‘TUTELARY’ INTERVENTION TO COUNTER
THE NEW UNLAWFUL TERRITORIAL SITUATIONS:
A TERTIUM GENUS OF MILITARY INTERVENTION IN INTERNATIONAL LAW?*

Giuliana Ziccardi Capaldo**


1. - Introduction.
The recent events in the Middle East where the Islamic State of Iraq and the Levant, now known as Islamic State of Iraq and the Levant (ISIL), established control over territories belonging to Syria and Iraq and the reactions of states raise questions on the “effectiveness” of international law when presented with the challenges of global terrorism and the new offensive forms of non-state actors. These events have marked “a dramatic evolution in the nature of the terrorist threat” according to the UN Secretary-General1 because those that the Security Council refers to as “entities such as the Islamic State of Iraq and the Levant (ISIL), the Al-Nusrah Front (ANF) and other cells, affiliates, splinter groups or derivatives of Al-Qaeda”2 is a significant new feature, which is not only to act as armed ideological movements but also to establish themselves as a “state”, subverting the Middle East’s territorial status quo.

The situation that has arisen in this region has similarities with those territorial situations qualified as “unlawful” by the United Nation from the end of the 60s. We analysed these in our 1977 book The Unlawful Territorial Situations in International Law,3 which began from the erga omnes obligations (a category of international obligations identified by the International Court of Justice (ICJ) in the Barcelona Traction case),4 established by peremptory norms of general international law for the protection of the fundamental interests of the international community as a whole, up to qualifying as unlawful territorial situations those created “by a serious breach by a state of an obligation arising under a peremptory norm of general international law” (within the meaning of Article 40 of the International Law Commission’s (ILC) report).5 Thus, given the similarities (“occupation” of territories by force, extended violation of human rights, the exercise of power with terrorist methods over oppressed peoples, gross and systematic failures ascertained by UN bodies), the situation in question should also be framed among those situations even where under UN Security Council resolutions 2170 and 2178 the illegality of the situation is not imputed to a state but to a non-state entity, with all the consequences that this implies.

** Full Professor of International Law, University of Salerno, Italy

1 S/PV.7272, 24/09/2014, at 3.
2 SC Res. 2178 (Sept. 24, 2014).

Università degli Studi di Salerno
This circumstance exacerbates the extant problems of the system of collective security, a system on which the ineffectiveness of the Security Council weighs, which reinforces the request of states for greater freedom in decisions to use force. A recurring request in concrete cases of armed intervention after the radical change introduced by the practice that freed states from requiring Security Council authorization for the use of sanctions not involving the use of force foreseen in Article 41 of the Charter. With the end of the idyll between the great powers of the past decade (1999–2010) and especially with the re-emergence of the conflict between the United States and Russia, states are pushing to overcome Security Council authorization to use force, as happened in various situations (among them the crises in Kosovo, Afghanistan, Iraq/Gulf War II) and also in the case in question. Certainly, we are in a phase of uncertainty where as a result of changes in international law introduced by globalization more precise rules are emerging on the enforcement system and the collective security measures adoptable in situations only seemingly identical from a legal and political point of view. Taking into account the recent developments relating to non-state actors, a deeper analysis of the coercive role that such measures can play presents itself “with an irresistible force” upon our attention (and that of internationalists) due to the fact that they belong to supporting structures, as we have argued in The Pillars of Global Law where the collective security system is considered one of the “pillars” of global law.

2. - The Legal Basis of the Intervention of the US Coalition in Territories under the Control of ISIL.

The beginning of the “unauthorized” air strikes by the United States and its partners (Saudi Arabia, Qatar, United Arab Emirates, Jordan, and Bahrain) in Syria on the night of 22 September 2014 raises the question of whether such attacks are legitimate and what constitutes the legal basis. The ineffectiveness of the UN system to manage the situation with the traditional forms of intervention soon became clear not only as a result of the conflict between the United States and Europe on one side and Russia on the other due to the Croatian question and the ambiguous relationship that ties Putin’s Russia to Assad’s Syria, as evidenced by the vote expressed at the United Nations by the Russian representatives, but also due to the opposition of Russia to the “internationalization” of the fight against terrorism as it could set a prejudicial precedent to President Putin’s line in the war on terrorism. Moscow ascribes the repression of Chechen terrorism and the Islamic “Caucasus Emirate” terrorism to domestic jurisdiction. The latter demanding the creation of an Islamic State in North Caucasus while the UN Security Council had already included it among groups closely linked to Al-Qaida. Together with these political developments, which are at the base of the issues leading to the Security Council’s ineffectiveness, the particularity of the territorial situation in the region in question has gained importance due to its gravity and fluidity that require rapid intervention and the use of immediate security measures capable of putting an end to serious violations of international human rights standards and international law principle (which we include in the concept of “tutelary guarantees” aimed at protecting the victims from the adversary effects of the attacks) rather than long-term actions subordinated to the strict procedures of Chapter VII of the Charter.

A military and security approach to the international spread of terrorism is not enough and requires a multifaceted UN strategy; tutelary actions obviously do not exclude the adoption of punitive sanctions for all perpetrators of these violent acts, be they state or non-state actors. The US president said verbatim, “We are not going to stabilize Syria under the rule of Assad” whose government committed “terrible atrocities” so that the sanctions against the Damascus government

8 See G. Ziccardi Capaldo, Terrorismo Internazionale e Garanzie Collettive, Milano, 1990, 71-102, especially at 75 et seq. See also supra note 6, at 47.
should not end; also in respect of armed individuals and groups operating in the areas under the control of ISIL, the Security Council has already adopted sanctions. Indeed, the Security Council’s significant and unitary effort was expressed in Resolutions 2170 and 2178, respectively of 15 August and 24 September 2014, both unanimously adopted under Chapter VII of the Charter. In the first, the Security Council condemned “in the strongest terms [...] continued gross, systematic and widespread abuses of human rights and violations of international humanitarian law”, perpetrated by ISIL and ANF to which the Al-Qaida sanctions regime was extended. In an annex to the text, it named the individuals subject to travel restrictions, asset freezes, and other measures targeted at Al-Qaida affiliates and further measures foreseen by the fundamental UN Resolution 2161 of 17 June 2014 and the historical resolutions underlying the UN counter-terrorism regime, set up and managed by the Security Council and subsidiary bodies. A system that operates with the participation of states and not without difficulties and critical objections due to doubts of legitimacy and ample doctrinal debates that we participated in to point out the need for ensuring adherence to the rules of due process and the legal procedure of the UN counter-terrorism regime. The Security Council’s anti-terrorism resolutions have been subject to widespread and growing criticism in the judgments of the European Court of Justice (ECJ) and the European Court for Human Rights (ECtHR) due to the lack of due process safeguards. It goes without saying that the tough stance of the two European courts, in addition to introducing a new and delicate practice in the relationship between international bodies, has certainly not benefited the proclaimed legitimacy and the intangibility of the UN sanctions system.

The second SC Resolution 2178 mentioned above faces the problem of strengthening and standardizing the legal strategy and policy to combat the flow of fighters going to Iraq and Syria, and to this end, the Security Council called on all states to cooperate urgently to ensure that their legal systems provide for the prevention and prosecution (as serious criminal offences) of the recruitment and travel of terrorist fighters to and from the areas of conflict as well as the financing or facilitation of such activities. No direct involvement of the Security Council in the territorial situation is foreshadowed in the acts and official statements of the UN bodies. Despite that in the above-mentioned resolutions the Security Council unanimously determined the “serious threat to peace” due to the disturbingly changed regional equilibrium, stating “[...] its gravest concern that territory in parts of Iraq and Syria is under the control of Islamic State in Iraq and the Levant (ISIL) and Al Nusrah Front (ANF) and about the negative impact of their presence, violent extremist ideology and actions on stability in Iraq, Syria and the region, including the devastating humanitarian impact on the civilian populations [...]”, there are no signals of the United Nations’ willingness to manage the situation under Chapter VII of the UN Charter and therefore within the framework of what the commentary on Article 41 of the ILC Draft Articles on Responsibility of States (2001) defines “organized [cooperation]”. Emerging instead from the substance of the UN acts and from the official statements of its agencies is the openness towards a solution to be found in the context of that which the same commentary calls “non-institutionalized cooperation”. This is clear even from the

11 See SC Res. 1267 (Oct. 15, 1999); SC Res. 1373 (Sept. 28, 2001).
16 Paragraph (2) of Article 41 states, “[...] Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-
ambiguous formula used in the two above-mentioned resolutions stating in the preamble the need to combat “by all means [...] threats to international peace and security caused by terrorist acts”, warning at the same time that any action must be conducted “in accordance with the Charter of the United Nations and international law, including applicable international human rights, refugee and humanitarian law” and stressing in this regard “the important role the United Nations plays in leading and coordinating this effort”. The framework proposed is a targeted action co-managed by states and the United Nations in which the role of the United Nations is one of guidance and coordination, which falls within the “integrated system of international law enforcement” as we analysed and defined it.

The Security Council has not claimed any active role in the territorial changes that have taken place in Syria and Iraq even in response to the requests to restore the territorial situation and counter the advance of the jihadists. No condemnation was expressed of the “unauthorized” US intervention in Syria that started on the eve of the adoption of Resolution 2178, even though the Security Council and the UN Secretary-General had been officially informed.

Indeed, precisely before the meeting in which the Security Council voted for Resolution 2178, the US Permanent Representative to the United Nations sent a letter on 23 September 2014 to the UN Secretary-General requesting him to circulate the letter to member states and admit it as a Security Council document. He stated that the Iraqi government had asked the United States “[to] lead international efforts to strike ISIL sites and military strongholds in Syria in order to end the continuing attacks on Iraq”. A military action considered by the United States as complying with Article 51 of the Charter, which confers the right to individual and collective self-defence “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 UN organs had already been informed of Iraq’s request to the United States in a letter dated 20 September 2014, signed by the Foreign Minister of Iraq and sent the same day to the President of the Security Council by the Permanent Representative of Iraq to the United Nations, wherein international law was assumed as the basis of the request (no reference was made to Article 51 of the Charter). Furthermore, the Permanent Representative of Iraq in an annex to the text of the aforementioned letter recalled that even earlier, in a letter dated 25 June 2014 addressed to the UN Secretary-General and the President of the Security Council, the Iraqi Foreign Minister had asked the international community “[to] restore stability to our country”.

3. - The US Position Based on Article 51 of the UN Charter: The Controversial “Unwilling” or “Unable” Criteria.

Most of the analysis on the air strikes of the United States and its partners in Syria find their legal basis in Article 51 of the UN Charter.

According to ICJ settled case-law, dating to the Nicaragua case, the use of force by a state in self-defence requires that a “large-scale” armed attack be imputable to a state. Thus, if the attack comes from armed groups, imputability to a state must be proven on the basis of the degree of control that


17 SC Res. 2161 (June 17, 2014). See also supra note 15.


19 S/2014/695.


21 S/2014/691, annex.

this state had over the military operations (“effective control” and “overall control” criteria)\textsuperscript{23}. The ICJ also followed the same approach in the Bosnia and Herzegovina v. Serbia and Montenegro and Congo v. Uganda cases\textsuperscript{24} based on Articles 1 and 3(g) of the resolution of the UN General Assembly on the Definition of Aggression (GA 3314 (XXIX) of 14 December 1974), also stating that these provisions have become customary international law.

It is clear that in the situation in question, Iraq is not claiming direct aggression by Syria (or another state) or substantial involvement in the jihadist attacks of the Damascus government. Moreover, even if charging the Syrian government with the responsibility of failing to put in place measures to prevent such attacks, this does not confer on Iraq or other states the right to use force under Article 51 of the Charter. These arguments contradict the broad interpretation of the aforementioned article that, also on other occasions, the United States and Israel have sought to support but which neither the majority of states nor the UN organs have accepted.

The failure of the “unwilling or unable criteria” to justify the legitimate use of self-defence against attacks carried out by non-state actors located in another state not able to deal with the attacks themselves was also clear in the Lebanese situation in 2006, which provided the opportunity to address the unresolved and more general question concerning the broad right to self-defence resulting from expanding the international social base to non-state actors through global law.\textsuperscript{25} On that occasion, Israel’s right was challenged to invoke Article 51 of the Charter to respond with the use of force to the attacks of Hezbollah operating in Lebanese territory against Israeli cities, attacks from which the Lebanese Government dissociated itself and to which it had not given its support.\textsuperscript{26}

The foregoing implies that the unwillingness or inability of a state to take reasonable steps to prevent the use of its territory as a base for attacks by non-state actors on other states is insufficient to create the right of self-defence against the territorial state, restricting self-defence to actions against armed attacks by non-state actors or terrorist organisations where effective involvement of the state in which they are located can be proven. Consequently, excluding that the legal basis of the US armed coalition resides in Article 51 of the Charter, it must be sought aliunde.

4. - A New Approach to Global Security: Tutelary Interventions to Protect Fundamental Rights while Countering Global Terrorism.

The signals coming from the UN official statements and acts lead us to qualify the military action of the United States and coalition partners in Syria as well as Iraq not as collective self-defence but as an intervention "in the common interest" deriving from non-institutionalized cooperation. This must be positioned within the framework of collective guarantees that in analyzing the practice relating to the blitz or raids of states operating uti universi for the suppression of terrorism that occurred in the 80s we called “tutelary” and distinguished from “punitive” measures in the construction of a unitary system of collective guarantees operating in accordance with international law.\textsuperscript{27} We described the dual function of collective guarantees—punitive and tutelary—within the integrated system of collective security. With the term “tutelary intervention” we refer to those integrated


\textsuperscript{27} See supra note 8.
actions conducted by states operating in the common interest (uti universi), including other governmental and non-governmental actors, to co-manage situations where there is a need for “immediate” security intervention to stop, prevent, or contain serious violations of fundamental rights and collective interests when the territorial state is unwilling or unable to safeguard these rights/interests. This enables the “managing” states (i.e., agents states)—in place of the territorial state primarily legitimized—to extraterritorially exercise exceptional coercive powers (including the use of force) on behalf of the global community for the sole purpose of protecting seriously violated fundamental rights and to restore legality.

The raids conducted by the coalition, although in the territory of Syria and Iraq but not directed “against” these states, had no punitive purpose and were aimed at removing the gross violations of objective international law in these regions. The military action of the United States and coalition states is a collective action that appertains to non-institutionalized forms of cooperation of global law, actions of “immediate security” of a “tutelary” character, exercised outside of Chapter VII of the Charter, but still subject to the coordination and the scrutiny of their legitimacy by the United Nations. In general, these actions rely on the participation of various social forces aimed at ending serious damage or prejudice against individuals or populations, regardless of the responsibility of the government or the authority that exercises power of control over these territories. Thus, our investigation into the legitimacy of the raids by the coalition forces shall not concern the issue of the international legal subjectivity of the Islamic State, namely, whether at the present time the control of ISIL over the territories of Syria and Iraq is sufficiently stable and from which the “effectiveness” of government power can be inferred, a prerequisite for the existence of a new state.

The first US air raid in Iraq on 8 August 2014 and subsequent air strikes of US-coalition in Syria had a “tutelary” character in the sense of action to protect fundamental global values, accompanied by wide—even tacit—acceptance by the United Nations and other social forces. This type of armed intervention, even if unilaterally conducted by states, has a public character (tutelary protection of public interests) and is not subject (and could not be) to the consent of the territorial state that will not or cannot—due to no longer having control of the territory—nor to Security Council authorization.28 In the case in question, the UN bodies, the global community, and the states concerned provided clear signals in this direction. The UN bodies, although informed, did not condemn the unauthorized intervention, the attacks did not meet significant objections from states, except Russia and Iran, so many states lent their support to the intervention with wide acceptance from world public opinion. Iraq has given its consent; Syria has not done so but has had a conciliatory attitude: Damascus made it known that the United States had informed the Syrian ambassador to the United Nations a few hours earlier, a statement that prompted the Obama administration to state having informed Syria but not asking for “the regime’s permission”.29

Endorsing the US argument for the need of information alone, the UN Secretary-General in a joint press conference with French President François Hollande held on 23 September, on the sidelines of a UN conference on climate change, said verbatim: “I’m aware that today’s strikes were not carried out at the direct request of the Syrian government but I note that the government was informed beforehand”.30 His other statements shed light on the characteristics of the US/coalition intervention under way and on the conditions for their exercise. Ban Ki-moon stressed the undeniable concurrence of the international community that the situation constituted an “immediate threat to international peace and security”; that the current raids “... took place in areas no longer under the

29 The spokesman of the U.S. State Department, Jen Psaki stated, “We did not request the regime’s permission”; http://www.ibtimes.com/us-airstrikes-syria-we-didnot-request-regimes-permission-1693554.
effective control of [Syrian] government” and that this required immediate action to protect the Syrian population. All considerations that, in excluding the need of the consent of the territorial state, underscore the “immediate” and “tutelary” nature of the raids and enable more streamlined decision-making processes compared with the procedures in Chapter VII. A position consistent with the current use of the immediate security approach that Ban Ki-moon shared with many member states at the Security Council meeting the next day on 24 September (“Immediate security issues must be addressed” he said) while noting it should also give way to a “multilateral, multifaceted strategy” in designing future scenarios. On the same occasion, when the air raids in Syria had already started, the UN Secretary-General also stressed forcefully “[a]s the custodian of the Charter of the United Nations” that “[…] all measures must be fully in line with the goals and values and principles of the United Nations” thus confirming that these actions, even if conducted “unilaterally” by coalition states, are not beyond the control and coordination of the UN bodies. And here the call is clear to respect the criteria of necessity, proportionality, and the binding norms of international law (and among these the protection of human rights is certainly central), which, moreover, the United States in the previously cited letter had already stated feeling bound by.

What seemingly emerges is that the UN Secretary-General interpreted the actual US strategy as based—beyond the screen of Article 51 of the Charter—on the approach of immediate security/protection in the common interest whereby the United States considers itself charged with the responsibility of leading military operations and protecting the fundamental values of the global society. This can be deduced from the “general” purpose pursued by President Obama, namely, dealing with the dramatic evolution of global terrorism where the United States considers itself on the front line after the events of 11 September; from the declared urgency to take responsibility for the protection of the core human rights of individuals, including foreigners, in a situation of serious lack of authority since the governments of Iraq and Syria are unable to control the territory (subsidiary security); and finally, from the solicitation to cooperate “as nations and an international community to confront the real and growing threat of foreign terrorist fighters,” a concept on which Obama insisted in meetings that led to the adoption of Resolution 2178 and a goal that he has pursued with determination, winning the consensus of public opinion and the direct support or assistance of states that are increasingly joining the original core of the coalition, including those of the affected regions.

The positive reactions of the states and UN bodies to the US coalition airstrikes demonstrate the sharing of a “tutelary” approach centred around the idea of an “immediate security” intervention conducted in the common interest, which due to the purposes (protection of seriously threatened and/or violated global fundamental values) and characteristics (protection, necessity, urgency, subsidiarity of the action) does not require the consent of the territorial state nor Security Council authorization, while due to its public nature must be subject to the control of UN bodies and the scrutiny of the global community. This is an intervention model that by developing forms of coordination between the United Nations, states, international organizations, and public opinion has created a new security instrument that involves the global society in safeguarding fundamental rights. Counterbalancing the rigidity of the Charter, it adapts to the expansion of the social base with new players and new global constitutional principles that limit the sovereignty of states, especially the “responsibility to protect,” that by imposing on the sovereign state the obligation to protect the population of its territory paves the way for other international actors to take steps to provide subsidiary forms of security to meet the need to protect seriously violated fundamental

31 Id.
33 Id.
34 Id.
35 The US permanent UN representative in the previously cited letter (supra, note 19), informed the secretary-general that “[…] 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 […].”
rights in the event it “cannot or does not want” to take charge. It should be noted that the development of the collective security system illustrated by progressive views\footnote{J. d’Aspremont, *The Collective Security System and the Enforcement of International Law (or a Catharsis for the Austinian Imperatival Complex of International Lawyers)* (Feb. 20, 2013), in *The Oxford Handbook of the Use of Force in International Law* (Marc Weller ed., 2013), available online at http://ssrn.com/abstract=2221477.} ascertaining that we have reached another stage of evolution of the system leads us to envisage a tertium genus of armed intervention as a measure of immediate security, in addition to collective self-defence that requires the consent of the territorial state, and collective security under UN Charter Chapter VII that require Security Council authorization.


We thus proceed with our analysis by outlining the legal framework (in the direction taken in previous studies\footnote{See supra, note 6, at 250.} and updating it to the changes) within which “tutelary” intervention shall be implemented according to current international practice: (1) serious violation (by extension, cruelty, etc.) of human rights and/or fundamental global interests/goods (i.e., peace and security, environment, commons, etc.) protected by peremptory international law; (2) the unwillingness or inability of the primarily legitimized territorial state (i.e., “unwilling” or “unable” criteria), which enables the state acting in the common interest (“agent” state) to act in its stead and implies a corresponding limitation of sovereignty of the territorial state; (3) the need for “immediate” action (i.e., urgency); (4) the exclusively “tutelary” character of the collective security action aimed at protecting the common good-interest “in itself”; (5) minimal invasion into the sphere of sovereignty of others, limited to the strictly necessary extent to achieve the aim; (6) the obligation of agent states to inform the territorial state of the purpose of the third-party action, accompanied by behaviour that unequivocally infers non-offensive intent; (7) the need for proportionality: the principle of proportionality in armed attacks is established by Article 51 (5) (b) and again by Article 57 of Additional Protocol I of 1977\footnote{Additional Protocol I to the Geneva Conventions of 12 August 1949 on the Protection of Victims of International Armed Conflicts, 8 June 1977.}, which is also considered applicable to non-international armed conflicts; these norms prohibit loss of life and damage to the civilian population that is “excessive in relation to the concrete and direct military advantage anticipated”; (8) compliance with peremptory norms and especially humanitarian and human rights law, including the procedural and substantive rights of accused individuals during arrest, detention and trial; (9) UN control over the conduct of agent states and satisfying the requirements of legitimacy; (10) UN and global community approval, even tacit. It follows that such intervention should be considered legitimate if the United Nations does not censure it through its bodies and if not disapproved by most states and world public opinion.

6. – Conclusion.

Our analysis of the US coalition armed intervention in Syria in territories under the control of ISIL has focused on understanding why even the United Nations are moving towards a new approach to global security, legalizing immediate intervention by military and integrated security forces in foreign territory for “tutelary” purposes without the consent of the territorial state nor Security Council authorization. This new type of armed intervention reinforces and complements the collective enforcement system, ranked as a tertium genus alongside collective self-defence and UN-authorized intervention, with the aim of “protecting” fundamental values and goods from gross violations by state and non-state actors (i.e., in cases of crimes against humanity, war crimes or ethnic cleansing, acquisition or use of weapons of mass destruction, environmental disasters, etc.). This approach, which in interpreting the change occurring in international law gives priority to the immediacy of protection of human and people’s rights and global security while overriding the limitation of state consent and Security Council authorization but without relinquishing UN scrutiny
of the conduct of agent states, will lead the global community to design a new legal framework for multilateral intervention to meet the new challenges of terrorism and counter the new unlawful territorial situations.

It could be said that the global community has now given a positive response to the US “immediate security” approach. However, there is a risk that these interventions could degenerate into indiscriminate attacks. We will have to see how this matter develops in shaping the change through normative processes and the behaviour of states, non-state actors, and the United Nations in the ongoing raids.

Abstract

The unauthorized intervention of the United States and coalition partners in territories under the control of the Islamic State of Iraq and the Levant (ISIL) in Syria and Iraq raises the question of its legitimacy. This article suggests that the legal basis cannot be found in Article 51 of the UN Charter. It argues that positive reactions of states and the cooperation of UN bodies in relation to the US intervention imply concurrence with the immediate security approach in the face of new unlawful territorial situations created by non-state actors. This approach is centred on the idea of ‘tutelary’ intervention as a form of non-institutionalized cooperation - a tertium genus with respect to collective self-defence and UN-authorized intervention - an idea that recognizes the important role the United Nations plays in leading and coordinating this type of military action. It will be interesting to see how the new intervention model evolves, safeguarding fundamental rights and commons while countering global terrorism.