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9/11: TERRORISM, SUBSEQUENT U.S 'WAR' AGAINST NON-STATE ACTORS AND THE ADVENT OF A NEW CUSTOMARY LAW

Introduction

It has now become glaringly clear that the 9/11 attack on the U.S.A was the beginning of a change in the international legal system. Terrorist groups like ISIS and Al Qaeda have posed unprecedented levels of threat to the maintenance of international peace and security¹. The United States after the tragedy of 9/11 had launched a full-fledged attack, which is persistent till date, against all terrorist organizations threatening international peace, and in furtherance of this have used force in the form of airstrikes and bombings against these terrorist organizations. These terrorist organizations are essentially *non-state actors* taking safe haven in different states. The international law has struggled to locate the use of force against non-state actors within the international law framework and owing to this very fact, they have posed great amount of challenges to the regulation of use of force².

The purpose of this paper is to trace the trajectory of the changes in international law to substantiate the argument that the attack of United States on different non-state actors has now been accepted as a legitimate right to self-defense. This acceptance is indeed a defining moment in the history of international customary law.

¹ United Nations Security Council, Resolution 2249 (S/RES/2249) (2015), at paragraph 5 of the Preamble

² The Use of Force Against Non-State Actors: Justifying and Delimiting the Exercise of the Right of Self-Defence — The Singapore Law Review The Singapore Law Review, <http://www.singaporelawreview.com/juris-illuminae-entries/2017/the-use-of-force-against-non-state-actors-justifying-and-delimiting-the-exercise-of-the-right-of-self-defence> (last visited Sep 15, 2020)

Locating the paradigm shift in law regarding use of force against non-state actors

It is not the case that disturbance of international peace and security is a new phenomenon. However, in recent past this threat has increased manifold. Article 2(4) of the UN Charter prohibits member states from using threat or use of force against other states, and this prohibition has been regarded to be *Jus cogens*. It is Chapter VII of the UN Charter which imbibes within it the exceptions against this use of force, amongst which Article 51 is the most pertinent. Earlier, a State's 'inherent right of self-defense' was only against aggressor states³; in fact, even the ICJ maintained after the 9/11 attacks that only against an aggressor state (thus excluding non-state actors from falling within this definition) can force be used⁴, but due to the surge of terrorism, this viewpoint is exponentially losing traction.⁵

In spite of the ICJ rejecting the Israeli claim to self-defense against a non-State actor in the Advisory opinion on the *Wall* case, it is interesting to note that in the case of *DRC v Uganda*, Judge *Simma* emphasized on the need for an expansive reading of Article 51 of the Charter, in "view of that large-scale attacks by non-State actors can qualify as 'armed attacks' under Article 51".⁶

After the 9/11 attack, President Bush of the United States said something very significant, which later developed to become what the scholars have called the 'Bush Doctrine'. The president had unabashedly proclaimed, "we will not make any distinction between the terrorists who commit the crimes and those who harbor them"⁷. The complete passive reaction by the International community, where no state criticized this hostile policy that the United States had announced was one the earlier signs which showed the tacit approval of use of force against non-state actors for self-defense⁸. This policy was a clear departure from the *Nicaragua* case⁹. Michael Scharf has argued in his paper¹⁰ that the terrorist events after the 9/11 attacks, especially the 2015 attacks against a Russian jetliner and a Paris Stadium have triggered a 'Grotian moment', wherein a

³ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (merits), 1986 I.C.J. 14

⁴ [2004] ICJ Rep. 136 [139].- Advisory opinion on Legal consequences of the construction of a wall in the occupied palestinian territory.

⁵ Monica Hakimi, "Defensive Force against Non-State Actors: The State of Play" 91 Intl L Studies 1, 4-30 (2015).

⁶ DRC V Uganda [2005] ICJ Rep. 168.

⁷ Davis Brown, "Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses", 11 CARDOZO J.INT'L & COMP.L. 1, 26 (2003).

⁸ Michael P. Scharf, "How the War Against ISIS Changed International Law" Case West. Reserve J. Int. Law 48(2016).

⁹ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (merits), 1986 I.C.J. 14

¹⁰ Michael P. Scharf, "How the War Against ISIS Changed International Law" Case West. Reserve J. Int. Law 48(2016).

fundamental paradigm shift happened in the history of international law with huge implications, as it led to the unanimous adoption of UN Security Council Resolution 2249, which in a way let States use all means necessary to fight the ISIS in Syria without offering a legal basis for military action¹¹. Ordinarily customary law takes many decades to crystalize, but in this case the custom to justify forceful action against non-state actors was done in a matter of 14 years and thus should be classified as a Grotian moment¹².

The Bush doctrine basically reflects a reasoning along the lines of the failed state or weak state argument, wherein the belief is that these states have the presence of the terrorist organizations due to the fact that they have failed at the management of their state, and thus, have jeopardized the safety of the international community along with their own citizens¹³. Thus, such states must give up their territorial sovereignty, as they themselves become a threat to the international peace and security.¹⁴

It has become an acceptable practice for a state to invoke right of self-defense against non-state actors.¹⁵ Immediately after 9/11 the UNSC had adopted Resolution 1373¹⁶ which said that there is a right to self-defense in the context of the September 11 attacks and it even stated that the States are prohibited “from allowing their territory from being used as a safe haven for terrorist groups¹⁷”. Through Resolution 1368¹⁸ the UNSC recognized terrorism to be a threat to international peace and security. Therefore, these two resolutions implicitly recognized that right of self-defense may be used against non-State actors as well.

In light of the above-mentioned evidences, it has in fact become increasingly clear that with a surge in terrorism, that states have become increasingly tolerant of the use of defensive force against non-state actors. Although, even after almost 20 years of the 9/11 attack, states are still weary of deeming these actions to be ‘lawful’ but tacitly it is an accepted practice that they are not unlawful¹⁹.

¹¹ Id.

¹² Id.

¹³ Monica Hakimi, “*Defensive Force against Non-State Actors: The State of Play*” 91 Intl L Studies1, 4-30(2015).

¹⁴ Id.

¹⁵ Id.

¹⁶ United Nations Security Council Resolution 1373 (2001).

¹⁷ Id.

¹⁸ United Nations Security Council Resolution 1368 (2001).

¹⁹ Monica Hakimi, “*Defensive Force against Non-State Actors: The State of Play*” 91 Intl L Studies1, 4-30(2015).

Legally analyzing the question of encroachment on the sovereignty of host nations

It cannot be denied that the use of force against non-state actors poses a threat to the territorial sovereignty of the host nations. Despite this, many scholars have repeatedly emphasized on the need to maintain the sanctity of territorial sovereignty as it remains as “one of the basic pillars of international law”. Therefore, there is a need to separately justify, the incidental infringement of sovereignty caused to the ‘host countries’ in the process of using force against terrorist organizations, even if Article 51 and the customary law development may justify the use of the right of self-defense against the non-state actors themselves.²⁰ Firstly, it must be noted that if the degree of relationship between the host country and the non-state actor is such that the involvement is enough for attribution of private conduct to the State itself, then there is no ambiguity of law as then self-defense can be exercised against the state itself under Article 51 of the UN Charter. But in cases where the involvement is not attributable, two questions become significant, firstly what kind of degree of involvement is necessary- which is basically a factual question of whether the state is ‘unwilling or unable’²¹ to deal with the non-state actor and secondly, how to rationalize “the fact of host State involvement into a ground for legal justification”²² Answer to the second question is extremely tricky.

Scholars like Ruys and Verhoeven have mentioned that Article 51 of the UN charter may authorize or give sanction to the use of force against non-State actors, but it overwhelmingly overlooks the relationship between the host state and the victim state²³. Therefore, Federica Paddeu has argued that this question can be best answered with the help of Article 21 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), which reads as “*The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defense taken in conformity with the Charter of the UN*”. Paddeu has answered how Article 21 is more useful in analyzing this legal relationship in three sets, firstly, she says that when force is used in lieu of self-defense, it does not constitute a breach of prohibition because it is done in furtherance

²⁰ Federica I. Paddeu, “*Use of Force against Non-State Actors and the Circumstance Precluding Wrongfulness of Self-Defence*” 30(1)Leiden J Intl L93 (2017).

²¹ ²¹ A. Deeks, “*“Unwilling or Unable”*: Toward a Normative Framework for Extraterritorial Self-Defense”, 52 Va J Int’l L 483 (2012).

²² Federica I. Paddeu, “*Use of Force against Non-State Actors and the Circumstance Precluding Wrongfulness of Self-Defence*” 30(1)Leiden J Intl L93 (2017).

²³ T. Ruys and S. Verhoeven, “*Attacks by Private Actors and the Right of Self-Defence*”, 10 J Conflict & Security Law 289at 310 (2005)

of self-defense. This is of course true when the action conforms to all the legal criteria is necessary for invoking self-defense such as necessity, immediacy and a due notification to the UNSC for the same under Article 51.²⁴ Secondly, she considers the category of ‘other obligations’ which the victim state has towards the host state, such as maintaining the sanctity of other rights such as territorial sovereignty, non-intervention, etc. which will also be justified so long as the forceful action is done in furtherance of rightful ‘self-defense’. Lastly, she says that the only type of infringement which is not justified while exercising self-defense under Article 21 is violation of human rights which she categorizes as ‘intransgressible’²⁵ and therefore, acts as a complete restriction upon the victim state.

Thus, testing the legality of an action of self-defense against non-state actors located in non-consenting state is better understood under the analytical model provided by Paddeau, upon the touchstone of Article 21 of ARSIWA. Although this approach is yet to be accepted by the states or even the ICJ. Furthermore, under Article 21 of the ARSIWA, there is also a possibility for the host state to request compensation from the victim state for the damage caused during the course of the defensive action.²⁶

Regardless of the merits of this approach, the ambit of the right of collective self-defense still remains unclear under this framework.²⁷ For the use of collective self-defense, as laid down under the case of *Nicaragua* both firstly, presence of preconditions for individual self-defense are and secondly the express consent of the host third states to use force in its territory must be present²⁸. For these reasons, the use of force in Iraq on approval of the Security Council by the US is more justified than the use of force of US in the state of Syria, as there was no element of consent present here²⁹.

²⁴ Michael P. Scharf, “*How the War Against ISIS Changed International Law*” Case West. Reserve J. Int. Law 48(2016).

²⁵ Federica I. Paddeu, “*Use of Force against Non-State Actors and the Circumstance Precluding Wrongfulness of Self-Defence*” 30(1) Leiden J Intl L93 (2017).

²⁶ Nicholas Tsagourias, “*Self-Defence against Non-State Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule*” 29Leiden J Intl L801(2016).

²⁷ The Use of Force Against Non-State Actors: Justifying and Delimiting the Exercise of the Right of Self-Defence — The Singapore Law Review The Singapore Law Review, <http://www.singaporelawreview.com/juris-illuminae-entries/2017/the-use-of-force-against-non-state-actors-justifying-and-delimiting-the-exercise-of-the-right-of-self-defence> (last visited Sep 15, 2020)

²⁸ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (merits),1986 I.C.J. 14

²⁹ Michael P. Scharf, “*How the War Against ISIS Changed International Law*” Case West. Reserve J. Int. Law 48(2016).

Conclusion

In conclusion, we have routinely seen in the past that the United States of America, in their quest to counter-terrorism have used force in countries like Afghanistan, Iraq and Syria where the non-state actors are located. The Bush Doctrine gives us an insight into the mindset of those in power in the U.S. as they have routinely made arguments that Syria has harbored terrorist organizations willfully in their territory, and thus have used arguments such as that of a ‘failed state’ or ‘unable and unwilling state’ to justify their actions against these countries in the past. The legality of the use of force by US on such non-state actors is a very tricky terrain, although due to the development in international law it can be said with certainty, more so due to provisions like Resolution 2249, that even though the right of self-defense of the US against such non-actor groups does exist, it must be done in accordance to the rules of self-defense under the international law, and both *jus Ad Bellum* and *jus in Bello* must be fulfilled. There has been evidence that the US has completely flouted the principles of necessity, distinction, proportionality and humanity under *jus ad bello*³⁰. The use of drone and lethal autonomous weaponry in these host states has led to various human rights violations, and it as has been argued in this paper, with the help of Article 21, such violations cannot be justified under the name of self-defense. A case by case basis of checking the legality of US airstrikes in different time periods is beyond the scope of this paper, but the excessive use of drone warfare definitely does point to the unfulfillment of various norms under International law. Moreover, it is difficult to argue that there has been a sustained ‘imminent threat’ by the terrorist groups to the United States, and therefore difficult to justify *all* of its airstrikes in these territorial countries. Thus, it can be said with certainty that there have been instances where the use of force by the US was necessary, but for a lot of instances, the customary and codified international law cannot be used to justify their actions. There have been a lot of instances where these drones have failed to distinguish between civilians and combatants, and have therefore killed innocent civilians in great numbers. Due to the fact that a right to self-defense against non-state actors inevitably leads to a threat to the territorial sovereignty of the country, it must be done with great caution, while upholding the sanctity of the host nations’ territory. A co-joined reading of both Article 51 of the UN Charter along with Article 21 of the ARSIWA will lead to a helpful framework to answer

³⁰ Id.

such difficult questions³¹, and all states must steer clear of abusing the paramount rule of prohibition of use of force, until and unless completely necessary to maintain international peace and security.

³¹ The Use of Force Against Non-State Actors: Justifying and Delimiting the Exercise of the Right of Self-Defence — The Singapore Law Review The Singapore Law Review, <http://www.singaporelawreview.com/juris-illuminae-entries/2017/the-use-of-force-against-non-state-actors-justifying-and-delimiting-the-exercise-of-the-right-of-self-defence> (last visited Sep 15, 2020)