THE USE OF FORCE AGAINST NON-STATE ACTORS: JUSTIFYING AND DELIMITING THE EXERCISE OF THE RIGHT OF SELF-DEFENCE

WEE YEN JEAN

I. INTRODUCTION

Traditionally conceived of as primarily governing inter-state relations, international legal frameworks have often struggled to accommodate non-state actors. This has posed significant challenges for the regulation of the use of force. In recent times, technological and military advancements have greatly increased the destructive potential of non-state actors,¹ and “terrorist cells are unfortunately omnipresent in today’s world”.² This necessitates a re-evaluation of the efficacy of a state-centric model in guiding the international community’s response, especially as the emergence of the Islamic State (“ISIS”) as a “global and unprecedented threat to international peace and security”³ has revived important debates about the scope and limits of the right of self-defence as a justification for the use of force by states in response to attacks by non-state actors.

Focusing on the right of individual self-defence (which is that exercised by the victim state against the aggressor), this article will first outline the status of non-state actors in this area of international law, particularly since the 9/11 terrorist attacks. Next, it will observe that the use of force by victim states in self-defence against non-state actors has been increasingly accepted, but that an additional and defensible legal basis must be found to justify the use of force within the territory

of a non-consenting host state (the state from which the non-state actors are operating) in violation of its territorial sovereignty. It is submitted that, as Tsagourias\textsuperscript{4} and Paddeu\textsuperscript{5} have suggested, conceiving of self-defence as a circumstance precluding wrongfulness currently provides the nearest solution to the problem. The article will conclude by briefly considering the implications of adopting such an approach, in particular on the scope and limits of the right of collective self-defence (that invoked by third states coming to the victim state’s aid), which as yet remain unclear.

II. SELF-DEFENCE AGAINST NON-STATE ACTORS

The use of force by states is prohibited by Article 2(4) of the United Nations Charter, and this prohibition is widely regarded to be \textit{jus cogens}. The main exception to this prohibition is the “inherent right of individual or collective self-defence” against an “armed attack” recognised by Article 51 of the Charter, the scope of which is (unsurprisingly) highly contentious. While the formal legal position is that the right of self-defence can only be invoked against an aggressor \textit{state}, “[t]he claim that international law absolutely prohibits defensive force against non-[s]tate actors is losing legal traction” and is “increasingly difficult to sustain”.\textsuperscript{6} The right of self-defence against non-state actors has been increasingly invoked and accepted in state practice,\textsuperscript{7} even if its lawfulness has not yet been clearly established. This section will trace that development.

The International Court of Justice (“ICJ”) has maintained in its jurisprudence that an element of state involvement is required in order for a group to be considered to have launched an “armed attack”, thereby ruling out the invocation of self-defence against truly “non-state” actors. In the \textit{Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)}\textsuperscript{8} [Nicaragua], the ICJ relied on Article 3(g) of the 1974 Resolution on

\textsuperscript{7} Supra note 5.
the Definition of Aggression,\textsuperscript{9} and held that the definition of “armed attack” could extend to cover attacks by “armed bands, groups, irregulars, or mercenaries”, but these actors must have been sent “by or on behalf of a State”.\textsuperscript{10} Even after 9/11, the ICJ maintained that self-defence could only be invoked in response to an armed attack “by one State against another State” in its Advisory Opinion on the \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory}\textsuperscript{11} \textit{[Wall]}.

However, this orthodox view has come under increasing strain in light of state practice since 2001, when the United Nations Security Council Resolutions 1368\textsuperscript{12} and 1373\textsuperscript{13} implicitly recognised the United States’ right of self-defence in response to the 9/11 attacks by Al-Qaeda, and the majority of states (including China and Russia) supported \textit{Operation Enduring Freedom} against Afghanistan as a legitimate exercise of the right of self-defence. There is also a principled basis for this shift: although the \textit{legal} significance of these Resolutions is not entirely clear, Judges Buergenthal and Kooijmans in \textit{Wall} (albeit in a Declaration and Separate Opinion respectively) point out that neither Resolution expressly or implicitly limits the application of the right of self-defence only to attacks carried out by \textit{state actors}. In fact, the contrary seems to have been the case,\textsuperscript{14} and indeed the Security Council authorised action under Chapter VII of the Charter without ascribing these terrorist acts to a particular state in Resolution 1373.\textsuperscript{15} Similarly, in his Separate Opinion in the \textit{Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)}\textsuperscript{16} \textit{[DRC v. Uganda]}, Judge Simma called for an urgent reconsideration of the restrictive reading of Article 51 of the Charter in \textit{Wall}, stating that these Resolutions “cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as ‘armed attacks’ within the meaning of Article 51”.\textsuperscript{17}

\textsuperscript{10} \textit{Supra} note 8 at [195].
\textsuperscript{11} \textit{[2004]} ICJ Rep. 136, at [139].
\textsuperscript{14} \textit{Supra} note 11, Declaration of Judge Buergenthal, at [6]; see also Thomas Franck, “Terrorism and the Right of Self-Defense” (2001) 95 \textit{AJIL} 839-840.
\textsuperscript{15} \textit{Supra} note 11, Separate Opinion of Judge Kooijmans, at [35].
\textsuperscript{16} \textit{[2005]} ICJ Rep. 168.
\textsuperscript{17} \textit{Ibid}, Separate Opinion of Judge Simma, at [11].
Furthermore, it could be argued that what was fatal to Israel’s claim to self-defence in Wall was that self-defence cannot be invoked by a state to justify the use of force against an attack "originat[ing] within, and not outside",\(^{18}\) its own territory (in that case, the Occupied Palestinian Territory). In contrast, Resolutions 1368 and 1373 contemplate acts of international terrorism that pose a global threat to international peace and security, not just within the territory of one state. A similar observation can be made regarding Resolution 2249, which was adopted unanimously in 2015 in response to the terrorist attacks in France.

Thus, as Hakimi observes, most states do in practice tolerate the use of defensive force against non-state actors; and although they are unwilling to legitimise or validate them as lawful, such operations are in practice unlikely to be condemned or treated as unlawful.\(^{19}\) It is submitted that, in place of the current legal grey area, a more robust and defensible legal basis must be found for the exercise of the right of self-defence in these circumstances, to lend it greater legitimacy. Any such basis must be able to justify the victim state’s violation of the territorial sovereignty of the host state in (and from) which these non-state actors are operating; and the absence of such a justification accounts for a significant part of states’ difficulty with recognising a right of self-defence against non-state actors in the first place.\(^{20}\) It is this issue that the next section will turn to address.

III. SELF-DEFENCE AND TERRITORIAL SOVEREIGNTY

Territorial sovereignty has long been established as a fundamental principle of the international legal order. Ruys and Verhoeven, for example, stress that state sovereignty “is and remains one of the basic pillars of international law and order and should not lightly be violated”.\(^{21}\) The use of force in self-defence against a non-state actor, within the territory of a non-consenting host state, thus prima facie constitutes an internationally unlawful violation of the host state’s territorial

\(^{18}\) Supra note 11 at [139].
\(^{19}\) Supra note 6 at 30.
\(^{20}\) Supra note 5 at 3.
\(^{21}\) Supra note 2 at 310.
sovereignty. Such a use of force then needs to be separately justified; although Article 51 may authorise the use of force against the non-state actors themselves, it does not extend to the ancillary infringement of sovereignty. (For the purposes of this article, it is assumed that the non-state actors’ acts are not, in the first place, attributable to the host state itself.)

It is submitted that the suggestion (made, for example, by Tsagourias and Paddeu) that self-defence should be conceived of as a circumstance precluding wrongfulness currently provides the neatest solution. Under this approach and, to the extent that it entails a violation of the host state’s territorial sovereignty, the exercise of self-defence would be governed and justified by Article 21 of the Articles on Responsibility of States for Internationally Wrongful Acts (“ARSIWA”) rather than by Article 51 of the Charter. This distinction would lend the issue greater analytical clarity. As Paddeu argues, “Article 51 and Article 21 codify different effects of the exercise of the customary right of self-defence in the legal order”. Article 51 provides the legal basis to justify the effect of self-defence on the prohibition on the use of force, whereas Article 21 would serve to preclude the “wrongfulness of an act of a State … if [it] constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations”—the wrongful act in this case being the violation of the host state’s territorial sovereignty. Article 51 would therefore govern legal relations between the victim state and the non-state actor, while Article 21 would govern legal relations between the victim state and the host state.

Although this approach has yet to be accepted by states (or the ICJ), it would provide an analytically sound and normatively defensible framework to explain why the victim state’s right of self-defence extends to allowing it to use force in a way that would otherwise constitute an unlawful violation of the host state’s territorial sovereignty. Furthermore, since Article 21 of the ARSIWA operates only to excuse the victim state’s international responsibility for its otherwise wrongful act, this leaves open the possibility of the host state requesting compensation from the victim state for

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22 Supra note 5 at 5-6.
23 Supra notes 4 and 5.
26 Supra note 5 at 27.
damage caused in the course of its use of defensive force.\textsuperscript{27} As Tsagourias points out, this yields a “fair and proper” outcome that avoids disadvantaging the interests of the host state unnecessarily.\textsuperscript{28}

IV. UNRESOLVED QUESTIONS

Notwithstanding the benefits of this approach, it raises further questions about the scope and limits of the right of collective self-defence, such as that sought to be invoked by third states like the United States and United Kingdom against ISIS on behalf of Iraq. As the ICJ made clear in Nicaragua,\textsuperscript{29} collective self-defence requires both (a) that the preconditions for individual self-defence are present, and additionally (b) that the victim state expressly requests third states to use force in its territory. Hence, while the exercise of the right of collective self-defence within the territory of Iraq (which requested via a letter to the Security Council in 2014, that the US “lead international efforts to strike [ISIS] sites and military strongholds, with [its] express consent”\textsuperscript{30}) is relatively uncontroversial, the use of force against ISIS within the territory of Syria (which has vehemently objected to unrequested military intervention in its territory as a violation of international law, the Charter, and its sovereignty and territorial integrity\textsuperscript{31}) is hotly disputed. As Bannelier-Christakis argues, this makes it impossible to use “intervention by invitation” as a legal basis for third states’ use of force in Syria,\textsuperscript{32} since the consent of Syria’s government has been neither sought nor obtained. Other purported justifications for intervention in these

\textsuperscript{27} Supra note 4 at 824.
\textsuperscript{28} Ibid.
\textsuperscript{29} Supra note 8 at [199].
circumstances, such as the “unwilling or unable” doctrine propounded by the United States, also remain extremely contentious: indeed, Corten argues that such a doctrine is unlikely to ever be accepted by states, as it would lead to “a radical change in the interpretation of both the rule prohibiting the use of force and self-defence as its main exception”, and “would eventually mean the end of the collective security system enshrined in the Charter”.

However, if Article 21 is invoked to excuse a violation by Iraq of Syria’s territorial sovereignty in the exercise of its right of individual self-defence, and if Iraq itself expressly requests third-state intervention, then this may be taken to permit the use of force by third states against ISIS on Syria’s territory in their exercise of the right of collective self-defence. Article 21 would preclude wrongfulness as long as the act constitutes a lawful measure of self-defence taken in conformity with the Charter, and Article 51 of the Charter does include such a right of collective self-defence. This does not seem to have yet been much discussed in academic commentary on the subject. While any use of force in self-defence is limited by the requirements of necessity and proportionality, such a potential expansion calls for caution, especially since—as Gray argues—the effectiveness of using force against non-state actors is itself limited, and may indeed be counterproductive.

V. CONCLUSION

Although the right of self-defence against non-state actors has been increasingly accepted in the practice of states, a firm legal footing for the exercise of this right—especially when this would involve an infringement of the host state’s territorial sovereignty, as would likely be the case—has

34 Olivier Corten, “The ‘Unwilling or Unable’ Test: Has it Been, and Could it Be, Accepted?” (2016) 29 Leiden J Intl L 777 at 797.
36 Emphasised by the ICJ in e.g. Nicaragua (supra note 8) and DRC v. Uganda (supra note 17).
yet to be established. On one hand, established doctrines of international law have come under great strain, and compelling arguments have been made in support of the need for international law to adapt to allow effective action to be taken against evolving threats to global security. On the other hand, the prohibition on the use of force is a cornerstone of the international legal order, and any widening of the right of self-defence should be treated with circumspection.

Going forward, it is submitted that a two-pronged justification, involving both (a) a reading of Article 51 of the Charter that takes into account the shift in state practice and the international community’s changing security needs; and (b) Article 21 of the ARSIWA, would provide a helpful framework for analysis, albeit that this may in turn have uncertain implications. Ultimately, attention must to be paid to the practice and changing attitudes of states to the use of force in response to new and unprecedented threats and, drawing lessons from past interventions, states claiming a right to intervene on any ground must steer clear of any (real or perceived) abuse of the exceptions to the prohibition of the use of force, if they are to be seen as acting legitimately in furtherance of international peace and security.