The two exceptions to the prohibition on the use of force in international law are: 1) collective self-defence under art 51 of the Charter, and 2) UN authorisation under Chapter VII. The UN has expressly deemed ISIL a threat to international peace and security in Resolution 2170 (2014) and by listing ISIL on its terrorist sanctions list.[31] But its response has largely been focussed on suppressing the flow of funds, foreign fighters, and equipment to ISIL.[32] There is no UN peacekeeping force in Iraq; the UN Assistance Mission for Iraq (UNAMI) is a political mission mandated to further national reconciliation and strengthen the rule of law.[33]

The closest the Council has come to authorisation is its call in Resolution 2170 for all States "to take all measures as may be necessary…to *counter incitement* of terrorist acts … perpetrated by individuals or entities associated with ISIL, ANF, and Al-Qaida".[34] The resolution was adopted unanimously in August 2014, but Russia stated that the resolution did not constitute authority for military action.[35] It is typical of Security Council resolutions in times of crisis to contain "constructive ambiguity" – a diplomatic tactic used to enable proponents of military action to claim authorisation and those opposing it to deny such authorisation.[36] So while the Security Council has urged the international community to "further strengthen and expand support for the Government of Iraq as it fights ISIL and associated armed groups,"[37] there is a good argument that none of the resolutions expressly authorise the use of force in Iraq.[38]

B. "Intervention by Invitation" as a Justification to the Prohibition on Foreign Intervention

Intervention by invitation involves a sovereign State's consent given to another State to lawfully use force in its territory that would otherwise be contrary to the prohibition on the use of force.[39] The International Law

31 SC Res 2170, S/RES/2170 (2014).

32 SC Res 2170 (2014) focused on foreign terrorist fighters and listed six individuals on the Al-Qaida Sanctions list; SC Res 2178, S/RES/2178 (2014) expanded the counter-terrorism framework by imposing obligations on Member States to respond to the threat of foreign terrorist fighters; and SC Res 2199, S/RES/2199 (2015) related to ISIL's and ANF's illicit funding via oil exports, traffic of cultural heritage, ransom payments and external donations.

33 SC Res 1500, S/RES/1500 (2003) and SC Res 1770, S/RES/1770 (2007).

34 SC Res 2170.

35 *Security Council Meeting Records* S/PV.7242 (2014), at 3.

36 Dr Kennedy-Graham, former diplomat, explains the concept in Parliament in his Ministerial Statement (6 November 2014) available online at <www.greens.org.nz>.

37 *Statement by the President of the Security Council* (2014), above n 9.

38 See above n 31.

39 Christopher J Le Mon "Unilateral Intervention by Invitation in Civil Wars: the Effective Control Test Tested" (2003) 35 NYU Journal of International Law and Politics 741.

Commission expressly recognised this principle in its Articles on State Responsibility[40] and scholars have considered it a generally accepted principle that in the absence of a civil war, recognised governments have a right to receive external military assistance.[41] Support for the rule, in terms of *opinio juris*, is also found in General Assembly Resolution 3314. The resolution includes in its definition of "aggression" "[t]he use of armed forces … which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement."[42] The statement implies that, so long as the intervening State acts within the bounds of the host State's consent, the intervention is lawful. Further evidence of *opinio juris* is found in the ICJ's decision in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) (Nicaragua Case)* where it held that where collective self-defence is invoked, the attacked State must have declared itself to be the victim of an armed attack and have requested assistance.[43]

France relied on art 51 self-defence and governmental invitation to justify its military intervention in Mali to help a weak Malian government fight Islamist rebels in 2013. The international community seemed to largely accept it.[44] The Security Council initially gave an African-led International Support Mission in Mali (AFISMA) the mandate to use force. But due to operational and logistical delay, the Security Council gave its blessing (short of authorisation) to France and Chad to step in.[45] Bannelier and Christakis argue that the attitude of the Security Council at this time clearly demonstrates it accepted invited intervention as a valid legal basis for France's involvement and was, in fact, relieved.[46] That situation is distinguishable on the basis that the UN had expressly authorised the use of force against the terrorist groups in Mali (albeit for a different entity).

Arguably, the prohibition on the use of force in art 2(4) of the Charter does not apply to the present situation because, with an invitation from the Government, there is no use of force "against the territorial integrity or political independence" of Iraq. Put another way, there is no affront to Iraq's sovereignty. Further, the wording of art 2(4) renders it applicable only

40 International Law Commission *Draft Articles on Responsibility of States for Internationally Wrongful Acts* Supplement No 10, A/56/10 (2001), art 20.

41 Oscar Schachter "The Right of States to Use Armed Force" (1984) 82 Michigan Law Review 1620 at 1645; David Wippman "Military Intervention, Regional Organizations, and Host-State Consent" (1996-1997) 7 Duke Journal of Comparative and International Law 209 at 209; See also Christine Gray *International Law and the Use of Force* (3rd edition, Oxford University Press, 2008) at 67.

42 *Resolution on the Definition of Aggression* GA Res 3314, XXIX (1974); see also Le Mon, above n 39, at 735.

43 [1986] ICJ Rep 14 [Nicaragua Case] at 94, and 104-105.

44 See Amy Laird "Mali: a Legally Justifiable Intervention by France?" (2012) NZYIL 123; Karine Bannelier and Theodore Christakis "Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict" (2013) 26 Leiden Journal of International Law 855.

45 SC Res 2085, S/RES/2085 (2012).

46 Bannelier and Christakis, above n 44, at 873.

as between States.[47] New Zealand's military intervention is not against Iraq, but ISIL, which – despite its self-proclaimed statehood – is an "armed group" under international law. For clarity, although New Zealand's deployment is "non-combat", it is nonetheless considered "direct military assistance" for the purposes of international law.[48]

1. Intervention by Invitation in NIACs

Even if we accept that the intervention does not violate Iraq's sovereignty, it might nevertheless be contrary to the second clause in art 2(4): "or in any other manner inconsistent with the Purposes of the United Nations". One of those Purposes is upholding "the principle of equal rights and self-determination of peoples".[49] The non-intervention rule was developed to give effect to the principle of self-determination which extends to peoples' right to rebel against their own government. Articulations of the rule are found in art 2(7) which prohibits the UN from intervening in "matters which are essentially within the domestic jurisdiction of any state",[50] art 3(2) of Additional Protocol II[51] and General Assembly Resolutions during the 1960s and 1970s.[52] This view was particularly prominent during decolonisation and the Cold War and was intended to limit (in) direct use of force by the colonial powers and superpowers. The idea is that military assistance is prohibited in particular when its object is to support an established government against its own population.[53] Member States cannot intervene with armed forces in order to save or support governments which are unable to command the support of their people. It follows that a government which no longer has the support of its people loses the sovereign authority to request external assistance.

Conversely, military interventions for the purpose of overthrowing duly established governments would also be unlawful. In the *Nicaragua Case*, the ICJ stated a clear rule of non-intervention except by invitation of the

47 "All *Members* shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations", Charter, art 2(4).

48 The Institut de Droit International defines "military assistance on request" as "direct military assistance by the sending of armed forces by one State to another State upon the latter's request": M Gerhard Hafner, Institut de Droit International *Present Problems of the Use of Force in International Law, Sub-Group C – Military assistance on request* 10th Commission (8 September 2011) [IDI Resolution 2011], art 1(a).

49 Charter, art 1(2); see also M K Nawaz "Intervention by Invitation and the United Nations Charter" (1959) 1 International Studies 203 at 207.

50 See also Laird, above n 44, at 126 and 133.

51 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) 1125 UNTS 609 (opened for signature 8 June 1977, entered into force 7 December 1978), art 3(2).

52 *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty* GA Res 2131, XX A/Res/2131 (1965); *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States* GA Res 2625, XXV A/Res/2625 (1970); see also Laird, above n 44, at 126.

53 See IDI Resolution 2011, above n 48, art 3(1).

legally recognised government.[54] States (and international organisations) cannot impose their will on an effective, incumbent government. There is a presumption in international law that only the sovereign can express the will of the State in international affairs and that sovereignty is enjoyed when a government exercises effective control over territory and people.[55]

The practical advantage of this test is that States cannot ignore a functioning government, regardless of its political origin or character. Perhaps more importantly, effective control offers relative objectivity and external verification for determining governmental authority.[56] A corollary of the test is that when the government no longer exercises effective control because the opposition achieves sufficient military success so as to bring the conflict into the realm of civil war, the government no longer has the right to request outside assistance. By the time of New Zealand's deployment, ISIL controlled about a third of Iraq's territory, enabling it to carry out sustained and concerted military operations.[57] According to this test then, Iraq may be losing its authority to request external aid.

The obvious disadvantage of this approach is that it privileges a result based on the relative strength of the parties over a result determined by the popular support each side possesses or the type of regime each would establish if ultimately successful.[58] Just because ISIL has the capability to take over large parts of Iraq and Syria does not mean it enjoys popular support, or the right to represent the people. If the ruling actor is unrepresentative, the correlation between control and popular support is false.[59] This highlights the need for a more qualitative inquiry into when it might be lawful to respond a State's request for assistance.

2. Legitimacy Test

There appears to be an emerging trend in which military assistance to governments is justified in respect of the government's perceived legitimacy and popular support vis-à-vis the opposition's. Christopher Le Mon explores several cases where the reactions of the international community to an intervention show that the intervention was generally accepted where the requesting government was considered legitimate.[60] France, in a more recent example, appealed to the legitimacy of Mali's internationally-recognised, transitional Government in justifying its intervention.[61] Canada indicated

54 Nicaragua Case, above n 43; see also Le Mon, above n 39, at 751.
55 See Wippman, above n 41, at 211-213; see also Tom J Farer "Panama: Beyond the Charter Paradigm" (1990) 84 American Journal of International Law 503 at 510.
56 Wippman, above n 41, at 211-212.
57 "Iraq's economy in tatters amid ISIL war" *Al Jazeera News* (28 November 2014) <www.aljazeera.com>; *BBC News* (18 May 2015), above n 8.
58 Wippman, above n 41, at 220.
59 At 211-212.
60 The six case studies are: Lebanon (1958), the Dominican Republic (1965), Chad (1966-89), Afghanistan (1979- 89), Sri Lanka (1987-90) and Tajikistan (1992-97): Le Mon, above n 39, at 754-745.
61 Laird, above n 44, at 127.

this view when it referred to the request from the "democratically elected Government of Iraq".[62] Similarly, New Zealand's Minister for Defence referred to the request coming from the newly-formed Government of Iraq, "which is legitimately in place".[63] The UN has also reaffirmed the legitimacy of the Iraqi Government when the Secretary-General welcomed the successful election and formation a new Government in 2014.[64] Overall, Iraq's legitimacy vis-à-vis ISIL's seems trite: on the one hand there is an internationally-recognised, democratically-elected government, and on the other; a terrorist organisation not recognised by any other State.[65]

State practice therefore seems to support the idea that intervention by invitation is only lawful if the inviting government is perceived as legitimate – the engagement then being a lawful interaction between two sovereigns.[66] But this approach is susceptible to abuse as it requires subjective evaluations of the actors, their human rights record and (western) democratic credentials. It may be more problematic in theory than the more "objective" effective control test. In practice, though, most States continue to give considerable deference to a recognised government, even after it has lost control of a significant portion of its territory.[67] This appears to be true of the situation in Iraq.

Some scholars argue the *purpose* of the foreign military operation is decisive and that intervention by invitation should be deemed unlawful when its aim is to settle a purely internal political battle in favour of the established government.[68] I would add the same applies to aiding an insurgent group. Perhaps both limbs – an objective inquiry based on effective control and a more qualitative inquiry based on legitimacy and purpose – are necessary to avoid the limitations of each alone.

3. The Fight Against ISIL as an "Internationalised Armed Conflict"

The lawfulness of New Zealand's military involvement may be supported by a more nuanced characterisation of the conflict – moving away from the traditional IAC/NIAC debate. "Transnational armed conflict" is a term used to characterise current phenomena of cross-border armed conflict between a State and a collective non-State actor.[69] The term "internationalised armed

62 Above n 29.
63 Hon Gerry Brownlee, Hansard, above n 2.
64 "UN chief lauds formation of new Government in Iraq" *UN News Centre* (9 September 2014) <www.un.org>.
65 According to an OHCR report, Iraqi forces may also have committed war crimes and violated human rights, and both exercise some form of governance. However this is, of course, at vastly different degrees: *Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups*, Human Rights Council A/HRC/28/18 (2015).
66 Le Mon, above n 39, at 791.
67 Wippman, above n 41, at 220.
68 Bannelier and Christakis, above n 44.
69 For a discussion on the characterisation of transnational armed conflicts and the applicable law see Claus Kreb "The International Legal Framework Governing Transnational Armed Conflicts" (2010) 15 Journal of Conflict and Security Law 245.

conflict" describes a number of different factual circumstances but for our purposes it includes wars involving foreign intervention in support of an insurgent group fighting an established government.[70]

The conflict with ISIL better fits this framework since ISIL conducts its operations not only in Iraq but from Syria, where the conflict spilled over from, and elsewhere in the region.[71] According to Iraq, ISIL's "safe haven" in Syria enables it to train for, plan, finance and carry out terrorist operations across the border. It has made Iraq's borders "impossible to defend" and exposed its citizens to the threat of terrorist attacks.[72] In addition to the cross-border nature of the conflict, intervening States, including New Zealand, have referred to ISIL as an international terrorist organisation and therefore a global threat. Its ambition is to establish a caliphate that transcends Iraq's borders and by September 2014, ISIL, together with the ANF, recruited more than 13,000 foreign fighters from more than 80 Member States.[73] These factors bring the conflict out of the confinement of a pure NIAC, and yet, it is not an IAC either, because it is not a war between two or more States (and the actions of ISIL have not been attributed to another State).

There is the problem that the idea of a "transnational/internationalised armed conflict" is not supported by either Common Article 3 of the Geneva Conventions or by art 1(1) of Additional Protocol II.[74] Under international humanitarian law at least, there seems to be no in-between: an armed conflict is either international or non-international.[75] There is little questioning, however, that the concept of "transnational" or "internationalised armed conflict" best characterises the situation in Iraq. In terms of public international law, the internationalisation of the conflict may give credence to the justification for collective self-defence at Iraq's behest. New Zealand would arguably be justified in coming to Iraq's defence as collective self-defence applies to an armed attack coming from outside the State's borders.[76]

There is a pattern emerging whereby the Council declares a situation to be a threat to international peace and security, followed by an appeal from the attacked government for assistance, then Member States respond to that appeal in the form of military assistance. Recently, we have seen such responses globally, as in Iraq, and regionally, as in Yemen. In extreme cases where there has been no Council approval, States have intervened on the basis

70 James G Stewart "Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict" 85 IRRC 313 at 315.

71 The Security Council emphasised the need "… to prevent terrorist groups … in particular ISIL, from using the territories of Iraq and neighbouring States to carry out violence or other illicit acts to destabilize Iraq and the region" SC Res 2169, S/RES/2169 (2014).

72 Letter to Security Council, above n 23.

73 Ban Ki Moon, Secretary-General "Security Council Unanimously Adopts Resolution Condemning Violent Extremism, Underscoring Need to Prevent Travel, Support for Foreign Terrorist Fighters" (press release, 24 September 2014).

74 Kreb, above n 69, at 225.

75 Stewart, above n 70, at 316.

76 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136.

of the "responsibility to protect" as in Syria and, earlier, in Yugoslavia in 1999. While the debate around these interventions has largely focussed on whether there was a right to intervene in the first place, what is often overlooked is that the right to use force under art 51 lapses once the Security Council takes "measures necessary to maintain international peace and security".[77] Whether or not the Council does in fact take responsibility for managing the crisis, self-defence should not be used as a justification for allowing States to conduct military interventions without limitations as to time and purpose. The Council's constructive ambiguity cannot be taken as tacit approval of open-ended self-defence.

IV. Conclusion

The principle that State consent provides the necessary validity to intervene in an armed conflict is deceptively simple. Despite the apparent lack of debate on the lawfulness of military intervention in Iraq, the subject deserves greater investigation. It is clear the prohibition on intervention applies in civil wars. Beyond that though, it becomes increasingly difficult to define when a recognised government can lawfully request foreign help. However, recent cases point to a few generalisations that indicate emerging principles. States do not seem to object to intervention by invitation if the request comes from a legitimate source; if the conflict transcends borders (especially in the context of international terrorism); and if the purpose of the intervention is not to settle a purely internal power struggle.

New Zealand may have a justification for aiding Iraq in the exercise of its self-defence since the attack from ISIL comes from beyond Iraq's borders as well as from within. But such a conclusion rests on a somewhat simplified interpretation of self-defence. Is this the legal basis on which New Zealand is relying on? Or is it that it deems ISIL a threat to its own national security? Or that it is one of a number of States that agree the situation in Iraq poses a threat to international peace and security and that this confers an obligation on the international community to restore stability? Is the crisis confined to Iraq or does it include the conflict in Syria, wider regional instability, or even the global threat of terrorism? The answer to the lawfulness of any use of force will differ according to how the threat and the armed conflict are defined.

The Security Council, as the official arbiter of the use of force, should provide some clarity and leadership in this regard. There is the argument that where the circumstances justify action, but the Security Council is hamstrung or ineffective, States should be able to act unilaterally in the defence of another State. However, unilateral interventions, even at the behest of a recognised government, are also problematic since they do not go through the same checks and balances as deployments born of multilateral decision-making. Once the Security Council had established that ISIL

77 Charter, art 51.

posed a threat to international peace and security, it should have officially sanctioned collective military action, rather than give States its blessing to act unilaterally and without restriction. Its failure to do so is a failure to fulfil its primary purpose: "to maintain international peace and security".[78]

For its part, New Zealand should be more vigilant about the lawfulness of its military endeavours in foreign conflicts. Any decision to deploy troops overseas should first be affirmed by a legal opinion from the Attorney-General and be informed by public and Parliamentary debate. By doing this, New Zealand would be seen as fulfilling its obligations as a responsible global citizen, concerned with upholding the rule of law. In terms of legal certainty at the international level, New Zealand's best course of action would have been to obtain clear UN authorisation to use force in Iraq. Having fought hard for its seat on the Council, New Zealand should use this opportunity to organise a truly international response to ISIL – one whose scope and legality is clearly and transparently defined.

78 Charter, art 1(1).