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Counter-Terrorism and International Law
— Armed Attacks as a Composite Act —

Abstract: The legality of counter-terrorist air-raids against the cross-border terrorist attacks is one of the difficult challenges for the international society. Whether such air-raids are justified or not as the exercise of self-defense? Can the terrorist attack by a non-State group be regarded as an 'armed attack' in Article 51 of the UN Charter? These issues will be looked at with reference to the concept of a 'composite act.'

Keywords: Counter-Terrorism, International Law, Composite Act, Self-Defense.

Resumen: La legalidad de las operaciones aéreas antiterroristas contra los ataques terroristas transfronterizos es uno de los fuertes retos para la sociedad internacional. ¿Se pueden justificar dichas operaciones como ejercicio de legítima defensa? ¿Puede considerarse el ataque terrorista de un grupo no estatal como un 'ataque armado' partiendo del artículo 51 de la Carta de Naciones Unidas? En este estudio analizaremos tales cuestiones partiendo del concepto legal de 'hecho compuesto'.

Palabras clave: contraterrorismo, Derecho Internacional, Hecho Compuesto, autodefensa.

Introduction

The validity of international law is based on the consent of the States. In international law, not only the rules but also the facts are to be established by the consent of the States concerned. "The validity and effectiveness of international law depends on the continuing consent and support of nation-States."[1] "States are said to be bound by international law because they have given their consent."[2] In *The Lotus Case* it is held that

> "[t]he rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations these co-existing communities or with a view to the achievement of common aims."[3]

Exceptions in the consent doctrine appear to be judgments of the International Court of Justice (ICJ) and the legally binding decisions of the Security Council under the *UN Charter*,

1. Jianming Shen, "National Sovereignty and Human Rights in a Positive Law", *Brooklyn Journal of International Law*, Vol 26, Issue 2. Art. 4, (12-01-2002), p. 419, available at: http://brooklynworks.brooklaw.edu/bjil/vol26/iss2/4.

2. Idem. "The basis of International Law: Why Nations Observe", *Penn State International Law Review*, Vol 17, Number 2, Art. 3, (01-01-1999), p. 314, available at: http://elibrary.law.psu.edu/psilr/vol17/iss2/3.

3. *The Lotus Case* (France v. Turkey), P.C.I.J., Ser. A, No 10 (Sep. 7, 1927), p.18.

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which is again consented by the Member States. In the relations of States the consent doctrine prevails. That is true of international law on counter-terrorism.

In this way, "[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."[4] Thus, Iraq has appealed that "we need your support in order to defeat ISIL and protect our territory and people,"[5] and "[w]e welcome the commitment that was made by 26 States to provide the new Iraq Government with all necessary support in its war against ISIL."[6] Then, the US has sent a letter to the UN that "the Government of Iraq has asked that the United States lead international efforts to strike ISIL sites and military strongholds in Syria in order to end the continuing attacks on Iraq, to protect Iraqi citizens, and ultimately to enable and arm Iraqi forces to perform their task of regaining control of the Iraqi borders."[7]

Qatar sent to the UN a joint statement issued by five Governments stating that they had "decided to respond to President Hadi's appeal to protect Yemen and its great people from the aggression of the Houthi militias," stating that "in accordance with the right of self-defence… to provide immediate support in every form and take the necessary measures, including military intervention, to protect Yemen and its people from the ongoing Houthi aggression, repel the attack that is expected at any moment on Aden and the other cities of the South, and help Yemen to confront Al-Qaida and Islamic State in Iraq and the Levant."[8]

Since December 2014, counter-terrorism actions against ISIL have been under the coordination of the US-led "Combined Joint Task Force – Operation Inherent Resolve." Among the States participating militarily in "Operation Inherent Resolve", nine States have sent letters to the Security Council reporting that they are acting pursuant to Article 51 in Iraq or in Syria, or in both States.[9] Among them Germany has explicitly mentioned 'armed attacks,' stating that "ISIL has carried out, and continues to carry out, armed attacks against Iraq, France, and other States."[10] Also, Belgium has clearly referred to "armed attack by ISIL."[11]

However, in the law of State responsibility, a State assumes responsibility for the acts of non-State entities only when the acts are attributable to the State.[12] It may be unreasonable to

4. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* article 20, available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

5. *Annex to the letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General,* UN Doc S/2014/440, annex, 2014.

6. *Annex to the letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council,* UN Doc S/2014/691, annex, 2014.

7. *Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General,* UN Doc S/2014/695, 2014.

8. *Letter dated 26 March 2015 from the representatives of Bahrain, Kuwait, Qatar, Saudi Arabia and the United Arab Emirates to the United Nations through the President of the Security Council,* UN Doc S/2015/217, 2015.

9. As of November 2016, they are Australia, Canada, Denmark, France, Germany, Netherlands, Turkey, UK and US. And the States that are listed as assisting "Operation Inherent Resolve", but have not sent letters to the Security Council reporting that they are acting pursuant to Article 51 are Bahrain, Belgium, Italy, Jordan, Latvia, New Zealand, Norway, Portugal, Saudi Arabia, Spain, Tunisia and United Arab Emirates. *Update Website of the Procedure of the UN Security Council, 4th Edition*, Oxford University Press, 9 November 2016.

10. *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,* UN Doc S/2015/946, 2015.

11. *Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council,* UN Doc S/2016/523, 2016.

12. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* articles 2(a), 4,-11. See Kimberley N. Trapp, *State Responsibility for International Terrorism*, Oxford: Oxford University Press, 2011, pp.34-62.

attribute ISIL's cross-border terrorist attacks to Syria, whose Assad government does not have ISIL under "effective control."[13] Rather, the lack of effective control over ISIL acts is one of the underlying causes of our problem.

Both Syria and Iraq have passed on to the Security Council President their grievance against military actions undertaken on their territory without their consent. In 2015, Syria has repeated that "any attempt to invoke Article 51 of the Charter to justify military action on Syrian territory without coordination with the Syrian Government manipulates, distorts and misinterprets the provisions of that Article."[14] Iraqi Foreign Minister noted that Iraq "rejects, strenuously opposes and condemns … any military movements aimed at countering terrorism that take place without prior consultation with the federal Government of Iraq and without its approval."[15] If Syria and Iraq had consented to such military action, on the contrary, our legal problems would disappear.

Does the incursion of such private persons as insurgents, armed bands and terrorists into another State constitute an armed attack and justify the exercise of individual and collective right of self-defense under article 51 of the *UN Charter*?

The Caroline Case in the middle of 18th century,[16] which has been commonly taken, right or wrong, as a classical precedent of the right of self-defense, is definitely related to one State's use of force on another State's territory to prevent insurgents' use of force on another State. But its lasting legal validity is fundamentally challenged by articles 2(4) prohibiting any threat or use of force and 51 of the *UN Charte*r.[17]

It's true that article 51 does not literally preclude the possibility of non-State's armed attack.' It provides, without referring to "international relations," that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations," different from the wording of article 2(4) which includes the phrase of "in their international relations."

What will come under intense scrutiny concerns is, in the event, the status of ISIL as a non-State entity, or the possibility of non-State's armed attack.

First of all, under the basic principle of the law of State responsibility, an internationally wrongful act exists when conduct of an action or omission is attributable to the State under international law.[18]*Phosphates in Morocco Case* referred to an "act being attributable to the State."[19] Also, in *Diplomatic and Consular Staff Case*, the ICJ points out in respect of "the militants" that "the acts in question may be regarded as imputable to the Iranian State."[20] In

13. *Military and Paramilitary Activities in and against Nicaragua Case* (Merits) (Nicaragua v US), ICJ Rep 1986, para.115.

14. *Letter dated 29 December 2015 from the Permanent Representative of Syria to the United Nations addressed to the President of the Security Council,* UN Doc S/2015/1048, 2015. It restates the letter sent earlier in the same year. UN Doc S/2015/719, 2015.

15. *Letter dated 11 December 2015 from the Foreign Minister of Syria to the United Nations addressed to the President of the Security Council,* UN Doc S/2015/963, 2015.

16. *The Caroline Case, 29 British and Foreign State Papers,* 1841, pp.1137-38; 30 *British and Foreign State Papers*, 1842, pp.195-96.

17. Manuel R. García-Mora, *International Responsibility for Hostile Acts of Private Persons against Foreign States,* Leiden: Martinus Nijhoff, 1962, p.120.

18. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* article 2.

19. *Phosphates in Morocco*, Preliminary Objection, PCIJ Rep 1938, Ser A/B, No 74, p.28

20. *US Diplomatic and Consular Staff Case,* ICJ Rep 1980, para.56.

general, the conduct of private persons as such is not attributable to the State.[21] As ISIL is not internationally recognized as a State, it is simply a group of private persons. So, the conduct of ISIL is not directly attributable to Syria. Syria may not be held immediately responsible for ISIL's cross-border non-State attacks on Iraq.

1. Non-State Attacks

On the next day to September 11, the UN Security Council recognized "the inherent right of individual or collective self-defence in accordance with the Charter."[22] A week later, the Permanent Council of OAS was concerned by "the terrorist attacks perpetrated against innocent civilians from many nations that took place on September 11, 2001," and recalled "the inherent right of the United States and each of the other Member States to act in the exercise of the right of individual and collective self-defense recognized by Article 51 of the Charter of the United Nations."[23]

The ICJ has maintained, however, the position held in the *Nicaragua Case* that only acts attributable to a State could constitute an armed attack, referring to "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State,"[24] and viewed the issue of responsibility as a question of State's 'effective control' over non-State entity[25]

In *Israeli Wall Opinion* the ICJ has basically followed the position in *Nicaragua Case*. "Article 51 of the Charter … recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However Israel does not claim that the attacks against it are imputable to a foreign State."[26]

In *Congo Armed Activities Case*, the ICJ has found that there is no satisfactory proof of the involvement in the attacks of the Government of the Democratic Republic of the Congo (DRC). "The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC. The Court is of the view that … even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC." As a result, the ICJ finds that the legal and factual circumstances for the exercise of a right of self-defense by Uganda against the DRC were not present. Thus, "the legal and factual circumstances for the exercise of the right of self-defense by Uganda against DRC were not present."[27]

In *Oil Platforms Case*, furthermore, the ICJ notes in the similar vein that "the United States has to show that attacks had been made upon it for which Iran was responsible."[28] Here again the attacks of a non-State entity had to be attributable to a State to constitute an armed attack.

Any non-State attack as such does not directly fall into the concept of armed attack. Thus, ISIL's non-State attack on Iraq is not of itself regarded as an armed attack. But only armed attack can

21. *Laure May Buffington Janes et al. (U.S.A.) v United Mexican States,* 4 RIAA 1925, p. 82.

22. UN Doc S/RES/1368 (2001), 12 September 2001, preamble.

23. OAS Doc OEA/Ser.G, CP/RES. 796 (1293/01), 19 September 2001, preamble.

24. *Military and Paramilitary Activities in and against Nicaragua Case* (Nicaragua v US), ICJ Rep 1986, para.195.

25. *Ibid*., para.115.

26. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, ICJ Rep 2004, hereinafter cited as Israeli Wall Opinion, para.139.

27. *Case concerning Armed Activities on the Territory of the Congo* (DRC v Uganda), ICJ Rep 2005, para.146-47.

28. *Case concerning Oil Platforms (Merits)* (Iran v US), ICJ Rep 2003, para.51.

justify Iraq to invoke the individual right of self-defense and other counter-terrorism alliance States to invoke the collective right of self-defense on the basis of Iraq's request under article 51 of the *UN Charter*.

In the meantime, UN General Assembly and Security Council Resolutions call for specific actions to be taken by all States and emphasize that terrorism must be fought by all parties, by all means, at all times, by whomever and against all perpetrators.[29] In *Declaration on Measures to Eliminate International Terrorism*, for instance, it is proclaimed that "the States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed."[30] The Security Council has repeatedly reaffirmed that "any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomever committed" and further reaffirms "the need to combat by all means."[31]

2. Terrorism and International Obligation

Any territorial sovereign State assumes international obligations concerning terrorism. Sovereignty not only confers rights upon States but imposes international obligations on them.

In 1924, it is reported in *Spanish Zones of Morocco Claims Case* that "[r]esponsibility is the necessary corollary of a right. All international rights carry with them international responsibility."[32] In the same vein, *Island of Palmas Case* holds in 1928 that "[t]erritorial sovereignty **...** involves the exclusive right to display the activities of a State. This right has as a corollary a duty: the obligation to protect within the territory the rights of other States."[33]

More immediately concerned, the ICJ holds in *Corfu Channel Case* that every State assumes "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[34] Similarly, in the context of environmental law, *Trail Smelter Arbitration* reaffirms that "under the principles of international law … no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein."[35]

In respect of counter-terrorism, a State's failure to prevent the use of its territory for cross-border terrorist attacks on other States is wrongful. But, the failure does not constitute an armed attack, only which can justify the injured State to invoke the right of self-defense under article 51 of the *UN Charter*. Thus, Syria's failure to prevent ISIL's use of its territory for cross-border terrorist activities in Iraq does not constitute an armed attack, and it does not justify the exercise of the individual and collective right of self-defense.

All States, including European States, assume the same obligation. With respect to ISIL, in particular, the States are under obligation not to permit the nationals to exit their own State to enter Syria to join ISIL and participate in cross-border terrorist attacks on other States, and to prevent from recruiting terrorists within the State for the purpose.

29. Eli E. Hertz, *Reply*, New York: Myths & Facts Inc, 2005, p.88.
30. UN GA Res 49/60, 1994, Annex.
31. UN Doc S/RES/2133, 2014, preamble; UN Doc S/RES/2139, 2014, preamble.
32. *Spanish Zones of Morocco Claims Case* (UK v Spain), 2 RIAA 1925, p.641.
33. *Island of Palmas Case* (Netherlands v US), 2 RIAA 1928, p.83.
34. *Corfu Channel Case* (UK v Albania), ICJ Rep 1949, p.22.
35. *Trail Smelter Arbitration* (US v Canada), 3 RIAA 1941, p.1965.

In the aftermath of 9/11 terrorist attacks, the Security Council has adopted a legally binding decision that all States shall prevent "those who … commit terrorist acts from using their respective territories … against other States or their citizens," and prevent "the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents"[36]

According to the report of Analytical Support and Sanctions Monitoring Team, established pursuant to the Security Council Resolution 1526 (2004), "[m]ore than half the countries in the world are currently generating foreign terrorist fighters. Among the various Al-Qaida … associates around the world, including the splinter group Islamic State in Iraq and the Levant (ISIL) … , there are more than 25,000 foreign terrorist fighters involved, traveling from more than 100 Member States. The rate of flow is higher than ever and mainly focused on movement into the Syrian Arab Republic and Iraq, with a growing problem also evident in Libya."[37] Then, the Security Council reiterates "the obligation of Member States to prevent the movement of terrorists or terrorist groups … by, inter alia, effective border controls," and calls upon Member States "to strengthen border management to effectively prevent the movement of terrorists and terrorist groups."[38] The Security Council also urges "all Member States, notably Sahel and Maghreb States, to coordinate their efforts to prevent the serious threat posed to international and regional security by terrorist groups crossing borders."[39]

Traditionally, they have been called volunteers or mercenaries. It has been pointed out that volunteers are really instruments of international policy and not simply innocent foreigners who for ideological reasons join belligerent forces. Thus, in the Spanish Civil War, the French Law of January 21, 1937, authorized the government to take the necessary measures to prevent the departure of volunteers to participate in the civil war.[40]

Aren't the paid ISIL "volunteers" mercenaries? As regards mercenary, *Organisation of African Unity (OAU) Convention for the Elimination of Mercenaries in Africa* in 1972 has extended the obligation of States to control the activities of their nationals by placing responsibility on them for the prohibition and punishment of any activity connected with mercenaries that may occur within their jurisdiction.[41]

Then, article 47(1) of *Additional Protocol I of 1977 to the Geneva Conventions of 12 August 1949*, provides that individuals who are found to be mercenaries are to be deprived of the rights of combatant or prisoner-of-war status. Article 47(2) defines a mercenary as any person who: (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part

36. UN Doc S/RES/1373, 2001, para.2(d) and (g).

37. *Analysis and Recommendations with regard to the Global Threat from Foreign Terrorist Fighters,* UN Doc S/2015/358, 2015.

38. UN Doc S/RES/2159, 2014, preamble and para.2.

39. UN Doc S/RES/2195, 2014, para.11.

40. Manuel R. García-Mora, *op. cit.*, pp.72-73.

41. In article 1, a mercenary is classified as anyone who, not a national of the state against which his actions are directed, is employed, enrols or links himself willingly to a person, group or organisation whose aim is: (a) To overthrow by force of arms or by any other means the government of that Member State of the Organisation of African Unity; (b) To undermine the independence, territorial integrity or normal working of the institutions of the said State; (c) To block by any means the activities of any liberation movements recognised by the Organisation of African Unity. OAU Convention for the Elimination of Mercenaries in Africa, OAU Doc. CM/433/Rev. L., 1972, Annex 1.

in the hostilities essentially by the desire for private gain and, in fact, is promised by or on behalf of a Party to the conflict material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that Party; (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; (e) is not a member of the armed forces of a Party to the conflict; and (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces. Before a person is identified as a mercenary, all of the requirements must be met.

The former clause of a definition article in the *International Convention against the Recruitment, Use, Financing and Training of Mercenaries* in 1989 accedes to *Additional Protocol I*. But its latter clause goes beyond it by stressing the protection of States from the present-day criminal and destabilizing activities of mercenaries.[42]

The breach of obligation of States to prevent the movement of terrorists or group of terrorists, i.e. mercenaries in the case of ISIL in Syria, is internationally wrongful.

Although the breach of obligation not to allow its territory to be used for acts contrary to the rights of other States and obligation not to allow the movements of terrorists or mercenaries may be internationally wrongful, it would not constitute an armed attack to justify the exercise of the individual and collective right of self-defese.

3. On 'Unable or Unwilling' Doctrine

Particularly after the 9/11 terrorist attacks, 'unable or unwilling' doctrine has been prevailingly alleged to justify Iraq to exercise the individual right of self-defense and justify other States of counter-terrorism alliance to exercise the collective right of self-defense based on Iraq's request. The 'unable or unwilling' doctrine is described that "defence force could be directed against a State following its failure to prevent transnational terrorism on the basis that it was unwilling or unable to thwart the security threat."[43] Has the 'unable or unwilling' doctrine been consented by the relevant States, and authorized in Security Council resolutions?

In respect to ISIL, the US has indicated that "States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence … 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 show. … The Syrian

42. A mercenary is any person who: (a) Is specially recruited locally or abroad in order to fight in an armed conflict; (b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party; (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; (d) Is not a member of the armed forces of a party to the conflict; and (e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces. A mercenary is also any person who, in any other situation: (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at: (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or (ii) Undermining the territorial integrity of a State; (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation; (c) Is neither a national nor a resident of the State against which such an act is directed; (d) Has not been sent by a State on official duty; and (e) Is not a member of the armed forces of the State on whose territory the act is undertaken. *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, UN Doc A/RES/44/34, 1989, annex, article 1.

43. Vincent-Joël Proulx, *Institutionalizing State Responsibility*, Oxford: Oxford University Press, 2016, p.34.

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."[44]

As early as 1997, Turkey has in effect made mention of 'unable or unwilling' doctrine in its letters to the UN that "… Iraq's inability to exercise its authority over the northern parts of its territory continues to provide room for frequent violations of Turkish borders and territory in the form of terrorist infiltrations and activities which result in losses of human lives and damage to property. … I cannot but reiterate Turkey's profound disappointment at the attitude adopted by the Government of Iraq."[45]

About two weeks after the terrorist attacks on the US Embassies in Nairobi in August 1998, the US launched cruise missiles into Al-Shifā chemical plant near Khartoum in the Sudan and terrorist training camps, installations and supply facilities under the control of Bin Ladin's organization in Afghanistan. In the Security Council the US has remarked that it has exercised its right of self-defense in responding to a series of armed attacks against the US Embassies and nationals, and presented an account that "these attacks were carried out only after repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with Bin Ladin's organization."[46] However, the Security Council has not described the "cowardly criminal acts" as 'armed attacks' under the *UN Charter*.[47]

In response to Chechnya cross-border attacks carried out from within Georgia, Russia claimed in its letter to the UN that Georgia was unable or unwilling to prevent the attacks, reading that "[t]he continued existence in separate parts of the world of territorial enclaves outside the control of national governments, which … are unable or unwilling to counteract the terrorist threat is one of the reasons that complicate efforts to combat terrorism effectively. … If the Georgian leadership is unable to establish a security zone in the area of the Georgian-Russian border … we reserve the right to act in accordance with Article 51."[48]

In 2008, the US President said, "[i]f Pakistan is unable or unwilling to hunt down Osama bin Laden and take him out, then we should take him out."[49] When he was killed in 2011, Pakistan claimed that it had not any prior knowledge of the US operation against Osama bin Laden.[50] Thus, Pakistan's relevant ability or willingness might have not been established. The President

44. *Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General,* UN Doc S/2014/695, 2014.

45. *Identical letters dated 2 January 1997 from the Minister for Foreign Affairs and Deputy Prime Minister of Turkey addressed to the Secretary-General and to the President of the Security Council*, S/1997/7, 3 January 1997, Annex, preamble.

46. *Letter dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, UN Doc S/1998/780, 1998, available at: http://www.undp.org/missions/usa/s1998780.pdf.

47. It simply "[c]alls upon all States to adopt … effective and practical measures for security cooperation, for the prevention of such acts of terrorism, and for the prosecution and punishment of their perpetrators." UN Doc S/RES/1189, 1998, para.5.

48. *Annex to the letter dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General,* UN Doc S/2002/1012, Annex, 2002. The Security Counsil Resolutions on "threats to international peace and security caused by terrorist acts" in 2002 did not mention to the attacks. UN Doc S/RES/1438, 2002; S/RES/1440, 2002.

49. "Obama & the Coming Military State" *Real Jew News,* 2008, available at: http://www.realjewnews.com/?p= 300FALL.

50. "Official statement: Pak denies prior knowledge on Osama", Islamabad: P.R.No.152/2011, Office of the Spokesperson, 2011, available at: http://www.ndtv.com/world-news/official-statement-pak-denies-prior-knowledge-on-osama-454677.

of Security Council has merely stated that "States must ensure that any measures taken to combat terrorism comply with all their obligations under international law."[51]

After all, the 'unable or unwilling' doctrine has not been consented by the key factor State, i.e. Iraq, who alone is entitled to request other States to exercise the collective right of self-defense against Syria, as noted above.[52] Moreover, the doctrine has not been expressly authorized by neither the Security Council nor the ICJ. There is, however, an alternative solution for the exercise of the right of self-defense.

4. A Composite Act

International terrorist activities by the non-State group of ISIL across the border of Syria may be assumed as a composite act consisting of two internationally wrongful acts: omission to prevent cross-border attacks; and action of cross-border use of force by such a non-State group as ISIL.

A composite act is defined in the International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts*. "The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act."[53] In the case of crimes against humanity, for example, the composite act is a violation separate from the individual violations of human rights of which it is composed.[54] In the similar vein, a general situation rather than specific instances is focused in the United States counterclaim in *Oil Platforms*.[55] In *Ireland* v. *the United Kingdom*, a practice consists of an accumulation of "breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system; a practice does not of itself constitute a violation separate from such breaches."[56] Thus, ISIL's cross-border terrorist activities may amount to the practice of "armed attack" under article 51 of the *UN Charter*.

In particular, the German criminal law concept of "*Nebentäterschaft*" may serve our purposes of regulating the cross-border use of force by such a private group as ISIL. While for there to be co-perpetration the perpetrators must act by common agreement, for there to be "*Nebentäterschaft*" they act independently from one another. The perpetrators stand alongside one another, without any connection between them.[57] Their statuses as being independent perpetrators are defined as multiple independent principals.[58] Figuratively, suppose that a perpetrator X had administered non-fatal dose of poison to an injured person Z, and later another perpetrator Y administered additional non-fatal dose of poison to Z, as a result amounting to a fatal dose, without any connection between X and Y. If their acts are taken individually, then neither X nor Y will be ruled guilty of murder, because the amount of

51. UN Doc SC/10239, 2011.

52. UN Doc S/2015/963, 2015.

53. The International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, article 15.

54. The European Commission of Human Rights, *Ireland* v *UK*, Ser A, No 25, 1978, para.159; see also para157.

55. *The US Counterclaim in Oil Platforms* (Iran v US), Counter-Claim, Order of 10 March 1998, ICJ Rep 1998, para 190.

56. The European Commission of Human Rights, *Ireland* v *UK*, Ser A, No 25, 1978, p. 64, para159.

57. Case No. IT-04-74-T 11 3, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 29 May 2013, p.493/78692 BIS.

58. Michael Bohlander, *Principles of German Criminal Law*, London: Bloomsbury Publishing, 2008, pp.160-61.

poison administered in both cases is non-lethal. If the acts are taken together, on the contrary, by way of "*Nebentäterschaft*", both X and Y will be ruled guilty of murder.

While ISIL's non-State attacks on Iraq as such does not constitute an armed attack, the practice may be declared as an armed attack when it carries out "acts of armed force against another State of such gravity as to amount to … an actual armed attack conducted by regular forces."[59] While the failure of the State to prevent such cross-border attack as such, whether unwilling and unable or not, does not constitute an armed attack, the omission may be regarded as contributing to constitute an armed attack when the attack "on a significant scale" causes damage to another State like Iraq. In the event, the action of ISIL and the omission of Syria would be respectively declared as an armed attack.

Thus, the practice of cross-border non-State armed attacks is distinct from a single act of private persons on the one hand and from the omission on the part of a State on the other hand. Consequently, the basic principle of State responsibility in international law that a State is unaccountable for the conduct of private persons is not diluted. And the existing concept of armed attack remains to be a reliable ratchet against the wrongful use of force.

Conclusion

The rule of law binding upon States emanates from their own free will.[60] What is their free will in respect of counter-terrorism against ISIL's cross-border attacks on Iraq and other States?

The State practice of air raids on ISIL in Syria has been carried out almost ceaselessly. The Security Council reports that "the international coalition conducted almost daily air strikes against the Islamic State of Iraq and the Levant (ISIL)."[61] And largely acquiescence has been given to the counter-terrorism raids against ISIL by almost all States. Moreover, The Security Council has expressly recognized the inherent right of individual or collective self-defense in the relevant resolutions, and expressed its readiness "to take all necessary steps to respond to the terrorist attacks,"[62] or "to combat by all means … threats to international peace and security caused by terrorist acts,"[63] though the resolutions have not described the attacks as armed attack. The ICJ's position in respect of ISIL's terrorist attacks seems ostensibly to be irreconcilable with the resolutions adopted by the Security Council after 9/11 terrorist attacks.

To be exact, however, the Security Council resolutions appear to have prudently avoided introducing the phrase of an 'armed attack.' Security Council resolutions have taken an inhibitory stance with respect to the non-State ISIJ, reiterating, for example, that "the advance of ISIL, on Iraq's territory is a major threat to Iraq's future."[64] From this viewpoint, the Security Council recognizes the exercise of the right of self-defense, but at the same time it does not affirm that ISIL's cross-border terrorist attacks constitute an armed attack.

59. *Military and Paramilitary Activities in and against Nicaragua Case* (Merits) (Nicaragua v US), ICJ Rep 1986, paras.195-96, 199.

60. *The Lotus Case* (France v Turkey), PCIJ Rep 1927, Ser A, No 10, p.18.

61. UN Doc S/2015/124, 2015, para.12.

62. UN Doc S/RES/1368, 2001, preamble, para.5

63. UN Doc S/RES/1373, 2001, preamble; UN Doc S/RES/1455, 2003, preamble.

64. UN Doc S/RES/2169, 2014, preamble.

Meanwhile, as described above, the ICJ has not accepted that non-State attacks can justify the exercise of the right of self-defense. Thus, the positions of the Security Council and the ICJ may differ so long as the permissibility of the exercise of the right of self-defense against ISIL is concerned.

There has been raised a problem on the power of the ICJ in relation to the Security Council. The power relationship is not articulated in the *UN Charter*. It is held by the ICJ in *the Aegean Sea Continental Shelf Case* that "the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial functions."[65] The ICL has reiterated the position in *US Diplomatic and Consular Staff in Teheran Case* that "the jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement by the Court have been pursued *pari passu*."[66] In *Lockerbie Case*, Libya filed a case against the US and UK before the ICJ to challenge and nullify a Security Council sanction resolution, requesting the ICJ to order the resolution *ultra vires*, incompatible with the principle of litispendence.[67] In practice, however, the Security Council and ICJ have dealt with the same matter sequentially or simultaneously, with no standing down of one organ in favor of the other.[68]

In this way, the free will of the States may be contradictory in respect of counter-terrorism measures against ISIL's attacks. While it recognizes the exercise the right of self-defense, it does not view the attacks as an armed attack. 'Armed attack as a composite act' solution may produce much fewer side effects than the 'unable or unwilling' doctrine of self-defense.[69]

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65. *The Aegean Sea Continental Shelf Case* (Greece v Turkey) (Request for the Indication of Interim Measures), ICJ Rep 1976, para.29.

66. *US Diplomatic and Consular Staff in Teheran Case* (US v Iran), ICJ Rep 1980, para.3.

67. *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libya v US; Libya v UK), (Request for the Indication of Provisional Measures), ICJ Rep 1992, paras.42-44.

68. Philippa Webb, *International Judicial Integration and fragmentation*, Oxford: Oxford University Press, 2013, p.129.

69. Cf. Dawood I. Ahmed, "Defending Weak States against the 'Unwilling or Unable' Doctrine of Self-Defense", *Journal of International Law and International Relations*, vol.9, 2013, pp.21-26.

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