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The legitimate political interference and use of force in foreign countries

Notwithstanding attempts of the International Court of Justice (ICJ) jurisprudence and scholars of figuring out main questions related to the right to self-defence against Non-State entities, important topics still remain controversial.

Discussions mainly concern the interstate or non-interstate reading of article 51 of the United Nations (UN) Charter.

ICJ Jurisprudence strictly interprets article 51 UN Charter as requiring that an armed attack be attributable to the hosting state. In particular, a state could be responsible for the attack perpetrated by a terrorist group based in its territories, in the case that it tolerates its presence.[1]

Accordingly, two requirements have to be satisfied so as to use force against Non-State Actors. The seriousness of an armed attack and the attribution to state.

Part of the doctrine agrees with the ICJ interpretation and closely examines the standard of attribution.[2]

Other Scholars criticize this interpretation, pointing out that, pursuant to Article 51 UN Charter, it is not strictly necessary to attribute an armed attack to a state, so as to invoke the right of self-defence.[3]

It has been observed how the ICJ thesis can find some limits in the case that the hosting state does not have technical and logistic means for defeating such terrorist group.[4]

Discussions also concern relations between the UN Charter and Customary International Law. In particular, in regards to the interpretation of the UN Charter.[5]

ICJ Jurisprudence and some scholars argue that prohibition of the use of force and self-defence principles are part of Jus Cogens.[6] In particular, discussions arise about the possibility of overriding the UN Charter disposition, on the basis of article 53 VCLT, so as to justify anticipatory self-defence doctrine or the use of force against Non-States Actors.[7]

Some authors also point out in which circumstances terrorism could rise to a crime against humanity and the advantages of prosecuting it as an International Crime.[8]

Against the background of this knowledge, this brief article aims to address how to enclose the right of self-defence against a non-state actor within an interstate reading of article 51 UN Charter.

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[1] See *"Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs United States)",* ICJ Reports 1986 P. 14; "*Armed Activities on the Territories of Congo (DRC-Uganda Case)*", ICJ Reports 2005 p. 201 ICJ Report.

[2] See Prof.C. J. Tams, "*the use of force against terrorism*", The European Journal of International Law IJIL, 2009,

[3] See Eli E. Herzt, "*Article 51 The Right to Self Defence*", 2010, Mith and Fact.

[4] Ibid.

[5] See EmmanuaelaMylonaki, "*Re-Assessing the Use of Force against Terrorism under International Law*" ; R Baxter "*Multilateral Treaties as Evidence of Customary International Law*", 1965, HeinOnline, 41 BYBIL 275(1965-1966); "*North See Continental Shelf (Federal Republic of Germany/Netherlands)*", 1969, ICJ Report.

[6] *"Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs United States)",* ICJ Reports 1986 P. 14; Palestinian Wall Case, Separate opinion, Judge Elaraby, quoted by C. J. Tams "*The Use of Force against Terrorism*", The European Journal of International Law EJIL, 2009 ; *Case Concerning Oil Platform (Islamic Republic of Iran vs. United States of America)*", 2003 ICJ Reports 161, Separate opinion, Judge Simma; M Shaw, "*International Law*", Cambridge, Cambridge University Press, 2008.

[7] See Emmanuaela Mylonaki, "*Re-Assessing the Use of Force against Terrorism under International Law*" ; J. De Arechega, General Course in Public International Law, 1978, recuil de course, quoted by Emmanuaela Mylonaki,*Re-Assessing the Use of Force against Terrorism under International Law*".

[8] Roberta Arnold, "*The Prosecution of Terrorism as a Crime against Humanity*"zaöRV 64, (2004), 979-1000.

Furthermore, the article will focus on possible arguments which could be advanced in favour of a non-state reading of article 51 UN Charter.

As argued above, the interstate reading of article 51 UN Charter is based on the attribution requirement. This requirement could be considered as a manifestation of the principle of due diligence.[9]

However, the standard of attribution presents lacks. In some circumstances, it is not possible to find a direct link between terrorist organizations and states in which the organizations have their bases.[10] More precisely, in some cases, states are the victim of a terrorist group. In this situation, no reference could be made to the attribution requirement (effective control or complicity). This is due to the state taking all of the necessary measures to prevent such harmful acts by keeping them private.

Accordingly, the existence of the state sovereignty itself is threatened and the civilian population of this state are also affected. How do you justify the violation of a state sovereignty by using force where the so called hosting state does not violate any standard of due diligence? In this situation, the attribution based-definition cannot be used, notwithstanding all temptations of adapting it to the various situation.[11]

The problem and risk of the standard of attribution is to consider states unlawfully guilty of having tolerated the presence of the terrorist organization within its territories.

An inter-state reading of article 51 UN Charter could be applicable by moving from the standard of attribution to the principle of subsidiarity.

Article 31 of the Vienna Convention on the Law of Treaties (VCLT) states that the treaty has to be read in light of the purpose of the entire Convention. This norm could be valorised in order to find an answer to the topic concerning the right to self-defence against non-state actors.

The main purpose of the UN Charter is to foster peace and security and avoid the uprising of any armed conflict. Article 51of the UN Charter could be viewed as a safeguards measure in case it is necessary as an intervention in order to re-establish peace and security. In an organization such as the United Nations Organisation (UNO), all countries should cooperate in order to maintain peace and security in the world.

Accordingly, it could be applicable the principle of subsidiarity, in which the UNO or the state victim of the armed attack could intervene against the terrorist group. This could be relevant in the case of hosting states being unable to defeat the organization based therein.

When there is not a strict link between the state and the terrorist organization based in that state, as required by the ICJ to legitimize the use of force, it is possible to make reference to the principle of subsidiarity.

An interesting topic would be to analyse the principle of subsidiarity in customary international law and treaty law. Furthermore, investigating how this principle could be used for justifying the violation of a state sovereignty with the use of force in some particular circumstances.

For instance, subsidiarity is one of the core principles of the European Union (EU) legal system. The EU does intervene in those circumstances, where member states are not able to act more effectively than the EU.

Secondly, this article poses some questions about the non-state reading of article 51 UN Charter and the circumstances that it can be applied against non-state entities. How should the UN Charter be interpreted in the modern age? Has the UN Charter drafter omitted any intentional references to

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[9] Due diligence represents in this field of International Law obligations for states to prevent the commission of harmful acts by private entities against foreign states. See also for a comprehensive analysis of due diligence in international Law: ILA Study group of due diligence in international law, First report, 2014, at http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1045.

[10] See also Herz, *supra*, footnote 3.

[11] See Tams, *supra* footnote 2.

state in article 51 UN Charter? If terrorism aims at overthrowing the sovereignty of the states by spreading terror, should an international organization which has the unique role of promoting peace and avoiding war, allow terrorist groups to grow and spread terror among the civilian population? Is there a standard of due diligence which requires states to react to this kind of attack? Is there a potential conflict between International/Regional Human Rights Conventions and the UN Charter? Is it possible to strike a balance between international and regional human rights conventions and the prohibition of the use of force against non-state actors which threaten civilian life? Under Human rights Conventions, states must avoid any violation of fundamental rights. The protection of human rights does require in some extreme circumstances a balanced use of force.

At which circumstances could the terrorist organization be considered as a *de facto* state whose main purpose is to spread terror? A possible answer could be to evaluate the potential of the terrorist organization and the potential threat of such an organization to the international community.

Could the principle of subsidiarity, in some strict circumstances, justify the use of force against states, which are controlled and governed by politicians who do not respect the fundamental rights of the population?

This is another important issue, which the international community must address in the future. The United Nation organisation and the regional/international conventions have the purpose of spreading peace and security and protecting fundamental rights. How could this scope be pursued, when the government of a state, systematically, violates fundamental rights and does not allow the population to live in peace and security, by exercising their civil and political rights.

There are serious risks that all the rights, mentioned/recalled in the UN Charter and in the Conventions on human rights, remain just ideals and do not become realty. If states are part of an organisation or agree to conventions, which aim at defending/fostering peace, security and protecting fundamental human rights, those contracting parties need to recognize and allow the exercise of fundamental rights.

Continuous and systematic violations of fundamental rights by governments is due to either an incapacity of politicians, for whatsoever reasons, to provide the necessary/sufficient stability to the countries, by passing the requested reforms, or a deliberate attack to the population. Mostly in the first case, an interference by foreign countries or by the international community, in the political decisions and interests of states must be duly valuated and weighed. It could be exercised in those serious cases, where governments do not respond to the exigencies of the population violating some of their rights. However, an eventual intervention by the international community must be as soft as possible. Furthermore, It must respect the population and their customs. In fact, an intervention roughly/harshly conducted, without respecting local traditions and citizens, runs the danger of creating an effect, contrary to that expected. In the past, there were many interventions, not duly conducted which created serious problems to the stability and economic development of countries. For instance, the raising up of contrasts among the population themselves. One of the reasons is that the local population will always see the intervention of foreigners as an invasion of their territories.

An economic and social reform could be well considered by foreign countries but not by the local people, considering their own situation, mentality and tradition. In fact, the proposed/imposed reforms, in this moment, could not satisfy the primary exigencies of citizens. Maybe, It will be in the future.

The success of reforms, mostly, depends on the culture and customs of the population as well as on their capacity of understanding the significance and future benefits of such measures. At the beginning the more the reforms give benefits to all the population, the bigger the success will be. But, It is not easy to find a reform which may satisfy all of the citizens. This is one of the most important issues which politicians must face and take into consideration, mostly in those states, crossing very difficult situations, due to economic and social deficiencies.

There is a strict linkage between culture, tradition, customs and the success of reforms.

In this scenario, the principle of subsidiarity, would allow a foreign intervention in those contracting states, where the population is not able to exercise their fundamental rights. In fact, serious potential deficiencies, creating sufferance would be overcome with external aiding, so as to allow the states to comply with the duty assumed, by joining conventions, namely the protection of fundamental rights.

BIBLIOGRAPHY

Emmanouela Mylonaki-Khalid Khedri, “*Re-assesssing the Use of Force against Terrorism under Internationl Law*”, HeinOnline JURA 2013/1.

Kimberlein N. Trapp, “*The Use of Force against Terrorists: a Reply to Chistian J. Tams*”, The European Journal of International Law Vol. 20 n. 4, EJIL 2010.

Christian J. Tams, “*The Use of Force against Terrorism*”, The European Journal of International Law, Vol. 20 n. 2, EJIL 2009.

Roberta Arnold, “*The Prosecution of Terrorism as a Crime Against Humanity*”, ZAöRV 64 (2004).

M Shaw, “*International Law*”, Cambridge University Press, Cambridge, 2008.

“*Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs United States)”,* ICJ Reports 1986 p. 14.

“*Armed Activities on the Territories of Congo (DRC-Uganda Case*)”, ICJ Reports 2005 p. 201.

“*Case Concerning Oil Platform (Islamic Republic of Iran vs. United States of America)*”, 2003 ICJ Reports 161