Applying the Unable/Unwilling State Doctrine – Can a State Be Unable to Take Action?

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The discussion regarding self-defence against non-state actors (NSAs) is a re-occurring topic on the international agenda. Various legal (and not so legal) arguments have been put forward to address dilemmas that may arise under the framework regulating the use of force in international relations. This paper focuses on whether a state can defend itself against a hostile NSA located in a third state not taking (sufficient) actions. More specifically, I will look closer into the application of the doctrine of the "unable or unwilling state" as a justification for self-defence in such a scenario.[1] The doctrine entails that NSAs can be lawfully attacked if they are harboured in a state that is unable or unwilling to control them. The doctrine sets one of the lowest standards on when NSAs can be lawfully attacked in third states on the basis of the right of self-defence. Whether the doctrine is reflecting the current status of the law is questionable.[2] Nonetheless, given that the doctrine applies, there are particular difficulties to invoke it as I will demonstrate by looking at the current situation in Syria. Can the unable/unwilling state doctrine legally justify the military operations of certain foreign states, i.e. the United States (US), United Kingdom (UK), France, etc. directed at the Islamic State (IS) in Syrian territory? I argue that even if one would accept this doctrine as a benchmark to determine acceptable use of force against an NSA in a third state, it sets an ambiguous and arbitrary standard that undermines the legal framework regulating use of force building on collective security.

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[1] The doctrine of unable or unwilling state was included in a set of principles put forward by a group of international lawyers to reflect current principles and rules of international law. See Principles of International Law on the Use of Force by States in Self-defence, 2005, available at the website of the Chatham House, the Royal Institute of International Affairs: <https://www.chathamhouse.org>.

[2] The Chatham House is an independent policy institute and the principles were put together as a clear statement of the rules by a group of eminent international lawyers. However, this document does not constitute a primary source of international law according to the ICJ Statute Art. 38.

International law on use of force is quite straightforward, although the arguments put forward by states when relying on it can at times be quite confusing. Art. 2 (4) of the Charter of the United Nations (UN Charter) prohibits military force between states in their relations. The article has two exceptions a) if acting in self-defence (Art. 51 UN Charter), or b) if the Security Council authorizes such force (Art. 42 UN Charter). Without entering into the larger discussion on the history of the right of self-defence, I will briefly note that at least since the adoption of the UN Charter self-defence against NSAs seems to be excluded according to the mainstream scholarly debate. However, a literal interpretation of Art. 51 UN Charter seems not to require that the attack is attributed to a state, but seen in the larger context of the Charter, such reading would not cohere with the rest of the provisions in the Charter, in particular in regard to Arts. 2 (4) and 42, as well with other rules in international law. In addition, the International Court of Justice (ICJ) has repetitively stated that self-defence cannot be applied against NSAs, unless they act on behalf or under control of another state.[3] Nevertheless, the right of self-defence against NSAs may have been modified after the attack on the World Trade Center on 9.11.2001. To counter the 9/11 attack, the US together with the UK launched Operation Enduring Freedom (OEF) attacking al-Qaida targets in Afghanistan in October 2001. As a justification of the operation, the two states invoked their right of self-defence.[4] The concern here is that the 9/11 attack had not been conducted by a state, but by al-Qaida. Although Afghanistan could not be held responsible for the 9/11 attack, OEF received large support within the international community.[5] For instance, in the UN General Assembly debates held from 1.-5.10.2001, a large number of states with the exception of Cuba, expressed their support of the US invoking its right of self-defence.[6] Scholars have tried to clarify the support from a legal standpoint. Among the justifications, one was grounded on the circumstance that Afghanistan was unable or unwilling to take action against al-Qaida despite the knowledge of the group's presence in the state and that the group already

[3] See See *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Merits, Judgment, ICJ Reports 1986 and *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), Judgment, ICJ Reports 2005.

[4] Letters of 7.10.2001, UN Doc. S/2001/946 and UN Doc. S/2001/947.

[5] Even though al-Qaida had been harboured by Afghanistan, this would not make the attack attributable to the state according to the general rules on state responsibility.

[6] *Ulf Linderfalk* summarizes the debate, see *U. Linderfalk*, The Post-9/11 Discourse Revisited – The Self-Image of the International Legal Scientific Discipline, GoJIL 2 (2010), 900.

performed several harmful attacks against other states. Afghanistan refused to extradite *bin Laden* and showed no signs of willingness to deal with al-Qaida. Thus, Afghanistan must be considered as an unwilling state to deal with the NSA that would justify military force on the basis on self-defence, given that we accept the unable/unwilling state doctrine. However, the inability to deal with NSA does not seem to have been discussed in relation to OEF. I will now see how this doctrine can be applied in the case of Syria.

The fact that Syria has not consented to the military operations conducted by the US, UK and France in its territory would probably not make Syria an unwilling state as in the case of OEF. The doctrine on unable/unwilling state does not appear to dictate that a state must accept assistance from other states. Such a conclusion would challenge the territorial sovereignty of a state. Moreover, Syria has launched several military attacks at IS and is involved in a civil war against the group. Consequently, Syria cannot be considered as unwilling to take action against IS. Can Syria be considered as unable given how the situation has evolved? I will look at two circumstances that may support such a conclusion. First, in letters to the Security Council, Germany and Belgium endorse that they may exercise the right of self-defence against IS due to the fact that Syria lacks control over the territory where IS is located.[7] Such reasoning may indicate, as suggested by *Dapo*, that Syria is unable to take action against IS. However, this may not be the correct interpretation of the letters because Belgium and Germany also focus on the interpretation of the necessity requirement.[8] If it is meant to invoke the unable standard, it is unclear if lost effective control of territory would automatically establish inability of a state. Regarding effective control, it has not been a circumstance that the ICJ relied on in relation to the self-defence against NSAs. In the *Democratic Republic of the Congo (DRC) v. Uganda* case, the DRC cannot possibly have been exercising effective control over all parts of its territory. Yet, the Court did not consider that as providing Uganda with a right of self-defence. Looking at events post-9/11, Colombia did not have a right to attack Fuerzas Armadas Revolucionarias de Colombia (FARC) on Ecuadorian territory, although FARC was located in inaccessible parts of the Amazon over which Ecuador cannot possible have been able to exercise effective control.

[7] Letter of 10.12.2015 (Germany) and Letter of 7.6.2016 (Belgium), UN Doc. S/2015/946 and UN Doc. S/2016/523.

[8] *Dapo Akande* claims that Germany and Belgium seem to be saying that is that because Syria does not have effective control of the territory then it is necessary for them to use force in self-defence. See comments by *D. Akande*, EJIL Talk, available at <http://www.ejiltalk.org>.

Second, Syria has invited Russia, which is a militarily powerful state, to combat IS. This clearly demonstrates that Syria indeed is not unwilling but perhaps also not unable. A state can always ask for military assistance. Thus, perhaps it is only in the cases where such requests are not granted that a state truly can be said to be unable to take action, but then it would probably not be unwilling. In any case, the doctrine of unable/unwilling state seems to have limited relevance to forward the argument that self-defence can be a legal basis to justify attacks against IS in Syrian territory without Syria's consent, at least as it seems impossible for a state to be truly unable if it is not unwilling. In any case, if Syria were considered as unable to fight IS, then also Iraq must be considered unable as well. Would then Russia have a right to intervene on Iraqi territory to fight IS on the behalf of Syria? In conclusion, the doctrine of unable/unwilling state lacks both a clear legal underpinning and a clear and set content at least as far as it involves an unable state. Its invocation may undermine the prohibition on use of force, risking the collective security.