

INCOMPLETE WORLD ORDER: UNITED NATIONS SECURITY COUNCIL RESOLUTION 2249 (2015) AND THE USE OF FORCE IN INTERNATIONAL LAW

ELENA CIRKOVIC**

This article poses the question of whether the UNSC Resolution 2249 (2015) expands the scope of exceptions to the general prohibition of the use of force in the context of the global war on terror. Despite the language of the Resolution pointing to the 'unprecedented' threat of global terrorism, the essential rules of self-defence remain consistent with the UN Charter framework. Rather than demonstrating an emergence of a new global order, the current language on the use of force in international law has stepped away from the humanitarian arguments for military intervention and responsibility to protect (R2P). The impetus towards individual and collective self-defence demonstrates a different strategy in the context of the global war on terror. Hence, it is not only the rhetoric of war as such that has shifted, but fragments thereof, depending on the strategic alignment of a variety of interests and priorities of the moment (for example, against whom the war is waged, who are the actors supported/protected, etc.). This article argues that arguments in the fields of international relations or international law that conceive of international uses of force as 'exceptional' in a Schmittian sense, are misplaced in so far as they cover over the more chronic power-politics of states and strategic utilization of international law.

'And so it goes' (Kurt Vonnegut, *Slaughterhouse Five*)

* Some parts of this article were written already in 2012, and updated as 1. The war in Syria escalated, and 2. I moved to Turkey and completed further research. Many of my colleagues were kind to offer their time and commentary. I thank Obiora Okafor, Jens Bartelson, Peter Fitzpatrick, Antje Wiener, Panu Minkkinen, Bruce (Ossie) Oswald, Nicholas Ashford, Henry Jones, and Umut Özsü, for their engagement with preliminary drafts. In particular, I am grateful for the opportunity to present and discuss my work as part of the History, Critique, and Theory of International Law workshop, which took place on March 10, 2016, at Melbourne Law School (MLS). My project greatly benefited from the close reading and commentary offered by Anne Orford, Martti Koskeniemi, and Christina Nowak. I am also thankful for all the challenging questions posed by my colleagues at the 2016 Harvard Institute for Global Law and Policy (IGLP) workshop in Madrid, especially Markus Gunneflo, Jose Maria Beneyto Perez, and Ratna Kapur, who read the paper with great care. Lastly, my students of international law at Bilkent University in Ankara provided an invaluable and constant critique of the very existence of the international legal system, thus challenging my entire enterprise.

* Assistant Professor, Department of Political Science and International Relations, Bogazici University, 34342 Bebek, Istanbul, Turkey

I. INTRODUCTION

The outright declaration of aggressive war is currently forbidden in international relations under the framework of both the United Nations (UN) Charter and customary international law. Charter Article 2(4) specifies a comprehensive prohibition on the use of force, or force that is in '[any] other manner inconsistent with the purposes of the United Nations.' The Charter refers to 'war' in the spirit of 'never again': first, in the Preamble's statement of purpose 'to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind', and second, in reference to the Second World War (Article 77 and Article 107).¹ The rest of the Charter refers to: 'effective collective measures for the prevention and removal of threats to the peace', 'aggression', 'actions with respect to threats to the peace, breaches of the peace, and acts of aggression', 'action by land, sea, or land forces', 'armed force', 'military measures', 'international and local disputes', 'threats and use of force', and 'enforcement action'. The clear exception to the ban on the use of force under Article 2(4) is action that is within the limits of collective security and adheres to the core purpose of the UN 'to maintain international peace and security', and/or the inherent right to self-defence.² In the 1986 ICJ *Nicaragua v. United States* case, President Singh stated in a separate opinion that the ban on force is 'the very cornerstone of the human effort to promote peace in a world torn by strife.'³ The purpose of the Charter framework, as emphasized in the Preamble, is to banish war from international relations.

The legal debates following the attacks of 9/11 included arguments that UN Security Council (UNSC) Resolutions authorizing anti-terror measures by its member states contributed to the broadening of the definition and scope of the use of force in

¹ Art. 107 allows for 'action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action', as part of transitional security arrangements

² These exceptions consist of exercises of the right to self-defence (UN Charter Article 51) and collective action by the authorization of the Security Council to "maintain and restore international peace and security" (UN Charter Article 42).

³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* Judgment of 26 June 1986 on Merits, [1986] ICJ Rep 14, at 153 (President Singh, Separate Opinion).

international law.⁴ This analysis poses the question of whether the UNSC Resolution 2249 (2015) expands the scope of exceptions to the general prohibition of the use of force in the context of the global war on terror.⁵ Despite the language of the Resolution pointing to the ‘unprecedented’ threat of global terrorism, the essential rules of self-defence remain consistent with the UN Charter framework.

If there is a broadening in legality and practice of the use of force, especially against non-state actors, does this imply that we are witnessing a new shift in the global order?⁶ An attempt to answer whether this is the case is, as Carl Schmitt argued while posing a similar question, ‘the hazardous undertaking’ and a ‘fervent hope.’⁷ This article argues that there is a shift in the language about war, human rights, and humanitarianism.⁸ However, rather than demonstrating an emergence of a new global order, or a power shift outside of the law, the current language on the use of force in international law shows an internal shift in a narrative on particular law. Namely, the argument justifying external military interventions has stepped away specifically from the humanitarian arguments and responsibility to protect (R2P). The present impetus towards individual and collective self-defence demonstrates a different strategy in the context of the global war on terror. It is not only the rhetoric of war in total that has shifted, but fragments thereof, depending on the strategic alignment of a variety of interests and priorities of the moment (for example, against whom the war is waged, who are the actors supported/protected, etc.).

A further question addressed in this analysis is the extent to which there has been a development of a more expansive interpretation of what Article 51 allows regarding self-defence against non-state actors. In *Nicaragua* the ICJ pronounced that the UN

⁴For instance, C. Tams, ‘The Use of Force against Terrorists’ (2009) 20 *EJIL*, 359.

⁵This article does not address the broader question of the legislative capacities of the UNSC. For a critical account of the role of the UNSC as a legislator at the international level see M. Koskeniemi, ‘The Police in the Temple. Order, Justice, and the UN: A Dialectical View’ (1995) 6 *EJIL* 326, at 344-345.

⁶ C. Schmitt, *The Nomos of the Earth: In the International Law of the Jus Publicum Europaeum* ([1950], 2003) Chaps III and IV. For recent commentary on the rise of new powers as norm-makers in the international legal system see W. W. Burke-White, ‘Power Shifts in International Law: Structural Realignment and Substantive Pluralism’ (2015) 56 *Harvard International Law Journal*, 1-80, at 77.

⁷Schmitt, *Ibid.*, at 39.

⁸ M. Koskeniemi, ‘Human Rights-so 90s’ Public lecture 3 March 2014, Public International Law at Oxford, available at: <https://www.youtube.com/watch?v=9hFdZRYZhkg>

Charter rules on self-defence had entered into customary international law.⁹ The human effort to promote peace therefore also includes measures of self-defence. However, scholarship, judicial decisions, and government policies that interpret and define the scope and content of what this actually means have been in disagreement.¹⁰ Some have argued for a very narrow interpretation, while others suggest the need for an expansion of the right to use force beyond Article 51's provisions.¹¹ Importantly, principles of necessity and proportionality retain their function of keeping international laws regarding the unregulated use of power and force in check.

The methodology of this analysis is interdisciplinary, as it relies on both jurisprudence and on the critical discourse analysis approach to international relations, to form the argument on the current apparent inability of international law to address the humanitarian crises emanating from several ongoing armed conflicts.¹² It follows in the line of critical international relations and legal scholarship, which seeks to understand and

⁹ *Nicaragua case*, *supra* note 3, para. 193. See Dissenting Opinion of Judge Jennings, at 530-531.

¹⁰ C. Gray (ed), *International Law and the Use of Force* (2008), at 31-33.

¹¹ I. Brownlie, *International Law and the Use of Force* (1963); O. Schachter, 'The Lawful Use of Force by a State against Terrorists in another Country' (1989) 19 *Israel Yearbook on Human Rights* 209, at 213-214. For instance, in *Corfu Channel* [1949] ICJ Rep 4., the Court stressed that even temporary infringements constituted a violation of Art. 2(4)UN Charter. See, A. Cassese (ed.), *The Current Legal Regulation of the Use of Force* (1986), at 514 .

¹² The article is generally borrows its method from Duncan Kennedy's exposition on 'A Semiotics of Critique' and especially the guidance given in the Coda 'There are four steps to follow as one gets ready to do some critical theory within law [...]. First: Identify a distinction that drives you crazy when it is trotted out to justify things you can't stand, and that you feel people don't really believe in except when they need it to justify those things (to take an example at random, the distinction between adjudication and legislation). Second: Find in each half of the distinction the things, traits, aspects, qualities, characteristics, or whatever that were supposed to be located in the other half, and vice versa. This is the move classically called chiasmus, and practiced most notably and repetitively by Marx and then by Derrida, theorized in an irrationalist semiotic manner in *Of Grammatology*. Third: Put the question of whether the distinction you have just destabilized corresponds to a real division in reality on hold, suspend it, or put it in parentheses or in brackets (Husserl calls this the *epoche*) – turn your eyes away from it, and instead try to figure out why the people who use the distinction work so hard to maintain belief in it in the face of their own doubts, which you can intuit by imagining that they are just as capable of destabilizing it as you are. Fourth: Trace the consequences of the distinction by hooking it up to one or many of the organicist, antinomian, paranoid structuralist, and semiotic moves discussed above. My own project, subject always to critical unraveling per *supra*, has been to ask about the distributive consequences of liberal distinctions, that is, to ask how belief in them contributes to inequality, domination, alienation, and unhappiness, in different measures for different people, for some much more than for others. Good luck.' (footnotes omitted) in D. Kennedy, 'A Semiotics of Critique' (2001) 22 *Cardozo Law Review* 1147, at 1189.

clarify our present international condition and the prevalence of a global interventionist liberal cosmopolitanism. The nexus of public and private, political, economic, and regulatory power known as global liberal governance is, as Michael Dillon and Julian Reid argue, ‘a varied and complex regime of power, whose founding principle lies in the administration and production of life, rather than in threatening death.’¹³ But the maintenance of life may require both: annihilation of some (self-defence) and protection of others (humanitarianism). Emergencies, crises, and violence threaten to enter into spaces of *normalcy* and safety in the forms of refugees, terrorists, or cyber-crime. Namely, *war* albeit banished from the world that the UN Charter seeks to create, seems to appear in the sites of chronic exceptionality or emergencies, and geographies with turbulent history and local factions, which are difficult to regulate. The threat of the global war on terror, however, breaks these spatial boundaries as it not only requires humanitarian interventions elsewhere, saving civilians in distant lands,¹⁴ but also, and primarily, self-defence against a more ambiguous and omnipresent enemy. By returning to the scholarship of Carl Schmitt, and recent interpretations of his work in jurisprudence, this analysis seeks to address shifts in thinking about society, politics, and governance through the lens of emergency as a chronic condition. In so doing, this article fundamentally challenges the specifically constitutionalist view of the international community as an inherently *legal* community.¹⁵

The article proceeds as follows. In Part I, it explores the potential implications that Resolution 2249 has on the status of the use of force in international law, especially in the context of the global law on terror. In Part II, it looks at some of the individual state arguments legitimizing contemporary interventions in reference to the principles of *unable and unwilling* and *intervention by invitation*. The current situations of the external use of force focus primarily on self-defence, or as it is phrased in the UN Charter Article 1(1), ‘effective collective measures for the prevention and removal of threats to the peace.’ Part III provides a discussion of the status of war as an exception in the international legal system. In so doing it refers to the literature engaging with Carl Schmitt as a critic of liberalism. The exception, in Schmitt’s writing, would imply an abandonment of the

¹³ M. Dillon and J. Reid, ‘Global Liberal Governance: Biopolitics, Security and War’ (2001) 30 *Millennium Journal of International Studies* 42.

¹⁴ N. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford Publishing, 2000).

¹⁵ A. Peters, ‘Global Constitutionalism Revisited’ (2005) 5 *International Legal Theory* 39, at 42.

international legal system, rather than being a normless hole within the system. This article argues that instead of treating war as an exceptionality, it is more useful to observe the crisis of normative coherence in the current relations between the legal decision and violence.

II. UNSC RESOLUTION 2249 (2015) AND THE ‘GLOBAL WAR ON TERROR’

On 20 November 2015, the UNSC unanimously adopted Resolution 2249 (2015) and unequivocally condemned the terrorist attacks perpetrated by ISIL — also known as Da’esh¹⁶ — that occurred on 26 June in Sousse, on 10 October in Ankara, on 31 October over the Sinai Peninsula, on 12 November in Beirut, and on 13 November in Paris, among others. In the Resolution, the Council called upon member states to take ‘all necessary measures’ to redouble and coordinate their efforts to eradicate Da’esh in Iraq and Syria.

The text includes language that is consistent with the UN Charter Article 1(1) invocation of ‘effective collective measures’. The Resolution determines that Da’esh, as well as Al-Nusra Front (ANF) and other groups, individuals, undertakings, and entities associated with Al-Qaida constitute a global and unprecedented threat to international peace and security. Accordingly, it determines to combat such a threat by all means. This wording is also consistent with the UN Charter Chapter VII enforcement action in accordance with stipulations in Article 39.¹⁷

While the Resolution does not make explicit reference to Chapter VII of the UN Charter, it is better understood as part of the existing doctrine of self-defence in international law, which now includes the right of states to use unilateral force against terrorists.¹⁸ To be sure, the mere legitimization of self-defence is distinct from authorizing

¹⁶ Da’esh is the acronym for the group’s full Arabic name, al-Dawla al-Islamiya fi al-Iraq wa al-Sham. The word rhymes with or suggests a number of nefarious words and concepts in Arabic: ‘Committer of heinous crimes,’ ‘crusher,’ ‘crumbler,’ ‘shocker.’

¹⁷ M. Weller, ‘Permanent Imminence of Armed Attacks: Resolution 2249 (2015) and the Right to Self Defence Against Designated Terrorist Groups’, *EJIL Talk!* November 25, 2015. Available at: <http://www.ejiltalk.org/permanent-imminence-of-armed-attacks-Resolution-2249-2015-and-the-right-to-self-defence-against-designated-terrorist-groups/>; D. Akande and M. Milanovic, ‘The Constructive Ambiguity of the Security Council’s ISIS Resolution’ *EJIL Talk!* November 21, 2015. Available at: <http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/> (unless otherwise stated, all URLs were last accessed 10 January, 2017).

¹⁸ Y. Dinstein, *War, Aggression, and Self-Defence* (2011).

force, and unilateral actions of countries are not always automatically legitimized. The circumstances of legitimation remain vague and determined on a case-by-case basis, as has been evident in the varied interpretations of unilateral State actions in the current conflict in Syria and Iraq, as well as in cases such as Yemen and Ukraine.¹⁹

The terminology of Resolution 2249 echoes the UNSC Resolution 1973 (2011), which authorized NATO intervention in Libya by way of ‘all necessary measures’.²⁰ The intervention in Libya was legitimized under the banner of the R2P principle and that of necessary protection of civilians and civilian populated areas under threat of attack. However, Resolution 2249 refers to the self-defence of States and global peace and security, not responsibility towards the civilians affected in the war zones. The use of the terminology of ‘all necessary measures’ or ‘means’ was further affirmed in Resolution 2213 (2015) in which the UNSC expressed grave concern about terrorist groups in Libya and reaffirmed ‘the need to combat by all means, in accordance with the Charter of the UN and international law including applicable human rights, refugee and humanitarian law, threats to international peace and security caused by terrorist acts’.²¹

Although the R2P has been introduced as a developing norm of international law, following the humanitarian crises of the 1990s,²² there has been no development of sufficient *opinio juris* to sustain the positive obligation of such a responsibility.²³ Resolution 1973 created a precedent with explicit preambular reference to its conformity with the R2P. General acceptance of the military intervention by NATO in Libya also relied on the support of the League of Arab States, the African Union, and the Secretary General of the Organization of the Islamic Conference. However, the Resolution 1973 did not authorise member states to ‘act nationally or through regional organizations or arrangements’ to help the rebel forces with arms or bomb the military buildings or

¹⁹ The Crisis in Ukraine, Special Issue, (2015)16 *German Law Journal* 3

²⁰ SC Res 1973, 17 March 2011.

²¹ SC Res 2213, 27 March 2015.

²² See for instance, D. Kritsiotis, ‘Humanitarian Intervention’, in R. Robertson and J. A. Scholet (eds.) *Encyclopedia of Globalization Vol. 2* (2007) 583–587; D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2004); N. Krisch, ‘Review Essay. Legality, Morality and the Dilemma of Humanitarian Intervention after Kosovo’ (2002) 13 *EJIL*; S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (2001).

²³ UNGA, Responsibility to Protect: timely and decisive response UN Doc A/66/874 (25 July 2012), para 54.

residences of the Qadhafi clan.²⁴ The consequence of the intervening coalition's active role and objective of achieving regime change in Libya, contributed to lesser probability of obtaining the UNSC approval for future invocations of the R2P and especially the military intervention in Syria.²⁵

Due to the role of both state and non-state actors in Syria, the potential responsibility of the international community to protect civilian populations could not only focus on state actors, but also on the actions of increasingly transnational terrorist groups. In his 2012 argument for the intervention against the Syrian government, Harold Hongju Koh, acting then as a legal advisor to the State Department, listed the following goals that the UN would need to achieve in Syria: protection of human rights, preservation of peace and security, and prohibition against the deliberate use of banned weapons.²⁶ These humanitarian arguments for military intervention against the Syrian government could not address the emergence of non-state armed groups, which became key protagonists in the increasingly complex political environment of the Syrian conflict.

Eventually, states did intervene in Syria, albeit not within the reasoning and scope of humanitarian interventions and R2P.

The emphasis on self-defence in the extraterritorial use of force, does not need to contradict the protection of civilians, and acts of self-defence have to remain within the boundaries of international humanitarian law and international human rights law. Resolution 2249 balances 'all necessary measures' with legal parameters of accountability and an invocation of humanitarian and human rights law. It does not depart from or significantly expand on Article 51 of the UN Charter. Rather, it demonstrates an adaptation and strategies in response to the new varieties of internal, regional, and global conflict. In the main operative paragraph 5, the Resolution:

²⁴ S. Zifcak, 'The Responsibility to Protect after Libya and Syria' (2012) 13 *Melbourne Journal of International Law* 1; M. Evans, 'Interview: The R2P Balance Sheet after Libya' in *The Responsibility to Protect: Challenges and Opportunities in light of the Libyan Intervention* (e-International Relations, 2011) at 40 <http://www.e-ir.info/wp-content/uploads/R2P.pdf>

²⁵ C. Stahn 'Between Law-breaking and Law-making: Syria, Humanitarian Intervention and "What the Law Ought to Be"' (2014) 19 *Journal of Conflict & Security Law* 1.

²⁶ H. Koh, 'Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way for Ward)', *Just Security*, Wednesday, October 2, 2013, at: <http://justsecurity.org/1506/koh-syria-part2/>.

‘5. Calls upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da’esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL also known as Da’esh as well as ANF, and all other individuals, groups, undertakings, and entities associated with Al-Qaida, and other terrorist groups, as designated by the United Nations Security Council, and as may further be agreed by the International Syria Support Group (ISSG) and endorsed by the UN Security Council, pursuant to the statement of the International Syria Support Group (ISSG) of 14 November, and to eradicate the safe haven they have established over significant parts of Iraq and Syria;’

The resolution does not explicitly endorse military action, but rather gives the UNSC support to action being taken. While calling upon all states ‘that have capacity to do so’, to take all necessary measures, it implicitly evokes interventions under the ‘unable and unwilling’ text. The individual state practice to date, has already provided us with an interpretation justifying extraterritorial self-defence where the state in question is unable to prevent conflict or actions of armed non-state actors, from spilling across their borders.²⁷

The novelty, however, of the Resolution 2249, is its emphasis on the situation to which it is responding: the unprecedented character and scale of the global terrorist threat to peace and security. The reality of an ‘armed attack’ has been changing due to several factors, including the greater porousness of physical borders, new forms of virtual weaponry, transnational terrorism, and the re-conceptualization of sovereignty.²⁸ If we read the threat of global terrorism as an unprecedented emergency, the gravity of the harm threshold has already been met. Thus the Resolution affirms the already changing nature of self-defence as expressed in the Chatham House Principles of International Law on Use of Force in Self-Defence, which takes the view that ‘[a]n armed attack means

²⁷ A. Deeks, ‘Unwilling or Unable’: Toward a Normative Framework for Extraterritorial Self-Defense’ (2012) 52 *Virginia Journal of International Law* 3, 483.

²⁸ R. Liivoja, ‘Law in the Virtual Battlespace: The Tallinn Manual and the Jus in Bello’ (2013) 15 *Yearbook of International Humanitarian Law*.

any use of armed force, and does not need to cross some threshold of intensity.²⁹ These developments pose a challenge to the notion of proportionality as a reasonable necessity of force, for the attainment of limited objectives has become a much more fluid notion in the context of global terrorism.

The nature of the threat posed by Da'esh, removes the strict boundaries of the territorial state. The threat is represented as an ethereal presence of groups and individuals who do not follow a clear organizational structure. The post-9/11 responses to terrorism already referred to increasingly amorphous networks surrounding an idea ('radical novelty of the post 11 September world')³⁰, not to a sovereign entity or specific groups. Hence, in reference to the 'unprecedented' and 'global' scale of modern terrorism, the Resolution echoes this kind of language of possibility concerning a more encompassing and global violence. In turn, the scope of the right to self-defence, as it currently stands in both the UN Charter and customary law, has been read more broadly.

III. LEGITIMATION OF INDIVIDUAL AND COLLECTIVE USE OF FORCE AGAINST NON-STATE ACTORS

Examples of state practice, which support a broader reading of the right to self-defence, have been extensively documented.³¹ Surely, the practice of the use of force against non-state actors did not commence with 9/11. As many states have asserted their right to the use force against terrorists and other non-state armed groups, the international community did not necessarily condemn this practice.³² In fact, as Christian Tams argues, the contemporary international policy against terrorism has already been implemented outside the UNSC framework. Acts of all kinds can constitute an armed attack if 'they result in, or are capable of resulting in destruction of property or loss of lives.'³³ It is then not atypical that many states are currently intervening militarily against Da'esh in Syria and Iraq, under distinct legal bases. First, the type of military involvement

²⁹ E. Wilmhurst (ed.), *Principles of International Law on Self-Defence set out by Chatham House* (2005), at 12.

³⁰ See Stanley Hoffman's commentary following 9/11 in 'On the War', *The New York Review of Books* (8 November 2001). Pointedly, he writes 'As soon as the shock of the terror attacks on New York and Washington was felt, commentators began saying that September 11, 2001, marked the beginning of a new era in world affairs. It is a misleading interpretation of a horrible event.'

³¹ See for eg. Tams, *supra* note 4.

³² R. J. Vincent, *Non Intervention and International Order* (1974) 350.

³³ Dienstein, *supra* note 18, at 193.

is not entirely novel, even if the threat emanates from a more amorphous ‘enemy’ with a global ideological presence.³⁴ Second, the strict rules on attribution have expanded over time to recognize the threat of non-state actors in international law. As long as the criteria of necessity and proportionality are respected, the responding act will be a legitimate exercise of self-defence. This has generally been the attitude in relation to the contemporary conflict in Syria and Iraq.

All the coalition states intervening in Syria expressly referred to the objective of fighting against the Da’esh, and the specific purpose of the consent given by the Iraqi authorities for their intervention.³⁵ Nevertheless, while the ICJ confirmed that intervention is ‘allowable at the request of the government’ in the case of *Armed Activities on the Territory of the Congo*,³⁶ this does not imply that this is so in every case. General principles of international law and specific rules can preclude the justificatory effect of an invitation. In the case of Syria, however, the Syrian government appeared to be unable to adequately respond to the threat and prevent terrorist groups from using its territory as a base of operations to launch attacks against Iraq. The more recent UNSC Resolution 2178 (2014), which responds to the threat of foreign terrorist fighters, reaffirms that all states shall prevent the movement of terrorists or terrorist groups by effective border controls and address, in accordance with their relevant international obligations, the threat posed by foreign terrorist fighters. State ‘failure’ to do so would legitimate unilateral actions of states.

The authority of Iraq’s invitation, however, stands in contrast to the Russian military intervention in Syria, which began in September 2015 after an official request by the Syrian government for military help against rebel and jihadist groups. Russia’s intervention in Syria follows the norm of intervention by invitation, if we consider the Syrian government as a legitimate issuing authority. The competing interests of involved

³⁴ Da’esh, however, does strive to be a state and therefore is concerned with territorial control.

³⁵ M. Lederman, ‘The War Powers Resolution and Article 51 Letters Concerning Use of Force in Syria Against ISIL and the Khorasan Group’ [UPDATED to add statement of the U.N. Secretary-General], (September 23, 2014), available at: <https://www.justsecurity.org/15436/war-powers-Resolution-article-51-letters-force-syria-isil-khorasan-group/>.

³⁶ *Armed Activities on the Territory of the Congo, Congo(The Democratic Republic of v Uganda)*, Merits, ICJ GL No 116, [2005] ICJ Rep 168, paras. 42-53, ICGJ 31 (ICJ 2005), (2006) 45 ILM 271, 19th December 2005, International Court of Justice [ICJ].

states became even clearer when in December 2015, Turkey intervened with its troops in the Iraqi territory, without the Iraqi government's invitation. Turkish government argued that the activities of armed non-state groups at its border pose a threat to Turkish security.³⁷ Rather than demonstrating an altogether novel development in customary law on military intervention, the pattern and legitimization of interventions in Syria and Iraq, demonstrate a more flexible and fragmented reading of the right to extraterritorial use of force in self-defence.

3.1 Invocation of self-defence and its limits

In response to the Paris shootings of November 2015, in letters dated on 8 September 2015,³⁸ the Permanent Representative of France to the UN addressed the Secretary-General and the President of the UNSC, invoking Resolutions 2170 (2014), 2178 (2014) and 2199 (2015) in particular, and identifying the Da'esh as constituting a threat to international peace and security. The letter stated that those acts are also a direct and extraordinary threat to the security of France. It evoked the letter from the Iraqi authorities to the UNSC,³⁹ requesting the assistance of the international community in order to counter the attacks perpetrated by Da'esh. Hence, in accordance with Article 51 of the UN Charter, France announced that it had taken actions involving the participation of military aircraft in response to attacks carried out by Da'esh from Syrian territory.

Germany put forward the argument that Syria is unable to exercise effective control over its entire territory and also invoked its right to self-defence against Da'esh under Article 51 even *without* the consent of the Syrian Government. Germany has also been exercising the right of collective self-defence, in supporting the military measures of those States that have been subjected to attacks by Da'esh.⁴⁰ Similarly, the letter from the government of Belgium invoked Article 51 and collective self-defence. The letter states

³⁷ E. Cirkovic, 'Exceptionality and context: Turkish intervention in Syria and the war on terror' (26 February, 2016) Voelkerrechtsblog. Available at: <http://voelkerrechtsblog.org>

³⁸ S/2015/745.

³⁹ S/2014/691.

⁴⁰ The written opinion of the Academic Commission of the German Parliament and the Government shows in detail the heavy reliance on the UNSC Resolutions. See, WD 2 - 3000 - 203/15.

that Da'esh has occupied a certain part of Syrian territory over which the Government 'does not, at this time, exercise effective control.' Moreover, it stated further that, 'In the light of this exceptional situation, States that have been subjected to armed attack by ISIL originating in that part of the Syrian territory are therefore justified under Article 51 of the Charter to take necessary measures of self-defence. Exercising the right of collective self-defence, Belgium will support the military measures of those States that have been subjected to attacks by ISIL. Those measures are directed against the so-called "Islamic State in Iraq and the Levant" and not against the Syrian Arab Republic. The reference to an *exceptional* situation implies extraordinary measures, and the implication that Syria has lost effective control over part of its territory, here fulfills necessity requirements for acts of lawful self-defence. Thus, according to the Belgian government, an action against a non-state actor operating from the territory of another state is permitted, without that state's consent.⁴¹

The United Kingdom also made a reference to taking necessary and proportionate measures against Da'esh in Syria, in exercise of the inherent right of individual and collective self-defence.⁴² Turkey, in its letter of 24 July 2015 also evoked its inherent right to individual and collective self-defence under international law. It stressed that, 'The developments in Syria have been affecting Turkey greatly, since we share a long border with this region. We have been facing threats and attacks emanating from Syria since the start of the conflict.'⁴³ It emphasized the incapacity of the Syrian regime to prevent these threats emanating from its territory, which clearly imperil the security of Turkey and the safety of its nationals.

Russian intervention in Syria has followed both legitimization processes: individual self-defence and intervention by invitation.⁴⁴ The Russian government argued that Da'esh was behind the crash of a commercial Russian aircraft, Metrojet 9268, over the

⁴¹ S/2016/523.

⁴² S/2015/928.

⁴³ S/2015/563.

⁴⁴ The legal argument of intervention by invitation has been used by all states intervening in Iraq and Syria including nine members of the US-led coalition, Russia, and Iran; by Egypt for its airstrikes against ISIL in Libya; and by Iran and Russia for their interventions in Syria.

Sinai desert on October 31, which killed the 224 people on board.⁴⁵ Russia's insistence on Syrian consent as the legal basis for its operations does not negate the approach of other countries. The international community, however, responded in challenging its support for and recognition of Assad's government, thus reflecting yet another problem: the legitimacy of the inviting government, and its recognition (or lack thereof) by the international community.

Interestingly, the incursions of Turkish troops into Iraqi territory since December 2015, without the Iraqi government's invitation, have also prompted a series of debates over the legality of armed interventions on foreign soil without an invitation of the State. Turkey regards the Kurdish militia People's Protection Units (YPG) as a terrorist organization and alleges that it is affiliated with the Kurdistan Workers' Party (PKK). It has invoked the right to self-defence not only against the Da'esh, but also against the PYD. Iraq insisted that this constitutes a violation of its sovereignty under Article 2(4) of the UN Charter, whereas Turkey argued that the activity of armed non-state groups at the Iraqi-Turkish border is a threat to Turkish security. In this context it is important to refer to the 'accumulation of events' theory, because Turkey made references to both, its long standing internal security issue with the PKK, as well as the now regional threat emanating from Syria and Iraq.⁴⁶ The 'accumulation of events' theory was consistently evoked by Israel in justifying the use of force in response to cross-border attacks or bombings.⁴⁷ In the context of the global war on terror, as Tams argues, 'states seem to have shown a new willingness to accept the "accumulation of events" doctrine which previously had received little support'.⁴⁸

As *Armed Activities* case implied, the UNSC has the primary responsibility to deal with terrorist activities in failed states. Thus, 'Article 51 ... does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other

⁴⁵ 'Russia Allies With France Against ISIS, Saying Jet That Crashed in Sinai Was Bombed', *New York Times*, November 17, 2015, available at: http://www.nytimes.com/2015/11/18/world/europe/russia-plane-crash-bomb.html?_r=0.

⁴⁶ B. Cali, 'Syrian and Turkish Military Activities and International Law' *EJIL Talk!* (October 11, 2012), available at: <http://www.ejiltalk.org/syrian-and-turkish-military-activities-and-international-law/>

⁴⁷ Ronen, 'Israel, Hizbollah and the Second Lebanon War', (2006) 9 *Yrbk Int'l Humanitarian L* 362, at 372.

⁴⁸ Tams, *supra* note 4, at 388.

means are available to a concerned State, including, in particular, recourse to the UNSC.⁴⁹ It allows self-defence ‘until the Security Council has taken measures’.⁵⁰ The interim self-defence measures taken by a state or coalition of states cannot be used for resolving long-term security problems. Additionally, any potential evidentiary issues would require an overseeing international body.⁵¹ However, the UNSC Resolutions passed in response to the new realities of the global war on terror, appear to have provided individual States with extended mandates and powers in combating terrorism both on their own soil, and elsewhere.

The ‘unable and unwilling’ test adds to the debate on military interventions as a relatively new development in response to armed attacks by non-state actors. While a way to address the problem of violent non-state actors in third party territory, it remains controversial because the bypassing of state consent opens up a new space for the use of force by states on foreign territory. It cannot be argued that the principle is supported by demonstrated *opinio juris*, and as such it is not an established principle under international customary law.⁵² As the examples of Israel and Turkey indicate, there is already evidence of states intervening unilaterally against non-state actors using the ‘accumulation of events’ argument.⁵³ However, even with a government’s invitation, as evidenced in Yemen and Ukraine, the legitimacy of military intervention is not always assured.

⁴⁹ Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), para. 148.

⁵⁰ Ibid.

⁵¹ A. Deeks, ‘Unwilling or Unable’: Toward a Normative Framework for Extraterritorial Self-Defence’ (2012) *Virginia Journal of International Law* 52, 495.

⁵² E. Posner, ‘Obama’s Drone Dilemma. The killings probably aren’t legal-not that they’ll stop’, *Slate Magazine*, October 8, 2012), at http://www.slate.com/articles/news_and_politics/view_from_chicago/2012/10/obama_s_drone_war_is_probably_illegal_will_it_stop_single.html#comments

⁵³ In the 2003 *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, the ICJ used language that suggested that the cumulative nature of a series of forcible actions could possibly turn them into an ‘armed attack’. Narrower interpretation, however, was given in 2004 ICJ *Advisory Opinion on the Legal Consequences of Construction of a Wall*, that Israel could not defend the legality of the separation barrier it was building on the West Bank on the basis of its right to self-defence under Article 51 since it did not claim that the attacks which the barrier was designed to prevent were imputable to another state. However, when the persons planning and executing attacks are operating from outside its borders, if neither the state from which those non-state actors operate nor the international community takes effective measures to stop the attacks the victim state must have the right to use force in self-defence.

3.2 *The (Un) questioned legitimacy of intervention upon invitation: Yemen and Ukraine*

On 21 April 2015, the Saudi-led war coalition of Arab states the *Operation Decisive Storm*, the military campaign against Yemen that started on 25 March, had transitioned to the post-conflict phase, *Operation Restore Hope*. Nevertheless, the bombing resumed some hours after the coalition's announcement. The central issue of the war has been the notion of 'legitimacy'-namely: the legitimacy of Saudi-led coalition's military intervention; Iran's alleged covert support of the Houthi rebels; the legitimacy of President Hadi's exiled government; the demands and role of the Houthi rebels; and finally, the statements made by representatives of the US administration, indicating that the US provides support for the intervention as part of its counterterrorism strategy in Yemen. Importantly, the competing claims for legitimacy in Yemen, as well as the external involvement of Saudi Arabia and other actors, predate the current intervention.

Both, President Hadi's letter and the Gulf States' statement initially justified the need for intervention in response to the alleged role of 'regional powers' and 'outside forces' in supporting the Houthis. The five participating States of the Gulf Cooperation Council, provide some explanation for the legal basis for the airstrikes in the written statement to the UNSC.⁵⁴ The statement quotes a letter from President Hadi requesting military intervention, and provides the following three claims for justification of intervention: the intervention is invoked by the 'Intervention by invitation' doctrine on behalf of President Hadi; pre-emptive self-defence against the threat posed by the Houthis to Saudi Arabia and the whole region under Article 51 of the UN Charter; and, collective self-defence of Yemen against the Iranian supported Houthis under Article 51 of the UN Charter.

Saudi Arabia's intervention in Yemen is based on the assumption of Hadi's legitimacy. The alleged Iranian involvement implies that the collective self-defence could be directed against the foreign military forces as already acting within Yemen's territory, and the 'insurgents' who are their proxies/agents.⁵⁵ Whether Saudi Arabia, Iran, the United States and other countries are currently parties to the pre-existing NIAC in Yemen, transforming it into an international conflict, is contingent upon proof and upon

⁵⁴S/2015/217.

⁵⁵ Z. Vermeer, 'The Jus ad Bellum and the Airstrikes in Yemen: Double Standards for Decamping Presidents?' *EJIL Talk!* (30 April, 2015).

the extent of the alleged Iranian involvement in Yemen, which to date, has not been clarified.

Without clear evidence regarding foreign influence in Yemen *predating* the current strikes, the conflict remains a NIAC. Moreover, no invitation to use force, or balancing with military necessity, would absolve any intervening state of its relevant obligations under international humanitarian law, or international human rights law.⁵⁶ In Yemen, in particular, there has been no transparency in the reporting on the military strikes of the coalition and as the UN report, attempts to distinguish between legitimate military targets and civilian ones, have been inadequate.⁵⁷

Meanwhile, the crisis in Ukraine has received much attention from the perspective of debates about self-determination, constitutional identity, and democratic legitimacy.⁵⁸ Details of this case are beyond the scope of this investigation as it involves a forcible annexation of a territory. Briefly, in February 2014, the President of Ukraine Viktor Yanukovych lost effective control and fled his country's territory. He requested intervention from the international community in that capacity. In March 2014, the majority of states in the UN General Assembly considered Russia's annexation of the Crimean Peninsula illegal under international law. Like Hadi, Yanukovych was democratically elected and removed from the office unconstitutionally. Hadi, unlike Yanukovych, continued to be recognized as President by the international community. Both cases, again demonstrate the multi-polar, fragmented, and often contradictory approach to the extraterritorial use of force. Part of the controversy, regarding the legitimacy of interventions by invitation, stems from the lack of consensus on whether only a government in effective control over its territory can issue an invitation.

The states have identified domestic, global, and/or unprecedented threats to their individual and international peace and security. Rather than being exceptional, the situation of military interventions at present emphasizes the tense relationship between

⁵⁶ A. Deeks, 'International Legal Justification for the Yemen Intervention: Blink and Miss It', *Lawfare*, Monday, March 30, 2015) available at <https://www.lawfareblog.com/international-legal-justification-yemen-intervention-blink-and-miss-it>

⁵⁷ 'Zeid condemns repeated killing of civilians in Yemen airstrikes', OHCHR, available at: <http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17251&LangID=E#sthash.cA026zF9.dpuf>

⁵⁸ The Crisis in Ukraine, *supra* note 19.

the self-constituting image of the international legal system that vows to prevent conflict, and the right to the use of force in order to achieve this aim. Some of the narratives have merely served to abstract from the reality of conflict, as has been evident in the language of ‘exceptionalism’. The unprecedented nature of the global war on terror, as affirmed in the UNSC 2249 creates an aura of an exception in the current situation and the possible interpretations of the use of force. However, it can also be argued that the sufficient ambiguity regarding possible interpretation of the UN Charter Chapter VII, already allows for the very concept of self-defence to be a permanent situation of ‘exception’ to the Article 2(4). This is a broader normative question on the very purpose of the international legal system, and its intent to obscure or eliminate *war* in international relations.

War is an exception to the rule prohibiting aggression. It is allowed in situations of self-defence, albeit not as ‘war’ but as self-defence and deployment of all necessary measures. However, war as an actual experience cannot be an exceptional state of things, because it is already allowed in the UN Charter. In other words, there can be no further exception to an *exception*.

IV. EXCEPTIONALITY OF CONFLICT

4.1 Exception, war, and the revival of Carl Schmitt’s geophilosophy

Although the UN Charter reference to ‘effective collective measures for the prevention and removal of threats to the peace’ may not include directly the use of force, neither does it banish the concept of ‘military necessity’ once there is a war. Military necessity – is clearly defined as the requirement whereby a belligerent has the right to apply any measures that are required to bring about the successful conclusion of a military operation and which are not forbidden by international humanitarian law.⁵⁹ Because the law of the UN Charter does not regard the use of force in self-defence as exceptional, theorizing about ‘the exception’ is unhelpful to understand justifications for the use of force that appeal to the right of self-defence. The justification for the use of force by appeal to that right is not ‘extra legal’. Instead, there is political and legal disagreement, as is to be expected, about what counts as self-defence. In a sense, this seems uncontroversial. A system of domestic criminal law has the purpose to prevent

⁵⁹ *The Sanremo Handbook on Rules of Engagement* (November 9 2009) at 5. Available at: <http://www.ihl.org/wp-content/uploads/2015/12/ROE-HANDBOOK-ENGLISH.pdf>

crimes, yet it contends with the possibility of crime.⁶⁰ As aggressive war is an international crime, the international legal system contends with the possibility of that crime and provides the means to suppress and punish it as a breach.

The use of force in self-defence can involve a debate premised on the strict reading of Article 51 of the UN Charter or the GA Resolution on Friendly Relations, or define self-defence as an 'inherent' or 'natural' right to liberate oneself.⁶¹ As Ed Morgan argued 'It is all new and old, tentative and foundational, anti-war and pro-defence, non-violent and highly coercive; the law has become, in the words of Kurt Vonnegut, 'a trafficker in climaxes and thrills and characterization.'⁶²

That superpower interventions will trigger similar behaviour by the other superpower within its realm, which R. J. Vincent describes through examples of the Brezhnev Doctrine in 1968 and the Johnson Doctrine of 1965, is not novel.⁶³ What appears to be a shift in current examples of military interventions is a change in language from the early 1990s, if we observe the justification of military interventions after the Cold War as humanitarian. For instance, in his 1990 article 'International Law after the Cold War', Michael Reisman argued that the military character of the international arena has been perceptibly reduced at the strategic level. Exceptions to formal prohibitions on unilateral uses of force would no longer be compromised by the 'symmetrical doctrines of selective interventions' or other elective strategic doctrines such as 'Mutual Assured Destruction'. The notion of necessity as one of the traditional cumulative criteria of lawfulness could regain its true meaning.⁶⁴ This new vision of international law as a relevant and benign language of international relations was controversially challenged by the unilateral 1999 NATO military intervention in the Kosovo crisis. It was a moral duty, 'illegal but justified', to protect the local civilian population from gross and systematic human rights abuses.⁶⁵ The exceptional measures were necessary in order to save civilians

⁶⁰ D. Dyzenhaus, 'Schmitt v Dicey: Are States of Emergency Inside or Outside the Legal Order' (2008) 27 *Cardozo Law Review* 2005, at 2006.

⁶¹ GA Res. 2625 (XXV), 24 October, 1970.

⁶² K. Vonnegut, *Slaughterhouse Five* (1972) at 5.

⁶³ See Vincent, *supra* note 32, at 178.

⁶⁴ M. Reisman, 'International Law After the Cold War' (1990) 84 *American Journal of International Law* 859.

⁶⁵ Y. Dinstein, 'Comments on War' (2004) 27 *Harvard Journal of Law and Public Policy* . 877, 881; UN Press Release SG/SM/6938 (Mar.24, 1999).

and reflected in the moral impulse of the international system. The action was criticized for a similar reason. The implication of support for military intervention in Kosovo was that the self-perception of the international community as being anti-war in general, would be undermined by the NATO action.⁶⁶ As Bruno Simma concluded, ‘all of us leave a path of virtue from time to time. But one should not announce such a dangerous course as a general programme for the future, especially at one’s 50th birthday.’⁶⁷ The slippery slope of exception was a further stretch on an already weak legal system.

The rhetoric of humanitarian concerns did not entirely disappear. It continues to be supported by the recent framing of nuclear disarmament process as a humanitarian issue. Security, sovereignty,⁶⁸ or intervention must be justified by humanity. While the existential threat of nuclear weapons requires preventive measures against ‘massive killing of the innocent’⁶⁹ it remains to be seen how such language differentiates itself from the current humanitarian crisis emanating from ongoing, armed conflicts. Thus instead of arguing that humanitarian language is entirely absent in the international legal community, we can observe ‘selective humanitarianism’ and accordingly ‘selective humanity’ of those potentially affected.

Simma’s conclusion reveals the faith in international community’s virtue. The real worry, then, is that the states will ‘stretch’ their interests to such a degree that the claim that actions undertaken by appeal to that justification are a legally regulated use of force becomes somewhat farcical. This is not a problem of ‘the exception’, but of the insufficient institutionalization of the law. As David Fraser argued ‘If we cannot distinguish law before and after Auschwitz, what does that say about our ability, as a theoretical or principled matter, to characterise the rule of law as ‘good’ or desirable?’⁷⁰ And what would be the role of corresponding institutions, establishing and enforcing the parameters of such law?

We can argue that the current international legal system is not really anti-war as much as it is anti-aggressive war. The use of force is not always illegitimate, but rather,

⁶⁶ For instance, K. Booth, ‘Ten Flaws of Just Wars’, in K. Booth (ed.) *The Kosovo Tragedy: The Human Rights Dimensions* (2001), at 314–24.

⁶⁷ B. Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 *EJIL* 22.

⁶⁸ A. Peters, ‘Humanity as the A and Ω of Sovereignty’ (2009) 20 *EJIL*.

⁶⁹ M. Koskeniemi, ‘Case Analysis: Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons’ (1997) 10 *Leiden Journal of International Law*.

⁷⁰ C Joerges, N S Ghaleigh (eds.), *Darker Legacies of Law in Europe* (2003).

states do not have a right to the legally blameless use of force at their discretion. This is, importantly, how Carl Schmitt thought the '*ius publicum Europaeum*', the spatial, legal, and political order of the world, worked. In *The Turn to the Discriminating Concept of War* he wrote: 'For several years now, bloody struggles have been carried out in the varied regions of the earth – struggles to which a more or less common understanding warily avoids attaching the term "war."'⁷¹ The scholarly revival of Schmitt's work emerges in response to the increasing gaps created by 'exception' and global war on terror,⁷² in the seemingly established liberal system of the post-Cold War Period.⁷³

It is not clear whether Schmitt's concept of the exception, as developed in his *Political Theology*, was supposed to have an international application. Rather, it was supposed to illuminate domestic constitutional issues. This is where he clearly argues that 'not every extraordinary measure, not every police emergency measure or emergency decree, is necessarily an exception. What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order.'⁷⁴ This suspension would not happen within a legal system, as there would be no legality of which to speak. Further, Schmitt claims that the exception or *Ausnahmezustand* is something that is declared by a sovereign, whose sovereignty is manifested precisely in the power to 'switch off' the law.⁷⁵ In other words, the exception is not simply a situation of emergency or crisis. The exception is a legal idea (namely: the absence/inapplicability

⁷¹ *The Turn to the Discriminating Concept of War* was originally presented as a lecture on Friday, October 29, 1937, at the 4th annual conference of the Academy for German Law (Akademie für Deutsches Recht) on the theme "The Law of Reich and Volk".. See, C. Schmitt, 'The Turn to the Discriminating Concept of War (1937)', in *Carl Schmitt Writings on War* 30 (Timothy Nunan, ed. trans. 2011), 31-32.

⁷² A. Benoist, 'Global Terrorism and the State of Permanent Exception: The Significance of Carl Schmitt's Thought Today', in L. Odysseos and F. Petit (eds.), *The International Political Thought of Carl Schmitt. Terror, liberal war and the crisis of global order* (Routledge Innovations in Political Theory, 2007). 73-96.

⁷³ For instance John McCormick pointed out in 1998 that 'Carl Schmitt is fast becoming recognized as the twentieth century's foremost critic of liberalism', 'Review: Political Theory and Political Theology: The Second Wave of Carl Schmitt' (1998) 26 *Political Theory* 6, 830. For an extensive critique of critical, normative, and cosmopolitan theorists' approach to Schmitt see also D. Chandler, 'The Revival of Carl Schmitt in International Relations. The Last Refuge of Critical Theorists' (2008) 37 *Millennium Journal of International Studies* 1, 27-48. See also M. Koskeniemi, 'International Law as Political Theology: How to Read *Nomos der Erde*?' (2004) 11 *Constellations* 4, 492-511.

⁷⁴ C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1985) 12.

⁷⁵ *Ibid.* 13 ff.

of law, replacement by another law, as declared by the supreme legal authority). In the international sphere, there is no sovereign who can declare an exception. For that reason alone, it seems doubtful that the idea has a straightforward international application. The closest we can get to this argument, however, is by demonstrating that the pseudo-constitutional nature of the UN Charter, and UNSC's role to maintain peace and security provides such a situation, where it both prohibits and allows for an exception as a legal status declared by a legal authority, in the situation of individual and collective self-defence.

The very notion of international legality is a liberal project, for it requires some level of mutual cooperation and consensus.⁷⁶ In the context of the international order, space and borders matter in the Schmittian geophilosophy, and the corresponding presence or absence of conflict. Schmitt's view about international order after 1945 seems to have been that there was no international legal order (because the old *nomos* had been destroyed without being replaced by a new). In the first half of the 1940s Schmitt wrote, and had published in 1950, his seminal work with an international focus, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (*Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*).⁷⁷ It is not only a history of the development of international law from the Middle Ages to the beginning of the Cold War, but also a narrative of how the 'modern' international society eventually disintegrated. We revisit Schmitt because he wrote at a time when he believed that the then 'nomos of the earth', the 'Westphalian System', had collapsed. This centerpiece of the geographical, legal, and political global order went into decline from the second half of the nineteenth century to the beginning of the First World War. As the old *nomos* of the earth, or traditional Eurocentric order of international law floundered⁷⁸ no new order reappeared, or rather there was no order with explicit spatial grounding in the international system. A *nomos* is a form of law, or a structure that carries an order of law. But it is not backed by a sovereign. Interestingly, Schmitt does not deny the possibility of international law, and he does not appear to accept the argument that international law is a state of anarchy. However, international law cannot be grounded in the sovereignty of a state.

⁷⁶ For an analysis on contradictions in the liberal visions of empire see especially, D. Bell, *Reordering the World: Essays on Liberalism and Empire* (2016).

⁷⁷ C. Schmitt, *supra* note 6.

⁷⁸ *Ibid.*

In reference to Hobbes and Locke, Schmitt engages in an interesting discussion of so-called ‘amity lines’.⁷⁹ Namely, formerly free geographical areas became sites of conflicts in 16th and 17th century. International law designated the new world as a conflict zone. Importantly, however, it removed the conflict from sphere of peace and order ruled by European public law: ‘[T]he designation of a conflict zone at once freed the area on this side of the line—a sphere of peace and order ruled by European public law—from the immediate threat of those events “beyond the line,” which would not have been the case had there been no such zone. The designation of a conflict zone outside Europe contributed also to the bracketing of European wars, which is its meaning and justification in international law.’⁸⁰ This article thus posits, in a way, that current interventions are ‘beyond the line’ in a physical and geographical sense.

Schmitt’s critique of liberal universalism is rooted in the perspective that there is no political unity in the international realm; rather, an image of such unity is at best achieved through ‘ideological short-circuits’ and ‘fictional unities’.⁸¹ This did not rule out the existence of law, or of an international *nomos*. Where there is no global sovereign and consensus over a clear definition of the scope and content of justice and law, approaches based on any particular justice merely institutionalized disorder and conflict, rather than order and ‘the mitigation of conflict.’⁸² But the disintegration into conflict is just as possible, as is consensus making. The difficulty emerges in the imagination of abstract and spaceless universalism that denies both of those possibilities.⁸³ Law can easily become a political tool, while at the same remaining part of the universalist ethical argument. Justice, law, power, and practice, could not be seen as separate from each other.

The ‘exception’, if we follow Schmitt, would have to be a use of force that is not legally authorized or permitted but that is also, not legally prohibited. The power exercised by the sovereign in an exception is authorized in a weak sense: it is exercised by the sovereign who represents that state, and therefore still rightful or permitted.

⁷⁹ *Ibid.*, at 97-98.

⁸⁰ Quoted in J. Lossay, ‘Postcolonialism’ in S. Legg ed., *Spatiality, Sovereignty and Carl Schmitt: Geographies of the Nomos* (2011) at 255.

⁸¹ C. Schmitt, *supra* note 6, at 335.

⁸² *Ibid.*, at 118.

⁸³ Schmitt, *supra* note 6, at 11.

However, what characterizes the public use of violence in the state of normality, presumably, is that almost all uses of violence are a response to the breach of a (criminal) law. Such uses of force take place pursuant to some legal norm. All other uses of force, by contrast, are seen as criminal. This is the alternative that no longer holds in the state of exception, for the action in which the sovereign engages no longer takes the form of an execution of law.

However, state capacity to make decisions outside of the recognized legal bond, or broadly interpret its norms, might signify nothing more than the manner in which politics always introduces new and unanticipated problems and that the application of a norm like ‘self-defence’ will have to adapt to an array of novel circumstances. In general, that is true of any legal concept, if we consider law as a system that both changes and is adaptable to its social environment.

It is surely possible that within a global liberal, or indeed constitutional regime, a situation of conflict might arise, which in turn would require a modification of that legal order’s normative self-perception. Duncan Kennedy specifically argues that there can be an ethical requirement ‘to violate the constitution (to make an “exception”)’. In such a situation, ‘[l]iberal constitutional principles will leave the actor in a situation like that of the Kierkegaardian patriarch, unsure whether or not to sacrifice his son.’⁸⁴ If the dilemma here is genuine, the sacrifice is too great, but the situation warrants it. This was the ethical and moral dilemma presented before, during, and after the NATO intervention in Kosovo. This is the moment when dialogue breaks down and requires strategic moves by the involved parties. An outcome is the product of strategy, bargaining, or even violence, rather than dialogue.

The extreme measures of Schmitt’s absolute decision-maker are not necessary because they are possible in the legal system. It is also important to differentiate between Schmitt’s domestic constitutional theory and his ideas about international law. Schmitt could not have had the view that the absolute state guarantees international law, since he observed the international legal system as being essentially pluralistic. The sort of law that the UN Charter purports to create, one that aims to comprehensively legalize the international use of force, could not work internationally, because such a system would be incompatible with the co-existence of truly independent and self-determined polities.

⁸⁴See Kennedy, *supra* note 12, at 1164.

An international legal order must recognize a state's right to engage in the use of force in the pursuit of what it perceives to be its vital interests. But on the basis of that recognition, the international system, according to Schmitt, can be a legal order (and is not 'the exception'), although it does not rule out war. From such a standpoint, the UN Charter system merely gives rhetorical support to the powers that were the winners of the two great wars.⁸⁵ We can also argue that the UN Charter does not indeed rule out war, it only prohibits aggression.

The universal legal bond envisaged in the Charter has a certain form, it embeds a Kelsenian understanding of what legality is, and Schmitt was as concerned to challenge that understanding of legality as he was to invoke 'the exception' or the limits of law. Clearly, if there is a crime of aggressive war, there is a legal concept of (illegal) war. There is also a concept (or several) of the (legitimate) uses of force in support of the Charter framework. What the current international legal system does, is not to fail to recognize war, but rather to distinguish legally between different kinds of uses of force that, in an older dispensation that Schmitt reminisces about, would all have had the same legal status.

Lastly, when providing a mere description of the 'strategy' of actors in international relations, we should be careful not to 'justify violence', and this is not where the reference to Schmitt should lead us. Duncan Kennedy describes this argument as follows: 'It is common to say that if you insist that it is always possible that dialogue will give way to strategy, and that the strategic has no internally generated necessary stopping point short of all-out war, you are endorsing, or at least inviting, political murder.'⁸⁶ The objective here, however, is exactly the opposite. In a situation where we are witnessing what some have argued to be the greatest humanitarian crisis since the Second World War⁸⁷, and a very re-definition of 'human'⁸⁸ in relation to the current forced movements of peoples across borders, legally and politically defined as refugees and asylum seekers

⁸⁵ See C Schmitt, *The Concept of the Political: Expanded Edition*, translated by G Schwab (2007) at 27. Thus, political conflicts 'can neither be decided by a previously determined general norm nor by the judgment of a disinterested and therefore neutral third party.'

⁸⁶ Kennedy, *supra* note 12, at 1166.

⁸⁷ UNHCHR, 'Syria conflict at 5 years: the biggest refugee and displacement crisis of our time demands a huge surge in solidarity', 15 March (2016).

⁸⁸ For a critical international relations perspective see, M. Dillon and J. Reid, *The Liberal Way of War: Killing to Make Life Live* (2009).

(as well as migrants), the article takes an unapologetic stance that the belief in certain ‘liberal distinctions’ and structures of the international legal system need to be addressed in order to make sense of the current crisis.

V. CONCLUSION

The purpose of Resolution 2249 (2015) is to strengthen global commitment to the war on terror. It does so by identifying the activities and extremist violent ideology of the Da’esh as a global and unprecedented threat to international peace and security, and authorizes combat by all means against, as it repeats ‘this unprecedented threat to international peace and security.’ The Resolution demonstrates a development in the relevant rules of international law applicable to extraterritorial use of force by states against non-state actors. It appears to broaden the interpretation of individual and collective power of states to use force domestically and internationally in the context of self-defence.

However, the use of force in self-defence is not ‘beyond’ law. It is built into the pre-existing decision rules. Likewise, there is nothing determinative over which situation may result in a compromise, or an all-out war. This is where Schmitt stops short, for his solution lies in the decision of leadership and the absolute state. Schmitt’s concern is order, and conflict management. The concern of our contemporary liberal international order is conflict management and global peace, but also a prevention of a rise of such an absolute state (with an emphasis on *never again*). But Schmitt warns us about real possibilities for separation of universalism from power and pluralism. His critique of liberal universalism is grounded in the fact that there is no factual political unity of mankind. Any attempt to claim otherwise can merely create ‘fictional unities’.⁸⁹ Any claim to represent the ‘interests of humanity’ cannot co-exist with the politics of friend and enemy: ‘Humanity is not a political concept.’⁹⁰

The aspiration to global, rather than only international constitutionalism⁹¹ is consistently countered by law’s contingent co-existence with morality, and politics. The

⁸⁹ See Schmitt, *supra* note 6, at 335

⁹⁰ Schmitt, *supra* note 85, at 55

⁹¹ J. Bentham, ‘Principles of International Law’, in *The Works of Jeremy Bentham Vol II* (1843) 535; G. F. Martens, *Einleitung in das positive europäische Völkerrecht auf Verträge und Herkommen gegründet* (1796).

many parallel debates of the past couple of decades over globalization and transnationalism, public and private norms, official and unofficial, and competition between hard and soft law, all emerge from the jurisprudential attempt to theorize the transformation of legal institutions in the context of an evolving and complex society. We are still not certain how to address the breaches by 'third parties' or rather, transnational private (armed) actors, if duties of care are applicable primarily on individual states and the international community of states. Nevertheless the failure of such a system to find relevance in too many situations, including the current war in Syria, results in the questioning of its very existence.