Combating Terrorism and the Use of Force against a State: A Relook at the Contemporary World Order

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Self-defence has long been understood as an inherent right of a State when it is militarily attacked by another State. After September 11 attacks, however, there have been attempts to reinterpret the meaning of 'armed attack' under Article 51 of the UN Charter to include attacks by terrorists - non-State actors. This paper critically examines the legal and policy considerations that promote a right of self-defence against terrorists by means of thoroughly analyzing the text of the UN Charter, State practice and the jurisprudence of the ICJ. The paper finds that a terrorist attack as such may not be an armed attack within the meaning of Article 51 of the Charter unless it is an act of a State or directly imputable to a State and is on a large scale with substantial effects. The paper concludes that unilateral use of force against a State in the name of self-defence is not the correct way of combating terrorism and that there are effective alternatives such as addressing the root causes of terrorism, resorting to law enforcement mechanisms or coercive countermeasures, and strengthening multilateralism.

Keywords

Terrorism, Self-defence, Article 51. Armed Attack, State Responsibility, Security Council, ICJ

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I. Introduction

Self-defence has long been understood as an inherent right of a State when militarily attacked by another State.[1] It has generally been regarded as a right applicable only in cases of inter-State armed conflict. Since the September 11 attacks, however, there have been attempts to include the term 'terrorist attack' to mean 'armed attack' under Article 51 of the UN Charter, thereby rendering the use of force against terrorists, or against a State that harbors terrorists, as a lawful exercise of self-defence.[2] It has been argued that certain resolutions of the Security Council authoritatively pronounce that a terrorist attack could be equated to an 'armed attack' within the meaning of Article 51.[3] There have also been arguments purporting that for a State to be responsible for terrorist attacks, a higher threshold of attribution is not required and that mere harboring of terrorists may trigger the use of force in self-defence.[4]

This paper will reappraise the legal and policy considerations that promote a right of self-defence against terrorists, or against States harboring terrorists. The two main arguments made by this paper are as follows: (1) one is that the 'armed attack' as required under Article 51 must come from a State or the attack must be attributable to the extent that it is considered as the act of the State; and (2) the other is that to use military force against another State is an extremely serious matter that requires a higher threshold of attribution than mere harboring. The author nevertheless agrees that if there is convincing evidence that a State is directly responsible for a terrorist attack conducted on a large scale and has substantial effects, it would amount to an 'armed attack' within the meaning of Article 51, triggering the right to use of force in self-defence by the victim State.

This paper is composed of seven parts including Introduction and Conclusion. Part two will discuss whether a terrorist attack can be regarded as an 'armed attack' under Article 51 of the Charter. Part three will analyze invoking the right of self-defence against terrorists in a foreign country. Part four will examine the question of State responsibility by analyzing three landmark rulings of the International

1 U.N. Charter art. 51. For details, *see* C. Greenwood, *Self-Defence*, *in* 9 Max Planck Encyclopedia of Public International Law 103-4 (R. Wolfrum ed., 2012).

2 D. Brown, *Use of Force against Terrorism after September 11: State Responsibility, Self-Defence and Other Responses*, 11 Cardozo J. Int'l & Comp. L. 28 (2003).

3 C. Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 San Diego Int'l L. J. 17 (2003).

4 A. Slaughter & W. Burke-White, *An International Constitutional Moment*, 43 Harv. Int'l. L. J. 20 (2002).