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The rapidly evolving norm relating to collective self-defence against non-state actors in the territory of 'unwilling or unable' states

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On 9 September 2015, the Australian Permanent Representative to the United Nations (UN) transmitted a letter to the President of the Security Council that, in essence, placed Australia's view on the lawfulness of its military action in Syria on the record. Simultaneously, the Attorney-General, via an op-ed in *The Australian* on 10 September 2015, and a statement in the Senate, expanded upon this theme by describing in greater detail how the Australian Government had arrived at this legal conclusion.

Procedurally, and from the perspective of Australia's reputation, this transparency is most welcome: Australians deserve to know the outlines of the legal assessment the Government has made; Australia's international partners deserve to know the same; and Australia's commitment to the maintenance of international law requires that our Government have sufficient faith in its legal analysis to place it on the public record.

From a substantive international law viewpoint, however, what is most significant about this development is that it is indicative of the rapid (by international law standards) evolution – at least in the view of one fairly eclectic group of States – of a core norm. This evolution involves, in effect, the overt expansion of the right of individual and collective self-defence under article 51 of the UN Charter, and possibly under customary international law, into a norm that also encompasses a limited set of additional situations where the use of force would be authorised under article 51. These are, specifically, situations where the territorial state from which an armed attack by a non-state actor is emanating, either in whole or in part, is unwilling or unable to deal with that threat adequately. As an evolutionary interpretation of the right of self-defence, the interesting aspect is the relative speed at which this evolution has been progressing – whilst international law scholars all learned that the continental shelf and space law are the traditionally accepted examples of 'instant customary international law', it is arguable that we are now witnessing the emergence of a new case study.

This expansion of this new norm has been a bubbling issue since its first modern employment in relation to Afghanistan in 2001. At first, the contested question relating to the military intervention was whether a State could launch military action in self-defence against non-state actors. While the conventional view denying such expansion of the right was adopted by the International Court of Justice in *Palestinian Wall* in 2004 and *Armed Activities in the Congo* in 2005, more than a decade of State practice, with what appears to be at least a pretty broad level of acquiescence amongst States, indicates that exercising the right of self-defence against non-state actors is now fairly well accepted.

But the question that has more recently emerged is whether, based on this expanded notion of self-defence, States can violate the territorial sovereignty of another State (i.e., Syria in the current context). Sir Daniel Bethlehem and others have crystallised the 'unwilling or unable' criteria to better situate this State practice within the substantive legal context of the self-defence norm, most notably in his article published by *the American Journal of International Law* in 2012. However, since late 2014, a number of States have gone on the record, in the specific context of Daesh in Syria, employing – expressly – the 'unwilling or unable' criteria as a component of their arguments on collective self-defence. Australia (as noted above), Iraq, the US, the UK, Canada, and Turkey have all expressly or impliedly referred to the 'unwilling or unable' criteria as a justification for combat operations against Daesh in Syria. In its 24 July 2015 letter to the President of the Security Council, for example, Turkey explicitly stated that:

> It is apparent that the regime in Syria is neither capable of nor willing to prevent these threats from emanating from its territory, which clearly imperil the security of Turkey and the safety of its nationals.

This collection of assessments and statements, thus far, seems to indicate the following expanded parameters:

- Iraq – unwilling and unable Syria having a direct effect on Iraqi security
- Turkey – unwilling and unable Syria having a direct effect on Turkish security
- US and UK – unwilling and unable Syria having both a direct effect on Iraq, with whom US/UK are cooperating in collective self-defence, and also a direct effect on US/UK security, and
- Australia and Canada - unwilling and unable Syria having a direct effect on Iraq, with whom Australia and Canada are cooperating in collective self-defence.

It remains to be seen, of course, whether the 'unwilling or unable' criteria becomes a routine, broadly and more positively accepted aspect of the norm, supported by an appropriate level of State practice. For starters, there is a strong sentiment against this expansion amongst some experts, and some States may have objected to the 'unwilling or unable' criteria. Additionally, there are diverging views about who, exactly, can access the 'unwilling or unable' expansion – just the directly threatened State, or third States as well on the basis of collective self-defence? (See the pieces by Marc Weller in *ASIL Insights*, and Kevin Jon Heller in *Opinio Juris*, for example).

What is clear, however, is that the 'unwilling or unable' criteria are now clearly considered by a number of States to be an integrated, legitimate, and appropriately nuanced component of the self-defence norm, and that this conclusion has been reached, in a fairly coherent form, in only a little more than a decade – quite fast by international law standards.

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