JUS AD BELLUM IN SYRIA: THE MEANING OF THE US AIRPOWER CAMPAIGN

Jus ad bellum in Syria: the meaning of the US airpower campaign

Operation Inherent Resolve is the name of the air campaign carried out by a Combined Joint Task Force of US-led coalition forces against the Islamic State of Iraq and the Levant, also known as ISIS/ISIL/Daesh.1 Repeatedly, the campaign has been engaged to ‘degrade and ultimately destroy’ Daesh.2 The group is a terrorist-designated organisation3 responsible for war crimes4 and crimes against humanity5 – arguably even genocide (against the Yazidis minority of Iraq) – under the Rome Statute. The group is at war with more than 60 nations or groups: coalition nations conducting airstrikes in Iraq include Australia, Belgium, Canada, Denmark, France, the Netherlands, the United Kingdom and the United States; coalition nations conducting airstrikes in Syria include Bahrain, Jordan, Saudi Arabia, the United Arab Emirates and the United States.6

The ad bellum justifications against Daesh have ranged from humanitarian intervention to collective-self-defence. Iraq itself invoked self-defence, and gave consent to the deployment of US airpower to assist the fight against Daesh.7 In a letter to the UN Secretary-General, US Ambassador Samantha Power informed the world about the US rationale for expanding the campaign from Iraq into Syria.8 This article analyses that justification, and what is means for international law developments concerning jus ad bellum.

Legal possibilities in Syria

State sovereignty, and the principles of peaceful settlement of disputes and non-interference are the pillars of international law.9 Jus ad bellum, the body of law that regulates the use of force, provides for few exceptions. Such exceptions rise from hard ‘treaty’ law, ‘soft law’, and customary international law.10 The two broad categories for the use of force in international law are enforcement actions by the UNSC, and the right to self-defence. Both categories have many sub-categories, only some of which are relevant for the US-led airpower campaign in Syria.

Enforcement actions by the UNSC can be justified in the form of humanitarian interventions. Humanitarian interventions have also materialised without UNSC authorisation,11 although recourse to such justification absent a Security Council mandate has proven highly controversial.12 In 2001, the International Commission on Intervention and State Sovereignty (ICISS), set up by the Canadian government in response to Kofi Annan’s question of when the international community must intervene for humanitarian purposes, found that sovereignty not only gave a State the right to ‘control’ its affairs, it also conferred on the state primary ‘responsibility’ for protecting the people within its borders. It proposed that

that no states objected to the creation of the CoI.
8 On 18 December 2014 the UN General Assembly adopted resolution A/RES/69/188 with stronger language than previous years. The resolution condemned the systematic, widespread and gross violations of human rights in the DPRK, including those that amount to crimes against humanity, and called that the DPRK government bears the responsibility to protect its population. It also encouraged UNSC to refer the situation to the International Criminal Court.

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when a state fails to protect its people – either through lack of ability or a lack of willingness – the responsibility shifts to the broader international community.13

In 2005 the UN World Summit Outcome clarified that such responsibility can only be exercised with UN Security Council authorisation.14 In the case of Syria, the veto powers of Russia and China have banned any such course of action.15 It is reasonable to speculate as to whether Russia would have vetoed a limited intervention in Syria directed against Daesh; Russia has indeed supported anti-terrorism resolutions, including UN Resolution 2178 of 23 September 2014 against Daesh,16 and air strikes against Daesh arguably benefit the regime that Russia is so ardently trying to protect. A proposal, however, never made it on to the Security Council table. That is because the US preferred the strategically less risky but perhaps legally more controversial justification of self-defence. The right to self-defence is regulated in Article 51 under Chapter VII of the UN Charter.17 It can be exercised by an individual state or collectively, and determinations concerning self-defence revolve around the concepts of ‘armed attack’,18 necessity and proportionality.19

The US legal justification

Building on Iraq’s consent to US intervention in Iraqi self-defence, Power’s letter to the UN Secretary-General invokes a combination of different ways of exercising self-defence. The first part of the letter reads as follows:

‘Iraq has made clear that it is facing a serious threat of continuing attacks from the Islamic State in Iraq and the Levant (ISIL) coming out of safe havens in Syria. These safe havens are used by ISIL for training, planning, financing, and carrying out attacks across Iraqi borders and against Iraq’s people. For these reasons, the Government of Iraq has asked that the United States lead international efforts to strike ISIL sites and military strongholds in Syria in order to end the continuing attacks on Iraq, to protect Iraqi citizens, and ultimately to enable and arm Iraqi forces to perform their task of regaining control of the Iraqi borders.’

The requirement of exercising collective Iraqi self-defence is that, if Daesh poses a threat of crossborder attacks into Iraq, military action can legitimately be used against Daesh to prevent such crossborder attacks, provided that action is proportional to the threat posed, and necessary to prevent such crossborder attacks, or to degrade Daesh’s capability to launch them. The second part to the justification invoked the concept of ‘control’ and the rather disputed ‘unwilling or unable test’, which has been used amidst controversy to justify the use of force against non-state actors in the post-9/11 realm and the ‘Global War on Terror’:20

‘States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.’

Even more controversially, the US invoked preventive self-defence against a lose group of senior al-Qaeda members operating in Syria: ‘Additionally, the United States has initiated military actions in Syria against al-Qaeda elements in Syria known as the Khorasan Group to address terrorist threats that they pose to the United States and their Allies.’

As noted by some, the ‘vague wording of the letter about Khorasan’ (threats to ‘the United States and our partners and allies’) as compared to the ‘pretty specific’ language about Daesh (‘to end the continuing attacks on Iraq, to protect Iraqi citizens’) ‘suggests that Khorasan [was] not currently engaged in armed attacks on Iraq’.21 This is of paramount importance, as the imminence of an attack is what draws the line between pre-emptive self-defence and preventive self-defence.22 Scholars have largely discredited the concept of ‘preventive’ self-defence as a legitimate ground for jus ad bellum. A careful analysis of state practice and opinio juris (the combination of which gives rise to customary rules) to determine whether customary international law permits states to engage in ‘preventive self-defence’ concludes that ‘support for self-defence against non-imminent threats is virtually non-existent’.23

Notably, the international community itself rejected preventive self-defence at the institutional level in 2004,24 cautiously accepting the legal ground of ‘pre-emptive’ self-defence provided that the requirement of the Caroline standard (that is, the use of military force in response to the threat of an imminent armed attack) is met.25
A new international norm?

What made the rejection of preventive self-defence possible in 2004 was the strong response it met from states in the wake of the US invasion of Iraq in 2003. From Ruys’ work on customary law:

‘[…] many States, such as Germany, Japan, Switzerland, Uganda, Singapore or Liechtenstein, which professed support for anticipatory self-defence after 2002, nonetheless placed great weight on the imminence requirement. Germany, for instance, expressly denounced an erosion of the Charter framework and State practice via the notion of “preventive self-defence”. Likewise, the French politique de defense unequivocally “rejects . . . the notion of preventive self-defence”.26

Even ‘traditional adherents of the counter-restrictionist interpretation of Article 51’ (and closest Allies of the US) such as Israel, Australia and the UK upheld the imminence requirement.27

At this stage, two observations are important to make: first, there appears to be consensus that preventive self-defence has never been accepted unequivocally as a non-violation of *jus ad bellum*. In light of this, it appears that – at least as far as the Khorasan part of its justification is concerned – the US is in violation of international law. The US has indeed provided proof of the Khorasan’s imminent ‘threat’ to the US,28 but failed to prove the imminence of the attack itself.29

Secondly, the question then arises of how broadly is pre-emptive self-defence accepted as a legal ground for the use of force? To answer this question, it is useful to look at state practice and opinio juris in response to the issue, both leading to the 2004 High-Level Panel on Threats, Challenges and Security, and in reaction to Power’s letter to the UN Secretary-General.

Ruys reports that ‘numerous UN Members opposed the acceptance of pre-emptive self-defence’, namely Turkey, Algeria, Argentina, Bangladesh, Belarus, China, Costa Rica, Cuba, Egypt, India, Indonesia, Iran, Malaysia, Mexico, Pakistan, Syria and Vietnam.

He concludes that:

‘[…] because of the resistance of a considerable number of UN Members to the acceptance of pre-emptive self-defence, the relevant recommendations of the High-Level Panel were not included in the Outcome Document of the 2005 World Summit of the UN General Assembly. No trace of Article 51 can be found in the resolution. Instead, paragraph 79 simply reaffirms “that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security.”’290

His analysis leads to the conclusion that, if on the one hand support for pre-emptive self-defence ‘fairly rare and muted prior to 2001, has become more widespread and explicit in recent years’, on the other hand it seems premature to claim that there exists ‘widespread acceptance’ of its legality.31

In other words:

‘[…] taking account of the Charter “baseline” and the absence of a concrete precedent in State practice which convincingly demonstrates the international community’s support for some form of anticipatory self-defence, it is impossible to identify de lege lata a general right of pre-emptive – and a fortiori preventive – self-defence.’

At this stage, the question then becomes: what has been the reaction of the international community to the letter of the US Ambassador to the UN announcing an airpower campaign in Syria, and how does this reaction change customary rules concerning preventive and pre-emptive self-defence? There are two ways of looking at this question: (1) how many states have supported (directly or indirectly) the legal justification provided by the US to go at war with Daesh? In this sense, it is fair to assume that participation in the US-led coalition is an indication of ‘embracing’ its legal justification, when not expressively rejecting it and providing a different justification; or (2) how many states have openly denounced the justification provided by the US to go at war with Daesh? In this sense, it is fair to assume that participation in the US-led coalition is an indication of ‘embracing’ its legal justification, when not expressively rejecting it and providing a different justification; or (2) how many states have openly denounced the justification provided by the US to go at war with Daesh? A preliminary – and superficial assessment – seems to lean towards a shortage of reactions against it, although the answer to this question truly requires an in-depth analysis of countries’ reaction, and a sophisticated analysis of countries ‘discourse’ in reacting to the US Ambassador’s letter. Discourse analysis would, in fact, not only mark the difference between those who ‘openly reject’ and ‘accept’ the overall justification, but also shed light on other important differences, among those who ‘openly accept’ and ‘openly don’t reject’ it, and among those who accept or reject
more or less openly either preventive or pre-emptive self-defence. Such analysis is needed to crystallise the correct interpretation of self-defence – both preventive and pre-emptive – as applying to attacks from state and non-state actors alike; and the status of the ‘unwilling or unable’ standard for authorising the legal use of force against non-state actors in the territory of third parties.

Conclusions

The Obama administration has tried its best to keep the US out of the Syrian civil war. Confronted with the ‘threat’ posed by the spread of Daesh and its violent ideology, and provoked by the ‘direct attack’ against US nationals held hostage and executed brutally provoked by the ‘direct attack’ against US territory of third parties.

Out of very legitimate humanitarian concerns, for example, the US could have attempted to circumvent recalcitrant veto powers bringing the matter before the General Assembly. The conscious decision to limit force against specific targets, and to do so in self-defence, was taken. Strategically riskier options existed, that would have been legally less controversial: the US could have requested a vote on a UNSC Resolution authorising limited use of force against Daesh, for example.

Its invocation of self-defence to justify the use of force against non-state actors in the territory of another state is important for two reasons. First, it did so appealing not only to pre-emptive self-defence, consensus of whose legality is still unsettled; it also appealed preventive self-defence, around which there appear to be no consensus over its acceptability (therefore violating the prohibition on the use of force as far as its attacks against the Khorasan group is concerned), and on the ‘unwilling or unable’ standard, which is highly disputed as well. Secondly, it is important because the world’s reaction to this exceptional legal justification is important to understand the evolution of the norm on the prohibition against the use of force in customary international law. While a preliminary analysis of the world’s reaction does not seem to support a rejection of the legality of these grounds in jus ad bellum, an in-depth and sophisticated analysis of the world’s reaction and its discourse is needed to make the case for a crystallisation of the status of preventive and pre-emptive self-defence, as well as the legitimacy of the ‘unwilling or unable’ test to justify the use of force against non-state actors inside the territory of another state that has not expressed consent.

Notes

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2 Da’ish al-Islamīyah fī al-Jīl waš-Shīm, led to the Arabic acronym Da’ish or Daesh. The reasons for the author to adopt Daesh instead of the more common ISIS/ISIL acronym are, in order: (1) the author believes in the legitimising power of words; (2) in the words of the French Foreign Minister Laurent Fabius: ‘This is a terrorist group, and not a State’; (3) Arabic-speaking media organisations refer to the group as such: www.independent.co.uk/news/world/middle-east/isiss-islamic-state-vs-isil-vs-daesh-what-do-the-different-names-mean-9750629.html.
3 The UN’s Al-Qaida Sanctions Committee first listed ISIL in its Sanctions List under the name ‘Al-Qaeda in Iraq’ on 18 October 2004, as an entity/group associated with Al-Qaeda. On 2 June 2014, the group was added to its listing under the name ‘Islamic State in Iraq and the Levant’, available at www.un.org/sc/committees/1267/AQList.htm, last accessed 1 February 2015.
4 ‘Willful killing; Torture or inhuman treatment; Willfully causing great suffering, or serious injury to body or health; Extensive destruction and appropriation of property; Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; Unlawful deportation or transfer or unlawful confinement; Taking of hostages’. See Art 8 of the Rome Statute Establishing the International Criminal Court, available at www.icc-cpi.int/icc/cour/docs/PIDS/publications/RomeStatutEng.pdf, last accessed 1 February 2015.
5 ‘Enslavement; Forcible transfer of population; Rape, sexual slavery, enforced prostitution, forced pregnancy; Persecution against an identifiable group on religious grounds in connection with any crime within the jurisdiction of the Court; Other inhumane acts.’ See, ibid, Art 7.
8 Letter dated 25 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN


11 NATO utilised such a doctrine in its 1999 Kosovo intervention.


18 Nicaragua v United States [195–195]; DRC case [131–135], [146] and [147]; and Palestinian Wall Case Advisor Opinion of the International Court of Justice [159].

19 Ibid, Nicaragua [176]; and Legality of the Threat or Use of Nuclear Weapons Advisory Opinion of the ICJ (1996) [41–48].


26 See n 23, Ruys (2010).

27 Ibid.

28 Although this was already the case back in 2007, according to Congressional Records, V 153, PT 10, 22 May 2007 to 5 June 2007.


30 See n 23, Ruys (2010).

31 Ibid.