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INTERNATIONAL LAW AND PRACTICE

Symposium on the Fight against ISIL and International Law Editor's Introduction

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The present symposium follows on from a forum held at the University of Oslo on 11 September 2015 during the 11th Annual Conference of the European Society of International Law. This forum, sponsored by the ESIL Interest Group on Peace and Security, was particularly successful and led to a very interesting debate between the members of the European Society of International Law.[1] The *Leiden Journal of International Law* has today the pleasure to publish, after the usual process of peer review, the complete and updated versions[2] of the four papers presented during this event.

The fight against ISIL[3] raises multiple questions and creates several challenges for international law. These include co-operation issues between the judiciary and police, use of force problems, queries related to the legitimacy and recognition of governments, issues related to political transition and self-determination of peoples and ethnic groups, human rights, humanitarian or refugee law problems, and protection of cultural heritage. It is of course not possible to discuss all of these issues in the limited space available here. Instead, the objective of this symposium is to focus on some of the most important and controversial issues or, to be more precise, the issues concerning *jus ad bellum* and *jus in bello*.

The first three articles address, in detail, problems relating to the use of force against ISIL. The objective of these articles is not only to assess whether the multiple military interventions against ISIL and other terrorist groups are in conformity with positive international law. The articles also aim to evaluate whether these interventions and the counter-terrorism discourse surrounding them could lead to an evolution of the current legal system regulating the use of force.

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1 The video recordings of the event can be found at www.jus.uio.no/pluricourts/english/news-and-events/events/2015/esil-2015-en/video-and-streaming.

2 The articles cover events up to the end of January 2016.

3 This symposium refers to the Islamic State on Iraq and the Levant (ISIL), the name of this terrorist organization used officially in UN practice and UNSC resolutions. The press often refers to this organization as ISIS (Islamic State on Iraq and Syria) while in France and elsewhere the name 'Daesh' is often used.

The first article focuses on the legal basis of consent and military intervention by invitation. Karine Bannelier shows that this was an important legal argument used by states to justify their interventions. The principle has been relied on not only in Iraq, where the nine members of the US-led coalition as well as Russia and Iran 'act under the legal umbrella of consent of the Iraqi government', but also in Libya regarding the Egyptian airstrikes, and Syria regarding Iranian and Russian involvement. The article highlights that, to the extent that these military interventions were consensual and targeted ISIL and other UN-designated terrorist groups, 'their legality has not been challenged by any state'. This contrasts with the sharp criticisms that marked some military operations undertaken either in the name of 'the fight against terrorism' without the consent of the territorial state, such as the Turkish operations in Iraq or, more notably, with the consent of the territorial state but against non-terrorist groups, such as the alleged Russian strikes against the 'Syrian moderate opposition'. According to Bannelier this, along with several other elements, indicates that the consensual interventions in Iraq, Syria and Libya do not challenge the 'classical' rules in relation to intervention by invitation or the prohibition of intervention in a civil war without a specific and legitimate purpose. Bannelier then turns to the intervention of the US-led coalition in Syria and shows the limits of the passive consent theory and the difficulties in using it to provide a legal basis for the airstrikes against ISIL and the Al-Nusrah Front in Syria.

The following two articles, by Olivier Corten and Nicholas Tsagourias, continue this theme by examining whether self-defence, if combined with the unwilling or unable test, might provide the missing piece of the legality puzzle of the fight against ISIL in Syria.

Corten provides a clear negative answer to this question. He starts from the indisputable fact that the unwilling or unable theory does not appear in any treaty or other legal instrument. He then proceeds to an examination of customary international law in order to determine whether this theory was part of positive law in September 2014, when the United States invoked it in order to justify its airstrikes in Syria. Finally, Corten assesses whether this 'precedent' could change the development of *jus ad bellum*.

It is interesting to note, from this point of view, that some scholars, writing in parallel with Corten, took the view that the war against ISIL 'triggered a "Grotian Moment"' that 'changed international law', making it accept henceforth that 'force can be justified where a government is unable or unwilling to suppress the threat posed by non-state actors operating within its borders'.[4] Corten shows, nonetheless, that even among the 15 states participating in the US-led coalition in Syria only four, the USA, Canada, Australia and Turkey, explicitly invoked the unwilling or unable test in their letters to the UNSC or in the debates during the Council meetings. For instance, France spoke of an 'act of war' and 'aggression' against it after the

4 M. Scahrf, 'How the War Against ISIS Changed International Law', March 2016, Case Research Paper Series in Legal Studies, Working Paper 2016-6, (ssrn.com/abstract=2741256), at 1.

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Paris attacks of 13 November 2015,[5] and advanced the argument of self-defence. However, it did not rely on the unwilling or unable theory in its letters to the UNSC, instead giving the impression that it considers the fight against ISIL a very specific and *sui generis* case, especially taking into consideration the important territorial control exercised by the so-called Islamic State. Corten presents several arguments based on practice, *opinio juris* and case law to demonstrate 'the absence of a general acceptance of the "unwilling or unable" test'. In contrast to Scahrf, who relied heavily on Resolution 2249 adopted on 20 November 2015 by the UNSC to argue that this resolution 'plays an important role in crystallizing the new role of customary international law' regarding self-defence against non-state actors and the 'unwilling or unable' test,[6] Corten notes that this resolution *does not even mention* or evoke self-defence. This is significant and is in sharp contrast with some previous resolutions sometimes invoked in support of a broad conception of self-defence, such as S/RES 1368 (2001) that explicitly mentions self-defence in its preamble.

Of course, Corten acknowledges that international law could change in the future in this field. However, he warns that such a radical change could even lead to 'the end of the UN system'. He writes that:

> [b]y conferring to every state the power to implement unilaterally its own conception of the necessities of the war against terror, the "unwilling and unable" standard bypasses, if not simply ignores … the entire collective security system established by the Charter and brings us back to square one of the pre-UN 'self-preservation', 'self-help' or 'vital interests' doctrines.

The third article, by Nicholas Tsagourias, sets the debate about self-defence against non-state actors at the appropriate level. During these last years some scholars have spent a great deal of energy arguing that self-defence and Article 51 of the UN Charter could apply to non-state actors. As both Corten and Tsagourias show, this recurrent debate somehow misses the real point. International law does not prohibit the use of force against non-state actors. Accordingly, there is no need to search for an exception under Article 51 in order to take action against the authors of terrorist attacks. The real issue is whether this force can be exercised on the territory of a third state, especially if this state is unable to eradicate the terrorist group.

Tsagourias considers that the 'classic' rules of self-defence on the basis of attribution fail to satisfactorily address the security threats posed by terrorists, especially because they require in a way or another very close links between a state and the non-state actor. On the other hand, Tsagourias is uncomfortable accepting that the unwilling or unable theory forms part of the primary rule of self-defence. He explains that, even if one succeeds in dealing with several complications in relation to the applicability of this test, the problem still remains as to how this test could provide an autonomous and sufficient legal basis to justify the violation of the

5 See '"France is at war", President François Hollande says after ISIS attack', *CNN*, 17 November 2015 edition.cnn.com/2015/11/16/world/paris-attacks; or 'Hollande maintien sa position: « La France est en guerre », *Le Monde*, 16 November 2015.

6 See Scahrf, *supra* note 4, at 51.

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territorial state's sovereignty that cannot be held responsible for the terrorist's actions. Tsagourias proposes a third alternative legal avenue: self-defence combined with the unwilling or unable test, used as a circumstance precluding wrongfulness or, better still, a circumstance excusing or mitigating the responsibility of the intervening states,[7] within the context of Article 21 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).

This interesting proposal sets the question in a coherent way and deserves careful consideration. However, the author of this editorial is skeptical for two reasons. First, there is in reality a great similarity between Tsagourias' proposal and previous attempts to rely on other circumstances precluding wrongfulness to justify use of force. These include countermeasures, distress and, above all, necessity. The difficulties in doing so have been discussed extensively.[8] Second, it has been shown elsewhere that, if Article 21 of ARSIWA could indeed have a utility in order to deal with the relations between a state acting in self-defence and a third state, this 'circumstance' is very strictly framed by international law 'in order to avoid a situation where the state acting in self-defence could obtain a sort of *carte blanche* in order to violate international law and the rights of third states'.[9] Article 21 of ARSIWA could then, under strict conditions, excuse or mitigate the effects in the territory of third states of actions undertaken in the exercise of self-defence. It could hardly give a license, however, to undertake major military operations for more than one year and a half on the territory of a third state without the consent and, indeed, despite the protests of this state.

The symposium ends with an article by Vaios Koutroulis that provides a meticulous and thoughtful insight into the applicability and operability of *jus in bello* with respect to the conflicts against ISIL. Koutroulis tries to disentangle the various armed conflicts to which the fight against ISIL has given rise, including traditional non-international armed conflict, non-international armed conflict of a transnational character, and potentially international armed conflict. On this basis, Koutroulis seeks to identify the relevant applicable rules. Koutroulis' article on *jus in bello* is in direct relation with some of the papers on *jus ad bellum*, such as Bannelier's article on consent. Indeed, as Koutroulis shows, if the Syrian government is considered as not having consented to the US-led coalition's operations, then the coalition is involved in two distinct armed conflicts: one international with the Syrian government and one non-international with the Islamic State. Koutroulis also shows the contradictions between the *jus ad bellum* and the *jus in bello* arguments of states. Koutroulis takes as an example President Hollande's declaration after the 13 November Paris attacks that France 'is at war' with ISIL. The geographical scope of application of international humanitarian law (IHL) extends to the territory of the states intervening in the 'war' against ISIS, which means that IHL applies in an operation against an

7 See T. Christakis and K. Bannelier, 'La legitime defense a-t-elle sa place dans un code sur la responsabilité internationale?', in A. Constantinides and N. Zaikos (eds.), *The Diversity of International Law: Essays in Honour of Professor Kalliopi K Koufa* (2009), 530–1.

8 See O. Corten, *The Law Against War* (2010), 198–248.

9 See T. Christakis and K. Bannelier, 'La légitime défense en tant que circonstance excluant l'illicéité', in R. Kherad (ed.), *Légitimes défenses* (2007), 254–5, and Christakis and Bannelier, *supra* note 7, at 529–30.

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ISIL fighter in the territory of a state party to the coalition, for example, in the arrest of a terrorist in Paris or Brussels. However, as Koutroulis highlights, state practice with respect to such incidents indicates that attacks by ISIL outside the territory of Iraq and Syria 'have been treated under a law enforcement paradigm rather than under IHL'. Indeed,

> despite the bellicose rhetoric adopted by French authorities in the aftermath of the Paris attacks, the reaction to the attacks on behalf of the French and Belgian authorities was a typical law enforcement operation of search for and arrest of suspected criminals.

As a conclusion, we hope that the readers of the *Leiden Journal of International Law* will appreciate the interesting thoughts and arguments put forward in these four articles. The debate on several of the issues discussed here is, of course, far from over. However, it is necessary to respond to terrorism within the framework of international law and institutions. The UN Security Council undoubtedly has a major role to play. It is therefore frustrating to watch its current, self-imposed confinement of its role to producer of ambiguous resolutions of an essentially diplomatic character, such as Resolution 2249 (2015). Let us hope that in the near future the Council will finally be able to play a more decisive role, including by giving a clear Chapter VII use of force mandate to the states intervening against ISIL and terrorism. On the basis of this symposium, it seems clear that this is necessary to avoid the current legal uncertainties and the risks associated with states' recourse to new theories such as the 'unwilling or unable' test.