

The Influence of Strategic Culture on Legal Justifications

Comparing British and German Parliamentary Debates Regarding the War against ISIS

Martin Hock*

Abstract

This article presents an interdisciplinary comparison of British and German legal arguments concerning the justification of the use of force against the Islamic State in Iraq and Syria (ISIS). It is situated in the broader framework of research on strategic culture and the use of international law as a tool for justifying state behaviour. Thus, a gap in political science research is analysed: addressing legal arguments as essentially political in their usage. The present work questions whether differing strategic cultures will lead to a different use of legal arguments. International legal theory and content analysis are combined to sort arguments into the categories of instrumentalism, formalism and natural law. To do so, a data set consisting of all speeches with regard to the fight against ISIS made in both parliaments until the end of 2018 is analysed. It is shown that Germany and the UK, despite their varying strategic cultures, rely on similar legal justifications to a surprisingly large extent.

Keywords: strategic culture, international law, ISIS, parliamentary debates, interdisciplinarity

1 Introduction

In early 2014 ISIS swept across Iraq and Syria and established a terrifying regime. While having been deprived of much of its territory after air campaigns by Western powers and ground fighting conducted by local forces, ISIS is not defeated. The international alliance's efforts have not been cancelled, and concerns about the group's comeback were pronounced after the Turkish attack on Kurdish forces in October 2019.¹ The international warfare against ISIS presents an interesting case study on the question of democratic warfare owing to its unclear legal background. Questions regarding the legal-

ity of the use of force against ISIS are manifold. Thus, the legal justifications become important.

This article studies the legal justifications for the use of force against ISIS advanced by the United Kingdom and Germany. These countries present a viable comparison – two mature democracies of comparable economic and military power that are members of the same alliance. However, their strategic cultures differ significantly. Building on the work of Geis *et al.*² and Wagner,³ content analysis – including a novel coding scheme with a focus on international law – is used on parliamentary speeches in order to compare the legal justifications set forth in the British and German parliaments. This analysis is applied on five levels: the state, the government and the opposition, as well as the arguments for and against the use of force across the government-opposition divide. While the works mentioned present important studies in regard to political justifications for democratic warfare, the legal justifications for this have not been studied comprehensively, yet.

This article asks whether a different strategic culture leads to different choices with regard to the legal justifications. Hereby, justification refers to every legal argument made in favour of or against the use of force. Furthermore, arguments can be divided into three ways of understanding international law: formalism, instrumentalism and natural law. This allows for placing the countries on a scheme depending on the prevailing legal understanding. Additionally, the exact importance of these legal understandings will be refined by determining whether a given understanding is a decisive, dominant, influential or a minority position. Compared with the related concept of political culture,⁴ strategic culture offers the benefit of being specifically designed to address questions of war and peace. Several outcomes are expected. Given the respective strategic cultures, Germany will rely more heavily on formalist arguments, while the UK will refer to instrumentalist and natural law-based arguments. Furthermore, in line with the theoretical premises of strategic culture, it is argued that

* Martin Hock is Research Associate at the Technische Universität Dresden, Germany. This article evolved out of an LLM-thesis written under the supervision of Prof. Wolfgang Wagner at Vrije Universiteit Amsterdam. The author wishes to thank Prof. Wagner for his inspiration as well as his important and valuable advice, both in teaching and supervision.

1. R. Salloum, 'Türkische Offensive. Was nun mit den IS-Gefangenen passiert', *Spiegel online*, 10 October 2019, <https://www.spiegel.de/politik/ausland/syrien-tuerkischer-angriff-was-mit-den-is-gefangenen-passiert-a-1290886.html> (last accessed 24 February 2021).

2. A. Geis, H. Müller & N. Schörnig (eds.), *The Militant Face of Democracy. Liberal Forces for Good* (2013).

3. W. Wagner, *The Democratic Politics of Military Interventions. Political Parties, Contestations, and Decisions to Use Force* (2020).

4. For an overview on political culture see J. Gebhart (ed.), *Political Culture and the Cultures of Politics: A Transatlantic Perspective* (2010).

the overall distribution of arguments in the legal understandings will be roughly equal on all levels, i.e. formalist arguments will prevail in Germany on all levels, as against instrumentalist arguments in the UK. The study shows, however, only modest evidence for strategic culture being influential in regard to legal justifications. While Germany's and the UK's warfare against ISIS are studied in the present article, the framework should be expanded to include more countries and more uses of force, especially the case of France. Thus, this article should be read as a starting point for further research.

2 Democratic Warfare and Strategic Culture: State of the Art

While democratic peace theory has gained a great deal of traction since the 1980s,⁵ the question of democratic warfare has received less attention – despite criticism of democratic peace theory after the Iraq War.⁶ This holds especially true when one tries to turn around the constructivist argument made for democratic peace and asks for norms and justificatory patterns of democratic war – patterns that may be influenced by a country's strategic culture.⁷ Early work on democratic warfare⁸ was followed by a surge in the studies after the wars in Afghanistan and Iraq.⁹ An important theoretical branch is the research into the connections between parliamentary powers and the decision to go to war.¹⁰ These decisions

have traditionally been understood as driven by national interest in democracies and non-democracies alike. Nevertheless, after the end of the Cold War, the national interest has become disputed and unclear, leading to so-called wars of choice.¹¹

A key work in this field is Geis *et al.* (2013),¹² building on their previous research, Geis *et al.* (2006).¹³ The authors present a framework for understanding the argumentative patterns surrounding the justifications for democratic warfare but do not treat the question of international law comprehensively.¹⁴ Their work has been expanded and continued by Wagner 2020¹⁵ and Geis and Wagner 2021.¹⁶ This points to an important gap in the study of democratic wars. Given the constructivist background of the arguments, the way international law is treated and the role that is given to it by democratic states matters. Choosing a specific legal justification is in itself a political act. It has, however, not been studied comprehensively yet. This holds true in the case of the war against ISIS and the legal questions surrounding it as well. There is plenty of debate in the field of international law with regard to the scope of self-defence against non-state actors and the legality of the Syrian/Iraqi intervention.¹⁷ While notions of Just War and the Responsibility to protect (R2P) were discussed after the Kosovo War, legal scholarship focused on the question of self-defence against non-state actors and the problems surrounding the sovereignty of host states after 9/11. The unable-or-unwilling formula has emerged as a key concept in this debate. However, the interplay between legal justifications for democratic warfare, strategic culture and legal justifications is a field that has gained relatively little research attention.

5. For recent examples see F. Bakker, 'Hawks and Doves. Democratic Peace Theory Revisited', 2018 (PhD dissertation, University of Leiden); M. Baum and P. Potter, *War and Democratic Constraint* (2015); S. Dieterich, H. Hummel & S. Marschall, 'Bringing Democracy Back in. The Democratic Peace, Parliamentary War Powers and European Participation in the 2003 Iraq War', 50 *Cooperation and Conflict* 87 (2015); W. Wagner, 'Is there a Parliamentary Peace? Parliamentary Veto Power and Military Interventions from Kosovo to Daesh', 20 *The British Journal of Politics and International Relations* 121 (2018).
6. D. Kinsella, 'No Rest for Democratic Peace Theory', 99 *American Political Science Review* 453 (2005).
7. M. Britz, 'Introduction', in M. Britz (ed.), *European Participation in International Operations. The Role of Strategic Cultures* (2016) 1, at 2; F. Doeser and J. Eidenfalk, 'Using Strategic Culture to Understand Participation in Expeditionary Operations: Australia, Poland, and the Coalition against the Islamic State', 40 *Contemporary Security Policy* 4 (2019); W. Mirrow, *Strategic Culture Matters: A Comparison of German and British Military Interventions since 1990* (2009).
8. P. Everts, *Democracy and Military Force* (2002).
9. Among others, J. Caverley, *Democratic Militarism: Voting, Wealth and War* (2016); O. Encarnacion, 'Bush and the Theory of the Democratic Peace', 8 *Global Dialogue* 60 (2006); J. Ferejohn and F. McCall Rosenbluth, 'Warlike Democracies', 52 *Journal of Conflict Resolution* 3 (2008); P. Mello, *Democratic Participation in Armed Conflict. Military Involvement in Kosovo, Afghanistan and Iraq* (2014); J. Owen, 'Iraq and the Democratic Peace. Who Says Democracies Don't Fight?', 84 *Foreign Affairs* 122 (2005).
10. Among others, H. Hegemann, 'Towards "Normal" Politics? Security, Parliaments and the Politicization of Intelligence Oversight in the German Bundestag', 20 *The British Journal of Politics and International Relations* 175 (2018); J. Kaarbo, 'Prime Minister Leadership Style and the Role of Parliament in Security Politics', 20 *The British Journal of Politics and International Relations* 35 (2018); T. Raunio and W. Wag-

3 Research Design

The following section provides an overview of the distinguishing criterion of strategic culture. Furthermore, it presents content analysis as a method and the scheme

- ner, 'Towards Parliamentarisation of Foreign and Security Policy?', 40 *West European Politics* 1 (2017); Wagner, above n. 5.
11. T. McCormack, *Britain's War Powers. The Fall and Rise of Executive Authority* (2019), at 6; P. Mello and D. Peters, 'Parliaments in Security Policy: Involvement, Politicization, Influence', 20 *The British Journal in Politics and International Relations* 3, at 6 (2018); Raunio and Wagner, above n. 10, at 3.
12. Geis, Müller & Schörnig, above n. 2.
13. A. Geis, L. Brock & H. Müller (eds.), *Democratic Wars. Looking at the Dark Side of Democratic Peace* (2006).
14. The same applies pars pro toto for C. Hilpert, *Strategic Cultural Change and the Challenge for Security Policy. Germany and the Bundeswehr's Deployment to Afghanistan* (2014); more, but not sufficient work on legal justification has been done in M. Britz (ed.), *European Participation in International Operations. The Role of Strategic Cultures* (2016).
15. Wagner, above n. 3.
16. W. Wagner and A. Geis, 'What We Are Fighting For: Democracies' Justifications of Using Armed Force since the End of the Cold War', in L. Brock and H. Simon (eds.), *The Justification of War and International Order. From Past to Present* (2021), at 293.
17. Among many, see K. Weigelt, *Die Auswirkung der Bekämpfung des internationalen Terrorismus auf die Staatliche Souveränität* (2016).

between formalism, instrumentalism and natural law on which the cases will be placed.

3.1 Strategic Culture as Distinguishing Criterion

Compared with the related concept of political culture, strategic culture offers the benefit of being developed specifically to understand and explain acts by states concerning the use of force. This is significant, since the decision to go to war is of extreme importance and is often institutionally separated from regular decision-making. The strategic culture has been used widely since as early as the work of Snyder (1977).¹⁸ Despite its prominence, no clear consensus on a definition has emerged.¹⁹ Doerer and Eidenfalk²⁰ distinguish between four generations of the concept: the first generation following Snyder (1977)²¹ and Gray (1981; 1999)²² was interested in understanding why states approached strategy and military interventions differently, considering culture as a country-specific context. This results in a specific viewpoint from which strategic choices are made, which then shapes behaviour – challenging hitherto dominant theories of states as rational actors driven by externally arising goals.²³ The second generation saw it as a tool of international hegemony. Additionally, their work was intended to conceptualise differences between official policy statements and actual actions by states.²⁴ Third-generation scholars emerging in the 1990s focused on the possibilities of falsifiable theory-building, using strategic culture as an independent variable to explain an actor's actions and predict choices made.²⁵ The fourth generation incorporated constructivist approaches by focusing on changes in strategic culture and subgroups.²⁶

In the present work strategic culture is understood, along the lines of the first generation, as a set of 'socially transmitted, identity-derived norms, ideas, and patterns of behaviour that are shared among the most influential

actors and social groups within a given political community, which help to shape a ranked set of options for a community's pursuit of security and defence goals'.²⁷ However, in using strategic culture as an explanatory variable to test outcomes it draws on ideas of the third generation as well. For this purpose, strategic culture is seen as an 'ideational milieu, which limits behavioural choices'.²⁸ Those choices are not the concrete acts of foreign policy but the legal justifications. Therefore, they are political acts in themselves. It is assumed that these are an outcome of and are therefore limited by strategic culture. Furthermore, it is implicitly presupposed that these legal understandings are not part of the strategic culture itself but a product of it. Otherwise, the scope of research would be tautological.

3.1.1 Strategic Culture in Germany

German strategic culture can be described as 'reactive, passive and reluctant',²⁹ with Germany being a 'Zivilmacht'.³⁰ It is based on the self-image of promoting a rule-based global order.³¹ A public mistrust against the military and the use of force exists, and this societal preference is reflected in the institutional framework. Thus, the parliament has a decisive vote on the use of force.³² Dominance of the civilian leadership is secured on all ministerial levels, while the military lacks preferred access to policy making. In addition, German forces are integrated into multilateral frameworks on all operational, strategic and political levels.³³ Reacting to the humanitarian catastrophes of the 1990s, Germany became more willing to use military force. The reluctant stance did not wane but was balanced by humanitarian impulses and the call for more contributions on common defence from allies.³⁴ However, if German troops are deployed, the rules of engagement tend to be restrictive.³⁵ Over the course of the Afghanistan war, reforms aimed at transforming the Bundeswehr into an expeditionary army were conducted, culminating in the abolishment of military draft in 2011. However, this did not necessarily lead to a major change

18. J. Snyder, 'The Soviet Strategic Culture: Implications for Limited Nuclear Options', *Rand Air Force Project Report R 2154 AF 1977*, <https://www.rand.org/content/dam/rand/pubs/reports/2005/R2154.pdf> (last accessed 24 February 2021).

19. H. Biehl, B. Giegerich & A. Jonas, 'Introduction', in H. Biehl, B. Giegerich & A. Jonas (eds.), *Strategic Cultures in Europe. Security and Defense Policies across the Continent* (2013) 7, at 11.

20. Doerer and Eidenfalk, above n. 7, at 6.

21. Snyder, above n. 18.

22. C. Gray, 'National Style in Strategy: The American Example', 6 *International Security* 21 (1981); C. Gray, 'Strategic Culture as Context: The First Generation of Theory Strikes Back', 25 *Review of International Studies* 49 (1999).

23. Biehl, Giegerich & Jonas, above n. 19, at 11; Britz, above n. 7, at 4.

24. Biehl, Giegerich & Jonas, above n. 19, at 10; examples for the second generation, B. Klein, 'Hegemony and Strategic Culture: American Power Projection and Alliance Defence Politics', 14 *Review of International Studies* 133 (1988); A. Johnston, *Hegemony and Culture in the Origins of NATO Nuclear First-use, 1945-1955* (2005).

25. Mirrow, above n. 7, at 5-6; as an example, I. Johnston, 'Thinking about Strategic Culture', 19 *International Security* 32 (1995).

26. As examples, J. Lantis, 'Strategic Culture and National Security Policy', 4 *International Studies Review* 87 (2002); J. Johnson, K. Kartchner & J. Larsen, *Strategic Culture and Weapons of Mass Destruction: Culturally Based Insights into Comparative National Security Decision Making* (2009).

27. C. Meyer, *The Quest for a European Strategic Culture: Changing Norms on Security and Defence in the European Union* (2006), at 20.

28. Johnston, above n. 24, at 46.

29. J. Junk and C. Daase, 'Germany', in H. Biehl, B. Giegerich & A. Jonas (eds.), *Strategic Cultures in Europe. Security and Defense Policies across the Continent* (2013) 139, at 149.

30. H. W. Maull, 'Germany and Japan. The new Civilian Powers', 69 *Foreign Affairs* 91 (1990).

31. See for example Permanent Mission of the Federal Republic of Germany to the United Nations, "Germany stands for a rules-based international order", Interview with Ambassador Heusgen, <https://new-york-un.diplo.de/un-en/news-corner/heusgen-bpa-interview/2246162> (last accessed 24 February 2021).

32. W. Wagner, 'The Bundestag as Champion of Parliamentary Control of Military Missions', 35 *Sicherheit und Frieden* 60 (2017).

33. A. Bergstrand and K. Engelbrekt, 'To Deploy or Not to Deploy a Parliamentary Army? German Strategic Culture and International Military Operations', in M. Britz (ed.), *European Participation in International Operations. The Role of Strategic Cultures* (2016) 49, at 53-4; I. Kraft, 'Germany', in H. Meijer and M. Wyss (eds.), *The Handbook of European Defence Policies and Armed Forces* (2018) 52, at 52-3.

34. Bergstrand and Engelbrekt, above n. 33 at 50-1.

35. Junk and Daase, above n. 29, at 148.

in operational strategy on the ground or in the societal and institutional framework.³⁶

After the Russian invasion of Ukraine in 2014, Germany took steps to strengthen its forces – such as increasing military spending and personnel. These actions, however,³⁷ do not present a new strategic culture. A more prominent German role in security issues as well as increased spending on defence is contested in the German public and opposition parties.³⁸ This leads to the assumption that Germany's reluctance to use force will be reflected in the use of formalist understandings of international law since the UN-Charter is based essentially on restraint in the use of force (see 3.3).

3.1.2 Strategic Culture in the United Kingdom

British strategic culture is based on the self-image of being an important member of the international community coupled with high ambitions with regard to responsibilities and capabilities towards international security. This is especially true with regard to its post-colonial and Commonwealth position, its standing in the UN system, the special relationship with the USA and its influence in the North Atlantic Treaty Organisation (NATO). British forces have been deployed in conflicts nearly continuously for most of the 20th and 21st century.³⁹ Another defining feature is the lack of a unified document spelling out its conditions and prerogatives.⁴⁰ Given the close partnership with the USA, NATO became the means of choice to project British power. The UK remains reluctant towards European defence integration, which might be seen as undermining NATO.⁴¹

While retaining the main components of British strategic culture, significant changes took place from the late 1990s onwards. The idea of using force to defend human rights assumed prominence in British politics. Expeditionary missions became the British military's most important task.⁴² This was accompanied by institutional changes. Starting with the vote on the war in Iraq, parliamentary powers over the use of force increased. The relationship between the civilian and the military levels, however, is not as clear-cut as it is in Germany. The decision to go to war traditionally lies with the government alone, while the parliamentary powers remain unstable. Although there is strong civil-

ian-military cooperation to the extent that all positions in the Ministry of Defence are staffed with a civilian and a military of the same rank, the balance between the two remains shaky. This is exacerbated by the lack of written formal rules in line with the British constitutional traditions.⁴³

In 2010 military planning began showing a stronger focus on efficiency. A Strategic Defence and Security Review was conducted and a National Security Council established. This Council was aimed at making decisions about security issues more transparent. Furthermore, bilateral defence cooperation with France was significantly strengthened. The default reflex, however, remained reliance on an alliance with the USA.⁴⁴ While changes in the strategic culture are visible, the UK remains a 'middle-ranking power ... [with a] level of ambition in international security policy [that] could scarcely be higher'.⁴⁵ The influence of Brexit on strategic cultures remains to be determined.⁴⁶ This has led to the assumption that the UK's proactive stance on military means will lead to the preferred use of instrumentalist understandings of international law and a greater willingness to interpret international law in a way that will align with the intention to use force.

3.2 Patterns of Legal Justifications

The following part provide an overview of the three patterns of legal justifications used in the present work. These categories mirror closely the theoretical debates conducted in the field of international legal theory.⁴⁷

3.2.1 Formalism

Formalism as a theoretical concept is based on law as it is written or conducted. It does not rely on ideas of power or moral acting as spheres outside the law.⁴⁸ Formalism is concerned mainly with what rules constitute law and what is meant by law. It is therefore necessary to identify which rule can be considered as law and what this rule means. One way of doing so is the source thesis. If a rule meets the criteria set up to make a rule law, it can be said that it is law.⁴⁹ Another possibility is the social thesis. A rule becomes law if it is socially accepted as law. According to this theory, law arises out of two social rules, the primary rule of obligation and the secondary rule of recognition. Taken together, these result in the socially constructed habitual obeying of laws by

36. Hilpert, above n. 14, at 137-66.

37. Contra: Kraft, above n. 33, at 69-70.

38. K. Oppermann, 'Between a Rock and a Hard Place? Navigating Domestic and International Expectations on German Foreign Policy', 28 *German Politics* 482, at 484-7 (2018).

39. M. Britz, 'Continuity or Change? British Strategic Culture and International Military Operations', in M. Britz (ed.), *European Participation in International Operations. The Role of Strategic Cultures* (2016) 151, at 151-3; P. Cornish, 'United Kingdom', in H. Biehl, B. Giegerich & A. Jonas (eds.), *Strategic Cultures in Europe. Security and Defense Policies across the Continent* (2013) 371, at 371; McCormack, above n. 11, at 27.

40. Cornish, above n. 39, at 371.

41. Britz, above n. 39, at 153; A. Dorman, 'United Kingdom', in H. Meijer and M. Wyss (eds.), *The Handbook of European Defence Policies and Armed Force* (2018) 71, at 71-6.

42. Britz, above n. 39, at 154; Dorman, above n. 41, at 76-7.

43. Britz, above n. 39, at 159, 171.

44. *Ibid.*, at 171.

45. Cornish, above n. 39, at 383.

46. For an overview of Brexit and British defence, see R. Johnson and J.H. Matlary (eds.), *The United Kingdom's Defence after Brexit* (2019).

47. For an overview see A. Orford and F. Hoffmann (eds.), in A. Orford and F. Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (2016), on the use of formalism/instrumentalism among others M. Koskeniemi, 'What Is International Law For?', in M. Evans (ed.), *International Law* (2010) 32.

48. J. Kammerhofer, 'International Legal Positivism', in A. Orford and F. Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (2016) 407, at 408-11.

49. J. D'Aspremont, *Formalism and the Sources of International Law* (2011), at 12-14.

the majority of its subjects.⁵⁰ Both theses do not sufficiently answer how law should be applied and what content it has. Interpretation remains crucial and has to be separated from the question of the legal form of a rule.⁵¹ In formalist interpretations justice and legality are measured in terms of the fulfilment of procedural standards. If these are met, a decision can be considered lawful.⁵²

3.2.2 Instrumentalism

Instrumentalist understandings of law are based on power and the state's will. This incorporates some strains of realist and positivist approaches to international law. In instrumentalist understanding, law and its invocation in the political debate are not an end in themselves but a means to foster other goals that a given state considers necessary. In this concept there is no viable distinction between legal disputes and political conflicts.⁵³ Starting from the question of the state's compliance with international law, Keohane⁵⁴ offers a compelling overview of instrumentalist understandings of law based on game theory. International law as a set of rules matters as it influences the interest calculation made by actors. It creates defined opportunities and restrictions. Compliance can be expected in situations in which adherence to law is in the state's interests. Nevertheless, if a situation arises in which the state's interest diverges from law, the state will find ways to modify, reinterpret or circumvent it. The more vital and strong the interest of a state, the more reinterpretation can be expected.

3.2.3 Natural Law

Natural law ultimately relies on notions of morality. It requires the grounding of a legal system in external factors. This entails the notion that something beyond the realm of the will of states or ordinary human beings – a guiding, higher moral order – is the source of law. The order may be derived from God's rules, the common humanity or the reason of every human being.⁵⁵ A central feature of natural law theories is arguments about just warfare, which often take the form of war as law enforcement.⁵⁶ During the Middle Ages and the Enlightenment many competing versions of natural law thought existed. They were invoked mostly as barriers against arbitrariness and as protection for the individual.

50. *Ibid.*, at 15-16; H.L.A. Hart, *The Concept of Law* (1994), at 100-10.

51. D'Aspremont, above n. 49, at 15.

52. Hart, above n. 50, at 157-60; see also M. Kramer, *In Defense of Legal Positivism. Law without Trimmings* (2003), at 23-4.

53. P. Danchin, 'Beyond Rationalism and Instrumentalism: The Case for Rethinking U.S. Engagement with International Law and Organization', 28 *SAIS Review of International Affairs* 79, at 83 (2008); O. Jütersonke, 'Realist Approaches to International Law', in *The Oxford Handbook of the Theory of International Law* (2016) 327, at 336-42, S. Neff, *War and the Law of Nations: A General History* (2005), at 161-2.

54. R. Keohane, 'International Relations and International Law: Two Optics', 38 *Harvard International Law Journal* 487, at 489-91 (1997).

55. A. Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law', 5 *Social and Legal Studies* 321, at 323-7 (1996); G. Gordon, 'Natural Law in International Legal Theory: Linear and Dialectic Presentations', in A. Orford, and F. Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (2016) 279, at 282-3.

56. Neff, above n. 53, at 54-7.

Gradually the idea of a God-given order became less prominent, replaced by the notion of a unified humanity and then by the concept of inalienable individual rights and contractual relationships between free human beings.⁵⁷

3.3 Legal Questions Surrounding the War against ISIS

The military actions against ISIS are connected to a vast array of legal problems. While the general prohibition on the use of force may act as a restraint against interventions, various understandings of self-defence as well as concepts of Just War, humanitarian intervention and R2P as well as the unclear wording of Res. 2249⁵⁸ can be used to justify action against ISIS.

Formalist and instrumentalist understandings of international law concern the illegality of the use of force and various understandings of self-defence. According to Article 2 (4) UN-Charter,⁵⁹ the use of force is illegal if it is not based either on an authorisation by the Security Council or on self-defence.⁶⁰ The support of insurgents may be considered as indirect violence and is thus illegal, as well as interventions on behalf of insurgents. Intervention on behalf of the government is not an illegal use of force as long as there has been an invitation by the lawful government.⁶¹

Article 39 UN-Charter empowers the Security Council to determine the existence of a threat to the peace, breach of the peace or act of aggression and decide on measures necessary in order to maintain or restore international peace and security. The Council is relatively free to decide what situations may be regarded as falling within this scope. Once this decision is made, however, military measures according to Article 42 UN-Charter are possible.⁶² This authorisation might be given by Res. 2249. Furthermore, the resolution might foster a broad understanding of the right to self-defence. Far from giving a clear-cut answer, however, this resolution is ambiguous in its wording. Problems surround the binding power of the resolution as well as the actual scope of authorisation.⁶³

57. A.M. Gonzalez, 'Natural Law as a Limiting Concept: A Reading of Thomas Aquinas', in A.M. Gonzalez (ed.), *Contemporary Perspectives on Natural Law. Natural Law as a Limiting Concept* (2008) 11, at 11-12; Gordon, above n. 55, at 287-8.

58. SC Res. 2249 (2015).

59. Also in the following: Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

60. Y. Dinstein, *War, Aggression and Self-Defense* (2017), at 89-91, 329-39.

61. *Ibid.*, at 125-9; A. von Arnould, *Völkerrecht* (2019), at 480.

62. Dinstein, above n. 60, at 329-39; von Arnould, above n. 61, at 484-8.

63. D. Akande and M. Milanovic, 'The Constructive Ambiguity of the Security Council's ISIS Resolution', *EJIL Talk!* (2015), <https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/> (last accessed 24 February 2021); A. Deeks, 'Threading the Needle in Security Council Resolution 2249', *Lawfare Blog* (2015), <https://www.lawfareblog.com/threading-needle-security-council-resolution-2249> (last accessed 24 February 2021); P. Hilpold, 'The Fight against Terrorism and SC Resolution 2249 (2015): Towards a More Hobbesian or Kantian International Society?' 55 *Indian Journal of International Law* 535, at 536-7 (2015).

Self-defence, according to Article 51 UN-Charter, is a temporarily restricted right held by every state to the individual or collective use of force in response to an armed attack.⁶⁴ There is considerable debate about the scope of this right. The traditional reading of Article 51 UN-Charter refers to self-defence being applicable against armed attacks by states only.⁶⁵ Nevertheless, in the context of the war against ISIS it is directed against a non-state actor. While the wording of Article 51 UN-Charter does not explicitly exclude this – only the attacked one has to be a state⁶⁶ – questions regarding sovereignty arise. The self-defence actions will always infringe on the territorial sovereignty of a state. In order to solve the inherent contradiction and tension between the right to self-defence against non-state actors and territorial sovereignty, both the British⁶⁷ and the German governments⁶⁸ have invoked the notion of unable-or-unwilling which gives self-defence leverage over territorial sovereignty.⁶⁹ The basic argument of this formula is that if a state is unable or unwilling to prevent armed attacks by non-state actors emanating from its territory, self-defence trumps sovereignty.

While international law has precedence, European law has to be considered as well. The mutual defence clause of Article 42 (7) Treaty of the European Union⁷⁰ offers another ground for the use of force. It obliges all member states to offer aid and assistance to any member state that is a victim of armed aggression on its territory.⁷¹ This framework was invoked by the French government as a response to the Paris attacks.

The questions about self-defence against non-state actors reflect back towards the understandings of international law. Formalist understandings entail all arguments that refer back to the legality of the use of force based on the formal Charter-law. This includes the general prohibition on the use of force and the reading of Res. 2249 in cases where it is read as permission to use force, since it is based on the grounds of a Security Council resolution. Connected to this is the question of

self-defence. If it is based on Article 51, it can be seen as a formalist argument. Unable-or-unwilling can be seen as either formalist or instrumentalist depending on how this issue is framed. It might be a formalist concept – in the way that unable-or-unwilling is consistent with the procedures of the Charter. It could also be an instrumentalist one – if reference is made to using force across borders and thereby catching the gist of the formula without the formalistic cover. The invocation of EU law shows an instrumentalist approach in the sense that UN law would have been the only formally valid legal framework for deciding on the legality of the use of force.

Natural law understandings, however, are focused on theories of Just War, humanitarian intervention and the R2P. Given the stunning number of atrocities committed by ISIS, the R2P or a wider Just War framework could be invoked. The main starting point is the assumption that peace is the norm and war an exception to be justified. Thus, warfare is considered as an act analogous to domestic law enforcement – essentially, the enforcing of international law by means of warfare. Just War thinking rose to new prominence in the 20th century, and UN-Charter can be read along these lines. With the general prohibition of violence, peace as a natural state and war as its aberration was established. The enforcement actions authorised by the Security Council were originally intended to be conducted by a standing UN army as consequence of a former wrongdoing – the threat to or breach of the peace. It therefore resembles a law enforcement action. However, given the background of the Cold War, the Just War elements were constrained by politics.⁷²

Renewed interest in Just War thinking started in the late 1970s and was further enhanced by the lack of serious efforts to protect civilians during the Rwandan genocide and the atrocities in Yugoslavia.⁷³ This culminated in the ideas of humanitarian intervention and, ultimately, the R2P.⁷⁴ These interventions take place on the fault line between two competing norms: non-intervention, equal sovereignty of states and the general prohibition of the use of force, on the one hand, and the protection of human rights and the prevention of mass atrocities and genocide on the other.⁷⁵ The Kosovo War sharpened the contrasts. Western governments and lawyers argued for the legality, or at least legitimacy, of the intervention. This led to the idea that war was illegal but morally necessary.⁷⁶ With regard to the potential for misuse, these concepts are highly contested, mainly by

64. Dinstein, above n. 60, at 205-13, 253-5; on the armed attack requirement: T. Ruys, *Armed Attack' and Art. 51 of the UN-Charter. Evolutions in Customary Law and Practice* (2013).

65. See, for example, R. van Steenberghe, 'The Law of Self-Defence and the new Argumentative Landscape on the Expansionist's Side', 29 *Leiden Journal of International Law* 43, at 43-5 (2016).

66. S. Murphy, 'Terrorism and the Concept of Armed Attack in Art. 51 of the U.N. Charter', 43 *Harvard International Law Journal* 41, at 50 (2002).

67. A. Lang, 'Legal Basis for UK Military Action in Syria', *House of Commons Briefing Paper 7404* (2015), <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7404#fullreport>, at 14-15.

68. Wissenschaftlicher Dienst des Bundestags, 'Sachstand. Staatliche Selbstverteidigung gegen Terroristen. Völkerrechtliche Bewertung der Terroranschläge von Paris vom 13. November 2015', WD-2-3000-203/15, at 12.

69. Mainly developed by A. Deeks, 'Unable or Unwilling. Towards a Normative Framework for Extraterritorial Self-Defense', 52 *Virginia Journal of International Law* 483 (2012).

70. Consolidate Version of the Treaty of the European Union OJ C 326, 26 October 2012, 13-390.

71. P. Koutrakos, 'External Action: Common Commercial Policy, Common Foreign and Security Policy, Common Security and Defense Policy', in C. Chalmers and A. Anthony (eds.), *The Oxford Handbook of European Union Law* (2015) 217, at 291.

72. J. Brunnée and S. Toope, 'Slouching Towards New Just Wars: The Hegemon after September 11th', 18 *International Relations* 405, at 408-9 (2004); Neff, above n. 53, at 323-5.

73. D. Zupan, *War, Morality, and Autonomy. An Investigation into Just War Theory* (2004).

74. G. Evans, *The Responsibility to Protect* (2009).

75. von Arnould, above n. 61, at 522-3.

76. For the shape of the legal argument see M. Koskeniemi, 'The Lady Doth Protest Too Much – Kosovo, and the Return to Ethics in International Law', 65(2) *The Modern Law Review* 159-75, at 159 (2002); for a variant of the moral necessity argument see: B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *European Journal of International Law* 1, at 14 (1999).

Table 1 Generalised Outcome Scheme

	Decisive (absolute majority)	Dominant (relative majority)	Influencing (not majority, but not smallest number)	Minority Position (smallest number of arguments)
Instrumentalism	Case X	Case Y		
Formalism			Case X	Case Y
Natural Law			Case Y	Case X

non-Western countries. In the end, they do not significantly change the *ius ad bellum* and the prohibition of the use of force.⁷⁷

In the framework of these concepts, formalistic proceedings are essentially coloured by moral arguments and the inclusion of some higher metaphysical order. International law is thus understood as natural law if these legal justifications are used.

3.3 Hypotheses

Treating strategic culture as the independent variable raises several hypotheses about the use of legal justifications in Germany and Britain. It is expected that in Germany formalist arguments will prevail, while the UK will refer to instrumentalist arguments. Those will be decisive or at least dominant. Furthermore, in line with the theoretical premises of strategic culture, it is argued that the overall distribution of arguments in the legal understandings will be roughly equal on all levels, i.e. formalist arguments will prevail in Germany on all levels, instrumentalist in Britain.

3.4 Methods

The methods used in this work are based on the methodological foundation of content analysis. Applying this technique to speeches made in parliament offers important insights into the legal justifications made. This relies on the theoretical framework put forward by Geis *et al.* (2013).⁷⁸ In a second step, the justifications derived from the speech acts will be placed on a scheme between the three legal understandings.

3.4.1 Content Analysis of Parliamentary Debates

Content analysis offers a viable route for studying the legal justifications for and against the use of force made in parliament. These arguments reflect back on the constraining and the permissive factors bearing on the use of force in democratic countries.⁷⁹ This means seeing speech as a performative act that illuminates the wider cultural and argumentative landscape shared in a political community – in the case of the use of force, this is the strategic culture of a country – since arguments presented in parliament are under constant scrutiny by

the political opponent and the public and have to be defended against counterarguments.⁸⁰

Parliamentary debates therefore offer a greater insight into the arguments used by political elites than do statements by the government or similar documents. Given this theoretical background, a differing strategic culture should lead to differing permissive and restraining arguments across cases as well. Furthermore, it can be expected that the distribution of arguments in favour of and against the use of force among the three categories will be roughly similar in each case – if, for example, a country's strategic culture favours arguments based on natural law, it can be expected that the argument for going to war as well as those against it will be based mainly on natural law, since this type of argument will be the most persuasive.

The debates will then be analysed for the argumentative patterns according to the categories on the state level (government and opposition in Germany and the UK taken together), the government level (arguments put forward by both governments) and the opposition level (arguments brought forward by both oppositions). This affords a more in-depth analysis. In the next step, the most prevailing arguments in favour of and against the use of force in each country across government and opposition will be analysed. This further step is necessary since it is possible that speakers make arguments for and against the use of force in one speech, and it is therefore not sufficient to distinguish by opposition and government alone. If the majority of arguments in a country can be placed into one category and the majority of those of the other country in a different category, it will be reasonable to assume that a differing strategic culture is the cause of this.

3.4.2 Outcome: Scale between Formalism, Instrumentalism and Natural Law

The outcome of the content analysis will allow for the countries to be placed on a scale regarding the understanding of law prevailing in the arguments most often used. This scale consists of three understandings based on the alleged nature of international law: international law as formalism, international law as instrumentalism and international law as a form of natural law. This then allows the cases to be organised according to the following scheme (Table 1):

77. Dinstein, above n. 60, at 75-7; M. Vashakmadze, 'Responsibility to Protect', in B. Simma, D.-E. Khan, G. Nolte, A. Paulus & N. Wessendorf (eds.), *The Charter of the United Nations. A Commentary* (2012) 1201, at 1236.

78. Geis, Müller & Schönrig, above n. 2.

79. *Ibid.*, at 34.

80. *Ibid.*, at 36.

In this scheme, *decisive* refers to the understanding of international law that encompasses an absolute majority of arguments (measured in percentage). A case will be classed under *dominant* if a majority (but not absolute majority) of arguments can be sorted under a given understanding. *Influencing* refers to understandings that contain fewer arguments than the majority (thus not *dominant*) but not the fewest arguments per understanding. This is reflected by *minority position*. If two cases share the same number of arguments per understanding, they will be classed into the higher category. Since it is statistically unlikely that two cases will have exactly the same percentage, cases will be sorted into different categories only if they differ by two percentage points or more – given the low number of arguments in some levels of analysis.

As a result, every case has to be represented in the scheme three times, once for every understanding of international law (as shown by the fictional cases X and Y in the preceding illustration).

4 Data Set and Coding Scheme

The data set consists of 213 speeches (including interventions or questions in parliament that are treated as speeches) given in nine parliamentary debates. Starting with the first debate held in one of the two parliaments on 26 September 2014, it contains all debates held in Germany (Bundestag) and Britain (House of Commons) until the end of 2018. Seven of those debates are German,⁸¹ while two are British.⁸²

A total of 55.4% of the speeches were given by members of the government and 44.6% by opposition members (both German and British). In Germany the government-to-opposition ratio is 50.8% to 49.2%. In the United Kingdom, this ratio is 57.2% to 42.8%.

81. Held on 2 December 2015, Plenarprotokoll 18/142, <https://dip21.bundestag.de/dip21/btp/18/18142.pdf> (last accessed 24 February 2021); on 4 December 2015, Plenarprotokoll 18/144, <https://dip21.bundestag.de/dip21/btp/18/18144.pdf> (last accessed 24 February 2021); on 20 October 2016, Plenarprotokoll 18/196, <https://dip21.bundestag.de/dip21/btp/18/18196.pdf> (last accessed 24 February 2021); on 10 November 2016, Plenarprotokoll 18/199, <https://dip21.bundestag.de/dip21/btp/18/18199.pdf> (last accessed 24 February 2021); on 21 November 2017, Plenarprotokoll 19/2, <https://dip21.bundestag.de/dip21/btp/19/19002.pdf> (last accessed 24 February 2021); on 12 December 2017, Plenarprotokoll 19/4, <https://dip21.bundestag.de/dip21/btp/19/19004.pdf> (last accessed on 24 February 2021); and on 18 December 2018, Plenarprotokoll 19/58, <https://dip21.bundestag.de/dip21/btp/19/19058.pdf> (last accessed on 24 February 2021).

82. Held on 26 September 2014, 'Iraq: Coalition Against ISIL', Hansard Vol. 585: debated on Friday 26 September 2014, <https://hansard.parliament.uk/Commons/2014-09-26/debates/1409266000001/IraqCoalitionAgainstISIL> and 'ISIL in Syria', Hansard Vol. 603: debated on Wednesday 2 December 2015, <https://hansard.parliament.uk/commons/2015-12-02/debates/15120254000002/ISILinSyria>.

The coding scheme draws on the codes developed by Geis *et al.*⁸³ and substantially refined by Wagner.⁸⁴ Given that in their work the focus is on the political reasons for the use of force and not the legal justifications, adaptations have to be made. The aforementioned authors provide a rather broad coding scheme concerning international law – for example, *enforcement of international law*; *support of the UN, covered by international law*, and *lack of UN mandate/weakening of UN through war*. Codes such as *Enemy Image*, *Warfare as Punishment* and *Solidarity with allies* are based on the work by Wagner.⁸⁵ Every argument made by speakers that can be considered as a legal justification for the use of force will be sorted into one of the codes. In this context, argument is understood as a logical connection between the presence or absence of a given legal concept (the code) that therefore allows or precludes the use of force. This creates a data set that is open to statistical, qualitative and quantitative research. The actual coding has been done by the author using the software Nvivo.

The codes are divided into the three understandings of international law. The codes are designed to cover both explicit and implicit references to legal debates and justifications for the use of force. For example, the concept of *unable-or-unwilling* is used as a coding of its own as well as in connection with Res. 2249 and the use of force across borders. This serves a dual purpose: it allows differing understandings of international law to be covered, and also reduces coder bias since explicit references, i.e. naming the concept, as well as implicit reference to the legal elements of a concept will be included in the data set.

Formalism contains codes based on the formal procedures of international law. *Action should be with UN, not with nation states* covers the reference to the UN as a primary means of conflict resolution and a reduction of state's interests. *Self-defence according to Article 51, Collective self-defence according to Article 51, no situation of self-defence according to Article 51, Self-defence should be based on UN law (not EU law), No self-defence according to EU law and Self-defence according to EU law* are included since they reflect the formalist approach set out in the charter – with Article 51 being an exception to the general prohibition of the use of force and the primary role of UN law in the realm of war and peace. This primary role is explicitly referred to in Article 42 (7) TEU. *Covered by international law* and *Not covered by international law* are included in formalism since this argument is essentially legalistic. While no specification about the actual basis of the coverage is given, the argument does not include interests, power or morality. *Invitation by government* and *No invitation by government* reflect back to the formal legal basis of an intervention by invitation. *Res. 2249 allows use of force* and *Res. 2249 precludes use of force* are formalist arguments in the sense that they refer back to the legal

83. Geis, Müller & Schörnig, above n. 2, at 40-1.

84. Wagner, above n. 3.

85. *Ibid.*

grounding in UN procedures, with the Security Council authorising the use of force by means of a resolution. Analogous to *Covered by international law*, the codes *Unable-or-unwilling against international law* and *Unable-or-unwilling consistent with international law* cover arguments that ask for the formal validity of this concept (as opposed to *Force can be used across borders* as an instrumentalist code).

Instrumentalism contains codes that refer back to the tinkering with international law in the name of state's interests. *Against national interest and security*, *National interest and security*, *Fostering international influence*, and *Diminishing international influence*, *International consensus against use of force*, *International consensus for the use of force*, and *Solidarity with allies* capture arguments that make the state's interest explicit. The same line of reasoning is present in *Counter threat (no situation of self-defence or direct attack suffered)*. Rather than formally through Article 51, it is the interest and the subjectively perceived threat that produces (il)legality. These codes could be considered to be covering extralegal aspects and therefore not grasping arguments about international law per se. However, it is a choice to argue for a counter-threat situation and not for self-defence. This reflects the value and importance that is given to law as well as the idea about how law is generated. Along the lines of American and Scandinavian legal realism, it can be argued that the normativity of law derives from observable social facts. Law is responsive to changes in behaviour.⁸⁶ Thus, seemingly extralegal arguments become legal and may create new law. Another cluster of codes incorporates arguments about the circumvention of formal constraints – such as disagreement in the Security Council and therefore the inability to reach a decisive decision, a state of exception that leaves no room for deliberation or the support for the UN's true intention, which are interpreted by the state – based on the intention of states but not on morality. These codes are *Blockade in Security Council allows use of force without resolution*, *State of exception makes legality less important*, and *True intentions of UN supported by warfare*. *Force can be used across borders* is the instrumentalist framing of the unable-or-unwilling formula.

Natural law includes codes that refer back to morality. *Moral arguments preclude warfare or warfare as a breach of norms* covers the morality aspect in the broadest way. *Just War* and *Responsibility to Protect* are used if a speaker refers explicitly to these concepts. In order to cover all criteria of these concepts, further codes such as *Humanitarian catastrophe and protection of locals*, *Just cause* and *No just cause given*, *Last resort*, *peaceful means exhausted*, *Peaceful means not exhausted*, *Proportionality of means given*, *No proportionality of means given*, *Prospect of success given*, *No sufficient prospect of success given*, *Rightful authority given*, *No rightful authority given*, and *Right intention*, *warfare as morally justified*. This is done in order to cover speakers that refer to the single elements of the concept as well as those that name it. *Ene-*

my image and *Enemy image not sufficient* cover another layer of morality-based arguments in the sense that degrading the enemy upgrades one's own position and moral standpoint. The enemy is portrayed as essentially wicked and evil. *Warfare as enforcement of international law*, *Warfare as punishment* and *Warfare should not be used as punishment* ask for the reasons for going to war that were often given in Just War theories.

5 Findings

The findings are presented in five steps. The first step of the analysis will be the state level, where the overall distribution of arguments is compared. In the second step the arguments made in favour of and against the use of force advanced by the governments and, in the third step, by the oppositions, respectively, will be compared. This allows for the cases to be placed on the scale between the three understandings of international law. The analysis led to evidence of strategic culture being modestly influential. Formalism is dominant on the state level in Germany, but instrumentalist and natural law understandings are both influencing. Instrumentalism is dominant on the state level in Britain. However, there are similarities between the cases: both governments rely heavily on instrumental arguments. The German opposition, however, focuses mainly on formalist arguments, while the British opposition offers natural law-based arguments. Thus, the findings run counter to the assumption that the overall distribution of arguments should be roughly comparable.

5.1 State Level

The state level shows differences between the two cases. In Germany 37.0% of arguments are formalist, 31.1% instrumentalist and 31.8% natural law arguments. In the UK 19.3% are formalist arguments, 41.6% are instrumentalist and 39% are natural law arguments (Figure 1).

It shows a clear difference in the prevalence of arguments. In Germany, a majority of arguments are formalist, rendering this understanding dominant. However, there are a significant number of instrumentalist and natural law arguments in Germany. Since these differ by less than 1%, both are considered to be influencing. In the UK significantly more arguments are based on instrumentalism and natural law than on formalism. Here, instrumentalism is dominant. Thereby, the hypothesis is validated: the UK relies on instrumentalist and natural law arguments to a higher degree, while Germany uses more formalist arguments. However, the large number of arguments based on instrumentalism in Germany indicates modest evidence for a causal relationship between strategic culture and understandings of international law only.

86. Jütersonke, above n. 53, at 328-36.

Figure 1 Comparison of Formalism, Instrumentalism and Natural Law on the State Level Germany/UK (as of percentages per category) Figures and tables have been designed and compiled by the present author.

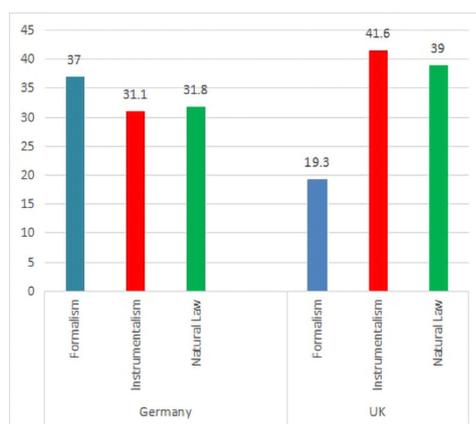
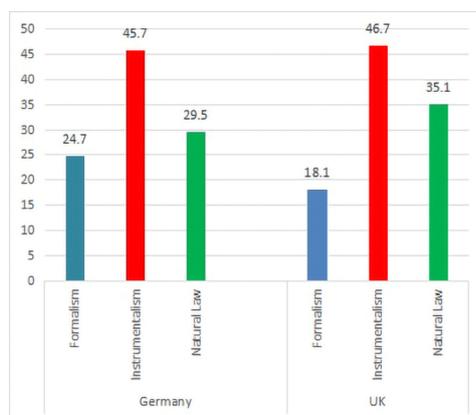


Figure 2 Justifications Offered by the German and British Governments (as of percentages per category)



5.2 Government Level

Comparing the arguments set forth by both governments leads to modest evidence concerning the hypotheses. A total of 24.7% of arguments by the German government are formalist, 45.7% are instrumentalist and 29.5% are natural law arguments. In the UK 18.1% are formalist arguments, 46.7% instrumentalist and 35.1% natural law (Figure 2).

While the German government uses more formalist arguments, a majority of arguments are instrumentalist in both cases. Thus, instrumentalist understandings are dominant in both cases. The British government uses more natural law arguments. Again, this is modest evidence regarding the hypotheses. Formalist arguments are more important to the German government but not to the extent of becoming more important than instrumentalist arguments. However, the hypothesis is validated with regard to the relatively higher reliance on instrumentalist and natural law arguments in Britain. The hypothesis, however, is refuted on the basis that the distribution of arguments is not similar between levels of analysis.

5.3 Opposition Level

In Germany 53.9% of the arguments made by the opposition are formalist, only 9.5% are instrumentalist and 36.5% are natural law based. In Britain 21.3% are formalist, 32.3% instrumentalist and 46.4% natural law arguments (Figure 3).

malist, 32.3% instrumentalist and 46.4% natural law arguments (Figure 3).

The heavy reliance on formalist arguments and the sparse use of instrumental arguments by the opposition in Germany run along the lines of the hypotheses. Formalism is dominant in the case of the German opposition. In Britain a relative majority of arguments are natural law based, while instrumentalism is the second strongest category. While this is in line with the expected outcomes, the distribution of arguments is not similar across the government and the opposition, thereby refuting the hypothesis. This is blatant in the case of Germany, but traceable in the British case as well.

5.4 Arguments Supporting the Use of Force

The next step analyses arguments supporting the use of force across categories and across government and opposition. This is necessary since not every argument made by the government or the opposition might be an argument in favour of or against the use of force, respectively. In both cases – contrary to the hypothesis – instrumentalist approaches dominate (47% in Germany and 44.8% in the UK). Natural law arguments do play a more important role in the UK, with 42.2% of arguments following a natural law understanding (29.2% in Germany). Formalism is a minority position in both cases, with 23.8% of arguments in Germany and 13.1%

Figure 3 Justifications Offered by the German and British Opposition (as of percentages per category)

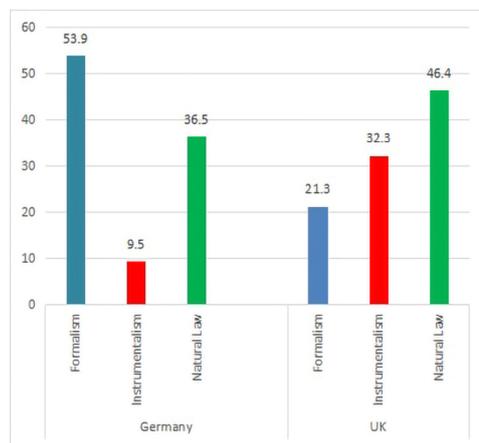
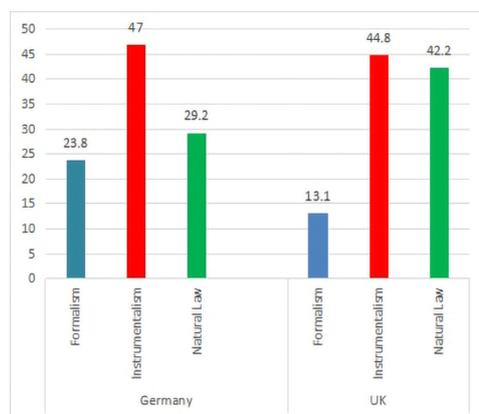
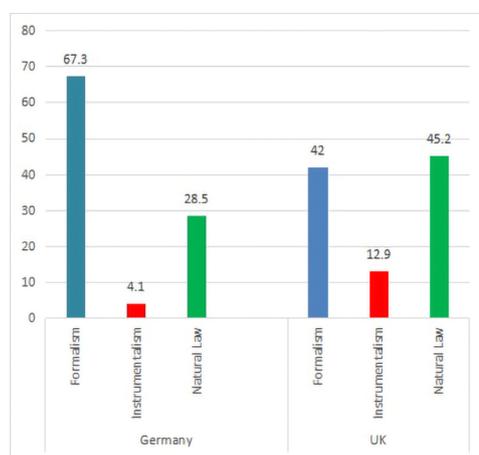


Figure 4 Arguments Supporting the Use of Force in Germany and the UK (as of percentages per category)



78

Figure 5 Arguments against the Use of Force in Germany and the UK (as of percentages per category)



of arguments in the UK. It differs, however, from the other levels of analysis, thereby challenging the hypothesis (Figure 4).

5.5 Arguments Made against the Use of Force

The next step analyses arguments against the use of force across categories and across government and opposition. Analogous to the previous step, this is necessary because not every argument made by the opposition might be an argument against the use of force. In Germany, formalist arguments against the use of force are decisive, with 67.3%. Natural law understandings are influencing with 28.5%, while instrumentalism is in

a clear minority position. In the UK, natural law arguments are dominant, with 45.2%, while formalist arguments are influencing, with 42.0%. Instrumentalist arguments are a minority position, with 12.9%. Contrary to the hypothesis, the pattern of distribution does not resemble the distribution regarding the arguments in favour of the use of force (Figure 5).

UN-Charter, International consensus against use of force, and No sufficient prospect of success given are used in Germany only. Given the decisiveness of formalist arguments, the hypothesis that Germany will rely more on

Table 2 Placing of Germany/UK Regarding the State Level

	Decisive	Dominant	Influencing	Minority Position
Formalism		Germany		UK
Instrumentalism		UK	Germany	
Natural Law			Germany and UK	

Table 3 Placing of Germany/UK Regarding the Arguments in Favour of the Use of Force

	Decisive	Dominant	Influencing	Minority Position
Formalism				Germany and UK
Instrumentalism		Germany/UK		
Natural Law			Germany and UK	

formalism is validated in regard to the arguments against the use of force.

5.6 Placing the Cases on the Scale

The results point towards modest overall evidence in favour of the hypotheses. The patterns of justification do differ along the lines of Germany having a higher number of arguments based on formalism, while instrumentalist and natural law arguments are more often used in Britain. While formalism is the legal justification that is most often used in Germany, natural law and instrumentalist understandings are used frequently.

The observation of modest evidence favouring the hypotheses, however, is challenged as soon as another level of analysis is included. According to the hypotheses, the distribution of arguments should be roughly similar regardless whether all arguments, the arguments by the government and the opposition or the arguments in favour of or against the use of force are examined. While the legal justifications brought forward by the British government are of comparable – though not the same – distribution to the state level, a clear shift towards instrumentalism is evident in the case of the German government. This contradicts the hypothesis.

A similar observation is made on the opposition level, where, at first glance the German case behaves as expected in showing a strong inclination towards formalism. This, however, stands in contrast to the observation made on the government level and therefore contradicts the hypothesis. This holds true for the British case as well.

A look at the arguments made in support of the use of force across the government-opposition divide shows a remarkable tilt in the German and the British case towards instrumentalism. Furthermore, in the UK natural law arguments are used more frequently. In both cases the arguments made against the use of force show a tilt towards formalism and natural law. The higher overall consensus in Britain is remarkable. All in all, this

presents – at best – modest evidence in support of the hypothesis.

In addition to that, the results pose serious challenges to the research framework of the present article. Had a clear distributive pattern spanning all levels of analysis emerged, the ranking of the cases on the scale would have been straightforward. With the results pointing to the contrary, this becomes problematic. One possible way forward might be discarding the placing on the scale. However, the ranking of cases and the inclusion of more cases in future research remains a possibility. Using the state level as a reference for placement covers the argumentative landscape, while analysing the arguments in favour of and against the use of force covers those arguments that are considered the most convincing. Making use of the latter has the advantage of circumventing the problem that a speaker may make arguments in favour of and against the use of force in the same speech.

This leads to the following placing for the state level (Table 2).

In the German case formalist understandings of international law are *dominant* but present a *minority position* in Britain. Instrumentalism is *dominant* in the UK and presents an *influencing* position in Germany, while natural law is *influencing* in both cases.

With regard to the arguments in favour of the use of force, the scale differs (Table 3).

Formalism is a *minority position* in both cases. The cases are similar in regard to natural law as well, which is *influencing*. Additionally, instrumentalism is *dominant* in Germany and Britain.

A look at the arguments against the use of force reveals a different outcome again (Table 4).

For Germany, the rejection of warfare on formalist grounds is *decisive*, while this plays only an *influencing*

Table 4 Placing Germany/UK Regarding the Arguments against the use of Force

	Decisive	Dominant	Influencing	Minority Position
Formalism	Germany	UK		
Instrumentalism				Germany and UK
Natural Law		Germany and UK		

role in Britain. However, in both cases instrumentalism is a *minority position* and natural law is *dominant*.

6 Conclusion

The analysis of legal justifications has led to results that often run counter to the hypothesis. There is evidence that strategic culture is modestly influential – the broader argumentative landscape on the state level differs, formalism being more important in Germany than in the UK. More striking, however, are the similarities. Instrumentalism is *dominant* in both cases when it comes to arguing in favour of the use of force. Formalism is *decisive* in Germany and still *influencing* and only slightly less relevant than natural law in the UK when it comes to arguing against the use of force. Furthermore, the findings run counter to the assumption that the overall distribution of arguments should be roughly equal on all levels of observation. Additionally, it became evident that the overall level of legal discussions was low, with relatively little reference made to actual legal concepts – it was even lower in Germany than in the UK. On the other hand, it is open to debate whether most codes in the category of formalism might signify a distinct legal concept and therefore present a sophisticated level of debate. The fact that natural law played an important role in both debates, however, reflects the similar standing of humanitarian concerns in both strategic cultures and the role of ethics to justify the use of force as well as the refusal to use military means.

This modest evidence leads to broader questions. German and British strategic cultures may be more alike than assumed and thereby may significantly challenge the research framework. Nevertheless, strategic culture is broader than legal justifications, and serious differences between the use of military force and the way warfare is conducted remain. Another means by which this result could be challenged is the structure of the codebook. A possible explanation for the outcome of the analysis might be the distribution of codes across the legal understandings.

Regardless of these limitations, the research design of the present work can be adapted to include more cases and to study more usages of force. The generalisability of the outcomes needs to be determined by further research. This includes building a larger data set and executing the coding by more persons in order to reduce possible coder bias. Given the prevalence of instrumen-

tal understandings in both cases, it may be assumed that these will play a major role in other democracies as well. The perception of the enemy might have influence on the perceived need to wage war regardless of formal arguments against it (as in the Kosovo War). ISIS has used massive violence in order to fulfil its goal and deliberately spread terror. The perceived direct threat stemming from ISIS may have contributed to the legal justifications. It may be absent in other military missions and may alter the legal justifications. The direct threat, however, could have been used to make formalist arguments based on self-defence instead of instrumentalist understandings. In addition to that, the modalities of a given use of force such as the question of what type of military involvement is expected might lead to different legal understandings. Thus, there might be a link between strategic culture, legal discourse and the modalities of intervention. Taking this into account would be beneficial for further research. Furthermore, it might be that the common membership in alliances has streamlined the countries' strategic culture, thereby giving credit to the second generation of research on strategic culture. That would further strengthen the previous findings⁸⁷ that in missions framed as alliance politics, internal constraints are often overridden. This might also be the case when it comes to legal justifications. Important further work along these lines would be on cases where moral condemnation and direct threat are largely absent. In addition, studying countries that are not part of a military alliance would be beneficial. Including uses of force with a rather clear-cut formal legal basis might lead to interesting results – will instrumental arguments prevail in cases that offer clear formal arguments? Adaptions on the level of the coding scheme may be necessary to include the legal particularities of other wars and to even out biases introduced in the coding scheme. The main trio, formalism, instrumentalism and natural law, however, can be used for further studies.

If instrumentalist arguments are an important part of the debate in the cases studied, what does this say about the importance of international law? The rather missing debate on actual legal concepts in parliament could be interpreted as law playing a minor role in decision processes in general. Furthermore, the present work's findings could be interpreted as supporting a realist reading

87. Wagner, above n. 5, at 130.

of international law – law and politics are inseparable.⁸⁸ This holds especially true given the current debates on the blockade in the Security Council and the deterioration of international law in general. It seems that formal law is invoked when this is in the interest of the speaker – as in the case of the German opposition – but is marginalised if national interest is concerned. The case of Germany, with its self-image of promoting a rule-based global order, lends this argument even more strength. If national security and power come into play, adherence to formal legal contents may be expected to drop – even though they are not completely abandoned. Further studies, however, are necessary. The question of strategic culture and its connection to international law is open to continuing research.

88. A. Fischer-Lescano and P. Liste, 'Völkerrechtspolitik. Zur Trennung und Verknüpfung von Politik und Recht der Weltgesellschaft', 12 *Zeitschrift für Internationale Beziehungen* 209, at 212 (2005).