

German Parliament decides to send troops to combat ISIS – based on collective self-defense “in conjunction with” SC Res. 2249

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On 4th December 2015, after a [parliamentary debate on 2d December](#), the German Parliament decided, with 445 positive votes (146 negative votes and seven abstentions), to honour the German’s Government’s formal request ([BT Drucksache 18/8666](#) of 1st Dec. 2015) to send up to 1200 troops to combat ISIS. A formal parliamentary decision to deploy military abroad is required by the German Constitution (Basic Law) and a German 2005 law ([Parlamentsbeteiligungsgesetz](#)) which codifies prior constitutional case law.

The international legal basis for the deployment decision, as officially claimed by the Government, is “Art. 51 of the UN Charter *in conjunction with* Art. 42(7) TEU as well as resolutions 2170 (2014), 2199 (2015), 2249 (2015) of the Security Council.” In its request to Parliament, the Government explained that action against IS (by the US, Australia, the UK, and France) “in exercise of collective self-defence under Art. 51 of the UN Charter is covered by resolution 2249 (2015).” ([BT Drs. 18/1866](#), p. 3). The EU-assistance clause as invoked by France on 13th November, to which all EU member States responded on 17th November with the promise for assistance, has been analysed [here](#) by Carolyn Moser. The substance of the IS resolution 2249 has been analysed on EJIL talk! by [Marc Weller](#), by [Dapo Akande and Marko Milanovic](#).

As [Dapo and Marko](#) have pointed out, the novelty of SC res. 2249 is not so much that it does not mention Chapter VII, but rather that it does not “decide” or “authorize” but only “calls upon” Member States “to take all necessary measures”. The omission to mention Chapter VII, together with the softer verb “call”, deliberately leaves open whether the resolution would allow for coercive measures without Syrian consent or not. Thereby, reservations by Russia and China against an infringement of Syrian sovereignty, as their delegates had voiced at the two previous occasions in the Security Council, when they vetoed draft resolutions which had foreseen an arms embargo against Syria (2011) and humanitarian assistance to the civilian population in Syria (2012), could be appeased. It is by no means clear that this resolution could function as an independent basis of military action (see for a negative answer [Jasper Finke](#)).

German Parliamentary Debate of 2d December 2015

During the Parliamentary debate, the German minister of foreign affairs, Frank-Walter Steinmeier, answered to the critical remark of a member of the left party that “normally, the right to self-defence is interpreted as allowing defence against a State attack (...) Does the German government interpret Art. 51 in the sense that one may take military means against any terrorist act?” as follows: “Very clearly, to the question of Art. 51 of the UN-Charter – self-defence – I reply: We are here not in a seminar (...) After in total eight attacks which happened in France, this is not the hour to explain to the French (...) that they need not feel attacked.” ([column 13879](#), my translation).

Another member of the governing Christian democrat party insisted that international law is “no suicide pact”. It does not require us to let us and our friends be slaughtered by terrorists because unfortunately we do not yet have the ideal Chapter VII resolution. Art. 51 of the UN Charter rather says clearly that we are allowed to defend us, and we may help our friends.” ([column 13896](#), my translation).

Yet another member of the Christian democrat party appealed to the opposition to “put aside, in the sign of solidarity, from lecturing in a filibuster-like fashion, nitty-gritty, and seminar-style on a differentiated analysis of the legal question.” ([column 13891](#), my translation).

But what is the legal question?

The legal question is, first, whether Article 51 allows for self-defence against non-state actors. Since 2001, state practice has increasingly leaned towards answering this question with a “yes”. It is well known that the two Security Council resolutions taken in the aftermath of 9/11 had mentioned self-defence only in their preambles and thus not fully accepted that the US American legal attacks on Afghanistan against Al Qaeda were really covered by self-defence as claimed by the United States. Also, the ICJ case law, as I submit, most plausibly read as not clearly answering in the negative but as having left open the question in the Israeli Wall opinion (2004) and notably in the famous para. 147 of the judgment DR Congo v. Uganda (2005) on “self-defence large-scale attacks by irregular forces”.

But since the rise of IS and their increasing perpetration of attacks in various States outside the territories which they are directly controlling, a growing number of States has invoked individual or collective self-defence against IS. States can rely on the open wording of Art. 51 which speaks of an armed attack but not of an armed attack *by a state*. But the well-known problem is that any “defensive” reaction against IS will inevitably affect the territory, infrastructure, and population of Syria. Such sacrifice by Syria would need an

additional justification. At this point, the declaration that Syria is “unwilling or unable” to prevent attacks emanating from IS, as stated by the USA, Canada, Australia, and Turkey in their letters to the Security Council (S/2014/695; S/21015/221; S/2015/693; S/2015/563), comes into play. The term “unwilling or unable” has been used by those states (but not, e.g. by the UK and France) without explaining its legal meaning. As it is well rehearsed, four legal functions of the formula are conceivable but ultimately not really convincing. First, it could constitute a criterion of attribution of IS attacks to Syria – but this seems absurd assuming Syria’s sheer incapability despite willingness. Second, the formula cannot, again for fairness reasons, explain Syrian responsibility for its *own* omissions if the State is indeed incapable. Third, it seems strange to accept some kind of forfeiture of Syrian sovereignty because the sheer inability of Syria. Finally, although the Syrian “inability” may give rise to the “necessity” of military reaction (in the realm of Art. 51 UN Charter), this is a limiting condition and no free standing authorisation.

So far, only a few States – but not Germany – have protested against the rapid rise of the “unwilling or unable” formula. The silence of the vast majority of states is in normative terms problematic, because it risks to be interpreted as *implied acquiescence* to an extensive interpretation of Art. 51 of the UN Charter. Worse even, the explicit and positive endorsement of the broad reading of self-defence, as just done by Germany, too (after notably the UK, as analysed [here](#) by Marko) might constitute a further – even not very stable – building block of subsequent practice (Art. 31(3) lit. b) VCLT). It is not unlikely that this practice, if it is not outbalanced by protesting statements will from now on guide the application of Art. 51 UN Charter – for the better or worse.

Another legal question of course the “imminence” of attacks to be expected by IS. Art. 51 does not allow punitive military action for the past attacks of 13th November. States may only rely on self-defence now by either claiming a “permanent attack” (see [Marc Weller](#)) or imminent incidents. One should keep in mind that especially the reliance on self-defence by the UK after the targeted killing of two individuals came frightfully close to a “pre-emptive self-defence” argument in the style of the 2002 “Bush doctrine”, as [Nehal Bhuta](#) has pointed out on this blog. But after the 13th November attacks, the situation looks different. IS has explicitly announced new attacks so that imminence can hardly be denied.

The Parliamentary scientific service had on 23th and 30th November 2015 issued a two-part legal opinion on the question of State defence against terrorists and the legal implications of SC res. 2249 (2015) ([WD 2-3000-2013/15](#)). In this legal opinion, the service came to the conclusion that “obviously, last but not least against the background of the recent Paris attacks – an evolution of customary law” has occurred in the direction of admitting self defence against non-state actors (p. 14, my translation). The government and parliament heavily relied on this legal opinion and on that basis claim that the German

decision is fully covered by international law. (The claimed constitutional law basis of the deployment is Art. 87a (2) of the German Basic Law (“defence”), and – arguably – also Art. 24 (2) of the Basic Law (“collective security”) if read broadly, as the Government explicitly does in its request). It is an interesting twist in European history – and a sign of the success of European integration – that Germany, a country which after the Second World War has been so extremely reluctant to take military action abroad, now does so to help France.

I think that the German decision is indeed covered by international law, but that this cover is really thin. It is hard to build on the law “as it stands”, because the law is moving. Still, the emergence of novel customary law, as assumed by the German legal service, would normally seem to require more time than 15 years (since 2001) – if we do not buy into the “instant custom” theory. A normative assessment of the legal grey zone which could guide policy advice is difficult. On the one hand, it can hardly be denied that IS has the capacity to launch armed (suicidal) attacks of high scale and intensity, with the threat exacerbated by their relatively novel means. Populations all over the world deserve protection from such threats.

On the other hand, the risk of escalation and of a spiral of violence is obvious. And history cannot “teach” any lesson on this question. While on the one hand, the illegal unilateral Iraq intervention by the USA in 2003 surely fuelled fundamentalism in the region, it is also plausible that the *failure* of the United Nations to intervene under the heading of R2P in Syria, or of the US and the UK under the banner of humanitarian intervention, have been important factors for the rise of IS. But all these reflections will remain speculative. We will never be able to “prove” that IS would be less strong if only in 2011 or 2012 military action in Syria had been taken.

In any case, the criteria of unwillingness and/or inability are too vague to set an effective limit on the lawfulness of “defensive” strikes against terrorist groups. States which seek to contain military reaction, or which fear that they themselves might at some point be qualified as “unable or unwilling” are therefore well advised to protest against the broad interpretation of self-defence.