

# ISIS: Public opinion and the complications of International Law

by Chris Hanley and James Downes

*Chris Hanley and James Downes discuss the ramifications surrounding ISIS, drawing on recent polling data. The article then looks at four core areas in the legitimacy to intervene, investigating authorisation from the UN Security Council, Humanitarian Intervention, intervention by recipient states and the right to self-defence. The article then concludes by outlining complications surrounding contemporary international law.*

## *ISIS in a nutshell*

There is no doubt that the ‘War on Terror’ that culminated around the 2003 invasion in Iraq has weakened the core pillars of al Qaeda. But despite the erosion of the terrorist group following a ‘post-2006 surge’ the US and allies were unable to completely destroy them. The Islamic State of Iraq and the Levant (ISIL or ISIS) ‘rebooted’ in 2011 after successfully freeing a multitude of political prisoners from Iraqi prisons. Continued intervention and presence in the Middle East by previous administrations has fed into a sense of animosity towards the US which has fuelled the growth of the most dangerous terrorist groups in existence.

## *So how did we get here?*

The ‘war on terror’ was a costly ordeal and was embroiled in conspiracy and corruption. As a result the citizens of the West are now much less likely to back military exercises beyond their borders. The people are fatigued and politicians now have to jump through hoops to be able to justify any type of armed conflict, regardless of the threat posed.

A quick look at public opinion over the last couple of decades testifies this viewpoint. Whilst Gallup polls showed that 82% of Americans were in favour of military action in Afghanistan, 2001 – and 64% for action in Iraq, 2003 – only 36% supported any type of conflict in Syria in September 2013<sup>1</sup>. Obama threatened military action and nothing happened. Now Syria is one of the main stumbling blocks for tackling ISIS and Western governments seemingly have no legitimacy to deal with it.

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<sup>1</sup> <http://www.gallup.com/poll/164282/support-syria-action-lower-past-conflicts.aspx>

*Views on proposed US military actions before they are enforced*

Country/ Region	Fieldwork dates	In favour (%)	Oppose (%)	No opinion (%)
Syria	3-4/09/2013	36	51	13
Iraq	14-15/03/2003	64	33	3
Afghanistan	5-6/10/2001	82	14	4
Kosovo/ The Balkans	19-21/02/1999	43	45	12
Iraq/ Persian Gulf	11-13/01/1991	55	38	4

Viewpoints

however are clearly influenced by the nature of the intervention. Despite the numerous atrocities committed against western journalists and aid workers, citizens, unsurprisingly, still oppose any prospect of a ground campaign. Figures published by Pew in October 2014 suggest that a slim majority of Americans support military intervention against Islamist militants (57%) but only small proportion believes that this campaign should include troops on the ground (39%).

A congressional letter from the White House appears to reflect this pattern in public opinion. Earlier last week, Obama appealed to Congress with a new AUMF (Authorisation of Military Force) which asked congress to give the Executive branch the approval to engage in this conflict on new terms – terms that deviate from powers previously assumed from the Bush administration. This new authorisation will limit the powers of the Executive to air-campaigns whilst leaving little room for maneuver with regards to putting troops on the ground. Is there any legitimacy to intervene?

This is a complicated question to answer. Up until now, Obama has drawn powers from an AUMF issued in 2001, which legally gave him the congressional power to act in Iraq and Syria in any way he saw fit. However, keeping in line with public opinion, Obama has restricted his actions to air-based tactics in an attempt to limit American casualties. His latest appeal to Congress shows that his decisions are acting in accordance with the general view of the American public. Democratically speaking, Obama’s actions do not seem to be operating outside of his electoral legitimacy – however, there is also a completely different dimension in answering this question – a legal perspective.

International law is complicated and resolution after resolution continues to redefine what is the international norm. However, in relation to this topic, the key premise in discussion is that *the use of force in the territory of another sovereign state is strictly prohibited.*

Nevertheless, there are four key exceptions to this rule that are derived from Article 51 in the UN charter:

*Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be*

*immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.*

1. *When there is authorisation from the UN Security Council.*

This does not sound too difficult to achieve – but it is worth noting that each of the five Great Powers, all of which were the victors of the Second World War (the UK, Russia, France, China and the US), have a veto power. Bearing in mind that interests in the Middle East are starkly different, a resolution from the council was never realistically a feasible option. For example, six vetoes have been issued since 2009 and five of them were exercised by Russia: four of which were in relation to the situation in Syria, with the latest veto concerning the ongoing conflict in Ukraine.

2. *Humanitarian Intervention*

This argument is probably the most controversial to date since so much is left to interpretation. Furthermore, it has only ever been applied to states – and unsurprisingly the grounds for action against non-state actors are weak since they would undoubtedly violate other rights of states explicitly outlined in the UN charter. Nonetheless, the argument has not yet been applied to this situation in Iraq and Syria since the threshold, whatever that may be, is a long way from being reached.

3. *When intervention is consented by the recipient State*

This is what is observed in Iraq today, where allied states have been welcomed by the Government in the fight against ISIS. This is the easiest solution but a state cannot be forced to consent to such action – which leads us to Syria. Bashar Al-Assad has not consented to any foreign military action in Syria. This definitely complicates the situation and consequently there have been attempts to redefine the term ‘consent’. A core normative question is raised on this issue. Does consent have to be explicit or could intervention be tacitly allowed? This is one of the arguments that has recently surfaced, where Assad has condemned any intervention on his territory, yet the Syrian Government has done nothing to disrupt or foil any current operations.

4. *The right to self-defence*

i. *Self-defence of the United States*

This argument should be no stranger to anyone who lived through the 2000’s and it is ultimately one that is being used again now by the US, with the dictum that if something is not done now, we are likely to pay for it in the future. Whilst ISIS might not pose any immediate threat, Obama is adamant that they do pose

an eventual threat to the Western democracy. Therefore, “self-defence” manifests itself in a proactive engagement.

It is worth mentioning here that Iraq has a claim to act in self-defence since ISIS operates both within and outside of their borders. The Iraqi government does not need to justify its actions to combat ISIS on their soil given the amount of atrocities they have committed. By taking their fight into Syria, without the permission of the Assad government however, certain criteria have to be met. Nevertheless, the general consensus is that they have the right to defend themselves even if it means that their actions will exceed their borders. Up until now, only a few have argued that the threat ISIS poses from Syria does not warrant Iraq’s intervention.

### *ii. Collective self-defence*

Another branch of this particular justification is the right to “collective self-defence”. In this instance, collective self-defence could be argued for since Iraq is directly affected by the situation on its borders. Furthermore, since the Iraqi government has the support of allied states in their fight against ISIS – allied states can argue that this grants them the right to carry this fight into neighbouring countries. However, this inevitably rests on the question of whether Iraq itself has the right to act in Syria on the basis of its defence.

### *iii. The unwilling or unable*

This is a test that is brought up time and time again in international conflict but its boundaries are none the clearer. On the 25th June 2014, the Iraqi government wrote to the UN Security Council explaining the situation with ISIS. In short, ISIS is actively attacking Iraq and the Syrian government is unable to prevent ISIS from using their land as their hub. Thus, in the act of self-defence, the Iraqi government can argue the right to intervene in Syria, even without the Syrian regime’s permission. Therefore, the US can justify intervention on these grounds too.

### *Is there a legal basis?*

As discussed above, there only seems to be a case for intervention on the grounds of self-defence – and even then the only country that has any real claim to this is Iraq. So what about the US? Well, their justification lies in the grounds of collective self-defence. Since the Iraqi government has the rightful claim, under Article 51 of the UN charter, to fight in Syria on the basis of defending their own country, the US can also make this plea since the Iraqi government has welcomed their assistance.

This also has ground in the fact that Iraq, alone, is not able to hold off the attacks of ISIS from Syria. Nor has Syria done enough to weaken the organisation in the last two years. Not only this, but the Assad regime has taken few steps to counter ISIS and many of the regions by which ISIS are operating are arguably out of the regime’s control. Ban Ki-Moon, the UN secretary General, said himself that “I also note that the strikes

took place in areas no longer under the effective control of that government"<sup>2</sup>. Therefore, allied states may have the right to aid on the basis of the 'unwilling or unable'. Thus, if this argument holds, permission from the Syrian government is no longer a pre-requisite for intervention.

### *Why just the US?*

So if there is a legal basis, why is the US the Western country to be active in Syria? Why did France, Belgium, Germany and Spain stop at Iraq? Even the UK has been reluctant to follow.

One fundamental reason is that the United States' efforts have been sufficient so far and Obama seems confident that they, along with their Arab allies have the firepower to deal with the threat. Furthermore, Jordan has recently intensified its efforts in the region in response to the burning of one of their captured pilots. Philip Hammond, Secretary of State for Foreign and Commonwealth Affairs, stated on a visit to the Kurdistan region that they see no 'imminent demand' for the UK to join the strikes. Whilst it is clear from various statements that the Conservative government does not rule out joining the strikes should the need arise, the division in Parliament is likely to stall the UK's involvement, at least for the time being.

The structure of governance across NATO states differs substantially as well and this quite clearly plays a role. Since the financial crisis, it has been harder and harder for leaders to justify spending precious budget on conflicts abroad – and especially since the 'war on terror'; justifications for war have come under much more scrutiny.

European governments are generally structured differently to the US. Many European governments have a fusion of powers and it is this that makes it hard for executive actions to be taken without the consent of the parliaments. The US on the other hand has a separation of powers, which designates the powers of the Commander-in-chief to the hands of the Executive. Moreover, the Bush administration arguably strengthened these powers, giving Obama much more to work with.

As previously mentioned, Congress effectively issued Bush a blank cheque in 2001 in the form of an AOMF, and since it has never been repealed Obama has been able to legally take action in Iraq and Syria with little opposition. With this in hand, the White House has lot of power and even though Obama asked Congress for a new updated AOMF, without the formal repeal of the former, nothing changes. The US is particularly unique in its ability to navigate through and interpret an otherwise rigid codified constitution. As poignantly paraphrased by Brooks, writing for Foreign Policy, upon hearing the news of the request for an AOMF:

*Dear Congress: I humbly request the authority to do whatever the hell I want even though I already have the authority to do it anyway. Love, Barack*

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<sup>2</sup> <http://www.ibtimes.com/us-defends-use-syria-airstrikes-letter-un-secretary-general-ban-ki-moon-1693858>

*Worlds apart*

From the above, it would be clear to the average European that the two sides of the transatlantic partnership have different approaches to foreign policy. The US has tended to opt for military action whilst most countries in the EU prefer diplomatic and economic solutions. However, it's interesting to note that public opinion doesn't necessarily reflect the actions of the government.

A survey conducted by TNS opinion for the German Marshall Fund earlier this year shows that opinion across the Atlantic is remarkably close on this matter. When asked about the type of missions NATO should be engaged in, 43% of Europeans<sup>3</sup>; and 49% of Americans thought that it should be involved in operations outside of America and Europe. This denotes only a 6 percentage point difference between the mentalities of citizens across the Atlantic, yet the foreign policy agendas of their governments are starkly different. It is however worth noting that NATO involvement is a fairly abstract concept for most people to grasp.

When looking specifically at the UK, at the beginning of February, YouGov found that almost two thirds of Brits are in favour of air strikes (63%) and just over half would support increasing the UK's general commitment in degrading the organisation (56%). When the prospect of the involvement of ground troops are discussed, support drops to under a third (32%). However, UK public opinion is generally much closer to the US' in terms of foreign policy and security than other European countries. It's likely that support for such intervention is much weaker elsewhere: Germany is a good example, where the Government often justifies its inaction with regards to foreign wars in low public support.

Regardless of the UK's proximity with US public opinion, the UK's foreign policy approach has nonetheless been much more in line with that of its European allies. Since the current operations in the Middle East seem to be operating within legal boundaries entrenched in the UN charter, it is apparent that the obstacles of European involvement are more related to institutional restraints as well as those posed by weaker general public support.

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<sup>3</sup> Proportions across European countries vary considerably.

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