

Respect for State Sovereignty: Primacy of Intervention by Invitation over the Right to Self-Defence

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The “Islamic State” (IS),¹ a terrorist organisation acting independently of any State,² controlled large portions of territory in Iraq and Syria.³ In June 2014 Iraq asked for international assistance in its fight against the IS on the Iraqi territory.⁴ Then, in September 2014, Iraq asked the United States (US) and its allies to help it in defending itself against the IS in Syria as well.⁵ However, Iraq could not invite States for intervention outside its territory. The only legal ground Iraq could refer to here was the right to collective self-defence of that State in reaction to armed attacks by the IS.

Syria also invited the United States and other States to combat the IS, but only in the form of coordinated action.⁶ The regime of *al-Assad*, contrary to the opposition, the Syrian National Coalition, could be regarded as the most effective authority able to represent the Syrian State and thus able to invite other States to intervene militarily on the Syrian territory.⁷ Moreover, it was entitled to set limits for its invitation.⁸ Only Russia⁹ and Iran¹⁰ inter-

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¹ It is also referred to as the “Islamic State of Iraq and the Levant” (“ISIL”), the “Islamic State of Iraq and Syria” (“ISIS”), or with its Arabic acronym, “Daesh” or “Da’esh”.

² There is an international consensus that the IS is a terrorist organisation. It has been designated as such by the United Nations, the European Union, the United States and the United Kingdom, among others. None of the attribution’s criteria of the conduct of a non-State actor to a State could be applied to the IS. Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001 <<http://legal.un.org>>, 38 et seq.

³ See <<http://www.bbc.co.uk>>.

⁴ Letter dated 25.6.2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General, UN Doc. S/2014/440, Annex (2014).

⁵ Letter dated 20.9.2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, UN Doc. S/2014/691 (2014).

⁶ Identical letters dated 21.9.2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. A/70/385-S/2015/727 (2015).

⁷ K. Bannelier-Christakis, Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent, LJIL 3 (2016), 761.

⁸ O. Corten, The Law against War, 2010, 274 et seq.

vened in Syria with the consent of President *al-Assad*. Their military presence was considered to be legal, as long as it was directed against the IS and not against the opposition of the regime of *al-Assad*.¹¹ Other States that intervened in Syria rejected its invitation for coordinated action.¹² The reason for this seems to be their refusal to be associated with a regime engaged in severe infringements of international law that had crossed the threshold of war crimes and crimes against humanity.¹³ Coordination with President *al-Assad* would have strengthened his political position. The question arises as to whether the political reason for refusing the Syrian conditional invitation for intervention can be translated into a legal consideration. A State should not accept an intervention by invitation when by so doing it violates its duty not to assist another State in the commission of serious violations of international law. Indeed, in accordance with a rule that is consolidating in customary international law, a State should not aid or assist another State in the commission of an internationally wrongful act by another State if the State providing the aid or assistance is aware of the circumstances making the conduct of the assisted State internationally wrongful and if the act would be considered to be internationally wrongful had it been perpetrated by the assisting State itself.¹⁴ However, it *cannot be convincingly argued that*, had the States that intervened in Syria without its consent accepted Syria's invitation for coordinated intervention, they would automatically have engaged themselves in a conduct amounting to assistance to serious violations of international law. Indeed, under international law, Syria had the right to defend its territory against the occupation by the IS. Other States could not assume that Syria would have necessarily perpetrated a se-

⁹ Letter dated 15.10.2015 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/792, Annex (2015).

¹⁰ Iranian President, *H. Rohani*, explained that Iranian "military advisers" are present in Syria on the invitation of the governments of that State. See his interview in *Le Monde*, 30.1.2016.

¹¹ External intervention is unlawful when it aims to settle an internal political conflict in favour of the established government. See *K. Bannier/T. Christakis*, Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict, *LJIL* 26 (2003), 855.

¹² Identical letters dated 21.9.2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. A/70/385-S/2015/727 (2015).

¹³ See for instance *B. H. Obama*, Statement by the President on ISIL, The White House, 10.9.2014 <<https://obamawhitehouse.archives.gov>>.

¹⁴ See Art. 14 and its commentary that quotes States' practice in the Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, <<http://legal.un.org>>, 65 et seq.

rious violation of international law in doing so, such as a grave breach of the Geneva Conventions¹⁵ or of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.¹⁶ Moreover, it cannot be demonstrated that coordinated action with Syria would have prevented efficient action against the IS.¹⁷ To our knowledge, no State challenged the legality of the military action of Russia and Iran against the IS on the ground of intervention by invitation. Thus, it is here submitted that there was no legal obligation to reject Syria's conditional offer for intervention.

Bahrain, Qatar, Jordan, Saudi Arabia and the United Arab Emirates did not give any justification for their participation in the US-led airstrikes against the IS in Syria. The other 11 States that intervened in Syria justified their military presence in Syria on the ground of the right to self-defence against the IS. The right to self-defence invoked was the right to collective self-defence of Iraq, and, after the terror attacks of the IS in Paris and in Saint-Denis in November 2015, of France, or the right to individual self-defence.¹⁸ Some of the intervening States advanced another reason, other than the need to react to an (ongoing, imminent or threat of) armed attack, to justify entering into Syria's territory without its consent. The United States, Canada, Australia, Turkey and the United Kingdom stated that Syria was "unwilling or unable" to prevent attacks emanating from the IS from its territory.¹⁹

The customary nature of the right to self-defence against non-State actors is contested, even if circumscribed by the "unwilling or unable" test.²⁰ If the position is taken that such a right to self-defence exists or is crystallising in customary international law,²¹ the question arises as to whether States enjoyed a discretionary choice between intervening in Syria on the basis of intervention by invitation or on the ground of the right to self-defence. In-

¹⁵ Art. 3 of the four Geneva Conventions applies to non-international armed conflicts. See for instance Art. 3 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12.8.1949, 75 UNTS 32-34.

¹⁶ 1974 UNTS 45.

¹⁷ R. Goodman, International Law on Airstrikes against ISIS in Syria, Just Security (28.8.2014), <<https://www.justsecurity.org>>.

¹⁸ While some of those States participated in the airstrikes against the IS, others simply provided military assistance, like Germany.

¹⁹ I. Couzigou, The Fight against the "Islamic State" in Syria: Towards the Modification of the Right to Self-Defence?, *Geopolitics, History, and International Relations* 9 (2017), 88.

²⁰ O. Corten, The "Unwilling or Unable" Test: Has It Been, and Could It Be, Accepted?, *LJIL* 29 (2016), 791.

²¹ A. S. Deeks, "Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense, *Va. J. Int'l L.* 52 (2011-2012), 485 et seq.

tervening States may be tempted to rely on the right to self-defence rather than on a conditional invitation for intervention. Indeed, a seeming advantage of this legal foundation would be that their presence then would not depend on the will of the territorial State.²² Furthermore, the unwillingness or inability of the territorial State would exonerate the intervening States of any responsibility for the incidental breach of the territorial State's sovereignty in the course of self-defence.²³ However, given the fundamental importance of the sovereignty of States under international law, priority should be given in principle to the legal justification for the use of force that is respectful of the sovereignty of the territorial State. Intervention with the agreement of Syria would have respected the sovereignty of that State. Concerning the unilateral exercise of the right to self-defence against the IS, it infringed the sovereignty of Syria.²⁴ Therefore, the military action against the IS in Syria could only be justified by the Syrian conditional invitation for intervention, as the sole legal ground respectful of the sovereignty of Syria. It is therefore concluded that, should the right to self-defence against non-State actors be or become customary, it is of a subsidiary nature to intervention by consent by the territorial State, unless cooperation with the territorial State in repelling non-State armed attacks amounts to a violation of the duty not to assist it in serious violations of international law or unless such cooperation were obviously inefficient to counter those armed attacks.

²² The consent for invention can be amended or withdrawn at any time. *Case Concerning Armed Activities on the Territory of the Congo*, ICJ Reports 2005, para. 51.

²³ N. Tsagourias, Self-Defence against Non-State Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule, LJIL 29 (2016), 25.

²⁴ Syria qualified the military action against the IS on its territory without its agreement as "a violation of Syrian sovereignty". See for instance Identical letters dated 17.9.2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2015/719 (2015).