

Effective Territorial Control by Non-State Armed Groups and the Right of Self-Defence

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It is now generally accepted that an armed attack carried out by a non-State armed group may activate the right of self-defence in Art. 51, Charter of the United Nations (UN Charter), but States relying on self-defence must nevertheless ensure that the conduct of the non-State armed group is attributable to the territorial State. The International Court of Justice in the *Nicaragua* case defined this threshold of attribution as one of effective control over the conduct of the non-State armed group.¹

As the Islamic State of Iraq and the Levant (ISIL) threat reveals, in some situations an armed attack by a non-State armed group is simply not attributable to the territorial State from which it emanates, and may even pose an existential threat to States like Iraq and Syria. Confronted with this difficulty, several States have advanced alternate justifications for the exercise of self-defence, offering weaker links of attribution between the activities of terrorist groups and the territorial States that “harbour” them,² or States that are unwilling or unable to effectively take action against non-State armed groups operating from their territories.³ These propositions enjoy only limited support in State practice.

In the ISIL context, a handful of States offer a new justification for the use of force in Syria while acting in the collective self-defence of Iraq and other States. The most elaborate articulation of this view was made by Germany in its letter to the Security Council in accordance with Art. 51, UN Charter on 10.12.2015, which states:

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¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, 14, para. 195.

² A. Nollkaemper, Attribution of Forcible Acts to States: Connections between the Law on the Use of Force and the Law of State Responsibility, in: N. M. Blokker/N. Schrijver (eds.), *The Security Council and the Use of Force: Theory and Reality, A Need for Change?*, 2005, 133, 136 et seq.

³ A. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defence, *Va. J. Int’l L.* 52 (2012), 483.

“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, are therefore justified under Article 51 of the Charter of the United Nations to take necessary measures of self-defence, even without the consent of the Government of the Syrian Arab Republic.”⁴

Earlier in 2015, Canada and Australia hinted at this argument, suggesting that their operations were not directed against Syria or its people.⁵ Norway and Belgium followed suit in 2016, each with a letter emphasising – as Germany did – that the measures taken in collective self-defence under Art. 51, UN Charter are directed against the ISIL and not against Syria.⁶ In contrast, the letters from Canada, Australia, Norway and Belgium do not expressly discard the need for Syria’s consent. Instead, they rely on Iraq’s letters to the Security Council requesting international support “with a view to denying terrorists staging areas and safe havens” in Syria.⁷

Notably, Germany, Norway and Belgium all refer to United Nations Security Council (UNSC) Resolution 2249 (2015), in which the Security Council found the ISIL to be an “unprecedented threat to international peace and security” based to some extent on “its control over significant parts and natural resources across Iraq and Syria”.⁸ The operative part of this Resolution calls upon Member States to:

“take all necessary measures, in compliance with international law ... on the territory under the control of ISIL ... to eradicate the safe haven they have established over significant parts of Iraq and Syria”.⁹

UN Secretary-General *Ban Ki-Moon* advanced the same line of reasoning in his response to United States airstrikes in Syria, stating that “the strikes took place in areas no longer under the effective control of that Government”.¹⁰ In a similar vein, the United Kingdom justified the use of force against “ISIL sites” and “military strongholds” in Syria to ensure that Iraq is able to regain control of its borders.¹¹ The United States has also affirmed

⁴ UNSC (10.12.2015) UN Doc S/2015/946.

⁵ UNSC (31.3.2015) UN Doc S/2015/221; UNSC (9.9.2015) UN Doc S/2015/693.

⁶ UNSC (3.6.2016) UN Doc S/2016/513; UNSC (7.6.2016) UN Doc S/2016/523.

⁷ UNSC (25.6.2014) UN Doc S/2014/440.

⁸ UNSC Res. 2249 (2015) UN Doc SC/RES/2249 (2015), preambulatory para. 5.

⁹ UNSC Res. 2249 (2015) (note 8), para 5.

¹⁰ *R. Goodman/S. Knuckey*, Remarkable Statement by UN Secretary-General on US Airstrikes in Syria, (23.9.2014), available at <<https://www.justsecurity.org>>.

¹¹ UNSC (25.11.2014), UN Doc S/2014/851.

Iraq's right to defend its borders in relying on Syria's unwillingness and inability to confront safe havens within its territory.¹²

Justifying the exercise of self-defence on the basis that a State has lost effective control over parts of its territory is problematic for several reasons. To begin with, as long as the State continues to exist, its loss of effective control of parts of its territory does not justify further compromising its sovereignty and territorial integrity by resorting to force without its consent. For as long as President *Bashar al-Assad's* Government represents Syria, and the ISIL has not established an internationally recognised *de facto* regime,¹³ measures "directed against" the ISIL constitute an unlawful use of force against Syria.

Secondly, the reliance on UNSC Resolution 2249 (2015) to justify the use of force in Syria is misplaced. The Resolution neither authorises forcible measures under Chapter VII, UN Charter, nor endorses the exercise of self-defence against Syria. On the contrary, by addressing the ISIL as a unified threat to international peace and security across Iraq and Syria, the Security Council fails to acknowledge the distinct legal justifications for the use of force in Iraq, which requested international assistance, and Syria, which did not.

Finally, the suggestion that the loss of effective territorial control is a more objective formulation of the "unwilling or unable" test¹⁴ is unpersuasive. The attempt to sidestep Syria's consent by directing the use of force against a non-State armed group operating in areas no longer under its effective control is not an argument rooted in the attribution of responsibility, and would instead have the effect of conferring some degree of international personality upon the ISIL. In any event, without support in State practice, this proposition is unconvincing.

In conclusion, reliance on effective territorial control by a non-State armed group is at present no more than political rhetoric that takes advantage of the context-specific territorial dimension of the ISIL threat. As such, the legal justification for the use of force in Syria remains obscure. A more cautious approach to overcoming this difficulty could be the "substantial involvement" of the territorial State, which finds mention in the

¹² UNSC (23.9.2014) UN Doc S/2014/695.

¹³ C. Henderson, Editorial Comment: The Use of Force and the Islamic State, *Journal on the Use of Force and International Law* 1 (2014), 209, 215.

¹⁴ M. Lewis, What Does the "Unwilling or Unable" Standard Mean in the Context of Syria?, 12.9.2014, available at <<https://www.justsecurity.org>>.

Definition of Aggression,¹⁵ but has so far not been invoked by participating States.¹⁶

¹⁵ Art. 3 (g) UNGA Res. 3314 (XXIX), 14.12.1974, UN Doc A/RES/29/3314.

¹⁶ O. Corten, Self-Defence Against Terrorists: What Can be Learned from Recent Practice (2005-2010)?, KGZ (Journal of International Law and Diplomacy) 109 (2010), 129, 152.