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THE USE OF FORCE AGAINST NON-STATE ACTORS

This panel was convened at 11:00 a.m., Thursday, April 5, 2018 by its moderator Monica Hakimi of the University of Michigan School of Law, who introduced the panelists: Katrina Cooper of the Government of Australia Department of Foreign Affairs and Trade; Paul McKell of the United Kingdom Foreign & Commonwealth Office; Asif Amin of the Kingdom of Denmark, Ministry of Defense, International Law Department and Patrick Luna of the Permanent Mission of Brazil to the United Nations.

Introductory Remarks by Monica Hakimi*

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This is the panel on the use of defensive force against non-state actors. We thought we would use the campaign against the Islamic State in Iraq and Syria, ISIS, to take stock on where we are on the question of when, if ever, states may use defensive force against non-state actors in other states.

Just to set the scene a little bit, I am sure many of you know that ISIS is a transnational terrorist group that emerged in Syria in 2013, in the middle of the civil war there. By the summer of 2014, ISIS occupied quite a bit of territory in Syria and crossed into Iraq. Within months, dozens of states were participating in or supporting a U.S.-led campaign against ISIS. Almost all of these states appeared to support the operations that were being conducted both in Iraq, at the Iraqi government's consent, and in Syria; of course, the campaign in both states was necessary to defeat ISIS.

But during the early stages of the campaign several states that were participating in military operations in Iraq declined to do so in Syria, and there seemed to be a sense that states disagreed about the legality, or if it was legal, the proper legal basis for the use of force in Syria against ISIS. I have a quote from the Deputy Prime Minister of the Netherlands which posits, "For military operations in Syria there is currently no international agreement on an internationally legal mandate."

At the time, a few states, notably the United States, invoked the unable or unwilling standard under which a state may use defensive force against non-state actors in another state, if that other state is unable or unwilling to deal with the threat. A number of other states made opaque statements about the legality of the operation without identifying a specific legal basis for it, and a number of other states just declined, as I said, to act in Syria, for whatever set of reasons.

The legal terrain shifted in November 2015, when the Security Council adopted Resolution 2249. Resolution 2249 does not mention self-defense or invoke Article 51 of the UN Charter, but it is clearly designed to address the problem of ISIS. It determines that ISIS "constitutes a global and unprecedented threat to international peace and security." It notes that "Iraqi authorities have stated that Daesh, or ISIS, has established a safe haven outside Iraq's borders that is a direct threat to the security of the Iraqi people and territory." And then it "calls upon member states that have the capacity to do so to take all necessary measures in compliance with international law, in particular with the United Nations Charter as well as … on the territory under control of ISIS, also known as Daesh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress

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terrorist acts committed specifically by ISIS, also known as Daesh as well as ANF, and all other individuals, groups, undertakings, and entities associated with Al Qaeda … ."

The Security Council calls upon states to deal with ISIS, does not expressly authorize force, and does not invoke Article 51 of the UN Charter. Nevertheless, the resolution seems to have shaken loose some resistance about using force against ISIS in Syria. Shortly after Resolution 2249 was adopted, a number of states, particularly in Europe, invoked the combination of Article 51 of the UN Charter and UN Security Council Resolution 2249 to justify using force in Syria.

The question we have before us is, how should we use this incident to get a sense of the law on defensive force against non-state actors? This area of law that has been contentious and uncertain. Our goal here today is to try to tease out both areas of agreement and areas of disagreement.

We thought we would structure the panel more as a conversation than as a series of presentations, so we will start by asking the panelists a few questions and having a conversation amongst ourselves, and then we will open it up to questions.

Without further ado let me introduce our panelists.

Ambassador Katrina Cooper is the Deputy Head of Mission for Australia and a former Senior Legal Advisor at the Department of Foreign Affairs and Trade. Paul McKell is the Legal Director at the UK Foreign & Commonwealth Office; his portfolio includes national security, Europe and human rights and foreign relations, and in those buckets falls the ISIS situation. Asif Amin is the head of the International Law Department at the Denmark Ministry of Defense. And last, but certainly not least, is Patrick Luna, who is the Legal Advisor at the Permanent Mission of Brazil to the United Nations.

To begin, I think it would be helpful to ask each of the panelists to lay out his or her state's position on whether, and if so when, states may use defensive force against non-state actors, and then to explain a little bit how that position on the law tracks or is consistent with the sequence of events that we have seen in Syria.

So, Ambassador, why do not we begin with you.

Remarks by Katrina Cooper*

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Thank you very much, Monica, and thank you very much for the invitation to speak on the panel. I was a senior legal advisor in Australia from 2013 to 2017, so, in fact, during this time. I think it is a terrifically conceived panel because it is one of the most pressing and problematic issues with which we have to deal, I think, as international legal advisors.

But Australiav's position on this is quite clear and quite well articulated, and that is that our view and our interpretation of Article 51 of the UN Charter is that the inherent right of self-defense applies to armed attacks from both state and non-state actors. And we think that Resolutions 1368 and 1373 make that quite clear too. That is our quite clear position.

In terms of non-state actors, too, we do subscribe to the unwilling and unable approach that you outlined, Monica. We think that where there is a non-state actor operating in the territory of another state, and there is a reasonable and objective basis for concluding that that other state is unwilling or unable to halt or repel attacks emanating from its territory that you can act in self-defense against that non-state actor. That does not mean, of course, that you can act against the third state, but specifically, and limited to, the non-state actor.

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