



**The Centre for International Law of the Institute of International
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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 September and 26th November 2015).

Turkey (24 July 2015)

France (after Paris attacks of 13th Nov. 2015)

2) Collective self-defense of Iraq

USA: 23 September 2014 (S/2014/695); UK: 25 November 2014 (S/2014/851); AUS: 9 September 2015 (S/2015/693); FR: 9 September 2015 (S/2015/745); Canada: 26th March 2015.

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

2. The reluctance of the ICJ in its case law

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

3. 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

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

4. Which qualifications?

a) The *Nicaragua*-criteria of 1986: no fit.

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

5. Armed attack by Syria through omission?

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?*

6. Has a *lex specialis* (of attribution) emerged?

Art. 21, 50, 55 ILC Articles (2001).

- "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").

- "**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?

→ **Forfeiture of Syrian sovereignty and territorial integrity /estoppel/"ungoverned space"?**

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 (4th 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.

Marko Milanovic, How the Ambiguity of resolution 2249 does Work, *EJIL Talk! Blog of the European Journal of International Law*, December 2015.