

The Fight against the 'Islamic State' in Syria and the Right to Self-Defence

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IRENE COUZIGOU, FEB 5 2016

Since the outbreak of the Syrian civil war in 2011, organised networks have spread out across borders, overtaking cities. The most famous of these is the 'Islamic State of Iraq and the Levant' (ISIL), more commonly known as 'Islamic State' (IS) (Flasch, 2015: 3). Militants of IS now control wide portions of territory in Iraq and Syria as well as an area in Libya. IS has killed and injured thousands of people and IS-related violence has led to the displacement of over a million people. Atrocities committed by the IS have extended to several other countries in the Middle-East, in West-Africa, and in Europe (Zerrouky, Audureau and Vaudano, 2015).

In response to attacks of IS, Iraq has requested that the United States and its allies assist it in defending itself against the group. Since September 2014, Iraq, together with the United States and several other states, has been using force against IS in Syria without the consent of the Syrian regime. Iraq acts on the basis of its right to individual self-defence and the other intervening states intervene on the basis of the right to collective self-defence. Self-defence, as well as the use of force within an authorisation given by the United Nations (UN) Security Council, constitute the two exceptions to the international prohibition on the use of force between states (Articles 51 and 42 UN Charter). An action in self-defence can be individual, when the victim state reacts to an armed attack, or collective, when other states react to an armed attack on the request of the victim state. France began its military intervention in Syria in September 2015, resorting to the rights to both individual and collective self-defence. After the terror attacks of IS in Paris on 13th November 2015, France extended its strikes, on the basis of the right to individual self-defence and asked for assistance. Several Western states, including the United Kingdom and Germany, decided to be involved in different ways in the fight against IS in Syria, invoking in particular the right to collective self-defence and, sometimes, also the right to individual self-defence. Russia too has been perpetrating strikes in Syria since November 2015 but these happen with the consent of that state. Consent by Syria to the resort to force by Russia precludes the wrongfulness of that act in relation to Russia and thus provides legal grounds for Russian military action (Article 20 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001).

The conduct of IS cannot be attributed to the Assad government and thus to Syria – the Assad regime being the most effective authority able to represent the Syrian state. Indeed, under international law, the conduct of a person or group of persons may be attributed to a state where the acting entity did so under the instructions, direction or control of the government of the state (Article 8 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001). Such control is not exercised by the Assad government over IS. Hence, the military interventions in Syria raise the question whether a right to self-defence against a non-state actor exists. Several states acting militarily in Syria have not been attacked by IS. Thus, the second question raised by the military actions in Syria is whether there is a right to self-defence in response to an armed attack that has not happened.

A Right to Self-Defence against Non-State Actors?

The right to self-defence is guaranteed in Article 51 of the UN Charter as well as in customary international law (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, ICJ Rep 1986 para 176). The bedrock principle of self-defence is that it may be invoked in response to an armed attack. In its *Nicaragua* Judgment, the International Court of Justice (ICJ) referred to Article 3(g) of the 'Definition of Aggression' appended

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to a resolution of 1974 of the UN General Assembly as concerning an 'armed attack' (*Id*, para 195). The Definition of Aggression can thus be used to define the concept of armed attack. Article 2 of this definition states that aggression is '...the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State....' (UN Doc A/RES/3314). Article 2 of the Definition of Aggression also specifies that an act of aggression must be of 'sufficient gravity'. Similarly, the ICJ has stated that the 'most grave forms of the use of force' constitute armed attacks (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, ICJ Rep 1986 para 191). Furthermore, for the Court, an armed attack must be carried out '...with the specific intention of harming' a state – e.g. of harming the vessels of a state (*Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, ICJ Rep 2003 para 64). Therefore, an armed attack must correspond to a severe use of armed force with a hostile character. The scope, duration and intensity of the armed force must be assessed to determine whether an armed attack has occurred. IS has clearly perpetrated attacks that have crossed the threshold of armed attacks.

The UN Charter and other regional defensive treaties do not envisage military defence against attacks committed by non-state actors. On the other hand, they do not exclude them. Could the state that is victim of an armed attack exercise its right to self-defence against a non-state actor, like IS, author of the attack? The ICJ has clearly stated that the Charter only 'recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State' (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep 2004 para 139). In another case, it declined to elaborate on whether actions by non-state actors would constitute an armed attack that would trigger an armed defensive response (*Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Rep 2005 para 147). States, and in particular the United States and Israel, have sometimes used force against non-state actors. After the defeat of the Taliban regime in November 2001, action in self-defence on the part of the United States and its allies was no longer directed against the state of Afghanistan that was not governed by the Taliban anymore, but directly against the Taliban forces and the Al-Qaeda terrorist organisation. At least at the beginning, the legality of this action against non-state actors was not contested (Gray, 2008: 204). In 2006 Israel took action in self-defence against Hezbollah in Lebanon, declaring that it was acting not against the state of Lebanon – to which it was not able to attribute Hezbollah's conduct – but against Hezbollah itself (UN Doc S/2006/515). Although many states criticised the disproportionate way in which Israel exercised its right to self-defence, they accepted that Israel enjoyed such a right in reaction to the attacks of Hezbollah (Van Steenberghe, 2010: 193). When, in other precedents, states invoked the right to self-defence against non-state actors, in particular terrorist organisations, third states were, however, reluctant to recognise the legality of the forcible action (Tams, 2009: 379-381). Thus, in recent state practice, there was no general and clear approval of the legality of the right to self-defence against non-state actors. This may change with the military interventions against IS in Syria.

Defensive action in Syria, without its explicit consent, affects its territorial integrity. There should therefore be a reason, other than the need to react to an armed attack, to enter into Syria's territory. States have an obligation to ensure that their territory is not used in detriment of other states (*The Corfu Channel Case (United Kingdom v Albania)*, ICJ Rep 1949 22). The United States, Canada, Australia and Turkey stated in their letters to the UN Security Council that Syria is 'unwilling or unable' to prevent attacks emanating from IS from its territory (UN Doc S/2014/695; UN Doc S/2015/221; UN Doc S/2015/693; UN Doc S/2015/563 respectively). Similarly, the British Prime Minister referred to the right of self-defence against IS in Syria and also to the fact that 'the Assad regime is unwilling and/or unable to take action necessary to prevent ISIL's continuing attack on Iraq – or indeed an attack on us' (Cameron, 2015a). Thus, for those states, the right to self-defence against IS in Syria is justified because Syria is 'unwilling or unable' to deal with the threat of IS. The expression 'unwilling or unable' is used without explaining its legal meaning. In the author's view, the most convincing meaning lies in the necessity of the military reaction because of the unwillingness or inability of Syria to address the IS's threat. But is Syria really unwilling or unable to fight IS? At the beginning of the emergence of IS, Syria was not fully committed to defeat this group. There is evidence that the regime of Bashar al-Assad allowed IS to metathesize while focusing its fire on other rebels. This does not seem to be the case anymore. Syria stated that it is willing to cooperate with the United States and other states to fight IS but those states do not want to associate themselves with Syria as long as the regime of Al-Assad remains in place (Clark and Allam, 2014). Concerning the 'inability' test, it can indeed be argued that Syria has proved unable, on its own, to prevent IS from using its territory to launch international attacks.

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The rise of the 'unwilling or unable' test is unprecedented in international practice. It is true that not all states intervening in Syria have resorted to this expression (e.g. France and Germany). However, on the other hand, only a few states have contested that criterion. The current silence of a vast majority of states towards the 'unwilling or unable' test might indicate an implicit acquiescence towards a right to self-defence against a non-state actor when the host state does not want or cannot prevent the actor's armed attack. A new interpretation of a norm becomes customary and thus legal, only if it is observed during a certain period of time on several occasions by states and if states believe that the interpretation is legal (*North Sea Continental Shelf Cases (Germany/Denmark; Germany/Netherlands)*, ICJ Rep 1969 para 74). Thus, it is too early to assert that a state is allowed to use force against a non-state actor perpetrating an armed attack against it or one of its allies if the host state is 'unwilling or unable' to prevent such attack. If such extensive right to self-defence emerges, it is hoped that future state practice will determine what exact criteria are requisite to determine when a state is unwilling or unable to counter armed attacks launched from its territory.

A Right to Self-Defence to React to a Threat of an Armed Attack?

Under Article 51 of the UN Charter, the armed attack must 'occur' to justify a response in self-defence. An action in self-defence must be reported to the UN Security Council that shall take measures necessary to maintain international peace and security. What is contemplated by the Charter is that states have the right to respond to an armed attack only for the period that it takes for the Security Council to be notified and for the necessary action to be taken to restore international peace and security. Another temporal interpretation of the right to self-defence argues that such a right exists in an anticipatory way, to prevent an armed attack that is about to be launched. The right to anticipatory self-defence departs from the text of Article 51 of the UN Charter but could have been preserved in customary international law. Whether this is the case is controversial (Corten, 2010: 406-443). Most academics, including the present author, consider that it would be unrealistic to expect a state, which detects preparations of an armed attack, to wait until this attack finally takes place (Dinstein, 2011: 200). Whether an armed attack may be regarded as 'imminent' should be assessed by reference to all relevant circumstances. The current reaction in self-defence of France in Syria adopts a broad interpretation of the condition of imminence of the right to self-defence. The Paris terrorist attacks of 13th November can be seen as reaching the level of an armed attack. IS intends to perpetrate other armed attacks in France. To our knowledge however, they are not about to be launched.

Following the attacks of 11th September 2001, the United States adopted another, third temporal conception in regard to the right to self-defence, where the armed attack is in a further distance than in the right to anticipatory self-defence. The United States asserted that it had a right to pre-emptive self-defence to react to potential armed attacks that may in particular be perpetrated by states developing weapons of mass destruction, which they might use themselves against the United States or supply to terrorist organisations hostile to that state. For the United States, circumstances have changed and the requirement of imminent attack should be adapted to the capabilities and objectives of today's adversaries (Bush, 2002: 13-16). The pre-emptive self-defence doctrine was not shared by other states and has thus not become customary. An extensive temporal conception of the right to self-defence seems, however, to have been recently adopted by states in their military action against IS. Thus, the United States has invoked, along with the right to collective self-defence, the right to individual self-defence to justify its strikes against IS in Syria (UN Doc S/2014/695). It has not however been victim of an armed attack by IS – an assault on a small number of captured Americans is not considered to be an armed attack – and has not given clear indications about a future imminent armed attack perpetrated by IS against the United States. The United Kingdom has also relied on the right to individual self-defence against IS. First, when it killed two British citizens in a drone strike in Syria in August 2015. One of the individuals killed was, as argued by the United Kingdom, 'engaged in planning and directing imminent armed attacks against the United Kingdom' (UN Doc S/2015/688). Second, when the United Kingdom began its strikes in Syria in November. The Prime Minister then referred to the threat posed by IS to the United Kingdom and to seven terrorist plots to attack the country that were linked to IS or inspired by their propaganda – therefore not all were directed by IS (Cameron, 2015b: 3). Again, the details given about the immediacy of an armed attack by IS against the United Kingdom were rather vague. France began its strikes against IS in Syria in September 2015, before the Paris attacks. In its letter to the Security Council, it was not clear whether France referred to its right to collective self-defence on behalf of Iraq or to its independent right to self-defence (UN Doc S/2015/745). Outside of the Council, the French President invoked past terrorist attacks against France with an

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Islamic background, culminating with the attack against the staff of the satirical magazine *Charlie Hebdo* in January 2015 – whose threshold did not, however, reach that of an armed attack. For France, IS constituted a direct threat to French national security that had to be countered by self-defence action (Pouchard, 2015). IS can indeed be regarded as a threat to the security of Western states: it has the capacity to commit armed attacks in those states and has expressed its intent to do so. It is to be noted that a majority of states do not explicitly contest the legality of self-defence actions in reaction to only a threat of armed attacks by IS.

Conclusion

In conclusion, the fight against IS in Syria may lead to a customary evolution of the right to self-defence, concerning the addressee of that right and the moment for action. States may recognise the existence of a right to self-defence against a non-state actor that perpetrates or is about to perpetrate an armed attack, based in a state that cannot or does not address the happening or preparation of the attack. States may also recognise the existence of an action in self-defence to react to a credible possibility of an armed attack by a non-state actor. The right to self-defence should adapt to new security challenges posed by unpredictable and mobile terror organisations. On the other hand, states should bear in mind that an extensive conception of that right may lead to abuses. A difficult equilibrium needs to be found.

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