Israel Law Review **53**(3) 2020, pp 355–391. © The Author(s), 2020. Published by Cambridge University Press in association with The Faculty of Law, The Hebrew University of Jerusalem.
doi:10.1017/S0021223720000151

From Apology to Functionalism: A Retrospective Look at the Military Campaign against the Self-Declared Islamic State

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This article discusses the military campaign against the 'Islamic State' (Daesh) in an attempt to illustrate the gaps in the international legal framework that regulates the use of force in dealing with a challenge such as that presented by the Islamic State. This case study was demanding given the need to reconcile state-centred rules with a diverse reality which includes several players, and particularly non-state armed groups in control of territory and population. In order to deal with this issue, the article proposes the invocation of a functional approach, compared with a binary approach, which is suitable in cases where several players exercise power in the same territory. In particular, it suggests that the Islamic State could have been treated functionally as a state for the purposes of self-defence or collective security measures, rather than invoking legal doctrines of unclear status that might result in undermining the international legal system they are invoked to protect.

Keywords: laws of war, Islamic State, Security Council, unwilling or unable

1. Introduction

The Islamic State[1] is a non-state armed group that was part of Al-Qaeda,[2] which took over territory stretching from Mosul in Iraq to the outskirts of Aleppo in Syria and proclaimed itself a 'caliphate' in June 2014.[3] In response to the threats posed by the Islamic State – with regard to infringement of the sovereignty of Iraq and Syria[4] and concern over the harsh human rights abuses in the territories under its control[5] – two coalitions were formed to join military forces

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[1] This organisation is also known as 'the Islamic State of Iraq and the Levant', ISIS (an acronym for 'the Islamic State in Iraq and Greater Syria'), ISIL (an acronym for 'the Islamic State in Iraq and the Levant'), Daesh (an abbreviation of the organisation's name in Arabic, al-dawlah al-islamiyah fil Iraq wa al-sham) or the Takfiri. For discussion see Xavier Raufer, 'The Islamic State, an Unidentified Terrorist Object' (2016) 25 *Polish Quarterly of International Affairs* 45, 46; Cole Bunzel, 'From Paper State to Caliphate: The Ideology of the Islamic State', *The Brookings Project on US Relations with the Islamic World*, Analysis Paper No 19, 3 March 2015, https://www.brookings.edu/wp-content/uploads/2016/06/The-ideology-of-the-Islamic-State-1.pdf.

[2] For discussion see Raufer (n 1) 46; Burak Kadercan, 'What the ISIS Crisis Means for the Future of the Middle East' (2016) 18 *Insight Turkey* 63, 64–67.

[3] William McCants, *The ISIS Apocalypse: The History, Strategy, and Doomsday Vision of the Islamic State* (St Martin's Press 2015) 121; Antonio Coco and Jean-Baptiste Maillart, 'The Conflict with Islamic State: A Critical Review of International Legal Issues' in Annyssa Bellal (ed), *The War Report: Armed Conflict in 2014* (Oxford University Press 2015) 388, 389; Gabor Kajtar, 'The Use of Force against ISIL in Iraq and Syria: A Legal Battlefield' (2017) 34 *Wisconsin International Law Journal* 535, 543.

[4] UNSC Res 2170 (15 August 2014), UN Doc S/RES/2170; UNSC Res 2249 (20 November 2015), UN Doc S/RES/2249.

[5] Gerald III Waltman, 'Prosecuting ISIS' (2016) 85 *Mississippi Law Journal* 817, 826–27; Hassan Hassan, 'The Sectarianism of the Islamic State: Ideological Roots and Political Context', *Carnegie Middle East Center*, 13 June

against the group:[6] an Islamic Military Alliance, and one with the United States in its forefront (the US-led Coalition).[7]

Since 2014, during several years of intense military operations against the group – in a circle of violence that included the US-led coalition, an Islamic Military Alliance, Russia, Iran, Iraq, Syria, and other non-state actors (NSA) such as the Kurdish Peshmerga – the Islamic State has lost most of the territory in Iraq and Syria that it used to control.[8] In October 2017 the coalition-backed forces on the ground captured Raqqa, the declared capital of the Islamic State.[9] By 2019 the Islamic State had lost all the territories it previously held in Iraq and Syria, and the US-led coalition proclaimed the end of the group in these areas.[10]

This article suggests that the campaign against the Islamic State was a battle for the protection of the international legal system and its core values, but it was promoted in a way that threatens the very system it came to defend. In order to illustrate this view, it discusses the military campaign against the Islamic State in Syria during the period in which it attempted to operate as a state, between June 2014 and October 2017. It discusses two legal doctrines: (i) the doctrine of 'unwilling or unable', invoked by the United States,[11] the United Kingdom,[12] Australia,[13] Canada[14] and Turkey[15] during the use of force in Syria; and (ii) the doctrine of responsibility to protect (R2P). Both doctrines promote the use of military intervention when states fail to exercise authority

2016, http://carnegie-mec.org/2016/06/13/sectarianism-of-islamic-state-ideological-roots-and-political-context/j1sf; Haroon Siddique, '20,000 Iraqis Besieged by Isis Escape from Mountain after US Air Strikes', *The Guardian*, 10 August 2014, http://www.theguardian.com/world/2014/aug/10/iraq-yazidi-isis-jihadists-islamic-state-kurds.

[6] Aaron L Jackson, 'Hunting Down Terrorists "Wherever They Exist": ISIL in Syria and the Legal Argument for United States Military Operations Within the Territory of a Non-Consenting Nation-State' (2015) 74 *Air Force Law Review* 133, 134; Al-Ghafli Ali, 'The Islamic Military Alliance to Fight Terrorism: Structure, Mission, and Politics' (2017) 12 *Journal of Regional Security* 157.

[7] While significant support was expressed for these coalitions, some states did not support them. In particular, Russia was not willing to support any operations without authorisation, and additional criticism was raised by Ecuador, Iran and Argentina. For discussion see Paulina Starski, 'Right to Self-Defense, Attribution and the Non-State Actor: Birth of the "Unable or Unwilling" Standard?' (2015) 75 *ZaöRV* 455, 488.

[8] Seth G Jones and others, *Rolling Back the Islamic State* (RAND Corporation 2017) 13–39, https://www.rand.org/content/dam/rand/pubs/research_reports/RR1900/RR1912/RAND_RR1912.pdf.

[9] Margaret Coker, Eric Schmitt and Rukmini Callimachi, 'With Loss of Its Caliphate, ISIS May Return to Guerrilla Roots', *New York Times*, 18 October 2017, https://www.nytimes.com/2017/10/18/world/middleeast/islamic-state-territory-attacks.html?rref=collection%2Ftimestopic%2FIslamic%20State%20in%20Iraq%20and%20Syria%20(ISIS)&_r=0.

[10] Jin Wu, Derek Watkins and Rukmini Callimachi, 'ISIS Lost Its Last Territory in Syria. But the Attacks Continue', *New York Times*, 23 March 2019, https://www.nytimes.com/interactive/2019/03/23/world/middleeast/isis-syria-defeated.html?rref=collection%2Ftimestopic%2FIslamic%20State%20in%20Iraq%20and%20Syria%20(ISIS).

[11] UNSC, Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General (23 September 2014), UN Doc S/2014/695.

[12] James A Green, 'Initial Thoughts on the UK Attorney General's Self-Defence Speech', *EJIL: Talk!*, 13 January 2017, https://www.ejiltalk.org/initial-thoughts-on-the-uk-attorney-generals-self-defence-speech.

[13] UNSC, Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council (9 September 2015), UN Doc S/2015/693.

[14] UNSC, Letter dated 31 March 2015 from the Chargé d'Affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council (31 March 2015), UN Doc S/2015/221.

[15] UNSC, Letter dated 24 July 2015 from the Chargé d'Affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council (24 July 2015), UN Doc S/2015/563.

in their territory in a way that erodes state sovereignty – a pillar in the international Westphalian legal system.[16] As will be shown, both doctrines can also serve as apologetic justifications for the deployment of military force based on political motives.

This article illustrates the gaps in the international legal framework regulating the use of force, and its difficulty in facing challenges such as that presented by the Islamic State: NSAs that control and administer territory and population. The challenge of confronting the group was exacerbated given the need to reconcile state-centred rules with a diverse reality which includes different types of player, some of which are in control of territory and exercise governmental authority despite the fact that they operate in areas belonging to sovereign states. This article proposes the invocation of a *functional* approach, contrary to a binary approach, which is suitable in complicated cases where several players exercise power in the same territory. Put simply, this article suggests that the Islamic State could have been treated functionally as a state for the purposes of self-defence or collective security measures, instead of invoking doctrines of unclear legal status, such as the 'unwilling or unable' doctrine, which might result in undermining the international legal system they are invoked to protect.

The outline of the article is as follows. The next section discusses the international legal framework for the use of force under international law. Later, I will present the rise of the Islamic State and the military campaign that brought about its demise. I will then present the legal justifications raised during the campaign, while focusing on the doctrine of 'unwilling or unable', and suggest the functional approach. Finally, I will discuss the response of the Security Council in the fight against the Islamic State.

2. THE INTERNATIONAL LEGAL FRAMEWORK REGULATING THE USE OF FORCE

2.1. BACKGROUND

The prohibition against the use of force in international law, a *jus cogens* norm,[17] is enshrined in Article 2(4) of the Charter of the United Nations.[18] This rule bars states from using force against

[16] The concept of sovereignty was first introduced in 1576 by Bodin, and later affirmed in the Treaties of Westphalia of 1648, which recognised the right of (Western) states to establish a domestic governmental system without outside interference from other states. The strength of sovereignty grew alongside the modern nation-state system, and today sovereignty is a foundational principle in the international system in which states were, and still are, the predominant actors: see *Island of Palmas Case (Netherlands v US)* 2 RIAA 829–71 (1928); Hendrik Spruyt, *The Sovereign State and its Competitors: An Analysis of Systems Change* (Princeton University Press 1994); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press 2001) 11; Frédéric Mégret, 'International Law as Law' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) 64, 66; Duncan French, 'Introduction' in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013) 1–21; Yaël Ronen, 'Entities that Can Be States but Do Not Claim To Be' in French, ibid 23.

[17] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, separate opinion of Judge Elaraby [74]; Christine Gray, 'The Use of Force and the International Legal Order' in Malcolm D Evans (ed), *International Law* (Oxford University Press 2010) 617.

[18] Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

https://doi.org/10.1017/S0021223720000151 Published online by Cambridge University Press

other states.[19] As will be elaborated in this section, this legal field – *jus ad bellum* – underscores that states are the main players on the international plane as they enjoy the ultimate right under international law: sovereignty.[20]

In accordance with the principle of sovereignty, states may regulate their domestic affairs without foreign interference,[21] a principal aspect of which is their exclusive right to use force inside their territory.[22] Indeed, states have traditionally attempted to maintain their exclusivity on the use of force inside their territory. A prominent example, noted by Lustig and Benvenisti, is the Brussels Declaration of 1874 – one of the first comprehensive statements of the modern laws of war – which was a concrete attempt to curtail the activities of NSAs which challenged the exclusive control of states over the use of force, in both wartime and in peacetime.[23]

2.2. The Prohibition on the Use of Force and Its Exceptions

States can protect their rights and interests in areas beyond their own territory, such as on the high seas, which are not part of the territory of any state.[24] However, when it comes to the sovereign territory of another state, the required legal route for a state to operate militarily is either to invoke

[19] eg, Bruno Simma, 'NATO, the UN and the Use of Force' (1999) 10 *European Journal of International Law* 1.
[20] For discussion see Kajtar (n 3) 573; Carsten Stahn, 'Terrorist Acts as "Armed Attack": The Right to Self-Defense, Article 51(1/2) of the UN Charter and International Terrorism' (2003) 27 *Fletcher Forum of World Affairs* 35, 36; Thomas M Franck, 'Terrorism and the Right of Self-Defense' (2001) 95 *American Journal of International Law* 839, 840; Katja Samuel, 'Can Religious Norms Influence Self-Determination Struggles, and with What Implications for International Law?' in French (n 16) 306; Christine Gray, *International Law and the Use of Force* (3rd edn, Oxford University Press 2008) 130, 135–38; UNGA Res 42/159 (7 December 1987), UN Doc A/RES/42/159, para 14; UNGA Res 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (14 December 1960), UN Doc A/RES/1514(XV), paras 1–2, 4.
[21] UN Charter (n 18) 2 para 7; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, Merits, [1986] ICJ Rep 14, [202]; Lyndsey Kelly, 'The Downfall of the Responsibility to Protect: How the Libyan and Syrian Crises Secured the Fate of the Once-Emerging Norm' (2016) 43 *Syracuse Journal of International Law and Commerce* 381, 392. See *Island of Palmas Case* (n 16); *SS 'Lotus' (France v Turkey)* (1927) PCIJ (Ser A No 3); Ronald A Brand, 'The Role of International Law in the Twenty-First Century: External Sovereignty and International Law' (1995) 18 *Fordham International Law Journal* 1685, 1686; Mégret (n 16); John Alan Cohan, 'Sovereignty in a Postsovereign World' (2006) 18 *Florida Journal of International Law* 907.
[22] Ditter Grim, 'The State Monopoly on the Use of Force' in Wilhelm Heitmeyer and John Hagan (eds), *International Handbook of Violence Research* (Springer 2005) 1043; Nicholas Tsagourias, 'Non-State Actors in International Peace and Security: Non-State Actors and the Use of Force' in Jean d'Aspremont, Michael William Reisman and Math Noortmann (eds), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (2011) 326. Historically, Hobbes believed that the only way for people to live in civil peace and social unity is under a social contract allowing the rule of an absolute sovereign, which is able to monopolise the use of force: Thomas Hobbes, *Leviathan xxxix* (Michael Oakeshott ed, 1950). In pursuance, it was stated by Weber that a state is a human community that successfully claims the monopoly of the legitimate use of physical force within a given territory: Max Weber, *From Max Weber: Essays in Sociology* (Routledge 1946) 77.
[23] Eyal Benvenisti and Doreen Lustig, 'Taming Democracy: Codifying the Laws of War to Restore the European Order, 1856–1874' (2017) *University of Cambridge Faculty of Law Research Paper No. 28/2017*, https://ssrn.com/abstract=2985781. Another example is the 1856 Declaration of Paris, which took back authorisation on the use of force given to privateers, by banning it and, in a way, reversing the privatisation of the colonial enterprise.
[24] *Fisheries Jurisdiction (Spain v Canada)* [1998] ICJ Rep 432, 466.

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one of the recognised exceptions to the prohibition against the use of force or, in the alternative and particularly when operating against an NSA, to receive the *consent* of the host state the territory from which the group is operating.[25] As noted by Cheng,[26] a state can defend its rights against NSAs in the territory of another state by its own action only after it has called upon the sovereign state to afford the necessary protection, and after it has sought the consent of the sovereign before deploying military force.

Today, the prohibition on the use of force between states bars the threat of or the use of military force against another state.[27] An illegal threat under this rule is an express or implied promise by a state to resort to unlawful use of military force, conditional on non-acceptance of its demands.[28] There are two exceptions to the prohibition which are stipulated in the UN Charter: (i) authorisation to use force under the collective security system, with authorisation of the Security Council; and (ii) the right of individual self-defence or collective self-defence against an armed attack.[29] There is also a customary right of self-defence,[30] and a debate regarding the existence of additional exceptions to the prohibition.[31] In order for a use of force to qualify as an armed attack justifying a lawful response in self-defence, there is a threshold of gravity in scale and effect.[32] Once this threshold is met, two further criteria – proportionality and necessity – are required from a state to be met for the exercise of force in self-defence to be lawful.[33]As stated by the International Court of Justice (ICJ), an armed attack must be one which has been

[25] In the view of Jackson (n 6) 161, receiving consent will be the optimal approach.
[26] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens for the London Institute of World Affairs 1953) 88–96.
[27] See, eg, Simma (n 19).
[28] Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press 1963) 364. For a modern view of this prohibition see Marco Roscini, 'Threats of Armed Force and Contemporary International Law' (2007) 54 *Netherlands International Law Review* 229, 234–35.
[29] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168; Roscini (n 28). For discussion relating to collective self-defence see Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff 1997) 155; Gray (n 17) 632.
[30] This customary right was recognised, inter alia, in the *Nicaragua* case: *Nicaragua v US* (n 21) [190].
[31] There are several alleged customary exceptions, such as humanitarian intervention. Another exception is the protection of nationals whose lives are at risk abroad. The most controversial exception is probably the claim that states can assist people fighting for their right to self-determination. For discussion see Brownlie (n 28); Gray (n 17) 615; Gray (n 20); Matthew C Cooper, 'A Note to States Defending Humanitarian Intervention: Examining Viable Arguments before the International Court of Justice' (2012) 40 *Denver Journal of International Law and Policy* 167.
[32] Michael P Scharf, 'How the War Against ISIS Changed International Law' (2016) *48 Case Western Reserve Journal of International Law* 1, 22; Anne Peters, 'The Turkish Operation in Afrin (Syria) and the Silence of the Lambs', *EJIL: Talk!*, 30 January 2018, https://www.ejiltalk.org/the-turkish-operation-in-afrin-syria-and-the-silence-of-the-lambs. The scale and effects criteria is not necessarily connected with numbers; rather it is a legal assessment depending on the facts and circumstances at hand: see Lokman B Çetinkaya, 'Turkey's Military Operations in Syria', *EJIL: Talk!*, 20 February 2018, https://www.ejiltalk.org/turkeys-military-operations-in-syria.
[33] The scope, duration and intensity would be of importance in assessing proportionality. As for necessity, the main element in this regard is the imminence of the need to respond and the evaluation of other alternatives. For elaboration see Noam Lubell, 'The Problem of Imminence in an Uncertain World' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 697; Çetinkaya (n 32).

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elevated to the gravest form of the use of force, compared with other less grave forms of the use of force.[34] The gap between these two options, sometimes referred to as the Nicaragua gap,[35] serves as a chilling factor to prevent the escalation of hostilities.[36] The ICJ stated in the *Nicaragua* case that an injured state, harmed by violations of international law which do not amount to an armed attack, is generally permitted to take proportionate countermeasures against the injuring state. In the words of the Court:[37]

> While an armed attack would give rise to an entitlement to collective self-defence, a use of force of a lesser degree of gravity cannot … The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica.

As can be seen, while the Court recognised this option, it did not specify what such proportionate countermeasures entail. In a later ruling, the *Oil Platforms* case, two ICJ judges opined on this issue. On the one hand, Judge Simma suggested that there should be a distinction between full-scale self-defence, triggered by an armed attack in itself, and proportionate countermeasures, which are triggered by an attack falling short of an armed attack.[38] On the other hand, Judge Higgins finds this issue to be more speculative than established as it is a matter of conjecture.[39]

If we look at Article 22 of the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA),[40] lawful countermeasures are acts executed by a state the wrongfulness of which is precluded if they are in response to a prior unlawful act, committed by the state against which the measures are directed, and only if

[34] *Nicaragua v US* (n 21) [191]; Michael N Schmitt and Andru E Wall, 'The International Law of Unconventional Statecraft' (2014) 5 *Harvard National Security Journal* 349, 359.
[35] For elaboration see Benjamin Zweifach, 'Plugging the Gap: A Reconsideration of the U.N. Charter's Approach to Low-Gravity Warfare' (2013) 8 *Intercultural Human Rights Law Review* 379. See also Jackson (n 6) 167; Annalise Lekas, 'ISIS: The Largest Threat to World Peace Trending Now' (2015) 30 *Emory International Law Review* 313, 332–35.
[36] Peters (n 32).
[37] *Nicaragua v US* (n 21) [249].
[38] *Oil Platforms (Iran v US)* [2003] ICJ Rep 161, separate opinion of Judge Simma, [12] ('I would suggest a distinction between (full-scale) self-defence within the meaning of Article 51 against an "armed attack" within the meaning of the same Charter provision on the one hand and, on the other, the case of hostile action, for instance against individual ships, below the level of Article 51, justifying proportionate defensive measures on the part of the victim, equally short of the quality and quantity of action in self-defence expressly reserved in the United Nations Charter. Here I see a certain analogy with the Nicaragua case, where the Court denied that the hostile activities undertaken by Nicaragua against El Salvador amounted to an "armed attack" within the meaning of Article 51, that would have given the United States a right to engage in collective self-defence, and instead qualified these activities as illegal military intervention. What the Court did consider permissible against such unlawful acts were "proportionate counter-measures", but only those resorted to by the immediate victim').
[39] *Oil Platforms (Iran v US)*, ibid, separate opinion of Judge Higgins, [43] ('Whether the Court envisaged only non-forceful countermeasures is, for the moment, a matter of conjecture. That, too, is not addressed in the present judgment. The Court simply moves on from the Court's 1986 statement that a necessary measure to protect essential security interests could be action taken in self-defence').
[40] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) UN Doc A/56/10 (2001) (ARSIWA) art 22.

they meet several requirements, such as notification and proportionality.[41] As is made clear by Article 50(1)(a) of ARSIWA, lawful countermeasures *cannot* include actions which constitute a threat or use of force as embodied in the UN Charter.[42] Accordingly, international law does not prescribe for the use of military force which is outside the purview of the Charter, and which can be appraised without reference to it.

A principle of relevance which might preclude wrongfulness of an act is that of necessity – enshrined in Article 25 of ARSIWA.[43] This principle precludes the wrongfulness of an act which was the only option to safeguard an essential interest in grave and imminent peril if the act did not impair an essential interest of the state towards which the obligations exist.[44] As I will explain shortly, while this principle theoretically can serve as justification for use of force which contradicts international law, its strict conditions and interpretation generally prevent such an option.

Under Article 25(1)(a) of ARSIWA, necessity may not be invoked if there were other means at a state's disposal to avoid a violation, such as negotiation.[45] If we look at the case of the Islamic State, we can see that no state tried to negotiate with it, for example, as part of the negotiations over a political transition process in Syria in order to end the conflict.[46] In fact, even aid organisations feared being prosecuted if they were found to be engaging with the group.[47] Another condition for this principle is that the actions of a state invoking necessity cannot seriously impair an essential interest of the other state; in other words, the interest relied on by the invoking state must outweigh all other considerations. When it comes to the use of force, certain humanitarian conventions applicable to armed conflict expressly exclude reliance on necessity; generally, in the view of the ILC, the non-availability of the plea of necessity when it comes to the use of force emerges from the object and the purpose of rules of a humanitarian character.[48] Accordingly, necessity as a legal rule which precludes wrongfulness is less suitable in the context of the Islamic State.

[41] For discussion see Elena Katselli Proukaki, *The Problem of Enforcement in International Law* (Routledge 2010) 221; *Corn Products International Inc v Mexico*, ICSID Case No ARB(AF)/04/01, para 145 (2008); *Gabčíkovo-Nagymaros Project*, Advisory Opinion [1997] ICJ Rep 7, dissenting opinion of Judge Vereshchetin, [83]; *Responsibility of Germany for Damage Caused in the Portuguese Colonies in the South of Africa (Naulilaa Incident) (Portugal v Germany)* II RIAA 1011, 1028 (1928).

[42] ARSIWA (n 40) art 50(1)(a). See David J Bederman, 'Counterintuiting Countermeasures' (2002) 96 *American Journal of International Law* 817; Enzo Cannizzaro, 'The Role of Countermeasures in the Law of International Countermeasures' (2001) 12 *European Journal of International Law* 889. For further discussion see Starski (n 7) 467.

[43] ARSIWA (n 40) art 25.

[44] *Gabčíkovo-Nagymaros Project* (n 41) [51]–[52].

[45] *Enron v Argentina* (2007) ICSID Case No ARB/01/3, para 308.

[46] UNSC Res 2268 (26 February 2016), UN Doc S/RES/2268, para 2; UNSC Res 2254 (18 December 2015), UN Doc S/RES/2254, para 2.

[47] Liz Fields, 'UNICEF Wants State Officials to Negotiate with Islamic State to Help Aid Delivery', *Vice News*, 13 March 2015, https://news.vice.com/article/unicef-wants-state-officials-to-negotiate-with-islamic-state-to-help-aid-delivery.

[48] ARSIWA (n 40) commentary to art 25, para 19.

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2.3. The Principle of Non-Intervention

Another norm of relevance for the case study of the Islamic State is the principle of non-intervention. This customary rule is anchored in Article 2(7) of the UN Charter, and it stems from the principle of sovereignty.[49] Notwithstanding its importance and binding legal status, Schachter stated in 1982 that foreign military interventions in civil wars have been so common that it seemed as if the rule of non-intervention had been stood on its head.[50] Similarly, it has been stated more recently by Schmitt and Wall that this principle is more apparent in its breach than in its observance.[51] Still, as will be shown in this article, this customary rule is of relevance to the case of the Islamic State.

The ICJ has instructed that in order for an intervention to be considered illegal, two elements must be examined. First, illegal intervention deals with matters regarding which a sovereign state is free to decide on its own, such as its political or economic system.[52] Second, illegal intervention must involve coercion.[53] In simple words, intervention occurs when there exists a coercive interference by a state in the internal or foreign affairs of another state.[54] In practice, organising, instigating, assisting, financing or participating in insurrections in favour of an NSA engaged in hostilities against the sovereign government, or against other NSAs, constitutes unlawful intervention.[55] As stated by the ICJ in the *Nicaragua* case, other forms of involvement in civil wars can also amount to a violation of the principle of non-intervention, such as humanitarian assistance on a selective basis intended to assist only one specific NSA and not the entire larger population, as was given by the United States in that case.[56] In comparison, the US cessation of economic aid, and the imposition of import restrictions and trade embargo against Nicaragua, were *not* considered to have violated this principle.[57] In recent years, cyber capabilities allow for new ways of non-physical intervention, which brought back the focus on the principle of non-intervention, in order to perform manipulation of elections or other attempts to influence public opinion.[58] As will be shown, this principle is of

[49] UN Charter (n 18) art 2(7); Schmitt and Wall (n 34) 354.
[50] Oscar Schachter, 'International Law in Theory and Practice' (1982) 178 *Recueil des Cours* 160. For more discussion in the same vein see Schachter (n 29) 158.
[51] Schmitt and Wall (n 34) 355.
[52] *Nicaragua v US* (n 21) [205].
[53] Other terms parallel with 'coercive' are 'forcible' or 'dictatorial': see Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (9th edn, Oxford University Press 1992) 43.
[54] Philip Kunig, 'Intervention, Prohibition of', *The Max Planck Encyclopedia of Public International Law* 1, para 4, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1434?prd=EPIL; Eliav Lieblich, 'Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements' (2011) 29 *Boston University International Law Journal* 337.
[55] *Nicaragua v US* (n 21) [205], [242]; *Democratic Republic of the Congo v Uganda* (n 29) [165]; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970), UN Doc A/RES/2625. For more discussion relating to intervention in civil wars see Gray (n 17) 623.
[56] *Nicaragua v US* (n 21) [243]; Schmitt and Wall (n 34) 361.
[57] *Nicaragua v US* (n 21) [243]; For further discussion see Lieblich (n 54).
[58] For discussion see Michael N Schmitt, *The Tallinn Manual on the International Law Applicable to Cyber Warfare* (Cambridge University Press 2013) 47; Terry Gill, 'Non-Intervention in the Cyber Context' in

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relevance when it comes to the use of force in Syria as part of the military campaign against the Islamic State.

2.4. THE STATE-CENTRED NATURE OF *JUS AD BELLUM*

Jus ad bellum as a legal concept reflects a state-centred perception in that it lies firmly on the understanding that states are the main players.[59] Henkin suggested that the state system traditionally is committed to territorial integrity, a particular manifestation of state sovereignty, which excludes all forms of external intervention, even for noble purposes.[60] In the traditional view of the ICJ, reflecting a state-centred perspective, the scope of the principle of territorial integrity is confined to the sphere of *relations between states*,[61] which excludes NSAs. Another aspect of this discussion is the debate over the existence of a right of self-defence against an NSA.[62] There are two main approaches in this regard. On the one hand, the Security Council has recognised the right of self-defence in the context of terror attacks conducted by NSAs.[63] By contrast, the ICJ has presented a significantly more traditional and state-centred perspective. In the view of the Court, if a state wishes to treat an attack by an NSA as an armed attack and to respond based on the right of self-defence, there is first a need to attribute the act to a sovereign state.[64] Against this backdrop, some claim that there is no right to use force against an NSA on the territory of another state unless some form of attribution to a state exists,[65] while others believe that

Katharina Ziolkowski (ed), *Peacetime Regime for State Activities in Cyberspace* (NATO CCD COE Publication 2013) 234.

[59] Christine Longo, 'R2P: An Efficient Means for Intervention in Humanitarian Crises: A Case Study of ISIL in Iraq and Syria' (2016) 48 *The George Washington International Law Review* 893, 896.

[60] Louis Henkin, 'That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera' (1999) 68(1) *Fordham Law Review* 1, 10.

[61] *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion [2010] ICJ Rep 403, [80].

[62] For discussion see Brian Finucane, 'Fictitious States, Effective Control, and the Use of Force Against Non-State Actors' (2012) 30 *Berkeley Journal of International Law* 35; Norman G Printer, 'The Use of Force Against Non-State Actors under International Law: An Analysis of the U.S. Predator Strike in Yemen' (2013) 8 *UCLA Journal of International Law and Foreign Affairs* 331.

[63] UNSC Res 1368 (12 September 2001), UN Doc S/RES/1368; UNSC Res 1373 (28 September 2001), UN Doc S/RES/1373; UNSC Res 1438 (14 October 2002), UN Doc S/RES/1438; UNSC Res 1530 (11 March 2004), UN Doc S/RES/1530.

[64] *Legal Consequences of the Construction of a Wall* (n 17) [139] ('Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State'). A different view was presented by three judges on the panel, according to which there is nothing in the text of Article 51 that stipulates that self-defence is available only when an armed attack is made by a state, or that excludes the application of this article against attacks by an NSA. See ibid para 33 of the separate opinion of Judge Higgins, para 35 of the separate opinion of Judge Kooijmans, and para 6 of the declaration of Judge Buergenthal. A similar view to that of the majority was evidenced in *Armed Activities on the Territory of the Congo* (n 29) [146]–[147]. In this instance, Judge Simma noted (para 11 of his separate opinion) the practice of the Security Council which allowed for the use of force against an NSA.

[65] Kajtar (n 3) 573; see also Gray (n 20) 135–38.

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states that fall victim to an attack by an NSA that meets a certain level of gravity may respond with the use of military force.[66] In any case, even if states are entitled to use force against NSAs in the territory of a third state, they must first seek the *consent* of the host state before they can use military force in that territory.[67]

As for the question of whether the prohibition on the use of force applies to NSAs as it applies to states,[68] the uncertainty is even greater. The traditional interpretation of Article 2(4) of the UN Charter is that the prohibition anchored in it applies only to use of force among states.[69] Corten, for example, believes that at present there is no general agreement which expands the prohibition on the use of force to relations which are not among states.[70] When discussions on the definition of aggression took place at the UN General Assembly, several states (Australia, Canada, Italy, Japan, the United States and the United Kingdom) suggested that the prohibition against the use of force applies to all political entities which are delimited by internationally recognised lines of demarcation or boundaries.[71] Eventually, the definition suggested by the General Assembly in 1974,[72] which was the predominant definition of aggression and the basis for the modern rule in the Statute of the International Criminal Court (ICC),[73] focused on the use of force by states, reflecting the state-centred preference of international law generally and particularly *jus ad bellum*.[74] One exception to the focus on states was Article 3(g) of the resolution which prohibited the use by a state of armed bands, or other types of NSA,[75] in order to carry out acts of armed force against other states; this is still a reference to NSAs but from a Westphalian perspective. An additional exception was Article 7 of the resolution, which states that nothing in the definition of aggression could in any way prejudice the right of self-determination, freedom and the independence of peoples forcibly deprived of that right, particularly people under colonial, racist or other forms of alien domination, and it also cannot deprive

[66] See, eg, Sean D Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter' (2002) 43 *Harvard International Law Journal* 41, 47–51; Stahn (n 20) 36; Franck (n 20) 840; Karl Zemanek, 'Response to a Terrorist Attack: A Clarification of Issues' (2013) 15 *Austrian Review of International and European Law* 199, 209. For elaboration about the suggestion in the German parliament that customary international law evolved in a way that allows the attacking of an NSA, see Anne Peters, 'German Parliament Decides to Send Troops to Combat ISIS – Based on Collective Self-Defence "in Conjunction with" SC Res. 2249', *EJIL: Talk!*, 8 December 2015, https://www.ejiltalk.org/german-parlament-decides-to-send-troops-to-combat-isis-%E2%88%92-based-on-collective-self-defense-in-conjunction-with-sc-res-2249.

[67] Jackson (n 6) 161; Cheng (n 26).

[68] Schachter (n 29) 119.

[69] Tsagourias (n 22) 327.

[70] Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart 2010) 311–401.

[71] Draft Proposal Submitted by Australia, Canada, Italy, Japan, the United Kingdom of Great Britain and Northern Ireland and the United States of America (25 March 1969), UN Doc A/AC/.134/L.17.

[72] UNGA Res 3314 (XXIX) (14 December 1974), UN Doc A/RES/3314(XXIX).

[73] Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90, art 8 *bis*.

[74] Christian J Tams, 'Self-Defence against Non-State Actors: Making Sense of the "Armed Attack" Requirement' in Mary Ellen O'Connell, Christian J Tams and Dire Tladi, *Self-Defence against Non-State Actors* (Cambridge University Press 2019) 132.

[75] UNGA Res 3314 (n 72).

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such people of the right to struggle in accordance with the principles of the UN Charter and in conformity with it.[76]

The view presented in the General Assembly resolution defining aggression, along with additional General Assembly resolutions which dealt with self-determination and the struggle against oppression, brought Samuel,[77] Wolfrum and Philipp,[78] to claim that NSAs can resort to forceful measures in their exercise of self-determination against alien subjugation,[79] colonialism,[80] racist regimes[81] or foreign occupation,[82] without violating the prohibition on the use of force. Regardless of whether this is indeed the case, it must be stressed that none of these exceptional situations are relevant to the case of the Islamic State, as will be elaborated in the next section. Another line of reasoning, noted by Tsagourias,[83] is that once the prohibition on the use of force reached customary status[84] it became binding on all international actors, including NSAs. Tsagourias believes that his view is reflected, for example, in the view of the ICJ in its *Reparations* Advisory Opinion, which dealt with the status of the United Nations as an international player. Here, the Court stated that subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights.[85] Put simply, the UN has international personality but it does not make it a state as not all legal players are the same.

In conclusion, the question of whether the prohibition on the use of force applies exclusively to relations among states remains controversial. This disagreement reflects more generally tensions which are created in attempting to reconcile state-centred rules with a reality that is much more diverse and includes other players such as NSAs. The following sections highlight even more the difficulty of applying *jus ad bellum* in the context of the Islamic State, which presented a unique and significant challenge before the international community.

3. THE CASE STUDY: THE ISLAMIC STATE IN IRAQ AND SYRIA

The Islamic State took over significant territories in Iraq and Syria, and attempted to establish its authority and govern these territories between 2014 and 2017.[86] In order to do so, the group provided basic services, such as infrastructure maintenance and

[76] ibid, art 7.
[77] Samuel (n 20).
[78] Rüdiger Wolfrum and Christiane E Philipp, *The Status of the Taliban: Their Obligations and Rights under International Law* (Kluwer Law International 2002) 585.
[79] UNGA Res 1514 (n 20) paras 1–2, 4.
[80] UNGA Res 2105 (XX) (20 December 1965), UN Doc A/RES/2105(XX); UNGA Res 2625 (XXV) (n 55).
[81] UNGA Res 2787 (XXVI) (6 December 1971), UN Doc A/RES/2787, para 4.
[82] UNGA Res 42/159 (n 20) para 14.
[83] Tsagourias (n 22) 327.
[84] *Legal Consequences of the Construction of a Wall* (n 17) separate opinion of Judge Elaraby, [3.1]; *Nicaragua v US* (n 21); Gray (n 17) 617.
[85] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949] ICJ Rep 174, 178.
[86] Jackson (n 6) 142; Raufer (n 1) 46; Waltman (n 5). The organisation was originally created by Abu Musab Al-Zarqawi, under the name of Jama'at al-Tawhid w'al-Jihad in 2003, and it was later commissioned by Osama bin Laden as Al-Qaeda in Iraq. After the death of Al-Zarqawi in 2006, it renamed itself as the Islamic

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development,[87] through a sophisticated bureaucratic structure.[88] It also employed a harsh penal and administrative system comprised of the Al-Hisbah morality police, the general police force, courts and entities which managed recruitment, tribal relations and education.[89]

At its height, the Islamic State was considered to be the richest terrorist group in history, as it gained wealth by virtue of oil smuggling, theft, the sale of antiquities, and significant taxation of many aspects of life in the wide territories under its control.[90] While it used to be concentrated in certain areas in Syria and Iraq,[91] as the reputation and capabilities of the Islamic State developed, the geographical scope of the threat it posed became vast given the group's appeal to foreigners who chose to join the group and act on its behalf in different parts of the world.[92]

The Islamic State's vision of statehood draws inspiration from Wahhabism, a doctrine originating in the thirteenth century, which promotes political organisation as a religious monotheistic state.[93] Hence, it is perceived as a religious alternative to the secular legal and social system underlying the international order.[94] In other words, the Islamic State rests on a theological-

State in Iraq (ISI). For discussion see Kadercan (n 2) 64–67. For an elaborated account of the caliphate project see McCants (n 3); Joby Warrick, *Black Flags: The Rise of ISIS* (Doubleday 2016).

[87] Michael Weiss and Hassan, *ISIS: Inside the Army of Terror* (Regan Arts 2016) 169.

[88] UN Security Council, Report of the Secretary-General on the Threat posed by ISIL (Da'esh) to International Peace and Security and the Range of United Nations Efforts in Support of Member States in Countering the Threat (29 January 2016), UN Doc S/2016/92, 2.

[89] UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (5 February 2015), UN Doc A/HRC/28/69, [36]. The Islamic State's vision of statehood has drawn inspiration from Wahhabism, a doctrine that promotes political organisation as a religious monotheistic state and was wedded into Saudi Arabia's political establishment: see McCants (n 3) 121; Robert J Delahunty, 'An Epitaph for ISIS: The Idea of a Caliphate and the Westphalian Order' (2018) 35 *Arizona Journal of International and Comparative Law* 1, 36.

[90] Helen Lock, 'How Isis Became the Wealthiest Terror Group in History', *Independent*, 15 September 2014, http://www.independent.co.uk/news/world/middle-east/how-isis-became-the-wealthiest-terror-group-in-history-9732750.html; Nadan Feldman, 'How ISIS Became the World's Richest Terror Group', *Ha'aretz*, 10 November 2015, http://www.haaretz.com/middle-east-news/isis/1.686287. The organisation was also very well equipped militarily: for example, it had more tanks than the French army: see Raufer (n 1) 46. For an elaboration of the economic capabilities of the Islamic State from a historical perspective, see Patrick B Johnston and others, *Foundations of the Islamic State: Management, Money, and Terror in Iraq, 2005–2010* (RAND 2016). See also Ben Smith, 'ISIS and the Sectarian Conflict in the Middle East', *HC Library Research Paper No 15/16*, 2015, http://researchbriefings.files.parliament.uk/documents/RP15-16/RP15-16.pdf.

[91] At the time of the declaration relating to the establishment of the Caliphate, the Islamic State controlled territory stretching from Mosul to the outskirts of Aleppo in Syria, which is more or less the distance between Washington DC and Cleveland, Ohio: see McCants (n 3) 121.

[92] See Lekas (n 35) 321; Jackson (n 6) 145. For discussion on the spreading of ISIS into other states, see Smith (n 90). For a look at the economic capabilities of the Islamic State, from a historical perspective, see Johnston and others (n 90). For data on the number of foreign fighters in the Islamic State, see 'Foreign Fighters: An Updated Assessment of the Flow of Foreign Fighters into Syria and Iraq', *The Soufan Group*, 2 December 2015, https://wb-iisg.com/wp-content/uploads/bp-attachments/4826/TSG_ForeignFightersUpflow.pdf.

[93] Wahhabism is the intellectual legacy of the thirteenth century Islamic scholar Taqi al-Din Ibn Taymiyyah, as interpreted and enforced by Ibn Abd al-Wahhab and his successors. For discussion see Hassan (n 5); Fouad al-Ibrahim, 'Why ISIS Is a Threat to Saudi Arabia: Wahhabism's Deferred Promise, *Alakhbar English*, 22 August 2014, http://serpent-libertaire.over-blog.com/2014/08/why-isis-is-a-threat-to-saudi-arabia-wahhabism-s-deferred-promise.html.

[94] Kajtar (n 3) 548; Jessica Stern, 'Radicalization to Extremism and Mobilization to Violence: What Have We Learned and What Can We Do about It?' (2016) 668 *Annals* 102, 106.

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political basis, in contrast to the Westphalian legal order, which rests fundamentally on human consent, without the necessity of attachment to religion.[95]

A turning point in the international attention directed at the group occurred when the Islamic State was accused of committing acts of murder, abduction, expulsion, rape and other human rights violations against the Yazidi minority in Iraq.[96] In response, two coalitions were formed to join military forces fighting against the group.[97] The US-led coalition operated in the territories under the group's control both in Iraq[98] and in Syria.[99] In addition, the US-led coalition provided training and equipment for groups involved in hostilities against the Islamic State from the ground,[100] such as the Kurdish Peshmerga.[101] Other measures have also been taken, such as the imposition of sanctions against individuals, groups and entities which provided support to the Islamic State (in terms of financing, arming, planning and recruiting).[102] In the midst of all of these occurrences Syria asked Russia to provide military assistance in combating the Islamic State and other terrorist groups operating in Syria.[103] As can easily be seen, the international involvement in the Syrian context was neither unified, nor did it speak in a single voice. Instead, different states adopted diverse allies in the conflict and supported them in various ways. In particular, Turkey, Saudi-Arabia, Jordan, Qatar, the US, the UK and France supported Syrian opposition,[104] while Russia and Iran provided military support, training, equipment and arms to the Syrian government forces, alongside reinforcement from Hezbollah, which deployed its members in Syrian territory to support the Assad government.[105]

[95] For discussion of the secular basis of the current international order see Mark Lilla, *The Stillborn God: Religion, Politics, and the Modern West* (Penguin Random House 2008) 7. The goal of the Islamic State is to monopolise Sunni political representation and disseminate monotheism. This wish is based on the concept of *bidah*, an Islamic term which forbids the inventing of religious practices unsanctioned by the religion, which is used to label practices, largely Sufi and Shia, as polytheistic: see Hassan (n 5); see also Chelsea Elizabeth Bellew, 'Secession in International Law: Could ISIS Become a Legally Recognized State?' (2015) 42 *Ohio Northern University Law Review* 239, 259; Stern (n 94) 107.

[96] Waltman (n 5) 826–27; Hassan (n 5); Siddique (n 5).

[97] Jackson (n 6) 134.

[98] US Department of Defense, Press Release, 'Statement by Pentagon Press Secretary Rear Admiral John Kirby on Airstrikes in Iraq', 10 August 2014, http://www.defense.gov/Releases/Release.aspx?ReleaseID=16878.

[99] Air strikes in Syria focused on significant strongholds as well as strategic targets, such as oil fields: see Jackson (n 6) 134; Claudette Roulo, 'U.S. Begins Airstrikes Against ISIL in Syria', US Department of Defense, 22 September 2014, http://www.defense.gov/news/newsArticle.aspx?id=123233.

[100] Jackson, ibid.

[101] Kadercan (n 2) 78–80.

[102] UNSC Press Release, 'Security Council Al-Qaida Sanctions Committee Amends Three Entries on Its Sanctions List' (2 June 2014), SC/11424.

[103] Kajtar (n 3) 556. Pursuant to this request, Russia began missile strikes in Syria on 30 September 2015 and continues to support the Syrian government until now: see, eg, UN Security Council, Letter dated 15 October 2015 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council (15 October 2015), UN Doc S/2015/792.

[104] There have been numerous NSAs involved in the Syrian civil war, including, but not only the following: The Free Syrian Army; Ahrar Al-Sham Coalition; Jaish Al-Islam; Katazb Thuwar Al Sham; Jaish Al-Islam; Shamia Front; Mujahidi Ibn Taimia; Liwa Miqdad Bin Amro; Jaish Al-Mujahidin; Tajamu Fastaqim Kama Umirt; Sukour Al-Sham; Jabhat al-Nusra (The Nusra Front); Kurdish Democratic Unity Party; Popular Protection Units; National Coalition of Revolutionary and Opposition Forces.

[105] For discussion see Kajtar (n 3) 540.

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The use of force in Iraq was justified by Iraq's request for assistance;[106] hence this consent precludes any wrongfulness on the part of the intervening states from the perspective of *jus ad bellum*.[107] Syria, by contrast, voiced its disapproval of the use of force in its territory against the Islamic State and of assistance provided to opposition NSAs operating in its territory,[108] with the exception of Russia and Iran which had been invited to assist the Syrian government.[109] Pursuant to this, the discussion below of the legality of the military campaign against the Islamic State will focus on the use of force in Syria, as the campaign in Iraq does not raise significant legal questions relating to *jus ad bellum*.

The international intervention against the Islamic State incentivised the latter to operate outside Iraq and Syria. An illustrative example is the chain of attacks that took place on 13 November 2015, when operatives of the group simultaneously attacked six locations in Paris (France), taking the lives of 126 persons in the most significant attack on French soil since the Second World War.[110] This deadly attack drew momentous attention, yet it was far from being the only major attack outside Iraq and Syria. During the period 2015 to 2019, more than 2,000 people lost their lives in Islamic State-related attacks *outside* Iraq and Syria,

[106] UN Security Council, Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary General (25 June 2014), UN Doc S/2014/440 ('We therefore request urgent assistance from the international community'); UN Security Council, Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of Security Council (20 September 2014), UN Doc S/2014/691 ('It is for these reasons that we, in accordance with international law and the relevant bilateral and multilateral agreements, and with due regard for complete national sovereignty and the Constitution, have requested the United States of America to lead international efforts to strike ISIL sites and military strongholds, with our express consent … We are grateful for the international community's support and believe that the provision of additional assistance for the specific purpose of targeting ISIL will further help the Iraqi people and the security forces to turn the tide in the struggle against the terrorists, and thereby restore security and stability in our territory').

[107] Schachter (n 29) 114; ARSIWA (n 40) art 20(1). For further discussion see James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2002) ARSIWA, ibid, commentary to art 20(1), 72–74.

[108] UN Security Council, Identical Letters dated 17 September 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council (21 September 2015), UN Doc S/2015/719; UN Security Council, Identical Letters dated 18 September 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council (22 September 2015), UN Doc S/2015/727; Ryan Goodman, 'Taking the Weight off of International Law: Has Syria Consented to US Airstrikes', *Just Security*, 23 December 2014, http://justsecurity.org/18665/weightinternational-law-syria-consented-airstrikes/.

[109] UNSC, Letter dated 15 October 2015 (n 103). For elaboration see Kajtar (n 3) 556.

[110] The attacks took place, inter alia, in the vicinity of the Stade de France (football stadium) while it hosted a national team game with many spectators, including the French President François Hollande, as well as on the streets of Paris and Le Petit Cambodge and Le Carillon restaurants. The deadliest part of the attack took place at a rock performance at the Bataclan Theatre. The Islamic State justified the attack as a response to French participation in the coalition operating against the group: for discussion see Marko Milanovic, 'France Derogates from ECHR in the Wake of the Paris Attacks', *EJIL: Talk!*, 13 December 2015, http://www.ejiltalk.org/france-derogates-from-echr-in-the-wake-of-the-paris-attacks; Marc Weller, 'Permanent Imminence of Armed Attacks: Resolution 2249 (2015) and the Right to Self Defence Against Designated Terrorist Groups', *EJIL: Talk!*, 25 November 2015, http://www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-self-defence-against-designated-terrorist-groups.

https://doi.org/10.1017/S0021223720000151 Published online by Cambridge University Press

with two notable attacks being the shooting in Sousse (Tunisia) when 38 people died, and the bombing of a Russian aircraft in Sinai (Egypt), killing 22 people.[111]

In Syria and Iraq, where the Islamic State attempted to establish its caliphate, the US-led coalition started to conduct air strikes against areas held by the group. In Iraq this began in August 2014,[112] and September 2014 in Syria.[113] Some attacks also took place outside Iraq and Syria, such as in Libya.[114] The air strikes against the Islamic State included significant military strongholds as well as strategic targets like oil fields, and against leaders of the group.[115]

During the period 2014 to 2017, the US-led coalition conducted over 10,000 bombing missions in Iraq and Syria against the Islamic State, leading to tens of thousands of casualties and significant destruction of private and public property.[116] Since the beginning of this campaign Syria and Russia have opposed it and called it an act of aggression.[117] During three years of intense military operations against the group, the Islamic State lost most of the territory in Iraq and Syria that it used to control,[118] and its income has declined significantly.[119] In

[111] For elaboration see Karen Yourish and others, 'How Many People Have Been Killed in ISIS Attacks Around the World', *New York Times*, 16 July 2016, https://www.nytimes.com/interactive/2016/03/25/world/map-isis-attacks-around-the-world-DE.html; Kadercan (n 2) 64; Tim Lister and others, 'ISIS Goes Global: 143 Attacks in 29 Countries Have Killed 2,043', *CNN*, 12 February 2018, https://edition.cnn.com/2015/12/17/world/mapping-isis-attacks-around-the-world/index.html.

[112] US Department of Defense (n 98); Dapo Akande and Zachary Vermeer, 'The Airstrikes against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars', *EJIL: Talk!*, 2 February 2015, http://www.ejiltalk.org/theairstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civilwars; Raphael Van Steenberghe, 'The Alleged Prohibition on Intervening in Civil Wars Is Still Alive after the Airstrikes against Islamic State in Iraq: A Response to Dapo Akande and Zachary Vermeer', *EJIL: Talk!*, 12 February 2015, http://www.ejiltalk.org/the-alleged-prohibition-on-intervening-in-civil-wars-is-still-alive-after-theairstrikes-against-islamic-state-in-iraq-a-response-to-dapo-akande-and-zachary-vermeer.

[113] From August 2014 to March 2015 the coalition conducted 1,700 air strikes in Iraq, and the US conducted 946 air strikes in Syria: Lekas (n 35) 324; Laura Visser, 'Russia's Intervention in Syria', *EJIL: Talk!*, 25 November 2015, http://www.ejiltalk.org/russias-intervention-in-syria; Dapo Akande, 'Embedded Troops and the Use of Force in Syria: International and Domestic Law Questions', *EJIL: Talk!*, 11 September 2015, http://www.ejiltalk.org/embedded-troops-and-the-use-of-force-in-syria-international-and-domestic-law-questions.

[114] Jake Rylatt, 'The Use of Force against ISIL in Libya and the Sounds of Silence', *EJIL: Talk!*, 6 January 2016, http://www.ejiltalk.org/the-use-of-force-against-isil-in-libya-and-the-sounds-of-silence.

[115] Jackson (n 6) 156; Roulo (n 99).

[116] Participating aircraft included F-15, F-16, F/A-18, F-22 fighter aircraft and B-1 bombers, alongside Tomahawk missiles deployed from US naval vessels: for discussion see Scharf (n 32) 9. For updated numbers, see Global Conflict Tracker, Council of Foreign Relations, https://www.cfr.org/nteractives/global-conflict-tracker#!/conflict/war-against-islamic-state-in-iraq; 'Islamic State and the Crisis in Iraq and Syria in Maps', *BBC News*, 28 March 2018, https://www.bbc.com/news/world-middle-east-27838034.

[117] UNSC, Identical letters dated 17 September 2015 (n 108); UNSC, Identical letters dated 18 September 2015 (n 108); Jackson (n 6) 157; Goodman (n 108); Ryan Goodman, 'Assad: Willing to Risk Direct Confrontation with U.S. over Moderate Rebels – and Stronger Opposition to US Airstrikes', *Just Security*, 27 January 2015, http://justsecurity.org/19419/syria-assad-risk-directconfrontation-moderate-rebels-opposition-airstrikes; Smith (n 90).

[118] Jones and others (n 8).

[119] This occurred mainly because of the territorial losses, bringing about a dramatic reduction of 80% from 2015 to 2017 in its average monthly revenue: see Jackson (n 6) 142. For elaboration see Stefan Heissner and others, 'Caliphate in Decline: An Estimate of Islamic State's Financial Fortunes' (2017) *Report of The International Centre for the Study of Radicalisation*, http://icsr.info/wp-content/uploads/2017/02/ICSR-Report-Caliphate-in-Decline-An-Estimate-of-Islamic-States-Financial-Fortunes.pdf.

October 2017 the coalition-backed forces on the ground captured Raqqa, the declared capital of the Islamic State.[120] In the view of some states – including Iraq, Russia and Iran – this move marked the end of the Islamic State, or at least the end of the project of the caliphate.[121]

By 2018 the Islamic State held only a small percentage of the territory it took over in 2014, and only around 1,000 members of the group remained in Iraq and Syria.[122] As time moved on, and the territory under the control of the group dwindled, the Islamic State shifted its focus from attempting to govern the territory to its old tactics. The once self-proclaimed caliphate has transformed back into a more traditional terrorist group with clandestine networks of cells engaged in guerrilla attacks, bombings and targeted assassinations.[123] By March 2019 the Islamic State had lost all the territories it previously held in Iraq and Syria.[124] On 27 October 2019, the leader of the group, Abu Bakr al-Baghdadi, was killed during a raid led by the US.[125]

As can be seen, the Islamic State suffered a significant demise in Iraq and Syria, which seems final. Yet, it is too soon to declare the end of the Islamic State because the group still poses a threat in two main respects. First, it still has affiliates in various states around the world, such as Algeria, Afghanistan, Egypt, Libya, Malaysia, Nigeria, the Philippines and Somalia.[126] Hence, it is still possible that the Islamic State will pursue the establishment of a caliphate in a different part of the world under its control,[127] as the group has already demonstrated its ability to make use of the benefit of political resentment of disenfranchised Sunni Muslims in Shia-dominated Iraq in order to regroup and resurrect in a new and improved

[120] Coker, Schmitt and Callimachi (n 9).
[121] Emma Graham-Harrison, 'Iraq Formally Declares End to Fight against Islamic State', *The Guardian*, 9 December 2017, https://www.theguardian.com/world/2017/dec/09/iraq-formally-declares-end-to-fight-against-islamic-state; Babak Dehghanpisheh, 'Iran's President Declares End of Islamic State', *Reuters*, 21 November 2017, https://www.reuters.com/article/us-mideast-crisis-rouhani-islamic-state/irans-president-declares-end-of-islamic-state-idUSKBN1DL0J5; Alec Luhn, 'Russia Declares "Mission Accomplished" against Islamic State in Syria', *The Telegraph*, 7 December 2017, http://www.telegraph.co.uk/news/2017/12/07/russia-declares-mission-accomplished-against-islamic-state-syria.
[122] 'US-Led Coalition Strikes Kill 150 Islamic State Militants in Syria', *The Guardian*, 24 January 2018, https://www.theguardian.com/us-news/2018/jan/24/us-led-coalition-strikes-kill-150-islamic-state-militants-in-syria.
[123] Eric Schmitt and others, 'Its Territory May Be Gone, but the U.S. Fight Against ISIS Is Far From Over', *New York Times*, 24 March 2019, https://www.nytimes.com/2019/03/24/us/politics/us-isis-fight.html?rref=collection%2Ftimestopic%2FIslamic%20State%20in%20Iraq%20and%20Syria%20(ISIS). See also Coker, Schmitt and Callimachi (n 9).
[124] Wu, Watkins and Callimachi (n 10).
[125] Martin Chulov, 'Nowhere Left to Run: How the US Finally Caught Up with ISIS Leader Baghdadi', *The Guardian*, 27 October 2019, https://www.theguardian.com/world/2019/oct/27/nowhere-left-to-run-how-the-us-finally-caught-up-with-isis-leader-baghdadi.
[126] McCants (n 3) 140. See also Warrick (n 86); William McCants and Craig Whiteside, 'The Islamic State's Coming Rural Revival', *Brookings*, 25 October 2016, https://www.brookings.edu/blog/markaz/2016/10/25/the-islamic-states-coming-rural-revival.
[127] For example, the Australian Attorney General referred to the possibility that the Islamic State might seek to establish a caliphate in Indonesia: Adam Brereton, 'ISIS Seeking to Set Up "Distant Caliphate" in Indonesia, George Brandis Warns', *The Guardian*, 21 December 2015, https://www.theguardian.com/world/2015/dec/22/isis-seeking-to-set-up-distant-caliphate-in-indonesia-george-brandis-wams. Another possible effect of the Islamic State is that the resurgence of the idea of a caliphate will have spillover effects for the evolution of radical Islamic movements across the Muslim world: for discussion see Shmuel Bar, 'The Implications of the Caliphate' (2016) 35 *Comparative Strategy* 1, 8.

form.[128] Second, many fighters with the Islamic State have made their way to other states, including in the West and, in particular, in Europe.[129] Accordingly, sleeper cells may have been put in place in the United States, Europe and other Western states long before the battlefield losses mounted.[130] Returning fighters may decide to engage in terror attacks or promote radicalisation, sectarian tensions, and maybe even some form of a political renaissance for the idea that the Islamic State symbolises.[131]

4. THE LEGALITY OF THE MILITARY CAMPAIGN AGAINST THE ISLAMIC STATE IN SYRIA

Syria protested against two main aspects of the military efforts against the Islamic State: (i) the use of military force in its territory without its consent; and (ii) granting assistance to opposition NSAs operating in Syria.[132] The exceptions, as noted, were from Russia and Iran, which were invited to assist the Syrian government.[133] This section will present justifications raised by leading states in the US-led coalition, and then discuss the nature and legality of the doctrine of 'unwilling or unable'. It will then examine whether Syria was indeed unwilling or unable to combat the Islamic State, and finally it will suggest a functional approach as the way forward.

4.1. LEGAL JUSTIFICATIONS FOR THE USE OF FORCE IN SYRIA

One justification put forward for the use of force in Syria without the latter's consent, invoked by Germany and Belgium, was that the request of the government of Iraq to assist it in the fight against the Islamic State, as part of an effort of collective self-defence, includes the ability to use force in areas in Syria.[134] This justification portrays the military effort as the realisation of

[128] When American-led forces withdrew from Iraq in 2011 it was estimated that the Islamic State's predecessor, the Islamic State of Iraq, was down to a few hundred soldiers. Within three years, however, the group of diminished insurgents was able to regroup and roar across Iraq and Syria, declaring an Islamic caliphate from the Mediterranean coast of Syria almost to the Iraqi capital, Baghdad: see Coker, Schmitt and Callimachi (n 9); Kadercan (n 2) 64–67.

[129] Foreign fighters can move around on their passports for as long as no personal sanctions exist against them; other fighters have also tried to use the wave of refugees from Syria and Iraq into Europe and enter under the pretence of escaping from the hostilities: for discussion see Thomas R McCabe, 'Jihad in the West: Are Returning Jihadists a Major Threat?' (2017) 24 *Middle East Quarterly* 1, 2.

[130] Coker, Schmitt and Callimachi (n 9).

[131] Another danger arises from cases involving 'lone wolf' assaults, which are inspired or enabled by Islamic State propaganda online: for discussion of the phenomenon see Haider Ala Hamoudi, '"Lone Wolf" Terrorism and the Classical Jihad: On the Contingencies of Violent Islamic Extremism' (2015) 11 *Florida International University Law Review* 19; Alexander Tsesis, 'Social Media Accountability for Terrorist Propaganda' (2017) 86 *Fordham Law Review* 605.

[132] Syria and Russia released statements opposing the US campaign in Syria, calling it an act of aggression: see Jackson (n 6) 135; UNSC, Identical letters dated 17 September 2015 (n 108); UNSC, Identical letters dated 18 September 2015 (n 108); Goodman (n 108); Goodman (n 117); Smith (n 90).

[133] UNSC, Letter dated 15 October 2015 (n 103); for elaboration see Kajtar (n 3) 556.

[134] UNSC, Letter dated 10 December 2015 from the Chargé d'Affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council (10 December 2015), UN Doc S/2015/946

https://doi.org/10.1017/S0021223720000151 Published online by Cambridge University Press

the right of collective self-defence against the Islamic State on behalf of Iraq.[135] The problem, however, is that Iraq can only consent to the deployment of military force in its territory; it has no authority relating to the territory of neighbouring Syria. Such a broad reading of the right of collective self-defence carries the potential to affect the scope and duration of the right to use military force under Article 51 of the UN Charter. In addition, this justification conflicts with the view of the ICJ, according to which self-defence applies against NSAs provided their actions can be imputed to another state.[136]

As for the United Kingdom, it contended *initially* that it is using force in the exercise of inherent individual and collective self-defence, based on Iraq's invitation. This justification is another broad reading of the right of collective self-defence, as was raised by Belgium and Germany. In a note sent to the Security Council, it was stated that the UK attacked a specific target in Syria that had planned and directed an imminent armed attack against it.[137] The note does not specify who the target was, the armed attacks that were planned, or any other relevant piece of information which could help to appraise the validity of its proposition. The factual ambiguity can be explained by reasons of national security, but the lack of a proper legal basis cannot be justified in a similar manner.[138] While the UK can reply to an armed attack against it, there is doubt whether it can act in an anticipatory fashion to prevent it beforehand in the face of an attack (especially when the gravity of the attack is unclear); even if there was an initial right to use

('ISIL has carried out, and continues to carry out, armed attacks against Iraq, France, and other States … States that have been subjected to armed attack by ISIL originating in this part of Syrian territory are therefore justified under Article 51 of the Charter of the United Nations to take necessary measures of self-defence, even without the consent of the Government of the Syrian Arab Republic. Exercising the right of collective self-defence, Germany will now support the military measures of those States that have been subjected to attacks by ISIL'); UNSC, Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council (9 June 2016), UN Doc S/2016/523 ('the Kingdom of Belgium is taking necessary and proportionate measures against the terrorist organization "Islamic State in Iraq and the Levant" (ISIL, also known as Da'esh) in Syria in the exercise of the right of collective self-defence, in response to the request from the Government of Iraq … In the light of this exceptional situation, States that have been subjected to armed attack by ISIL originating in that part of the Syrian territory are therefore justified under Article 51 of the Charter to take necessary measures of self-defence. Exercising the right of collective self-defence, Belgium will support the military measures of those States that have been subjected to attacks by ISIL. Those measures are directed against the so-called "Islamic State in Iraq and the Levant" and not against the Syrian Arab Republic').

[135] *Nicaragua v US* (n 21) [95];

[136] *Legal Consequences of the Construction of a Wall* (n 17) separate opinion of Judge Elaraby, [139]; *Democratic Republic of the Congo v Uganda* (n 29) [146]–[147].

[137] UNSC, Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council (26 November 2014), UN Doc S/2014/851 ('I am writing in accordance with Article 51 of the Charter of the United Nations to report to the Security Council that the United Kingdom of Great Britain and Northern Ireland is taking measures in support of the collective self-defence of Iraq as part of international efforts led by the United States. These measures are in response to the request by the Government of Iraq for assistance in confronting the attack by the Islamic State in Iraq and the Levant (ISIL) on Iraq').

[138] The UK also mentions in a third letter sent to the Security Council that its use of force is applied as called for by the Security Council in its Resolution 2249 (n 4) but, as will be discussed in the next chapter, reliance on Security Council authorisation relating to the Islamic State seems as problematic as the other justifications raised by the UK: for further discussion see the next section of this article. For the UK justification see UNSC, Letter dated 7 September 2015, ibid; Arabella Lang, 'Legal Basis for UK Military Action in Syria' (2015) *HC Library Briefing Paper No. 7404*, http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7404#fullreport.

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force, the existence of a threat, as well as its imminence, should be appraised. On the other hand, there are, naturally, more expansive views. For example, Reisman and Armstrong claim that imminence is interpreted more flexibly in state responses to terrorist organisations;[139] Hakimi believes that anticipatory self-defence might already be shifting, or might soon shift, towards the more permissive view.[140] In any case, the decision of the UK to employ vague legal explanations is worrying as it is a permanent member of the Security Council, and hence it is doubtful that the Council would be able to limit its operations.

Vague explanations by the United Kingdom, along with unconvincing explanations presented by Belgium and Germany at the earlier stages of the military campaign, indicate that states involved in the military campaign against the Islamic State allowed themselves greater 'leeway of justification' as the Security Council was unable to authorise the use of military force against the Islamic State,[141] and given the international support – almost consensual – for the need to fight the group.[142] In simple words, it might have been easier to present controversial justifications against the Islamic State, in the context of the prolonged and disastrous civil war in Syria, and to portray it as a 'lesser evil'. Nevertheless, we must recall that while the military campaign against the group was successful in terms of driving it away from the territories it occupied, it is not at all clear that the general welfare of the Syrian population improved as a result; nor did the military campaign prevent attacks against civilians by players other than the Islamic State – most notably the Syrian government.[143]

A more nuanced argument has been put forward by the United States, another permanent member of the Security Council and leader of the most prominent coalition against the Islamic State. The US originally raised several claims to support its use of force in Syria,[144] but its main and most consistent claim is that Syria is 'unwilling or unable' to address the threat

[139] W Michael Reisman and Andrea Armstrong, 'The Past and Future of the Claim of Preemptive Self-Defense' (2006) 100(3) *American Journal of International Law* 525.

[140] Monica Hakimi, 'The UK's Most Recent Volley on Defensive Force', *EJIL: Talk!*, 12 January 2017, https://www.ejiltalk.org/the-uks-most-recent-volley-on-defensive-force. As noted by Hakimi, under the 'accumulation of events' theory, multiple small-scale attacks can be considered collectively as creating the right to respond with defensive force.

[141] Scharf (n 32) 23.

[142] The military coalitions enjoyed significant support, but some states did not support them. In particular, Russia was not willing to support any operations without authorisation, and additional criticism was raised by Argentina, Chad, Ecuador, Iran and Venezuela: for discussion see Starski (n 7) 488; Olivier Corten, 'The "Unwilling or Unable" Test: Has It Been, and Could It Be, Accepted?' (2016) 29 *Leiden Journal of International Law* 777, 789.

[143] For example, the Syrian government used chemical agents against its population twice, once in 2017 and once in 2018: for discussion see Mary Ellen O'Connell, 'Unlawful Reprisals to the Rescue against Chemical Attacks?', *EJIL: Talk!*, 12 April 2018, https://www.ejiltalk.org/unlawful-reprisals-to-the-rescue-against-chemical-attacks; Monica Hakimi, 'The Attack on Syria and the Contemporary Jus ad Bellum', *EJIL: Talk!*, 15 April 2018, https://www.ejiltalk.org/the-attack-on-syria-and-the-contemporary-jus-ad-bellum.

[144] Examples include the right of hot pursuit and collective self-defence alongside Iraq. At the domestic level, the US affiliated the Islamic State with Al Qaeda in order to rely on the existing authorisation to use military force against the latter following the attacks on 11 September 2001: see UNSC, Letter dated 23 September 2014 (n 11). For discussion see Marko Milanovic, 'Belgium's Article 51 Letter to the Security Council', *EJIL: Talk!*, 17 June 2016, http://www.ejiltalk.org/belgiums-article-51-letter-to-the-security-council. For discussion see Scharf (n 32) 49.

https://doi.org/10.1017/S0021223720000151 Published online by Cambridge University Press

of the Islamic State; thus, the coalition is entitled to act against it in the course of action in self-defence.[145] The doctrine of 'unwilling or unable' has been raised in the past only by the US[146] in order to justify drone strikes in, for example, Yemen, Afghanistan, Pakistan and Somalia.[147] In the context of the Islamic State, after the US paved the way for this claim it has also been raised by Australia,[148] Canada,[149] the UK[150] and Turkey.[151] The military campaign against the Islamic State is a critical juncture in the development of the doctrine, and I will now turn to discuss its nature and legality, and if indeed its main condition was met (whether Syria was 'unable or unwilling' to fight against the Islamic State).

4.2. The Doctrine of 'Unwilling or Unable' in International Law

There is much discussion over the question of whether using military force violates Article 2(4) of the UN Charter when a state is 'unwilling or unable' to act.[152] In particular, there is disagreement relating to the status of the doctrine as an alleged exception to the prohibition against the use of force and, more generally, about its legal status under international law.[153] Before delving into the legal status of the doctrines, some preliminary remarks on its nature are due.

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[145] UNSC, Letter dated 23 September 2014 (n 11) ('ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the US and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations, when, 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 has shown that it cannot and will not confront these safe havens effectively itself').

[146] For discussion see Upendra D Acharya, 'International Lawlessness, International Politics and the Problem of Terrorism: A Conundrum of International Law and U.S. Foreign Policy' (2012) 40 *Denver Journal of International Law and Policy* 144; Ian S Lustick, 'Fractured Fairy Tale: The War on Terror and the Emperor's New Clothes' (2007) 16 *Minnesota Journal of International Law* 335; James Thuo Gathii, 'Failing Failed States: A Response to John Yoo' (2011) 2 *California Law Review Circuit* 40; Arnulf Becker Lorca, 'Rules for the "Global War On Terror": Implying Consent and Presuming Conditions for Intervention' (2012) 45 *New York University Journal of International Law and Politics* 1.

[147] Scharf (n 32) 49; Ryan J Vogel, 'Drone Warfare and the Law of Armed Conflict' (2010) 39 *Denver Journal of International Law and Policy* 101, 131; Kurt Larson and Zachary Malamud, 'The United States, Pakistan, the Law of War and the Legality of the Drone Attacks' (2011) 10 *Journal of International Business & Law* 1, 20; Starski (n 7) 457. Part of the justification for the use of force in states like Yemen was that they were 'lawless areas': for discussion see Joshua Bennett, 'Exploring the Legal and Moral Bases for Conducting Targeted Strikes Outside of the Defined Combat Zone' (2012) 26 *Notre Dame Journal of Law, Ethics & Public Policy* 549.

[148] UNSC, Letter dated 9 September 2015 (n 13).

[149] UNSC, Letter dated 31 March 2015 (n 14).

[150] Green (n 12).

[151] UNSC, Letter dated 24 July 2015 (n 15).

[152] eg, Ashley Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 *Virginia Journal of International Law* 483; Christof Heyns, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (13 September 2013), UN Doc A/68/382, para 91; James Crawford, 'Sovereignty as a Legal Value' in Crawford and Koskenniemi (n 16) 127; Nyamuya Maogoto, 'Somaliland: Scrambled by International Law?' in French (n 16) 220.

[153] Helen Duffy, *The 'War on Terror' and the Framework of International Law* (2nd edn, Cambridge University Press 2015) 291–92. For discussion of the manner in which the actions against the Islamic State affected this doctrine see Scharf (n 32) 49; for a different view see Corten (n 142) 777. For discussion of the application of this doctrine relating to Syria see Johan D van der Vyver, 'The ISIS Crisis and the Development of International Humanitarian Law' (2016) 30 *Emory International Law Review* 532, 557.

As observed by Maogoto, doctrines that override considerations of consent, like 'unwilling or unable', and push the limits of the existing law, reflect a new reality that erode positivist tendencies of the international legal system.[154] Lorca, while tracing the origins of the 'unwilling or unable' doctrine, argues that it derives from the resort of powerful states, at the height of Western colonialism during the nineteenth and early twentieth centuries, to justify interventions – by force or diplomatic means – in pursuit of international claims, concerning the life or property of nationals residing abroad.[155] In his view, since the nineteenth century, voices from non-Western states have contested the legality of interventions to recover damages, and these efforts culminated in the recognition of the principle of non-intervention in the 1933 Montevideo Convention[156] and then in the UN Charter.[157] Pursuant to this, Gathii noted[158] that the modern invocation of ancient doctrines, such as the invocation of 'unwilling or unable', reveals imprints of colonialism and imperialism.[159]

The 'unwilling or unable' doctrine also recalls a return to medieval structures, namely the invocation of legal norms which are characterised by their relative autonomy from existing law,[160] and by the fact that they spring from social life[161] – that is, bottom up.[162] One example is the medieval institution of chivalry, which comprised customary regulations of gallant demeanour for the actions of knights;[163] another is the medieval *lex mercatoria*, created by the merchant community.[164] Historically, before the emergence of *jus ad bellum*, just-war theories prevailed with some version of a 'legitimate authority' constraint, construed as a necessary condition for war.[165] The principle of 'legitimate authority' maintained that a rightful entity can impartially declare war or evaluate whether war is just.[166]

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[154] Maogoto (n 152) 220. For criticism see Gathii (n 146) 44.
[155] Lorca (n 146) 44.
[156] Convention on the Rights and Duties of States (entered into force 26 December 1934) 165 LNTS 19, art 8.
[157] Arnulf Becker Lorca, 'Sovereignty Beyond the West: The End of Classical International Law' (2011) 13 *Journal of the History of International Law* 7, 67.
[158] Gathii (n 146) 48.
[159] Mehta went further and contended that Western states feel an internal urge to disrespect international law when it comes to non-Western states: Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (University of Chicago Press 1999) 20.
[160] Stephan W Schill, 'Lex Mercatoria' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford Public International Law 2014), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1534.
[161] Anna Di Robilant, 'Genealogies of Soft Law' (2006) 54 *American Journal of Comparative Law* 499, 512.
[162] Richard AC Alton, 'An Examination of Historical Reconstruction's Impact on Modern Customary International Law via an Analysis of Medieval Post-Conflict Ransoming of Prisoners' (2016) 39 *Suffolk Transnational Law Review* 271, 276.
[163] Waseem Ahmad Qureshi, 'Examining the Legitimacy and Reasonableness of the Use of Force: From Just War Doctrine to the Unwilling-or-Unable Test' (2018) 42(3) *Oklahoma City University Law Review* 221, 235. The chivalric code distinguished between innocents and combatants, and later influenced scholars such as Grotius in their conceptions of non-combatants. See also Robert W Mcelroy, *Morality and American Foreign Policy* (Princeton University Press 1992) 150.
[164] This system, similar to the chivalric code, was implemented through special, often temporary, merchant courts: for discussion see Schill (n 160); for discussion in the imperial context see James Q Whitman, 'Western Legal Imperialism: Thinking about the Deep Historical Roots' (2009) 10 *Theoretical Inquiries in Law* 305, 322.
[165] Seth Lazar, 'War' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy*, 3 May 2016, https://plato.stanford.edu/entries/war/#LegiAuth.
[166] Qureshi (n 163) 227; see also Cécile Fabre, *Cosmopolitan War* (Oxford University Press 2012) 142.

The doctrine of 'unwilling or unable' evokes medieval structures in two respects: (i) it is a bottom-up course of action that states take relative autonomy from existing law – as the doctrine of 'unwilling or unable is currently not part of the *lex lata*, and; (ii) states take back their role as the legitimate authority which decides that the use of military force is just, even if not as part of self-defence, and diminishes the role of the Security Council as the modern 'legitimate authority' entrusted with maintaining international peace and security since the establishment of the UN. If the doctrine of 'unwilling or unable' evolves into a binding norm, this might lead to a radical change in the United Nations collective security system with the Security Council at the heart of it.[167]

Against this backdrop, I shall move to focus on the legal status, if such indeed exists, of the doctrine. According to Scharf,[168] use of force in the territory of a 'failed state' would not violate territorial integrity if that state does not exercise meaningful control over its borders and territory.[169] Returning to the legal status of the doctrine of 'unwilling or unable', in Scharf's view[170] several developments generated a Grotian Moment,[171] leading to a new rule of customary international law concerning use of force against NSAs. The developments to which Scharf refers are the international military and legal responses to three main events: (i) the systematic Al-Qaeda terrorist attacks against the World Trade Centre and US Pentagon on 11 September 2001;[172] (ii) the attacks by the Islamic State on the Russian airliner in Sinai on 31 October 2015; and (3) the chain of Islamic State attacks that took place in Paris on 13 November 2015.[173]

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[167] Corten (n 142) 797.

[168] Scharf (n 32) 49; see also Gregory M Travalio, 'Terrorism, International Law, and the Use of Military Force' (2000) 18 *Wisconsin International Law Journal* 145.

[169] This rationale is similar to that laid down relating to the doctrine of R2P, discussed at Section 5 of this article, according to which if a certain state is unable or unwilling to stop mass atrocities from occurring on its territory, other states have a collective and subsidiary responsibility to take measures to protect the civilian population. R2P is subject to several criteria: seriousness of the harm; just cause for intervention; intervention as a last resort; proportionality; and an assessment of consequences: see Amir Seyedfarshi, 'French Interventionism in the Age of R2P: A Critical Examination of the Case of Mali' (2016) 7 *Creighton International and Comparative Law Journal* 2, 21; Lekas (n 35) 343. See further Spencer Zifcak, 'The Responsibility to Protect' in Evans (n 17) 505.

[170] Scharf (n 32) 49.

[171] This term was coined by Professor Richard Falk in 1985, and has been used by several others in order to symbolise the advent of the modern international legal regime: see Richard Falk and others (eds), *The Grotian Moment in International Law: A Contemporary Perspective* (Westview Press 1985) 7. For other examples see Michael P Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (Cambridge University Press 2013); Michael P Scharf, 'Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change' (2010) 43 *Cornell International Law Journal* 429 (discussing the evolution brought about by the Nuremberg Charter and rulings); UNSC, An Agenda for Peace: Preventive Diplomacy, Peacemaking, and Peace-Keeping, Report of the Secretary-General (17 June 1992), UN Doc A/47/277-S/24111, para 17.

[172] Scharf (n 32). In his view, as reflected in the practice of international bodies like the Organization of American States and the North Atlantic Treaty Organization, these attacks changed the perception that terrorists are always dependent on state funding, as more and more groups were able to grow and expand in the territories of failed states, and that only states can commit an armed attack giving rise to a right of counter self-defence. As for the international response, see UNSC Res 2170 (n 4); UNSC Res 1373 (n 63). Scharf also refers to the fact that several states – such as Colombia, Ethiopia, Kenya, Russia and Turkey – relied on the response to the 11 September attacks when they engaged in warfare against NSAs.

[173] UNSC Res 2249 (n 4). For discussion see Milanovic (n 110); Weller (n 110). For elaboration see Yourish and others (n 111); Kadercan (n 2) 64.

Corten, by contrast, believes that the main justification of the US when it comes to the use of force in Syria, the doctrine of 'unwilling or unable', is not legally valid. This is because it was not accepted as positive law by states, not even by most of the members of the US-led coalition, as even the states that invoke this doctrine did not demonstrate a genuine legal conviction that the doctrine reflects *existing* international law (*lex lata*), or a *developing* or *desired* norm (*legi ferenda*). Rather, they referred to their moral obligation to act in the Syrian context.[174] The two most prominent examples are (i) the statement by the Canadian Minister of Foreign Affairs made during a debate in the Canadian House of Commons that there was no legal basis for any intervention in Syria because of the absence of authorisation by the Syrian government; and (ii) the Australian Prime Minister expressed his doubts regarding the legality of the strikes in Syria without the consent of the Syrian government.[175] Tsagourias and Kajtar have also criticised the claim that this doctrine acquired a status under international law, and noted that it does not resolve legally the issues arising from the fact that the actions were taken against an NSA in the territory of another state.[176]

The legal status of the doctrine of 'unwilling or unable' is vague as it is not anchored in any legally binding document and was never recognised as a customary or a general principle by any judicial body.[177] The campaign against the Islamic State is the first occasion on which states other than the US have resorted to invoking the doctrine; yet notably only a portion of the US-led coalition resorted to this claim.[178] As noted, even those who did (such as Australia and Canada) had their own doubts about the legality of the doctrine and its invocation.[179] Additional scholars to those already mentioned – such as Peters,[180] Acharya,[181] and Lustick[182] – doubted the legal status of the doctrine and noted the problems it raises. In fact, as will be explained in the next subsection, even if this doctrine has acquired a status under international law, it is not obvious that it was met in the case of the Islamic State (as Syria was willing and able to fight against the group). Nevertheless, we can see that the doctrine grew stronger in practice during the military campaign against the Islamic State. Why did this occur?

[174] Corten (n 142) 780–83.
[175] Waseem Ahmad Qureshi, 'International Law and the Application of the Unwilling or Unable Test in the Syrian Conflict' (2018) 11 *Drexel Law Review* 62, 88; Corten (n 142) 780–83.
[176] Nicholas Tsagourias, 'Self-Defence against Non-State Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule' (2016) 29 *Leiden Journal of International Law* 801; Kajtar (n 3) 574.
[177] Corten (n 142) 780–83. For discussion of the elements required for the development of custom in international law see Oscar Schachter, 'Entangled Treaty and Custom' in Yoram Dinstein and Mala Tabory (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff 1989) 717, 730; Julio Barboza, 'The Customary Rule: From Chrysalis to Butterfly' in Calixto A Armas Barea and others (eds), *Liber Amicorum 'In Memoriam' of Judge José María Ruda* (Martinus Nijhoff 2000) 1, 6; Ori Pomson, 'Does the Monetary Gold Principle Apply to International Courts and Tribunals Generally?' (2019) 10 *Journal of International Dispute Settlement* 88, 120–21.
[178] Kajtar (n 3) 574.
[179] Corten (n 142) 780–83.
[180] Peters (n 66).
[181] Acharya (n 146) 144.
[182] Lustick (n 146).

https://doi.org/10.1017/S0021223720000151 Published online by Cambridge University Press

In my view, a main reason is that the campaign was not just an armed conflict against an NSA; rather, it was a battle for the protection of the international legal system and its core values. As noted, the Islamic State vision of statehood originates from the thirteenth century,[183] and it rests on a theological-political basis, contrary to the Westphalian legal order, which rests fundamentally on human consent without attachment to religion.[184] Delahunty suggested that the Islamic State rejected two axioms of the international order: first, it claimed that the basis of the international legal order must be founded on the sacred, not the secular; second, it claimed the authority to represent the entire global community of Muslims while disregarding other existing sovereign Muslim states.[185] Interestingly, in Corten's view the possible crystallisation as a binding norm of 'unwilling or unable' would lead to a radical change in, if not the end of, the United Nations collective security system.[186] In that sense, leading US-led coalition member states went on a battle to protect the system, but they did so in a way that jeopardises the UN collective security system – a main pillar in the maintenance of peace and order in this international legal system.

In conclusion, the status of the doctrine of 'unwilling or unable' under international law is not clear, and its content is vague.[187] Still, we cannot ignore the fact that the United States,[188] the United Kingdom,[189] Australia,[190] Canada[191] and Turkey[192] invoked it in order to deploy military force in Syria. Accordingly, I will focus now on the main question that one must answer when invoking this doctrine. Was Syria indeed unwilling or unable to fight the Islamic State in its territory?

4.3. Was Syria Unwilling or Unable to Fight the Islamic State?

As a preliminary matter, one should recall that the military campaign in the territory of Syria included numerous players with different allegiances and legal reasoning for their participation in the campaign. The Syrian opposition was composed of different NSAs, some working together and some against the other groups,[193] and they were supported by Turkey, Saudi-Arabia, Jordan, Qatar, the United States, the United Kingdom and France. On the other hand, Russia and Iran supported the Syrian government forces, and they received reinforcement from Hezbollah, which deployed its members in Syria.[194] As I will show, the states that invoked the doctrine

[183] Hassan (n 5); Al-Ibrahim (n 93).
[184] For discussion of the secular basis of the current international order see Lilla (n 95) 7.
[185] Delahunty (n 89) 36.
[186] Corten (n 142) 797.
[187] Tsagourias (n 176) 810.
[188] UNSC, Letter dated 23 September 2014 (n 11).
[189] Green (n 12).
[190] UNSC, Letter dated 9 September 2015 (n 13).
[191] UNSC, Letter dated 31 March 2015 (n 14).
[192] UNSC, Letter dated 24 July 2015 (n 15).
[193] See the list of NSAs at n 104.
[194] For discussion see Kajtar (n 3) 540.

https://doi.org/10.1017/S0021223720000151 Published online by Cambridge University Press

of 'unwilling or unable' did not engage in a dialogue with Syria, and even ignored Syria's pleadings and objections regarding the use of force on Syrian territory without its consent.

In earlier stages of the conflict there was an attempt to establish a Syrian National Coalition, claiming to be the legitimate representative of the Syrian people as a government-in-exile of Syria, but it was unable to deliver significant diplomatic or material support for the opposition, and it lost its impact and legitimacy both inside and outside Syria.[195] While such attempts to delegitimise the Syrian government were made, Syria consistently reaffirmed, before the Security Council,[196] its sovereignty over its territories, and particularly the areas controlled by the Islamic State. The Security Council also continuously recognised the territorial integrity of Syria.[197]

The fact that Syria is engaged in hostilities and invites other sovereign states to assist it[198] raises doubt as to the question of whether it is unwilling to fight the Islamic State, as claimed by the US,[199] the UK,[200] Australia,[201] Canada[202] and Turkey.[203] Syria has stressed continuously in its dialogues with the Security Council that its competent institutions and agencies continue to fulfil their responsibilities in accordance with international law, and that it is both determined to eliminate what it terms as terrorism on its territory and is, at the same time, open to cooperate with other states in the struggle; hence, states should not operate without its consent on its territory.[204] Syria also explained that NSAs that operate against it undermine its sovereignty; hence, the financial and military assistance granted by states to NSAs operating in Syria constitutes, according to the Syrian government, a violation of the principle of non-intervention.[205] Deeks, in attempting to formulate the normative framework for the 'unwilling or unable' doctrine, has emphasised the need for any state that wishes to invoke this doctrine first to attempt to obtain the consent of the territorial state.[206] In the present case the US-led coalition member states that invoked the doctrine did not attempt to obtain Syria's consent for the use of force on its territory, and they ignored Syria's objections to any use of force on its territory without its consent and coordination.

[195] Zachary Laub, 'Syria's War: The Descent into Horror', Council on Foreign Relations, 23 October 2019, https://www.cfr.org/interactives/syrias-civil-war-descent-into-horror#!/syrias-civil-war-descent-into-horror.
[196] UNSC, Identical letters dated 17 September 2015 (n 108); UNSC, Identical letters dated 18 September 2015 (n 108).
[197] UNSC Res 2170 (n 4); UNSC Res 2249 (n 4).
[198] UNSC, Identical letters dated 14 October 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council (16 October 2015), UN Doc S/2015/789.
[199] UNSC, Letter dated 23 September 2014 (n 11).
[200] Green (n 12).
[201] UNSC, Letter dated 9 September 2015 (n 13).
[202] UNSC, Letter dated 31 March 2015 (n 14).
[203] UNSC, Letter dated 24 July 2015 (n 15).
[204] UNSC, Letter dated 18 June 2014 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General (4 January 2016), UN Doc S/2015/1048.
[205] ibid.
[206] Deeks (n 152) 520; for a similar view see Starski (n 7) 460.

In my view, the disregard of Syria's desire to choose its partners during the military campaign against the Islamic State endangers the stability of the prohibition against the use of force. The invocation of the doctrine of 'unwilling or unable' also illustrates two concepts introduced by Koskenniemi:[207] (i) concreteness (apology), and (ii) normativity (utopia). An argument about concreteness is an argument about the closeness of a particular principle to state practice, while an argument about normativity seeks to demonstrate the rule's distance from state will and practice and from politics.[208] In Koskenniemi's view, neither claim is sustainable alone, as the argument about concreteness is an apology for the exercise of force (when it is used to establish effective control over a territory), while an argument about normativity is abstract and begs the question of whose application of the external criterion should receive precedence.

In sum, the invocation of the doctrine of 'unable or unwilling' was an apologetic justification for the use of force which contravenes state sovereignty. Currently there are two perceptions of Syria's capacity and willingness to cooperate with other states: one advocated by Syria itself,[209] and the other by US-led coalition member states;[210] it is not clear which view deserves prominence.[211] This reveals that at times legal concepts of a binary nature are less useful in a complicated and nuanced reality within which several elements of different legal concepts can exist in a mixed fashion.[212] The military campaign against the Islamic State was indeed complicated, and nuanced, as elaborated above. Pursuant to this, the next subsection will suggest a possible solution: consideration of a *functional* approach in the field of *jus ad bellum*, by analogy with the increasing use of a functional approach in other contexts.[213]

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[207] Martti Koskenniemi, *The Politics of International Law* (Hart 2011) 46.

[208] ibid 39. In Koskenniemi's view, concreteness results from liberal principles and subjectivity of value, and it prescribes significance to state practice as a tangible verification tool in recognising the will and interests of states. Normativity requires application of the law regardless of the political differences of legal subjects and, in particular, states. For example, in the context of statehood and the need for recognition, those who advocate the declarative approach seek to rely on pure facts (and, most importantly, effective establishment of authority – *effectivités*), while those who support the constitutive approach argue in terms of a criterion external to facts (in particular, general recognition).

[209] UNSC, Identical letters dated 17 September 2015 (n 108); UNSC, Identical letters dated 18 September 2015 (n 108).

[210] UNSC, Letter dated 10 December 2015 (n 134); UNSC, Letter dated 7 September 2015 (n 137); UNSC, Letter dated 23 September 2014 (n 11). For an illustrative discussion of the views of the members of the coalition see Longo (n 59) 908.

[211] For discussion in the context of the Israeli occupation over Palestinian territories see Yuval Shany, 'Faraway, So Close: The Legal Status of Gaza After Israel's Disengagement' (2005) 8 *Yearbook of International Humanitarian Law* 369; Yuval Shany, 'Forty Years After 1967: Reappraising the Role and Limits of the Legal Discourse on Occupation in the Israeli-Palestinian Context: Binary Law Meets Complex Reality: The Occupation of Gaza Debate' (2008) 41 *Israel Law Review* 68; Yuval Shany, 'The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v Prime Minster of Israel' (2009) 42 *Israel Law Review* 101.

[212] In the context of sovereignty and military occupation see Aeyal Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (Cambridge University Press 2017) 56.

[213] Vera Gowland-Debbas, 'Note on the Legal Effects of Palestine's Declaration under Article 12(3) of the ICC Statute' in Chantal Meloni and Gianni Tognoni (eds), *Is There a Court for Gaza? A Test Bench for International Justice* (TMC Asser Press 2012) 513; Yuval Shany, 'In Defence of Functional Interpretation of Article 12(3) of the Rome Statute: A Response to Yaël Ronen' (2010) 8 *Journal of International Criminal Justice* 329, 334–35; Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the

4.4. FROM APOLOGY TO FUNCTIONALISM: A POSSIBLE WAY FORWARD

In many fields the law offers clear-cut dichotomies. A classic example is an age limit that decides who is entitled to vote or is eligible to face criminal prosecution.[214] Another example from the field of international humanitarian law (*jus in bello*) is the division between combatants and civilians, which has significance for a multitude of questions – relating to targeting, detention, property rights and more.[215] In the field of *jus ad bellum*, the focus of this article, one can note the questions discussed above. Does an attack constitute an armed attack in the sense of Article 51 or not?[216] Is the scope of the principles of territorial integrity[217] and self-defence[218] confined only to the sphere of relations between states and therefore excludes NSAs?

The invocation of clear-cut triggering norms can impact on the application of an entire legal regime, as the existence of an armed attack would trigger the application of *jus ad bellum*. Generally, clear-cut triggering norms aim to generate a high measure of legal certainty and lower implementation costs.[219] In the present case there is a need to reconcile the fact that the Islamic State for three years controlled different areas and exercised certain governmental authorities with the fact that, regardless of what occurred on the ground, the areas still remained under the sovereignty of Iraq and Syria. This complexity derives from the tension between the legal perception of the situation and the actual conditions on the ground. A possible solution could be the invocation of a *functional* approach in the field of *jus ad bellum*, by analogy with the increasing use of a functional approach in other fields, such as statehood[220] and the law of occupation.[221] I will shortly present the invocation of a functional approach in these two fields, and then return to discuss how it can also assist when it comes to *jus ad bellum*, and particularly when it comes to a challenge such as that presented by the Islamic State.

Creation of International Humanitarian Law' (2011) 37 *Yale Journal of International Law* 107, 120; Gross (n 212).

[214] In the ICC, for example, art 26 of the Rome Statute (n 73) dictates that jurisdiction is excluded over persons aged under 18. For additional examples see Shany (2008) (n 211) 73.

[215] A significant question is whether a person, when captured, should be qualified as a prisoner of war, which would give immunity from criminal prosecution. For discussion, especially in the context of an NSA such as the Islamic State, see Jason Callen, 'Unlawful Combatants and the Geneva Conventions' (2004) 44 *Virginia Journal of International Law* 1025; Knut Dörmann, 'The Legal Situation of "Unlawful/Unprivileged Combatants"' (2003) 85 *International Review of the Red Cross* 849; Yuval Shany, 'Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (Oxford University Press 2011) 13. For a critical view of the rigidness of the regime see Elizabeth Holland, 'The Qualification Framework of International Humanitarian Law: Too Rigid to Accommodate Contemporary Conflicts?' (2011) 34 *Suffolk Transnational Law Review* 145.

[216] Scharf (n 32) 22.

[217] *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* (n 61) [80].

[218] *Legal Consequences of the Construction of a Wall* (n 17) separate opinion of Judge Elaraby, [139]; *Armed Activities on the Territory of the Congo* (n 29) [146]–[147].

[219] Shany (2008) (n 211) 73. Also see Jessica A Clarke, 'Adverse Possession of Identity: Radical Theory, Conventional Practice' (2005) 84 *Oregon Law Review* 563, 600.

[220] Gowland-Debbas (n 213) 513; Shany (n 213) 334; Roberts and Sivakumaran (n 213).

[221] For discussion see Gross (n 212).

https://doi.org/10.1017/S0021223720000151 Published online by Cambridge University Press

In the context of *occupation*, there is a growing tendency to analyse functionally the existence of a situation of occupation. For example, the Ethiopia-Eritrea Claims Commission found that when an army is present in an area of a hostile state on a transitory basis, not *all the obligations* of an occupant can reasonably be applied, but some of them may.[222] In simple words, the legal obligations of an occupant arise in correlation with its actual exercise of governance power.[223] As noted by Gross, the Commission suggested a position that differentiates between obligations on the basis of the capacity and power exercised by the occupying power rather than on a formalist on/off definition of occupation.[224] The rationale underlying this view is the need to consider how to allocate responsibility in a situation where control and governance power are shared and exercised by several entities – including an NSA (just like the Islamic State).[225] This approach is evident in other judicial decisions, such as the *Naletilic* case before the International Criminal Tribunal for the former Yugoslavia (ICTY),[226] and it was also adopted by the International Committee of the Red Cross (ICRC) in its updated commentaries on the Geneva Conventions.[227]

With regard to *statehood*, in recent decades there has been an increase in the invocation of functionalism in the application of the statehood criteria towards quasi-states,[228] in the sense that quasi-states have been treated as states for certain purposes, as they were considered to possess state-like features in certain respects. The invocation of functionalism in this field of law places the emphasis on *governance*, namely the provision of services by the state or by different players with a better capacity to do it, together with the execution of its policy,[229] rather than on the traditional Montevideo Criteria,[230] which illustrate the Westphalian notion of the sovereign state.[231] Shany noted that quasi-states tend to be regarded functionally as states if and when

[222] EECC Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims, XXVI RIAA 291 (2005).
[223] Gross (n 212) 7.
[224] Aeyal Gross, 'Rethinking Occupation: The Functional Approach', *Opinio Juris*, 23 April 2012, http://opiniojuris.org/2012/04/23/rethinking-occupation-the-functional-approach/.
[225] Gross (n 212) 77.
[226] ICTY, *Prosecutor v Mladen Naletilic*, IT-98-34-T 203-08, 31 March 2003. For discussion of the case see Gross (n 212) 64–47.
[227] ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC and Cambridge University Press 2016) Article 2, para 310, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518#64_B.
[228] Quasi-states are political entities with significant state-like features. Another parallel term occasionally used is 'de facto states' or 'de facto regimes'. For discussion see Milena Sterio, 'A Grotian Moment: Changes in the Legal Theory of Statehood' (2011) 39 *Denver Journal of International Law and Policy* 209; Jonte van Essen, 'De Facto Regimes in International Law' (2012) 28 *Utrecht Journal of International and European Law* 31.
[229] For discussion relating to governance at the international level see James Rosenau, *Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World* (Cambridge University Press 1997) 80; David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford University Press 1995).
[230] Convention on the Rights and Duties of States (n 156) art 1. For discussion of the classical notion of statehood see James Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006) 46; Jennings and Watts (n 53) 717–18; Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press 1963) 25.
[231] Thomas Risse, 'Governance under Limited Sovereignty' in Martha Finnemore and Judith Goldstein (eds), *Back to Basics: State Power in a Contemporary World* (Oxford University Press 2013) 78. An example in the context of

the differences between them and states are viewed as irrelevant for the purposes of the institution or treaty at hand, and that the decision should be made in light of the nature and function of the legal arrangement in question.[232] Examples for this approach include India's membership of the United Nations before its independence,[233] and the participation of Taiwan and Puerto Rico in the work of several intergovernmental organisations.[234]

The advantage of a functional approach is that it allows for a more nuanced analysis of a situation, compared with a binary approach,[235] in complicated cases where several players exercise power in the same territory. In the present case, military power was applied by the various players in Iraq and Syria and, at the same time, sovereign-like power was applied by the Islamic State, which had established de facto authority over part of the territory. In this complicated reality, the Islamic State could have been treated functionally as a state for the purposes of self-defence or collective security measures, instead of invoking legal doctrines of unclear legal status such as 'unwilling and unable'. This suggestion correlates by analogy with the solution of *jus in bello* to situations in which violence between a state and NSAs crosses a certain threshold of intensity, and especially when the group exercises effective control over territory. The more organised and strong the NSA is, the higher the probability that the situation will be considered an armed conflict,[236] resulting in the attribution of *jus in bello* obligations upon the NSA party to the conflict.[237] A similar line of thought could also be useful in our context in attempting to apply and interpret the state-centric tools of *jus ad bellum* in complex situations such as the case generated by the Islamic State.

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failing to meet the territory demand is the Czech Republic: see Guido Acquaviva, 'Subjects of International Law: A Power-Based Analysis' (2005) 38 *Vanderbilt Journal of Transnational Law* 345, 394. For discussion of the two components of statehood in this regard – authority and effective control – see Stephen D Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999) 4.

[232] Shany (n 213) 334. See also William Thomas Worster, 'Law, Politics, and the Conception of the State in State Recognition Theory' (2009) 27 *Boston University International Law Journal* 115. With regard to Palestine see Michael G Kearney, 'Why Statehood Now: A Reflection on the ICC's Impact on Palestine's Engagement with International Law' in Meloni and Tognoni (n 213) 391. For example, when Palestine declared that it accepts the jurisdiction of the International Criminal Court (ICC), first in 2009 and later again in 2015, the ICC prosecutor faced the dilemma of whether to treat Palestine as a state for the purposes of the Rome Statute establishing the ICC (n 73): for discussion see Amichai Cohen and Tal Mimran, 'The Palestinian Authority and the International Criminal Court', *The Israel Democracy Institute*, 10 February 2015, https://en.idi.org.il/articles/5216. In the view of Shany, as the main goal of the Rome Statute is to end impunity through the exercise of complementary international jurisdiction by the ICC, then acceptance of its declaration will promote the main goal of the ICC by exercising jurisdiction over a situation where serious crimes may have occurred (the Israeli-Palestinian conflict) and prevent the option of a legal black hole (territories over which no state exercises sovereignty).

[233] Gowlland-Debbas (n 213) 513.

[234] Shany (n 213) 334; Roberts and Sivakumaran (n 213) 120. For additional discussion relating to Taiwan see Jure Vidmar, 'States, Governments, and Collective Recognition' (2017) 31 *Chinese (Taiwan) Yearbook of International Law and Affairs* 136; Beat Dold, 'Concepts and Practicalities of the Recognition of States' (2012) 22 *Swiss Review of International and European Law* 81, 88.

[235] For illustration of the problem of binary application of occupation law in the context of the Gaza Strip see Shany (2008) (n 211).

[236] ICTY, *Prosecutor v Tadić*, Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, [70]. For elaboration see Shany (n 215); Marko Milanovic, 'Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case' (2007) 866 *International Review of the Red Cross* 373.

[237] Essen (n 228) 34.

The invocation of a functional approach in the field of occupation law tends to lead to more accountability for an occupant, and more protection for the occupied.[238] In the context of *jus ad bellum*, it can also lead to more accountability – both from the sovereign state, which will wish to re-establish its authority in the relevant territory, and from the intervening states, which will be required to analyse in a more nuanced and dynamic fashion the question of unwillingness and inability in different territorial parts of the conflict. As for the invocation of a functional approach in matters of statehood, it places the emphasis on *governance*[239] rather than on the traditional Montevideo Criteria,[240] which illustrate the Westphalian notion of the sovereign state.[241] As noted earlier, quasi-states tend to be regarded functionally as states if and when the differences between them and states are viewed as irrelevant for the purposes of the legal rule at hand, in light of the nature and function of the legal arrangement in question.[242] As I will explain, the Islamic State illustrates just when a functional approach is required: when dealing with armed conflicts that include various players and, in particular, NSAs in control of territory over which they exercise governmental functions.

Jus ad bellum firmly reflects a state-centred perception[243] under which states may regulate their domestic affairs without foreign interference,[244] a main aspect of which is their exclusive right to use force inside their territory.[245] However, in the present case the Islamic State managed territories and populations in Iraq and Syria for three years – while Iraq and Syria failed to exercise their sovereign authority in the areas under the control of the group. International law might risk being ineffective if it challenges the validity of effective situations by creating a conflict between *law* and *fact*.[246] Accordingly, state-centrism in international law is tempered by the notion of *ex factis jus oritur* – namely, that effective power cannot be ignored at the risk of rendering redundant legal rules in the face of new reality.[247] This principle, *ex factis jus oritur*, is fundamental in that the international legal order, absent a centralised structure, demands a strong and concrete impact on reality in order to solidify its foundations.[248]

[238] Gross (n 212) 8.
[239] For discussion relating to governance at the international level see Rosenau (n 229); Held (n 229).
[240] Convention on the Rights and Duties of States (n 156) art 1. For discussion of the classical notion of statehood see Crawford (n 230) 46; Jennings and Watts (n 53) 717–18; Higgins (n 230) 25.
[241] An example in the context of failing to meet the territory demand is the Czech Republic: see Acquaviva (n 231) 394.
[242] Shany (n 213) 334; see also Worster (n 232).
[243] Longo (n 59) 896.
[244] UN Charter (n 18) 2 para 7; *Nicaragua v US* (n 21) [202]; Kelly (n 21) 392. See also *Island of Palmas Case* (n 16) 829–71; *SS 'Lotus' (France v Turkey)* (n 21); Brand (n 21) 1686; Mégret (n 16); Cohan (n 21).
[245] Grim (n 22) 1043; Tsagourias (n 22) 326.
[246] For discussion of this rationale see Charles de Visscher, *Les Effectivités du Droit International Public* (Éditions A Pedone 1967); Theodore Christakis and Aristoteles Constantinides, 'Territorial Disputes in the Context of Secessionist Conflicts' in Marcelo G Kohen and Mamadou Hébié (eds), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar 2017) 343.
[247] Nehal Bhuta, 'The Role International Actors other than States Can Play in the New World Order' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 70.
[248] Salvatore Zappalà, 'Can Legality Trump Effectiveness in Today's International Law?' in Cassese, ibid 106.

There is a limit, though, to the importance granted to effective power and its ability to affect the legal perception of a situation. This limit is encapsulated in the rule of non-recognition, which rejects the legal competence of an illegally created entity,[249] based on the general principle of *ex injuria jus non oritur*.[250] As noted by Lauterpacht,[251] this rule aims to vindicate the legal character of international law against the law-creating effect of facts. According to the rule of non-recognition, effective power cannot justify infringing the basic pillars of the international system, nor affect state sovereignty in a permanent manner. Nevertheless, effective power and governance, such as that exercised by the Islamic State, invited an interpretative move that recognises the reality on the ground by treating functionally the Islamic State as a state for the sake of *jus ad bellum*, without permanently infringing the sovereignty of Iraq and Syria.

In my view, it is preferable to face head-on the reality, with creative interpretation of the existing law under the UN Charter, instead of invoking a doctrine without legal status under international law, such as 'unwilling or unable', while ignoring completely the reality and particularly the fact that Syria is actually willing and able to fight the Islamic State but not with the intervening states in the US-led coalition. Invocation of a functional approach does not create new law, as the invocation of the doctrine of 'unwilling or unable' might have attempted to do; rather, it relies on the existing law (be that self-defence or collective security efforts) by interpreting the situation in accordance with the reality on the ground. Given the high number of players in the Syrian context, the different affiliations and loyalties, and the fact that several of them are in control of a territory, a functional examination is a more logical and appropriate option. Such an approach will help to deal more effectively with the complexity of the situation, bring about more accountability and protection and, most importantly, not undermine the very system it was invoked to protect.

5. THE RESPONSE OF THE SECURITY COUNCIL IN THE CAMPAIGN AGAINST THE ISLAMIC STATE

The military campaign against the Islamic State has been a real challenge for the international security system, given the need to promote peace and security in areas where a variety of players and interests are at play. Generally, as noted by Weller,[252] the Security Council may determine

[249] Acts that are in contravention of peremptory norms are invalid *ab initio*, and this principle seeks to uphold the illegality and invalidity of the alleged territorial regime. For discussion of the transition from illegal regimes into states see Yaël Ronen, *Transition from Illegal Regimes under International Law* (Cambridge University Press 2013); John Dugard, *Recognition and the United Nations* (Grotius Publications Ltd 1987) 49.

[250] *Gabčíkovo-Nagymaros Project* (n 41) [133]; *Factory at Chorzów (Germany v Poland)* Jurisdiction (1925) PCIJ Rep (Ser A, No 9) 31.

[251] Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947) 402. The rule of non-recognition is based on the Stimson doctrine enunciated in 1932, during the Japanese invasion of Manchuria and in the international response to this act. It has been applied consistently by international tribunals, such as the ICJ: see, eg, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [1971] ICJ Rep 16, [124].

[252] Weller (n 110).

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which state is the author of an armed attack and which state is the victim,[253] whether there is a right to use force by a certain state,[254] or even when the right to use force no longer holds.[255] However, in our case the Security Council was not able to provide authorisation for the use of force against the Islamic State.

The Security Council has several structural limitations. It does not have a military force as it depends on voluntary contributions of soldiers and funds; it operates under the shadow of the right of veto of its permanent members; it lacks transparency and suffers from misrepresentation on the part of all UN members.[256] The veto power is probably the most criticised aspect of the work of the Security Council in that it allows the five permanent members of the Council to promote either their own self-interests or those of their allies.[257] As a result, the effort to adopt a strong resolution as part of the struggle against the Islamic State was blocked by the threat of veto by Russia and China.[258]

On 15 August 2014, soon after the declaration of the establishment of the caliphate by the Islamic State and the Yazidi crisis, the Security Council adopted Resolution 2170.[259] The *raison d'être* of the resolution was the Islamic State and the dangers it poses; however, while the use of force against the group was intensifying at that point in time, the resolution did not address the issue at all. Rather, it focused on the phenomenon of foreign fighters joining the Islamic State, calling on UN member states to take national measures to prevent fighters from travelling from their soil to join the Islamic State and other groups in Syria, placing economic sanctions against the group and imposing travel restrictions on six of its members.[260] In addition, the resolution called for prosecution of foreign fighters, and to prevent ideological extremism.[261] There was no option to adopt a stronger resolution given the threat of veto from Russia and China.[262] This is yet a further demonstration of the systemic deficit that the right of veto brings about in the work of the Security Council.[263]

[253] UNSC Res 82 (25 June 1950), UN Doc S/1501; UNSC Res 678 (29 November 1990), UN Doc S/RES/678.
[254] UNSC Res 1373 (n 63).
[255] UNSC Res 598 (20 July 1987), UN Doc S/RES/0598.
[256] Henkin (n 60) 11.
[257] Jessica Elbaz, 'International Stalemate: The Need for a Structural Revamp of the U.N. Security Council' (2016) 15 *Cardozo Public Law, Policy, and Ethics Journal* 211, 334. For further discussion see Amber Fitzgerald, 'Security Council Reform: Creating a More Representative Body of the Entire U.N. Membership' (2000) 12 *Pace International Law Review* 319; Inocencio Arias, 'Humanitarian Intervention: Could the Security Council Kill the United Nations?' (2000) 23 *Fordham International Law Journal* 1005.
[258] Scharf (n 32) 23.
[259] UNSC Res 2170 (n 4); Lekas (n 35) 324.
[260] UNSC Res 2170 (n 4) para 19; Longo (n 59) 903. For later sanctions imposed by the Security Council see UNSC Res 2253 (17 December 2015), UN Doc S/RES/2253. For discussion of Security Council measures and human rights obligations in international law see Antonios Tzanakopoulos, 'Collective Security and Human Rights' in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press 2010) 42.
[261] UNSC Res 2170 (n 4) para 9; Lekas (n 35) 324. Such domestic proceedings have begun recently, for example, in Germany (in the Higher Regional Court of Frankfurt).
[262] Scharf (n 32) 23.
[263] For discussion see Fitzgerald (n 257); Arias (n 257); Zifcak (n 169) 504; Elbaz (n 257).

Another important resolution is Security Council Resolution 2249, which *called* upon states that have the capacity to do so to take all necessary measures to redouble and coordinate their efforts to prevent and suppress terrorist acts committed by ISIL on territory under ISIL control.[264] Weller suggested that Resolution 2249 can be read as if it relieves particular states from the need to fulfil the criteria for self-defence when considering armed action in Syria.[265] It seems that the last justification offered by the UK, relying specifically on Resolution 2249, is based on a similar understanding of the resolution.[266] In my view, the interpretation adopted by the UK is an expansive reading of Resolution 2249. While paragraph 5 calls upon states to take all necessary measures in their fight against the Islamic State, the use of the term 'calls' instead of 'authorises' or 'decides' indicates that the resolution did not intend to grant a legal mandate to act militarily against the organisation but rather to refer to existing lawful measures at the hands of states.[267] Syria, the most relevant state in the situation, objected to the idea that this resolution provides authorisation to use force on its territory.[268]

As was elaborated above, some of the states operating in Syria do so based on legal claims, particularly the doctrine of 'unable or unwilling', which are not clear of doubts. The military campaign against the Islamic State served as a bad precedent in the sense that states might allow themselves to apply an even broader interpretation of Security Council resolutions concerning the use of military force, or simply rely on doctrines which are vague and of unclear legal status – like 'unwilling or unable'.[269] The Security Council could have produced a more robust basis by authorising the use of military force under Article 42 of the UN Charter,[270] yet the effort to adopt a stronger resolution was blocked by the threat of veto by Russia and China.[271]

Another option before the Security Council, which is of relevance to the Syrian civil war and the campaign against the Islamic State, was to invoke the doctrine of responsibility to protect (R2P) – developed under the patronage of the United Nations and applied by the Security

[264] UNSC Res 2249 (n 4).
[265] Weller (n 110).
[266] UNSC, Letter dated 7 September 2015 (n 137) ('Great Britain and Northern Ireland is taking necessary and proportionate measures against ISIL/Daesh in Syria, as called for by the Council in resolution 2249 (2015), in exercise of the inherent right of individual and collective self-defence').
[267] For discussion see Dapo Akande and Marko Milanovic, 'The Constructive Ambiguity of the Security Council's ISIS Resolution', *EJIL: Talk!*, 21 November 2015, http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution. For a more expansive reading of the resolution see Weller (n 110). Controversies surrounding the interpretation of Security Council resolutions are not uncommon, as one can recall the controversy relating to the use of force by the US in Iraq during 2003. For discussion see Donald Nungesser, 'United States' Use of the Doctrine of Anticipatory Self-Defense in Iraqi Conflicts' (2004) 16 *Pace International Law Review* 193; Jorge Alberto Ramirez, 'Iraq War: Anticipatory Self-Defense or Unlawful Unilateralism?' (2003) 34 *California Western International Law Journal* 1; Matthew D Campbell, 'Bombs Over Baghdad: Addressing Criminal Liability of a U.S. President for Acts of War' (2006) 5 *Washington University Global Studies Law Review* 235, 240; Lustick (n 146).
[268] UN Security Council, Letter dated 18 June 2014 (n 204) para 6.
[269] Kajtar (n 3) 570.
[270] UN Charter (n 18) art 42.
[271] This demonstrates the systemic deficit that the right of veto brings about in the work of the Security Council: for discussion see Fitzgerald (n 257); Arias (n 257); Zifcak (n 169) 504; Elbaz (n 257).

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Council during the Libya crisis of 2011.[272] Under this doctrine, considered by Simpson[273] and Chimni[274] as a reconfiguration of humanitarian intervention, if a state is unable or unwilling to stop acts of genocide, war crimes, ethnic cleansing or crimes against humanity occurring on its territory, other states have a collective and subsidiary responsibility to take measures to protect the civilian population.[275] The United Nations initiative which promoted this doctrine sought to balance between state sovereignty, the pillar of the state-centric system, and between humanitarian needs that arise in conflict situations, such as the current situation in Syria.[276]

This doctrine was invoked during the Libyan civil war in 2011, but while the mandate granted to the North Atlantic Treaty Organization (NATO) by the Security Council was for humanitarian reasons (such as the enforcement of no-fly zones),[277] NATO broadened the scope of its mission from protection of the civilian population to over-throwing Muammar Gaddafi in a way that tainted this doctrine, which was considered then as an emerging norm of great significance.[278] Against this backdrop, BRICS nations (Brazil, Russia, India, China and South Africa), which felt betrayed after the Libyan experience, object to any external intervention in Syria that is not based on the UN Charter or on Syria's invitation.[279] This resistance to external intervention was in spite of the fact that the number of casualties, the grave character of the violations and the intensity of the hostilities are much higher in Syria than was the case in Libya.[280] In practice, while during the earlier stages of the Syrian crisis some Security Council resolutions acknowledged the responsibility of Syria to protect its population,[281] the Council never took the additional step of advancing protection under R2P in Syria.

Syria failed to prevent the commission of international crimes on its territory, and in several instances the Syrian government itself committed atrocities, such as the use of chemical weapons.[282] The Syrian context was a prime case for invoking R2P, yet this option never came to realisation. The misuse of R2P in the context of Libya demonstrated how this doctrine can, and did, serve as a means to justify coercive intervention based on political motives.[283] As such, these two doctrines – R2P and 'unable or unwilling' – can each be seen as an apologetic justification for the

[272] Kelly (n 21) 384; Longo (n 59) 898; UNSC Res 1973 (17 March 2011), UN Doc S/RES/1973. For discussion relating the development of the doctrine see Zifcak (n 169) 504.
[273] Gerry Simpson, 'International Law in Diplomatic History' in Crawford and Koskenniemi (n 16) 43.
[274] BS Chimni, 'Legitimating the International Rule of Law' in Crawford and Koskenniemi (n 16) 290, 300.
[275] This concept is subject to several criteria: seriousness of the harm; just cause for intervention; intervention as a last resort; proportionality; and an assessment of consequences: see Seyedfarshi (n 169) 21; Lekas (n 35) 343; for more discussion see Zifcak (n 169) 505.
[276] Lekas (n 35) 342.
[277] UNSC Res 1973 (n 272).
[278] Longo (n 59) 915.
[279] Kelly (n 21) 385.
[280] 'UN Special Envoy for Syria Welcomes Ceasefire Understanding; Pledges UN Support', *UN News Centre*, 9 September 2016, http://www.un.org/apps/news/story.asp?NewsID=54896#.WJpSJPl96Um.
[281] See, eg, UNSC Res 2165 (14 July 2014), UN Doc S/RES/2165.
[282] For discussion see Mary Ellen O'Connell, 'Unlawful Reprisals to the Rescue against Chemical Attacks?', *EJIL: Talk!*, 12 April 2018, https://www.ejiltalk.org/unlawful-reprisals-to-the-rescue-against-chemical-attacks; Hakimi (n 143).
[283] Kelly (n 21) 385.

https://doi.org/10.1017/S0021223720000151 Published online by Cambridge University Press

use of force. The reasoning behind the invocation of each doctrine might be portrayed differently: R2P was depicted in the Libyan context as an attempt to protect humanitarian interests,[284] while 'unwilling or unable' was invoked against the Islamic State to neutralise a threat.[285] Still, in practice, the misuse of R2P in the first and only opportunity it was invoked was apologetic in its execution (taking advantage of a noble goal in order to promote political interests). In comparison, the invocation of 'unwilling or unable' in Syria was also apologetic as it covered the fact that the states invoking the doctrine ignored the most crucial fact in the application of the doctrine – Syria was indeed willing and able to fight the Islamic State, but simply not in conjunction with the US-led coalition.

While the doctrine of R2P is currently no more than soft law, I believe that its invocation, or its lack thereof, is of theoretical and normative interest. The doctrine challenges the superiority of sovereignty by promoting the view that protection of sovereign states from forcible intervention is conditional, similar to the doctrine of 'unwilling or unable'. As acknowledged by Crawford,[286] under R2P a state maintains its full sovereign rights only if it meets its responsibility to its nationals and to other states.[287] Thus, the invocation of R2P by the Security Council could have affected the direction in which sovereignty will evolve in future years to come, and also serve as a test case for the resilience of the Westphalian order[288] and to the possible legal status of this doctrine. While the ICJ recognised in the *Nicaragua* case that states are permitted to apply proportionate countermeasures which do not amount to a use of force,[289] such possibility to employ military countermeasures without infringing the prohibition against the use of force was never really specified. Also, today, it is clear from Articles 22 and 50(1)(a) of ARSIWA that international law does not prescribe the use of military force that is outside the purview of the UN Charter, and particularly Articles 2(4) and 2(7) of the Charter.

The limits against individual actions by states demonstrate the important role of the Security Council and, in particular, in the prescription of the legal basis for the deployment of military force in Syria. The fact that R2P was not used in Syria indicates the strength of Syria's sovereignty, along with the lack of political interest in promoting the doctrine, even in spite of a prolonged disastrous conflict on its territory which brought about the death of hundreds of thousands

[284] UNSC Res 1973 (n 272).
[285] UNSC, Letter dated 9 September 2015 (n 13); UNSC, Letter dated 31 March 2015 (n 14); UNSC, Letter dated 24 July 2015 (n 15). For discussion see Green (n 12); Kelly (n 21) 391.
[286] Crawford (n 152) 130.
[287] Similarly, the ICC can initiate proceedings against a person only if there is no other state party to its Statute that is willing and able to prosecute that individual. In other words, the ICC can prosecute only when other states with jurisdiction fail to do so: Rome Statute (n 73) art 17. While this doctrine of complementarity demonstrates that the ICC is intended to supplement, rather than supplant national jurisdictions, it nevertheless indicates that when a state 'fails' in exercising its authority over its territory or nationals, its sovereignty is eroded in the sense that it may face military intervention or international criminal initiatives. Accordingly, the failure of Syria in exercising effective control over the territories held by several NSAs, and in particular the Islamic State, was invoked by Turkey and Germany as part of their legal justification for their use of force.
[288] This is since sovereignty is a pillar in the international Westphalian legal system: see Koskenniemi (n 16) 11; Mégrét (n 16) 66.
[289] *Nicaragua v US* (n 21) [249].

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and the injury and displacement of millions. In simple words, it indicates that currently the doctrine of R2P is of no tremendous importance in law or in practice.[290] In sum, the Security Council did not provide legal authorisation for the campaign against the Islamic State; nor did it advance determinacy, validation, coherence or adherence to the rules of *jus ad bellum*.[291] The invocation by states that are using force in Syria of terms which are vague, and of debatable legal validity, reflects gaps in the current legal framework and in the ability of international institutions, especially the Security Council, properly to address challenges to the Westphalian order as that presented by the Islamic State.[292]

6. CONCLUSION

The Islamic State has transformed itself from a small group into a quasi-state which administers territories, presenting capabilities and wealth like no other group before it. In doing so, it did not seek the acceptance of other players in the international system; rather, it presented itself as a direct challenge and an alternative to the legal and social system underlying today's global order. The international community reacted strongly against the group, with coalitions of historic size and strength. Between 2014 and 2017, intense military operations against the group led to the loss of most of the territory in Iraq and Syria that it used to control and much of its resources. By 2019 the Islamic State had lost all the territories that it had previously held.

[290] For discussion of the legal status of the doctrine see Zifcak (n 169) 504.

[291] Thomas Franck advanced the legitimacy theory, according to which these four elements create pressure towards compliance (as they are perceived to have come into being in accordance with the right process): determinacy, symbolic validation, coherence and adherence: for discussion see Thomas M Franck, *Fairness in International Law and Institutions* (Oxford University Press 1995). Generally speaking, legitimacy serves as an incentive to comply with international law, through the eyes of a rational decision maker that selects the course of action that maximises its utility: for discussion see James Morrow, 'A Rational Choice Approach to International Conflict' in Nehemia Geva and Alex Mintz (eds), *Decision Making on War and Peace: The Cognitive-Rational Debate* (Lynne Reinner 1997) 11; Moshe Hirsch, 'Compliance with International Norms in the Age of Globalization: Two Theoretical Perspectives' in Eyal Benvenisti and Moshe Hirsch (eds), *The Impact of International Law on International Cooperation: Theoretical Perspectives* (Cambridge University Press 2004) 166. For a realist view in relation to state adherence to international law (when the action correlates with the interests of the state) see Joseph M Grieco, 'Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism' (1988) 42 *International Organizations* 485.

[292] In fact, the Security Council was not able to adopt a resolution to authorise the use of force even after the use of chemical weapons by the Syrian regime, once in 2017 and also in 2018. In 2017 it was only the US who responded militarily by launching 59 Tomahawk missiles, and in 2018 the US was joined by the UK and France: see Hakimi (n 143). In both instances the US did not present any concrete legal arguments; rather, it presented political and moral considerations. Other states broadly expressed support for these attacks, given the gravity of the use of chemical weapons by the Syrian government, while 'elegantly' avoiding referring to the legality of the action. The UK was the only state to raise a legal claim, while France basically referred to the *necessity* of its response, invoking a language of reprisals, a regime which has long been out of date in international law. For discussion see Hakimi (n 140); Marko Milanovic, 'The Syria Strikes: Still Clearly Illegal', *EJIL: Talk!*, 15 April 2018, https://www.ejiltalk.org/the-syria-strikes-still-clearly-illegal; Alonso Gurmendi Dunkelberg and others, 'Mapping States' Reactions to the Syria Strikes of April 2018', *Just Security*, 22 April 2018, https://www.justsecurity.org/55157/mapping-states-reactions-syria-strikes-april-2018. As for reprisals, their illegality has been affirmed by various UN institutions, ranging from the ICJ, the ILC and the General Assembly: *Iran v US* (n 38) separate opinion of Judge Simma, [12]; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226.

As the attempt of the Islamic State to establish a caliphate presented a challenge before the current international legal order and a threat to undermine the ideology underlying it, the campaign against the Islamic State can be seen as a battle for the protection of the international legal system and its core values. The doctrine which justified the use of force in Syria by leading members in the US-led coalition was 'unwilling or unable', notwithstanding the fact that it has no root in international law at the present time. Even if this doctrine has acquired a status under international law, as suggested by Scharf, it is not applicable in the present case because Syria was willing and able to fight the Islamic State, as it did with the assistance of Russia and Iran. As a result, the invocation of the doctrine of 'unable or unwilling' served as an apologetic justification for the use of force.

The Security Council did not provide authorisation for the use of force against the Islamic State; therefore states protected what they perceived as their national interests, even at the cost of violating international law (in particular, the prohibition against the use of force and the principle of non-intervention). The Security Council could have used the doctrine of R2P, but the failed attempt to invoke the doctrine in Libya cautioned the Council from using it in the context of the civil war in Syria (even though this disastrous conflict brought about the death of hundreds of thousands and the injury and displacement of millions). The doctrine of R2P challenges the superiority of sovereignty, as does the doctrine of 'unwilling or unable', but the fact that it was not used in Syria indicates the strength of state sovereignty along with a lack of political interest in promoting the doctrine. Invocation of doctrines such as 'unwilling or unable' reflects the gaps in the current state-centred legal framework, and in the ability of international institutions to address challenges such as that presented by the Islamic State.

A possible solution is consideration of a functional approach in the field of *jus ad bellum*, by analogy with the increasing use of a functional approach in other fields. In simple words, the Islamic State could have been be treated functionally as a state for the purposes of self-defence or collective security measures. This suggestion correlates with the solution of *jus in bello* to situations in which NSAs exercise effective control over territory. It can also lead to more accountability – from both the sovereign state and the intervening states.

This approach balances two competing interests, which are reflected in principles of international law. On the one hand, there is the need to avoid the risk of ineffectiveness of the law – as effective power cannot be ignored at the risk of rendering redundant legal rules in the face of a new reality (*ex factis jus oritur*). On the other hand, international law completely rejects the legal competence of an illegally created entity based on the rule of non-recognition and the principle of *ex injuria jus non oritur*. The functional approach is an interpretative move that recognises the reality on the ground by treating functionally the Islamic State as a state for the sake of *jus ad bellum*, without infringing permanently the sovereignty of Iraq and Syria. In my view, it is a better option to interpret creatively the existing law instead of invoking a doctrine without legal status under international law while ignoring completely that Syria is in fact willing and able to fight the Islamic State but not in conjunction with the states in the US-led coalition.