

The Right to Self-Defence Against Non-State Actors – Criteria of the “Unwilling or Unable” Test

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Some of the States involved in the fight against the Islamic State of Iraq and the Levant (ISIL) in Syria assert that they have a right to individual and/or collective self-defence for two reasons: because ISIL perpetrates armed attacks and because Syria is “unwilling or unable” to prevent the commission of those attacks.¹ The “unwilling or unable” test is not part of contemporary international law.² Indeed, State practice remains unclear as to the requirements for the implementation of this test, when it is applied to a State from which a non-State actor commits armed attacks, in the absence of any positive support of that State. This paper aims to present what those requirements should be.

A State has a customary obligation of due diligence to prevent the commission of unlawful activities from within its territory or any other area under its exclusive control against another State.³ Thus, a State must adopt all measures reasonably available to it aiming to prevent the continuation of armed attacks against another State, from any area under its exclusive control. In this author’s view, the territorial State or the victim State should assess if all possible means are resorted to in order to suppress armed attacks launched by a non-State actor from the territorial State’s confines.⁴ Indeed, to require that another entity determines whether a State applies its obligation of due diligence in preventing the misuse of its territory, would be too

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¹ Letter dated 23.9.2014 from the USA to the UNSC, UN Doc S/2014/695 (2014); Letter dated 31.3.2015 from Canada to the UNSC, UN Doc S/2015/221 (2015); Letter dated 9.9.2015 from Australia to the UNSC, UN Doc S/2015/693 (2015); Letter dated 24.7.2015 from Turkey to the UNSC, UN Doc S/2015/563 (2015); *D. Cameron*, Statement in the House of Commons on his response to the Foreign Affairs Select Committee (FAC) report on military operations in Syria, 2015 <<https://www.gov.uk>>.

² *O. Corten*, The Unwilling or Unable Test: Has it Been, and Could it Be, Accepted?, *Leiden Journal of International Law* 29 (2016), 780 et seq.

³ *The Corfu Channel Case*, ICJ Reports 1949, 22.

⁴ *A. S. Deeks*, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, *Va. J. Int’l L.* 52 (2012), 495.

time consuming and would thus undermine the rapidity of a response in self-defence by the victim State. In order to assess whether a State respects its obligation of conduct in addressing armed attacks from the area under its jurisdiction, the victim State should check: whether there has been a continuous pattern of armed attacks; whether the State criminalises the commission of armed attacks; whether the State conducts detailed investigations into those attacks; whether the State arrests, prosecutes, or extradites the authors of those attacks; whether the State complies with United Nations (UN) Security Council resolutions, if any, that sanction the authors of those attacks. A careful assessment of all these facts is needed before any determination can be made as to the “inability” of the territorial State.

If a State is “unable” to suppress, on its own, the perpetration of armed attacks by a non-State actor from within its territory or any other area under its exclusive control, in this author’s opinion, it must ask the victim State or other State(s) for assistance, or it must accept the assistance that may be offered to it.⁵ The request for assistance by the territorial State is viable as long as it is clear, free, and given by the government of the State. Such is the most effective authority in the State, able to represent it, nationally and internationally, independently from its legitimacy.⁶ If needed, the victim State must require from the territorial State to comply with its obligation to suppress armed attacks from its territory, when necessary in collaboration with it or other State(s). The territorial State has to agree with any international assistance that is, under the given circumstances, necessary and proportionate with the aim of preventing further armed attacks perpetrated from any area under its jurisdiction. This assistance could include the use of armed force.

If the “unable” territorial State fails to seek or accept assistance in the prevention of the perpetration of further armed attacks by a non-State actor from any area under its exclusive control, it is here argued that the State is “unwilling” to meet its obligation to prevent those attacks.⁷ If the territorial State no longer has a government able to control offensive non-State actors in its territory, it is *per se* “unable”. In those situations of an “unwilling” State or an “unable” failed State, the victim State should have a right to self-

⁵ In that sense: *K. N. Trapp*, Can Non-State Actors Mount to an Armed Attack?, in: M. Weller, *The Oxford Handbook of the Use of Force in International Law*, 2015, 695.

⁶ The USA could not ignore the explicit and free offer for collaboration made by the government of Syria in the fight against ISIL, for the reason that it did not want to be associated with the Al-Assad regime.

⁷ *K. N. Trapp*, Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors, *ICLQ* 56 (2007), 147.

defence against the non-State actor. The action in self-defence must be necessary and proportional.⁸ Thus, it should target only the non-State actor, author of the armed attacks, and the level of force should be adapted to its objective, i.e. repelling the armed attacks.

If these *de lege ferenda* requirements in the implementation of the “unwilling or unable” standard are followed, a State could react in self-defence to armed attacks launched from a State that does not actively support them, in exceptional cases, when this seems reasonably necessary. An adequate balance would be struck between the territorial integrity of the State whose territory is used as a basis by a non-State actor for the commission of armed attacks, without any positive assistance of that State, on the one hand, and the security needs of the victim State, on the other hand.

⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, 94, para. 176.

