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The Renewal of the U.S. Discourse System on "Extraterritorial Use of Force Against Non-State Actors" in the Syrian Conflict

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Abstract **Review Article**

In the Syrian conflict, the United States launched military strikes against non-state actors and maintained a long-term military presence without authorization from the UN Security Council or consent from the Syrian government, thereby facing serious challenges to the legality of its actions under international law. To address this dilemma, the United States was compelled to update its discourse system for "extraterritorial use of force against non-state actors." This paper examines the motivations and pathways of U.S. discourse adaptation in the Syrian conflict. The study finds that prior to the Syrian conflict, the United States had already constructed a preliminary legal justification framework by expanding the scope of self-defense to cover non-state actors, introducing the "unwilling or unable" standard, and advancing the "hot pursuit" discourse. However, as ISIS was defeated and the Syrian government regained territorial control, the original discourse could neither justify the continued U.S. military presence nor provide a legal basis for strikes against pro-regime forces. In response, the United States updated its discourse system through three pathways: first, setting the "complete defeat of non-state actors" as the condition for ending collective self-defense; second, expanding the objects of collective self-defense from states to non-state armed partners; and third, adopting a broad interpretation of the "imminence" requirement for self-defense, arguing that once self-defense is lawfully initiated, subsequent actions do not require reassessment of imminence. These adaptations have enabled the United States to sustain a legal narrative for its military operations in Syria in the absence of traditional legal authorization, yet their legitimacy and validity remain highly contested.

Keywords: Syrian conflict; extraterritorial use of force; non-state actors; discourse system; collective self-defense.

BACKGROUND OF THE STUDY

Non-state actors are a special type of organizational entity. The concept of non-state actors in this article primarily refers to "non-sovereign entities that exercise significant political power and territorial control; are not controlled by a sovereign government; and frequently use violence to achieve their objectives." [1]In other words, the "non-state actors" in this article mainly refer to "armed non-state actors." Armed non-state actors, also known as violent non-state actors (VNSAs), are individuals or groups that are wholly or partially independent of a government and threaten or use violence to achieve their goals. When a country launches military strikes against such actors outside its own territory, it inevitably raises the issue of whether it violates the sovereignty of another country. To legally use force against non-state actors extraterritorially, a number of special and stringent conditions must be met. Prior to the outbreak of the Syrian conflict, the United States had on more than one occasion carried out extraterritorial military strikes against non-state actors and, in doing so, had also on more than one occasion violated international law. However, the United States has consistently sought to provide legal justifications for its extraterritorial military strikes against non-state actors, gradually developing its own discourse system for "extraterritorial use of force against non-state actors." Due to the highly distinctive nature of its military activities in the Syrian conflict, the United States was

1 "22 U.S. Code § 6402 – Definitions," https://www.law.cornell.edu/uscode/text/22/6402#11.

compelled to update its original discourse system for "extraterritorial use of force against non-state actors."

I. The U.S. Discourse System on "Extraterritorial Use of Force Against Non-State Actors" Prior to the Syrian Conflict

Any state's use of force abroad is subject to the constraints of Article 2(4) of the United Nations Charter, which prohibits the use of force. However, there are three exceptions to this prohibition: authorization by the UN Security Council, self-defense, and invitation by a legitimate government. Although Article 2(4) of the UN Charter does not explicitly stipulate that it applies exclusively to inter-state relations, neither does it explicitly prohibit a state from using force extraterritorially against non-state actors. Nevertheless, any use of force against non-state actors abroad may interfere with the territorial integrity of the state in which they operate, even if such force is directed solely at the non-state actors' bases. This means that, without Security Council authorization or an invitation from a legitimate government, using force against non-state actors within another state's territory is generally unlawful. However, in order to "legitimize" its interventions, the United States had already created and developed its discourse system for "extraterritorial use of force against non-state actors" even before the Syrian conflict.

(1) Expanding the Subject of "Armed Attack" That Triggers Self-Defense to Include Non-State Actors

"Before 2001, many international law experts believed that, under international law — whether customary law or Article 51 of the UN Charter — an armed attack could only be carried out by a state against another state, although the definition of 'armed attack' had sometimes been interpreted to include 'armed bands, groups, irregulars, or mercenaries' sent by or on behalf of a state." [2] "The 'force' in the prohibition of the use of force principle refers to force in international relations, meaning that such acts of force generally occur only between states." [3]

At the turn of the century, particularly after the 9/11 attacks, the existing legal framework governing extraterritorial use of force against non-state actors no longer satisfied the needs of the United States. The United States began to construct its own discourse system for "extraterritorial use of force against non-state actors." One of its primary approaches was to build upon the doctrine of self-defense, arguing that non-state actors themselves could serve as the attribution subject triggering the right of self-defense in response to an "armed attack," while simultaneously lowering the threshold for attributing attacks by non-state actors to a state.

If a non-state actor on the territory of one state independently launches violence against another state — i.e., if the violence cannot be attributed to a state — then such an act does not constitute an "armed attack" that triggers the right of self-defense under international law. In other words, a purely non-state actor has traditionally not been considered a subject capable of launching an armed attack that would give rise to the right of self-defense. In such a case, using force against a non-state actor within the host state's territory without its consent would constitute a serious violation of that state's sovereignty. The balancing mechanism between the right of self-defense against non-state actors on foreign territory and the right of a state to respect its territorial integrity lies in the customary law requirements that must be followed for the lawful exercise of the right of self-defense, in particular the requirements that the use of force be necessary and proportionate. [4]The necessity of military strikes against non-state actors operating in foreign territory conflicts with the prohibition against violating a state's territorial integrity. The way to reconcile these two considerations lies in the customary law elements of the lawful exercise of the right of self-defense. Necessity and proportionality are such elements. They limit the right to use force in self-defense in two ways. The first question concerns whether it is necessary to use force, especially when other (peaceful and diplomatic) mechanisms exist to protect a country's fundamental interests. The principle of proportionality works together with the necessity requirement, meaning that the defensive force should be of the same intensity as the offensive force it responds to.

Strictly speaking, a state cannot exercise the right of self-defense against a non-state actor unless the non-state actor that has launched an armed attack against another state is "actually controlled" by the state in which it is located. This attribution requirement is intended to provide the necessity for self-defense actions (i.e., the host state uses the non-state actor as a means to harm the security interests of another state). This "actual control" attribution standard was, in the view of the United States, too strict and hindered its counter-terrorism operations. In order to make its cross-border strikes against non-state actors satisfy the "necessity" condition for self-defense, the United States developed its self-defense discourse by lowering the attribution threshold: it changed the original condition —

2 Rein Mullerson, "Self-Defence against Armed Attacks by Non-State Actors," *Chinese Journal of International Law*, Vol. 18, No. 4, December 2019, p. 751.

3 Li Bojun ed., "Practical Tutorial on International Law," Wuhan: Wuhan University Press, 2010, p. 310.

4 Kimberley N Trapp, "Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors," *International and Comparative Law Quarterly*, Vol. 56, No.1, 2007, p. 142.

"actual control" of a non-state actor by a state — to mere acquiescence.

After the 9/11 attacks, the Security Council recognized in its Resolutions 1368 (2001) and 1373 (2001) the inherent right of individual and collective self-defense, but did not refer to armed attacks from any state. [5] Although the United States demanded that the Taliban government hand over al-Qaeda's leaders and end the group's presence in Afghanistan, it did not claim that the Taliban had "effective control" or "full control" over al-Qaeda. [6] The U.S. government did not believe that the 9/11 attacks were carried out by the Afghan Taliban, nor did it believe that the Taliban directly controlled al-Qaeda. Rather, it believed that the attacks were carried out by al-Qaeda under the command of its leaders hiding in Afghanistan. Although some authors had held the view — that the right of self-defense could be exercised against armed attacks by non-state actors — before 9/11, it was only after the 9/11 attacks that this view gained wider acceptance. [7]

After 9/11, the applicability of "self-defense" to armed attacks by non-state actors gained more support. At the same time, the United States continued to use this "self-defense" justification to carry out military strikes against terrorist organizations in countries such as Afghanistan, Pakistan, Yemen, and Somalia. As a result, the attribution subject of an "armed attack" that triggers the right of self-defense gradually expanded from states or state-controlled non-state actors to include non-state actors independent of state control. In other words, the United States holds the view that "as with the use of force by regular armed forces, the use of force by autonomous non-state actors is also regarded as prohibited by Article 2(4) of the United Nations Charter and may trigger the right of self-defense in favor of the attacked state." [8] Thus, non-state actors would find it difficult to use the territorial sovereignty barrier of other states to evade military retaliation.

Although the International Court of Justice, in its jurisprudence, has recognized the right of self-defense only within the traditional international law framework — i.e., against an "armed attack" carried out under the "effective control" of a state — and has refused to explicitly acknowledge the possibility of self-defense against non-state actors, and has also refused to lower the attribution threshold for the purpose of *jus ad bellum*, [9] the United States nonetheless advocates this approach of lowering the conditions for initiating self-defense. [10]

(2) Lowering the Threshold for Cross-Border Self-Defense Against Non-State Actors with the "Unwilling or Unable" Discourse

Even if it is recognized that the use of force by an autonomous non-state actor located in another state's territory can trigger the victim state's right of self-defense, using force against that actor within the host state's territory without the consent of its government is generally considered a violation of international law. As mentioned above, the initial approach adopted by the United States was to lower the attribution standard for the use of force by non-state actors — reducing the "actual control" by the host state over the non-state actor to mere "acquiescence" in the non-state actor's armed attacks.

However, relying on the host state's "acquiescence" to justify self-defense strikes against non-state actors on its territory without its consent is problematic, because if the information shows that the host state was completely unaware of the relevant attacks by the non-state actor, it would be difficult to claim that the host state acquiesced, and thus the attack could not be attributed to it. For example, al-Qaeda's attacks on the United States cannot be attributed to the Taliban regime in Afghanistan. There is no information suggesting that the Afghan Taliban government was in any way involved in the preparations for the 9/11 attacks, nor is there any information suggesting that the Taliban government even knew that such attacks were being prepared. [11]

In light of this, the United States began to emphasize state responsibility, thereby highlighting the necessity of its cross-border self-defense strikes against non-state actors without the host state's consent. States have an obligation "not to allow their territory to be used for acts that violate the rights of other states." [12] A state has a customary obligation to exercise due diligence to prevent unlawful activities against another state from within its territory or from any area under its exclusive

5 SC Res. 1368 (2001); SC Res. 1373 (2001).
6 Terry D. Gill & Kinga Tibori-Szabó, "Twelve Key Questions on Self-Defense against Non-State Actors," *International Law Studies*, Vol. 95, 2019, p.481.
7 Rein Mullerson, "Self-Defence against Armed Attacks by Non-State Actors," *Chinese Journal of International Law*, Vol. 18, No. 4, December 2019, p. 753.
8 Pemmaraju Sreenivasa Rao, "Non-state Actors and Self-defence: A Relook at the UN Charter Article 51," *Indian Journal of International Law*, 2016, Vol.56, No.2, p.127.
9 He Zhipeng, Wang Huiru, "The Challenges and Development of the Use of Force Law by 'Non-State Actors' - Comment on the 'Unability or Unwillingness' Test," *Journal of Law*, Issue 8, 2019, p. 52.
10 See Kammerhofer, "The Armed Activities Case and Non-State Actors in Self-Defence Law," *Leiden Journal of International Law (LJIL)*, Vol. 20, 2007, pp.101-106.
11 Rein Mullerson, "Self-Defence against Armed Attacks by Non-State Actors," *Chinese Journal of International Law*, Vol. 18, No. 4, December 2019, p. 764.
12 Corfu Channel, Merits, ICJ Reports 1949, 4, 22.

control. [13] Therefore, a state must take all reasonably available measures aimed at preventing any continued armed attack on another state from any area under its full control. The territorial state or the victim state should assess whether all possible means have been used to suppress armed attacks launched by non-state actors from within the territorial state. [14] This general obligation under international law is even more important and urgent when it involves non-state actors using (or abusing) state territory to carry out armed attacks against third states, even if those non-state actors neither act on behalf of the territorial state nor are substantially or otherwise involved in the activities of the latter. It is more likely to be widely accepted that the non-state actor itself (unlike the state on whose territory it operates) can become a target of defensive force under Article 51 if the use of force is necessary because the victim state cannot rely on the host state's cooperation in counter-terrorism. Consequently, the United States began to use the so-called "unwilling or unable" discourse to justify its cross-border use of force against non-state actors.

In a speech in August 2007, then-presidential candidate Barack Obama asserted that if the United States had actionable intelligence about key al-Qaeda leaders in Pakistan and President Musharraf would not act, his administration would take action against them. He later clarified his position: "I'm saying, if we have actionable intelligence against Osama bin Laden or other key al-Qaeda officials … and Pakistan is unwilling or unable to strike them, we should strike them." [15] In September 2011, John Brennan, President Obama's national security adviser (later CIA director), said in a speech at Harvard Law School: "As President Obama has said on many occasions, we reserve the right to take unilateral action if or when other governments are unwilling or unable to take the necessary action." [16] On May 2, 2011, the United States put these words into action. U.S. forces entered Pakistan and killed Osama bin Laden without the consent of the Pakistani government. After the success of the U.S. military operation, the Pakistani government protested the "unauthorized unilateral action" of the United States. [17] This unannounced military operation indicated that the United States had determined that Pakistan was indeed "unwilling or unable" to strike bin Laden, and therefore the strike did not require its consent.

If a state is "unable" to stop, by its own means, armed attacks by non-state actors from its territory or from any other area under its full control, it must request assistance from the victim state or other states, or must accept assistance that may be offered to it. As long as the request is clear, freely made, and issued by the government of the territorial state, such a request for assistance is viable. In other words, before taking military action within the territory of an "unable" territorial state, the victim state should also obtain the invitation or consent of that territorial state.

If necessary, the victim state must demand that the territorial state fulfill its obligation to stop armed attacks from its territory and cooperate with it or other states as needed. The territorial state must agree to any international assistance that is necessary and proportionate under the circumstances to prevent further armed attacks by non-state actors from any area under its jurisdiction. Such assistance may include the use of armed forces.

If an "unable" territorial state does not seek or accept assistance to prevent further armed attacks by non-state actors from any area under its full control, it may be considered "unwilling" to fulfill its obligation to prevent such attacks. [18] If the territorial state no longer has a government capable of controlling the offensive non-state actors within its territory, it is itself "unable." In the face of an "unwilling" state or an "unable" failed state, the victim state should have the right to self-defense against the non-state actors. It should be noted here that self-defense actions must be necessary and proportionate. [19]Therefore, they should be directed only at the non-state actors — the initiators of the armed attacks — and the level of force should be appropriate to the objective, i.e., to repel the armed attack.

(3) Advancing the "Hot Pursuit" Discourse

The war in Afghanistan and the series of related cross-border military strikes against non-state actors not only prompted the United States to introduce new

13 "The Corfu Channel Case," ICJ Reports 1949, 22.
14 Ashley S. Deeks, "'Unwilling or Unable': Toward a Normative Framework for Extraterritorial Self-Defense," *Virginia Journal of International Law*, Vol. 52, No. 3, 2012, p.495.
15 Dan Balz, "Obama Says He Would Take Fight to Pakistan," *Washington Post*, August 2, 2007, at Al.
16 "John Brennan Speech on Obama Administration Antiterrorism Policies and Practices," September 16, 2011, http://opiniojuris.org/2011/09/16/john-brennan-speech-on-obama-administration-antiterrorism-policies-and-practices/.
17 Jane Perlez & David Rohde, "Pakistan Pushes back against U.S. Criticism on Bin Laden," *New York Times*, May 3, 2001, http://tinyurl.com/7nzkclj.
18 Kimberley N Trapp, "Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors," *International and Comparative Law Quarterly*, Vol. 56, No.1, 2007, p. 147.
19 *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), ICJ Reports 1986, 94, para. 176.

discourses that lower the threshold of self-defense — such as "acquiescence" and "unwilling or unable" — but also led it to advance the so-called "hot pursuit" discourse. The modern interpretation of this discourse provides legal leeway for states to enter other countries to hunt down non-state actors. These actors — terrorists, rebels, pirates, warlords, drug lords — commit crimes on the territory of the pursuing state and then flee to another country seeking safety. The U.S. government and others have interpreted this phrase broadly to justify larger cross-border incursions or even limited airstrikes. In the early stages of the Iraq War, some officials in Washington suggested that U.S. forces carry out raids or airstrikes on Islamic militants hiding on the Syrian border.

In fact, U.S. military leaders have said that "pursuit" is becoming another component of the U.S. rules of engagement, which stipulate when, where, and how to use force. As Army Lieutenant General Douglas Lute (former President George W. Bush's "war czar") told the Senate Armed Services Committee in March 2007, U.S. forces do not need the approval of the Pakistani government to "cross the border by artillery or ground strikes." According to a classified 2005 memo released by WikiLeaks some years ago, U.S. forces were apparently also authorized to enter Iran and Syria to "hunt down" terrorists. This policy was further confirmed in a January 2007 statement by President Bush, which called for actively seeking out and destroying terrorist networks in those Middle Eastern countries. [20]

The use of the phrase "hot pursuit" in international affairs is on the rise, given the borderless nature of today's enemies — from terrorists to drug traffickers — not to mention that states are increasingly "unable" and sometimes "unwilling" to control these fighters. In the view of the United States, in certain circumstances (for example, when a non-state actor attacks a state and then flees into the territory of a host state, but into areas that are not effectively controlled by the host state), "hot pursuit" can be a necessary and lawful response to violent non-state actors, provided that the response is immediate, proportionate, and a last resort.

With the 2001 U.S.-led overthrow of the Taliban regime, the principle of "effective control" was effectively cast aside. UN Security Council Resolution 1373, adopted shortly after 9/11, called on states to "refuse to provide safe havens for those who finance, plan, support, or commit terrorist acts." The deterrence generated by "hot pursuit" actions may give some effect to that resolution. [21]

There is also the discourse of "preemptive self-defense." The post-9/11 reality led the George W. Bush administration to articulate a preemptive self-defense doctrine in very strong and public language in 2002. The doctrine argued that, under international law, the United States has an evolving right to preemptively use military force against threats posed by "rogue states" or terrorists possessing weapons of mass destruction. [22] Preemptive self-defense refers to the right to unilaterally use high-intensity violence, without prior international authorization, to prevent the development of an incipient situation. Even if such an incipient situation has not yet begun to operate or pose a direct threat, the potential preemptive actor believes that, if allowed to mature, it could be quelled only at a higher and possibly unacceptable cost. [23]

II. The Necessity for the United States to Update Its Discourse System on "Extraterritorial Use of Force Against Non-State Actors" in the Syrian Conflict

Although the United States was invited by the Iraqi government to enter Iraq to fight the Islamic State, the legal basis that the United States gave for its military operations was collective self-defense. When the United States extended its military operations against the Islamic State to Syria and continued to station forces there, its original discourse system on "cross-border use of force against non-state actors" could no longer meet its normative needs. It became necessary for the United States to update and develop its discourse system on "extraterritorial use of force against non-state actors."

(1) The "Unwilling or Unable" Discourse Barely Provides a Normative Basis for the U.S. Initial Use of Force in Syria

After the outbreak of the Syrian conflict, the Sunni extremist group "Islamic State" took advantage of the situation to expand its territory in Iraq and Syria and to commit atrocities. The group's ideology was also distinctly anti-Western, and its actions threatened U.S. interests. When the new Iraqi government — the beacon of democracy that the United States had hoped for in the Middle East — faced a serious threat from the Islamic State, the United States sent troops at the invitation of the

20 Beehner, Lionel, "Can Nations 'Pursue' Non-state Actors across Borders?" *Yale Journal of International Affairs*, Vol. 6, No. 1, 2011, p. 111.
21 Beehner, Lionel, "Can Nations 'Pursue' Non-state Actors across Borders?" *Yale Journal of International Affairs*, Vol. 6, No. 1, 2011, p. 112.
22 See The National Security Strategy of the United States of America (2002), pp.29-31, https://nssarchive.us/wp-content/uploads/2020/04/2002.pdf.
23 W Michael Reisman and Andrea Armstrong, "The Past and Future of the Claim of Preemptive Self-Defense," *American Journal of International Law*, Vol. 100, No. 3, July 2006, p.526.

Iraqi government and formed a coalition to help the Iraqi government fight the Islamic State within its territory. Although "intervention by invitation" could serve as a legal basis for sending troops to Iraq, the legal basis that the United States actually invoked for its actions against the Islamic State in Iraq was collective self-defense. In September 2014, the United States began to extend its military strikes against the Islamic State into Syria. [24]

However, U.S. military operations in Syria faced legitimacy problems, because they had neither Security Council authorization, nor the invitation or consent of the Syrian government, nor were they responding to an armed attack by the Syrian government forces. Although UN Security Council Resolution 2249 called on member states to "take all necessary measures" to combat the Islamic State in Syria and Iraq, it explicitly stated that any such measures must be "in accordance with international law, in particular the UN Charter" — which requires the consent of the territorial state, in this case the Syrian government. The United States could, of course, rely on the controversial theory of "passive consent" to justify its military actions in Syria, but this became impossible after Syria condemned the attacks in September 2015 as a "blatant violation" of its sovereignty. [25]

The United States carried out airstrikes on several small facilities used by Iraqi militias in Syria. No one accused Syria of directing, controlling, or even supporting those militias. This once again sparked debate over whether the UN Charter allows a state to use force against non-state actors on the territory of another state without that state's consent. Brazil, China, Mexico, and Sri Lanka categorically rejected the use of force against non-state actors without the territorial state's consent. China's statement was perhaps the strongest to date: the use of force in self-defense against non-state actors on the territory of another state should be subject to the consent of the state concerned. No country should interfere in other countries' internal affairs under the pretext of "counter-terrorism," nor should it arbitrarily use force under the pretext of "preemptive self-defense." [26]

The "legal basis" that the United States gave for its military strikes against the Islamic State in Syria — without Security Council authorization and without the invitation or consent of the Syrian government — was an extension of collective self-defense for Iraq, because the Syrian government was "unwilling or unable" to effectively combat the Islamic State. In a letter dated September 23, 2014, addressed to the UN Secretary-General regarding U.S. military operations on Syrian territory, the U.S. government notified the UN Security Council under Article 51 of the UN Charter: States must be able to exercise their inherent right of individual and collective self-defense as reflected in Article 51 of the Charter, if, as is the case here, the government of the state where the threat is located is "unwilling or unable" to prevent the use of its territory for such attacks. The Syrian regime had demonstrated that it was itself "unwilling and unable" to effectively counter these terrorist groups. Accordingly, the United States had initiated necessary and appropriate military operations in Syria to eliminate the ongoing threat posed by the Islamic State to Iraq, including protecting Iraqi citizens from further attacks and enabling Iraqi forces to regain control of Iraq's borders. In addition, the United States had launched military operations in Syria against members of al-Qaeda in Syria known as the Khorasan Group; to address the terrorist threat they posed to the United States and its partners and allies. [27]

In justifying the use of force against the Islamic State and al-Qaeda in Syria, both the Obama and Trump administrations openly relied on a controversial theory. That theory holds that the victim state (the United States, acting on its own behalf and on behalf of Iraq) may use force in self-defense against non-state actors (the Islamic State, al-Qaeda) within the territory of the territorial state (Syria) without the latter's consent, provided that the victim state determines that the territorial state is "unwilling or unable" to effectively respond to the threat posed by the non-state actors. [28]In other words, the U.S. military entry into Syria to strike the Islamic State relied on its original discourse system on "extraterritorial use of force against non-state actors": the victim state may use force in self-defense against non-state actors within the territory of the territorial state without the latter's consent, as long as the victim state confirms that the territorial state is "unwilling or unable" to effectively respond to the threat posed by the non-state actors. Although its determination that the Syrian government was "unwilling or unable" was untenable, [29]the United

24 Somini Sengupta & Charlie Savage, "U.S. Invokes Iraq's Defense in Legal Justification of Syria Strikes," *New York Times*, September 23, 2014.
25 Karine Bannelier-Christakis, "Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent," *Leiden Journal of International Law*, Vol. 29, No. 3, September 2016, p.743.
26 See UN Doc A/75/993-S/2021/247, March 16, 2021.
27 Letter dated September 23, 2014, from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General (S/2014/695).
28 Tess Bridgeman, "When Does the Legal Basis for U.S. Forces in Syria Expire?" March 14, 2018, https://www.justsecurity.org/53810/legal-basis-u-s-forces-syria-expire/.
29 Waseem Ahmad Qureshi, "International Law and the Application of the Unwilling or Unable Test in the Syrian Conflict," *Drexel Law Review*, Vol. 11, No. 1, 2018, pp. 61-100.

States thereby maintained consistency in its relevant discourse and, in a hegemonic manner, advocated for it.

The U.S. *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* (December 2016) (the "Framework Report") states: the unwilling or unable standard is not a license to wage war globally or to disregard the borders and territorial integrity of other countries. Indeed, this legal standard does not overlook the importance of respecting the sovereignty of other states. Rather, its application ensures that the sovereignty of other states is respected. Specifically, the application of the standard ensures that the use of force on foreign territory without consent is permissible only in the exceptional case where a state is unwilling or unable to take effective measures against non-state actors that use its territory as a base for attacks and related actions against other states. With respect to the "unable" prong of the standard, inability may be most clearly manifested, for example, when a state has lost or abandoned effective control over the part of its territory where armed groups operate. With respect to the "unwilling" prong, for example, when a state colludes with or harbors a terrorist organization operating from its territory and refuses to address the threat posed by that organization, that may indicate unwillingness. [30]

Syria's consent was not sought for political reasons, not because there was no legal requirement. When the host state is unable but willing, a state should obtain its consent before entering it to strike non-state actors by force. A large part of Syrian territory was occupied by the Islamic State — a terrorist entity that emerged from and spread across Iraqi territory, operating not only in the territory of both countries but also attacking other states, including European states. Yet the U.S.-led coalition did not seek the consent of the Syrian government and did not even notify it before using air power against the Islamic State on Syrian territory. Although the coalition did not use force against Syrian government forces (which would have been an armed attack under Article 51 of the UN Charter), the fact that it did not even seek the Syrian government's consent for strikes against the Islamic State at least amounts to disrespect for Syria's sovereignty and interference in its internal affairs. This conclusion is also supported by state practice. [31]For example, in 2015 Iraq rejected Turkey's claim that it had the right to take self-defense actions against the Kurdistan Workers' Party in Iraq without Iraq's consent, even though Turkey's actions took place in areas not under the control of the Iraqi government.

(2) The Existing Discourse Cannot Provide a Normative Basis for the Continued U.S. Military Presence in Syria

When the United States used the "unwilling or unable" discourse, it did so only to justify the "legal basis" for its initial use of force in Syria. In other words, the United States explained its reliance on the "unwilling or unable" discourse only when explaining the legal basis for its initial resort to force. But it is not enough to assert that the "unwilling or unable" test was met at the time of the initial use of force. It does not address the question that a state may maintain a military presence and take military action in another state without that state's consent only if the "unwilling or unable" standard continues to be met. The Trump administration should have publicly articulated whether it had undertaken the necessary inquiry to ensure it was still operating within the bounds of the "unwilling or unable" doctrine, why it believed the limits of that doctrine had not been reached in Syria, and finally, whether it believed that counter-Iran or counter-Assad military objectives were lawful based on Syria's inability or unwillingness to address ISIS. [32]

As terrorist groups such as the Islamic State were defeated in Iraq and Syria, and as the Syrian government's dominance increased with the help of Russia, Iran, and Lebanese Hezbollah, the U.S. "unwilling or unable" discourse became increasingly inapplicable. In other words, with the defeat of the Islamic State, the question "Why are you (the U.S. military) still here?" would be asked more and more loudly. As of 2021, the United States stationed approximately 900 troops in Syria, most of them deployed in the so-called Eastern Syria Security Zone (ESSA). About 100 U.S. personnel were stationed in the Al-Tanf area in southeastern Syria. [33] The long-term U.S. military presence in the Al-Tanf area and in key oil areas of northeastern Syria faced legal difficulties: no legal basis could be found for such a long-term presence. In fact, under international law, the long-term U.S. presence in Syria constituted an unlawful military occupation. To justify the legitimacy of its long-term presence, the United States found it necessary to update its discourse system on "extraterritorial use of force against non-state actors."

30 *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operation*s (December 2016), p. 10.
31 Rein Mullerson, "Self-Defence against Armed Attacks by Non-State Actors," *Chinese Journal of International Law*, Vol. 18, No. 4, December 2019, p. 771.
32 Tess Bridgeman, "When Does the Legal Basis for U.S. Forces in Syria Expire?" March 14, 2018, https://www.justsecurity.org/53810/legal-basis-u-s-forces-syria-expire/.
33 Carla E. Humud, "Syria & U.S. Policy," September 20, 2021, https://crs reports.congress.gov.

(3) The Existing Discourse Cannot Provide a Normative Basis for U.S. Military Strikes in Syria

In February 2018, the Trump administration launched military strikes against pro-Syrian government forces. These pro-government forces had neither attacked Iraq nor the United States, and unlike the Islamic State, they were not recognized terrorist organizations. Consequently, Trump's actions also faced legal difficulties. The United States' existing self-defense-based discourse system on "extraterritorial use of force against non-state actors" could not effectively justify these actions. To provide a reasonable justification for such actions, the United States likewise needed to update its discourse system on "extraterritorial use of force against non-state actors."

Furthermore, after the Biden administration took office, its military strikes against non-state actors located in Syria posed new legal and normative challenges. On February 25, 2021, President Joe Biden ordered strikes against facilities in Syria operated by Iran-backed Shiite militias. Within 48 hours, the Biden administration submitted a "War Powers" report to Congress, reporting on the strikes and explaining that the targeted groups "had been involved in recent attacks against U.S. and coalition personnel in Iraq, including the attack in Erbil, Iraq, on February 15, 2021, which injured one U.S. service member, four U.S. contractors (one of them seriously), and killed one Filipino contractor." The report asserted that "these groups continue to plan future attacks of this kind." In particular, the Biden administration also submitted an Article 51 letter to the United Nations, stating that the strikes were taken in self-defense. [34]

Without the consent of the Syrian government, it was clearly unlawful for the U.S. military to launch military attacks from Iraq against non-state actors in Syria. After the Trump administration assassinated Soleimani and others in Iraq, Iraq had repeatedly demanded the withdrawal of U.S. troops. Under these circumstances, U.S. actions became even more illegal. The legal basis invoked by the Biden administration was "collective self-defense." If supplemented by the "unwilling or unable" discourse, this might appear to reflect the "necessity" of the U.S. military strikes (in self-defense). However, it is clear that at the time of the U.S. strikes, the non-state actors in Syria were not conducting, nor were they even about to launch, an armed attack. A persistent threat does not equate to an imminent attack. In fact, the Biden administration "had no right to retaliate, no right to use force for deterrence, no right to attack Iran on Syrian territory, and no right to use major military force in response to the kind of violence that occurred last week." [35]

III. The Pathway for the United States to Update Its Discourse System on "Extraterritorial Use of Force Against Non-State Actors" — Reconstructing the Discourse of "Collective Self-Defense"

The U.S. military's entry into Syria to fight the Islamic State without the consent of the Syrian government was essentially unlawful, but the United States made full use of its original "unwilling or unable" discourse to barely provide a normative basis for its initial use of armed force in Syria. After the Islamic State was defeated, the U.S. military remained in Syria for a prolonged period and frequently launched military strikes within the country. This created the need to update and develop the discourse system on "extraterritorial use of force against non-state actors."

(1) Making the Complete Defeat of Non-State Actors a Condition for Ending "Collective Self-Defense" in Syria

The analysis above shows that although the United States managed to cope with the legal challenges of its military entry into Syria to strike the Islamic State by expanding the scope of the "armed attack" subject that triggers the right of self-defense and by using the "unwilling or unable" discourse, the fact that the Islamic State had been defeated and the Syrian government's effective control had increased posed new international normative challenges to the continued U.S. military presence. The existing discourse system could no longer justify this fact. Just as the legitimacy of exercising the right of self-defense on the basis of consent depends on whether certain requirements are met from the outset of the use of force and during its continuation within the state, so too does the victim state in a situation of "unwillingness or inability" have an ongoing obligation to ensure that the requirements of the "unwilling or unable" test remain satisfied after the initial resort to force within the territory of the non-consenting state.

The way the United States responded to this legal challenge was to further narrow the connotation of "collective self-defense" and expand its extension, building on the original "unwilling or unable" test, by specifying new conditions for ending "collective self-defense" in an "unwilling or unable" context. The U.S. Department of State announced earlier in 2018 that "the complete and total defeat of the Islamic State" was a necessary condition for ending U.S. military operations

34 Oona Hathaway, "Knowns and Unknowns of US Syria Strike: Looming Int'l and Domestic Law Issues," March 5, 2021, https://www.justsecurity.org/75198/knowns-and-unknowns-of-us-syria-strike-looming-intl-and-domestic-law-issues/.

35 Shannon Roddel, "Syria Airstrikes a Grave Violation of International Law, Expert Says," February 26, 2021, https://news.nd.edu/news/syria-airstrikes-a-grave-violation-of-international-law-expert-says/.

in Syria. In discussing how to define "complete and total defeat" to determine when a "conditions-based" withdrawal should occur, the Department of Defense sent a letter to Senator Kaine articulating a new standard that the U.S. government had not previously made clear: "ISIS will be defeated when local security forces are able to effectively address and contain the ISIS group, and when ISIS is unable to function as a global organization." [36]This suggests that U.S. troops could remain in place for a long time until all territory once controlled by the Islamic State is liberated. Moreover, the Trump administration indicated that the U.S. military presence in Syria was also aimed at countering Iran's influence and hastening the end of Assad's rule. [37]

(2) Expanding the Protected Subjects of "Collective Self-Defense" to Include Non-State Actors

Does "local security forces" include the Syrian government, or only the current U.S. non-state partners? Under the traditional norm of "collective self-defense," the objects of collective self-defense for the United States, other than itself, should be states, not non-state partners. Therefore, "local security forces" should, in principle, refer to the forces of the Syrian government. However, given the historical development of the Syrian conflict, "local security forces" clearly refer to the United States' non-state partners — the Kurdish People's Protection Units (YPG) and the Syrian Democratic Forces (SDF) they lead. In this way, the United States effectively expanded the objects of "collective self-defense" to include non-state organizations, further altering the traditional connotation and extension of "collective self-defense." The Department of Defense statement quoted in Senator Kaine's letter reflects an expanded interpretation of the concept of "collective self-defense," extending it not only to the defense of state forces but also to the defense of non-state forces ("irregular partner forces or individuals"). In February 2018, the Trump administration invoked collective self-defense of the Syrian Democratic Forces to justify its strikes against pro-Syrian government forces. [38]

Once the Islamic State was defeated, the "normative basis" that the United States had initially given for its military entry into Syria — that it was an extension of collective self-defense for Iraq — faced certain challenges. At that point, people asked: For whom is the U.S. military conducting "collective self-defense" by its presence in Syria? By expanding the objects of collective self-defense to include non-state forces (in Syria, primarily the Syrian Democratic Forces), the United States "overcame" this challenge to some extent. Thus, by updating its discourse system on "extraterritorial use of force against non-state actors," the United States largely "solved" the problem of why it still needed to maintain a long-term military presence in Syria after the defeat of the Islamic State. The long-term presence was to protect the Syrian Democratic Forces (expanding the objects of "collective self-defense"), and the reason they needed protection was that the Islamic State in Syria had not yet been completely and totally defeated (setting a new condition for ending collective self-defense — the complete and total defeat of non-state actors).

In 2024, the United States provided a new normative justification. When discussing international law, a State Department spokesman invoked Article 51 of the UN Charter, which provides for the inherent right of self-defense, and claimed: "The United States is using force in Syria to fight ISIS and providing support to opposition groups fighting ISIS for the collective self-defense of Iraq (and other countries) and the national self-defense of the United States." [39]

(3) Adopting a Broad Interpretation of the "Imminence" Requirement for Self-Defense

According to the International Court of Justice's judgment in the *Nicaragua* case, acts of self-defense must satisfy three elements: imminence, necessity, and proportionality. Imminence requires that the threat be ongoing or imminent; necessity requires that there be no other reasonable means to eliminate the threat; proportionality requires that the level of force used not exceed what is necessary to protect one's own security.

However, the Biden administration's "self-defense" strikes against so-called Iran-backed non-state armed groups in Syria suffered from a lack of imminence, among other issues. In response, the United States has a new discourse on "extraterritorial use of force against non-state actors." Brian Egan, the State Department Legal Adviser, stated at the 110th Annual Meeting of the American Society of International Law in 2016: "In the U.S. view, once a state lawfully resorts to force in self-defense against an armed group after an actual or imminent armed attack by that group, international law does not require the state to reassess

36 Tess Bridgeman, "When does the Legal Basis for U.S. Forces in Syria Expire?" March 14, 2018, https://www.justsecurity.org/53810/legal-basis-u-s-forces-syria-expire/.

37 Tess Bridgeman, "When Does the Legal Basis for U.S. Forces in Syria Expire?" March 14, 2018, https://www.justsecurity.org/53810/legal-basis-u-s-forces-syria-expire/.

38 Elvina Pothelet, "U.S. Military's 'Collective Self-Defense' of Non-State Partner Forces: What does International Law Say?" October 26, 2018, https://www.justsecurity.org/61232/collective-self-defense-partner-forces-international-law-say/.

39 Tom O'Connor, "US Defends Legal Case for Troops in Syria as Pressure Builds to Withdraw," March 1, 2024, https://www.newsweek.com/us-defends-legal-case-troops-syria-pressure-builds-withdraw-1874909.

whether an armed attack is imminent before each subsequent action against that group so long as hostilities have not ended." [40]In other words, the imminence requirement legally applies only to the "first strike" against a non-state actor, not to military actions taken after the initial armed attack. This may explain why the United States did not claim that its airstrikes on Syria on February 25, 2021, prevented an imminent armed attack. In the U.S. view, it is sufficient to claim that an armed attack had already occurred. [41]

CONCLUSION

When a non-state actor located on the territory of a state launches an armed attack against another state, how should the victim state respond? This is a difficult problem. If the victim state enters the host state's territory to strike that non-state actor, it needs, in the absence of Security Council authorization, the invitation or consent of the territorial state. If it carries out a cross-border strike in the exercise of the right of self-defense, it also faces legal difficulties, because a non-state actor is not a state, and the subject of an armed attack that triggers the right of self-defense is generally supposed to be a state, unless the non-state actor's actions are "actually controlled" by a state.

But after 9/11, a series of U.S. counter-terrorism operations, together with the accompanying logic of action, changed the traditional legal provisions on "self-defense" and gradually developed the U.S. discourse system on "extraterritorial use of force against non-state actors." First, it expanded the range of subjects that can trigger the right of self-defense by way of armed attack from states to include non-state actors, maintaining that as long as a state acquiesces in the relevant armed attacks by non-state actors, the victim state may enter that state's territory and use force against the non-state actors without the state's consent.

The "acquiescence" argument focuses on lowering the attribution standard for armed attacks. Later, the United States began to focus on "state responsibility" and further developed its discourse system on "extraterritorial use of force against non-state actors" by advancing the "unwilling or unable" discourse. The content of that discourse is: when a non-state actor within a state launches an armed attack against another state, if the territorial state is "unwilling or unable" to strike the non-state actor within its territory, then the victim state has the right to carry out cross-border self-defense strikes against that non-state actor, even without the territorial state's consent.

By using the "unwilling or unable" discourse, the United States largely provided a normative basis for its military strikes against the Islamic State in Syria without the consent of the Syrian government. However, after the Islamic State was defeated, the United States still stationed troops in Syria, supported the autonomy of the Syrian Kurdish region, plundered the country's oil and agricultural products, and, in addition to striking the Islamic State, also occasionally struck pro-Syrian government forces and so-called Iran-backed forces. Thus, the original U.S. "unwilling or unable" discourse was no longer sufficient to provide a normative basis for its continued military presence in Syria and its other actions. Consequently, the United States continued to update its discourse system on "extraterritorial use of force against non-state actors." The specific measures were: making the complete defeat of non-state actors a condition for ending "collective self-defense" in Syria; expanding the protected subjects of "collective self-defense" to include non-state actors; and adopting a broad interpretation of the "imminence" requirement for self-defense.

40 Brian Egan, "International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations," *International Law Studies*, Vol.92, 2016, p. 239.

41 Adil Ahmad Haque, "Self-Defense against Non-State Actors: All over the Map," March 24, 2021, https://www.justsecurity.org/75487/self-defense-against-non-state-actors-all-over-the-map/.