

Challenging the “Unwilling or Unable” Test

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The workshop on “Self-Defence Against Non-State Actors” organised by the Max Planck Institute in Heidelberg on 4.-5.11.2016 was marked by very interesting and heated debates among *jus ad bellum* experts about a great variety of issues. In this very brief op-ed I will focus on the famous “unwilling or unable” (UoU) test of self-defence. Proponents of this test claim that the case of Syria and adoption of United Nations Security Council (UNSC) resolution 2249 led to a “newly accepted change in the international law of self-defence” according to which “any State can now lawfully use force against non-State actors (NSA) (terrorists, rebels, pirates, drug cartels, etc.) that are present in the territory of another State if the territorial State is unable or unwilling to suppress the threat posed by those non-state actors”.¹ However, there are good reasons to argue that the UoU test was “unable” to make its entry in positive international law and that the international community of States could be “unwilling” to do so in the future.

I. Unable: The Positiveness of the UoU Test Is Doubtful for at Least Three Reasons

No acceptance by the UNSC: Contrary to what some scholars suggested, UNSC resolution 2249 provides no support for the UoU test. This resolution does not refer to self-defence, even less so to the UoU test. Several elements, including the context of adoption of this resolution, indicate on the contrary that there was a consensus among UNSC members not to refer to self-defence – which was in sharp contrast with other similar resolutions in the past.²

No agreement between coalition members themselves: While the members of the coalition claimed that they were entitled to act against the Islam-

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¹ M. P. Scharf, How the War Against ISIS Changed International Law, Case W. Res. J. Int'l L. 48 (2016), at 53.

² See K. Bannelier, The Joint Committee’s Drones Report: Far-Reaching Conclusions on Self-Defence Based on a Dubious Reading of Resolution 2249, Journal on the Use of Force and International Law 3 (2016), <<https://papers.ssrn.com>>.

ic State of Iraq and the Levant (ISIL) on the basis of individual or collective self-defence, the grounds for this claim seem to vary. Several states (Germany, Belgium, Norway or the Arab states) did not refer to the UoU test in their letters to the UNSC, despite its previous use by the USA.³ France, for instance, seemed to be reluctant to endorse this new theory.⁴

No endorsement by other UN members: The debates within the United Nations (UN) demonstrate that the UoU test was not shared by the vast majority of States. In February 2016, for instance, the Non-Aligned Movement reaffirmed its constant position that “consistent with the practice of the UN and international law, as pronounced by the International Court of Justice (ICJ), Art. 51 of the Charter of the United Nations (UN Charter) is restrictive and should not be rewritten or re-interpreted”.⁵

II. Unwilling: The International Community of States Could Hesitate to Accept the UoU Test In Positive Law for Several Reasons Including the Following

Blurring the distinction between obligations of conduct/result: By suggesting that a State will not be protected anymore by Art. 2 § 4 of the UN Charter and International Law if it is “unable” to defeat some NSA on its territory, the UoU test profoundly alters the nature of the due diligence principle. It is well established today that, under this principle, States have obligations of conduct, rather than result: If they know (or ought to have known) that their territory is used for acts contrary to the rights of other States, they need to deploy all their best efforts to put an end to this threat, even if the outcome cannot be ensured. Claiming that a State has an “obligation of result” to eliminate all terrorists threats on its territory in order to be protected against foreign intervention could be highly risky and even absurd: Western leaders themselves often make declarations about how “long and difficult” it is to eliminate terrorist threats in their territory. Does this mean that the UoU test could apply in such cases?

A risk for multilateralism: The UoU test could lead States to consider that self-defence always offers a sufficient legal basis for military intervention abroad and there is thus no need to search multilateral solutions (interna-

³ See O. Corten, The “Unwilling or Unable” Test: Has It Been, and Could It Be, Accepted?, LJIL 29 (2016), at 777 et seq.

⁴ Listen to the position of the head of the legal office of the French MFA *François Alabrune* here: <<https://colloquesfdi2016com.files.wordpress.com>>(1:07:00 - 1:09:00).

⁵ S/PV.7621, 15.2.2016, at 33 et seq.

tional cooperation, consent of the State concerned, use of force mandate by the UNSC ...) in the fight against hostile NSAs. While the initial scholarly proposals on the UoU test put emphasis on the “prioritisation of consent and cooperation”,⁶ these elements were set aside in the case of Syria (because of the United States (US)-led coalition’s hostility to the regime of Bashar-Al-Assad). It is more striking that the recent report of the Joint Committee on Human Rights of the United Kingdom (UK) Parliament on the UK Government’s drone policy completely neglects to discuss all these alternative solutions – considering that self-defence and the UoU test provide a sufficient legal basis for the use of lethal force for counter-terrorism purposes in foreign countries.⁷

A risk for the jus contra bellum system: The UoU test opens the gate to unbridled unilateralism in relation with the use of force. If this new theory becomes part of positive law, it could entirely unravel the shroud of collective security and seriously endanger the system of the prohibition of the use of force. To paraphrase the ICJ, this new theory could be regarded as “the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organisation, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States ...”.⁸ Indeed, we could ask ourselves if the western proponents of this theory are ready to accept that, tomorrow, it could be used by States like China, Russia or other regional powers in order to undertake military interventions against “threatening” NSAs abroad. This could lead us back to the pre-Art. 2 § 4 universe of International Law where the doctrines of self-help, self-preservation and “vital interests” of States were dominant.

As a conclusion I could recall the “Plea Against the Abusive Invocation of Self-Defence as a Response to Terrorism”, initiated by O. Corten and six other scholars (including the author of these lines)⁹ and signed, in September 2016, by more than 240 international lawyers and professors from 36 countries.¹⁰ One of the main reasons for the adoption of this plea was, precisely, to challenge the UoU test. This is just another proof of the fact that

⁶ A Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, *VJIL* 52 (2012), at 519.

⁷ See K. Bannelier (note 2).

⁸ *Corfu Channel Case (UK v. Albania)*, Merits, Judgment, ICJ Reports 1949, at 35.

⁹ See O. Corten, A Plea Against the Abusive Invocation of Self-Defence as a Response to Terrorism, *EJIL Talk!*, 14.7.2016, <<http://www.ejiltalk.org>>.

¹⁰ See <<http://cdi.ulb.ac.be>>.

this test is still far away from universal acceptance, both in international legal scholarship and State practice and *opinio juris*.