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Self-defense against IS – Is International Law Changing?

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A. Contentious Conduct: Facts and Claims

B. Self-defense

I. Claims of Self-defense

1) Individual self-defense against IS and/or Khorasan

USA (23 Sept. 2014)

UK (8 Sept. and 26 Nov. 2015)

Turkey (24 July 2015)

France (after Paris attacks of 13 Nov. 2015)

2) Collective self-defense of Iraq

USA: 23 Sept. 2014 (S/2014/695); UK: 25 Nov. 2014 (S/2014/851); Australia: 9 Sept. 2015 (S/2015/693); France: 9 Sept. 2015 (S/2015/745); Germany: 10 Dec. 2015 (S/2105/946); Canada: 26 March 2015 until Feb. 2016.

II. Are these claims covered by the law of self-defense under Art. 51 UN-Charter? Is self defense allowed against non-state armed attacks?

1. The openness of Art. 51 UN Charter (ICJ, *Nicaragua* (1986) para. 176)

2. The reluctance of the ICJ in its case law

ICJ, *Oil platforms* (2003); *Wall opinion* (2004); *Congo v. Uganda* (2005).

3. Armed attack by Syria through omission? Probably not.

a) General duty to prevent harm emanating from a state's own territory (neminem laedere)?

- ICJ, *Corfu Channel* (1949).
- Friendly Relations Declaration (1970).

b) Prior failure to comply with obligation to suppress, imposed by SC

c) Duties with regard to terrorist activities

- Obligations to prevent and protect.
- Obligations to apprehend and prosecute.

d) Legally relevant omissions of Syria?

No, because not able. Anyway omissions can never reach threshold (?).

4. Scholarly prevailing trend after 9/11 (2001): Self-defense allowed against non-state armed attacks, but with qualifications

a) Policy arguments against allowing self-defense against non-state actors, without any link to a state

- “Collateral damage“ in the territorial state, infringement of its sovereignty.
- Danger of abuse.
- Danger of escalation.

b) Prominent voices: in favour of allowing self-defense against NSAs (under certain conditions, mostly ask for “large scale attacks”)

Judges Simma and Kooijmans, sep. opinions in ICJ, *Uganda v. Congo* (2005); Daniel Bethlehem (2012); Leiden Policy Recommendations (2013); Chatham House Principles (2014).

5. Which qualifications? Has a *lex specialis* emerged?

- See Art. 21, 50(1)a, 55 ILC Articles (2001).
- But unclear whether we are looking for loose criteria of attribution or independent of attribution to State.

a) The *Nicaragua*-criteria of 1986: do not fit to Syrian situation.

b) Application of Art. 8 and 9 ILC Articles State Responsibility (2001) on attribution?

c) New concepts:

- “substantial involvement”? (cf. Art. 3 lit. (g) Definition of Aggression (1974))
- “harbouring”? (cf. UN SC-Res. 1368, para. 3).
- “Aiding and abetting” (Art. 16 ILC Articles: “complicity”).
- complete loss of effective control of State over territory (cf. German letter of 2015 to SC).

- “**manifestly unable or unwilling**” (USA; Turkey; Australia)?

Problems:

- (1) “Necessity” is no free-standing basis of authorization.
- (2) Too vague.
- (3) What if willing, but unable? (as Syria here). Obligation to consent and cooperate?

Legal consequence:

→ **Forfeiture of Syrian sovereignty and territorial integrity/estoppel/“ungoverned space”** in some areas of the State?

(cf. German letter to SC of 10 Dec. 2015 (S/2105/946).

III. How would the evolution of the law on self-defense take place (technically)?

1. Extensive interpretation of Art. 51 UN Charter?

Subsequent practice in terms of Art. 31 (3) lit b VCLT?

2. New customary rule?

- Time needed for formation of new custom?
- Silence as acquiescence?

*3. Specific problem of change of a norm of *ius cogens**

Art. 2(4) and Art. 51 UN Charter

C. UN SC Res. 2249 of 20 Nov. 2015

- (1) No mention of Chapter VII!
- (2) Only “Calls upon...” (para. 5)
- (3) Reference: “in compliance with international law” (para. 5).

Germany (4 Dec. 2015): “Art. 51 UNC in conjunction with Security Council Resolutions 2170 (2014), 2199 (2015) and 2249 (2015)”.

Legal opinion of Academic Service of the German parliament (*Bundestag*): “Resolution 2249 may be interpreted as confirming that States can invoke the right of self-defense against the IS, without being obliged to refer to a (further) consent by the Iraqi or Syrian government” (Wissenschaftlicher Dienst, WD 2 – 3000 – 203/15, 21).

7565th session SC: statements of all other states present (China, Spain, Russia, Lithuania, Jordan, New Zealand, Chile, Angola and Bolivia): Ambiguous.

D. Invitation/consent

1) Iraq

Cannot dispose of Syrian integrity.

2) Syrian invitation of Russia

Forfeiture of the right to invite? Because above threshold of full-fledged civil war? Because of loss of support of own population? Because of massive human rights violations?

But: if Syria is qualified as „unable“, then it must be allowed to enable itself.

E. Conclusion: Has a normative shift occurred after 9/11 (2001), and again after 2014?

- (1) Only a few states explicitly invoke self-defense.
- (2) Reactive statements by non-participating states: Vague, rarely legality claims.
- (3) Protest and objections by Russia, Ecuador, Iran, Argentina, (China).
- (4) Silence of all other states, no acquiescence. No obligation to protest, because no clear claims.

Should academics and counselors press in favour of developing the law further?

- Weighing of interest of victim states versus “harbouring” states: Effective protection versus recipe for escalation and abuse (see Turkey!).

- Insisting on the role and responsibility of the **Security Council** and the system of collective security. “Responsibility not to veto”.

→ Advising governments to protest, or not to protest, or to issue approving statements.

References

Paulina Starski, „Right to Self-Defense, Attribution, and the Non-State Actor“, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* /Heidelberg Journal of International Law 75(2015), 455 et seq.

Anne Peters, “German Parliament decides to send troops to combat ISIS – based on collective self-defense ‘in conjunction with’ SC Res. 2249”, *EJIL Talk! Blog of the European Journal of International Law*, 8 December 2015. <http://www.ejiltalk.org/author/anne-peters/>

Dapo Akande and Marko Milanovic, “The Constructive Ambiguity of Security Council resolution 2249”, *EJIL Talk! Blog of the European Journal of International Law*, December 2015.