The Fine Line Between Collective Self-Defense and Intervention by Invitation: Reflections on the Use of Force against 'IS' in Syria

By *Claus Kreß*
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Bashar and Asma al-Assad. Image credit: Ricardo Stuckert/ABr via Wikimedia Commons.

[Editor's Note from Ryan Goodman: *With the U.S. Congress turning its attention to an AUMF for ISIL, I invited Professor Claus Kreß, leading international law expert on the use of force to contribute to Just Security. A key question in the fight against the Islamic State is the legality of use of force inside Syria. Professor Kreß adds an especially significant argument to the discussion in his analysis of President Assad's invitation to the U.S. on condition of military cooperation and whether the U.S. can lawfully reject that offer.*]

The vast territory under control by the murderous non-State organization Islamic State covers parts of Iraq and Syria. This makes it seem somewhat artificial to non-lawyers to distinguish between these two States when discussing the international legality of the use of force against the Islamic State. Yet, the intervening States do precisely this and some of them continue even to limit their forcible action to the territory of Iraq.

The legal justification given for the use of force in Iraq is "intervention by invitation." In light of the explicit request for assistance by the government of that State, this explanation rests on solid grounds. The allied intervention against the Islamic State in Iraq demonstrates, as did shortly before

France's intervention against violent non-State fighters in Mali, that State practice does not support the proposition that a government invariably loses the power to invite armed assistance from abroad when it is confronted by internal violence reaching the level of a non-international armed conflict.

But Iraq's invitation does not extend to Syria. Until the present day, the President of that State — unfortunately, it may perhaps be added, in light of his appalling record of violations of international law — remains Bashar al-Assad. He, also, has invited the United States to use force against the Islamic State, but only in the form of "coordinated action." President Obama has rejected this offer. As I will show, it is in fact Syria's record of systematic violations of international law that provides **the best legal explanation for rejecting his invitation**. Indeed, the rejection of his offer *may* be legally compelled.

While Syria first seemed unambiguous in denouncing US forcible action against the Islamic State in Syria as "aggression," Professor Ryan Goodman has pointed to a number of subsequent explicit and high-level Syrian statements that might be taken to indicate the emergence over time of Syrian consent despite the US refusal to coordinate its military activity with Syria.

If such consent was — or were to be — forthcoming, it would indeed suffice to preclude a violation of the prohibition of the use of force because the expression of consent is a unilateral legal act and no acceptance of it by the legal beneficiary is needed. But as Professor Goodman has recognized himself, a more recent statement by President Assad suggests that he maintains the more restrictive position of "*conditional* consent" and, accordingly, criticizes the US military action as illegal. In any event, the International Court of Justice has emphasized in the *Armed Activities* case the inviting State's right to withdraw its consent at any time and without the need for formalities. This means that **any reliance on 'intervention by invitation' would remain fragile in the case of Syria** as long as President Assad is in office.

This is the reason why the US, together with Iraq, has chosen a different legal explanation. In its letter to the UN of 23 September 2014, the US has based its use of force against the Islamic State in Syria primarily on the right of collective self-defense to the benefit of the victim State Iraq. On 20

September, Iraq had sent to the President of the UN Security Council the corresponding letter, including, as the International Court of Justice has demanded in the *Nicaragua* case, a statement of the armed attack against it and a request for assistance. While the Arab States that participate in the use of force against the Islamic State in Syria have, as of yet, not explained there legal positions in letters to the Security Council, the United Kingdom, in a subsequent letter to the Security Council, has gone on record in support of the legal justification advanced by the US and Iraq.

It is interesting to note that none of the States concerned has made an attempt to formulate the claim of collective self-defense in purely inter-State terms: neither has the Islamic State been recognized as a State, nor has it been argued that this organization's violence against Iraq is attributable to Syria so that Iraq has become the victim of an armed attack *by* the former State. Instead, the collective self-defense claim is construed as follows: The US and its allies use force in Syria at the request of Iraq to defend that State against the non-State armed attack carried out by the Islamic State against Iraq *from* Syrian *soil*.

This claim implies the legal conviction that the right of self-defense, as recognized in Article 51 of the UN Charter, covers not only armed attacks *by other States*, but also those of highly destructive *non*-State actors. This legal conviction had been articulated long before 11 September 2001, as I have demonstrated in detail in 1995. But through operation "Enduring Freedom," it gained international prominence. The case of Enduring Freedom is also noteworthy because it entailed, for the first time (as far as I can see), the reliance of a right of *collective* self-defense against a *non*-State armed attack. In the case of the use of force against the Islamic State in Syria, this right has, again for the first time I believe, acquired the center stage of State practice.

As is well known, the International Court of Justice has yet to accept the idea of a right of (individual and collective) self-defense in case of a non-State armed attack. But, as I have explained in the study mentioned above, the wording of Article 51 of the UN Charter supports the idea, neither systematic nor teleological considerations contradict it and the pre-Charter history of self-defense claims in cases of non-State armed attacks certainly goes back to the beginning of the 19th century. What is more, while State practice between 1945 and 2001 was

not free of ambiguity, most of the relevant incidents since 9/11 clearly point toward the recognition of a right of self-defense in cases of non-State armed attacks. The reason for this is fairly obvious: governments not just of the "West" have come to appreciate that not only a foreign aggressor State, but also highly destructive transnational non-State actors may pose a horrendous threat to the populations that these governments are to protect.

The fact that the right of self-defense, as recognized in Article 51 of the UN Charter, therefore applies in cases of *non*-State armed attacks does not mean, however, that it — hereby and to that extent — loses its *inter*-State dimension. Quite to the contrary, the central legal consequence of the application of the right of self-defense in such a case is the permission for the State(s) acting in self-defense to use force on the territory of the State from which the non-State armed attack emanates. This permission is not an arbitrary one. It is in line with the fundamental international legal principle that it falls upon every State to ensure, and by the use of internal force if necessary, that its territory is not abused for violent action against others States. **In international law, the claim to sovereignty over territory comes with a price**.

It therefore follows not only from the right of self-defense's general requirement of necessity, but primarily from the respect for the sovereignty of the territorial State that the right of self-defense in case of a *non*-State armed attack is of a *subsidiary* nature. It presupposes that the territorial State is either *unwilling* or *unable* to end the non-State armed attack – or, as it should be added for the sake of completeness, *fails to exercise due diligence* to that effect. State practice is remarkably consistent with these principles. As Professor Ashley Deeks has demonstrated in a formidable article, the legal claims to a right of collective self-defense in cases of non-State armed attacks have generally included the statement that the territorial State is unwilling or unable to deal with the non-State threat.

The legal claim, as formulated by the US and Iraq, and as supported by the United Kingdom, in the case of the use of force against the Islamic State in Syria has followed this line of practice. In its letter of 23 September 2014, the US stated that Syria "cannot and will not confront these [Islamic State's] safe havens effectively itself.". This assessment has already been the subject of spirited treatments by Professor Ryan Goodman and by Professors Jennifer Daskal, Ashley Deeks and Ryan

Goodman in *Just Security*. The following lines are to add a reflection to this important debate.

If one considers President Assad's offer to fight the Islamic State in Syria in coordination with the US and its partners to be genuine (and I find it difficult simply to rely on a belief to the contrary), it is impossible to say that Syria is un*willing* to deal with the armed attack carried out by the Islamic State. The US may be correct, though, to hold that Syria, as represented by Assad's remaining and weakened armed forces, is un*able* to eliminate the non-State threat *on its own*.

As Professor Goodman has rightly pointed out, this inability alone, however, does not entitle the US to reject Syria's offer to join forces to fight the Islamic State in Syria: If the goal to end a non-State armed attack can be effectively achieved through coordinated military action with the territorial State, then, in principle, this avenue must be pursued because it reconciles the needs to protect the sovereignty both of the victim and the territorial State. It follows, that, again in principle, the right of collective self-defense in case of a non-State attack is subsidiary to "intervention by invitation." In other words, the former question is raised only if the latter (intervention by invitation) is not first satisfied.

Professor Goodman has pointed to the possible argument that any coordination with Syria would compromise effective military action against the Islamic State by the US and its partners. But the US has not spelled out such an argument and, as Professor Goodman himself recognizes, it is not self-evident under the circumstances.

The far more plausible reason for the rejection of President Assad's "conditional invitation" by the US is the latter State's unwillingness to join forces with and hereby to support a regime that is notorious for violations of international law that have crossed the threshold of crimes against humanity and war crimes. The question is whether what appears to be a political reason at first glance can be translated into a legally relevant consideration. In that context, I suggest to draw a distinction between the direct assistance in the commission of atrocities by Syria and the bolstering of the Assad regime more generally.

To start with the first scenario, it is submitted, that a State must not rely on the legal title of "intervention by invitation" where the acceptance of the invitation by a "criminal regime" would amount, by virtue of the conditions attached to the invitation by

the regime, to a **violation of the duty not to assist another State in the commission of serious violations of international law**, including war crimes and actions rising to the level of crimes against humanity. As I have detailed in a recent article, while States may continue to be reluctant consistently to assert this duty, it flows from the customary rules on State responsibility. In a very enlightening recent article, Professor Monica Hakimi has usefully connected this body of law with the concept of the Responsibility to Protect. Yet, whether the acceptance of President Assad's condition of "coordinated action" would entail the high risk for the accepting State to become engaged in a course of conduct amounting to internationally wrongful assistance to Syria's violations of international law, is not easy to say.

Below the level of such illegal assistance within the meaning of the law of State responsibility — and this is the second scenario — there is arguably no legal obligation on the US to reject President Assad's "conditional invitation," but the US may still reasonably claim to *retain discretion* to rely on the right of collective self-defense instead of that of "intervention by invitation." The reason for accepting such a discretion (which would imply a limited exception from the subsidiarity of the right of collective self-defense *vis-à-vis* "intervention by invitation") lies in the fact that *any* coordination with President Assad would *somehow* strengthen his position — a position that he continues to abuse to the effect of the commission of serious violations of international law to the detriment of a significant part of the civilian population in Syria. There can be no denial that the use of force against the Islamic State in Syria *in itself* indirectly helps Assad because the Islamic State has long become a serious threat for him and for his government as well. But grudgingly to accept *this* effect as the *inevitable lesser evil* compared to the continuing growth of the Islamic State barbarian empire is one thing, strengthening Assad *beyond* that point through coordinated action is another. Faced with this dilemma, the decision made by the US and Iraq not to accept Syria's offer of "coordinate forcible action" and to instead exercise the right of collective self-defense in support of Iraq constitutes **a principled attempt** to draw a refined line between the rights of collective self-defense and intervention by invitation.

It is true that a number of States have been displaying a measure of uncertainty as regards the legal intricacies of the

current use of force by the US and its Arab partners in Syria. But it is also true that the legal position, as put forward by the US and Iraq, and as supported by the United Kingdom, has met with protest only from Syria, Russia and Iran. And, as Professor Hakimi has accurately pointed out in another recent article, the two latter States have themselves relied on the right of self-defense in cases of alleged non-State armed attacks on prior occasions. All in all, it therefore appears fair to say that the overwhelming part of the community of States is displaying an attitude of "benevolent silence" toward the legal case advanced by the US, Iraq and the United Kingdom.

My conclusion is that the legal claim to a right of individual and collective self-defense in a case of a non-State armed attack has gained further traction through the use of force against the Islamic State in Syria and that a precedent has been established to the effect of a refinement of the line between the right of self-defense in a case of a non-State armed attack and the legal title to intervention by invitation of the territorial State. This refinement concerns the case where the government of the territorial State commits violations of international law reaching the threshold of criminality under international law, and where the same government attaches conditions to its invitation whose fulfillment would imply either the illegal assistance in future atrocities committed by that government or at least the strengthening of the latter's position in more general manner.

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