MILITARY INTERVENTION IN SYRIA AND THE "UNWILLING OR UNABLE" TEST: LAWFUL OR UNLAWFUL?

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As is known, military intervention by the U.S.-led coalition was commenced in September 2014 in Syria. The justification invoked by some participants of the coalition was that the Syrian government was "unwilling or unable" to deal with Islamic State of Iraq and the Levant (ISIL), an international terrorist group. The "unwilling or unable" test gives rise to various debates among international scholars and practitioners. Some international publicists argue that military intervention on the basis of the "unwilling or unable" test is an emerging rule of customary international law, while others are rather opposed to it. The U.S. announced its intention to withdraw its troops from Syria on 19 December 2018. This, however, does not mean an immediate cessation of operations of the U.S.-led coalition in Syria. It is expressed in the statement made on 6 February 2019 by Mike Pompeo, the U.S. Secretary of State, in which he articulated that the arms cut in Syria is not a shift in mission but a strategic turn in essence. What can be inferred is that it seems unlikely that the military intervention of the U.S.-led coalition in Syria will be terminated in the near future. In fact, it arouses deep concern of humanity that the military intervention in Syria justified by the "unwilling or unable" test might recur in other regions or states. In this respect, the present article argues the compatibility of military intervention based on the "unwilling or unable" test proposed by some states, including the U.S., and some international publicists under universal principles of customary international law formation and international conventions.

Keywords: unwilling; unable; military intervention; self-defense; U.N. Charter; ISIL.

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Introduction

After the end of the Cold War, particularly in the 21st century, the number of military interventions against sovereign states under various kinds of justifications rapidly increased. Afghanistan, Iraq, Yemen, Syria, and Libya have been the subjects of such military interventions. Some intervening states relied on requests or consents of the territorial states or the authorization of the United Nations Security Council, while others resorted to the "unwilling or unable" test as a legal ground for use of defensive force on a territorial state.

Military interventions justified by the "unwilling or unable" test are often carried out in order to deal with non-state actors operating within the boundary of a territorial state. The most typical, recent example is the military intervention in Syria being carried out by the U.S.-led coalition to defeat Islamic State of Iraq and the Levant (ISIL).

Military interventions are being carried out not only in Syria but also in Iraq. The U.S.-led coalition initiated military action in Iraq on 8 August 2014[1] and in Syria on 22 September 2014.[2]

While the legality of the former has never been challenged, the latter is very much debated, especially the "unwilling or unable" test that was advanced by some intervening states as a legal basis for military actions against ISIL in Syria.

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[1] Karine Bannelier-Christakis, *Military Interventions Against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent*, 29(3) Leiden Journal of International Law 743, 750 (2016).

[2] *Id.* at 766.

Among justifications provided by some intervening states, including the United States of America, self-defense on the basis of the "unwilling or unable" test was the main justification for the airstrikes against ISIL in Syria. On 23 September 2014, the United States sent a letter to the Security Council justifying the launch of an air campaign against ISIL on the Syrian territory. According to this letter,

> ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. *States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe havens effectively itself.* Accordingly, the United States has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq, including by protecting Iraqi citizens from further attacks and by enabling Iraqi forces to regain control of Iraq's borders. In addition, *the United States has initiated military actions in Syria against al-Qaida elements in Syria known as the Khorasan Group to address terrorist threats that they pose to the United States and our partners and allies*.[3]

Some states that took part in the U.S.-led coalition, including Australia and Turkey supported the "unwilling or unable" test as advanced by the United States in the letter.

On the other hand, the test is very much disputed by a considerable number of states, including Russia, which is also taking military actions in Syria.

The "unwilling or unable" test is one of the legal justifications for unilateral military actions in self-defense, when the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. According to the "unwilling or unable" test, if a territorial state is willing and able to eliminate terrorist threats posed to a victim state by a non-state actor, the victim state cannot act in self-defense.[4] However, although the territorial state is willing to deal with a non-state actor, its inability to effectively eliminate the threat would result in the right of a victim state to act in self-defense against the non-state actor. Such inability of the territorial state is attributable to loss of control over parts of its territory where the non-state actor operates and to lack of law enforcement capability.[5]

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[3] U.N. Security Council, Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, 23 September 2014, S/2014/695. (emphasis added)

[4] Ashley S. Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52(3) Virginia Journal of International Law 483 (2012).

[5] *Id.* at 525 & 527.

The term "unwilling or unable" began to be officially used since the publication of the article titled "Principles of International Law on the Use of Force by States in Self-Defence" by the Chatham House in 2006 and relatively all-inclusive definition was reached by N. Schrijver and L. van den Herik in "Leiden Policy Recommendations on Counter-Terrorism and International Law" published in 2010.[6]

However, a similar theory according to which it would be allowed to target a territorial state that is unable to deal with non-state actors dates back to the 1970s. It was used by the U.S. to justify actions against Cambodia. The legal basis the U.S. put forward was that the Cambodian government lost control over the relevant areas and the areas where the attacks had been carried out were "completely occupied and controlled by North Vietnamese forces."[7] The theory was also used by Israel in the 1980s to justify actions abroad against the Palestine Liberation Organization by alleging that it should be allowed to target a state harboring a terrorist group.[8] In 1995, Turkey invoked Iraqi government's inability to exercise effective control over northern parts of its territory to justify its attacks against Kurds in Iraq and the U.S. State Department voiced its support of the Turkish incursion in a press briefing:

> …a country under the United Nations Charter has the right in principle to use force to protect itself from attacks from a neighboring country if that neighboring state is unwilling or unable to prevent the use of its territory for such attacks.[9]

The relationship between the "unwilling or unable" test and use of force has been researched by Ashley Deeks in her extensive study "'Unwilling or Unable': Toward a Normative Framework for Extraterritorial Self-Defense" published in 2012. The aim of her study was to establish a new normative framework for extraterritorial self-defense. In the study, Deeks attempted to develop normative factors that define what it means for a territorial state to be "unwilling or unable" to eliminate threats posed by a non-state actor since the legitimacy of the "unwilling or unable" test is undermined by its lack of content. The first normative element developed by Deeks is the "prioritization of consent and cooperation."[10] According to this element, a victim should obtain a territorial state's consent to use force within the latter's borders and

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6 Olivier Corten, *The "Unwilling or Unable" Test: Has it Been, and Could it be, Accepted?*, 29(3) Leiden Journal of International Law 777, 778 (2016).

7 U.N. Security Council, Letter dated 30 March 1970 from the Deputy Permanent Representative of Cambodia to the United Nations addressed to the President of the Security Council, 30 March 1970, S/9729.

8 Corten 2016, at 778.

9 R. Nicholas Burns, *U.S. Department of State Daily Press Briefing, Friday July 7, 1995*, Office of the Spokesman (Nov. 10, 2019) available at http://dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1995/9507/950707db.html.

10 Deeks 2012, at 520.

should explore whether there is an opportunity to work cooperatively with the territorial state to suppress terrorism, thus reducing the number of possible cases in which a victim state uses force unilaterally in the territorial state.[11]

Nevertheless, the U.S.-led military intervention in Syria seems far from compatible with the normative elements of the "unwilling or unable" test since they failed to obtain any consent or cooperation from the Syrian government.

The Syrian government's "unwillingness or inability" to suppress ISIL invoked by the U.S. as a legal justification for their military intervention does not seem to be very convincing. The Syrian governmental army has been taking necessary measures to fight against ISIL since ISIL seized control of some parts of Syrian territory and the government even requested other states for assistance in their fight against terrorism.[12]

It is true that the Syrian government has not yet succeeded in eradicating ISIL, but it cannot be accused of having been unwilling or unable to deal with ISIL. Those undisputed proofs can be found in various sources, such as the Reports made by the Secretary General.[13]

Nevertheless, according to the U.S. legal reasoning, the failure of the Syrian government to eradicate ISIL, i.e. Syrian "objective inability" allegedly grants the U.S. and other intervening states a right to use force unilaterally in the Syrian territory.

The aim of this study is to assess whether the military intervention on the basis of the "unwilling or unable" test in Syria is in conformity with international law. A consensus on the issue of military interventions on the basis of the "unwilling or unable" test has not yet been reached. Some scholars, like Gareth Williams, contended that the test is an emerging norm of customary international law,[14] while others, like

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[11] Deeks 2012, at 533.

[12] For example, *see* U.N. Security Council, Security Council Meeting on the Situation Concerning Iraq, 19 September 2014, S/PV.7271, at 43; U.N. Security Council, Security Council Meeting on Threats to International Peace and Security caused by Terrorist Acts, 19 November 2014, S/PV.7316, at 33; U.N. General Assembly, Security Council, Identical letters dated 26 February 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, 3 March 2015, A/69/804–S/2015/152; U.N. General Assembly, Security Council, Identical letters dated 25 May 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, 1 June 2015, A/69/912–S/2015/371.

[13] U.N. Security Council, Report of the Secretary-General on the Implementation of Security Council Resolutions 2139 (2014) and 2165 (2014), 24 September 2014, S/2014/696, at 6; U.N. Security Council, Report of the Secretary-General on the Implementation of Security Council Resolutions 2139 (2014), 2165 (2014) and 2191 (2014), 23 March 2015, S/2015/206, at 13; U.N. Security Council, Report of the Secretary-General on the Implementation of Security Council resolutions 2139 (2014), 2165 (2014) and 2191 (2014), 17 April 2015, S/2015/264, at 4; U.N. Security Council, Report of the Secretary-General on the Implementation of Security Council Resolutions 2139 (2014), 2165 (2014) and 2191 (2014), 22 May 2015, S/2015/368, at 4; U.N. Security Council, Report of the Secretary-General on the Implementation of Security Council Resolutions 2139 (2014), 2165 (2014) and 2191 (2014), 23 July 2015, S/2015/561, at 4.

[14] Gareth D. Williams, *Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the "Unwilling or Unable" Test*, 36(2) University of New South Wales Law Journal 619 (2013).

Olivier Corten concluded that if we accept the test, every state would be allowed to launch a military campaign on another state's territory, which would lead to a radical change, if not to the end, of the U.N. system.[15]

The present article focuses on investigating whether the "unwilling or unable" test is in conformity with both customary international law and international treaties. The article investigates the legality of the test in terms of state practice and *opinio juris*, which are the universally recognized elements of customary international law (Section 1) and in terms of the principles of respect for sovereignty, non-use of force, circumstances precluding wrongfulness, and self-defense recognized under international treaties (Section 2).

Unless accurate legal solution to the problem of military intervention justified by the "unwilling or unable" test is provided, the present system of international law, including non-use of force regime would be in the throes of crisis. Admittedly, a state cannot be denied a right to defend itself against attacks or threats posed by non-state actors, including international terrorist groups, but it is equally right and proper that such act in self-defense must not lead to any violations of sovereignty of a territorial state where a non-state actor operates from.

Therefore, the present article highlights the problem of sovereignty violation in the analysis of military intervention on the basis of the "unwilling or unable" test, thus attempting to contribute to alleviating the throes of crisis which the present use of force regime faces.

Section 1 will argue that no universal and consistent state practice or *opinio juris* exists to corroborate the assertion that the "unwilling or unable" test has emerged as a norm of customary international law. Section 2 will show that the "unwilling or unable" test as invoked by the U.S. in the Syrian case is incompatible with rules of international law, including Chapter II of the U.N. Charter that regulated respect for sovereignty and non-use of force, and its exceptions, namely self-defense and consent as circumstances precluding wrongfulness. Section 3 will provide concluding remarks.

The sources cited in the research include academic literature, articles, reports, and government statements, etc.

1. The "Unwilling or Unable" Test and Military Intervention in Syria: Customary International Law

According to those in favor of the "unwilling or unable" test in justifying military interventions, the test has emerged as a new principle of customary international law.

Customary international law is defined as international law that derives from the practice of states and is accepted by them as legally binding.[16] Paragraph 1 of Article 38

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[15] Corten 2016, at 77.

[16] *Black's Law Dictionary* (B.A. Garner (ed.), 9th ed., St. Paul: West, 2009).

of the Statute of the International Court of Justice (ICJ) defines customary international law as "international custom, as evidence of a general practice accepted as law." In order for international custom to be formed, two elements are required: state practice and *opinio juris*. Although the two-element approach is not without controversies, it is mainly recognized by the international community. One of the typical precedents that endorsed the two-element approach is the judgment of the International Court of Justice on the 1960 *Case Concerning Right of Passage over Indian Territory*.[17] There are several other precedents of the ICJ and the Permanent Court of International Justice concerning the requirements for the formation of customary international law. The two-element approach has been applied by many of those who argue that the "unwilling or unable" test has emerged as customary international law.

As is known, the "unwilling or unable" test has never been specified in any of the international legal documents or judicial precedents; it only exists as an academic theory. Unlike other customary rules of international law like the principle concerning free use of outer space, the "unwilling or unable" test has not been universally recognized by all states. Nevertheless, some international publicists argue that the test has already emerged as a customary international law since state practice and *opinio juris* in favor of the test exist.

The following sections will investigate whether there exist state practice and *opinio juris* concerning the "unwilling or unable" test.

1.1. Non-Existence of State Practice

According to some scholars, the "unwilling or unable" test reflects a practice in which some states crossed the boundaries of other states that were accused of being unable to prevent terrorist groups from using their territories as "safe havens" for launching attacks against the intervening states.[18]

State practice refers to activities that are usually or regularly done by states, often as a tradition or custom. In order for a certain activity to become state practice and to be recognized as an element required for the formation of customary international law, it should be general and consistent. In other words, a certain state conduct should be carried out not by a handful of states, but by an overwhelming majority of states and not temporarily, but consistently and repeatedly in order for it to amount to state practice. This was adopted in the decisions of international courts and tribunals and widely endorsed in the literature.[19]

The important problem herein is exactly how many states must carry out a certain practice in order for it to be general and how long a certain practice must exist in

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[17] *Case Concerning Right of Passage over Indian Territory (Portugal v. India)* (1960) I.C.J. 6.

[18] Deeks 2012, at 502.

[19] International Law Commission, Second Report on Identification of Customary International Law (prepared by Special Rapporteur Michael Wood), 22 May 2014, A/CN.4/672, para. 21.

order to be consistent. There is no specific legal requirement for this, but there exist an academic approach that is universally recognized.

As for the generality of a certain practice, it is recognized that a practice is general if it is followed by an overwhelming majority of states, which have had the opportunity of applying the practice, which leads to the formation of a rule of customary international law. As for the consistency of a practice, it is accepted that although repetition of a certain conduct for hundreds of years had been required in the past, decades or several years of repetition may lead to the formation of a certain practice at the present time. For example, although the principle on free use of the high seas has been observed by several states since 17th century, it was not until the 19th century that it became state practice. By contrast, the law of freedom of movement in outer space was recognized as a rule of customary international law after only a few years of practice.[20]

As for the military intervention on the basis of the "unwilling or unable" test, the same conduct must be repeatedly followed by an overwhelming majority of states, which have had the opportunity of applying the test, in order for the relevant state practice to be formed. Such states include those which have been, are or can be the subjects of attack by a non-state actor. States without non-state actors operating across boundaries or have well-functioning security cooperation with neighboring states seldom need to apply the test. The application of the "unwilling or unable" test is mainly relevant to those states facing political or military instability, or civil strife and that are under direct or indirect threat of attack posed by non-state actors.

In fact, it is difficult to determine exactly how many states will have the opportunity to invoke the test, since which states will be under attack by non-state actors is unpredictable.

But it is not impossible to decide which states have had the opportunity of applying the test. As mentioned above, the approach similar to the present "unwilling or unable" test was proposed in 1970s, so it can be said that the states that carried out military interventions after the 1970s have had the opportunity of applying the "unwilling or unable" test. Such cases include the U.S. intervention against Cambodia in 1970, Turkish military attack against Kurds in northern Iraq of 1995, Rwandan and Ugandan use of force in the Democratic Republic of Congo in 1997, alleged Russian action against Chechen separatists in Georgia in 2002, Columbian military attack against Ecuador in 2008, and airstrikes by U.S.-led coalition against ISIL in Syria in 2014.[21] But the limited space of the article does not permit detailed analysis of all relevant cases. Some of the most typical cases are analyzed in this article to assess the applicability of the "unwilling or unable" test.

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[20] Katherine N. Guernsey, *The North Sea Continental Shelf Cases*, 27(1) Ohio Northern University Law Review 141, 150 (2000–01).

[21] Anton Larsson, *The Right of States to Use Force Against Non-State Actors – Is the "Unwilling or Unable" Test Customary International Law?*, Thesis in Public International Law, Faculty of Law, Stockholm University (2015), at 16–38 (Nov. 10, 2019) available at http://www.diva-portal.org/smash/get/diva2:854914/FULLTEXT01.pdf.

Among six states which have had the opportunity of applying the test, including the U.S., Turkey, Russia, Uganda, Rwanda, and Columbia, only three of the states explicitly referred to the "unwilling or unable" test: Turkey in 1996, Russia in 2002, and the U.S. in 1970 and 2014.[22] However, Russia invoked the "unwilling or unable" test but managed to reach an agreement of cooperation with the Georgian government before resorting to the use of force.[23] Thus, Russia, which have had the opportunity of applying the "unwilling or unable" test, but not actually applied it, is excluded in the list of states that have applied the test in practice. In light of this, a handful of states that do not constitute even a simple majority have applied the test.

International practice after 2006, when the "unwilling or unable" test was relatively well-defined, particularly indicates that the majority of states which have had the opportunity of applying the test did not apply the test in practice.

The states which have recently had the opportunity of applying the test include the states that took part in the U.S.-led coalition acting in Iraq and Syria since 2014. Military action in Iraq is clearly undisputable and the "unwilling or unable" test cannot be applied hereto since it is based on invitation and consent of the Iraqi government.

On the other hand, although Syria invited Russia and Iraq to carry out military interventions against ISIL in its territory, the government did not invite or consent the U.S.-led coalition to intervene. Therefore, the states participating in the coalition can be considered as the states which have the most probable opportunity of applying the test. Among those states, only four: the U.S.,[24] Canada,[25] Australia,[26] and Turkey[27] invoked the "unwilling or unable" test. These states justified that they acted in conformity with the "unwilling or unable" test in Syria in the letters sent to the United Nations and in a number of meetings held in the U.N. It is interesting to note that, inter alia, Canada and Australia opposed the invocation of the test at first, but then shifted their position to support the justification on the basis of the "unwilling or unable" test.

What transpires is that a general and consistent state practice does not exist concerning military intervention on the basis of the "unwilling or unable" test and accordingly, it can be concluded that no relevant rule of customary international law has formed.

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22 Larsson, *supra* note 21, at 40.

23 *Id.*

24 Letter dated 23 September 2014, *supra* note 3.

25 U.N. Security Council, Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, 31 March 2015, S/2015/221.

26 U.N. Security Council, Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, 9 September 2015, S/2015/693.

27 U.N. Security Council, Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, 24 July 2015, S/2015/563; *see also* U.N. Security Council, Letter dated 14 June 2015 from the Permanent Representative of Turkey to the United Nations addressed to the President of the Security Council, 15 June 2015, S/2015/434.

1.2. Non-Existence of Opinio Juris

For a rule of customary international law to be formed, *opinio juris*, a subjective element must exist as well as state practice, which is an objective element. *Opinio juris* is the principle that for conduct or a practice to become a rule of customary international law, it must be shown that nations believe that international law (rather than moral obligation) mandates the conduct or practice.[28] *Opinio juris* constitutes one of the two fundamental elements required for the formation of customary international law.

An *opinio juris* is established when the majority of states believe that a certain practice is mandatory under international law through repeated application of the practice. This immediately raises an important problem concerning the sources of evidence that must be relied upon to determine the existence or non-existence of *opinio juris*.

The International Law Commission (ILC) opined that *opinio juris* can be inferred from practice,[29] but went further to enumerate several other materials in which evidence of *opinio juris* may be found.[30] Besides clear statements by a State, the ILC emphasizes that intergovernmental correspondence, the jurisprudence of national courts, the opinions of government legal advisors, official publications in fields of international law, internal memoranda by State officials, treaties (and their *travaux préparatoires*) and resolutions of deliberative organs of international organizations, such as the General Assembly and Security Council of the United Nations, and resolutions of international conferences can be the sources of evidence for determining the existence of *opinio juris*.

In fact, since the behavior of states analyzed in Subsection 1.1 do not demonstrate the existence of general and consistent state practice in favor of the "unwilling or unable" test, similar conclusion can be drawn as to *opinio juris*. However, assuming that some scholars argue that state practice in favor of the test has already been established, it is necessary to reassess the presence of *opinio juris* in favor of the test in terms of the above-listed sources of evidence.

The analysis focuses mainly on the states that are closely involved with the "unwilling or unable" test as well as other states. This is because the former group of states has more urgent needs to declare their *opinio juris* concerning the "unwilling or unable" test. Such states include those states participating in the U.S.-led coalition in the Syrian territory.

As mentioned earlier, besides 15 states in the U.S.-led coalition, Russia and Iran are undertaking intervention in Syria. 18 states, including Syria, the territorial state, are involved with the application of the test. It will be determined which (group of) states accepted or refused the test below.

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[28] *Black's Law Dictionary*, *supra* note 16, at 1201.

[29] Second Report on Identification of Customary International Law, *supra* note 19, para. 7.

[30] *Id.* para. 76.

First, a substantial number of participants of the U.S.-led coalition never referred to the "unwilling or unable" test except only four which have explicitly invoked the "unwilling or unable" test: the U.S., Canada, Australia, and Turkey.

Germany merely implied the test but not expressed conviction in favor of the test, contending that

> the Government of the Syrian Arab Republic does not at this time exercise effective control. States that have been subjected to armed attack by ISIL originating in this part of Syrian territory, are therefore justified under Article 51 of the Charter of the United Nations to take necessary measures of self-defense...[31]

The UK and France never invoked the "unwilling or unable" test as a legal basis for their attacks. The UK invoked collective and individual self-defense without explicitly invoking the "unwilling or unable" test as a legal ground for their military intervention in Syria. In a letter sent to the Security Council in November 2014, the UK referred to collective self-defense according to Article 51,[32] in the second letter sent in September 2015, it referred to individual self-defense,[33] and in the third letter sent in December, it referred to "individual and collective self-defense" in relation to Security Council Resolution 2249 (2015).[34]

In the same vein, after having abstained from using force in the Syrian territory, France suddenly shifted its position to participate in the military intervention in Syria since September 2015 without providing any legal reasoning. It simply stated that in accordance with Article 51 of the Charter of the United Nations, France has taken actions involving the participation of military aircraft in response to attacks carried out by ISIL from the territory of the Syrian Arab Republic.[35]

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31 U.N. Security Council, Letter dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, 10 December 2015, S/2015/946.

32 U.N. Security Council, Identical letters dated 25 November 2014 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council, 26 November 2014, S/2014/851.

33 U.N. Security Council, Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, 8 September 2015, S/2015/688.

34 U.N. Security Council, Letter dated 3 December 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, 3 December 2015, S/2015/928.

35 U.N. Security Council, Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, 9 September 2015, S/2015/745. No legal precision was brought in the following months. Déclaration du gouvernement sur l'engagement des forces aériennes – Intervention de Laurent Fabius au Sénat, 15 September 2015 (Nov. 10, 2019) available at https://www.diplomatie.gouv.fr/z_

What is more important is that the Arab states, which account for a considerable number of the states participating in the coalition, refused to support the "unwilling or unable" test. After beginning their military intervention on the Syrian territory, those states did not send any report to the Security Council, as required by Article 51 of the U.N. Charter.[36] Prior to military intervention on the Syrian territory, Arab states had strongly condemned Turkish incursion into Iraqi territory invocation of self-defense on the basis of the "unwilling or unable" test and requested immediate withdrawal of Turkish force in June 2015. This clearly indicates the position of Arab states concerning the "unwilling or unable" test.

Second, other intervening states, including Russia and Iran, which were invited by the Syrian government to undertake military intervention, denounced the illegality of any unilateral action against Syria. The fact that Russia condemned "strikes of the U.S. armed forces against ISIL in Syria without the consent of the legitimate government" as "an act of aggression, a gross violation of international law,"[37] clearly indicates absence of Russian legal conviction in favor of the test. The same opposition can be observed in the Iranian position. It should also be mentioned that, Syria, the territorial state, strongly denounced the actions of the U.S.-led coalition as infringement upon the Syrian territory.

What can be inferred from the foregoing is that the majority of states involved in the military intervention in Syria do not support the test.

Military intervention justified under the "unwilling or unable" test was not accepted by the majority of international community. Algeria, Argentina, Belarus, Brazil, Chad, China, Cuba, the DPRK, Ecuador, India, Iran, Venezuela, South Africa, and ASEAN States declared their positions rejecting any attempts to undermine the sovereignty, independence, and territorial integrity of Syria, thus strongly denounced unilateral military intervention and its justification, the "unwilling or unable" test.[38]

In addition, the "unwilling or unable" test is not supported by international organizations, such as the United Nations. The Security Council of the United Nations is an international organ whose primary responsibility is maintenance of international peace and security, and it is the fundamental requirement of the present international security system that use of force should be authorized by the Security Council. Therefore, military intervention on the basis of the "unwilling or unable" test must be, at least, acquiesced by the Security Council.

archives/fr/anciens-ministres-old/laurent-fabius/discours/article/declaration-du-gouvernement-sur-l-engagement-des-forces-aeriennes-intervention. *See also* U.N. Security Council, Security Council Meeting on Threats to International Peace and Security caused by Terrorist Acts, 20 November 2015, S/PV.7565, at 2.

[36] Corten 2016, at 783.

[37] Russia Says Air Strikes in Syria Would Be Act of Aggression Without U.N. Vote, Reuters, 11 September 2014 (Nov. 10, 2019) available at https://uk.reuters.com/article/uk-russia-u-s-syria-airstrikes/russia-says-air-strikes-in-syria-would-be-act-of-aggression-without-u-n-vote-idUKKBN0H61BF20140911.

[38] Corten 2016, at 788–789.

Nevertheless, exhaustive reading of Security Council resolution and declarations concerning the Syrian case indicate that no reference was made to the "unwilling or unable" test. The Security Council reaffirmed its respect for state sovereignty, territorial integrity, and political independence and called upon member states to cooperate and consistently support each other's efforts to counter terrorism.[39] This shows that the Security Council does not support unilateral military intervention or use of force on the basis of the "unwilling or unable" test as invoked in the Syrian case.

Lack of *opinio juris* of the international community is corroborated in relevant academic literature. A book entitled "Self-Defence Against Non-State Actors: Impulses from the Max Planck Trialogues on the Law of Peace and War" published by the Max Planck Institute for Comparative Public Law and International Law in 2017 covers different positions of scholars concerning the "unwilling or unable" test and self-defense. The articles were classified under four categories: restrictive positions, expansionist positions, conceptual alternatives, and meta questions. Among the articles edited in the book, eight were restrictive, challenging the "unwilling or unable" test, five were expansionist, supporting the test, and two articles took rather eclectic positions.[40] As a whole, the test was not accepted by the majority of the scholars whose articles were included in the book.

The foregoing suggests that the "unwilling or unable" test, on the basis of which unilateral military intervention is carried out, has not obtained *opinio juris* from the majority of states, thus not qualifying as an emerging rule of customary international law.

2. The "Unwilling or Unable" Test and Military Intervention in Syria: International Convention

The United Nations Charter is the most authoritative instrument under which the legality or illegality of military intervention on the basis of the "unwilling or unable" test can be judged. The Charter, which was written with vivid memory of the First World War and with the Second World War still raging, is the fundamental legal document that comprehensively regulates rights and obligations of states, including non-use of force.

Article 2.1 of the U.N. Charter specifies sovereign equality as the most important principle for the maintenance of international peace and security, and to that end Article 2.4 prohibited threat or use of force. The exceptions to the prohibition are regulated in Chapter VII (authorization of the Security Council) and Article 51 (self-defense).

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[39] Corten 2016, at 789–790.

[40] *Self-Defence Against Non-State Actors: Impulses from the Max Planck Trialogues on the Law of Peace and War* (A. Peters & C. Marxsen (eds.), Berlin: Max Planck Institute for Comparative Public Law and International Law, 2017).

Provisions on non-use of force and its exceptions were further itemized in Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) that was adopted in November 2001. Articles 20 and 21 of ARSIWA specify consent and self-defense as circumstances precluding wrongfulness. ARSIWA can also be used as an important source for deciding the legality of unilateral military intervention on the basis of the "unwilling or unable" test.

For military intervention on the basis of the "unwilling or unable" test to be legal, it must be compatible with exceptions of non-use of force that are enshrined in international legal instruments, including the U.N. Charter and ARSIWA.

Since military intervention on the basis of the "unwilling or unable" test amounts to use of force, it clearly falls into the range of application of Article 2.4. Therefore, only when such intervention is held compatible with exceptions of non-use of force – authorization of the Security Council, consent, and self-defense – can it be deemed legal.

In case of intervention by authorization of the Security Council, intervening states do not need to invoke the "unwilling or unable" test and the Security Council has never authorized any states to intervene in Syria, so the first item can be excluded from further analysis.

In practice, those who support the "unwilling or unable" test as proposed by the U.S. in the Syrian case, provides two legal reasoning: one is passive consent, which is a variety of consent, and the other is self-defense.

Subsections 2.1 and 2.2 will explore whether military intervention on the basis of the "unwilling or unable" test is compatible with exceptions of use of force: consent and self-defense.

2.1. Consent as a Circumstance Precluding Wrongfulness

Article 20 of ARSIWA reads that

> [v]alid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

According to this provision, consent can be recognized as a circumstance precluding wrongfulness when two requirements are met. First, the consent must be valid, and second, the act must not exceed the limits of that consent. What is fundamental to the validity requirement of consent is the method of giving consent. This is because determining whether or not a relevant act remains within the limits of that consent depends on the method of consent.

However, Article 20 of ARSIWA simply provides the term "valid" without specifying detailed methods for granting consent. In this light, the ILC emphasized that

> consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked.[41]

It can be concluded, therefore, that the valid method of consent, a circumstance precluding wrongfulness, should be an express and free one without any elements of fraud, coercion, or threat.

What is of paramount importance in the method of consent is that consent must be expressly stated. Consent that is not expressed by a state cannot be recognized as a circumstance precluding wrongfulness, regardless of whether it is freely given or coerced.

Nevertheless, the military intervention in Syria was carried out by the U.S.-led coalition even without tacit or implied consent, not to speak of any express written consent from the Syrian government.

As mentioned earlier, strikes of the U.S.-led coalition against ISIL on the Syrian territory commenced on 22 September 2014. The following ten states were reported to have participated in the U.S.-led airstrikes in Syria until early February 2016: the U.S., Australia, Bahrain, Canada, France, Jordan, Saudi Arabia, Turkey, the UAE, and the UK.[42] Later, the number of participants increased to fifteen as five more states – France, Germany, The Netherlands, Denmark, and Morocco – joined the coalition.[43] Among these participants, no state has ever asked or obtained express consent from the Syrian government.

For political reasons, not only the U.S. but also all other member states are hostile to the Syrian government, regarding it as illegitimate and asking for the departure of Bashar al-Assad government. Consequently, consent has never been asked from Syria. This was endorsed by the statement of the U.S. State Department that clearly indicated that the U.S.-led coalition was "not looking for the approval of the Syrian regime"[44] and constantly ruled out any cooperation with the Syrian government forces.[45]

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41 United Nations, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), at 73, para. 6 (Nov. 10, 2019) available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. This is consistent with the previous position of the Commission according to which consent, in order to produce any legal effects, must be "*valid in international law, clearly established, really expressed (which precludes merely presumed consent), internationally attributable to the State and anterior to the commission of the act to which it refers*." *Document A/34/10: Report of the International Law Commission on the work of its thirty-first session (14 May – 3 August 1979)* in *Yearbook of the International Law Commission 1979. Vol. II (Part Two)* 112 (New York: United Nations, 1980) (Nov. 10, 2019) also available at https://legal.un.org/ilc/publications/yearbooks/english/ilc_1979_v2_p2.pdf.

42 Bannelier-Christakis 2016, at 766.

43 Corten 2016, at 780.

44 Justin Sink, *White House Won't Commit to Asking Congress for Syria Strike*, The Hill, 25 August 2014 (Nov. 10, 2019) available at thehill.com/policy/defense/215905-white-house-wont-commit-to-asking-congress-for-syria-strike.

45 Anne Gearan, *U.S. Rules out Coordinating with Assad on Airstrikes Against Islamists in Syria*, Washington Post, 26 August 2014 (Nov. 10, 2019) available at https://www.washingtonpost.com/world/national-

Since airstrikes of the U.S.-led coalition were not carried out under the consent of the Syrian government, it is definitely in violation of international law. Not long after the initiation of airstrikes, intervening states advanced the theory of "passive consent" as a legal justification for their use of force.

According to the "passive consent" theory, the Syrian government was not opposed to the strikes of the U.S.-led-coalition against ISIL considering it as a relief for the government forces,[46] which amounts to the alleged "passive consent" from the Syrian government.

The alleged "passivity" of the Syrian government can be disputed in view of its strong denouncement with respect to the airstrikes of the U.S.-led coalition in its own territory. When the U.S. President Barack Obama announced his intention to bomb ISIL targets in Syria on 10 September 2014, the government strongly reacted, declaring that "any action of any kind without the consent of the Syrian government would be an attack on Syria"[47] Russia and Iran also declared that "strikes by the US armed forces against ISIL positions in Syria without the consent of the legitimate government" will be, "an act of aggression, a gross violation of international law."[48]

The foregoing suggests that the "passive consent" approach as a legal justification for military intervention lacks evidence.

The supporters of the "passive consent" approach contend that the passivity of the Syrian government for several months after the airstrikes began shows that the government was not opposed to the strikes of the U.S.-led coalition against ISIL. What they relied upon to support the "passive consent" approach is silence and ambiguous expression of the Syrian position stated, for example, in the letter sent to the Security Council in June 2015 reading "it is prepared to cooperate bilaterally and at the regional and international levels to combat terrorism" and that

> it supports any genuine international effort aimed at countering the terrorism in all its forms and manifestations, provided that, in doing so, every effort is made to safeguard civilian lives, respect national sovereignty and adhere to international infringements.[49]

The immediate question then arises concerning whether silence or ambiguity amount to "passive consent" for a military intervention and further equivalent to valid consent, thus justifying intervention under international law.

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security/us-rules-out-coordinating-with-assad-on-airstrikes-against-islamists-in-syria/2014/08/26/cda02e0e-2d2e-11e4-9b98-848790384093_story.html.

46 Identical letters dated 25 May 2015, *supra* note 12.

47 Ian Black & Dan Roberts, *Isis Air Strikes: Obama's Plan Condemned by Syria, Russia and Iran*, The Guardian, 12 September 2014 (Nov. 10, 2019) available at https://www.theguardian.com/world/2014/sep/11/assad-moscow-tehran-condemn-obama-isis-air-strike-plan.

48 *Id.*

49 Identical letters dated 25 May 2015, *supra* note 12.

"Action versus reaction" paradigm is of great importance in international legal relations. As a legal maxim *qui tacet, consentire videtur* indicates, silence, tolerance, and non-opposition cannot be entirely ignored in international relations. Inactive response or silence, however, cannot be recognized as consent. If it is accepted in a use of force regime, it would be abused, resulting in continuous military intervention and use of force against other states under the pretext of "passive consent" or "tacit consent."

It is for this reason that the U.N. General Assembly Resolution 3314 on the Definition of Aggression stated that an act of aggression may consist of

> [t]he use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement.[50]

According to this paragraph, there seems to be little room for military activities or even presence of foreign troops in the territorial state without requiring express consent from the territorial state.

What transpires is that the "passive consent" approach advanced by some intervening states as a legal justification for military intervention in Syria is hardly compatible with the U.N. General Assembly Resolution 3314 on the Definition of Aggression.

The theory of "passive consent" seems to have become inapplicable after Syria sent a letter to the Security Council concerning military intervention carried out by the U.S.-led coalition on 17 September 2015. In the letter, Syria stated that the intervening states:

> invoke[d] a distorted reading of the intention of Article 51 of the Charter of the United Nations … Syria has not made any request to that effect. … If any State invokes the excuse of counter-terrorism in order to be present on Syrian territory without the consent of the Syrian Government, whether on the country's land or in its airspace or territorial waters, its actions shall be considered a violation of Syrian sovereignty. Combating terrorism on Syrian territory requires close cooperation and coordination with the Syrian Government in accordance with the counter-terrorism resolutions of the Security Council.[51]

Thus, it clearly denounced military intervention by the U.S.-led coalition as illegal under international law. Later, it even stated that

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[50] U.N. General Assembly, Definition of Aggression, 14 December 1974, A/RES/29/3314, para. 3(e).

[51] U.N. Security Council, Identical letters dated 17 September 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, 21 September 2015, S/2015/719.

> [t]he United States, Britain, France, Canada and Australia have sought to justify their intervention in Syria by citing the fight against ISIL. They have invoked Article 51 of the Charter of the United Nations, but have not consulted with the Syrian Government. That course of action distorts the provisions of the Charter and manipulates international law.[52]

In subsequent letters, Syria showed its opposition to airstrikes and legal justification invoked by the U.S.-led coalition even more clearly, calling it as a flagrant violation of its national sovereignty and international law. In December 2015, for instance, Syria sent a letter protesting that

> aircrafts of the so-called international coalition led by the United States of America continue to violate the sovereignty of Syria under the pretext that they are targeting the Islamic State in Iraq and the Levant (ISIL) terrorist organization.[53]

While denouncing military intervention by the U.S.-led coalition without any invitation or consent as futile and hypocritical, the Syrian government invited Russia and Iran to assist in its effort to defeat terrorism and waged large-scale military actions against ISIL.

The Russian military intervention in Syria is based on invitation by the Syrian government. In a letter sent to the Security Council on 15 October 2016, Russia stated that

> in response to a request from the President of the Syrian Arab Republic, Bashar al-Assad, to provide military assistance in combating the terrorist group Islamic State in Iraq and the Levant (ISIL) and other terrorist groups operating in Syria, the Russian Federation began launching air and missile strikes against the assets of terrorist formations in the territory of the Syrian Arab Republic on 30 September 2015.[54]

Since Russia launched strikes against ISIL in Syria, the Syrian government have been calling other states to "respect international law" as Russia, and expanded its

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[52] U.N. General Assembly, Security Council, Identical letters dated 21 September 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, 22 September 2015, A/70/385–S/2015/727.

[53] U.N. Security Council, Identical letters dated 9 November 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, 16 November 2015, S/2015/851.

[54] U.N. Security Council, Letter dated 15 October 2015 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council, 15 October 2015, S/2015/792.

operations to annihilate ISIL under the assistance of Russian force. As of September 2018, the government forces liberated approximately 1400 civilian areas from the control of terrorists and seized control of over 96% of its territory.

Unlike the Syrian case, military intervention by the U.S.-led coalition in Iraq was never challenged since it is based on an invitation of the Iraqi government. When ISIL captured some important areas in Iraq, including Mosul in 2014, the Iraqi government issued requests for "the assistance of the international community" to help "defeat ISIL and protect our territory and people" from the growing threat posed by this terrorist organization.[55] In response to this call, a U.S.-led coalition, consisting of nine participants (the U.S., Australia, Belgium, Canada, Denmark, France, Jordan, The Netherlands, and the UK)[56] started airstrikes against ISIL in Iraq.

The Iraqi government's invitation for assistance of the international community to defeat ISIL was affirmed in a letter sent to the President of the Security Council in September 2014, in which Iraq emphasized that

> in accordance with international law and the relevant bilateral and multilateral agreements, and with due regard for complete national sovereignty and the Constitution, we have requested the United States of America to lead international efforts to strike ISIL sites and military strongholds, with our express consent.[57]

Iraq has clearly affirmed several times that the airstrikes by the U.S.-led coalition were taking place on the basis of its express consent.[58] The Iraqi government has also authorized some other states, such as Iran, besides the U.S.-led coalition to intervene on its territory. No state raised any objections about the legality of such intervention.[59]

As military intervention on Iraqi territory is based on express request of the government to help defeat ISIL, an international terrorist group, but not to repress political rebels in a civil strife, it was never challenged by international community.

Unlike intervention on Iraqi territory, intervention by the U.S.-led coalition in Syria is not accepted by international community and raises strong opposition since it was launched without any consent from the territorial state, Syria.

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55 U.N. Security Council, Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General, 25 June 2014, S/2014/440.

56 *See* Operation Inherent Resolve: Targeted Operations to Defeat ISIS, U.S. Department of Defense (Nov. 10, 2019) available at www.defense.gov/News/Special-Reports/0814_Inherent-Resolve.

57 U.N. Security Council, Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to President of the UNSC, 22 September 2014, S/2014/691.

58 Bannelier-Christakis 2016, at 751.

59 *Id.*

2.2. Exercise of a Right of Self-Defense

The majority of states participating in military intervention in Syria to riposte ISIL invoked individual and collective self-defense or "Preventive" self-defense. As mentioned earlier, the U.S. invoked inherent right of individual and collective self-defense, as reflected in Article 51 of the U.N. Charter. Turkey also invoked its inherent right of individual and collective self-defense since

> the regime in Syria is neither capable nor willing to prevent these [ISIL] threats emanating from its territory which clearly imperil the security of Turkey and safety of its nationals.[60]

Similar positions were taken by the UK and France.

Whether the legal reasoning that the "unwillingness or inability" of Syria to defeat ISIL allows states concerned to exercise individual and collective self-defense or "Preventive" self-defense is compatible with international law or not can be determined by analyzing it in respect of provisions on self-defense under the U.N. Charter and ARSIWA.

Self-defense is a right of a state to defend itself against a real or threatened attack.[61] Self-defense, which is an exception to Article 2.4 that prohibits use of force, is specified in Article 51 of the U.N. Charter and ARSIWA. Article 51 of the U.N. Charter recognizes that a state has an inherent right of individual or collective self-defense if an armed attack occurs against the state, and Article 21 of ARSIWA regulates that the wrongfulness of an act of a State is precluded if the act constitutes a lawful measures of self-defense taken in conformity with the Charter of the United Nations. According to these provisions, a state can exercise individual or collective self-defense when armed attack against itself occurs, and use of force in self-defense is a circumstance precluding wrongfulness.

Application of these two provisions to military intervention on the basis of the "unwilling or unable" test in Syria raises several questions to be addressed.

The first question is whether self-defense can be applied to a victim state *vis-à-vis* a non-state actor within a territorial state. Since the conductor of an armed attack in the "unwilling or unable" test is a non-state actor acting within the territory of a territorial state, the subject of self-defense by a victim state is the non-state actor. International law, however, confines the subject of self-defense to be a state. Self-defense regulated under international law, including the U.N. Charter and ARSIWA includes an individual right of an aggressed state or collective right of its allies *vis-à-vis* an aggressor state. Article 2.4 prohibits states from using force and self-defense, which is an exception to this prohibition, is also applicable only to states.

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[60] Letter dated 24 July 2015, *supra* note 27.

[61] *Black's Law Dictionary*, *supra* note 16, at 1510.

The "unwilling or unable" test, according to which non-state actors can be the subjects of self-defense, is based on a distorted assumption that Article 51 can be applied to non-state actors, an assumption that has never been recognized in the relevant texts[62] and case-law.[63]

If self-defense is to be applied to non-state actors, it would necessarily accompany violation of sovereignty of a territorial state. This would, in turn, lead to military reactions of the territorial state, which considers such armed attack against non-state actors as invasion of its own territory. Then it would subsequently result in an ill-cycle of retaliation under the name of "aggression" and "self-defense" in international relations.

The Syrian case is a typical example. The Syrian government denounced military intervention by the U.S.-led coalition on the basis of the "unwilling or unable" test as a blatant violation of its sovereignty and an act of aggression.

In the present situation where non-state actors under different names, which are capable of conducting armed attacks, exist in different countries of the world, if the "unwilling or unable" test is accepted, unilateral military intervention would be commonplace anytime, anywhere. This would eventually lead to the collapse of international legal system concerning *jus contra bellum* and non-use of force. This seems to challenge the "unwilling or unable" test.

Then the question arises concerning who should be held responsible for armed attacks of non-state actors such as ISIL, and what should be done about it.

Self-defense, in a strict technical sense, concerns the relationship between two subjects: the aggressor and the aggressed. Therefore, military actions in self-defense can be properly addressed when which state should be held responsible for attacks of the non-state actor, namely ISIL is decided. It can be determined by analyzing the issue under ARSIWA that regulates attribution of a conduct to a State.

According to ARSIWA, attribution takes place on the basis of an institutional, a functional and an agency test.[64] The institutional test concerns the attribution of an attack to a state if it has been committed by a *de jure* or *de facto* organ of that state.[65] According to the functional test, an attack is attributed to a state if it has been

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62 Art. 1 of the Definition of Aggression, *supra* note 50, referring to the use of force by one state against another state. This inter-state criterion was reaffirmed in 2010 when the crime of aggression was defined at the Kampala Conference. The definition refers to Resolution 3314 (XXIX) and expressly requires that the author of the crime of aggression must be a state organ, excluding the prosecution against individuals leading a non-state group.

63 *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) I.C.J. 136, 194, para. 139. *See* Paulina Starski, *Right to Self-Defense, Attribution and the Non-State Actor: Birth of the "Unable or Unwilling" Standard?*, 75 ZaöRV 455 (2015).

64 Kristen E. Boon, *Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines*, 15(2) Melbourne Journal of International Law 329 (2014).

65 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (1986) I.C.J. 14, para. 109.

committed by an entity that is empowered by that state to exercise governmental authority or is committed by an organ of another state that has been placed at the disposal of the first state.[66] Following the agency test, there needs to be a special relationship between a state and the non-state actor that commits the attack which is established when the state instructs or directs the non-state actor to attack or when the state exercises "effective control" over the specific non-state attack.[67]

According to the provisions of ARSIWA, if a state is to be held responsible for a certain conduct, it should be attributed to that state. If a conduct of a non-state actor is to be attributed to a state, there needs to be close relationship between each other.

In light of this, armed attacks launched by ISIL cannot be attributed to Syria. This is because ISIL is not a *de jure* or *de facto* organ of Syria or other states, and does not exercise the power of the government over certain parts of Syria on behalf of the Syrian government, nor operate in accordance with direction, order, or control of any other state. In particular, ISIL operates within the areas that are out of control of the Syrian government.

Then what can be done about the conduct of non-state actors such as ISIL? Providing that conducts of ISIL are not attributed to Syria, the lawful solution to this problem seems cooperation between a victim state and a territorial state on the basis of invitation and consent of the territorial state.

The second question is whether the "unwillingness or inability" of a territorial state constitute the ground for military intervention in self-defense. Self-defense can be invoked when armed attack occurred. The definition of armed attack raises big controversies, and no universal legal definition has been reached yet. U.N. General Assembly Resolutions and judicial decisions of the ICJ and International Criminal Tribunal stated their legal positions on the issue.

According to Article 3(g) of the Definition of Aggression, this could be the case if a state either "sent" an irregular group to the territory of another state, or was "substantially involved" in a particular use of force perpetrated by this group.[68]

The ICJ affirmed in its 1986 judgment on *Military and Paramilitary Activities in and Against Nicaragua* that

> while the concept of an armed attack includes the dispatch by one State of armed bands into the territory of another state, the supply of arms and other support to such bands cannot be equated with armed attack.[69]

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66 Arts. 5 & 6 of ARSIWA.

67 *Military and Paramilitary Activities* case, *supra* note 65, paras. 116 & 117; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (2007) I.C.J. 43, paras. 398, 402–406, 413 & 414.

68 Definition of Aggression, *supra* note 50. *See* Corten 2016.

69 *Military and Paramilitary Activities* case, *supra* note 65, at 126–127, para. 247.

According to this, no participation in terrorist acts could never be considered as an armed attack and therefore, self-defense cannot be invoked with respect to such conduct.

The interpretation of U.N. General Assembly Resolutions and judicial decisions of the ICJ indicates that while dispatching armed forces or substantially participating in the use of force by such armed group amount to armed attack, such actions as tolerance, acquiescence, or even assistance do not amount to armed attack, thus not qualifying as a ground for invocation of self-defense.

Therefore, even though Syria was "unwilling or unable" to deal with ISIL, this cannot be used a legal justification for acting in self-defense.

If the "unwilling or unable" test was accepted, it would ultimately lead to the conclusion that tolerance or acquiescence or even "objective inability" of a territorial state to obliterate non-state actors operating in its territory amount to an armed attack under Article 51 of the U.N. Charter, thus allowing a victim state to unilaterally use force in the territorial state.

The third and final question that arises is whether "Preventive" self-defense can be invoked in the Syrian case.

"Preventive" self-defense has been the subject of debate among international scholars for a long period of time, but there seems to be no growing recognition in favor of the approach. Some scholars argue that the wording "when an armed attack occur" in Article 51 is interpreted as referring to the existence of an ongoing armed attack, which challenge invocation of self-defense during non-existence of an ongoing armed attack. On the other hand, others contend that, due to the genres of modern war, if threat of an armed attack exists, it should be suppressed by invoking "Preventive" self-defense.

"Preventive" self-defense is, in a word, an approach according to which a state can enfeeble another state on the basis of objective judgment of the former that the latter is about to launch an armed attack. According to this approach, the strengthening of military force such as development and production of missiles or airplane carriers of some states might pose as a potential threat to another state. Therefore, "Preventive" self-defense, which can be allegedly invoked on the basis of "existence of threat," a subjective and hypothetical precondition, is an approach that could allow arbitrary use of force.

Neither universal international legal texts nor case law concerning "Preventive" self-defense exist, and it is difficult to conclude that state practice thereof has been established. It is, therefore, incompatible with international law, to invoke "Preventive" self-defense in the Syrian case.

Nevertheless, some states participating in the U.S.-led coalition, including the UK and France resorted to "Preventive" self-defense, considering that targeted strikes could be allowed to put an end to the preparation of criminal activities that could

take place on their respective soils.[70] If we follow such approach, every state would be allowed to have rights to determine whether a certain circumstance is grave enough to use force in other state's territory, thus allowing every state to use force under the pretext of "Preventive" self-defense.

The assertion that "Preventive" self-defense can be exercised on the basis of hypothetical and subjective judgment is not supported by judicial decisions of the ICJ.

The ICJ affirmed, in *Military and Paramilitary Activities* case, that whether a measure is necessary or not is not "purely a question for the subjective judgment of the party."[71] In the *Oil Platforms* case, the Court added that

> the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any "measure of discretion."[72]

The statements of the ICJ, which reject subjective judgment of the party, reflects its position that "Preventive" self-defense should not be allowed without consent of a territorial state nor requesting the international community, including the United Nations, to determine the circumstance and take necessary measures.

According to the Webster formula,

> the necessity of that self-defense must be instant, overwhelming and leaving no choice of means, and no moment for deliberation,[73]

thus rejecting the "Preventive" self-defense approach.

In view of the foregoing, it seems that the "Preventive" self-defense as invoked by some states participating in the U.S.-led coalition has not been universally accepted. The "unwillingness or inability" of the Syrian government is purely a subjective and hypothetical judgment of the relevant states and it appears groundless to contend that there was no choice of means besides military campaign in the Syrian territory.

To sum up, the military intervention being carried out by the U.S.-led coalition in Syria is not compatible with provisions of international law on self-defense.

Conclusion

If the "unwilling or unable" test, as invoked by some states in the U.S.-led coalition conducting military intervention in Syria, is accepted as a rule of international law,

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[70] *See* Letter dated 7 September 2015, *supra* note 33; Letter dated 3 December 2015, *supra* note 34; Identical letters dated 8 September 2015, *supra* note 35.

[71] *Military and Paramilitary Activities* case, *supra* note 65, at 141, para. 282.

[72] *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* (2003) I.C.J. 161, para. 73.

[73] John B. Moore, *A Digest of International Law* 412 (Washington: Government Printing Office, 1906).

every state would be given a right to use force on another state's territory on the basis of "unwillingness or inability" of the state to obliterate non-state actors, including international terrorist groups.

It is beyond doubt that states must be able to defend themselves when they are under attack by non-state actors. No state would tolerate or remain indifferent to violations of its territory and infringements of its nationals. This does not mean, however, that the "unwilling or unable" test must be accepted. It is because, if the test is accepted, violations of territorial integrity and sovereignty of states, as is shown in the Syrian case, would be even more prevalent and the U.N. system concerning international peace and security would be completely useless.

It constitutes a grave challenge to the U.N. system, which is mainly based on respect for sovereignty, to use force in a territorial state without any invitation or consent of a territorial state, or authorization of the U.N.

In order to prevent ill-cycle of terrorism and retaliation and maintain international peace and security, it is essential to eradicate their causative events. Unlawful invasions and aggressive policies against humanity should be put to an end, and efforts of international community should be strengthened to alleviate racial and national contradiction and confrontation caused by extreme political ideologies, including racism, national chauvinism, and neo-Nazism.

It is equally important to exert efforts to further improve and perfect international law. The reason why the "unwilling or unable" test is frequently described as lawful is that there remains a gap where such test can gain footing.

It is difficult to predict which state would be the next victim of unilateral military intervention justified by the "unwilling or unable" test as is taking place in Syria. Therefore, it is of practical significance to explore appropriate and legitimate solutions that can universally apply to the international society and to codify it, thus preventing widespread dissemination of the "unwilling or unable" test. If international law is steadily supplemented and perfected in accordance with the requirements of changing circumstances, the international system governing use of force would become more reliable and stable.

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