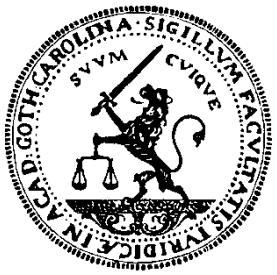

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The legal position of the Islamic State in international law

Legality of the use of force against the Islamic State

LAGF03 Bachelor Thesis

Bachelor Thesis, Bachelor of Law program
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Contents

Summary

ISIS is not a state. Legal considerations point at that ISIS is a non-state actor and a terrorist organisation. Out of the declaratory theory of recognition, effective control, rule through consent, stabilisation of national conditions and the constitutive theory of recognition ISIS quite convincingly fulfils the first two criteria. In UNC article 2.4 we find a prohibition on the use of force. The use of force in Iraq and Syria to combat ISIS is predominantly justified by foreign actors through the pillars of self-defence (UNC article 51), humanitarian intervention, consent of the host states and the need to protect own nationals. In this context, attribution of ISIS' actions to the state of Iraq and Syria becomes relevant, to which we answer negatively. The use of collective self-defence could serve as a solution. Leniency towards the accumulation of events theory is more understandable than the anticipatory use of force. Necessity and proportionality are two important elements of self-defence, of which at least the prior can to a larger degree be established in our case. The consent of the Iraqi and Syrian government plays an important role in the legality of the use of force against ISIS. Conclusively, some questions regarding the practical difficulties of an eventual lawful use of force against ISIS arise such as previous downfalls of external actors in the Middle East and resentment among the masses. Diplomacy and methods specifically targeted at confining the territorial strengths are suggested as careful solutions to the problem.

Sammanfattning

ISIS är inte en stat. Juridiska överväganden pekar på att ISIS är en icke-statlig aktör och en terrorist organisation. Utav ‘the declaratory theory of recognition’, faktisk kontroll, styre genom samtycke, stabilisering av nationella förhållanden och ‘the constitutive theory of recognition’ uppfyller ISIS ganska övertygande de två förstnämnda kriterierna. I FN-stadgans artikel 2.4 finner vi våldsförbudet. Våld i Irak och Syrien i syfte att motverka ISIS förklaras framförallt av utländska aktörer genom argument som rör självförsvar (FN-stadgan artikel 51), humanitär intervention, samtycke av värdländerna och behovet av att skydda egna medborgare. I sammanhanget, blir hänförbarheten av ISIS åtaganden till staten relevanta, men vi svarar i nekande i kontexten. Kollektivt självförsvar skulle kunna vara en lämplig lösning. Det finns anledning att luta mot ‘the accumulation of events theory’ mer än ‘the anticipatory use of force’. Faktiskt behov och proportionalitet är två viktiga faktorer av självförsvar, av vilka den förstnämnda är till stor utsträckning fastlagd i vårt fall. Samtycke från den Irakiska och Syriska regeringen spelar en viktig roll vid lagenligt bruk av våldsparagrafen gentemot ISIS. Sammanfattningsvis, förekommer vissa frågor gällande de praktiska svårigheterna med eventuell lagenlig våldsanvändning mot ISIS t.ex. tidigare motgångar av externa aktörer i mellanöstern och misstro bland folket. Diplomati och metoder som är riktade just åt begräsning av ISIS territoriella styrkor föreslås som försiktiga lösningar till problemet.

Acknowledgments

I would like to thank my supervisor, Peter Gottschalk, for his critique and assistance in leading me to core materials for this work. For the same reasons, I would also like to express gratitude to professor Ulf Linderfalk, whom I also consulted in pursuit of relevant sources.

Having a law-studying sibling, Jyoti Gogia, who informed me about English resources of law, certainly helped a lot because it opened up a vast array of international legal literature. A heartfelt thanks to her!

The feedback I received at the thesis seminar from examiner Sverker Jönsson and opponent Andras Vincze was very useful as they brought to my attention valuable adjustments that were necessary before the publication of this essay.

Last, but by no means least, I would like to express appreciation to my family and friends for being eager to engage in challenging dialogues about intervention and the Islamic State from the onset of research for this piece of work.

Any errors of fact or judgment are of course my own.

Abbreviations

ARSIWA	ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001)
FRD	Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1970)
IBA	International Bar Association
ICJ	International Court of Justice
IS	Islamic State
ISIS	Islamic State of Iraq and al-Sham
Montevideo Convention	Montevideo Convention on the Rights and Duties of States (1934)
NATO	North Atlantic Treaty Organisation (1949)
OIC CCT	Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999)
PEW	PEW Research Centre
Rome Statute	Rome Statute of the International Criminal Court (1998)
S/RES	Security Council Resolution
UNC	Charter of the United Nations (1945)
UN Doc	United Nations Document
UNGA	General Assembly of the United Nations
UNSC	United Nations Security Council (1945)
VCLT	Vienna Convention on the Law of Treaties (1969)

1 Introduction

1.1 Background

The Islamic State of Iraq and al-Sham, hereinafter ISIS, is attracting attention from the international community like never before. They have carried out operations in the name of this organisation as well as closely affiliated names for roughly a decade now, primarily from Iraq and Syria. In the backdrop of activities conducted by ISIS, the international community has shaped their legal policies accordingly. The U.S., for one, is carrying out airstrikes in Iraq and Syria and supplying and training the local forces with material to combat ISIS. The recurring causes for contemporary intervention in Iraq and Syria found in legal texts is that of self-defence and humanitarian intervention. The U.S. itself refers to intervention as part of a counterterrorism strategy[1], but we have reason to take account of all legal justifications for the intervention. This essay is a study of legal intervention and ISIS.

1.2 Aim of the study

Since the emergence of ISIS, the events in Iraq and Syria have been viewed through many different lenses and this essay in particular aims to shed some legal light on the question of ISIS and the use of force against it. It seems that the grounding principle of sovereignty does not suffice to answer the set of questions that arise in connection with this new phenomena. It is essential that we identify the key factors involved and define them. It is only then that we have a reasonable chance of not only debating on lines of reason, but

[1] Barack Obama, 'On ISIL, Our Objective is Clear' (Washington, D.C., 10 September 2014) <https://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1> accessed 20 March 2015

also tackling the situation in Iraq and Syria and their international counterparts.

1.3 Research questions and delimitations

The main research question of this essay is derived from the title of the essay itself, namely the Legal Position of the Islamic State in International Law - Legality of the Use of Force against the Islamic State. In drawing conclusions on the topic a number of subtopics will be addressed, such as the question of statehood and the hierarchy between the criteria involved. Another underlying research question deals with the onset of rights entitled to a state in accordance with UNC articles 2.4 and 51 by a non-state actor.

For a concrete analysis I will unfortunately have to leave out some very interesting aspects of intervention such as the mandate of the Security Council as per UNC article 42 and even the financing of ISIS. The actual use of force will take primacy over the threat of force in this essay.

1.4 Materials and previous research

During the course of research for this essay I found a large amount of literature about legality of the use of force, and less literature about ISIS. To illustrate, Christine Gray's *International Law and the Use of Force*[2] has served as an ideal introduction to the topic, but to compensate for the understandable absence of direct discussion on ISIS, I had much use of online legal journals. I even attempted to find common denominators between the chosen field of study and an advisory opinion from the ICJ, judgements from the ICJ and international documents to complete the investigation.

[2] Christine Gray, *International Law and the Use of Force* (3rd edn, OUP 2008)

1.5 Research method, theory and outline

For achieving the purposes of this essay it will firstly be examined what legal position can be attributed to the Islamic State. We must classify ISIS because the rights and obligations that materialize depend the type of entity that we are dealing with. ISIS will be measured against the criteria of statehood and that of terrorism.

The analysis will continue with a presentation of the most relevant articles from the Charter of the United Nations, mainly the prohibition on the use of force and the right to self-defence. The immediate link between the question of ISIS, statehood and the UNC articles will be found in chapter 3, with a presentation of a flexible and a strict approach as well as considerations of attribution. Relevant international case law on the matter will be presented.

Associated legal norms will follow. The selection of the norms to be taken up was based on their recurring prevalence in the legal texts that I studied. These include the accumulation of events theory, the theory of anticipatory use of force, necessity and proportionality. Consent and humanitarian intervention will also be examined.

With this knowledge at our disposal, the final segment will once again bring into focus intervention in the specific case of ISIS and its legal implications.

In this investigation UNC articles 2.4 and 51 among others will be examined closely and it can already be mentioned that parallel to the conclusions that I draw, one ought to have VCLT articles 31-33 in mind for a thorough understanding of the relationship between the conflicting norms and texts to be discussed.

2 The legal categorization of the Islamic State

2.1 The concept of a state and the Islamic State

Currently ISIS is estimated to comprise of 25 000 – 30 000 persons. Contrary to the proclamations of the Islamic State about being a State and an Islamic Caliphate, many functionaries of international law do not recognise ISIS as a state. This is partly owed to the criteria on the definition of a state in article 1 of the Montevideo Convention. It should not go unnoticed that one could, judged from factual information, to some extent successfully argue that ISIS does in fact possess a permanent population (those who are under occupancy of ISIS in Iraq and Syria), a defined territory (occupied areas by ISIS in Iraq and Syria), a government (the proclaimed caliphate) and even an ability to enter into relations with other states. For a thorough analysis we must delve into questions of 'effective control'[3], consent, durability of conditions and the 'declaratory' and 'constitutive'[4] theory of recognition.

2.1.1 Effective control and consent

As concerns the governance criteria, a test based on 'effective control'[5] narrows down the possibility of an eventual existence of a state. Most researchers would agree that ISIS is in fact exercising effective control over its occupied regions. Franck and Crawford are known for associating the governance yardstick with notions of consent-of-the-people and the consent

[3] Sean Murphy, 'Democratic legitimacy and the recognition of states and governments' (1999) 48 ICLQ 547
[4] ibid 548
[5] ibid 547

of-the-previously-reigning government, respectively.[6] Murphy enriches the two theories by accruing to them the status of an 'international legal norm'[7].

Interestingly, the case of the Algerian government quelling the Islamic Salvation Front in 1991 disproved the consent-of-the-people theory in that, in spite of the forceful elimination of political opposition by the Algerian government, the international community showed appreciation for the government's actions. Indeed, this meant that the true consent of the people was never able to come to the forefront.

In the case of ISIS, there really seems to be divided opinions on whether either of the two forms of consent exists in Iraq and Syria, though PEW's reports, at least as concerns the consent-of-the-people dynamic, shows that support for ISIS in these countries is growing dimmer.[8]

2.1.2 Stabilisation of conditions and the declaratory and constitutive theory of recognition

Whether or not the recognition of a state necessitates the stabilisation of the Montevideo qualifications is another aspect.[9] ISIS' formation dates back to a number of years now, but it is still relatively early to assess whether this criteria has been met. For that matter, the extent to which it is the number of years that determines if an entity successfully qualifies as a state or not is unclear. Rather it is territorial control, provision of services and an overall togetherness of the people, which is the true indicator of stabilisation according to Dodge and Wasser.[10] Nonetheless, the declaratory theory of recognition and constitutive theory of recognition[11] could act as a reserve

[6] Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 AJIL 46 and James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 33
[7] Murphy (n 3) 574
[8] Audrey Cronin, 'ISIS Is Not a Terrorist Group' (2015) 94 Foreign Affairs
[9] Murphy (n 3) 547
[10] Becca Wasser and Toby Dodge, 'The Crisis of the Iraqi State' (2014) 54 Taylor and Francis Online 14
[11] Murphy (n 3) 548

anchor, of which ISIS seems to satisfy the first as they have declared themselves a state, but have not won widespread international approval for the same. In any case, though according to traditional international law, it is unequivocal that ISIS is not a state, Cronin prefers to call ISIS a 'pseudo-state led by a conventional army'[12]. Perhaps Coll's interpretation of ISIS is even closer to reality:

> 'ISIS is […] part terrorist […] part guerrilla army, part proto-state'[13].

It would be in place to reassert that ISIS still is not a state when viewed through the lens of international law.

2.2 The Islamic State as a non-state actor

Another term that is used to describe ISIS, especially in the terminology of the UNC is that of a non-state actor. At first sight, this means that the rights and responsibilities that stem from statehood cannot be instituted upon ISIS. A not so far consequence of this could be said to be that the activities of ISIS cannot be attributed either to the Iraqi or Syrian state. The legal implications of these sorts of conclusions are significant with regard to the use of force, which are best discussed under the rubric of attribution, further on in this essay.

2.3 The Islamic State as a terrorist organisation

ISIS is widely referred to as a terrorist organisation. Cronin, however, expresses that ISIS is too big and established to be contained within the

[12] Cronin (n 8)
[13] Steve Coll, 'In Search of a New Strategy' (2014) 90 New Yorker 27

scope of this description, and hence is not a terrorist organisation at all.[14] What the term terrorism more precisely means is therefore clearly not undisputed. On a subjective level, Rehman illustrates the difficulty in defining terrorism by presenting the well-known saying:

> 'One man's terrorist is another man's freedom fighter.'[15]

2.3.1 Terrorism and the Rome Statute

Terrorism is not included as a crime in the Rome Statute, so this does not tell us what terrorism is, rather it tells us what terrorism is not. Synchronically, the actions of ISIS can be regarded as being crimes against humanity, which render the activities of ISIS criminal. This has been voiced to be enough to legitimise military intervention.[16]

2.3.2 Conventions, Resolutions, Reports and Terrorism

We find more concrete guidance in article 1.2 of the OIC CCT, judging from which the objective practice of threats, destruction, harm and confiscation of rights, by ISIS amounts to terrorism. A similar line of argument is prevalent in S/RES 1368 and 1373 of 2001 and reports adopted by the Secretary General and Committees. In view of the last mentioned resolution and the ever-growing fear of terrorism, it was even questioned whether the resolution gave the go-ahead to an 'unlimited' use of force.[17]

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[14] Cronin (n 8)
[15] Javaid Rehman, *Islamic State Practices, International Law and the Threat from Terrorism* (1st edn, Hart 2005) 73
[16] – –'Muddled?' (2014) 141 Commonweal 5
[17] Michael Byers, 'Terrorism, the Use of Force and International Law after 11 September' (2002) 51 ICLQ 402

3 Introduction to self-defence as an exception to the use of force

3.1 Introduction to articles 2.4 and 51 of the Charter of the United Nations

It is intended that no derogation occur from the prohibition of threat or use of force in UNC article 2.4. This renders it a jus cogens character. Linderfalk, among others, does not accrue to this viewpoint, though he does admit that it is part of international customary law.[18] In the article, the State is explicitly mentioned as the counterpart who shall enjoy this nearly absolute territorial and political independence. Self-defence was previously a feature of the Briand-Kellogg Pact (1928), and is currently regulated in UNC article 51. Apart from being a part of codified law, Byers believes that it is an acknowledged reason for the resort to force in customary international law.[19]

3.1.1 Emergence of non-state actors

The emergence of new non-state actors such as ISIS, who by some, are considered capable of carrying out the sort of armed attack mentioned in UNC article 51, raises the question of whether non-state actors by themselves and alone can cause the activation of the rights in UNC article 2.4 and 51. This question is important because it allows us to gauge if intervention by victim states to combat non-state actors in a not guilty host state at the expense of UNC article 2.4 concords with international law. The

[18] Ulf Linderfalk, 'The effect of jus cogens norms: whoever opened Pandora's box, did you ever think about the consequences?' (2007) 18 EJIL 860
[19] Byers (n 17) 401

host state's right to continue to be protected by the provisions of UNC article 2.4 vis-à-vis the victim state's rights are at stake here.

On this point, Simma, Khan, Nolte and Paulus present on the one hand that private groups are not the debtor nor the creditors of UNC article 2.4, whereas on the other hand they confer the rights and obligations of UNC article 2.4 to all 'regimes exercising their authority in a stabilized manner'.[20] Since ISIS can, depending on the angle of argument, be placed under any one or both of the descriptions, an investigator may feel somewhat bewildered. We continue to wonder; then what are the true implications of a victim state or for that matter a third party using force against ISIS?

3.2 State-to-state interaction – a restrictive view on the use of force against ISIS?

In the Wall case, ICJ reiterated that it is an armed attack of one *state*, which legitimizes the victim state's right to self-defence. However, even though this comment exhibits divisiveness of the state-to-state interaction, it was likewise implied that a non-state actor was responsible for the attacks.[21] Three dissenting judges went the whole way and took the stance that non-state actors could indeed commit an armed attack. Moreover, even the separate opinion of one judge in the Congo case bears evidence of this.[22]

Further, Trapp is convinced that when a victim state responds to the incitement of a non-state actor within the borders of another state, then this

[20] Simma et al, *The Charter of the United Nations, A Commentary* (3rd edn, vol I, OUP 2012) 213
[21] Legal Consequences of the Construction of the Wall (2004) para 139
[22] Congo v Uganda (Separate Opinion of Judge Simma) (2005) ICJ para 11

> 'surely amounts to a violation of that State's territorial integrity, even if the use of force is defensive and not targeted at the State's apparatus.'[23]

The result of application of this theory on ISIS rules out the use of force in Iraq and Syria as adhering to international law, as ISIS according to traditional legal theory is not a state.

3.3 State-to-non-state interaction – a flexible view on the use of force against ISIS?

In the case of the attacks on the World Trade Centre on 11th September 2001 by Al-Qaida, which gave leeway to changing international customary law, the host state's right to sovereignty and independence had to take the backseat while the victim state was allowed to seek restoration. Corton sees the reasonableness of this solution.[24] Raphael joins in and believes that attacks by non-state actors can indeed prompt self-defence as non-state actors can carry out armed attacks.[25] Even though Raphael's argument is slightly shaky when measured against contemporary international perceptions and more specifically the UNC, there is reason to give it attention. After all, many advocate that the use of force in international law is decentralized and a lot of solutions are contained in treaties and other forms of international relations between states.

Naturally then, if ISIS, who in spite of being a non-state actor is the cause of the attack in UNC article 51, then the use of force against it could, as a starting point, be considered lawful.

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[23] Kimberley Trapp, 'Back to basics: necessity, proportionality, and the right of self-defence against non-state terrorist actors' (2007) 56 ICLQ 145
[24] Raphael Steenberghe, 'The law against war or jus contra bellum: a new terminology for a conservative view on the use of force?' (2011) 24 LJIL 763
[25] ibid

3.4 Attribution and the activities of ISIS

Hirschmann asserts that there is 'terrorism supported by a state' as opposed to 'terrorism tolerated by a state' and this will be the basis of the discussion below.[26] The idea of attribution aids in assessing when the actions of a non-state actor can be attributed to a state. At first glance any conclusion reached from this course would seem to simplify the problem at hand, as this gives the victim state a legitimate reason for confining the territorial integrity and political independence of a host state. For example if the state of Iraq and Syria were legally responsible for the undertakings of ISIS, then the otherwise existing fact that the victim state would perhaps have to take the toll for not being able to intervene in Iraq and Syria as ISIS is a non-state actor, fades. As the reader will see, the situation is in fact far more complex and these dilemmas will be discussed further on in the essay.

It can be added that the standpoints of 'Bright-Liners', who have a more black and white and strict approach to use of force in general, and 'Balancers', who have a more flexible approach to the use of force, are two schools of popular thought.[27] These could be used to argue for the different nuances of possible attribution of ISIS to the Iraqi and Syrian state, which will be taken up in the analysis below.

3.4.1 Green light for attribution

When states 'actively support or willingly harbour' the perpetrators, the question of attribution is considerably simplified and it has even been put forth that in cases like these military intervention is in place.[28] Some authors

[26] Noelle Quenivet, 'The World after Sept 11: has it really changed?' (2005) 16 EJIL 565
[27] Matthew Waxman, 'Regulating resort to force: form and substance of the UN Charter regime' (2013) 24 EJIL 152
[28] Byers (n 17) 409

like to call this 'response to indirect aggression'.[29] What characterizes this concept is one state's resort to armed force via the actions of another State or non-state actor of which the latter categories appear to be the main performers.[30]

In the Congo case, the ICJ was of the opinion that rebel groups were acting against Congo on behalf of the Ugandan state and thus the attributably criteria was met.[31] However, support which one state gives to another state or non-state actor does not necessarily need to amount to use of force, as was seen in the Nicaragua case.[32] It is unclear if American armament and training of Iraqi and Syrian ground troops amounts to the use of force. Indeed this is not the same genre of attribution that we have been discussing so far, but the question nevertheless portrays the many interests involved in the current situation.

There is not enough legal or political knowledge to suggest that the Iraqi or Syrian state is the sole initiator of the actions of ISIS and hence it can be summed up that ISIS actions are not attributable to the state.

3.4.2 Yellow light for attribution

One prominent indicator for attribution is that of 'acquiescence'[33], which results when a state tacitly consents to terrorist incentives within its borders. The line of argument can certainly be followed here as even consent by silence points to the involvement of the host state in the intentions of the terrorists and deserves a fair share of responsibility. In recent practice the applicability of the actor criterion in UNC article 2.4 has been viewed under 'more lenient conditions'.[34]

[29] Steenberghe (n 24) 775
[30] Simma et al (n 20) 211 and FRD §§ 8-9
[31] Congo v Uganda (2005) ICJ paras 160-165 and ARSIWA arts 4-8
[32] Military and Paramilitary Activities in and against Nicaragua (1986) ICJ para 191
[33] Trapp (n 23) 154
[34] Christian Tams, 'The Use of Force Against Terrorists' (2009) 20 EJIL 361

Current legal and political knowledge does not hint at that the Iraqi or Syrian state would be accepting of ISIS' actions. This means that victim states acting in Iraq and Syria would need to seek refuge elsewhere for the legality of the use of force, especially in the case of total rejection of the idea of ISIS being able to trigger a victim's states invocation of UNC article 51.

3.4.3 Red light for attribution

It has been suggested that the terrorist organisation must be the sole target of the victim state if they were the only attacker.[35] If the host state is practically unable bring the attacks of the terrorists to an end is one more reason to direct the victim state's response at only the terrorists.[36] However, the mandate of the U.S. in Iraq and Syria has been suspected of being too broad and not having ISIS as its focus.

These ideas in particular have even welcomed the debate of 'failed states'[37]. For example, if a state at one point in time did in fact meet the criteria of article 1 in the Montevideo Convention, but due to new circumstances does not continue to do so, then how do we view this state in the meaning of UNC article 2.4? Does intervention become more or less justified?

3.5 Collective vs individual self-defence

In relation to ISIS, several sources point to that the regional community in the Middle East, Iraqi army, Kurdish Peshmerga and Sunni forces could

[35] Trapp (n 23) 147
[36] ibid 156
[37] Byers (n 17) 403 and Simma et al (n 20) 217

cooperate together with the U.S. to defeat ISIS.[38] Such action could in international law be termed collective self-defence. Upon consideration, we might actually find that the upside of this is that the U.S. would save itself from the on-going criticism for going overboard with its mandate of 2001 to defeat Al-Qaeda and of 2002 to go into Iraq. ISIS is a separate and arguably a conflicting entity to Al-Qaida and U.S. airstrikes in Syria are clearly not on Iraqi territory. One often-expressed problem with collective self-defence of this sort is that countries such as Saudi Arabia and Qatar, have made headlines for financing terrorism. To settle political aspirations of this kind would take time, but may certainly be worthwhile.

[38] Michael Pregent and Robin Simcox, 'ISIS on the Run' (2015) 94 Foreign Affairs and Leonard Weinberg, 'The Islamic State and American National Security' (2014) 10 Democracy and Security 341

4 Self-defence and associated legal norms

Once again, we keep to UNC articles 2.4 and 51 and analyse what impact developing legal norms has had on them. ISIS is even here the persistent topic of debate.

4.1 Accumulation of events

When two or more attacks allow for a victim state to legally resort to force we can say that the accumulation of events doctrine has penetrated. Over time, states have become more accepting of this theory, as shown by the Oil Platforms case, and Simma, Khan, Nolte and Paulus speak appreciatively of it.[39] President Obama's reliance on the theory can be spotted by his announcement:

> 'While we have not yet detected specific plotting against our homeland, ISIL leaders have threatened America and our allies'. [40]

Nonetheless, the UNSC has not officially adopted or acknowledged it. Tams is one author who expresses concern over this doctrine when he means that its adoption could act as 'an open-ended licence to use force'[41]. However, it is not as though attacks by non-state actors like ISIS would rise owing to this method of accountability. Careful delimitations and reasonableness in the application would anyways need to be taken account of, just as in the case of any other legal provision. Hence I do not see the immediate harm in the implementation of this theory.

[39] Simma et al, *The Charter of the United Nations, A Commentary* (3rd edn, vol II, OUP 2012) 1409
[40] Obama (n 1)
[41] Tams (n 34) 389

4.2 Anticipatory use of force

The IBA separate anticipatory use of force from pre-emptive use of force.[42] Anticipatory use of force has not gained acceptance in international law.[43] However the indications of the Caroline case are representative of the view that anticipatory self-defence can be used, under the prerequisite that certain conditions are met. These are namely that the relevant threat is 'instant, overwhelming, and leaving no choice of means, and no moment of deliberation'[44]. I find that this approach can be somewhat troublesome, even when justifying anticipatory use of force against ISIS, as I will try to reflect below.

Simma, Khan, Nolte and Paulus believe that the Caroline formula is out-dated and should not be affiliated with UNC article 51.[45] The intention is to curb the misuse of force by states against other states and non-state actors. As the reader may notice, the difficulty of this is similar to the one that the accumulation of events doctrine faces. Though I expressed some degree of leniency towards the accumulation of events doctrine and discussed the feasibility of its successful application, my assessment is slightly different in the case of anticipatory use of force. It can be much harder to predict and prove an imminent and singled out future-armed attack than an armed attack which follows a series of patterns over an identified period of time.

Hence it seems that the dangers stemming from the anticipatory use of force are somewhat high, at least higher than those risks emanating from the theory of accumulation. As a consequence there can be rational reasons for not accepting anticipatory use of force against ISIS, at least not until the factual circumstances and state practice show otherwise. The UN High-level

[42] Noelle (n 26) 577
[43] Byers (n 17) 411
[44] UN Doc. S/PV.2283:56 (1981)
[45] Simma et al (n 39) 1423

Panel on Threats, Challenges and Change tried to clear the air by campaigning that it is specifically imminence that could justify an anticipatory use of force.[46] The critic and not least the UNSC may find it difficult to separate this from the criteria set out in the Caroline formula and not surprisingly so.[47]

Of course one cannot deny that there can arise situations were characteristics of both the theories are prevalent. There is reason to see the fate of these scenarios as a case of accumulation of events, but clearly if the anticipated attack is too far out in time from the series of already occurred armed attacks, then there is reason to be cautious.

4.3 Necessity and proportionality

4.3.1 Necessity as a filter

It is established that necessity and proportionality is a feature of self-defence in customary international law and the U.S. and its allies have certainly not understated these criteria for the purposes of justifying their use of force in Iraq and Syria. It would be in order to start with necessity as the first threshold that self-defence has to cross followed by the discussion of proportionality. The validity of this set-up seems appropriate firstly because the substantive absence of necessity would make void any claims of proportionality and so this serves as an adequate filter. Secondly, it might even be concluded that proportionality is indeed a case specific topic and a matter, which usually calls for consideration of relatively many more circumstances than necessity, and as a result of this it should be studied subsequent to necessity.

[46] UNGA, 'A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change' (2004) para 188
[47] Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (1st edn, CUP 2002) 67

4.3.2 Elements of necessity

Corton declares three characteristics of necessity; *immediacy, effectiveness (adequacy or appropriateness) and proportionality*[48]. It is interesting to note, that besides being consumed in the necessity assessment, the last named criterion is even an independent feature of self-defence. It therefore becomes important to keep the two terms apart. Apart from this, Corton even sheds light on that if other more 'appropriate' methods are deliberately not used, then the means being used cannot be necessary.[49] A state's inability to deal with non-state actors operating on its territory, which was even considered under the rubric of attribution, is thought to equate with increased necessity.[50] The same applies when a host-state, despite the availability of resources, is consciously not trying to suppress the destructive activities of non-state actors towards another state.[51]

4.3.3 Necessity and ISIS

When applied to ISIS, the above-presented markers could be used to suggest that the necessity of containing the threat of ISIS justifies intervention in Iraq and Syria. After all, the leaderships of Iraq and Syria have been unable to deal with ISIS and Iraq has explicitly consented to external intervention. It is difficult to legally assess the fulfilment of the other criteria mentioned in the previous section in relation to ISIS.

Furthermore, ISIS has time and again expressed the will to take over the world, more increasingly after the pronouncement of the 'caliphate' in June 2014. Some observers do not see this as a possible outcome, whereas others believe that the declaration poses a threat to the sovereignty, 'conceptions of

[48] Steenberghe (n 24) 783
[49] ibid
[50] ibid 766f and Yoram Dinstein, *War, Aggression and Self Defence* (5th edn, CUP 2001) 217
[51] David Kretzmer, 'The inherent right to self-defence and proportionality' (2013) 24 EJIL 273

territoriality and tactics of territoriality'[52], and ultimately the security of other states. Then there is of course a third category that identifies indiscriminate terrorist attacks by returnees and converts to ISIS to the West as the worst and most likely scenario.[53] Both the latter categories would agree that necessity to intervene in Iraq and Syria exists.

4.3.4 Proportionality

The 'means-end' test and 'tit for tat' test are the two formulae that are adhered to when dealing with proportionality.[54] As the names suggest, the first test is designed so that a victim state can use means that are just necessary to attain 'legitimate'[55] aims of the intervention, which is usually to 'halt and repel the attack'[56]. The second test would enable a victim state to respond to a degree that concorded with the attack. In the Use of Nuclear Weapons Advisory Opinion (1996) it was suggested that for use of force to be proportionate, it must conform to the rules of armed conflict and humanitarian law.[57]

There seem to be 'grave and minor infractions of prohibition against force'.[58] As was revealed in the Nicaragua and Oil Platforms case either of the two transgressions suffices as grounds of self-defence if the attack itself availed 'grave forms of force'.[59] Further, the Chantham House Principles renounce any level of gravity at all for an armed attack to be able to generate a response.[60] In the Oil Platforms case, Judge Simma went as far as suggesting that a small *reprisal* would be an acceptable measure to redress a small attack (my italics).[61] This along with Simma's disregard of 'deterrent,

[52] Yosef Jabareen, 'The Emerging Islamic State: Terror, Territoriality, and the Agenda of the Social Transformation' (2014) 58 Geoforum 51
[53] Weinberg (n 38) 336
[54] Kretzmer (n 51) 235
[55] ibid 239 and UNC preamble para 7
[56] Kretzmer (n 51) 250
[57] Linderfalk (n 18) 865, 871
[58] Tams (n 34) 375 and Steenberghe (n 24) 759
[59] Dino Kritsiotis, 'Close Encounters of a Sovereign Kind' (2009) 20 EJIL 308
[60] Kretzmer (n 51) 243
[61] Oil Platforms (Separate Opinion Judge Simma) (2003) para 13

retributive, or even punitive motives'[62] behind acts of self-defence in a commentary of the UNC has the potential of raising some eyebrows. This is due to that reprisals are in fact not allowed under international law, as witnessed by the FRD, ARSIWA and S/RES/188 (1964).

4.3.5 Proportionality and ISIS

In September 2014 President Obama revealed that the aim of intervention in Iraq and Syria was to 'degrade and ultimately destroy'[63] ISIS, which could seem in order as a 'legitimate' cause as ISIS is the source of the armed attack. It has of course even been suggested that U.S.', NATO's and their partners' goal in Iraq and Syria is to push for democracy[64], which makes uncertain the legitimacy of intervention, and there are certainly those that express that this is just not desired nor well-suited for Islamic states. In the latter's eyes the intervention is not proportional. Lastly, this section must be read parallel with the previous section as legitimacy and necessity are intertwined.

[62] Simma et al (n 39)1427
[63] Obama (n 1)
[64] Weinberg (n 38) 337

5 Use of force against ISIS after consent of the Iraqi and Syrian governments?

Integrity and independence are so imperative rights that it is not surprising that Benjamin Franklin once expressed himself so bleakly:

> 'They who would give up an essential liberty for temporary security, deserve neither liberty nor security.'[65]

However, this is far from the prevailing view in the international community. It is a well-integrated part of customary international law that invitation or 'genuine' consent excuses the breach of UNC article 2.4.[66]

5.1 Accepting consent in specific circumstances

Both Corton and Raphael dislike the notion of using consent as a ball plank if all other methods for justifying the use of force fail. Firstly, the exception they say is when consent is given much in advance for example in a treaty. The situation in Iraq and Syria is of an interim nature and at least in this case no treaties have been signed. Secondly, in their view, a valid consent exists when;

- Consent comes from recognised governments with control.
- Consent is unimpaired, explicit and complete.

[65] Eric Metcalfe, 'Terrorism as a Challenge for National and International Law: Security versus Liberty?' (2005) 1 EHRLR 112
[66] Byers (n 17) 403 and Simma et al (n 20) 214

- Consent is not the result of any form of legally termed duress. [67]

5.2 Consent and ISIS

The government of Iraq, in contrast to the government of Syria, has given consent to the international community to enter and combat ISIS. In spite of the fact that Syria has not explicitly welcomed external aid, some believe its passivity to be a clear sign of consent.

One problem arises when we consider the liabilities of the governments in Iraq and Syria and start to contemplate whether consent by failing governments suffices.[68]

[67] Steenberghe (n 24) 772
[68] Simma et al (n 20) 215

6 Use of force for the purposes of humanitarian intervention

Humanitarian intervention and the right to it is by far one of the areas that displays the most dissenting set of opinions. Some claim that no such right exists while others hint at that, though it does not exist on paper, it is a part of international customary law. The interests of nationals of other states is often claimed to be the justificatory element. Simma, Khan, Nolte, Paulus and Kimberley are convinced that this is not the case, not even for the alleged *responsibility to protect*.[69]

The U.S. has been pursuing its aims in Iraq and Syria in the name of humanitarian intervention since August of last year.[70] It claims that it was the plight of the Yazidis that took them there. Weinberg's claim that it was the torture and murders of the U.S. nationals and servicemen and women in for example Erbil, which brought about the U.S. intervention in Iraq and Syria would be agreeable even to Simma, Khan, Nolte and Paulus as they recognise the reasonableness of intervention for the sake of own nationals in another country as lawful. [71]

[69] Simma et al (n 20) 224f and Trapp (n 23) 147
[70] Michael Schelerer et al., 'Whose fight is this?' (2014) 184 Time 16
[71] Weinberg (n 38) 336

7 Conclusions and analysis

7.1 Why is even the (lawful) use of force not well received?

The following section falls outside the immediate scope of the research question, but the multifaceted considerations related to ISIS and the use of force are incomplete without this account.

The intervention in Iraq and Syria has had its ups and downs. The attacks of 2007 led by General David Petreus were hailed not only by the international community, but the populations of Iraq and Syria. Legal intervention in Iraq and Syria has not always proved to be a success. Perhaps it is on account of this widely accepted fact that proclaimed intentions of combatting ISIS are met with cynicism.

Cyndi provides a valuable insight into the matter. Her research fingers at the unclear course of action of the Coalition Provisional Authority and Departments as well as clashes between the new Councils and old Ministries responsible for the deficiencies of the Iraqi Justice Integration Project. She even holds military interferences in the judicial system accountable for the downfall. In summary, she condemns the 'top-down', 'minimal' and 'substantive' nature of the rule of law that was faultily trying to be implemented in Iraq.[72] So even if there is lawful intervention, the international community is up against an incline when securing the buy-in of the Iraqi and Syrian people.

Even the immediate spill over effects of countering ISIS and arming local forces, such as the unintentional strengthening of the Syrian President Bashar al-Assad's regime is not well received, as the Syrian Sunni

[72] Cyndi Banks, 'Reconstructing justice in Iraq: promoting the rule of law in a post-conflict state' (2010) 2 HJRL 155, 160, 165, 166, 169

population, has for quite some time claimed to be victim of suppression by the government. The Iraqi Prime Minister Haider al-Abadi has not been object of such level of criticism.

7.2 Where to now?

The purpose of this essay was to bring to light the actions toward ISIS and their legitimacy. As the reader may rightfully be suspecting, there is no clear answer to the question.

Waiting for the breakthrough of the current plan of action is one aspect, but Cronin circumvents this approach. He strongly recommends

> 'offensive containment: combining a limited military campaign and economic effort'.[73]

In essence he points to the need for collective acts of coercion toward ISIS, including but not limited to the use of armed force. Coll is also for the placement of an armed force on Iraqi and Syrian soil.[74] In contrast, Weinberg and Hassan reject military measures altogether.[75]

Irrespective of our answers regarding legitimacy, perhaps the solution to tackle the on-going crisis may be found in the idiom that to achieve desired aims one must sometimes press where it hurts the most. If we take McCants' conclusion to be true, namely that ISIS' territorial control is its most valuable resource[76] then it is precisely this that ought to be the subject of attack. Perhaps the answer even lies in friendly politics with the reigning governments and economic and social considerations for Iraq and Syria.

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[73] Cronin (n 8)
[74] Coll (n 13) 27
[75] Weinberg (n 38) 335 and Mehdi Hassan, 'The first "war on terror" was a failure. Do we really need a sequel?' (2014) 143 New Statesman 35
[76] William McCants, 'State of Confusion' (2014) 93 Foreign Affairs

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