The Current Legal Framework of the Use of Force against Terrorist Organizations

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Abstract: Events that took place on 9/11, when symbols of American nation were destroyed by hijacked civilian airplanes, raised the issue of the effectiveness of the currently existing legal framework which regulates terrorist activities. Prior to that event, dealing with terrorist activities was mostly regulated by conventions, many of which were ratified by no more than couple of states. However, it became questionable whether these instruments are sufficient to fight terrorists who are not only immune to a threat of sanctions, but are even ready to sacrifice their lives. After the attacks took place, the United States launched against Afghanistan an armed action, ending up in a more than a decade long occupation, holding Taliban regime responsible for the attacks undertaken by Al-Qaida. The United States response to the 9/11 raised an important question: what is the legal response to terrorist attacks? This article explores the current legal framework of the use of force in response to terrorist attacks, especially with regard to distinguishing terrorist acts which are attributable to a certain state, from those which are undertaken by a terrorist group, not associated with any particular state.

Keywords: international law; war on terror; self-defense

1. Introduction

Invisibility and unpredictability of terrorist acts make terrorism one of the greatest fears of practically every state, especially those which have a history of combating terrorism on their soil. Terrorism, as a means of acquiring mostly religious, political and ideological goals, is no novelty in the modern age. But in spite of the fact that terrorism represents a serious and a long-existing problem in international community, it seems that international law rules do not address it in a satisfactory manner. Attempts have been made, but the lack of consensus among states has resulted in many issues on terrorism remaining open.

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To begin with, there is no agreed definition on terrorism. Although it would appear that attempts to define terrorism are useless because real-life situations usually leave no doubt on whether a certain act is a terrorist one or not, the UN General Assembly found it useful to determine the parameters that would qualify an act as an act of terrorism, so to make the fight against terrorism more efficient.[1] The task of defining terrorism was given to the Six Committee of the General Assembly, which, however, failed to draft such a definition. Subsequently, an *ad hoc* committee under the umbrella of the General Assembly was established. It was successful in drafting the International Convention for the Suppression of the Financing of Terrorism, which defined terrorism as any act which constitutes an offence within the scope of and as defined in one of the existing treaties dealing with issues of terrorism,[2] or any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.[3] Although such a determination of terrorism does not actually represent a definition, this has so far been the greatest achievement in defining terrorism. It has been asserted that a number of states felt discomfort in attempts to define terrorism. Setting fixed parameters according to which an act of terrorism could be detected would lead to applying equal standards for all, meaning that certain acts of states, which are undertaken on allegedly legitimate grounds, could be considered as acts of terrorism. (Saura, 2003-2004, p. 13)

Another disputable question was the one concerning legal response of states to terrorist acts. Many international conventions were adopted in the II half of the 20th century with the aim of combating terrorism. However, their adoption appeared to

[1] GA Res. 42/159.

[2] Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973; International Convention against the Taking of Hostages, 1979; Convention on the Physical Protection of Nuclear Material, 1980; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1988; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, 1988; International Convention for the Suppression of Terrorist Bombings, 1997.

[3] International Convention for the Suppression of the Financing of Terrorism. Retrieved from: http://www.un.org/law/cod/finterr.htm.

be insufficient for the efficient fight against terrorists, having in mind difficulties with locating terrorist infrastructure, inability to predict terrorist attacks and radicalism of terrorists, due to which they are not only immune to the threat of sanctions, but are even ready to risk their own lives to promote their ideas.

Even though terrorist attacks took place relatively often in different parts of the world, it was the horrible 9/11 attack that revived the debate about the legal mechanisms of fight against international terrorism. Being conducted by a non-state actor, but attributed by the United States to the state of Afghanistan on the grounds of harboring terrorists, the 9/11 attack caused an armed intervention undertaken by the United States against Afghanistan. Although the action was to an extent tolerated by the international community, it was of dubious legality. The action, which was allegedly undertaken on the grounds of self-defense, ended up in a more than a decade long occupation of the Afghan territory, bringing into question practically all three requirements of the legitimate self-defense: immediacy, necessity and proportionality.

It was mostly the United States intervention in Afghanistan, but also other instances of the use of force, such as those undertaken by Israel against neighboring states allegedly harboring terrorists, that gave rise to the question of how to deal with the attacks emanating from terrorist groups. Special attention has been given to differentiating situations in which terrorists act on their own, from the situations of the state-sponsored terrorism. In this regard, international law rules governing attribution of acts to states have to be examined.

2. Can Terrorist Attack be subsumed under the Meaning of an "Armed Attack" from Article 51 of the UN Charter?

The United Nations Charter in its Article 2(4) prohibits the threat or use of force which is directed against territorial integrity or political independence of any state or which is in any other manner inconsistent with the purposes and principles of the United Nations, providing for only one exception to the prohibition of the unilateral use of force – the right of self-defense, in Article 51 of the Charter.[1] The

[1] Article 51 provides: *„Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security*

provision of Article 51 does not introduce a new right of states, but rather confirms a right that has already existed in customary law. However, it introduces it with certain additional requirements. Firstly, in light of the primary responsibility for the maintenance of international peace and security given by the Charter to the Security Council,[1] Article 51 obliges states to immediately inform the Security Council on undertaking of self-defense, as well as not to prejudice the authority of the Security Council in taking at any time such action as it deems necessary in order to maintain or restore international peace and security. And secondly, it conditions the possibility of undertaking self-defense with the prior emergence of an unlawful armed attack.

In the customary law right to self-defense, which existed prior to the adoption of the Charter, there was no requirement that unlawful armed attacked be committed in order to trigger the right to self-defense. This meant that the state could have undertaken self-defense even in the anticipation of an armed attack, that is, prior to its actual occurrence. Since the emergence of an "armed attack" requirement represented a novelty in the Charter, but in customary law as well, as the adoption of the Charter reflected the *opinio juris* of practically entire international community, the meaning and the scope of the term "armed attack" had to be established.

No definition of an armed attack exists, either in the Charter or in any other international law document. It, therefore, became the subject of different interpretations. While some believed that it has to be an attack of a serious gravity, (Mrazek, 1989, p. 109), other believed that a single trans-border bullet could constitute an armed attack (Dinstein, 2005, p. 182). In discussing a threshold for determining an armed attack, the International Court of Justice found in its *Nicaragua* judgment that "the most grave forms of the use of force" constitute an armed attack, while those less grave do not.[2] The Court has endorsed its reasoning from the *Nicaragua* judgment in its more recent decision on *Oil Platforms*.[3]

With regard to criteria established by the International Court of Justice concerning the gravity of the attack, it might be concluded that terrorist attack should, as all the

Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

[1] Article 24 of the Charter.

[2] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 101.

[3] Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, ICJ Reports 2003, p. 187.

other armed attacks, undergo a case-by-case evaluation in determining the gravity of the attack. However, the gravity of the attack should not be taken as the only parameter in identifying an armed attack as a basis for undertaking self-defense. Another question yet has to be answered – who does the attack have to come from.

Article 51 is silent on the question of who does the attack has to come from in order to constitute an armed attack and give rise to the right to self-defense. Traditionally, it has been considered that such an attack has to come from a state and not from a non-state actor. Presumably, the drafters of the Charter did have in mind an attack coming from a state, since at the time of the adoption of the Charter states indeed were the only international law subjects capable of undertaking such an attack. In recent times, especially after the 9/11 attacks, those not inclined to this traditional understanding of an armed attack claimed that the general idea behind the Article 51 of the Charter is to provide to states a protection against an attack, regardless of who it comes from.[1]

Although states should be given the opportunity to defend themselves in an effective manner against the attacks emanating from non-states actors, allowing the possibility of self-defense against non-state actors opens a debate on several crucial issues. Firstly, the still very much debated issue of the international legal personality of non-state actors should have to be resolved. And secondly, there should be a way to reconcile a struggle against terrorists with respecting other states' sovereignty. Although terrorists operate through networks not associated with exclusively one state, they are nevertheless bound to a certain territory. For this reason, it is practically impossible to use military force against terrorists and not violate a certain state's sovereignty at the same time.

For the time being, the majority opinion is that an attack must come from a state in order to be considered an armed attack in the context of Article 51. The International Court of Justice has confirmed such a standpoint in several decisions and advisory opinions. In its *Nicaragua* judgment, the Court found that an armed attack means an action by regular armed forces across an international border, but also the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to an actual armed attack conducted by regular forces, or its substantial involvement therein.[2] By ruling in this manner, the Court limited the

[1] See: Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, Separate Opinion of Judge Higgins, p. 1063.
[2] ICJ Reports 1986 (note 27), p. 103.

possibility of undertaking armed attacks to states. The same conclusion was reached in the advisory opinion on the *Israeli Wall*, in which the Court said that Article 51 of the Charter recognizes the existence of an inherent right of self-defense in the case of armed attack by one state against another state.[1] Finally, in its most recent decision on the subject, in the *Armed Activities* judgment, the Court found that Uganda was not entitled to act in self-defense because the attacks against Uganda did not emanate from armed bands or irregulars sent by the Democratic Republic of the Congo or acting on behalf of the Congo.[2] The Court has, thus, embraced the traditional view, according to which an attack has to come from the state in order to be considered an armed attack and to give rise to the right of self-defense. Since the decisions in which the Court ruled in this manner are relatively recent, it can reasonably be expected that the Court would employ the same standard in future cases involving the issue of self-defense.

3. The Issue of Attribution of Terrorist Acts to States

Having determined that terrorist acts must come from the state in order to give rise to the right of self-defense, it must be established which acts are attributable to the state, triggering thus its international responsibility.

According to Draft Articles on Responsibility of States for Internationally Wrongful Acts, "the conduct of any State organ shall be considered an act of that state under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State and whatever its character as an organ of the central government or of a territorial unit of the state."[3] This goes for situations in which a person is acting as a *de jure* organ of a state. Situations such as these are in principle not disputable – an act of such a person would be considered as an act of the state itself, forming thus the so-called state-sponsored terrorism. Such situations are in practice very rare.

[1] Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 194.
[2] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Reports 2005, p. 222-223.
[3] Article 4, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001).
Retrieved from http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

There can also be a situation in which a person which commits a terrorist act is not a *de jure*, but rather a *de facto* organ of the state. These are usually acts of individuals, mostly physical persons, who do not normally posses any state authority, but in some specific situations they might be acting under direction or in the interest of the state concerned (Kittrich, 2009, p. 137). In this respect, it is important to outline Article 8 of the Draft Articles, which provides that "the conduct of a person or a group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct". There has been a discussion on the degree of control of a state over an individual in order to attribute his acts to a state. Judicial bodies did not seem to establish unified criteria in determining a degree of such a control. In the *Nicaragua* case, the International Court of Justice established the test of an effective control of a state over groups or individuals. The Court found that self-defense may in certain circumstances be undertaken in response to attacks committed by non-state actors, however it is an imperative that these attacks are of sufficient gravity and that the state from which non-state actors operate is significantly involved.[1] The Court confirmed the effective control test established in the *Nicaragua* case in its relatively recent judgment on the *Bosnian Genocide*.[2] On the other hand, the International Tribunal for the Former Yugoslavia (ICTY) did not set such a high standard for the state involvement. The Appeals Chamber of the Tribunal ruled in the *Tadic* case that in order to attribute the acts of a military or paramilitary group to a state, it must be proved that the state wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity.

It is, however, not necessary that the state should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.[3] The Tribunal does not require such a close connection between the state and the groups conducting terrorist activities as was required in the *Nicaragua* judgment. It must be noted though that the Tribunal has gone into establishing the standards for attribution of acts to states, which is the question

[1] ICJ Reports 1986 (note 27), p. 65.
[2] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Reports 2007, p. 209-210.
[3] Prosecutor v. Tadic, ICTY, Case IT-94-1-A (1999), International Legal Materials, vol. 38, nr. 6, para. 131, 145.

beyond its discretion. Its mandate is to deal with issues of individual criminal responsibility, not with those of state responsibility.

Regardless of the stricter attitude towards a state responsibility of the ICTY in comparison with the International Court of Justice, even the ICTY stated that the degree of control should exceed the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations.[1] This finding is significant with respect to recent developments in the sphere of "war on terror", since there have been contentions that the state bears international responsibility solely for harboring terrorists on its soil. Ever since the 9/11 attacks took place, attempts to broaden the state responsibility by attributing a wide variety of acts to states have been present. The question arose of whether the 9/11 events had an influence on changing international law in sense of reinterpreting the meaning of an armed attack, self-defense and the position of non-state actors.

4. The Impact of 9/11 Attacks on International Law

After the 9/11 terrorist attacks there has been a strong impulse by the part of the international community to extend the right to self-defense to non-state actors, regardless of the international responsibility of the state from which they operate. In fact, it has been maintained that international responsibility of these states does exist due to the fact that they are harboring terrorists. Such contentions are problematic in sense that they are not compatible with the international law rules regulating state responsibility.

A year after the 9/11 terrorist attacks, the Bush administration issued The National Security Strategy of the United States of America, in which the United States announced the struggle against terrorism and put forward the idea of the necessity of preemptive actions against terrorists. This act represents a formal confirmation of the American policy of preventive use of force in conducting the so-called "war on terror". The relevant part of the Document reads: "*The enemy is not a single political regime or person or religion or ideology. The enemy is terrorism…We make no distinction between terrorists and those who knowingly harbor or provide aid to them.*"[2] By equating terrorists with states which harbor them, the United

[1] Ibid., para.145.
[2] George W. Bush, The National Security Strategy of the United States of America (2002). Retrieved from http://www.state.gov/documents/organization/63562.pdf.

States attribute the responsibility for the terrorist acts to states, regardless of the involvement of a certain state in these activities.

It is undisputed that after the 9/11 attacks several states and international organizations spoke in favor of undertaking self-defense as a response to terrorist attacks. Right after the attacks, the North Atlantic Council has concluded that any attack directed against the United States from abroad shall be covered by the Article 5 of the North Atlantic Treaty,[1] according to which an armed attack against one or more of the states parties in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations will assist the Party or Parties so attacked.[2] Article 5 of the Treaty mentions an armed attack in the context of Article 51 of the United Nations Charter and the right of self-defense (Dinstein, 2005, p. 208). Also, following the attacks, there was a meeting of foreign ministers in the Organization of American States, where it was concluded that terrorist attack against the United States represents a terrorist attack against all of the American states.[3]

Special attention has been paid to two resolutions by which the Security Council addressed the 9/11 attacks. Both resolutions confirmed the right of individual and collective self-defense in accordance with the Charter.[4] There was no explicit mention of an armed attack in the context of terrorist attacks, however the mention of the right to self-defense points to the possibility of admitting such a status to terrorist acts (Drumbl, 2002-2003, p. 29). Yet, it has been agreed by many that the Security Council resolutions were formulated in an inconclusive manner. Since the Security Council acknowledged, acting under Chapter VII of the Charter, the existence of the threat to international peace and security, it could have authorized states to conduct a military action. However, no such authorization has been given. Instead, the Security Council confirmed the right to self-defense – a right which is inherent to states and which does not need to be confirmed by the Security Council if the prerequisites for its undertaking are fulfilled. It thus appears that these

[1] North Atlantic Treaty Organization: Statement by the North Atlantic Treaty Council, International Legal Materials, vol. 40, nr. 5, 2001, p. 1267.
[2] The North Atlantic Treaty (1949). Retrieved from http://www.nato.int/cps/en/natolive/official_texts_17120.htm.
[3] Organization of American States: Resolution on Terrorist Threat to the Americas, International Legal Materials, vol. 40, nr. 5, 2001, p. 1273.
[4] SC Res. 1368 (2001); SC Res. 1373 (2001).

resolutions were more of a shocking reaction to 9/11 attack than an elaborated attitude towards the acts of non-state actors.

The question of the status of no-state actors requires the answer on their international legal personality. With certain exceptions, the main subjects in international law are states and international organizations. Recently, there have been attempts to grant a status of international law subjects to certain groups and even to individuals. The rationale behind such tendencies is the following: it would be irreconcilable with the modern concept of international law and international security if states were bound by the international prohibition to use force, whereas international criminal and terrorist networks and organizations, which are capable of and willing to use military weapons, including weapons of mass destruction, against military, political, economic and purely civilian targets, would "only" be subject to criminal law (Krajewski, 2005, p. 22). This standing certainly holds true in certain respect, however the issue of international legal personality of non-state actors is far from being resolved. Even the proponents of such an idea are very cautious in asserting the existence of international legal capacity of non-state actors.

Finally, granting the right to self-defence against non-state actors is problematic from the perspective of the preserving the state sovereignty. A military action against a terrorist organization located on the territory of a particular state is at the same time an action violating that state's sovereignty. In an attempt to overcome this problem, the United States have introduced a theory, according to which there is an international responsibility of the state solely because it allows the presence of terrorist groups on its territory. It is a well known principle of international law that states have an obligation not to allow knowingly their territory to be used for acts in a manner contrary to the rights of other states.[1] However, the breach of such an international obligation does not mean that the state has committed an indirect aggression, as some states and legal writers are trying to prove. It is unlikely that terrorist acts, which are principally sporadic acts of violence, can be regarded as aggression. If we look at the Definition of Aggression, adopted in 1974 by the General Assembly, tolerating the presence of terrorist groups on its territory would not fall within the scope of indirect aggression.[2]

[1] Corfu Channel case (United Kingdom v. Albania), Judgment of April 9, 1949, ICJ Reports 1949, p. 22.
[2] Definition of Aggression (1974). Retrieved from http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement.

It seems that many questions regarding the potential international legal personality of non-state actors, as well as the ability of states to undertake self-defense against them, have remained unresolved. It is the United States and its traditional allies that encourage this concept, but the rest of the international community, although aware of the sensitiveness of the issue and the danger of terrorist activity, has not endorsed this expanded notion of self-defense. As was pointed out earlier, even the International Court of Justice, as the most authoritative interpreter of international law rules, has not changed its position on this point after the 9/11 attacks. In its judgment and advisory opinion from 2004 and 2005 it repeated its reasoning from the *Nicaragua* judgment, according to which self-defense can be undertaken against the state only.

5. Conclusion

If we conclude that self-defense is permissible only against states, the question that poses itself is how to fight against terrorist organization, if their conduct is not attributable to a certain state.

Some have proposed to invoke the state of necessity as a legal ground for using military force against such organizations. According to Draft Articles on Responsibility of States for Internationally Wrongful Acts, necessity may be invoked by a state as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that state if the act is the only way for the state to safeguard its essential interests against grave and imminent peril.[1] It would be quite a convenient ground for undertaking actions against terrorists, for the action in that case would not be directed against the host state as such, but merely against terrorist infrastructure. Neutralizing terrorist activities by using armed force would almost perfectly describe the state of necessity, were it not for the Article 26 of the Draft Articles, which says that nothing (meaning not even the necessity) can preclude the wrongfulness of any act of state which is not in conformity with an obligation arising under a peremptory norm of general international law. Since the prohibition of the use of force is a peremptory norm of international law, it is much disputed in the legal doctrine whether necessity can serve as a legal ground in this case.

[1] Article 25 of the Draft Articles.

This leaves us with the conclusion that it is only the Security Council authorization that can provide a legal basis for using military force against terrorist groups. Based on its Chapter VII powers, the Security Council can, when it determines the existence of the threat to the peace, breach of the peace or act of aggression, authorize the use of force against terrorists. It is very well known that the functioning of the Security Council is often not satisfactory. Even though the right of veto was supposed to serve as a guarantee of a fair decision-making, it turned out to be an obstacle for the efficient functioning of the Council. In this regard, the need for reforming the Security Council in order for it to function better than now is a question for a serious debate. Finding mechanisms for strengthening the responsibility of the Council members is of great importance.

In case of failure of the Security Council to act in situations of terrorist attack, states can always take measures in accordance with their national law. Even though some states claim that these measures are not sufficient to fight terrorists, actions including the unilateral use of force have not proved to be too efficient either. The United States responded to 9/11 attacks by attacking Afghanistan allegedly in self-defense. The action developed into a more than a decade long occupation of Afghanistan. If one could have been persuaded at the beginning of the action that it did constitute self-defense, as time passed by, it became more and more obvious that it did not fulfill the requirements for the legitimate self-defense. After such an intense armed action, the terrorist activity in Afghanistan is still very high and the alleged purpose of the United States action was not fulfilled. It has especially proved to be useless to try to change a regime in a particular country by an outside intervention because each society has to go through its own way of democratization and dealing with its internal problems, including neutralizing terrorist activity on its territory.

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