



USE OF FORCE AGAINST NON- STATE ACTORS: AN ANALYSIS OF RIGHT TO SELF DEFENSE

Kaniz Fatima
Lecturer in Law,
University of Gujrat
Gujrat - Pakistan
kaniz.fatima@uog.edu.pk

Mirza Muhammad Kashif
ADPP,
Gujrat – Pakistan
mirzakashifgop@gmail.com

Mudeel Raza Jurgees
Lecturer in Law.
IISAT
Gujranwala – Pakistan
mudeel.raza@iisat.edu.pk

ABSTRACT

International law prohibits the States to use force or extends any threat to use force in any manner against the territorial integrity and sovereignty of any other State. This prohibition is confirmed by the Charter of UN and it is part of international customary law as well. There is an exception to this prohibition provided by Article 51. This Article recognizes the right to self-defense of a State when it is assaulted by another State. The question is whether this right to self - defense be used against non -State actors as well and what should be done if these non- state actors are operating from the locality of another State. This study analyzes the scope of right to self- defense. It further discusses the legality of State practice to use extra territorial force against non-state actors. The doctrinal research methodology is opted for this research paper. This research provides an analysis of legal provisions, customary law and State practices related to the extraterritorial force against non- State actors. It suggests that the existing legal framework (UN charter and treaties) doesn't address the subject of exercising self-defense against non- state actors and the state practices has not yet acquired the status of customary law as it misses the necessary element of opinio juris. Therefore, uniform legal rules should be adopted by States to avail the benefit of self- defense provisions against non- state actors.

Key words: Use of force, intervention by invitation, self- defense, non- state actors.



Introduction

With technological development traditional methods of warfare have changed significantly. Wars are not limited to the battlefields but has led to nuclear, biological, chemical weapons and use of cyber space as well. In this era, wars are not only fought between States, we have witnessed new techniques and entities emerging in this field. Non-State actors and non -State armed groups are emerging. Fighting these non- state actors has become a challenge as they operate from a foreign State. In most of the cases this host State is not involved in the conflict (Jackson Nyamuya Maogoto, 2006). Hence it becomes challenging that under what scenario a victim State can attack the host State to respond these non -state actors. Forbidding the use of power against the territorial integrity and sovereignty holds the status of jus cogens under International Law (Belgium V. Spain, 1970). Article 51 of the UN Charter elaborates the principle that States can only use the force in defense if armed attacked has been befallen. However, the scope of this right is not so wider because it doesn't facilitate for right to preemptive self -defense or protection to States in case of an imminent threat. Right to self-defense has its roots in customary Laws and constitutes a valid exception against forbidden use of force. The international law provides the right to private defense to State on the account of apprehension of imminent danger to it. In this situation States have to follow the doctrine of necessity & proportionality. The language of Article 51 mentions the word 'States' only so it is debatable that if it engages the non-State actors. In recent years different States have used this provision to attack the non -state actors operating from foreign States. It is important to analyze the scope of Article 51 and ascertain the validity of extra-territorial use of power against non- state actors. There are two ways to attack the non-state actors in the boundaries of another State. One is right to private defense under Article 51 and the other is intervention by invitation (Dire Tladi, 2021). The use of force in self-defense is concerned, the approach is restrictive and can be allowed in very limited circumstances. On the other hand, use of force against non- state actors on the basis of intervention by invitation is more permissive with few exceptions. This paper analyses the first approaches only that is to study the use of force in self- defense against non -state actors. International Court of Justice interprets the article as follows. "The attacker can be a force subject of international law. In the case of an attack by a non-state actor, attribution to a State is required for the right of self-defense to be valid (DRC V. Uganda, 2005)". The defending State should first get permission from the territorial State, though, as non-state actors sometimes conduct their operations from there.

Use of force under International Law

"UN Charter prohibits the use of force against the territorial integrity and sovereignty of any State, or in any other manner inconsistent with the Purposes of the United Nations." This rule contains only two exceptions. First is provided by the UN Charter under Article 51 which permits the States to exercise right to self-defense individually or collectively after an attack is launched by other State. Second exception is use of force or take forcible measures with the prior sanction of Security Council. Another possible exception to this prohibition is humanitarian intervention but this exception is not recognized by the charter or any other international treaty. Use of force in any other manner e.g.



reprisals, retaliation is prohibited and illegal. This paper analyses the scope of first exception only that is right to self- defense.

The prohibition of Article 2(4) is not limited to the actual or physical use of force only but it also mentions the threat to use force. The threat to use force is also illegitimate but it is not the focus international community as the actual use of force. In its advisory jurisdiction, ICJ defines the threat to use force as follows.

“An express or implied promise by a State of a resort to force conditional on non-acceptance of certain demands of that State. (Definition by Ian Brownlie).”

So according to this definition, it can be concluded that the right to self -defense can be exercised in both situations, when there is actual use of force or in case of apprehension of imminent danger.

Initially the concept of war or use of force was limited between the States only. However, with the rise of non -State entities like non-State armed groups and terrorist, this concept has changed. This question has raised different concerns and questions. It is important that whether the use of force against non -state actors operating from foreign State constitutes the violation of territorial integrity of that State. The territorial integrity and political independence in this context mean policy of non-intervention. The general opinion in this regard is that if the force is used against non -state actors in host State without its consent comprises the violation of sovereignty in terms of Article. The killing of Osama bin Laden in Pakistan without the consent of host State is one such example. In these cases, the violating State forwards one argument in support of its action that the host State is not interested to remove those non-State actors. Another exception that was put forward by UK government to justify the use of force against another State was on the basis of humanitarian intervention. The purpose of humanitarian intervention was stated as to shield the rights of citizens from its own government. One of the best examples to use humanitarian intervention was against Iraqi government for failure to protect the rights of Kurds and ignoring the UN resolutions in this regard. These arguments and justifications to use force against any State are hardly recognized by any international instrument or Court decisions. Use of force in any way against any State without its sanction is in violation of the principle of sovereignty provided by Article 2(4) of Charter.

Analysis of Right to Self-Defense against Non- State Actors

Article 51 of the UN Charter provides the only exception against prohibition of article 2(4). This article permits a State to use force in defense against an armed attack by the other State. Any such action taken by the UN members must intimate to the UN Security Council. “This provision has been interpreted to incorporate the inherent rules of self-defense under customary international law, which requires that self-defense must be necessary and proportionate to the aggression (Kimberley N Trapp, 2008)”. The work of Professor ‘Dire Tladi’ is very significant on this topic. In his article on the “non-consenting innocent State”, he adopted a restrictive interpretation of the right to self-defense. He is



of the opinion that the article 51 cannot be interpreted in such a broad manner to allow the States to use force against a non-consenting State. Extra territorial force should not be used without prior consent of host State as it is a violation of UN charter and the use of force principle under International Law. According to him it is evident from the wording of Article 51 that this right can only be exercised against States only and in case of an attack from the State. He argues that this article should be interpreted in the light of the judgments of ICJ.

In an article titled “Lawful self-defense to terrorism”, the author Mary Ellen O’Connell” also argues for a restrictive interpretation of article 51 of the UN Charter. She wrote that an attack can only be launched against the other State if the actions of non- state actors are attributable to that State. If the non- state actors are operating independently and their action are not supported by the host State, then they cannot be targeted without the consent of host State. Any extraterritorial use of force without consent of that State will be violation of 2(4) of UN Charter. Attribution is the test to use force under right to self- defense.

“The Security Council has interpreted this provision and allows the possibility to authorize the use of force by establishing an UN force or individually or collectively by the member States on a specific mandate issued by SC through its resolutions. (Christian D. gray, 2014)”

An analyses of article 51 shows that the right to self- defense can only be exercised against States there is no mention of non- state actors but the recent years has witnessed different States to use force against non-state actors by using the provisions of article 51. Many justifications and interpretations have been put forward by the States to extend the scope of Article 51 as to cover the non- state actors as well especially after the 9/11 attacks of Al Qaida against USA. States have interpreted the scope of self- defense differently. States can be divided into two camps on the basis of their practices and views in this regard. United States is of the view that article 51 extends the right to use force across the border against non -state actors. According to USA any illegal use of force by the armed groups originating from the territory of any other State amounts to the armed attack required for exercising the right to self -defense. This group is known as expansive camp and other States like U.K, Turkey and Netherland also joins USA in its views on using force against an armed attack or in case of imminent danger of attack. The other group is known as restrictive camp that includes Russia and Pakistan. According to Russia, the article was drafted to exercise self -defense against the armed attacks of States. However, the interpretation of this article has changed with the passage of time and especially after the incident of 9/11. The broad interpretation the interpretation of the provision of the article 51 permits the use of force in case of self-defense against the non-state actor. This interpretation has become practical after the 1368 resolution of Security Council. According to the restrictive camp every random attack by the terrorists does not reach the magnitude of an armed assault and does not give rise the right to self- defense. The right to self- defense can only be exercised against non- state armed groups operating from foreign territory in exceptional circumstances with the permission of host State.



An International Law Professor ‘Michael Schmitt is of the opinion that “It is undeniable that community understanding of law shifts over time to remain coherent and relevant to both current and the global community’s normative expectations. So the Charter can be interpreted in good faith as to be applied on the non -state actors and terrorist groups.” This argument is recognized by many other scholars. States have launched attacks against non -state actors and have used extra territorial force against them. Recent examples include drone attacks by USA in Pakistan to target Al Qaida and use of armed force in Iraq and Syria. The next sections will analyze the legality of such attacks.

Another important aspect of article 51 of UN charter is that it allows to exercise right to self- defense in case of an attack by the other State, there is no prescription of preemptive self -defense in case of threat of attack. The judgement of ‘Nicaragua v United States’ is very important in this regard. The Court declared that “the State that is the victim of the armed attack, must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defense on the basis of its own assessment of the situation (John Norton Moore, 1986).” Moreover, the State using the right to self- defense must report promptly to the Security Council regarding their exercise of use of force. Retrospective self- defense claims are not persuading if States fails to immediately report the use of force to Security Council. The most important requirement in exercising the right to self-defense is that the victim State ought to utilize the power that is vital and relative to the assault. Though the Article 51 does not mention the word non-State actors but it is now evident by recent State practices that this right can be used and exercised against these non- State actors but its scope is limited. With legal point of view, the position of restrictive camp is sounder and more logical.

Extra Territorial Use of Force against Non-State Actors

In this age of rising terrorism and non- state armed groups, it is very important to examine that under what circumstances force can be used against these armed groups. If we see the jurisprudence of different International Courts, there are no guidelines provided in this regard. ICJ, in its decision in ‘DRC v Uganda’ discussed this issue but failed to provide any concrete guidelines. In most of the cases, ICJ held that to practice the right to self-defense the assaults should be inferable from a State and no assault can be sent off straightforwardly against the non-state actors in the extrinsic territory. However, in the recent years, different States has launched direct attacks against non-state armed groups who were operating from foreign territory. So there is an argument that this is a new emerging right and there is no requirement of State attribution in this regard. The States who practiced this right to attack directly against non -armed groups has two bases to rely on. “The first one is by using article 51 and right to self - defense and the intervention by invitation. However, the validity of extraterritorial use of force against non-State actors without the consent of host State is questionable. (Dire Tladi, 2013)”

ICJ Judgments and Self- Defense against Non- State Actors



Extra-territorial use of power against non-state actors by using right to self- defense can be categorized in two different forms. The first one is using force to target only the non- state armed groups and their niche in the extrinsic territory. The other form involves to target the State as well from where these actors are operating. To target the State from whose place they work the attribution requirement should be fulfilled (*Nicaragua v United States, 1986*). In *Nicaragua* case the main issue was that “whether American assistance to the Nicaraguan Contra forces amounts to a legitimate exercise of collective self- defense”. So, the judgment did not explicitly address the validity of use of force against non-state actors and the court held that the use of force by US against Nicaragua is not legitimate as the actions of non -state actors cannot be attributed to the State. This same stance was reaffirmed in the advisory jurisdiction of construction of wall by Israel in Palestine territory that the right to self- defense commenced only when the armed attacks can be imputed to the State. In another judgement, ICJ held that the actions of rebels operating from DRC against Uganda are not attributable to DRC hence use of force is not legitimate. (*DRC v Uganda, 2005*). So, in the light of these decisions, it can be safely concluded that the ICJ jurisprudence has not addressed the issue of legitimacy of use of force against non- state actors explicitly and the right to self -defense cannot be exercised against non- state actors in extrinsic territory as it amounts to violation of integrity of the other State territory. However, it doesn't mean that the victim State has to suffer on the hands of non -state armed groups working from the foreign habitant.

International Customary law & use of force against non - state actors

Although ICJ jurisprudence does not encourage the States to use force against non- state actors working from foreign State but international community has perceived the right to respond such terrorist and armed groups that is evident from different State practices. In 2001 military campaign was launched against Al Qaida in Afghanistan. In 2006 military attacks were launched by Israel against Lebanon. In the light of these State practices, customary international law provides some insight regarding the situations in which a state can use force against non- state actors. The legal frame work for this is Article 2(4) and 51 of UN Charter. Article 20 of ILC Draft Articles on State Responsibility is also relevant in this regard. As a universal principle, any kind of use of force against another State amounts to infringement of Power and regional respectability of that State even if it is defensive in nature. There is a need to address the concerns of victim State to respond armed attacks by non- state armed groups and to protect the integrity of foreign State. The way to address this issue lies in the balancing mechanism of international customary law (Kimberley N Trapp,2007). There are two basic principles of international customary law that regulates the use of force and legitimate exercise of self- defense. These are doctrine of necessity & proportionality. These principles states that whether the use of force is necessary at all if it is so then it should be proportional. These requirement works to strike a balance between the security interest of victim state and the interest of host State. If the foreign State itself is working against the non- state actors stationed in its territory, then it isn't required for the victim State to utilize force against those gatherings. In this case the matter can be dealt with cooperative mechanisms and arrangements.



Where the host State fails to curtail the activities of non- state actors, then the victim State has no choice except to use extra territorial force. Even in this situation the victim State should seek the consent of host State and the force should be used by following the principle of proportionality. The issue is that whether the State practices to use force against non-state actors in extra- territorial boundary is an emerging customary law. There are two essentials to reach the status of international customary law, first is State practice and the other requirement is opinion juris. In this particular case we have evidence of State practices but these practices are not consistent and lacks the element of opinion juris. Hence it is safe to state that these State practices cannot be considered as customary international law.

Unable and Unwilling Criteria

One of the justifications put forward by the victim State in favor of extra territorial use of force against non -state actors in host State is the unfit or reluctant measures. This criteria states that if the host State is or un not capable or willing to take necessary measures against the non- state actors operating from its territorial boundaries then the victim State can use force against it. Being unwilling means that the State does not want to fight or prevent the non- state armed groups but being unable means that the state does not have sufficient financial or military resources to prevent such attacks. Many scholars agree that a state can be either unwilling or unable but according to some scholars a State must be both unwilling and unable to make an attack against it. Many States e.g., USA used these measures as an exception to the denial of use of force. Though it is not mentioned in the Charter or any international convention and probably used for the first time by the US State department during the Vietnam war. Many States used the criteria as a justification and valid exception for targeting the non- state actors located in other States. Being unable means if the state lacks sufficient resources and power to fight and control the non- state actors on its territory but being unwilling is also debatable. It is not clear that what kind of measures are expected from the host State to prove its willingness. Other than the illegality issue, it is required that the criteria must be based on the right to private defense after an outfitted assault from the domain of foreign State as provided by Article 51. However, the recent examples of State practices in this regard shows that the criteria have been used without fulfilling these requirements. Researcher is of the opinion that the criteria of being unable and unwilling should not be used capriciously without the acquiescence of host State or without the sanction of Security Council.

Consent of the Host State

“Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limit of that consent (Article 20 of Draft Articles on State responsibility states)” So the assent of host State can enable the victim State to utilize force against non-state actors working from the region of former State.



“Evaluating whether a defending country has the right to circumvent the consent of a territorial state is essentially a balance between the right to self-defense and the right to sovereignty and territorial integrity (Dire Tladi, 2013)”. According to different Scholars, the prey State should initially look for the assent of the territorial state (A.S Deeks, 2012). The endeavor to get this assent is the acknowledgment of the regional privileges to regional integrity and Supremacy. Furthermore, it furnishes the regional countries with the chance to exhibit their capacity and ability to eliminate the danger raised by the non-state gatherings. It allows the territorial State to grant the request and to cooperate with the victim State to culminate the threat. In other case the respondent country may be provided with its own arrangements to eliminate the non-state group. In this case, the Respondent is permitted to circumvent the consent of the territorial State only if these measures are found to be invalid. However, other Scholars like Trapp and Carton do not agree with this argument. They state that “It would seem to be terminating the Charter completely by allowing sovereignty and territorial integrity breached in this way, although the host State is not fulfilling its duties according to a multiple of terrorism conventions.” (Trapp on State Responsibility for International Terrorism)

This necessity to acquire the assent of regional State is deferred assuming the State is involved and activities of the non-State actors can be credited to that State. According to the ICJ decisions, Jurists and States, the circumstances where host State is engaged and supporting the actions of non -state armed groups then the matter is clearly State V. State. In this situation the requirement of State consent is not relevant. Assuming there is adequate proof of association of State from whose region the outfitted gatherings are going after or where the assaults by the non-state actor can be ascribed to the regional state, then, at that point, the victim State will reserve the privilege to utilize force against the non-state actor and the host State.

Conclusion

The rise of fear monger gatherings and non-state actors has totally changed the strategies for present day fighting. The major discussion between current jurists and politicians revolves around the legitimacy of the use of extraterritorial force against these fear monger bunch non state actors working from another State. Although there is evidence of State practices to deal with the non-state actors operating from another State but their practice is not consistent to follow it as a binding right. Hence the element of opinion juris is missing to attain the status of customary law. Unfortunately, there are no clear judgements and international rules on the extra territorial use of force against these non-state armed groups. ILC has also not stated its legal stance on the matter and Scholars are divided on the existence of any uniform legal norm in this regard. State has not yet agreed to any uniform and binding fair rules regarding the use of extraterritorial protective powers against non-state actors. The international organizations and Security Council has not yet developed any binding norms or treaty governing the exercise of extraterritoriality over non-state actors. The ICJ in recent years has missed some opportunities to interpret and clarify the law in this regard. There is a need to bridge the gaps between State practices and current legitimate regime on self-defense. However, e that as it may, the Validity of additional regional utilization of power against non - state entities is as yet questionable.



Although State practice is there but it is unknown that when these practices will become customary international law. It is concluded that extra territorial armed attack against any foreign State is illegal unless it is used with the prior leave of that State or with the consent of the Security Council. The realm of Article 51 is very restricted in this regard and no possibility of extraterritorial use of force seems there unless the blitz is attributed to the hosting State. ICJ and international organizations can play important role in this regard by laying down clear guidelines in this regard. Amendments can be made in the existing laws in order to clear the ambiguity and to develop some uniform legal norms.



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