

Germany's Vote to Strike ISIS in Syria Signals a Shift in its Approach to International Law

By Eric Langland

While much of the world is united against the Islamic State (ISIS), the international legal grounds by which countries justify striking ISIS targets in Syria are diverse, complicated, and controversial.¹ To begin with, ISIS is considered a non-state actor under international law, which poses a legal hurdle for states that want to target it inside Syrian sovereign territory. Additionally, the United Nations Security Council – the international community's authority on the use of force – responded to ISIS with a vaguely-worded resolution that falls short of authorizing military force in Syria. Finally, following the November 2015 terrorist attacks in Paris, France invoked article 42.7 of the European Union's Lisbon Treaty, a previously untested mutual assistance clause. The response from EU member states to the mutual assistance clause will set a precedent and have broader implications for the future of European common defense.

Germany entered this legal morass on December 4 when the Bundestag voted to authorize military assistance to the coalition striking ISIS targets in Syria. Chancellor Angela Merkel's government claimed collective self-defense, in conjunction with Article 42.7 of the Lisbon Treaty and UN Security Council Resolution 2249 (UNSCR 2249), as the international legal bases for military action.² In doing so, Germany altered its traditionally cautious approach to *jus ad bellum* – the criteria a state must consult before engaging in international armed conflict – by broadly interpreting a UN Security Council resolution and adopting an expansive definition of self-defense under the UN Charter.

The decision to join the coalition against ISIS in Syria is yet another sign of Germany's increasingly important role in the international community. But it also illustrates Germany's new willingness to interpret international law in ways that correspond with its foreign policy objectives. This article highlights several aspects of Germany's evolving approach to international law.

United Nations Security Council Resolution 2249

Shortly after terrorists affiliated with ISIS killed 130 civilians in Paris and many more in Lebanon and Turkey, the UN Security Council unanimously passed UNSCR 2249. The operative portion of the resolution is located in paragraph 5, in which the Council:

Calls upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee, and humanitarian law, on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL ... and to eradicate the safe haven they have established over significant parts of Iraq and Syria;

In its letter to the UN Security Council, and at a press conference following the Bundestag's vote to authorize military force, the Merkel government cited UNSCR 2249 as one basis for its use of force against ISIS in Syria.³ Under the UN Charter, a Security Council resolution authorizing military force is a legal basis for the use of force against another state, but not all resolutions specifically authorize the use of military force.⁴ For the Security Council to sanction the use of force, it must first determine that there is a threat to the peace, a breach of the peace, or an act of aggression.⁵ Then, acting under Article 42 of Chapter VII, the Security

Council can “decide” or “authorize” member states to use “all means necessary” to eradicate the threat.⁶

The UN Charter avoids prescribing the specific language that the Security Council must use to authorize military force. Rather, the Security Council has developed, through practice, a set of terms that indicate its intent to authorize military force.⁷ First, the phrase “acting under Chapter VII” is typically used to refer to the initial determination about a threat to peace, which the Security Council must establish. Second, the Security Council commonly uses the verbs “decide” or “authorize” to signal to member states that military action is authorized.

When a proposed military operation is particularly contentious, like the one against ISIS in Syria, the resulting resolution can leave doubt about whether the Security Council is actually authorizing member states to use military force. UNSCR 2249 does not disappoint in terms of ambiguity. For one thing, it omits any language referring to Chapter VII of the UN Charter. This omission alone, however, does not render the resolution unenforceable, as the International Court of Justice has pointed out that resolutions passed outside of Chapter VII can be legally binding and authorize the use of force.⁸ But UNSCR 2249 continues to deviate from the normative language authorizing the use of force when, instead of using the traditional verbs “decide” or “authorize,” it “calls upon Member States” to take all measures necessary in compliance with the UN Charter and international law.⁹

UNSCR 2249 therefore falls short of providing a green light for states seeking a UN mandate to strike ISIS in Syria. Nevertheless, the United States, France, United Kingdom, and Germany all claimed the text provided them with the legal authority to use such force. Germany’s case is particularly interesting, as it has traditionally tread carefully in the Security Council’s murky waters.

In 2002, when the Security Council passed Resolution 1441 (UNSCR 1441) – which the US and UK used partly to justify the invasion of Iraq – the Germans claimed the resolution did not authorize military force.¹⁰ UNSCR 1441 stated that the council was “acting under Chapter VII” and warned of “serious consequences” if Iraq did not comply with the provisions concerning its weapons program.¹¹ The ambiguity in the language of UNSCR 1441 related to whether the phrase “serious consequences” conveyed the same authorization to use military force as “all means necessary,” and whether an additional Security Council resolution was needed before states could use force.¹² US President George Bush and British Prime Minister Tony Blair, much to the dismay of many in the international community, claimed UNSCR 1441 as a basis for the war. Gerhard Schröder, then the German chancellor, took the opposing view, and stated shortly before the invasion that the resolution “contain[ed] nothing automatic as far as military force.”¹³

Compared to the Schröder government, Merkel’s coalition of Christian Democrats and Social Democrats appears willing to interpret Security Council resolutions more broadly.¹⁴ In its letter to the Security Council, the German government wrote: “The Security Council has confirmed in its resolution 2249 ... that ISIL ‘constitutes a global and unprecedented threat to international peace and security’ and has called upon Member States to eradicate the safe haven that ISIL has established in significant parts of Iraq and the Syrian Arab Republic.” Foreign Minister Frank-Walter Steinmeier explained further: “We thus consider that we are on firm legal ground, also in terms of international law, with the support we are providing for France.”¹⁵

Embracing UNSCR 2249 as a legal basis for military force signals a distinct shift in Germany’s approach to *jus ad bellum*. If one accepts the argument that UNSCR 2249 does not authorize military force, then Germany and its allies would have to rely on collective self-defense as the legal basis for the use of force against ISIS in Syria. Prior to the military

campaign in Syria, Germany only once provided significant military assets to an armed conflict without direct UN authorization: as part of NATO's mission to avert genocide in Kosovo. In that case, Europeans sought a Security Council resolution to intervene, but China and Russia initially opposed a resolution to establish a no-fly zone. Ultimately, NATO cast the conflict as a threat to European security, broadly interpreting its collective defense origins, and an extensive bombing campaign followed.¹⁶ Later, in June 1999 – months after the bombing began – the UN Security Council voted to allow it, and the operation gained a UN mandate.¹⁷

Germany's interpretation of its commitment to NATO in Kosovo signaled a willingness to place its interests – in this case mutual defense alliances and preventing genocide – above the politics of the UN Security Council. Similarly, promoting UNSCR 2249 as a legal basis for the use of force against ISIS in Syria demonstrates a shift from the strict interpretation exercised during the Schroeder years to the current government's foreign policy-based approach.

Collective Self-Defense Against a Non-State Actor

In addition to Security Council resolutions, the UN Charter allows member states to use force in self-defense or in collective self-defense, where one member state comes to the aid of another.¹⁸ In its letter to the Security Council, Germany also cited collective self-defense as a legal basis for using military force against ISIS in Syria: “Exercising the right of collective self-defense, Germany will now support the military measures of those States that have been subjected to attacks by ISIL.”¹⁹

But deploying military forces against a non-state actor located in a sovereign state is controversial. It pits two fundamentals of international law, the right to self-defense and state

sovereignty, against with each other. The UN Charter provides little guidance concerning what constitutes an “attack” under international law, referring only to an “armed attack” against a state.²⁰ Advocates of a strict interpretation of international law point out that the UN Charter is intended to regulate the actions of states, not non-state actors like the ISIS.²¹ Under this interpretation, a Security Council resolution is required to justify the use of force against ISIS in Syria.

A practice among certain states, which has gained momentum since 9/11, is to use force against a non-state actor in another state when that state is “unwilling or unable” to prevent the non-state actor from attacking another state.²² Prominent examples of the “unwilling or unable” test include Colombia’s pursuit of the FARC in Ecuador (2008), Israeli air strikes against the Palestinian Liberation Organization headquarters in Tunisia (1985), and the United States’ drone strikes against Al Qaeda targets in Pakistan, Yemen, and Somalia.²³ The night raid by US Special Forces on Osama bin Laden’s compound in Abbottabad, Pakistan in May 2011 is perhaps the best-known example of this doctrine in practice. Despite the growing acceptance of this practice, many states – specifically those whose territory is attacked – view the unwilling or unable test as an unacceptable affront to territorial sovereignty.

Application of the unwilling or unable test to Syria rests on Bashar al-Assad’s inability to prevent ISIS from striking targets abroad, for example in Paris or Brussels. In its letter to the UN Security Council, Germany wrote:

ISIL has occupied a certain part of Syrian territory over which 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, [sic] are therefore justified under Article 51 of the Charter of the United

Nations to take necessary measures of self-defense, even without the consent of the Government of the Syrian Arab Republic.

The unwilling or unable test is new to Germany. In Afghanistan, Germany came close to endorsing the practice when NATO invoked Article 5 of its charter on September 12, 2011 and the Bundestag later voted to provide military assistance to the United States in its fight against Al Qaeda. But in that case, the Bundeswehr provided very limited support to the US-led Operation Enduring Freedom and waited until the Security Council passed Resolution 1386 (UNSCR 1386), creating the International Security Assistance Force, before committing a significant number of troops and resources. Even then, wary of endorsing the right to self-defense against a non-state actor, the Security Council resolution made only a brief reference to self-defense in its preamble, choosing instead to characterize the operation as an international security operation.²⁴

While the unwilling or unable test remains controversial, endorsing it does not set Germany apart from the international community. Rather, it aligns the Germans with its NATO and European allies. Embracing the test removes a substantial legal hurdle to pursuing terrorist organizations unaffiliated with any state. Furthermore, it is yet another sign that the German government is willing to take contentious positions in order to achieve its foreign policy directives.

Article 42.7 of the Lisbon Treaty: the Mutual Defense Clause

Following the attacks in Paris, there was much speculation about whether French President François Hollande would invoke NATO's Article 5.²⁵ To some surprise, Hollande instead invoked article 42.7 of the Lisbon Treaty, the European Union's heretofore untested mutual

defense or assistance clause, to galvanize support for the military campaign against ISIS in Syria.²⁶ The text states:

“[I]f 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. This shall not prejudice the specific charter of the security and defense policy of certain Member States.

Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organization, which, for those States which are members of it, remains the foundation of their collective defense and the forum for its implementation.”

Unlike the legal questions surrounding the use of force against a non-state actor and the ambiguous wording in UNSCR 2249, the Lisbon Treaty’s Article 42.7 presented an immediate political question: How would European countries respond to France’s call for help? The United Kingdom and Germany answered with votes in their respective parliaments to authorize military support. Other EU member states offered varying degrees of military and non-military support.

Political questions aside, does the European Union’s mutual assistance clause also serve as a legal basis for the use of force? In a press statement shortly after the Bundestag’s vote, Foreign Minister Steinmeier addressed the legality of military action by citing article 42.7 in conjunction with UNSCR 2249 and Article 51 of the UN Charter.²⁷ Steinmeier’s statement appears to stop just short of characterizing the clause as a stand-alone basis for the use of force, but article 42.7 may serve another purpose. Collective self-defense under the UN Charter requires the state suffering an attack to affirmatively ask another for assistance.²⁸

Only then is the non-victim state's use of force legal under the UN Charter. Article 42.7, like NATO's Article 5, serves this function.

A more likely reason Germany is championing the Lisbon Treaty's assistance clause is the message it sends to the European Union. Article 42.7 uses vague language concerning the type of assistance member states must provide, and effectively allows EU states to sit on the sidelines if their individual foreign policies dictate. A weak response from European states would hardly send a signal of unity at a time when European cohesion is fraying. Germany, perhaps more than any other European country, has championed a European common defense initiative. By citing it as a basis – or even a partial basis – for force, Germany is promoting the military campaign against ISIS as a coherent European response.

Conclusion

The Bundestag's vote to join the coalition fighting ISIS in Syria, coupled with the government's official remarks on the legality of the use of force, reveal three developments in Germany's approach to international law. First, Germany will not bind itself to a strict interpretation of UN Security Council resolutions if they stand in the way of its own foreign policy objectives. Second, Germany has endorsed a broad definition of collective self-defense against non-state actors that removes a legal hurdle for the Bundeswehr to become more active fighting terrorist organizations. Third, Germany seized an opportunity to promote a European front on defense by including Article 42.7 in its legal justification. Taken together, these three points reflect Germany's willingness to depart in some ways from its historically cautious approach to foreign engagements.

But do these developments signal an intent to increase the Bundeswehr's role in foreign military operations? Critics will point to Germany's lackluster defense spending and its

relatively modest contribution to the military campaign in Syria to argue that its contribution to international security does not correspond to its political weight in the international community. An indicator of whether the government is ready to put more skin in the game may come in a Defense White Book scheduled for release this summer. Certainly this new approach to international law can be partly attributed to the nature of the threat IS poses, one that many Germans fear will eventually reach its cities. Regardless, the decision to join the coalition against ISIS in Syria is a break from tradition and one that may usher in a new era of German foreign policy.

Notes:

¹ ISIL and IS are two other acronyms commonly used for the jihadist group that calls itself Da'esh (Islamic State of Iraq and the Levant).

² German Federal Foreign Office, "The Fight against ISIS: German Bundestag Approves Bundeswehr Mandate," December 7, 2015 <http://www.auswaertiges-amt.de/EN/Aussenpolitik/Laender/Aktuelle_Artikel/Syrien/151204-SYR-Mandat.html> (accessed May 19, 2016).

³ United Nations Security Council Resolution 2249, November 20, 2015.

⁴ UN Charter, Article 42. Perhaps the least controversial basis for the use of military force against another state is authorization from the United Nations Security Council.

⁵ UN Charter, Article 39.

⁶ UN Charter, Article 42.

⁷ Dapo Akande and Marko Milanovic, "The Constructive Ambiguity of the Security Council ISIS Resolution," *European Journal of International Law Blog*, November 21, 2015

<<http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/>>
(accessed May 19, 2016).

⁸ International Court of Justice, Nambia Advisory Opinion

⁹ United Nations Security Council Resolution 2249, November 20, 2015, para. 5. Two leading scholars on UN Security Council resolutions observers described the wording as a constructive ambiguity, because it allows the current operations against ISIS without giving the express consent of the Security Council. See Akande and Milanovic (see note 7).

¹⁰ Chancellor Schroeder stopped short of calling the war illegal because US military bases in Germany were used to support the invasion.

¹¹ UN Security Council Resolution 1441, November 8, 2002, para. 13.

¹² Michael Byers, "Agreeing to Disagree: Security Council Resolution 1441 and International Ambiguity," *Global Governance* 10 (2004), p. 172.

¹³ "Schroeder Defends Stance on Iraq," BBC News, February 13, 2003

<<http://news.bbc.co.uk/2/hi/europe/2756031.stm>> (accessed May 19, 2016).

¹⁴ German Federal Government, "Bundestag Approves Mandate for Syria Mission," December 4, 2014 <https://www.bundesregierung.de/Content/EN/Artikel/2015/12_en/2015-12-01-syrien-mandat-bundeswehr.html> (accessed May 19, 2016).

¹⁵"In the Wake of the Attacks in Paris: Support in the Fight against Terrorism," German Federal Government, last update December 12, 2015

<https://www.bundesregierung.de/Content/EN/Artikel/2015/11_en/2015-11-26-von-der-leyen-steinmeier-militaerische-hilfe-frankreich_en.html> (accessed May 19, 2016).

(Opposition Greens disagree: Co-Chairman Simone Peter remarked that the government's legal case is fragile and lacks the approval of the UN. "There must be a UN resolution in order to legitimize military operations on foreign soil," she told German television this

morning.) <<http://www.euractiv.com/section/justice-home-affairs/news/german-military-intervention-in-syria-legal-lawyers-rule/>> (accessed May 19, 2016).

¹⁶ The Bundeswehr contributed over 3,000 troops and 14 Tornado aircraft to a 79-day NATO-led bombing campaign against the Federal Republic of Yugoslavia. It was the first time it contributed armed forces to an allied military campaign.

¹⁷ United Nations Security Council Resolution 1244, June 10, 1999.

¹⁸ UN Charter, Article 51.

¹⁹ Letter from Germany to the UN Security Council, December 10, 2015, available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_946.pdf.

²⁰ UN Charter, Article 51.

²¹ The UN Charter refers to “peace-loving states” in Article 4 and in Article 2(4) prohibits “members ... in their international relations from the threat or use of force against ... any state.” The International Court of Justice supported a state-centric interpretation of the UN Charter in its Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Territory*, 2004, ICJ Rep 136, 230.

²² See Ashley Deeks, “‘Unwilling or Unable’: Toward a Normative Framework for Extraterritorial Self-Defense,” *Virginia Journal of International Law* 52, no. 3 (2012), pp. 483, 501.

²³ For a chart listing instances of the unwilling or unable doctrine, see *ibid.*, pp. 549–50.

²⁴ Jochen A. Frowein, “Legal Advice for Foreign Policy in Germany,” *Wisconsin International Law Journal* 23, no. 1 (Winter 2005), p. 37.

²⁵ Three options were available to the French: (1) NATO’s common Article 5, the mutual defense clause calling on members to treat an armed attack against one as an act against all; (2) Article 42.7 of the Lisbon Treaty, the EU’s “mutual defense clause,” which creates an

obligation of “aid and assistance by all means in their power” while careful not to “prejudice the specific character of the security and defense policy of certain Member States”; and (3) the “solidarity clause” of Article 222 of the Treaty on the Functioning of the European Union (TFEU), which states that in response to a terrorist attack, “the Union shall mobilize all the instruments at its disposal, including military resources made available to member states, to” prevent, protect, and assist in the response to any terrorist attack.

²⁶ Invoking Article 5 of the NATO charter risked upsetting the Russians, who could potentially be valuable allies in the fight against ISIS. Article 222 of TFEU required the use of European institutions like the European Commission and European Parliament, which were cumbersome and marked by division.

²⁷ See “German Bundestag Approves Bundeswehr Mandate” (see note 2).

²⁸ The UN allows collective security agreements under Article 51, though in practice only once in the post-UN Charter era has a collective security agreement been used: NATO’s invocation of Common Article 5 the day after 9/11.