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The Use of Power to Counter the Non-State Actors in The Territory of Another State

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Abstract:

In the last decade, several states have used force against non- state actors in the territory of another state, and if the rules remain unclear, states could abuse this principle to stretch the limits of the use of force. which poses a problem for the stability of the international order. This paper will therefore examine the question of when the use of force in self-defence against a non-state actor can be lawful from a jus ad bellum perspective. As a first question, it must be identified what the current difficulties are concerning the application of the self-defence framework to non-state actors. The question when the use of force in self- defence against a non-state actor can be lawful. can essentially be divided into two parts. namely, an assessment of Article 51 of the UN Charter and the principles of necessity and proportionality. and a so-called "second layer' of analysis of the principles of necessity and proportionality. This second layer of analysis is necessary to determine when force can be used within the territory of another state (as opposed to against another state, as in the classic state-to-state situation).

Keywords: Self-defence, Intervention, International Terrorism

Introduction:

The UN Charter recognizes the sovereignty of all states in Article 2(1): "the Organization is based on the principle of the sovereign equality of all its Members". This sovereign equality means that all states have equal rights and obligations in the organization, and that international law is applicable to all of them in the same way. According to the International Commission on Intervention and State Sovereignty. sovereignty in the Westphalian sense of the word has come to mean the legal identity of a state in international law[1]. This entails the capacity to decide upon the people and resources within the territory of the state. without any influence from outside (other states). All states are entitled to immunity of outside influence of other states. but this also means that sovereignty entails the obligation to respect the sovereignty of every other state. This norm of sovereignty as internal autonomy and external non-intervention is also reflected in Article 2 of the UN Charter. namely in paragraphs 4 and 7. Paragraph 7 reflects the right of all states to decide upon internal matters itself: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII". Paragraph 4 reflects the principle of non-intervention. in the form of a general prohibition on the use of force in international law: "[a]all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. or

[1] ICISS (2001) Responsibility to Protect. p12

in any other manner inconsistent with the Purposes of the United Nations[2]. This general prohibition on the use of force was one of the most remarkable developments in international law, because previously the use of force had been regarded as a means states could employ to ensure that other states would respect international law[3]. This notion of self-help bestowed upon the use of force the qualities of "a judicial procedure involving also execution and punishment: it was looked upon as the litigation of nations. a means of obtaining redress for wrongs in the absence of a system of international justice and sanctions".[4]

Part of the autonomy of sovereignty was a state's capacity to enforce its rights internationally. but with the creation of the United Nations states wanted to restrict the use of force in the international community. States can no longer resort to the use of force for self-help. but the UN Charter allows for two exceptions to the general prohibition on the use of force. The first exception can be found in Article 42. through which the Security Council can authorize the use of force. And the second exception can be found in Article 51, which allows states to use force in self-defense. For this investigation, only the latter shall be examined, because this is the primary legal basis the US has used to justify its incursions into the territory of other states, thereby violating their sovereignty.

The use of force in self-defense

Article 51 of the UN Charter defines the individual or collective right to self-defense as follows: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations. until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defenses shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."[5]

Article 51 is interpreted to impose three conditions upon a state's use of force. First of all, the state must be under an armed attack, secondly, the state should report the actions undertaken to defend itself to the Security Council, and lastly, a state may only use force until the Security Council has taken measures necessary to maintain international peace and security. The scope and content of these conditions have been debated, however.

A problem with the first condition of Article 51 is that it leaves undefined what constitutes an armed attack. Whereas the Charter uses the word aggression in other instances (such as Article 1 and 39). Yoram Dinstein argues that Article 51 purposely uses the words 'armed attack' because this concept is more restricted than aggression itself[6]. Aggression is a wide concept that can include the threat of the use of force, but simply threats are not enough to trigger the right to self-defense. which is why the drafters of the Charter have chosen the words 'armed attack'. Antonio Cassese argues that an armed attack must be a "massive armed aggression against the territorial integrity and political independence of a State that imperils its life or government"[7]. He comes to the conclusion that the armed aggression must be massive because the ICJ has held in the Nicaragua case that "fewer grave forms of the use of force' may not be considered as an armed attack[8]. However. what the ICJ said specifically was that "it will be necessary to distinguish the

[2] UN Charter (emphasis added)

[3] Dinstein (1994) p.180, Brownlie (1963) p. 41

[4] Brownlie (1963) p.21

[5] United Nations Charter.

[6] Dinstein (1994) p.183

[7] Cassesse (2005) p.354

[8] Nicaragua, para 195 (emphasis added)

gravest forms of the use of force (those constituting an armed attack) from other less grave forms". and it never set the requirement 'massive'.

The second condition of Article 51 has been interpreted as a procedural requirement by some and as a substantive requirement by others. According to Gregor Wettberg, it is mainly a procedural requirement that ensures that the Security Council acquires enough information to decide whether it should act in a certain situation, but a failure to report the use of force would not be a reason to reject a claim to self-defense[9]. Conversely, Christine Gray holds that a failure to report the use of force in self-defense is at least a factor that weakens the claim that there was legitimate self-defense[10]. This approach was also taken by the ICJ, which held that "the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defense[11]. In the Congo case, the Court also 'noted' that Uganda did not report the use of force to the Security Council, implying it was an indicative factor that Uganda's use of force was not lawful[12]. Even if this condition is only procedural. states are well advised to comply with it because a failure to do so will weaken their claim to the lawful use of force.

Concerning the third condition of Article 51, there remain uncertainties when measures taken by the Security Council are necessary to maintain international peace and security, impede a state's right to use force in (collective) self-defense. For example. During the 8-year long conflict between Iraq and Iran, the Security Council intervened and demanded that both states respect an immediate ceasefire.[13] wonders whether Iran was ceding its right to self-defense in its refusal to accept the ceasefire, and notes that in the absence of an express determination of the existence or continuation of the right to self-defense, there have been controversies as to when Security Council measures terminate the right to self-defense[14]. According to Eric Myjer and Nigel White. the Security Council should always make a clear determination to that effect, stating "whether it is of the opinion that it has taken adequate measures, the necessary measures which will stop or suspend the right to self-defense, or whether it is of the opinion that states. be it collectively or not. can continue to defend themselves until the measures are proven to be adequate."[15]

Difficulties concerning the use of force in self-defense against non-state actors

Now as we know that the framework concerning the use of force in self-defense is still subject to debate among scholars. Applying this framework to non-state actors presents another set of difficulties, as the framework was envisaged to deal primarily with state-to-state relations.

Non-state actors have always played a role in the international arena, though, whether as insurgents against a state, as pirates operating on the high seas, or as mercenaries employed by states against each other. Before examining the difficulties presented by the application of the use of force in self-defense against non-state actors, some attention must be given to the concept of the non-state actor. Regrettably the term only provides a negative definition. dissociating itself from the legally settled term the state[16]. This paper will mainly examine the applicability of the use of force against terrorist groups and individuals. it is preferable to use the term non-state actor as opposed to terrorists because there is no internationally accepted definition of terrorism. Moreover, not all terrorist groups will be able to fall under the scope of Article 51 of the UN

[9] Wettberg (2007) p.213-214

[10] Gray (2008), p.122

[11] Nicaragua. Para 200

[12] Gray (2008), p.122

[13] Resolution 598. Para 1

[14] Gray (2008), p.125

[15] Myjer and White (2002) p.10-11, see also: Dinstein (2005) p.215

[16] Green (20081 p13. see also: Henkin (1991) p. 45

Charter, since they operate solely within the jurisdiction of the state that they are targeting.[17] For example, the Rote Armee Fraktion in Germany claimed lives and instilled fear, but it cannot be stated that Germany would invoke the right of self-defense against them.[18] Thus, while the concept of non-state is broader than that of terrorists it is more appropriate to use it, and the difficulties that apply to terrorist groups apply to other non-state actors too. Also. the guidelines proposed in Chapters 3 and 4 can be applicable to other actors than just terrorist groups. Therefore, the terminology used in this analysis will be non-state actor.

Article 51 and non-state actors

As noted in chapter 1, one of the difficulties concerning the right to self-defense is the definition of an armed attack. This is even further complicated when it comes to non-state actors, because traditionally it was understood that armed attacks can only be conducted by states. This state-centric approach was upheld by the ICJ. which has denied Israel's claim to use force in self-defense against the terrorist actions originating from the Occupied Territories in the 4dvisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory case. The Court found that Israel could not invoke self-defense for two reasons, firstly because Israel did not claim that the attacks against it were attributable to a state. and secondly, that the threats originated from territory that was under Israel's control and therefore SC Resolutions 1368 and 1373 were not applicable. Particularly because of this first reason it appears that "the ICJ regarded only states and not non- state actors as capable of launching an armed attack as required by Article 51 of the Charter[19]. Scholars have pointed out that Article 51 itself does not specify that the source of the attack should be a state, and according to Christopher Greenwood, it would be a "strange formalism" to limit the interpretation of international law in such a way[20]. Gray makes clear that the same applies to the rulings of the ICJ. In its decisions, such as the Wall opinion and the Congo case, the Court did not say that Article 51 only applies in cases where the armed attack is carried out by a state; it simply did not pronounce on whether non-state actors can conduct an armed attack that triggers the right to self-defense. In Gray's view, this should be interpreted ~as leaving open the possibility of self-defense against non-state actors."[21]

The second requirement of Article 51 poses fewer difficulties than the requirement of an armed attack. It has not been denied by scholars that states can report self-defense against a non-state actor to the Security Council. and indeed, states have done so. Whereas Wettberg holds that the requirement to report is not "crucial to the application of a self-defense regime vis-a-vis non-state actors, it is proposed in this essay that it is all the more important for states to comply with this requirement if they use force against a non-state actor[22]. Especially when the defending state intends to use (or has used) force in the territory of another state, it is important that there is a report to the Security Council in which the defending state makes clear that it was targeting the non-state actor, because this takes away any ambiguity that the territorial state itself was the object of the use of force.

It is also undisputed that the Security Council can undertake measures against non-state actors. which it has done[23]. But whereas with regard to states, the Security Council can take clear measures that would end the right to self-defense. such as imposing a ceasefire and installing a peacekeeping or monitoring mission to enforce this, it is difficult to impose such measures upon

[17] Wettberg (2007) p.63

[18] Shaw (2003). p 1048

[19] Wettberg (2007) p.22

[20] Greenwood (2002). P. 307

[21] Gray (2008) p. 136

[22] Wettberg (2007) p.214

[23] See for example Resolution 1368. Resolution 1373

a non-state actor. Non-state actors are not signatories to the UN Charter. and the Security Council has thus no binding authority over them. The Security Council's response to non- state actors has thus been confined to the field of law enforcement and sanctions, to be executed by states against the non-state actor. For example, in Resolution 1333, the Security Council imposed a sanctions regime on Al-Qaeda. deciding that all UN Members must freeze any funds or assets of Osama bin Laden and all individuals and entities associated with him, including Al Qaeda[24]. In Resolution 1373, the Council demanded that all states shall prevent and suppress the financing of terrorist acts, and that they should "criminalize the willful provision or collection. by any means. directly or indirectly, of funds by their nationals or in their territories, with the intention that the funds should be used. or in the knowledge that they are to be used. to carry out terrorist acts[25]. The Security Council has set up a Counter-Terrorism Committee[26], as well as a committee dealing with the sanctions on the Taliban and Al-Qaeda. which was later changed into the Al-Qaeda Sanctions Committee. While an effective criminal law strategy might lessen the extent to which a state also has to rely upon the use of force, it does not exclude the use of force. Therefore, Security Council measures of a law enforcement nature do not terminate a state's right to the use of force in self-defense against a terrorist non-state actor unless the Security Council clearly makes that determination.

The 'second layer' of necessity and proportionality: the use of force within the territory of another state.

The rules of the self-defense framework must thus be somehow extended to the territorial state. but as Michael Beyers points out, "most states would not support a rule that opened them up to attack whenever terrorists were thought to operate within their territory."[27]. Whereas the 'first layer' of the necessity and proportionality principles concerns the use of force against the non-state actor as an entity, the 'second layer' of these principles determines when the use of force can be employed within the territory of another state. It is with this second layer that the importance of customary law is highlighted again, because it is the only yardstick states have to interpret how to use force in self-defense within as opposed to against, another state.

Whereas 'normal' necessity requires that there exists no practical alternative to the use of force, this must now be interpreted to include that there can be: "no reasonable alternative to the penetration of State A's territory for the purpose of using force against the terrorists [or more broadly, the non-state actor] can exist"[28]. Several scholars maintain that there is "no reasonable alternative' to the use of force when the territorial state is either unable or unwilling to comply with its own responsibilities towards terrorist groups[29]. The reasoning behind this principle explains that "the unwillingness or inability of State A to comply with the requirements of international law cannot possibly be deemed to deprive State B of its authority to defend itself against an armed attack[30]. This principle is still in an early stage of development, however. first of all, because the ICJ has never pronounced upon it, and there is thus no ultimate legal authority behind it. and secondly, because there are no clear standards that a defending state can apply.

The problems a state runs into when it has to determine if. when. and how another state must be seen as "unable or unwilling' to undertake action against the terrorist group(s) are numerous. Ashley Deeks has outlined that it is unclear whether international law requires states to ask the

[24] Resolution 1333. para 8

[25] Resolution 1373.

[26] Resolution 1373. para 6

[27] Beyers (2003) p.160

[28] Lubell (2010). p.39-41. 67, Wilmshurst (2006). p.969. Schmitt (2002) p.33. Dinstein(2005) p.245

[29] Schmitt (2002) p.33

[30] Schmitt(2003) p47

territorial state to take measures itself, and if so, how much time the territorial state must be given to respond to that request[31]. Schmitt has argued that any non-consensual intrusion into another state's territory must always be preceded by a request to remedy the situation which the defending state perceives as contrary to international law or as a danger to its own security. According to Neam Lubell this requirement follows from the principle of necessity, which includes the requirement that the use of force must be the last resort. Before a state resorts to the use of force, it must have exhausted other means, and while it may not always be possible to attempt diplomatic negotiations with the non-state actor, it is always possible to revert to diplomacy with the territorial state. 'Thus, as long as the option of seeking a solution via the territorial state has not been used by the defending state, it cannot be said that the condition of necessity is fulfilled. This leaves unresolved the issue of how much time the territorial state must be given, however.

The most difficult problem of all, however, is when the defending state wishes to undertake action "has strong reasons to believe that the territorial state is colluding with the non-state actor, or were asking the territorial state to take steps to suppress the threat might lead the territorial state to tip off the non-state actor before the acting state can undertake its mission. For this problem, the temporal element of allowing a state the opportunity to address the non-state itself comes to the fore again, and neither Schmitt nor Lubell addresses these issues in their works. The 'second layer' of proportionality is more straightforward than that of necessity. While 'normal' proportionality entails that the use of force may not exceed what is necessary to avert the (imminent) threat, its application to the use of force within the territory of another state entails that even though sovereignty is violated, this violation must be kept to minimum, and therefore the defending state must terminate its incursion into the territory of another state as soon as possible", Because the use of force must always be limited to what is necessary for self-defense. Schmitt argues that once the defensive objectives are met, "State B must immediately withdraw because at that point there is no right of self-defense to justify its 'violation' of State A's territorial integrity

Conclusion

To conclude it must be established that the use of force in self-defense against a non-state actor within the territory of another state can be lawful in certain cases, but it shall remain a contested issue because the application of the self-defense framework is difficult to apply to a non-state actor and particularly the 'second layer' of the necessity principle lacks guidelines with which states can determine whether the territorial state was unable or unwilling. The question when the use of force in self-defense against a non-state actor within the territory of another state is lawful can be separated in two parts. namely the application of the self-defense framework against the non-state actor, which allows the defending state to assess whether force can be used against the non-state actor as an entity, and the 'second layer' of the principles of necessity and proportionality, which allows the defending state to assess whether force can be used within the territory of another state.

The application of the self-defense framework against non-state actors has proven difficult because it has been questioned whether non- state actors can conduct an armed attack that triggers the right to self-defense in accordance with Article 51. The ICJ has refrained from clarifying this issue, even when it had the chance to do so in the Congo case. The Wall Opinion can be interpreted as a signal from the ICJ that it regards only states as capable of launching an armed attack but as was shown in Chapter 2, state practice. opinion juris. and scholarly opinion confirms that non-state actors can conduct an armed attack. This essay proposed that a report to the Security Council is even more important in the case of the use of force against non-state actors because it gives the defending state a chance to make clear that it was targeting the non-state actor and not the territorial state. reducing the possibilities for abusing the use of force against non-state actors as a

[31] Lubell (2010) p.46 and 81

guide to really target the territorial state. The case-study of Al-Qaeda showed that the requirements of Article 51 can be applied to non-state actors. and in the case of Al-Qaeda, the use of force in self-defense could be seen as lawful because the events of 9/11 qualified as an armed attack, the US reported the use of force to the Security Council. and the measures the Security Council had undertaken against international terrorism did not curtail the right to self-defense. The necessity requirement of imminence was also fulfilled by Al-Qaeda because Al-Qaeda's capabilities and intent showed another attack could be pending. The proportionality requirement gives room for questioning because from the start the US was determined to root out Al-Qaeda completely. Enemies may be wholly defeated however. And therefore, even a determination to root out the entire terrorist organization can be seen as lawful.

The 'second layer' of the principles of necessity and proportionality, which allows the defending state to assess whether force can be used within the territory of another state was least defined by the literature. which is why this essay has examined the cases of Afghanistan and Pakistan in order to extrapolate guidelines. It follows that the unable or unwilling principle can be applied through a 3-step test. which include an assessment of the territorial state's obligations under international law. the duty to request the territorial state to take measures to prevent the terrorist activities in its territory, to give the territorial state time to comply with these demands, and if the territorial state continues to fail. the defending state should assess the territorial state's control and capacity in the region from which the threat is emanating as well as the relations between (elements of) the territorial state's government and/or military and the non-state actor.

The territorial: state's breach of its obligations under international law is a first sign that it is unwilling. which can be further confirmed by the defiance of demands to address the terrorist activities in its territory despite the time given to act. Demands can either be made publicly or privately (for example through cooperation). The time a defending state must give the territorial depends on the imminence of the threat posed by the non-state actor. If the imminence is clear and the territorial state fails to act against the terrorist groups, as was the case in Afghanistan. then a shorter time to move from negotiations to the deployment of the use of force is justified. If the territorial state is cooperating. as was the case with Pakistan. the defending state must further establish that the territorial state either lacks control and capacity in the region from which the threat is emanating or it lacks the capacity to control certain elements within its own security apparatus. The use of force in self-defense against a non-state actor is lawful if the defending state has tried to cooperate with the territorial state but it has recognized a pattern that the non-state actor has been tipped off and was able to escape. The indications that the non-state actor was tipped-off should be made public because this increases the accountability of the defending state and again diminishes the potential abuse of the use of force in self- defense.

Although the identification of these guidelines are an important step towards a better understanding of the unable or unwilling test, more scholarly debate on these guidelines is necessary. The topic would benefit from deeper research. for example, a thorough investigation into the opinion juris of states concerning this principle. similar to Wettberg's investigation on whether non-state actors are deemed capable of conducting an armed attack. Other cases of the use of force in self-defense against non-state actors within the territory of another state should be examined too. for example, that of Turkey in the territory of Iraq and that of Israel in Lebanon. because they might shed a different light on the guidelines developed in this essay.

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