

# The ‘Unwilling or Unable’ Test: Has it Been, and Could it be, Accepted?

OLIVIER CORTEN\*

---

## Abstract

On 23 September 2014, the United States of America sent a letter to the Security Council justifying the launch of an air campaign against the Islamic State of Iraq and the Levant (ISIL) on Syrian territory. In this letter, the US referred to a formula that appeared a few years ago in certain scholarly writings: the ‘unwilling or unable’ test. The aim of this article is to show that this test has not been accepted by the international community of states as a whole in the Syrian case. It is also to stress that such an acceptance would lead to a radical transformation of the *jus contra bellum* regime, one that a large majority of states is probably not ready to accept.

## Key words

armed attack; *jus contra bellum*; self defence; UN Charter; unwilling or unable

## I. INTRODUCTION: THE US ‘UNWILLING AND UNABLE’ TEST IN THE SYRIAN CASE

On 23 September 2014, the United States of America sent a letter to the Security Council justifying the launch of an air campaign against the Islamic State of Iraq and the Levant (ISIL) on the Syrian territory. According to this letter:

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 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.* The Syrian regime has shown that it cannot and will not confront these safe havens effectively itself. Accordingly, the United States has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq, including by protecting Iraqi citizens from further attacks and by enabling Iraqi forces to regain control of Iraq’s borders. In addition, the United States has initiated military actions in Syria against al-Qaida elements in Syria known as the Khorasan Group to address terrorist threats that they pose to the United States and our partners and allies.<sup>1</sup>

---

\* Professor at the Université libre de Bruxelles, Centre de droit international. Author of *The Law against War* [2010]/*Le droit contre la guerre* [2014] [ocorten@ulb.ac.be]. I would like to express my gratitude to Vaios Koutroulis in the finalization of this text.

1 Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc. S/2014/695, 23 September 2014 (emphasis added).

For years, the Syrian governmental forces have been engaged in a fight against various rebel groups, including ISIL. Indeed, the Syrian authorities are combating this terrorist group, not only by using a wide range of military means, but also by calling other states to support them in the fight against terrorism.<sup>2</sup> Those undisputed facts are attested by various sources, including the Reports regularly made by the Secretary General.<sup>3</sup> Thus Syria cannot be accused of complicity *vis-à-vis* ISIL (like the Taliban regime *vis-à-vis* al-Qaeda until 2001, Lebanon *vis-à-vis* Hezbollah, or Palestine *vis-à-vis* Hamas).<sup>4</sup> It cannot be accused of supporting a terrorist group, or even of remaining passive or tolerant in relation to ISIL armed activities. However, the government failed to eradicate ISIL, which continues to control a substantial part of Syrian territory.<sup>5</sup> It is this failure that, according to the US legal reasoning, would trigger a right to self-defence in favour of Iraq (which is the victim of ISIL military actions) but also of the United States (as well as other states) which suffer a dangerous threat against their national interests. In other words, it is in the name of a sort of Syrian 'objective inability' (i.e., a lack of result 'on the ground') that the US were allegedly allowed to launch strikes in this state's territory without requiring the consent of its government (or, for that matter, asking the Security Council to take any particular measure to address the situation).

In their aforementioned letter to the Security Council, the US refers to a formula that appeared a few years ago in certain scholarly writings: the 'unwilling or unable' test.<sup>6</sup> It should be noted from the outset that the 'unwilling or unable' formula does not appear as such in any legal instrument, including recent ones, nor was it

- 
- 2 For example, see Security Council Meeting on the Situation Concerning Iraq, UN Doc. S/PV.7271, 19 September 2014, at 43; Security Council Meeting on Threats to International Peace and Security caused by Terrorist Acts, UN Doc. S/PV.7316, 19 November 2014, at 33; *Identical letters dated 26 February 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. A/69/804-S/2015/152, 3 March 2015; *Identical letters dated 25 May 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. A/69/912-S/2015/371, 1 June 2015.
  - 3 Report of the Secretary-General on the Implementation of Security Council Resolutions 2139 (2014) and 2165 (2014), UN Doc. S/2014/696, 24 September 2014, at 6; Report of the Secretary-General on the Implementation of Security Council Resolutions 2139 (2014), 2165 (2014) and 2191 (2014), UN Doc. S/2015/206, 23 March 2015, at 13; Report of the Secretary-General on the Implementation of Security Council resolutions 2139 (2014), 2165 (2014) and 2191 (2014), UN Doc. S/2015/264, 17 April 2015, at 4; Report of the Secretary-General on the Implementation of Security Council Resolutions 2139 (2014), 2165 (2014) and 2191 (2014), UN Doc. S/2015/368, 22 May 2015, at 4; Report of the Secretary-General on the Implementation of Security Council Resolutions 2139 (2014), 2165 (2014) and 2191 (2014), UN Doc. S/2015/561, 23 July 2015, at 4.
  - 4 See however the French denunciation of a 'tactical partnership' or 'tactical alliance' between the Assad regime and ISIL, without any further explanation (or proof); *Letter dated 2 June 2015 from the Permanent Representative of France to the United Nations addressed to the President of the Security Council*, UN Doc. S/2015/404; Security Council Meeting on the Maintenance of International Peace and Security, UN Doc. S/PV.7527, 30 September 2015, at 22–3. See some ambiguous statements by the US and UK, *ibid*.
  - 5 See for example Keessings World News Archives (2015).
  - 6 See for example The Chatham House, 'Principles of International Law on the Use of Force by States in Self-Defence', (2006) 55 ICLQ 963, point 6; or, more recently, N. Schrijver and L. van den Herik, 'Leiden Policy Recommendations on Counter-terrorism and International Law', (2010) 57 NYIL 531. Even if the 'unwilling or unable' formula was, as far as I know, not used as such previously, the theory according to which it would be allowed to target a State harbouring a terrorist group dates back to the 1980's. It was used by Israel to justify actions abroad against the PLO, and also by the US, notably with the 'Shultz doctrine', with little support by other states in both cases; see T. Ruys, 'Armed Attack' and Article 51 of the UN Charter (2010), 421–8.

employed in relevant existing case-law, particularly by the ICJ.<sup>7</sup> However, according to some scholars, this argument is supposed to codify a practice in which some states crossed the boundaries of other states that were accused of being unable to prevent terrorist groups from using their territories as 'safe havens' for launching attacks against the intervening states.<sup>8</sup> The reference work with respect to the 'unwilling or unable' test is probably the extensive study published in 2012 by Ashley Deeks, whose aim, as reflected in the title of the study, is to establish a new normative framework for extraterritorial self-defence.<sup>9</sup> The starting point of Deeks' analysis is that the 'unwilling or unable' test suffers from a 'lack of content' that undermines its legitimacy. It is for this reason that she tries to 'develop normative factors that define what it means for a territorial state to be "unwilling or unable" to suppress attacks by a non-state actor'.<sup>10</sup> Among the various factors developed by Deeks, the very first one is the 'prioritization of consent and cooperation'.<sup>11</sup> According to this factor, which understandably appears as the first element to be taken into consideration, 'where a victim state obtains a territorial state's consent to use force within the latter's borders, the victim state need not conduct an "unwilling or unable" inquiry'.<sup>12</sup> In other words,

the victim state's preference in each case should be to obtain the consent of the territorial state [...] the victim state should, as a rule, explore whether there is an opportunity to work cooperatively with the territorial state to suppress the threat.<sup>13</sup>

Ashley Deeks later remarks that 'the requirement to prioritize consent or cooperation, seeks to reduce the overall number of cases in which the victim state uses force unilaterally in the territorial state'.<sup>14</sup> This element is simply ignored by the US in the Syrian case. As a matter of fact, for political reasons (due to the strong opposition between Damas and Washington), consent was never requested, if it was ever envisaged in the first place. It is thus clear that the US interpretation of the 'unwilling or unable' standard is far broader than that which is suggested by its advocates; even measured against the criteria set out by scholars who support this test, the US interpretation is overly extensive.

The aim of the present article is to assess the acceptance and acceptability of the 'unwilling or unable' test as it has been invoked by the US. As far as acceptance is concerned, we need to determine whether the Syrian case can be considered as a precedent supporting the 'unwilling or unable' standard in this particular sense. This article argues that this is not the case. In the following two sections, it will be established that this US version of the test has not been accepted by the 'international

7 Cf. Sections 4 and 5, *infra*; P. Starski, 'Right of Self-defense, Attribution and the Non-State Actor – Birth of the "Unable or Unwilling" Standard?' (2015) 75 *ZaöRv* 455.

8 Of course, as it is essentially linked to necessity, the 'unwilling or unable' test could be viewed as a contemporary expression of the 'Webster' formula. A. Deeks, "'Unwilling or unable': Toward a Normative Framework for Extraterritorial Self-Defense', (2002) 52 *VJIL* 483, at 502.

9 *Ibid.*, at 482–550.

10 *Ibid.*, at 488.

11 *Ibid.*, at 519.

12 *Ibid.*

13 *Ibid.*, at 520.

14 *Ibid.*, at 533.

community of States as a whole' (to use the words of Article 53 VCLT), firstly because even the intervening states themselves did not share a common and clear *opinio juris* on this issue (Section 2), and, secondly and more importantly, because the other states did not accept the test either (Section 3). Turning to acceptability, the relevant question is whether the 'unwilling or unable' standard could be generally accepted in a near future. We will cast some doubts on this possibility, mainly because it would lead to a radical transformation of the *jus contra bellum* regime, one that a large majority of states is probably not ready to accept. This transformation would concern the definition of both the rule prohibiting the use of force as such (Section 4) and the right to self-defence as an exception to this rule (Section 5). Ultimately, the acceptance of the US version of the 'unwilling or unable' standard will imply a return to unilateralism and the departure from the collective system of international security enshrined in the UN Charter (Section 6).

## 2. THE ABSENCE OF A COMMON *OPINIO JURIS* SHARED BY THE INTERVENING STATES THEMSELVES WITH RESPECT TO THE 'UNWILLING OR UNABLE' TEST

So far, 15 states participate in the US-led coalition bombing the Syrian territory: USA, UK, Canada, Australia, France, The Netherlands, Germany, Denmark, Saudi Arabia, Jordan, Qatar, Bahrain, United Arab Emirates, Morocco, and Turkey. Among those states, it seems that only four have explicitly invoked the 'unwilling and unable' test in the letters sent to – or in the debates that took place within – the UN: the USA,<sup>15</sup> Canada,<sup>16</sup> Australia<sup>17</sup> and, in a different context, Turkey.<sup>18</sup> For its part, Germany invoked it implicitly, in contending that:

'the Government of the Syrian Arab Republic does not at this time exercise effective control. States that have been subjected to armed attack by ISIL originating in this part of Syrian territory, are therefore justified under Article 51 of the Charter of the United Nations to take necessary measures of self-defence ...'<sup>19</sup>

But other participants of the coalition did not refer to any 'unwilling or unable' test. For this sole reason, the existence of a common *opinio juris* in favour of this standard appears rather doubtful. More specifically, four remarks can be made in support of this assertion.

<sup>15</sup> Letter dated 23 September 2014, *supra* note 1.

<sup>16</sup> Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/221, 31 March 2015.

<sup>17</sup> Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/693, 9 September 2015.

<sup>18</sup> Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/563, 24 July 2015; see also Letter dated 14 June 2015 from the Permanent Representative of Turkey to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/434, 15 June 2015.

<sup>19</sup> Letter dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/946, 10 December 2015.

First, there is a strong difference with regard to the general scope of self-defence invoked by the four states previously mentioned.<sup>20</sup> Indeed, the US and later Canada and Turkey invoked an *individual* right of anticipatory self-defence, whereas other participants to the coalition like Australia, limited their arguments to a *collective* self-defence aimed at protecting the Iraqi State against the ISIL activities emanating from Syrian territory. Besides, the US, Canada and Australia (with respect to Iraq) mentioned an undefined 'threat' (or 'direct threat' in the later case), so that it appears as an application of a broadly defined right of '*preventive*' self-defence. By contrast, Turkey invoked '*pre-emptive*' self-defence, allegedly aimed at riposting to a 'clear and imminent' threat.

Secondly, some elements cast doubts on the existence of a genuine legal conviction even with respect to states that have sent a letter to the Council referring explicitly to the 'unwilling or unable' test. Australia, for example, was initially clearly unconvinced by the legality of the strikes in Syria. In an interview given on 16 September 2014, Prime Minister Tony Abbot publicly said that:

President Obama has certainly indicated that US forces will strike ISIL inside Syria if needs be. That is not Australia's intention at this time. I don't rule it out but it is not our intention at this time because as you rightly say the legalities of operating inside Syria which is ungoverned space with a regime we don't actually recognise, *the legalities of operating inside Syria are quite different from the legalities of operating inside Iraq at the request and in support of the Iraqi government.*<sup>21</sup>

At that stage, Australia was reluctant to support the legality of strikes in Syria without the clear consent of this state's government. This position began to change in August 2015, when the Prime Minister asserted that: 'While there is a little difference between the legalities of air strikes on either side of the border, there's no difference in the morality.'<sup>22</sup> If we understand him correctly, it is thus for moral reasons that, progressively, Australia accepted participation in the coalition. From this moment, the Australian legal advisers began to endorse the 'unwilling and unable' test in order to justify the strikes in Syria,<sup>23</sup> a test that eventually appears in the letter sent by Australia to the Security Council on 9 September 2015.<sup>24</sup>

<sup>20</sup> See the different letters just cited.

<sup>21</sup> 'The Fight against ISIS – Official Position of States (January 2014–January 2016)', available at [iusadbellum.files.wordpress.com/2011/07/isistatespositions.pdf](https://iusadbellum.files.wordpress.com/2011/07/isistatespositions.pdf) (emphasis added); see also 'Islamic State: Government to Decide in Coming Days on Joining Iraq Strikes', 26 September 2014, available at [www.abc.net.au/news/2014-09-26/government-to-decide-in-coming-days-on-joining-iraq-strikes/5770874](http://www.abc.net.au/news/2014-09-26/government-to-decide-in-coming-days-on-joining-iraq-strikes/5770874).

<sup>22</sup> 'Islamic State: Tony Abbot hints Australia will join the US in carrying out air strikes in Syria', 20 August 2015, available at [www.abc.net.au/news/2015-08-21/islamic-state-tony-abbot-hints-air-strikes-syria/6713720](http://www.abc.net.au/news/2015-08-21/islamic-state-tony-abbot-hints-air-strikes-syria/6713720).

<sup>23</sup> 'Is it Legal for Australia to Bomb Syria? Five facts you need to know', 9 September 2015, available at [www.theguardian.com/australia-news/2015/sep/09/is-it-legal-for-australia-to-bomb-syria-five-facts-you-need-to-know](http://www.theguardian.com/australia-news/2015/sep/09/is-it-legal-for-australia-to-bomb-syria-five-facts-you-need-to-know); 'US Laid out Legal Basis for Syria acts against Islamic State, Government says', 23 August 2015, available at [www.abc.net.au/news/2015-08-23/more-signs-government-will-send-war-planes-to-syria/6718460](http://www.abc.net.au/news/2015-08-23/more-signs-government-will-send-war-planes-to-syria/6718460); 'Australia's military involvement in Syria is a war of self-defence, not a plan to topple the Assad regime', 10 September 2015, available at [www.businessinsider.com.au/australias-military-involvement-in-syria-is-a-war-of-self-defence-not-a-plan-to-topple-the-assad-regime-2015-9](http://www.businessinsider.com.au/australias-military-involvement-in-syria-is-a-war-of-self-defence-not-a-plan-to-topple-the-assad-regime-2015-9).

<sup>24</sup> Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/693, 9 September 2015; see also Security Council Meeting on the Maintenance of International Peace and Security, *supra* note 4, at 69.

The same shift can be observed in the Canadian case. On 6 October 2014, in a debate in the House of Commons, the Canadian Minister of Foreign Affairs explicitly stated that there was no legal basis for intervening in Syria, thus clearly rejecting the arguments raised in the letter the US had sent to the Security Council a few days before:

[T]he democratically elected government of Iraq has asked the world for assistance and has asked Canada to participate. This initiative has obviously been before the United Nations Security Council, where the Prime Minister showed great leadership by speaking, as I did at a previous Security Council meeting, in the last two weeks. It obviously has the blessing of both the UN Security Council and the government of Iraq. *We do not have any legal authorization in Syria.* As despicable as the political leadership is in Syria, and with respect to the motion before Parliament, *we obviously do not have any legal basis at this stage for that effort.*<sup>25</sup>

Despite the clarity of this statement and the absence of any new ‘legal authorization’ in Syria, in March 2015, Canada sent a letter to the Security Council endorsing the US position.<sup>26</sup> Considering the evolution of the public position of the Australian and Canadian authorities, the least we can say is that legal conviction is seriously open to question: their late acceptance of the US position simply appears to be the result of moral and more probably political considerations, and ‘not by any sense of any moral duty’.<sup>27</sup>

Thirdly, a significant factor must be stressed: a substantial number of participants in the coalition *never* referred to the ‘unwilling or unable’ test inside the UN. The UK position is one example in this respect: in September 2014, Iraqi consent was the only legal basis invoked;<sup>28</sup> in November, a letter was sent to the Security Council referring to collective self-defence according to Article 51<sup>29</sup>; in September 2015, a second letter was sent referring this time to individual self-defence<sup>30</sup>; in December, a third letter was sent, referring to ‘individual and collective self-defence’ in relation to SC Res 2249 (2015).<sup>31</sup> None of those documents mentions the inability or unwillingness of the Syrian government as a factor triggering the applicability of Article 51 of the Charter. In the same way, after having chosen to abstain from entering Syrian territory for months, France suddenly invoked self-defence in September 2015, but

25 Government orders – Military Contribution against ISIL, House of Commons Debates, 41<sup>st</sup> Legislature, Second session, 123, Parliament of Canada, 6 October 2014, available at [www.parl.gc.ca/HousePublications/Publication.aspx?Mode=1&Parl=41&Ses=2&DocId=6717243&Language=E](http://www.parl.gc.ca/HousePublications/Publication.aspx?Mode=1&Parl=41&Ses=2&DocId=6717243&Language=E), at 1225 (emphasis added).

26 Letter dated 31 March 2015, *supra* note 16.

27 *North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. Netherlands)*, Judgment of 20 February 1969, [1969] ICJ Rep. 2, at 44, para. 77.

28 ‘Summary of the government legal position on military action in Iraq against ISIL’, 25 September 2014, available at <https://www.gov.uk/government/publications/military-action-in-iraq-against-isil-government-legal-position/summary-of-the-government-legal-position-on-military-action-in-iraq-against-isil>.

29 *Identical letters dated 25 November 2014 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. S/2014/851, 26 November 2014.

30 *Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council*, UN Doc. S/2015/688, 8 September 2015.

31 *Letter dated 3 December 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council*, UN Doc. S/2015/928, 3 December 2015.

without referring to any precise legal reasoning. It simply stated that: 'In accordance with Article 51 of the Charter of the United Nations, France has taken actions involving the participation of military aircraft in response to attacks carried out by ISIL from the territory of the Syrian Arab Republic.'<sup>32</sup> Similarly, when the Council of the EU activated the Mutual Defence clause in November 2015, no particular legal reasoning was developed.<sup>33</sup> Of course, it could be argued that those states implicitly or indirectly referred to the 'unwilling or unable' standard. At the same time, the UK and France (as well as the EU) rather seemed to invoke a right to self-defence against an attack (or even a threat) by a non-state actor, without requiring any additional condition in relation with the territorial state (in the present case, Syria).

Moreover, and more importantly, the Arab states, which form a significant part of the states participating in the coalition, refused to endorse the 'unwilling or unable' argument. Actually, despite all the debates that took place within the Security Council or the General Assembly, those states did not deem it appropriate to put forth any legal argument at all.<sup>34</sup> After beginning their military intervention on Syrian territory, those states did not send any report to the Security Council, as required by Article 51 of the UN Charter. As the ICJ observed in the *Military Activities Case*, that condition is more procedural than substantial.<sup>35</sup> However, the Court rightly added that 'for the purpose of enquiry into the customary law position, the absence of a report [to the SC] may be one of the factors indicating whether the state in question was itself convinced that it was acting in self-defence'.<sup>36</sup> It is true that the Arab states in question took a more general stance in relation to the Syrian civil war. In March 2013, they adopted the 'Doha Declaration' which affirms 'the right of each member state, in accordance with its wish, to provide all means of self-defence, including military support to back the steadfastness of the Syrian people and the free army'.<sup>37</sup> Despite the ambiguity of the terms, this declaration appears to accept the proposition that a right to self-defence could be invoked in the case of an armed

32 *Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. S/2015/745, 9 September 2015. No legal precision was brought in the following months; 'Déclaration du gouvernement sur l'engagement des forces aériennes - Intervention de Laurent Fabius au Sénat', 15 September 2015, available at [www.diplomatie.gouv.fr/fr/le-ministre-les-secretaires-d-etat/laurent-fabius/discours/article/declaration-du-gouvernement-sur-l-engagement-des-forces-aeriennes-intervention](http://www.diplomatie.gouv.fr/fr/le-ministre-les-secretaires-d-etat/laurent-fabius/discours/article/declaration-du-gouvernement-sur-l-engagement-des-forces-aeriennes-intervention); 'Déclaration officielle de François Hollande, Président de la République - 27 septembre 2015 - ONU', 27 September 2015, available at [www.franceonu.org/Syrie-D-autres-frappes-contre-Daech-auront-lieu-si-necessaire](http://www.franceonu.org/Syrie-D-autres-frappes-contre-Daech-auront-lieu-si-necessaire); see also Security Council Meeting on Threats to International Peace and Security caused by Terrorist Acts, UN Doc. S/PV. 7565, 20 November 2015, at 2.

33 It simply stated that: If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter; Council of the EU, Outcome of the Council Meeting, 3426<sup>th</sup> Council Meeting, Foreign Affairs, Brussels, 14120/15, 16-17 November 2015.

34 T. Ruys and N. Verlinden, 'Digest of State Practice (1 July-1 December 2014)', (2015) 2 JUFIL 119, at 143. See for example Security Council Meeting on the Maintenance of International Peace and Security, *supra* note 4.

35 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, at 105, para. 199.

36 *Ibid.*; see also *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment of 19 December 2005, [2005] ICJ Rep. 168, at 222, para. 145.

37 24th Arab Summit Issues Doha Declaration, 26 March 2013, available at [arableaguesummit2013.qatarconferences.org/news/news-details-17.html](http://arableaguesummit2013.qatarconferences.org/news/news-details-17.html) (emphasis added).

attack led by public authorities against their own people.<sup>38</sup> It goes without saying that this very broad proposition does not reflect positive international law.<sup>39</sup> This is probably why it has not been reported to the UN nor discussed within its main organs ... Be that as it may, what is important for our analysis is that the Arab states have not referred to, much less endorsed, the ‘unwilling or unable’ standard. We can even consider this standard has been condemned, if we take into account the consequences of the Turkish military operations in Iraq at the end of 2015. After having invoked explicitly the ‘unwilling or unable’ test in July 2015 in regard to Syria,<sup>40</sup> Turkey added in December that: ‘both Daesh and the PKK continue to pose significant threats to Turkey’s safety and security from areas *beyond the reach of the Iraqi Government, and it is our right to exercise self-defence*’.<sup>41</sup> In the following days, however, the League of Arab States adopted a resolution in which it decided:

1. To express its condemnation of the Turkish Government for its forces’ incursion into Iraqi territory, which is a violation of Iraqi sovereignty and a threat to Arab security;
2. To demand that the Turkish Government immediately and unconditionally withdraw its forces from Iraqi territory;
3. To support the Iraqi Government in any measures it may take in accordance with the relevant principles of international law to ensure that the Turkish Government withdraws its forces from Iraqi territory.<sup>42</sup>

Of course, it is difficult to determine precisely the legal reasons explaining this condemnation. But, with regard to those events, it can undoubtedly be affirmed that the ‘unwilling and unable’ test has not been supported by the majority of states participating in the coalition against ISIL.

A fourth and last observation can be made in this regard. To the extent collective self-defence was invoked, the US (and some of its allies) referred to the letters previously sent by Iraq to the UN. Those letters mentioned that ‘ISIL has repeatedly launched attacks against Iraqi territory from eastern Syria’<sup>43</sup> and asked the US to help to ‘end the constant threat to Iraq, protect Iraq’s citizens and, ultimately, arm Iraqi forces and enable them to regain control of Iraq’s borders’.<sup>44</sup> But it is worth

38 See *Letter dated 12 May 2015 from the Permanent Representative of Qatar to the United Nations addressed to the President of the Security Council*, UN Doc. S/2015/332, 14 May 2015.

39 O. Corten, *The Law Against War* (2010), at 126ff.; O. Corten, ‘La rébellion et le droit international. Le principe de neutralité en tension’, (2014) 374 *Hague Academy Collected Courses* 53, at 129 ff.

40 *Letter dated 24 July 2015 from the Chargé d’affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council*, UN Doc. S/2015/563, 24 July 2015.

41 Security Council Meeting on the Situation Concerning Iraq, UN Doc. S/PV.7589, 18 December 2015, at 5 (emphasis added).

42 Resolution No. 7987 adopted at the Ministerial Meeting of the Council of the League of Arab States, ‘Unified Arab Position on the Violation by Turkish Forces of the Sovereignty of Iraq’, 24 December 2015, annexed to *Letter dated 7 January 2016 from the Permanent Representative of Egypt to the United Nations addressed to the President of the Security Council*, UN Doc. S/2016/16, 11 January 2016 (emphasis added).

43 *Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General*, UN Doc. S/2014/440, 25 June 2014.

44 *Annex to the Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council*, UN Doc. S/2014/691, 22 September 2014.



noting that Iraq did not expressly denounce any 'armed attack', nor did it invoke self-defence according to Article 51 of the UN Charter. In fact, this provision was not explicitly mentioned in the Iraqi letters. Legally speaking, the only relevant element mentioned was the 'express consent' of the Iraqi government. Admittedly, some of the terms quoted above are not devoid of ambiguity. The fact nonetheless remains that Iraq did not make an 'express request' to the US for 'help in the exercise of collective self-defence', as required by the ICJ in the *Nicaragua* case.<sup>45</sup> Beyond the consequences this may have on the legality of the right to self-defence as such, it is clear that the Iraqi letters to the UN do not demonstrate the existence of an *opinio juris* in favour of the application of Article 51 on the part of the state that is supposed to be the main beneficiary of this application.

To summarize, in view of all these elements, it does not seem that the 'unwilling and unable' test succeeded in convincing the members of the coalition themselves. A confirmation of this lack of confidence can be found in a rather curious fact: even the states that sent a letter to the Security Council according to Article 51 and referred to the 'unwilling or unable' test did not invoke self-defence in the numerous debates that took place in the Security Council until 30 September 2015, more than a year after the launch of the first strikes in Syria. Even on that date, the US<sup>46</sup> and Australia<sup>47</sup> were the two only states to briefly mention self-defence, contrary to the UK, France and the Arab States.<sup>48</sup> Usually, when a state supports a legal position justifying a military intervention, it expresses it during the first meetings dedicated to the issue. In this case, however, the states participating in the US-led coalition chose to abstain from any reference to self-defence for more than a year. In the same vein, some US allies like Netherlands supported the self-defence argument on a national level, but did not evoke it within the UN.<sup>49</sup>

Whatever may be the reasons that may explain this behaviour, it is hardly compatible with the existence of a sincere and genuine *opinio juris* in favour of the 'unwilling or unable' standard. This element must also be taken into account in the assessment of the position of all the other states, to which we will now turn.

### 3. THE ABSENCE OF A GENERAL ACCEPTANCE OF THE 'UNWILLING AND UNABLE' TEST

In many precedents in relation to a particular use of force (like the military interventions against Yugoslavia in 1999, against Iraq in 2003 or against Libya in 2011), the arguments put forward by the intervening states were debated within the UN.<sup>50</sup>

45 *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 35, at 120, para. 232.

46 Security Council Meeting on the Maintenance of International Peace and Security, *supra* note 4, at 22. UN Doc. S/PV.7527, 30 September 2015, 22.

47 *Ibid.*, at 69.

48 *Ibid.*, at 9 (France), 23–4 (UK), 8 (Jordan), 37 (Turkey), 41–2 (Qatar), 52–3 (United Arab Emirates), 76 (Saudi Arabia).

49 Kamerbrief inzake Nader advies Extern Volkenrechtelijke Adviseur geweldgebruik tegen ISIS in Syrië, 26 June 2015, available at [www.rijksoverheid.nl/documenten/kamerstukken/2015/06/26/kamerbrief-inzake-nader-advies-extern-volkenrechtelijke-adviseur-geweldgebruik-tegen-isis-in-syrie](http://www.rijksoverheid.nl/documenten/kamerstukken/2015/06/26/kamerbrief-inzake-nader-advies-extern-volkenrechtelijke-adviseur-geweldgebruik-tegen-isis-in-syrie).

50 See for example Security Council Meeting on the *Letter dated 24 March 1999 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council*, UN Doc. S/PV.3988,

It was therefore easy to determine which (group of) states accepted or refused it. By contrast, in the case of Syria, it is more difficult to have some indications about the *opinio juris* of several states. An exhaustive reading of the letters sent to the Security Council from August 2014 to January 2016, of the *procès verbaux* of the relevant debates in the UN and of all the resolutions and statements adopted, completed by a selection of the positions expressed outside the organizations, can lead at least to a certain conclusion: it would be excessive to contend that the ‘unwilling and unable’ standard has been accepted by the international community of states as a whole.

From the outset, one must mention that, unsurprisingly, this argument was never accepted by the Syrian authorities themselves. It is true that Syria did not formally protest against the military intervention led by the US for over a year.<sup>51</sup> After the launch of the first strikes in September 2014, numerous letters were sent protesting against the support given by many Arab or Western states to the rebels,<sup>52</sup> or against economic sanctions,<sup>53</sup> or against some Israeli<sup>54</sup> and Turkish<sup>55</sup> incursions, but it was only on 17 September 2015 that Syria suddenly protested against the UK, Australia and France.<sup>56</sup> A few days later, it even affirmed that:

The United States, Britain, France, Canada and Australia have sought to justify their intervention in Syria by citing the fight against ISIL. They have invoked Article 51 of the Charter of the United Nations, but have not consulted with the Syrian

24 March 1999; Security Council Meeting on the Situation between Iraq and Kuwait, UN Doc. S/PV.4726 (Resumption 1), 26–27 March 2003; Security Council Meeting on the Situation in Libya, UN Doc. S/PV.6498, 17 March 2011.

- 51 K. Bannelier, ‘The Military Interventions Against the Islamic State in Syria, Iraq and Libya: *Jus ad Bellum* Issues’, Università degli Studi di Napoli Federico II, 26 October 2015.
- 52 See *Identical letters dated 26 September 2014 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. A/69/411–S/2014/705, 1 October 2014, at 2; *Identical letters dated 29 June 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. S/2015/487, 2 July 2015; *Identical letters dated 28 December 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. S/2015/1044, 31 December 2015.
- 53 *Identical letters dated 28 October 2014 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. S/2014/769, 7 November 2014, at 6; *Identical letters dated 8 June 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. A/69/930–S/2015/414, 11 June 2015.
- 54 *Identical letters dated 8 December 2014 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. A/69/646–S/2014/874, 8 December 2014; *Identical letters dated 9 February 2015 from the Chargé d’affaires a.i. of the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. S/2015/98, 9 February 2015; *Identical letters dated 25 February 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. A/69/799–S/2015/143, 27 February 2015.
- 55 *Identical letters dated 3 October 2014 from the Chargé d’affaires a.i. of the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. A/69/426–S/2014/719, 8 October 2014; *Identical letters dated 18 May 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. A/69/905–S/2015/346, 18 May 2015; *Identical letters dated 18 January 2016 from the Chargé d’affaires a.i. of the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. S/2016/45, 22 January 2016.
- 56 *Identical letters dated 17 September 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. S/2015/719, 21 September 2015.

Government. That course of action distorts the provisions of the Charter and manipulates international law.<sup>57</sup>

Syria also condemned the 'actions of the UK and France in Syrian air space' as 'contrary to the Charter of the United Nations and international law'.<sup>58</sup> In a subsequent letter, it stated that:

any attempt to invoke Article 51 of the Charter to justify military action on Syrian territory without coordination with the Syrian Government manipulates, distorts and misinterprets the provisions of that Article. The international community recognizes that the exercise of legitimate defence is subject to conditions that were put in place in order to uphold international law and the principles of sovereignty and non-interference, and to prevent the threat or use of force. Among the conditions required by Article 51 are that there should be an ongoing and effective act of aggression on the part of an armed force against a Member State, that the response should be temporary, and that it should respect the authority and responsibility of the Security Council. The military actions taken by Britain and other States in Syria do not meet those conditions. As a result, they belong outside the scope of international law, absent full cooperation and prior coordination with the Syrian State and its legitimate institutions as is the case with the Syrian and Russian Governments.<sup>59</sup>

It is thus clear that the Syrian authorities never accepted any argument based on self-defence.<sup>60</sup>

On the other hand, the absence of formal condemnation of the US-led strikes against ISIS from September 2014 to September 2015, after the direct military Russian implication in the conflict, is not without consequence. This can explain the silence of a large number of third states during all the debates that have taken place during

57 *Identical letters dated 21 September 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. A/70/385-S/2015/727, 22 September 2015.

58 Security Council Meeting on the Maintenance of International Peace and Security, *supra* note 4, at 30; see also *Identical letters dated 9 November 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. S/2015/851, 16 November 2015; *Identical letters dated 7 December 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. S/2015/933, 8 December 2015; *Identical letters dated 27 December 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. A/70/671, UN Doc. S/2015/1043, 30 December 2015; *Identical letters dated 22 December 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. A/70/654, UN Doc. S/2015/1014, 7 January 2016.

59 *Identical letters dated 29 December 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. A/70/673, UN Doc. S/2015/1048, 4 January 2016; see also *Identical letters dated 11 January 2016 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. S/2016/31, 12 January 2016.

60 Before the beginning of the military operations, Syrian authorities already stressed that '[a]ny action of any type without the approval of the Syrian government is aggression against Syria. ... There must be cooperation with Syria and coordination with Syria and there must be a Syrian approval of any action whether it is military or not'. See Ruys and Verlinden, *supra* note 34, at 135. In the following weeks and months, Syria also regularly stressed the necessity to cooperate in the fight against terrorism and to respect its sovereignty. Security Council Meeting on the situation concerning Iraq, *supra* note 2, at 43; Security Council Meeting on Threats to International Peace and Security caused by Terrorist Acts, *supra* note 2, at 33; Security Council Meeting on the Situation in the Middle East, UN Doc. S/PV.7433, 24 April 2015, at 29; Security Council Meeting on the Situation in the Middle East, UN Doc. S/PV.7476, 29 June 2015, at 4.

that period.<sup>61</sup> Against this background, in the absence of invocation of the argument by the intervening states during the meetings of the Security Council and of any firm and general protest by the targeted state for more than a year, it is rather logical that third states did not take any precise legal stand. This silence can obviously not be interpreted as an acceptance of any legal position at all.

However, interestingly, some states did consider it necessary to formulate some criticism against any unilateral action that infringed Syrian sovereignty. Several elements can be mentioned in this regard.

First, some states simply denounced the illegality of any unilateral action against Syria. Russia warned that ‘strikes of the US armed forces against ISIL positions in Syria without the consent of the legitimate government [...] would be an act of aggression, a gross violation of international law’<sup>62</sup> and, later, repeated that:

[t]here is doubt over the legitimacy of the strikes as such actions can only be carried out with the approval of the United Nations and the unequivocal permission of the authorities of the country where they are taking place, which in this case is the government in Damascus.<sup>63</sup>

Venezuela ‘reiterate[d] [its] commitment to the sovereignty, territorial integrity and political independence of the Syrian Arab Republic, in line with international law, including the Charter of the United Nations’.<sup>64</sup> Ecuador denounced the illegality of the intervention,<sup>65</sup> whereas Iran affirmed that the US led action did not have ‘any legal standing’<sup>66</sup> and Cuba rejected ‘any attempt to undermine the sovereignty,

61 In September 2014, German higher authorities, for example, mentioned the absence of protest by the Syrian government, ‘Germany, Britain say won’t take part in anti-IS air strikes in Syria’, available at [www.reuters.com/article/2014/09/11/iraq-crisis-germany-britain-idUSB4NoQV0o920140911](http://www.reuters.com/article/2014/09/11/iraq-crisis-germany-britain-idUSB4NoQV0o920140911); as did incidentally the UN Secretary General Ban Ki-moon, 23 September 2014, available at [www.un.org/apps/news/infocus/sgspeeches/statments\\_full.asp?statID=2356#VgwD-m26Qs](http://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=2356#VgwD-m26Qs).

62 ‘Russia Says Air Strikes in Syria Would Be Act of Aggression without UN Vote’, Reuters, 11 September 2014, quoted in Ruys and Verlinden, *supra* note 34, at 135.

63 ‘Russia Condemns U.S. Strikes on Islamic State Without Syria’s Approval’, *The Moscow Times*, 25 September 2014, available at [www.themoscowtimes.com/news/article/russia-condemns-u-s-strikes-on-islamic-state-without-syria-s-approval/507784.html](http://www.themoscowtimes.com/news/article/russia-condemns-u-s-strikes-on-islamic-state-without-syria-s-approval/507784.html); ‘Arab backing for U.S.-led airstrikes in Syria widens front against Islamic State’, *The Washington Post*, 23 September 2014, available at [www.washingtonpost.com/world/arab-backing-to-us-led-airstrikes-in-syria-widens-front-against-islamic-state/2014/09/23/85664a44-430c-11e4-b437-1a7368204804\\_story.html](http://www.washingtonpost.com/world/arab-backing-to-us-led-airstrikes-in-syria-widens-front-against-islamic-state/2014/09/23/85664a44-430c-11e4-b437-1a7368204804_story.html). See also Security Council Meeting on the Maintenance of International Peace and Security, *supra* note 4, at 4.

64 Security Council Meeting on the Situation in the Middle East, UN Doc. S/PV.7504, 17 August 2015, at 4; see also Security Council Meeting on the Situation in the Middle East, UN Doc. S/PV.7419, 27 March 2015, at 24; Security Council Meeting on the Situation in the Middle East, UN Doc. S/PV.7501, 7 August 2015, at 6; Security Council Meeting on the Maintenance of International Peace and Security, *supra* note 4, at 16; ‘Venezuela’s Nicolas Maduro Calls Re-Founding of UN; Slams US-Led Air Strikes in Iraq and Syria’, *International Business Times*, 25 September 2014, available at [www.ibtimes.com/venezuelas-nicolas-maduro-calls-re-founding-un-slams-us-led-airstrikes-iraq-syria-1694699](http://www.ibtimes.com/venezuelas-nicolas-maduro-calls-re-founding-un-slams-us-led-airstrikes-iraq-syria-1694699).

65 [www.cancilleria.gob.ec/ecuador-rechaza-ofensiva-estadounidense-en-territorio-sirio/](http://www.cancilleria.gob.ec/ecuador-rechaza-ofensiva-estadounidense-en-territorio-sirio/).

66 Loveday Moris, ‘Arab backing for U.S.-led airstrikes in Syria widens front against Islamic State’, *The Washington Post*, 23 September 2014, available at [www.washingtonpost.com/world/arab-backing-to-us-led-airstrikes-in-syria-widens-front-against-islamic-state/2014/09/23/85664a44-430c-11e4-b437-1a7368204804\\_story.html](http://www.washingtonpost.com/world/arab-backing-to-us-led-airstrikes-in-syria-widens-front-against-islamic-state/2014/09/23/85664a44-430c-11e4-b437-1a7368204804_story.html); Heather Saul, ‘Syria air strikes: Iran “says US attacks on Isis are illegal”’, *The Independent*, 23 September 2014, available at [www.independent.co.uk/news/world/middle-east/syria-air-strikes-iran-says-us-attacks-on-isis-are-illegal-9751245.html](http://www.independent.co.uk/news/world/middle-east/syria-air-strikes-iran-says-us-attacks-on-isis-are-illegal-9751245.html).

independence, and territorial integrity of Syria'.<sup>67</sup> Argentina also criticized the US offensive.<sup>68</sup>

Second, others more generally condemned any infringement of the sovereignty of a state, even in the context of the fight against ISIL. China stated that it was 'imperative to consistently comply with the purposes and principles of the Charter of the United Nations as well as the basic norms governing international relations, while maintaining the sovereignty, independence, unity and territorial integrity of Syria'.<sup>69</sup> Chad recalled the 'importance of preserving the sovereignty and territorial integrity of States and the need to ensure that any recourse to force is solidly rooted in the principles and purposes of the Charter of the United Nations'.<sup>70</sup> Brazil affirmed its 'commitment to a multidimensional response to the challenges posed by terrorism and remain convinced that cooperation and dialogue within the United Nations will enhance our capacity to counter this dangerous matter'.<sup>71</sup> Algeria promoted 'sincere negotiated political solution among the Syrians themselves in respect for the sovereignty . . . instead of the indiscriminate, disproportionate and counterproductive use of force'.<sup>72</sup> ASEAN states called 'the international community to *work together in unity* in the fight against terrorism'.<sup>73</sup> States like Belarus,<sup>74</sup> South Africa<sup>75</sup> and India<sup>76</sup> took similar stances. Other states condemned 'foreign interference in the affairs of States [and] policies addressed to regime change translated into military interventions'<sup>77</sup>, or 'external foreign military interventions, which lead only to the destruction of statehood'.<sup>78</sup>

Thirdly, and more importantly, the text of all the relevant resolutions and statements adopted by the Security Council or even the General Assembly must be taken into account. None of those numerous texts dedicated to the Syrian crisis mention Article 51 of the UN Charter, the right to self-defence, or *a fortiori* any 'unwilling or unable' argument. On the contrary, most of them seem to be incompatible with any unilateral action. For example, on 24 September 2014, when the first strikes in Syrian territory began, the Council:

67 'Cuba Advocates Political Solution to Crisis in Syria', Ahora, available at [www.ahora.cu/en/sections/world/1931-cuba-advocates-political-solution-to-crisis-in-syria](http://www.ahora.cu/en/sections/world/1931-cuba-advocates-political-solution-to-crisis-in-syria).

68 Starski, *supra* note 7, at 34 (citing *Buenos Aires Herald*).

69 Security Council Meeting on the Situation in the Middle East, *supra* note 60, at 19; Security Council Meeting on Threats to International Peace and Security caused by Terrorist Acts, UN Doc. S/PV.7272, 24 September 2014, at 17; see also Security Council Meeting on the Maintenance of International Peace and Security, *supra* note 4, at 6; and 'Russia Says Air Strikes in Syria Would Be Act of Aggression without UN Vote', *Reuters*, 11 September 2014, quoted in Ruys and Verlinden, *supra* note 34, at 136.

70 Security Council Meeting on Threats to International Peace and Security caused by Terrorist Acts, *supra* note 69, at 7.

71 Security Council Meeting on Threats to International Peace and Security caused by Terrorist Acts, *supra* note 2, at 37; see also Security Council Meeting on the Maintenance of International Peace and Security, *supra* note 4, at 48–9.

72 Security Council Meeting on the Maintenance of International Peace and Security, *supra* note 4, at 57.

73 ASEAN Foreign Ministers' Statement on the Rise of Violence and Brutality Committed by Terrorist/Extremist Organisations in Iraq and Syria, 'The Fight against ISIS – Official Position of States (January 2014–January 2016)', available at [iusadbellum.files.wordpress.com/2011/07/isistatespositions.pdf](http://iusadbellum.files.wordpress.com/2011/07/isistatespositions.pdf) (emphasis added).

74 Security Council Meeting on the Maintenance of International Peace and Security, *supra* note 4, at 65.

75 *Ibid.*, at 80.

76 *Ibid.*, at 77.

77 *Ibid.*, at 18 (Angola).

78 *Ibid.*, at 50 (Kazakhstan).

[...] Recognizing that international cooperation and any measures taken by Member States to prevent and combat terrorism must comply fully with the Charter of the United Nations,

Reaffirming its respect for the sovereignty, territorial integrity and political independence of all States in accordance with the Charter, [...]

18. *Calls upon Member States to cooperate and consistently support each other's efforts to counter violent extremism, which can be conducive to terrorism [...].*<sup>79</sup>

Similarly, in a Statement dated 19 November 2014, the Council reaffirmed 'its respect for the sovereignty, territorial integrity and political independence of all States in accordance with the United Nations Charter' and that 'Member States must ensure that any measures taken to counter terrorism comply with the UN Charter and all their other obligations under international law'.<sup>80</sup> On 18 December 2014, the General Assembly 'Reaffirm[ed] its strong commitment to the sovereignty, independence, unity and territorial integrity of the Syrian Arab Republic and to the principles of the Charter'.<sup>81</sup> The day after, the Security Council, recalled its 'respect for the sovereignty, territorial integrity and political independence of all States in accordance with the Charter', *appealed to the collaboration of all states* and international and regional organizations to 'impede, impair, isolate and incapacitate the terrorist threat'.<sup>82</sup> The Council again stressed the necessity to respect the sovereignty of Syria in subsequent statements, in April and August 2015.<sup>83</sup> The least we can say is that these positions do not appear to consecrate the possibility to launch unilateral military strikes on Syrian territory, which means that they cannot be interpreted as the expression of a general acceptance of any argument justifying unilateral military action. That conclusion was not challenged by the adoption, on 20 November 2015, of Resolution 2249 (2015), in which the Council:

Reaffirming the principles and purposes of the Charter of the United Nations,

Reaffirming its respect for the sovereignty, territorial integrity, independence and unity of all States in accordance with purposes and principles of the United Nations Charter,

Reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed, [...]

1. Unequivocally condemns in the strongest terms the horrifying terrorist attacks perpetrated by ISIL also known as Da'esh which took place on 26 June 2015 in Sousse, on 10 October 2015 in Ankara, on 31 October 2015 over Sinai, on 12 November 2015 in

79 UN Security Council, Security Council Resolution 2178 (2014) on Threats to International Peace and Security Caused by Terrorist Acts, (15-0-0), UN Doc. S/RES/2178 (2014), 24 September 2014 (emphasis added).

80 UN Security Council, Statement by the President of the Security Council on Threats to International Peace and Security Caused by Terrorist Acts, UN Doc. S/PRST/2014/23, 19 November 2014.

81 UN General Assembly, General Assembly Resolution 69/189 (2015) on the Situation of Human Rights in the Syrian Arab Republic (127-13-48), UN Doc. A/RES/69/189, 29 January 2015.

82 UN Security Council, Security Council Resolution 2195 (2014) on Threats to International Peace and Security, UN Doc. S/RES/2195 (2014), 19 December 2014 (emphasis added).

83 UN Security Council, Statement by the President of the Security Council on the Middle East, UN Doc. S/PRST/2015/10, 24 April 2015; UN Security Council, Statement by the President of the Security Council on the Middle East, UN Doc. S/PRST/2015/15, 17 August 2015.

Beirut and on 13 November 2015 in Paris, and all other attacks perpetrated by ISIL also known as Da'esh, including hostage-taking and killing, and notes it has the capability and intention to carry out further attacks and regards all such acts of terrorism as a threat to peace and security; [...]

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 [...]* and to eradicate the safe haven they have established over significant parts of Iraq and Syria [...].<sup>84</sup>

It is not the purpose of this article to determine the exact legal consequences of such a resolution, particularly concerning a possible 'authorization' to use force. However, as far as self-defence is concerned, what is significant is that this notion has *not* been mentioned or even evoked by the Security Council. This omission is significant, notably if we compare it to some previous resolutions sometimes invoked in support of a broad conception of self-defence, like SC Res 1368 (2001) that explicitly mentions self-defence in its preamble. The text of SC Res 1244 (2015), which was adopted unanimously, simply leaves the question of the validity of the legal arguments that could be used by States to take the 'necessary measures' called for open. In those circumstances, to deduce a general agreement consecrating the 'unwilling or unable' standard from such a resolution would be misleading.

To sum up, in view of the positions taken by numerous states, and of the texts adopted by the competent UN bodies, the 'unwilling or unable' argument seems to induce a certain reluctance.<sup>85</sup> But, of course, those conclusions are provisional. Nothing would preclude the international community of states as a whole to gradually tolerate or even accept this kind of argument. This, however, would imply a radical change in the existing *jus contra bellum*. More specifically, the acceptance of the 'unwilling or unable' test (especially as interpreted by the US) would lead to a lowering of the thresholds contained in Articles 2.4 and 51 of the UN Charter.

#### 4. LOWERING THE ARTICLE 2.4 THRESHOLD?

Article 2.4 of the UN Charter prohibits the use or the threat to use force in international relations, without defining the scope of the prohibition. Several texts were adopted that provide an authentic interpretation of this provision. According to the Declaration of Friendly relations annexed to GA Resolution 2625 (XXV) adopted in 1970:

Every State has the duty to refrain from organizing, *instigating*, *assisting* or participating in acts of civil strife or terrorist acts in another State or *acquiescing* in organized activities within its territory directed towards the commission of such acts, [...];

<sup>84</sup> See also UN Security Council, Security Council Resolution 2254 (2015) on the Middle East (Syria), UN Doc. S/RES/2254 (2015), 18 December 2015 (emphasis added).

<sup>85</sup> Starski, *supra* note 7, at 35–6.

[...] no State shall organize, assist, foment, finance, incite or *tolerate* subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State [...].<sup>86</sup>

As the underlined expressions reveal, a wide range of behaviours can be considered as a violation of Article 2.4 of the Charter. Firstly, beyond a direct participation in a subversive act led by an irregular group, mere assistance ('assisting') is prohibited.<sup>87</sup> That notion can be broadly conceived as covering supply of arms or any other military or logistical support. Secondly, 'instigating' (an act envisaged before the launching of an attack) or 'acquiescing' (this time after the launching),<sup>88</sup> i.e., mere declarations without any material act, can also be considered as violations of the prohibition to use force. Thirdly, even tolerance ('tolerate') – a purely passive behaviour – could be such a violation. In other words, doing nothing could, under particular circumstances, be sufficient to establish a violation of Article 2.4 of the UN Charter.<sup>89</sup>

At first sight, this rather broad definition of a 'use of force' could be apprehended as an illustration of the 'unwilling or unable' standard. All those particular (active, material or verbal, or even passive) behaviours appear as expressions of a (at least indirect) cooperation between a given state and an irregular group that operates from its territory. However, as mentioned above,<sup>90</sup> the US version of this standard goes even further as it is based on a purely 'objective' responsibility: Syria was not criticized for having instigated or acquiesced to, ISIL activities, nor for tolerating them, but simply for having not *succeeded* in defeating this terrorist group. Article 2.4 would thus not only entail an obligation of conduct, that is an obligation to take any reasonable measure against an irregular group, but an obligation of result, i.e., an obligation to put effectively an end to the activities of this group. To accept this lowering of the threshold of the prohibition to use force would obviously lead to a serious change in the current state of international law. A quick look at the *Armed Activities* Case confirms this conclusion. In its first counter-claim, Uganda contended that 'it has been the victim of military operations and other destabilizing activities carried out by hostile armed groups based in the DRC (which between 1971 and 1997 was called Zaire) and *either supported or tolerated* by successive Congolese governments'.<sup>91</sup> Uganda in sum invoked a 'duty of vigilance' deduced among others

86 This resolution was considered as expressing customary international law (emphasis added); *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 35, at 98–101, para. 187–90; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136, at 171, para. 87; *Armed Activities on the Territory of the Congo*, *supra* note 36, at 226, para. 162; see also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226, at 264, para. 102. A similar phrasing appears in UN General Assembly, General Assembly Resolution 42/22 (1987) on Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, UN Doc. A/RES/44/22, 18 November 1987, at point 6: 'States shall fulfil their obligations under international law to refrain from organizing, *instigating*, or *assisting* or participating in paramilitary, terrorist or subversive acts, including acts of mercenaries, in other States, or *acquiescing* in organized activities within their territory directed towards the commission of such acts' (emphasis added).

87 *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 35, at 101, para. 191.

88 *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Judgment of 24 May 1980, [1980] ICJ Rep. 3, at 35, para. 74.

89 Starski, *supra* note 7, at 19–20.

90 *Supra*, Section 1.

91 *Armed Activities on the Territory of the Congo*, *supra* note 36, at 262, para. 276 (emphasis added).



elements from the *Corfu Channel* Case.<sup>92</sup> Neither the DRC nor the Court contested the existence of such a duty. However, after having cited the Friendly Declaration Resolution quoted above, the Court observed that:

During the period under consideration both anti-Ugandan and anti-Zairean rebel groups operated in this area. *Neither Zaire nor Uganda were in a position to put an end to their activities. However, in the light of the evidence before it, the Court cannot conclude that the absence of action by Zaire's Government against the rebel groups in the border area is tantamount to "tolerating" or "acquiescing" in their activities.* Thus, the part of Uganda's first counter-claim alleging Congolese responsibility for tolerating the rebel groups prior to May 1997 cannot be upheld.<sup>93</sup>

Taking into account a subsequent period, the Court later stated that:

The DRC *was thus acting against the rebels, not in support of them.* It appears, however, that, due to the difficulty and remoteness of the terrain discussed in relation to the first period, *neither State was capable of putting an end to all the rebel activities despite their efforts in this period.* Therefore, Uganda's counter-claim with respect to this second period also must fail.<sup>94</sup>

In other words, the Court expressly stated that the inability to put an end to irregular activities is *not* equivalent to a violation of Article 2.4, particularly when the state concerned was 'acting against the rebels, not in support of them'.<sup>95</sup> Quite the opposite, it appears that an inability *a priori* seems to show that there has been no violation at all. If we transpose these legal considerations to the ISIL case, the fact that neither Syria, nor Iraq, nor the US and its allies, nor later Russia, succeeded so far in defeating this terrorist group (even if they are all 'acting against the rebels, not in support of them') rather confirms the *absence* of any violation of the prohibition on the use of force.

Finally, in view of the relevant texts and case-law, the 'unwilling or unable' test as put forward by the US in the letter sent to the SC appears an innovative argument whose acceptance would lead to a radical change in the current state of international law. Beyond this 'US version', it can also be said that this argument more generally departs from the existing legal requirements. As the methodology followed by the ICJ reveals, the question is not to determine if a state is 'able' or capable to defeat the rebels, but rather if it sincerely *tries to do so*, considering the means at its disposal in the particular circumstances. This duty of vigilance – or *due diligence* – is not an obligation of result, but of an obligation of conduct.<sup>96</sup> If a given state uses all reasonable means to preclude an irregular group to operate from its territory, including by launching strikes against it and requiring foreign states to help – militarily among other means – to conclude to a violation of the prohibition to use force would undoubtedly lead to a serious lowering of the threshold of Article 2.4. To invoke self-defence in this case would, *a fortiori*, imply lowering another (and higher) threshold, that of Article 51 of the UN Charter.

92 *Corfu Channel (United Kingdom v. Albania)*, Judgment of 9 April 1949, [1949] ICJ Rep. 4, at 22.

93 *Armed Activities on the Territory of the Congo*, *supra* note 36, at 268, para. 301 (emphasis added).

94 *Ibid.*, at 269, para. 303 (emphasis added).

95 See Starski, *supra* note 7, at 27.

96 T. Koivurova, 'Due Diligence', (2012) III EPIL, 238, para. 8.

## 5. LOWERING THE ARTICLE 51 THRESHOLD?

Article 51 of the UN Charter recognizes a right to self-defence ‘if an armed attack occurs’. The definition of an ‘armed attack’ – or *agresion armée* in the French version – gave rise to various debates, that led to the definition annexed to GA resolution 3314 (XXIX), generally considered as reflecting customary international law.<sup>97</sup> Reading this definition, whose content was reaffirmed in 2010 at the ICC Kampala Conference,<sup>98</sup> the distinction between a ‘mere’ use of force and a genuine ‘armed attack’ triggering the right to self-defence must be taken into consideration. This distinction has been affirmed by the ICJ in this famous dictum:

[W]hile the concept of an armed attack includes the despatch by one State of armed bands into the territory of another State, the supply of arms and other support to such bands cannot be equated with armed attack. Nevertheless, such activities may well constitute a breach of the principle of the non-use of force and an intervention in the internal affairs of a State, that is, a form of conduct which is certainly wrongful, but is of lesser gravity than an armed attack.<sup>99</sup>

The Court thus distinguished ‘the most grave forms of the use of force (those constituting an armed attack) from other less grave forms’, among which is cited the principle that ‘[e]very State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts’.<sup>100</sup> This does not mean that no participation in terrorist acts could ever be considered as an armed attack. According to Article 3(g) of the definition of aggression, this could be the case if a state either ‘sent’ an irregular group to the territory of another state, or was ‘substantially involved’ in a particular use of force perpetrated by this group.<sup>101</sup> This criterion was systematically applied by the ICJ – and by states appearing before it – when it was confronted to a ‘triangular relation’ between a territorial state, an irregular group operating from this state, and a victim state targeted by this group.<sup>102</sup> This means that Article 51 requires a higher threshold than Article 2.4: even a state tolerating or acquiescing to the activities of an armed group, or even assisting it, cannot be targeted in the name of the right to self-defence. This ‘gap’ between a mere use of force and an ‘armed attack’ has been denounced by certain scholars or judges.<sup>103</sup> Still, it undoubtedly reflects the current

97 *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 35, at 103, para. 195; *Armed Activities on the Territory of the Congo*, *supra* note 36, at 222–3, para. 46; see also, *Oil Platforms (Iran v. United States)*, Counter-Memorial and Counter-Claim Submitted by the United States, 23 June 1997, at 131, para. 4.12, and fn 293.

98 1998 Rome Statute of the International Criminal Court, 2187 UNTS 3, Art. 8 *bis*; Assembly of State Parties, Resolution RC/Res.6, The Crime of Aggression, 11 July 2010, available at [asp.icc-cpi.int/iccdocs/asp\\_docs/RC2010/RC-Res.6-ENG.pdf](http://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-Res.6-ENG.pdf).

99 *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 35, at 126–7, para. 247.

100 *Ibid.*, at 101, para. 191.

101 Annexed to UN General Assembly, General Assembly Resolution 3314 (XXIX) on the Definition of Aggression, 14 December 1974; O. Corten, *The Law Against War*, *supra* note 39, at 445 ff.

102 *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 35, at 101, paras. 191, 118 ff., 227 ff., 126–7, 195; *Armed Activities on the Territory of the Congo*, *supra* note 36, at 222–3, para. 146.

103 See notably Separate Opinion of Judge Simma, *Oil Platforms (Iran v. United States)*, Judgment of 6 November 2003, [2003] ICJ Rep. 161, at 331 ff, paras 12 ff.

state of international law as deduced from existing texts and case-law.<sup>104</sup> And, it goes without saying that, if the 'unwilling or unable' standard was to be accepted, this gap would simply disappear. The consequence would be that a mere assistance, tolerance, acquiescence, or even – as mentioned above – objective inability to prevent an irregular group to operate from its territory, would be equivalent not only to a violation of Article 2.4 but also to an 'armed attack' according to Article 51.

It is probably in order to avoid these legal consequences that some supporters of the 'unwilling or unable' test propose another interpretation of self-defence according to Article 51 of the Charter.<sup>105</sup> They argue that a distinction should be made between, on the one hand, the condition for the existence of an armed attack and, on the other hand, the 'necessity' criterion. The former should only be considered in the relations between the victim state and the terrorist group, whereas the latter would concern the relations between the victim state and the territorial State. Transposing this method to our particular case, ISIL would have perpetrated an 'armed attack' against Iraq (and also against France or even, to the extent that the 'preventive' or 'pre-emptive' self-defence theory is applied, against other – undetermined – states), and the US and its allies would consequently be, in the name of 'necessity', entitled to riposte by bombing Syrian territory.

Such a legal reasoning sounds rather innovative, as can be illustrated by three elements.

First, it is based on the assumption that Article 51 can be applied to non-state actors, an assumption that has never been recognized in the relevant texts<sup>106</sup> and case-law,<sup>107</sup> even recently. More importantly, this argument simply misses the point: as there is no *prohibition* to use force against a non-state actor (Article 2.4. only prohibiting a use of force 'in international relations', i.e., between states), the invocation of an *exception* to this prohibition (i.e., self-defence) seems simply irrelevant. In other words, *jus contra bellum* does *not* preclude a State using force against a non-state actor, particularly when this group has been held responsible for terrorist activities.<sup>108</sup> But, of course, the situation becomes different if a use of force is directed not (only) against a non-state actor but also against a state that would in some way be implicated in the initial armed attack. Every time state A crosses the boundary of a state B, bombs its territory or uses any weapon against it, an 'aggression', according to the definition

104 O. Corten, 'Judge Simma's Separate Opinion in the *Oil Platforms* case: To What Extent are Armed 'Proportionate Defensive Measures' Admissible in Contemporary International law?' in U. Fastenrath et al. (eds.), *From Bilateralism to Community Interest. Essays in Honour of Bruno Simma* (2011), 843–61.

105 D. Bethlehem, 'Principles Relevant to the Scope of a State's Right to Self-Defense Against an Imminent or Actual Armed Attack by Non-State Actor', (2012) 106:000 AJIL 1, at 6–7; Deeks, *supra* note 8, at 494–5; K.N. Trapp, 'Can Non-State Actors Mount an Armed Attack?' in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015), 694–5.

106 See Annex to UN General Assembly Resolution 3314 (XXIX), *supra* note 101, Art. 1, referring to the use of force by one state against another state. This inter-state criterion was reaffirmed in 2010 when the crime of aggression was defined at the Kampala Conference. The definition refers to Resolution 3314 (XXIX) and expressly requires that the author of the crime of aggression must be a state organ, excluding the prosecution against individuals leading a non-state group.

107 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 86, at 194, para. 139; see Starski, *supra* note 7, at 7–8.

108 Corten, *The Law Against War*, *supra* note 39, at 127 ff.

annexed to GA Resolution 3314 (XXIX), can be presumed.<sup>109</sup> In this case, Article 51, as Article 2.4, are applicable in ‘international relations’, that is to say between states. And Article 3(g) of the definition of the aggression becomes applicable . . . an Article that is clearly incompatible with any ‘unwilling or unable’ test. We are thus back to square one.

Second, the assertion that ‘necessity’ would allow using force against a state that would not be itself responsible of an armed attack (or for that matter of any violation of Article 2.4) is not supported by any contemporary text or case-law. At least since 1945, necessity is conceived not as a self-sufficient argument opening a right to use force, but as an additional condition,<sup>110</sup> and this condition is conceived not as broadening, but as *restraining*, the right to self-defence.<sup>111</sup> This has been recognized by the ILC, the ICJ, and by a large number of scholars. Roberto Ago, as a Special Rapporteur, has interpreted the necessity condition as follows: the state concerned ‘must not, in the particular circumstances, *have had any means of halting the attack other than recourse to armed force*’.<sup>112</sup> In the *Military and Paramilitary Activities* case, the ICJ pointed out that whether a measure is necessary or not is not ‘purely a question for the subjective judgement of the party’.<sup>113</sup> In the *Oil Platforms* case<sup>114</sup>, the Court added that ‘the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any “measure of discretion”’.<sup>115</sup> Even if we cite the Webster formula, often used as an authority in favour of a broad conception of self-defence,<sup>116</sup> it is difficult to understand how the ‘necessity’ criterion could be interpreted to support the ‘unwilling or unable’ test as invoked by the US in the Syrian case. According to this formula, to be admissible, ‘the necessity of that self-defence [must be] instant, *overwhelming and leaving no choice of means*, and no moment for deliberation’.<sup>117</sup> Those requirements could hardly be reconciled with the current US conception of self-defence: how would it be possible to seriously contend that the US had no choice but to launch a military bombing campaign in Syria without even *asking* for the consent of the authorities?

Third, and finally, the idea of splitting the conditions of self-defence (the ‘armed attack’ condition being evaluated *vis-à-vis* the irregular group, the necessity condition *vis-à-vis* the territorial State) is obviously in opposition with the letter and spirit of Article 51 of the UN Charter. When this Article requires the occurrence

109 See for example, UN General Assembly Resolution 3314 (XXIX), *supra* note 101, Art. 3(b); Starski, *supra* note 7, at 8–9.

110 O. Corten, ‘Necessity’, in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015), 868–74.

111 Corten, *The Law Against War*, *supra* note 39, at 470 ff.

112 ILC Documents of the 32<sup>nd</sup> Session (excluding the Report of the Commission to the General Assembly, 1980 YILC, Vol. II, (Part One), at 69, para. 120–1 (emphasis added); see also ILC Summary Records of the Meetings of the 32<sup>nd</sup> Session, 1980, YILC, Vol. I, 1619<sup>th</sup> Session, 25 June 1980, at 183, para. 24.

113 *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 35, at 141, para. 282.

114 *Oil Platforms*, Counter-Memorial and Counter-Claim Submitted by the United States, *supra* note 97 at 24, para. 43.

115 *Ibid.*, at 196, para. 73.

116 Bethlehem, *supra* note 105, at 2–3.

117 J. Moore, *Digest of International Law* (1906), at 412.

of an armed attack to riposte against an actor, it goes without saying that it is *this particular actor* that is supposed to be the author of the attack.<sup>118</sup> The drafters of this Article have never envisaged a situation in which a state A, victim of an armed attack by a non-state actor (or even a state) B, could invoke self-defence to riposte against a state C. And, as far as I know, no state has ever used such a reasoning during the numerous debates that took place within or outside the UN about the scope of self-defence: unsurprisingly, this notion has always been understood in a context of a bilateral relation between two subjects, one being the aggressor, the other the aggressed.<sup>119</sup> Ultimately, this is basically a question of (legal) logic.

To sum up, accepting the 'unwilling and unable' standard, especially as broadly interpreted by the US in the Syrian crisis, would lead to a radical change in the interpretation of both the rule prohibiting the use of force and the self-defence as its main exception. That can explain why the international community of states as a whole has not accepted this standard so far. This is quite understandable, since such a scenario would eventually mean the end of the collective security system enshrined in the UN Charter.

## 6. CONCLUSION: CHALLENGING THE UN COLLECTIVE SECURITY SYSTEM?

If we follow the conception of international law as reflected in the letter sent by the US to the Security Council in September 2014, every state would be allowed to launch a military campaign on another state's territory, under the sole pretext of the 'inability' of this state to put an end to the activities of a terrorist group. The main element founding the 'necessity' to riposte would be the existence of an ongoing armed attack against a given state (Iraq, in the case at hand), but also of a threat, whether imminent or not, against an undetermined number of other states. The UK, and later France, considered that targeted strikes could therefore be allowed to put an end to the preparation of criminal activities that could take place on their respective soils.<sup>120</sup> For each of these strikes, it would be for every state to determine if the situation is serious enough to trigger a right to use force on the territory of another state, without ever being obliged either to ask the government of this state for its consent, or for the Security Council to assess the situation and take appropriate measures.

Whatever one might think about the opportunity to establish such a new legal order, it goes without saying that its acceptance by the international community of states would lead to a radical change, if not to the end, of the UN system.<sup>121</sup> According to Article 39 of the Charter, it is the Security Council that is competent to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression' and to 'make recommendations, or decide what measures shall be

<sup>118</sup> Starski, *supra* note 7, at 30.

<sup>119</sup> Corten, *The Law Against War*, *supra* note 39, at 138 ff., 151 ff., 164 ff.

<sup>120</sup> See Letter dated 7 September 2015, *supra* note 30; Letter dated 3 December 2015, *supra* note 31; Identical letters dated 8 September 2015, *supra* note 32.

<sup>121</sup> Starski, *supra* note 7, at 44–6.

taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'. By conferring to every state the power to implement unilaterally its own conception of the necessities of the war against terror, the 'unwilling and unable' standard bypasses, if not simply ignores, this core provision and, in so doing, the entire collective security system established by the Charter. That movement appears less as a progress able to adapt international law to the new configurations of international relations than as a new version of the 'self-preservation', 'self-help' or 'vital interests' theories that characterized the nineteenth century.<sup>122</sup>

Of course, no one can predict what the future of international law will be and, who knows which future legal instruments could be adopted in the name of the fight against terrorism. Some commentators recently suggested that the 'unwilling or unable' test would be 'increasingly accepted in practice and supporting statements of governments and international organizations'.<sup>123</sup> Any change would nevertheless require the acceptance of the 'international community of States as a whole', the non-use of force having been recognized as a peremptory norm on various occasions.<sup>124</sup> So far, what we can observe is rather a clear reluctance of a significant number of states to accept any 'unwilling or unable' standard, not only in the Syrian case, but more generally.<sup>125</sup> In 2005, attempts were made by the US and others to interpret broadly the scope of self-defence, notably by recognizing its application in the case of an imminent threat.<sup>126</sup> The suggestion was supported by the Secretary General in its Report,<sup>127</sup> but was strongly criticized by numerous states,<sup>128</sup> and the relevant excerpt

122 See I. Brownlie, *International Law and the Use of Force by States* (1968), 41; R. Kolb, *Ius contra bellum. Le droit international relatif au maintien de la paix* (2009), 33; J. d'Aspremont, 'The Collective Security System and the Enforcement of International Law', in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015), 138–42.

123 E. Wilmshurst and M. Wood, 'Self-Defense Against Non-state Actors: Reflections on the "Bethlehem Principles"', (2013) 107 AJIL 390, at 393; see also L. Noir, 'Action Against Host States of Terrorist Groups', in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015), at 731.

124 The prohibition on the threat or use of force (and non only of an 'aggression') has been recognized as peremptory by a large majority of States during both the preparatory works of the Vienna Convention on the Law of Treaties and the debates having led to the adoption of General Assembly Resolution 1625 (XXV). Many other statements can be found in practice in the same sense; see Corten, *The Law Against War*, *supra* note 39, at 201–10.

125 See Corten, *The Law Against War*, *supra* note 39, at 739–53; Starski, *supra* note 7, at 32–4.

126 The National Security Strategy of the United States of America, September 2002, at 15, available at [www.state.gov/documents/organization/63562.pdf](http://www.state.gov/documents/organization/63562.pdf); High-Level Panel Report, 'A More Secure World: Our Shared Responsibility', Report of the Secretary General's High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565 (2004), at paras. 188–9.

127 UN General Assembly, 'In larger Freedom: Towards Development, Security and Human Rights for All', Report of the Secretary General, UN Doc. A/59/2005, 24 March 2005, at 33, para. 124.

128 See Corten, *The Law Against War*, *supra* note 39, at 430–5; see Comments of the Non-Aligned Movement (NAM) on the Observations and Recommendations contained in the Report of the High-Level Panel on Threats, Challenges and Change (UN Doc. A/59/565 and UN Doc. A/59/565CORR.1), New York, 28 February 2005, paras. 23–4; NAM, Informal Thematic Consultations of the General Assembly on the Report of the Secretary General (UN Doc. A/59/2005), Cluster II: Freedom from Fear, 21 April 2005, paras. 15–16, Statement by H.E. Ambassador Rastam Mohd Isa, Permanent Representative of Malaysia to the United Nations, in his capacity as Chairman of the Coordinating Bureau of the Non-Aligned Movement, on behalf of the NAM; Permanent Mission of Malaysia to the United Nations; Special Meeting of the Ministers of Foreign Affairs of the NAM, Declaration, NAM/2005/SFMM/05, 13 June 2005, paras. 16–17; NAM, Informal Meeting of the Plenary of the GA Concerning the Draft Outcome Document of the High-Level Plenary Meeting of the GA (delivered by by H.E. Ambassador Radzi Rahman, *Chargé d'affaires* A.I. of the Permanent Mission of Malaysia to the UN), 21 June 2005, statement by Chairman of the Coordinating Bureau of the NAM on behalf of the

was consequently deleted from the 2005 World Summit Declaration annexed to GA Resolution 60/1.<sup>129</sup> By contrast, in this text, UN Members:

[...] reaffirm[ed] that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security [and] further reaffirm[ed] the authority of the Security Council to mandate coercive action to maintain and restore international peace and security.<sup>130</sup>

This position was strongly supported by the Non-aligned Movement, which stated that:

[...] the UN Charter contains sufficient provisions regarding the use of force to maintain and preserve international peace and security ... In addition, and *consistent with the practice of the UN and international law, as pronounced by the ICJ, Article 51 of the UN Charter is restrictive and should not be re-written or re-interpreted.*<sup>131</sup>

Undoubtedly, as the 'unwilling and unable' test is at least equivalent to a re-interpretation of Article 51 of the Charter, it is not surprising that it has not been accepted by a large majority of UN members. In view of all the troubling implications of the new doctrine that emerged in the Syrian case, this is perhaps not such bad news for those who still believe in modern international law.

---

NAM; NAM, '14<sup>th</sup> Summit Conference of Heads of State or Government of the NAM', 11–16 September 2006, 2006/Doc.1/Rev.3, para 20.2.

129 UN General Assembly, General Assembly Resolution 60/1 (2005) on the 2005 World Summit Outcome, UN Doc. A/RES/60/1, 24 October 2005, at paras. 77–9.

130 *Ibid.*, at para. 79.

131 NAM, '16<sup>th</sup> Summit of Heads of State or Government', Final Document, 31 August 2012, para. 28.2 (emphasis added).