

USE OF FORCE AGAINST NON-STATE ACTORS: 'JUSTIFYING THE RIGHT OF SELF DEFENCE'

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ABSTRACT

Non-State Actors include organizations or individuals who are not affiliated nor funded by any agency of the Government. Non-State Actors are entities such as influential organization and at times individuals who have the potential to influence the actions of state actors. Non-State Actors lack allegiance to any stateⁱ. There is a growing scenario wherein Countries are faced with Attacks from Non-State Actors. The threats include Armed Attack, Cyber-attacks, Terrorism, Drone Surveillance, holding citizens of a sovereign hostage etc. This had led to the insurgence of the Right to Self-Defence against Non-State Actors. This involves the state from which the Non-State Actor is issuing such threats. The state which invokes the right of Self-Defence needs to overcome the obstacle of providing an explanation as to how the use of self-defensive force within the territory of the host-state will not infringe the sovereignty of the host stateⁱⁱ. It is difficult to rationalize the involvement (of host state) with Non-State Actors, in some cases it could considered to be a breach of due diligence, at times attribution and in others complicity of host state w.r.t providing refuge to the Non-State Actor. The Author puts forth a suggestion that in these instances where there is a lack of positive law, such acts of self-defence can be justified on the basis of '*Circumstances precluding Wrongfulness*'ⁱⁱⁱ. The author will further justify actions under self-defence, provide instances wherein infiltration into host states was involved and international ramifications of such an event. Finally, the author will delimit such acts, which can be undertaken by states under the blanket of the right of Self-Defence.

Keywords: Armed Attack, Host state, Justifications, Limitations, Non-State Actor, Self-defence, Territorial Sovereignty, Use of Force, Victim State.

INTRODUCTION

The International Legal Framework governing Inter-State Relations has always struggled to accommodate Non-State Actors. Because of which there exists problems as regards the regulation of the use of force^{iv}. Modern Technology, Scientific development and military advancements has vastly increased the destructive power of Non-State Actors. There is also the unfortunate existence of unidentified terrorists' cells in different parts of the world. One of such threats namely the Islamic States (ISIS) has developed as a 'Global and Unprecedented threat to International peace and security' in the recent times^v. This has created the need to justify and delimit the scope of the Right of Self-defence for the use of force by states as a response to attacks by Non-State Actors and thereby fill the void as regards punitive actions against Non-State Actors by the Victim State.

The International Law Commission's Draft Articles on State Responsibility had a proposal which suggested that where there existed exculpatory circumstances certain wrongful conduct at instances can be characterised as '*Not Wrongful*', i.e. the suggestion of characterising an act as wrongful but excused^{vi}. Article 2 (4) of the United Nations Charter prohibits the use of Force by states and this is regards as *jus cogens*^{vii}. There exists an exception to every rule however and in this case, it is by way of Article 51 of the Charter, which approves collective self-defence against an armed attack (the scope of this is however contentious)^{viii}. The right of Self-defence under formal legal position is only invoked against an aggressor state. The right of Self-defence against Non-State Actors has become the norm in the dealing of victim states with the Non-State Actor involved however the legality of such an action under right of Self-defence is questionable^{ix}. There is no positive law as regards to the right of self-defence against Non-State Actors. The Victims states actions against a non-state actor residing in another state namely the host state is difficult to justify as the host state is not the aggressor^x. Additional legal justification is required if the victim state proposed to proceed with action against the aggressor when the host state does not consent. The Author argues that Self-defence as a '*circumstance precluding wrongfulness*' provides the neatest problem as regards the sovereignty of the concerned host state.

RESEARCH METHODOLOGY

The Author Primarily proposes to answer three questions by way of this Paper, Firstly, what constitutes an offence for which the right of self-defence can be invoked under the international law^{xi}. Secondly against who can this right of self-defence be invoked, as already established it is a practice to enforce this right against non-state actors in state play, however, it is not a positive law^{xii}. Thirdly, it deals with the victim state and the host state from which the aggressor operates from. This article focuses mainly on the legal basis on which the victim state can operate while seeking self-defence against the aggressor. And once it is an established armed conflict between the non-state actor and the victim state^{xiii}. The right of self-defence of the victim state comes into picture. The use of force of the victim state on that non-state actor is interrupted by a host state wherein the non-state actor resides. If the host state consents to self-defensive force against the non-state actor the victim state can act on such consent, however when the host state is non-consenting that creates the problem which this paper intends to address. The This article will deal with state responsibility as regards harbouring aggressor in territory. The author proposes that the lack of a legal framework as regards use of self-defensive force against non-state actors needs to be rectified.

REVIEW OF LITERATURE

The author has derived heavily from the works of Nicholas Tsagourias^{xiv} and Federica I^{xv}. Paddeau. The experts from ICJ judgments helped the author formulate the view of the law involved in the present case. ‘Use of Force against Non-State Actors and the Circumstances precluding the Wrongness of Self-defence’, Paddeau’s views in this article has helped the author shape her view when it comes the double faceted application of article 51 of the charter as regards the legal relationship between victim state and non-state actor and article 21 of the ARS helped the author provide the best circumstance precluding the wrongness of self-defence. Further the author would like to state that she has reviewed and researched upon Paddeau’s works on the topic and the working of article 51 of the charter and article 21 of the ARS where derived from Paddeau’s conclusive work. Tsagourias’s in ‘Self-Defence against Non-State Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule’, provided the author the glimpse of a two-faceted conflict. One as to whether

a non-state actor can be involved in an armed conflict when an armed conflict as regards article 51 requires the involvement of two states namely the victim and the aggressor. The second being as to whether infiltration into the host state be justified is the host state has no involvement with the non-state actor but does not consent to the use of defensive force in its territory. And such a bequest of the host state is justifiable under the principle of territorial sovereignty. The author has further quoted important ICJ judgments to make her case as regards a 'Circumstance Precluding Wrongfulness'. The Author has also quoted United Nations Assembly Resolutions post 9/11 to justify the use of force against non-state actors and the changing regime where there is an increase in the acceptance of the use of self-defensive force against non-state actors^{xvi}.

RESEARCH HYPOTHESIS

It should be noted that the author deals with three parties in a dilemma. The Victim State, The host state and the Non-State Actor. Firstly, the author by way of this paper needs to justify the legal framework through which any action can be sought against a non-state actor. The author has provided an analysis as to what an armed conflict is composed of and how the right of self-defence of the afflicted comes into the picture^{xvii}. The right of self-defence is not one of vengeance but one borne out of a principle of proportionality to ensure that the threat to global peace and security is extinguished^{xviii}. Then once the right of self-defence of the host state is recognized begins the process to hold the non-state actor responsible by the use of defensive force. The state the non-state actor resides in is called as the host state. At certain instances the host state might be in cohorts with the non-state actor and be an aggressor which is difficult to prove but if proved the victim state has the right to use force as a measure of self-defence against the aggressor. This is however very difficult to prove and there exists degrees of state compliance with non-state actors. At times states could be said to have breached their due diligence. At times states could be said to have acted complicity and at time in attribution. This paper also further proposes the ideal of Circumstances precluding wrongfulness i.e. there are certain legal rights of the host state that has been impaired but there exist other legal rules which permit the same and the unlawful act by the victim state cannot thereby be condemned nor regarded as unlawful^{xix}. But this principle excuses such impairment of the rights of the host

state. This paper reviews the emergence of this principle and primarily encroaches upon the dilemma faced as regards to the use of self-defensive force against a non-state actor.

ANALYSIS

What Constitutes an Armed attack?

The parameter for actions of a victim state and proportionality was derived from the Caroline Test. The Caroline test was derived from a diplomatic incident between the United States and United Kingdom over the killing of a US citizen engaged in an attack on Canada which was then a British Colony^{xx}. The Caroline test established that there needs to be a necessity of self-defence which was instant, overwhelming and left no other choice of means and no moment of deliberation and secondly stated that the action taken by the victim state should be proportional and justified as a necessity under self-defence^{xxi}. This is the Customary right of self-defence and how it operates in general. An Armed attack is (a) an action by a regular state armed forces across an international border, (b) armed groups, irregular forces and mercenaries, when (a) they are sent by or on behalf of a state to carry out armed attack against another state and (b) the attack is of such gravity so that it amounts to an armed attack if it was conducted by the regular armed forces of a state. This was established in the Nicaragua Case^{xxii}. The delimitation of the definition is observed in *DRC v. Uganda*^{xxiii} wherein the ICJ said that the attacks did not create a necessity out of which a defensive measure could be carried out. This definition is inclusive of armed attacks instituted by a state, but the operation of the law when non-state actors are involved is interesting to observe. The right of self-defence against non-state actors has grown greatly since 2001, after the 9/11 and the United States' response to such aggression by the *Al-Qaeda*.

The Laws Governing Invoking the Right of Self-defence by victim state against non-state actor aggressor:

An element of state is required for a group to be considered to have launched an armed attack, this has been maintained in the jurisprudence of the International Court of Justice. This rules out the act of invoking self-defence against 'non-state' actors. In the Case concerning *Military and Paramilitary Activities in and against Nicaragua*^{xxiv}, the ICJ relying on Article 3 (g) of the

1974 resolution on the Definition of Aggression held that the definition of ‘armed attack’ could only extend to cover attacks instituted by armed bands, groups, mercenaries or irregulars who have been sent by or on behalf of the state. In the *Legal Consequences of a Wall in the Occupied Palestinian Territory*^{xxv}, this case was after the 9/11 attacks, the ICJ as its advisory opinion has stated that self-defence can only be invoked as a response to an armed attack by one state against another state. The United Nations Security Council Resolutions 1368 and 1373^{xxvi}, has implicitly recognized the United States’ Right to self-defence in response to the 9/11 attacks by Al-Qaeda. The Majority of the states inclusive of Russia and China supported the ‘Operation Enduring Freedom’ against Afghanistan as a legitimate exercise of self-defence. Judges Buergenthal and Kooijmans in *Wall*^{xxvii} have pointed out as a declaration and as separate opinions that the Resolution does not implicitly limit the application of the right of self-defence against Non-state Actors. The Security Council has authorised action under Chapter VII of the Charter without ascribing the terrorist acts to a particular state as per Resolution 1373^{xxviii}. In the Case Concerning Armed Activities on The Territory of The Congo, Judge Simma has stated the restrictive reading of Article 51 in the Wall needs to be reconsidered. And all so went on to add that the resolutions can only be interpreted to state that large scale attacks by non-state actors qualify as armed attacks within what is construed under Article 51 of the Charter.

It is observed that most states are tolerant of the use of defence of force against non-state actors. There is still a reservation as to legitimising or validating such a use of force however, these operations undertaken by victim states are not condemned nor regarded unlawful. Israel’s claim in the Wall was denied on the basis that self-defence cannot be invoked for a state to justify use of force against an attack which had originated within its own territory^{xxix}. This was Palestine Occupied Territory in Israel. However, this judgment is in contrast to the Resolutions 1368 and 1373 which contemplate acts that pose a global threat to international peace and security and not just within the territory of a particular state^{xxx}.

Self-defence cannot justify the damage brought about by the force of all obligations of the victim state. The ICJ in *Nuclear Weapons*^{xxxi} has laid down the obligations of total restraint. This delimits the use of force and what cannot be construed to be a use of self-defensive force. This was accepted by Iran in *Oil Platforms*^{xxxii} and by Uganda in *DRC v. Uganda*^{xxxiii}. It is an established principle under international law that acts of self-defence can in no way breach human rights or humanitarian law. In these instances, actions undertaken by the victim states

where could not be justified as self-defence^{xxxiv}. This is an important delimitation when it comes to use of force against non-state actors as an act of self-defence.

Self-defence and Territorial Sovereignty:

Territorial Sovereignty is one of the basic pillars of International Law and Order and should not be easily violated in any case. Territorial Sovereignty has remained a fundamental principle of the International Legal Order^{xxxv}. The use of force against a non-state actor who is within the territory of a non-consenting host state is an internationally unlawful violation of the territorial sovereignty of the host state. Thus, such acts need to be justified appropriately. The Article may at instances extend to use of force as self-defence against non-state actors but it is not inclusive to the extent of infiltration into the non-consenting host state and challenging its sovereignty^{xxxvi}. It is submitted that the suggestion in Paddeu that self-defence could be considered as a circumstance precluding wrongfulness in this case provides the most appropriate solution^{xxxvii}. The right of self-defence is covered under article 51 and the violation of the host states territorial sovereignty to exercise self defence will be governed and justified under article 21 of the Articles on Responsibility of States for Internationally Wrongful Acts. Article 51 in this case governs the legal relations between the victim and the non-state actor while article 21 governs the legal relations between the victim state and the host state. This approach is yet to be approved by the states or the ICJ^{xxxviii}. This is however an analytically sound defensive framework which would provide an explanation as to how the victim state's right of self-defence extends to allowing it to use force in a way that would have otherwise constituted an unlawful violation of the host state's territorial sovereignty. Article 21 of the ARISWA only excuses the victim state's international responsibility for its otherwise wrongful act but the victim state under Article 21 is still open to fines imposed by the host state for damages caused as a result of such defensive act. This provides a fair scenario where the outcome is not disadvantaging the interests of the host state unnecessarily^{xxxix}.

Self Defence as a circumstance Precluding Wrongfulness:

It is to be noted that the abovementioned Article 21 was always intended to work in an inter-state context i.e. between two states. The armed attack might have been private but it is

attributable to a particular state and in this case the use of defensive force fulfils the requirements of jus ad bellum, the right of self-defence justifies the effect of violation of the aggressor state's rights. In an armed attack by a non-state actor there are three parties i.e. the host state, the non-state actor and the victim state^{xl}. The Victim state is under an obligation to not to resort to force unless it is a victim of attack and this could include attacks by a private party. Thus, under the present law a state has the authority to resort to force regardless of the source of the aggressor^{xli}. This province arises out of article 51 which indirectly neutralises article 2(4) when such force is used as an act of self-defence. However, it is the non-state actor who is the aggressor and not the host state, thus there arises the dilemma as to whether the right to self-defence of the victim state as regards the non-state actor encroaches upon the rights of the host state. Firstly, this dilemma can be justified by stating that standard of the state's involvement with the non-state actor. This can be a legal ground to justify as to why the host states' rights are not impaired by the use of defensive force in its territory. It can be justified on the basis of a breach of the law of neutrality wherein a third party in this case the host state by its involvement with the non-state actor i.e. one of the parties to the conflict forfeits its neutral protection and renders itself liable to the attack by the opposing party^{xlii}. In this case we do not need to involve article 21 as the law of neutrality resolves the dilemma of the rights of the host state. Secondly the other justification is one of self-defence i.e. whether or not a third state is involved in any armed conflict a self-defending third state might lawfully impair some of the rights of a third state^{xliii}. It is difficult to attribute the conduct of a non-state actor to a particular state entity. If the victim state fails to attribute such conduct of the state entity it will not be entitled to use force against or even within the host state.

Self Defence and Third Parties:

The Right of self-defence may allow a state to use force against third parties i.e. it permits the impairment of the third-party rights by use of self-defensive force^{xliv}. Certain impairment of third-state rights during hostage situations have been justified on the grounds of a state's exercise of self-defence. In the institution of war zones, exclusion zones on the high seas wherein certain events affect the navigation freedom of all the states etc^{xlv}. Self-defence as a legal basis to justify interferences with the rights of another state has increased in the past decade. During the Algerian Emergency of the mid 1950's France justified its interference on

the basis of self-defence and Pakistan during the Indo-Pakistan conflict of 1965. The United Kingdom in 1982 justified the creation of a 200 nautical mile exclusion zone along the Malvinas and the institution of security bubbles around its warships as an act of self-defence. These interferences were in regards to neutral shipping zones^{xlvi}. During the Iran-Iraq war the United States and the United Kingdom accepted the principle that self-defence could justify interference with neutral shipping when there was a reasonable suspicion of a non-neutral device. This was however condemned by the security council and the other states. This led to attacks on neutral merchant vessels on both sides^{xlvii}. This was to be condemned as a violation of the international law. During the 9/11 attacks the US engaged in the boarding of neutral vessels which were suspected to transport terrorists. US justified its action as self-defence although a sound legal basis for such an act was not articulated. To conclude the interference with neutral shipping ground was permitted in the instances wherein there existed a suspicion of collaboration between the third state and the aggressor^{xlviii}. These legal justifications and implications can be extended to the present dilemma of the host state rights. The UK's position on self-defence-based interference with neutral shipping grounds is the clearest analogy to impair the rights of the host state. However, to invoke the right of self-defence the host state involvement needs to be proved^{xlix}. This approach should extend to the combined readings of Article 51 of the Charter and Article 21 of the ARS. The resort to force in self-defence is laid down in Article 51 whereas the interference with host state rights will invoke Article 21 of the ARS. This establishes the concept of Circumstances Precluding wrongfulness, a category of rules of the law of responsibility whose main function is to justify the infringement of other legal rules¹. Article 21 can thus justify the breach of obligations of the victim state to the host state, better than any other circumstance precluding wrongfulness.

CONCLUSION

The use of force against non-state actors creates a dilemma where it is not possible to expect the victim state to tolerate the assault of the non-state actor while the rights of the hosts states also need to be upheld. Although the use of force as a right of self-defence against non-state actors is gaining increasing acceptance it is difficult to legally justify the interference in the rights of the host state. Can the use of force in the host state be legally justifiable?^{li} There is a reasoning that states that the host state has failed in its obligation of due diligence to other states

by harbouring violent non-state actors. And thus, the host state is liable to the use of force within its territory. This is however an overreaching concept. The author suggests that Paddeu's study should be used as an answer to this never-ending question. Article 21 explains that force which is lawful under Article 51 of the Charter does not constitute an infringement of other rights of the host state, the most important one being of territorial sovereignty^{lii}. Article 21 provides a framework to address the question of host state rights however it needs to be accepted as positive law through state practices and opinion juris^{liii}. The rights of host states against non-state actors still have a long way to go beyond the debate of the rights of the victim state and that of the host state.

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