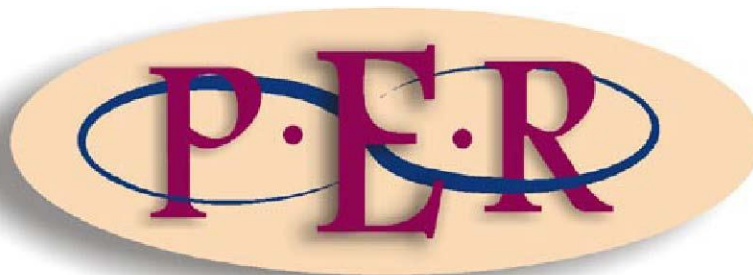


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THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE UNAUTHORISED CONDUCT OF INTERNATIONAL INSTITUTIONS

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1 Introduction

The law is not static but is subject to continuous change. This applies to international law as much as it does to the municipal law of any state. International law can be modified by treaties and conventions, and by the development of new rules of customary practice. In this contribution the development of international law through the medium of the unauthorised conduct of international institutions will receive special attention.

It will be argued that provided the unauthorised conduct (a) is not expressly forbidden and (b) is acceptable to a cross-section of the international community of states, it can be the foundation of a new rule of customary international law. Two examples will suffice to prove the point, namely (a) the creation of *ad hoc* criminal tribunals by the Security Council of the United Nations, and (b) the military intervention of forces of the North Atlantic Treaty Organisation (NATO) in Serbia to put an end to the persecution of Kosovar Albanians by the repressive regime of Slobodan Milošević.

2 Creation of *ad hoc* Criminal Tribunals by the Security Council of the United Nations

Following atrocities that erupted during the early 1990's in Yugoslavia and Rwanda, the Security Council of the United Nations decided to deal with the situation in those countries by the creation of international criminal tribunals, namely (respectively) the International Criminal Tribunal for the Former Yugoslavia (ICTY)¹ and the International

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¹ As to the ICTY, see in general McGoldrick "Criminal Trials before International Tribunals" 22-36.

Criminal Tribunal for Rwanda (ICTR),² in order to bring the perpetrators of those atrocities to justice. Those tribunals owed their existence to Security Council resolutions adopted under the Chapter VII powers of the Council to address situations that constitute a threat to the peace, a breach of the peace, or an act of aggression.³ The Security Council probably acted *ultra vires* when it resorted to the creation of criminal tribunals pursuant to its Chapter VII powers.⁴

The Security Council has been entrusted with the "primary responsibility" of maintaining international peace and security.⁵ It has been said that the establishment of *ad hoc* tribunals to prosecute perpetrators of genocide and persons who violated the rules of international humanitarian law does fall within the ambit of measures that can be adopted by the Security Council to satisfy the goal of restoring and maintaining international peace and security, notwithstanding the absence of any direct mention of such a competence in the (non-exhaustive) list of powers entrusted to the Security Council in Article 41 of the *UN Charter*,⁶ but the matter was not at all beyond dispute.⁷

In *Prosecutor v Duško Tadić* the Appeals Chamber of the ICTY based the competence of the Security Council to establish an international criminal tribunal on three grounds:⁸

§ The Security Council has been entrusted with wide, though not unfettered, powers, listed in Articles 39-42 of the *UN Charter*, to deal with a threat to the peace, a breach of the peace or an act of aggression. The list of powers is not exhaustive and is wide enough to include the establishment of an international

² As to the ICTR, see in general McGoldrich "Criminal Trials before International Tribunals" 36-40.

³ SC Res 827 (1993) (establishing the International Criminal Tribunal for the Former Yugoslavia); SC Res 955 (1994) (establishing the International Criminal Tribunal for Rwanda); and see Pejic 1997 *Alb L Rev* 843-845; Ciampi "Other Forms of Cooperation" 1711.

⁴ See Alvarez 1996 *EJIL* 245-60.

⁵ Article 24(1) *Charter of the United Nations* (1945).

⁶ See for example Ahlbrecht *Geschichte der Völkerrechtlichen Strafgerichtbarkeit* 243 (arguing that the creation of a judicial body whose functions are limited in terms of subject-matter and time does come within the ambit of "measures" not involving armed conflict within the meaning of a 41 of the *UN Charter*); Morris 1998 *AJIL* 68.

⁷ See for example Ahlbrecht *Geschichte der Völkerrechtlichen Strafgerichtbarkeit* 240-242; Arnold *UNO-Sicherheitsrat* 130-131; Crawford "Work of the International Law Commission" 25 note 10.

⁸ *Prosecutor v Duško Tadić aka "Dule"* (*Decision on the Defence Motion for Interlocutory Appeals on Jurisdiction*) Case No IT-94-1-A (2 Oct 1995) paras 33-48; and see Rowe 1996 *Int'l & Comp LQ* 691-695; Kreß 1996 *EuGRZ* 640-642.

criminal tribunal.⁹

§ The Security Council is admittedly not a judicial body or entrusted with judicial powers; but since it did not delegate any of its functions to the *ad hoc* tribunal, that was of no consequence. What the Security Council did in fact was to establish a subsidiary organ, without a separate juristic personality, to execute its own function of maintaining international peace and security, and entrusting that body with judicial powers as an appropriate means of counteracting a threat to international peace and security fell squarely within its range of powers.¹⁰

§ The rule that a court must be established by law as applied in a municipal setting does not apply in international law. The "most sensible and most likely" meaning of "established by law" in the international context is that the tribunal must be established in accordance with the rule of law: "it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments."¹¹

The second point perhaps requires further clarification. In international law, legal subjectivity has been conferred on international organisations, of which the United Nations is one. Within the United Nations structure, a distinction must be made between organs of the Organisation and subsidiary organs entrusted with executing the functions of the organs of the United Nations. An organ of the United Nations derives its existence and functions from the *UN Charter*, and new organs of the

⁹ *Prosecutor v Duško Tadić aka "Dule"* (Decision on the Defence Motion for Interlocutory Appeals on Jurisdiction) Case No IT-94-1-A (2 Oct 1995) paras 33-36.

¹⁰ *Prosecutor v Duško Tadić aka "Dule"* (Decision on the Defence Motion for Interlocutory Appeals on Jurisdiction) Case No IT-94-1-A (2 Oct 1995) paras 37-38; and see Sarooshi 1996 *BYIL* 428-431. In 1954, the International Court of Justice (ICJ) delivered an advisory opinion on the question whether it was within the power of the General Assembly to establish the Administrative Tribunal of the United Nations with power to hear and to decide staff grievances, and in particular whether the General Assembly could entrust the Tribunal with the power to pronounce decisions which would be binding on the General Assembly itself. The ICJ stated, *inter alia*, that "[b]y establishing the Administrative Tribunal the General Assembly was not delegating the performance of its own functions: it was exercising a power which it had under the Charter to regulate staff relations. In regard to the Secretariat, the General Assembly is given by the Charter a power to make regulations, but not a power to adjudicate upon, or otherwise deal with, particular instances." *Effect of Awards of Compensation Made by the United Nations Administrative Tribunals: Advisory Opinion* 21 ILR 310 (13 July 1954) 321.

¹¹ *Prosecutor v Duško Tadić aka "Dule"* (Decision on the Defence Motion on Jurisdiction) Case No IT-94-1-T (10 Aug 1995) para 45; and see Swart "Arrest and Surrender" 1669.

Organisation can be created only through an amendment of the *UN Charter*. Subsidiary organs, on the other hand, may be created by resolution of the organ whose functions they are called upon to execute. Such subsidiary organs include the United Nations Children's Fund (UNICEF), the United Nations Development Programme, the United Nations High Commissioner for Refugees, and the United Nations High Commissioner for Human Rights. The ICTY and ICTR are in that sense merely subsidiary organs of the Security Council charged with powers that serve as a means of executing the primary function of the Security Council to maintain international peace and security.

The denotation of the ICTY and ICTR as subsidiary organs of the Security Council has been challenged by several analysts. It has been noted, for example, that the Security Council has not been given absolute authority over those *ad hoc* tribunals.¹² Judges of the Court are appointed by the General Assembly (admittedly from a list submitted to it by the Security Council);¹³ and the Chief Prosecutor, though formally appointed by the Security Council, is nominated by the Secretary General of the United Nations.¹⁴ The independence of the Prosecutor "as a separate organ of the International Tribunal ..."¹⁵ may also speak against the subsidiary status of the tribunals.

Proclaiming the ICTY and ICTR to be subsidiary organs of the Security Council in any event does not resolve the predicament of their creation. The question remains whether the UN Charter includes the creation of courts of law to prosecute individuals within the powers of the Security Council as a means of securing international peace and security.

The following arguments may be advanced in support of the proposition that the Security Council, in creating *ad hoc* criminal tribunals, exceeded its authorised powers:

- The powers entrusted to the Security Council for maintaining international peace and security are encapsulated in Chapter VII of the *UN Charter*, and the ones not involving the use of armed force (the Article 41 powers) include

¹² See Partsch "Sicherheitsrat als Gerichtsgründer" 13 col 1, 17 col 2.

¹³ Article 13(2) *Statute of the International Criminal Tribunal for the Former Yugoslavia* (1993) (*ICTY Statute*); a 12(3) *Statute of the International Tribunal for Rwanda* (1994) (*ICTR Statute*).

¹⁴ Article 16(4) *ICTY Statute*; and see a 15(3) *ICTR Statute*.

¹⁵ Article 16(2) *ICTY Statute*; and see a 15(2) *ICTR Statute*.

"measures" such as "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communications, and the severance of diplomatic relations."¹⁶ Although these specific powers do not constitute a *numerus clausus*, the establishment of a criminal tribunal cannot by any stretch of the imagination be brought within the enclave of retributory responses enumerated in the Charter as required by the *eiusdem generis* rule of interpretation.¹⁷

- Since one is here dealing with punitive measures, the relevant empowering provisions of the Charter must be subjected to restrictive interpretation.
- And finally, the Security Council has been empowered to take action against States and not against individuals.

The statement of the ICTY in the case of Duško Tadić that Security Council Resolutions 731 and 748 requiring the Libyan government to surrender the two Libyan nationals suspected of the Lockerbie bombing and imposing economic sanctions against Libya as a means of securing compliance with that decision were "in substance, acting upon individuals, seeking the extradition and trial of those Libyan nationals" totally missed the point.¹⁸ Security Council Resolution 731 *called upon Libya* to surrender the suspects; and Security Council Resolution 748 *imposed sanctions against Libya* and not against the two suspects.

Other instances often cited to demonstrate that the establishment of a judicial body by the Security Council was not without precedent¹⁹ include the following: in 1949 the General Assembly (not the Security Council) established the United Nations Administrative Tribunal to resolve personnel disputes within the Organisation;²⁰ in

¹⁶ Article 41 *UN Charter*.

¹⁷ Martha Minow refers with some skepticism to the creation of the *ad hoc* tribunals pursuant to "a generous interpretation of the United Nations' authority to respond to threats to international peace and security". Minow *Between Vengeance and Forgiveness* 35; and also see Wedgwood "Constitution and the ICC" 119 (noting that "the authority of the Security Council to create additional *ad hoc* institutions has been questioned by some member states of the United Nations").

¹⁸ See *Prosecutor v Duško Tadić aka "Dule"* (*Decision on the Defence Motion on Jurisdiction*) Case No IT-94-1-T (10 Aug 1995) para 36.

¹⁹ See for example Arnold *UNO-Sicherheitsrat* 68-69, 71 (referring to GA Res 351 (1949), SC Res 687 (1991) and SC Res 864 (1993)); Partsch "Sicherheitsrat als Gerichtsgründer" 12 col 1 (referring to SC Res 689 (1991)).

²⁰ GA Res 351A (IV).

1991 the Security Council created a Fund to pay compensation to governments, nationals and organisations who had suffered direct loss, damage - including environmental damage and the depletion of natural resources - or injury in consequence of the unlawful invasion and occupation of Kuwait by Iraq, and established a Commission to administer the Fund;²¹ and in 1993 the Security Council imposed military sanctions against the National Union for the Total Independence of Angola (UNITA), the militant rebel group in Angola under Jonas Savimbi.²² These so-called precedents are far removed from establishing a criminal court with jurisdiction over individuals.

Alfred Rubin raised other concerns pertinent to the establishment of the ICTY, based not so much on matters of principle but on the contingencies prevailing in the former Yugoslavia. For example, Bosnia was not a state at the time, and since only states are under an obligation to comply with Chapter VII resolutions of the Security Council there was no means, according to Rubin, for compelling the authorities of that region to comply with demands for the surrender of suspects to the Tribunal.²³ These more practical, time- and place-oriented, problems need not be further explored for the purposes of the present survey, except perhaps for noting that a permanent international criminal tribunal can be constituted in a manner that would avoid such contingent discrepancies inherent in the constraints of Security Council control.

The decision of the Security Council to establish a criminal tribunal clearly was "[t]he most far-reaching use of Art 41 ordering measures not listed ..."²⁴ One analyst described the pertinent interpretation of Article 41 by the Security Council as "dynamic and teleological".²⁵ Another suggested that the creation of an international criminal tribunal by the Security Council may be seen as "a modern form of collective humanitarian intervention, to deal with ... massive human rights violations ..."²⁶ The

²¹ SC Res 687 (1991).

²² SC Res 864 (1993).

²³ Rubin 1994 *Pace Int'l L Rev* 8-13.

²⁴ Frowein "Chapter VII Action" 626.

²⁵ Arnold *UNO-Sicherheitsrat* 70.

²⁶ Jones *Practice of the International Criminal Tribunal* 41.

ICTR recognised that the Security Council, by asserting jurisdiction over individuals, "provided an important innovation of international law".²⁷

That, indeed, is how international law evolves. The appropriate response of the Security Council to the circumstances that prevailed in the former Yugoslavia, and subsequently in Rwanda, was not within the contemplation of the drafters of the *UN Charter* way back in 1945. Everyone would also agree that armed intervention under Article 42 of the *UN Charter* ought to be avoided as far as possible, and in any event was in all likelihood not an appropriate and effective means of preserving or restoring peace and security in the Balkans. Attempting to establish an international criminal tribunal through the agency of the General Assembly of the United Nations or by means of a treaty arrangement would most likely have been an exercise in futility and would in any event have been too time-consuming.²⁸ The Security Council cannot be expected to simply sit back and let the atrocities be, merely because the Charter does not make provision for measures that would be suitable for meeting the challenges of a new era. Provided the action taken by the Security Council (i) does not run counter to an express prohibition in the *UN Charter*, and (ii) meets with general approval by the international community of States - that is, the exercise of power by the Security Council is legitimate - then the "innovation of international law" acquires the attributes of legality - that is, a new rule of international law is created. That would not be the case if the assumption of powers by the Security Council, or any other law-creating agency of international law, were to provoke general condemnation by a cross-section of the countries of the world.

In June 2007 the Security Council of the United Nations did create yet another *ad hoc* tribunal. It decided by 10 votes to 0 (with China, Russia, Indonesia, Qatar and South Africa abstaining) to establish the Special Tribunal for Lebanon to investigate and to

²⁷ *Prosecutor v Kanyabashi (Jurisdiction)* Case No ICTR-96-15-T (18 June 1997) para 35; Berman "Relationship between the International Criminal Court and the Security Council" 174-75 (noting that the competence of the Security Council to establish *ad hoc* tribunals "was no longer seriously under challenge"); Lamb 1999 *BYIL* 203 note 17 (referring to the establishment of the *ad hoc* Tribunals as "an unprecedented response" of the Security Council to a threat to international peace); Goldstone 2001 *Wash U J L & Pol'y* 120.

²⁸ See *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* UN Doc S/25704 (3 May 1993); (1993) 32 *ILM* 1159 para 20; and see Scharf *Balkan Justice* 55.

try suspects of the February 2005 assassination of former Lebanese Prime Minister Rafik al-Hariri.²⁹

3 The Kosovo Airstrikes by NATO Forces

In the wake of untold atrocities committed by government agencies of the former Yugoslavia against Kosovar Albanians as a means of "ethnic cleansing" of the region, forces of the North Atlantic Treaty Organisation (NATO) began a bombing campaign in Belgrade in which 13 of the 19 NATO countries participated. The hostilities lasted from 24 March to 9 June 1999. The NATO intervention was widely applauded but also sharply condemned. Central to the dispute was the legal basis for affording legality, or at least legitimacy, to the air strikes.³⁰

The North Atlantic Treaty is essentially a collective self-defense Pact.³¹ It was devised by the Member States to "maintain and develop their individual and collective capacity to resist armed attack",³² and to act when "the territorial integrity, political independence or security of any of the Parties is threatened".³³ Legitimation of the bombing campaign in Belgrade can, in a word, not be based on the North Atlantic Treaty as such.

It strikes one as odd that proponents of the military campaign emphasized the goals to be achieved by the military action rather than its basis in international law. NATO's stated objectives were encapsulated in five points:

- An end to the killing by Yugoslav army and police forces in Kosovo;
- The withdrawal of those forces from the province;
- The deployment of a NATO-led international force in Kosovo;
- The return of all refugees; and

²⁹ SC Res 1757 (2007) Annex; and see De Wet 2008 *Friedens-Warte* 41 (note, though, that the Special Tribunal for Lebanon is not a hybrid tribunal in the sense contemplated by this author).

³⁰ See the commendable collection of editorial comments on NATO's Kosovo Intervention published in 1999 *AJIL* 824-862.

³¹ Article 5 *North Atlantic Treaty* (1949) ("The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all").

³² Article 3 *North Atlantic Treaty* (1949).

³³ Article 4 *North Atlantic Treaty* (1949).

- A political settlement for Kosovo.³⁴

When announcing the air strikes against Serbian targets, President Bill Clinton of the United States proclaimed that the campaign had three objectives:

First, to demonstrate the seriousness of NATO's opposition to aggression and its support for peace; second, to deter President Milošević from continuing and escalating his attacks on helpless civilians by imposing a price for those attacks; and third, if necessary, to damage Serbia's capacity to wage war against Kosovo in the future by seriously diminishing its military capabilities.³⁵

It would seem that a feasible justification of the airstrikes would be based on humanitarian intervention. However, only two NATO countries (Belgium and Germany) based the legality of the campaign on humanitarian intervention.

There is indeed wide support among publicists for holding that humanitarian intervention is the only basis upon which either the legality or the legitimacy of the air strikes could possibly be based.³⁶ Condemnation of or support for the military action in Serbia therefore in the final analysis depended on the view preferred by individual analysts in regard to the ultimate question as to whether or not humanitarian intervention remained lawful under the current rules of international law; and if not, whether the resort to arms might or might not derive legitimacy from the humanitarian objectives it set out to promote.

It is perhaps important to note that the Security Council did, after the event, sanction the implementation of the stated objectives of the Kosovo campaign,³⁷ without denouncing the NATO military action and while endorsing the *Interim Agreement for*

³⁴ See Chinkin 1999 *AJIL* 841 note 2.

³⁵ *Remarks Announcing Air Strikes against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro)* - *Weekly Compilation of Presidential Documents* vol 35.12 513 (24 March 1999) 514; and also see *Address to the Nation on Airstrikes against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro)* - *Weekly Compilation of Presidential Documents* vol 35.12 516 (24 March 1999) 517; Wedgwood 1999 *AJIL* 829.

³⁶ See Kemp *Individual Criminal Liability* 41; Bilder 1999 *J Transnat'l L & Pol'y* 153. Note, however, that Jordan Paust based the legality of the air strikes on (his interpretation of) a 52 of the *UN Charter*. Paust 2002 *Cornell Int'l LJ* 546-547.

³⁷ SC Res 1244 of 10 June 1999.

Peace and Self-Government in Kosovo of 7 June 1999 (the Rambouillet Accord).³⁸ By approving the Kosovo settlement, argues Louis Henkin, the Security Council "effectively ratified the NATO action and gave it the Council's blessing".³⁹ This, in turn, can be seen as an endorsement by the Security Council of humanitarian intervention in comparable circumstances.

The NATO action and Security Council response, according to Professor Louis Henkin, may reflect a step toward a change in the law; part of "the quest for developing 'a form of collective intervention' beyond the veto-bound Security Council".⁴⁰ It should be noted, though, that the legality of humanitarian intervention actually preceded the *UN Charter*, and if Kosovo is to be the guide, humanitarian intervention must be resorted to in response to only the most extreme cases of horrendous human right violations, and ought always to be executed by multi-national action.

It is submitted that even though the *North Atlantic Treaty*, being essentially a collective self-defence Pact, did not authorise offensive action in cases where no NATO country had been attacked, the Member States of NATO have now established their right under the Treaty to embark on a humanitarian intervention campaign. Provided, again, that the action taken (i) does not run counter to an express prohibition in the Treaty, and (ii) meets with general approval by the international community of states - that is, the action taken is legitimate - then the "innovation of international law" acquires the attributes of legality - that is, a new rule of international law is created. That, indeed, is how international law evolves. The formation of a new norm of international law would not result if the action taken violated an express prohibition of international law and/or provoked general condemnation by a cross-section of the countries of the world.

4 The ISIS crisis

Let me also refer to a recent, quite radical innovation in international humanitarian law that was sparked by atrocities committed by a Sunni insurgent group engaged in

³⁸ *Interim Agreement for Peace and Self-Government in Kosovo* UN Doc S/1999/648 (7 June 1999).

³⁹ Henkin 1999 *AJIL* 826.

⁴⁰ Henkin 1999 *AJIL* 828.

violent acts of terror as a means of establishing an Islamic state in the Middle East. Efforts to engage in a military response to those atrocities have led to the development of international humanitarian law to accommodate an armed intervention under the rubric of what might be called the "unwilling or unable paradigm".

The insurgent group originated in 1999 under the name of *Jama'at al-Tawhid wal-Jihad* as the forerunner of *Tanzim Qaidat al-Jahid fi Bilad al-Rafidayn*, commonly known as Al Qaeda in Iraq. In 2006 it joined other Sunni insurgent groups to form the Mujahideen Shura Council, which consolidated into the Islamic State of Iraq, and with a significant presence in Al Anbar, Nineveh and Kirkut. In 2013 the group changed its name to Islamic State of Iraq and the Levant (ISIL). It grew significantly under the leadership of Abu Bakr al-Baghdadi due to what was perceived as discrimination against the Sunni faction of Islam. Until February 2014 ISIL had close ties with al Qaeda, but following a power struggle al Qaeda cut all ties with the group. On 29 June 2014 the group was renamed as Islamic State of Iraq and Syria (ISIS).

ISIS aspires to bring most traditionally Muslim-inhabited states under its political control, including Iraq, Syria, Jordan, Israel, Palestine, Lebanon, Cyprus and Southern Turkey. It has acquired considerable financial resources by gaining control of oil fields in the eastern province of Deir-al-Zour, taking control of bank institutions and allocating to itself large sums of money, and receiving generous funding from wealthy donors in Sunni countries of the Persian Gulf. It has lured into its ranks thousands of foreign volunteers, including some from the United States and the United Kingdom.

It strictly imposes Islamic punishments such as amputations, beheadings and crucifixions, and has become notorious on account of its performance of innumerable acts of extreme terror violence. The beheadings of American journalist James Foley, American/Israeli journalist Steven Sotloff, British humanitarian aid workers David Haines, American humanitarian aid worker Peter Kassig, British taxi driver and humanitarian aid worker Alan Henning, and Japanese journalist Kenji Goto, and the burning to death of a Jordanian pilot Moath al-Kasasbeh, were videotaped and displayed on the Internet for the world to see. On 15 February 2015 ISIS publicly displayed the beheading in Libya of 21 Egyptian Coptic Christian fishermen. On 29

March 2015 a video was released showing the beheading of eight men said to be Shiite Muslims. ISIS was also responsible for the destruction of valuable religious shrines and works of art that were of special significance to rival Islamic factions.

A key question that has emerged in recent years is whether or not members of the states from abroad can within the confines of international humanitarian law embark on armed intervention against ISIL/ISIS strongholds in countries of the Middle East.

The Security Council of the United Nations, acting under Chapter VII of the *UN Charter*, in August 2014 deplored and condemned "in the strongest terms the terrorist acts of ISIL and its violent extremist ideology, and its continuous gross, systematic and widespread abuses of human rights and violations of international humanitarian law".⁴¹ In September 2014 the European Parliament in similar vein condemned "the atrocities threatened or committed by ISIS against various groups not sharing their convictions, above all religious and ethnic minorities such as Christians, Yezidi, Shabak and Turkmen, but also Shiites and Sunnis", and denounced "the odious assassination by ISIS of two American journalists and a British aid worker".⁴² ISIL/ISIS was proclaimed a terrorists organisation by the United States (on 17 December 2004), Australia (on 2 March 2006), Canada (on 20 August 2012), Turkey (on 30 October 2013), Saudi Arabia (on 7 March 2014), the United Kingdom (on 20 June 2014), Indonesia (on 1 August 2014), the United Arab Emirates (on 20 August 2014), Israel (on 3 September 2014), Malaysia (on 24 September 2014), Egypt (on 30 November 2014), India (on 16 December 2014), the Russian Federation (on 29 December 2014), Kyrgyzstan (on 25 March 2015), and Pakistan (on 29 August 2015).⁴³ ISIS is furthermore banned in Germany (since September 2014) and Switzerland (since October 2014).⁴⁴ The banning includes the prohibition of propaganda in favour of and financial support for ISIS. The terrorist acts of ISIS in Iraq were also condemned by

⁴¹ SC Res 2170 (2014).

⁴² *European Parliament Resolution on the Situation in Iraq and Syria and the ISIS Offensive* Doc 2014/2843 (RSP) para 1.

⁴³ Wikipedia 2015 https://en.wikipedia.org/wiki/Islamic_State_of_Iraq_and_the_Levant#Designation_as_a_terrorist_organisation.

⁴⁴ Wikipedia 2015 https://en.wikipedia.org/wiki/Islamic_State_of_Iraq_and_the_Levant#Designation_as_a_terrorist_organisation.

Syria,⁴⁵ while Jordan in February 2015 made its condemnation of the organisation known by launching airstrikes against ISIS targets.⁴⁶

Iraq has requested military support from the United Kingdom and the United States, among others, in its armed struggle against ISIS. On 26 September 2014 the British House of Commons adopted by 524 votes in favour and 43 votes against the following motion:

That this House condemns the barbaric acts of ISIL against the peoples of Iraq including the Sunni, Shia, Kurds, Christians and Yazidi and the humanitarian crisis this is causing; recognizes the clear threat ISIL poses to the territorial integrity of Iraq and the request from the Government of Iraq for military support from the international community and the specific request to the UK Government for such support; further recognizes the threat ISIL poses to wider international security and the UK directly through its sponsorship of terrorist attacks and its murder of a British hostage; acknowledges the broad coalition contributing to military support of the Government of Iraq including countries throughout the Middle East; further acknowledges the request of the Government of Iraq for international support to defend itself against the threat ISIL poses to Iraq and its citizens and the clear legal basis that this provides for action in Iraq; notes that this motion does not endorse UK air strikes in Syria as part of this campaign and any proposal to do so would be subject to a separate vote in Parliament; accordingly supports Her Majesty's Government, working with allies, in supporting the Government of Iraq in protecting civilians and restoring its territorial integrity, including the use of UK air strikes to support Iraqi, including Kurdish, security forces' efforts against ISIL in Iraq; notes that Her Majesty's Government will not deploy UK troops in ground combat operations; and offers its wholehearted support to men and women of Her Majesty's armed forces.⁴⁷

On 30 March 2015 the Canadian House of Commons approved by majority vote a government proposal to extend the military campaign in Iraq for up to one year, and to authorise airstrikes in Syria. Confining British military support to operations in Iraq was based on the fact that Syria had not requested the United Kingdom (or Canada and the United States) to attack ISIS strongholds in that country. The United States, however, did launch air attack against al Qaeda targets in Syria. In doing so the Obama administration was confronted by two distinct problems: one within the confines of its constitutional law, and the other under the dictates of international humanitarian law.

⁴⁵ SANA 2014 <http://www.sana.sy/en/?p=2988>.

⁴⁶ AP and Network Writers 2015 <http://www.news.com.au/world/middle-east/jordan-continues-their-revenge-on-isis-carrying-out-airstrikes-against-the-terror-group/news-story/b0dce593af0f349aff96e737ae4afbe>.

⁴⁷ *British House of Commons* Decision of 26 September 2014.

The constitutional problem amounted to the following dilemma. Even though the *American Constitution* requires Congressional approval before the nation goes to war,⁴⁸ President Obama initially did not request the consent of Congress for the military interventions in Iraq and in Syria. He based the legality of the airstrikes essentially on the 2001 Authorisation of Military Force against Terrorists, which authorised the President to use "all necessary and appropriate force" against those who he determined "planned, authorised, committed or aided" the September 11th attacks of 2001,⁴⁹ and the 2002 Authorisation for Use of Military Force against Iraq, which authorised the President—

... to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—

- (1) defend the national security of the United States against the continuing threat posed by Iraq; and
- (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.⁵⁰

It requires, to say the least, quite a stretch of the imagination to construe a link between the bombing campaign against ISIL/ISIS and the terrorist attack of September 11th or the invasion of Iraq by the George W Bush administration in 2002. However, the legality of the current bombing campaign under the municipal law of the United States is beyond the reach of this survey, except perhaps to mention that the Obama administration sought to justify its reliance on the congressional authorisations of the armed conflict in Afghanistan and in Iraq (a) by not confining its airstrikes to ISIS targets in Iraq but also targeting al Qaeda, and (b) by continuing to refer to ISIL (of which al Qaeda was a part) even though the organisation has changed its name to ISIS (of which al Qaeda is not a part).

There might therefore after all be some merit in this madness. Since the Obama administration based the legality under municipal law of the airstrikes against ISIS targets on the 2002 authorisation by Congress of the War against Terror ignited by al

⁴⁸ Article 8(10) *Constitution of the United States of America*, 1787.

⁴⁹ Authorisation for Use of Military Force against Terrorists Public Law No 107-40, 115 STAT 224 (14 September 2001).

⁵⁰ *Authorisation for Use of Military Force against Iraq Resolution of 2002* Public Law No 107-243, 116 STAT 1498, 50 USC (16 October 2002) s 3.

Qaeda on September 11th, and on the 2002 authorisation by Congress of the invasion of Iraq, and those armed attacks did not involve ISIS at all, current airstrikes against al Qaeda targets were in all likelihood intended to afford a degree of credence to relying on the 2001 and 2002 Congressional authorisations for the airstrikes of 2014 against ISIS. Relying on the 2001 and 2002 congressional authorisations in any event remains farfetched. So why not simply obtain congressional authorisation for the 2014 airstrikes targeting ISIS? The answer to this question is in all likelihood the fear that Congress might decline to authorise those airstrikes, (a) because many members of Congress would most likely consider airstrikes without the backing of American soldiers on the ground as futile, and/or (b) because there were clear indications that a vast number of Republicans would oppose any state action emanating from an Obama initiative merely in opposition to President Obama and irrespective of the merits of those initiatives. In his 2015 State of the Union Address, President Obama did say he would seek congressional approval of the air strikes in Iraq and in Syria.⁵¹ On 11 February 2015 the President submitted a request to Congress to authorise military force to "degrade and defeat" the ISIS forces in the Middle East without sustaining large-scale combat operation by US ground forces, which would "show the world we are united in our resolve to counter the threat" posed by ISIS.⁵² The matter has not yet come before Congress.

Within the confines of international humanitarian law, the airstrikes in Iraq by American and other national armed forces are clearly lawful because they were approved, and indeed requested, by the Government of Iraq. The airstrikes in Syria are most likely not lawful under the existing laws and practices of international humanitarian law, because they were not invited by the government of Syria. The judgment of the International Court of Justice (ICJ) in *Nicaragua v United States of America* can be cited in support of these assessments.⁵³ The *Nicaragua Case* of 1986

⁵¹ Jaffe and Walsh 2015 <http://edition.cnn.com/2015/02/05/politics/isis-war-authority-vote/>.

⁵² White House 2015 http://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf; and also see President of the USA 2015 http://www.whitehouse.gov/the-press-office/2015/02/11/letter_president_authorisation_use_united_states_armed_forces_islamic_state_iraq_levant.pdf.

⁵³ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America): Merits* 1986 ICJ 13 (27 June 1986).

is authority for the proposition that (a) a state can use military force against insurgents who take up arms against the government of that state; (b) the state may invite military support from other states to repress the insurgency; (c) it is unlawful for other states to afford military assistance to the insurgents.⁵⁴

The United States indeed informed Syria of its intended airstrikes and requested the Syrian government not to intervene - and Syria as a matter of fact did not intervene. Could this be interpreted as implied consent? Probably not!

The Security Council in its Resolution of 15 August 2014 called on all States "to take all measures as may be necessary and appropriate and in accordance with their obligations under international law to counter incitement of terrorist acts motivated by extremism and intolerance perpetrated by individuals or entities associated with ISIL, ANF [Al Nusrah Front] and Al-Qaeda and to prevent the subversion of education, cultural and religious institutions by terrorists and their supporters".⁵⁵ Although "measures as may be necessary and appropriate" could be taken to include armed force, it was generally understood that the resolution was not intended to authorise an armed intervention. The representative of the Russian Federation, who supported the Resolution, stated quite emphatically that "it should not be taken as approval of military action".⁵⁶ The Syrian representative, who also supported the Resolution (the Resolution was adopted unanimously) called upon the Security Council "in the future, to consult with his country and others in the region in order to make its action against terrorism effective".⁵⁷ The legality of airstrikes beyond the borders of Iraq can therefore not be based on Security Council authorisation under its Chapter VII powers.

All of the above culminated in efforts to justify the airstrikes in Syria under the rubric of an original and entirely new justification of armed interventions designated by American proponents as the "unwilling or unable" paradigm.

⁵⁴ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America): Merits* 1986 ICJ 13 (27 June 1986) paras 195, 196 (at 103).

⁵⁵ SC Res 2170 (2014) para 6.

⁵⁶ See UN 2014 <http://www.un.org/press/en.2014/sc11520.doc.htm>.

⁵⁷ United Nations: Meeting Coverage and Press Releases "Statement by Bashar Ja'afari (Syria)" <http://www.un.org/press/en.2014/sc11520.doc.htm>.

In a letter to the Secretary-General of the United Nations, dated 23 September 2014, Ambassador Samantha Power, representative of the United States of America to the United Nations, justified the airstrikes in Syria along the following lines:

ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right to self-defense, as reflected in Article 51 of the UN Charter, 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.⁵⁸

Earlier, the unwilling or unable rationale was also endorsed by John Brennan, Assistant to the President for Homeland Security and Counterterrorism, in remarks addressed to the Program on Law and Security of Harvard Law School in 2011. He emphasised that while the United States will uphold legal principles of state sovereignty and the laws of war, it "reserve[s] the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves".⁵⁹ Attorney-General Eric Holder, speaking at Northwestern University School of Law in 2012, had this to say:

[T]here are instances where our government has a clear authority - and, I would argue, the responsibility - to defend the United States through the appropriate and lawful use of lethal force....This does not mean that we can use military force whenever and wherever we want. International legal principles, including respect for another nation's sovereignty, constrain our ability to act unilaterally. But the use of force in foreign territory would be consistent with these international legal principles if conducted, for example, with the consent of the nation involved - or after a determination that the nation is unable or unwilling to deal effectively with a threat to the United States.⁶⁰

5 Concluding observations

It is perhaps ironical that the development of international law in instances exemplified in this essay stemmed from the need to cope with acts of barbarism that continue to

⁵⁸ Power 2014 <http://www.vox.com/2014/9/23/6836195/read-us-letter-to-un-security-council-claiming-self-defense-justifies>.

⁵⁹ Brennan 2011 <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-by-adhering-to-our-values-and-laws>; and see Brooks 2013 *Am U Int'l L Rev* 727.

⁶⁰ US DOJ 2012 <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-of-law>; and see Brooks 2013 *Am U Int'l L Rev* 727.

prevail in the world today and which include newly designed strategies of violence that were not foreseen when the existing norms of good governance were designed and proclaimed. This has been a matter of great concern to the international community of states. Creating *ad hoc* tribunals to bring perpetrators of genocide and crimes against humanity to justice, and for a collective self-defence organisation to exceed its mandate in order to counteract serious repression by a government against its own people, must therefore be applauded.

The unwilling or unable rationale as a means of combatting acts of international terrorism is perhaps rooted in international efforts to prevent the escalation of violence in our troubled times. In a Report of the International Commission on Intervention and State Sovereignty of December 2001 on *The Responsibility to Protect*, it is proclaimed that the international responsibility to protect supersedes the principle of non-intervention in the affairs of other states in instances where those other states are either unwilling or unable to restrain serious harm emanating from within their national borders. The Report proclaimed in summary:

Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.⁶¹

Based on "the responsibility to protect" rather than "the right to intervene", it has come to be acknowledged, according to the Commission, "that it is only if the state is unable or unwilling to fulfill this responsibility [to protect], or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place".⁶² A "culture of reaction" must accordingly be converted in the mindset of the international community into a "culture of prevention".⁶³ The Commission asserted the right to take military action in the event of unwillingness and inability on two fronts: self-defence and humanitarian intervention. The right to self-defence within the confines of article 51 of the *UN Charter* has thus been extended "to include the right to launch punitive raids into neighbouring countries that had shown themselves

⁶¹ ICISS 2001 <http://responsibilitytoprotect.org/ICISS%20Report.pdf> para (1)B.

⁶² ICISS 2001 <http://responsibilitytoprotect.org/ICISS%20Report.pdf> para 2.29.

⁶³ ICISS 2001 <http://responsibilitytoprotect.org/ICISS%20Report.pdf> para 3.42.

unwilling or unable to stop their territory being used as a launching pad for cross-border armed attacks or terrorist attacks".⁶⁴

As far as humanitarian intervention is concerned, the Commission noted an "emerging principle" of international humanitarian law proclaiming "that intervention for human protection purposes, including military intervention in extreme cases, is supportable when major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or is itself the perpetrator".⁶⁵ The Commission emphasized, though, that "[m]ilitary intervention for human protection purposes must be regarded as an exceptional and extraordinary measure, and for it to be warranted, there must be serious and irreparable harm occurring to human beings, or immediately likely to occur".⁶⁶ Military intervention for human protection purposes is in the opinion of the Commission justified in two "broad sets of circumstances" only, namely:

... in order to halt or avert:

- *large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or*
- *large scale "ethnic cleansing," actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.*⁶⁷

These conditions, according to the Commission, satisfy the "just cause" component of a decision to intervene.⁶⁸

It should be noted that humanitarian intervention in the traditional sense is aimed at toppling a repressive government responsible for severe violations of the human rights and fundamental freedoms of its own people. The unwilling or unable rationale is not aimed at the toppling of a government but authorises military intervention by State A against terrorist groups in State B in cases where State B is unwilling or unable to repress the acts of terrorism committed or orchestrated within its borders.

⁶⁴ ICISS 2001 <http://responsibilitytoprotect.org/ICISS%20Report.pdf> para 2.10.

⁶⁵ ICISS 2001 <http://responsibilitytoprotect.org/ICISS%20Report.pdf> para 2.25.

⁶⁶ ICISS 2001 <http://responsibilitytoprotect.org/ICISS%20Report.pdf> para 4.18.

⁶⁷ ICISS 2001 <http://responsibilitytoprotect.org/ICISS%20Report.pdf> para 4.19.

⁶⁸ ICISS 2001 <http://responsibilitytoprotect.org/ICISS%20Report.pdf> para 4.19.

The barbaric acts executed by ISIS clearly come within the confines of these indisputable ignitions of a just cause.

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LIST OF ABBREVIATIONS

AJIL	American Journal of International Law
Alb L Rev	Albany Law Review
Am U Int'l L Rev	American University International Law Review
BYIL	British Yearbook of International Law
Cornell Int'l LJ	Cornell International law Journal
EJIL	European Journal of International Law
EuGRZ	Europäische Grundrechte Zeitschrift

GA	General Assembly of the United Nations
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ISIL	Islamic State of Iraq and the Levant
ISIS	Islamic State of Iraq and Syria
Int'l & Comp LQ	International and Comparative Law Quarterly
J Transnat'l L & Pol'y	Journal of Transnational Law and Policy
NATO	North Atlantic Treaty Organisation
Pace Int'l L Rev	Pace International Law Review
SANA	Syrian Arab News Agency
SC	Security Council of the United Nations
UN	United Nations
UNICEF	United Nations Children's Fund
UNITA	National Union for the Total Independence of Angola
US DOJ	United States Department of Justice
USC	United States Code
Wash U J L & Pol'y	Washington University Journal of Law and Policy

THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE UNAUTHORISED CONDUCT OF INTERNATIONAL INSTITUTIONS

JD Van der Vyver*

SUMMARY

The law, including international law, is subject to continuous change. It can be adapted to changing circumstances through formal amendments of or additions to existing norms and practices. It can also be changed through the conduct of international institutions that is not within their legally defined competencies, provided - it will be argued - that the unauthorised conduct (a) is not expressly forbidden by existing rules of international law, and (b) is accepted or condoned by a cross-section of the international community of states.

The creation by the Security Council of the United Nations of *ad hoc* international criminal tribunals, for example, cannot even with a stretch of the imagination be justified on the basis of the powers of the Council stipulated in the *UN Charter*. However, their creation was applauded by the nations of the world as a feasible and practical way of responding to the atrocities of the early 1990's in the former Yugoslavia and Rwanda. The creation of international criminal tribunals by the Security Council has thus come to be accepted as a new rule of international law.

The same reasoning is applied to the newly acquired competence of NATO forces to intervene militarily on humanitarian grounds as exemplified by the NATO bombing campaign of 1999 in Serbia, while not one of the NATO countries was being attacked or under threat of an attack, and the competence of States to attack terrorist groups in a foreign country if the government of that country is either unwilling or unable to prevent the ongoing acts of terror violence.

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