THE STATE'S RIGHT TO DEFEND ITS TERRITORIAL INTEGRITY AGAINST INCURSIONS BY NON-STATE ACTORS

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ABSTRACT

History is replete with unprecedented waves of incursions by non-state actors into sovereign state and in the spirit of self-preservation and self-defence these aggrieved states have mounted peremptory campaigns into other neighbouring and distant states to rid the errant non-state actors of the capacity to carry out future attacks against them and to restore the reality of national security within their territorial boundaries.

This article seeks to analyse the extent of a states right to defend itself against non-state actor and in the course of this analysis issues like the threshold to justify the sovereign state offensive action and the necessity for self-defence will emerge. These issues will be analysed in line with the principles of international customary law, conventional law, opinion juris and recent state practices.

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INTRODUCTION

As prescribed by Article 2(4) and 51 of the UN charter a states' right to self-defence is inherent and unassailable and can be triggered in response to an armed attack. However, these provisions when interpreted in the narrow sense are not clear on whether the right of self-defence can be triggered when non-state actor operating from the territory of a sovereign mount an armed attack within the territory of another state

The 'attribution test' and the 'unable and unwilling test' are two major interpretations that have been employed in relation to a sovereign state right to self-defence against non-state actors. The application of these two interpretations has resulted in different controversies, the former (attribution test) relates to the failure to envisage a scenario where non-state actors are operating in connivance with a sovereign power or where the non-state actor is operating from a state with an ineffective state mechanism. On the other hand, the latter (unable and unwilling test) pitfalls lie in the difficulty of assessing whether or not a state could be deemed 'unable and unwilling' to deal with the threat posed by non-state actors, the difficulty of determining the very nature of the test, and the difficulty in adducing justifications for incursion into the territorial integrity of another state.

The attribution test was initially the traditional criterion for determining when an aggrieved state could resort to self-defence against non-state actors but the aftermath of the September 11, 2001 attacks on the World Trade Centre and the Pentagon resulted in a Grotian moment of law that led to an evolution of the formula for state involvement within non-state actors.

THE ATTRIBUTION TEST

Traditionally, the attribution test was the touchstone to determine when an attack by a non-state actor on a state would trigger the right to self-defence. However, state practices have led to the evolution of new tests to justify self-defence against non-state actors.

In considering the attribution test recourse will be taken to Article 2(4) and Article 51 of the UN charter which in an inter-state sense constricts the right to use force against non-state actors unless those attacks are attributable to a state. Therefore, attribution becomes an integral element to trigger the right of self-defence.

The attribution test is complete when the non-state actor is linked to a state. However, the interpretation of this right has often been construed as an exception prohibiting the use of force. Similarly, the Nicaraguan case reflects this when the ICJ established that an act of aggression by a non-state actor could only amount to an armed attack if the non-state actor was sent on or on behalf of a state. The ICJ decision on the construction of wall in the occupied Palestinian territory also informs this principle where it was opined that for an armed attack to trigger self-defence it is of necessity that the armed attack is 'imputable to a foreign state'.

Despite all these the application of the attribution test will result in challenges within a set of circumstance. Firstly, where a foreign state subtly pulls the strings of a non-state actor it becomes difficult for the attacks to meet the criterion of state responsibility. Secondly, another dilemma ensues when the non-state actor is operating from a state where the state machinery for control is dysfunctional and the armed attack cannot be attributable to the state.

However, it is noteworthy to establish that there have been attempts to extend and expand the application of this principle the case of Prosecutor v. Dusko Tadic is a vivid example of this expansion where the ICTY established the 'overall control test' to determine state responsibility. The 'overall control test' will only suffice when a state has an overall control of the military activities of the non-state actor. The requisite standard is not met where the state is only involved in equipping and financing the non-state actor. Another example of an expansion of this principle is also ingrained in the Bosnian genocide case where the court held that the 'overall control test' would not apply due to the peculiar nature of the case. There state complicity was the measure in determining state responsibility in this case.

THE UNWILLING AND UNABLE STANDARD

Ashley Deeks articulations is instructive when considering the application of the 'unwilling and unable standard'. The requisite standard to trigger self-defence is established when a foreign state is unwilling or unable to curtail the threat posed by non-state actors. The implication of the abovementioned situation is that the aggrieved states right to self-defence is triggered irrespective of the neutrality of the state where the non-state actors have operated. He goes further to espouse that the consent of the host nation is required, nation of the threat posed by these non-state actors,

a request to suppress the threat within a reasonable time, assessment of the territorial state capacity to suppress the threat and the interaction between the host nation and the victim state.

Dinstein also reinforced the unwilling and unable test when he stated that a state is entitled to enforce international law extra-territorially if another state is unable or unwilling to prevent an armed attack. He also emaciated some requirements for the test to suffice where he states that the use of force should be reactive and not anticipatory, there should be a tendency for future attacks, verification by the aggrieved state that the host state is unable and unwilling to suppress the threat posed the non-state actor, consent of the host state, the use of force should only be resorted to in restoring the reality of national security when other measures have been unsuccessful.

A wide range of countries have validated or clarified this standard both implicitly and explicitly. Countries like the United States of America has in the wake of the growing threat of ISIL endorsed the principle in the US Article 51 letter, September 23, 2014 that 'where a state has lost or abandoned effective control over the portion of territory from which the non-state actor is operating' the test of 'inability' is satisfied.

Similarly, Harold Koh's opinio juris post also reflected this principle in its position that where the government of the state where the threat is located is unable or unwilling the right to self-defence in article 51 will be triggered.

A former United Kingdom Prime Minister David Cameron in his statement before the parliament also endorsed the principle when he stated that the 'Assad regime is unwilling and unable to take action necessary to prevent ISIL's continuing attack' which has triggered the right to self-defence and collective self-defence.

The Dutch government also endorsed this principle in the letter from the Dutch foreign Minister to the parliament conveying advice of an external international law advisor regarding the use of force against Isis in Syria where it succinctly stated that the mandate to act against a non-state actor will suffice when the following test has been satisfied: 'there is an armed by that group, the territory of that third state is used to carry out this attack and the third state is unable or unwilling to put an end to the activities of non-state entities in its territory.

The application of this principle by the Czech ministry of defence is quite instructive where it adduced that if a territorial would be unwilling the consequences may differ as acts of such states could be interpreted as a certain degree of support to the non-state actor. It is acknowledged that state sovereignty should not serve as a protection of such state if such a state is unable or unwilling to exercise its sovereignty within its territory.

Australia's Article 51 letter also endorsed this principle where it held that Article 51 of the UN charter 'recognizes the inherent right of a state to act in individual or collective self-defence when an armed attack occurs against a member of the United Nation'. The state can act in self-defence when the government of the state where the threat is located is unable or unwilling to prevent the attacks.

Although Syria, Russia and its allies have viewed the collective self-defensive mounted by the coalition as a violation of Syria's sovereignty regardless of this there is still a wide acceptance of the coalition actions.

THE NEED FOR THE IMPOSITION OF THE UNWILLING AND UNABLE TEST

Firstly, the need for imposing the unwilling and unable test would suffice when there is a void created in the state administration and the state no longer has the machinery for control. For instance, in a scenario whereby the act of aggression carried out by a non-state actor doesn't qualify as an armed attack the unwilling and unable test will not suffice.

Secondly, another instance would be where the state machinery does not have the power to suppress the non-state actor the incursion of Israel into Lebanon to neutralize Hezbollah is illustrative in respect of this the Lebanese government could do little or nothing to thwart the activities of Hezbollah.

Thirdly, another instance would suffice when the territorial country loses part of its territory due to a wide range of factors and the non-state actors are operating from within those lost territories to instigate targeted attacks. This was the case with the ISIL in Syria where cities within the territory of Syria fell into the hand of ISIL.

However, it is noteworthy to establish that where the attack has not started and is not imminent consent is a precursor from the host government before the right of self-defence can be triggered

but in the light of an imminent attack by a non-state actor necessity would take pre-eminence to forestall the occurrence of such attack and it would be irrelevant whether consent has been given or not by the territorial state.

STATE PRACTICES IN RELATION TO THE RIGHT OF A STATE TO SELF-DEFENSE

The wake of the 9/11 terror attack on the Pentagon and World Trade Centre has resulted in a Grotian moment where the right to self-defence has evolved from the traditional interpretation and is now applicable against errant non-state actors operating from foreign states. The resultant effect of this is the evolution of states practices to justify the incursion of the victim state into the territory of foreign state where the errant non-state actor is situated. Similarly, the first principle of the Bethlehem principles also follows this evolution of states practices where it asserted that states have an immediate responsibility to thwart imminent and actual attacks by non-state actors.

Undoubtedly Kenyan's incursion into southern Somalia in a bid to secure the release of hostages detained by Al Shabab gained acceptability and was justified as self-defence due to the consent obtained from the transitional government of Somalia before the incursion.

The Institut de Droit International also established that in the course of an attack by a non-state actor where the territorial state does not cooperate the right of individual and collective self-defence could be triggered and the aim will be the neutralization of the non-state entity.

Additionally, the first principle of the 2017 Leiden Policy recommendations reflected that a state's right to collective and individual self-defence can be triggered against non-state actors irrespective of the fact that they are not acting on the behest of any state.

CONCLUSION

With regards to the right of a state to invoke self-defence against non-state actors it is evident that the ship has already sailed when we examine the evolution of state practices vis-à-vis the new trend of expansive interpretation of a state right to self-defence. Undoubtedly a state can invoke its right to self-defence where a non-state actor mounts an armed attack that erodes the reality of national security within its territorial borders. Additionally, consent of the host state is integral where an attack by a non-state actor is not imminent but, in a scenario, whereby an attack is imminent a state can exercise its right to self-defence without obtaining the consent of the host state.