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Self-Defense Against Non-State Actors in the Post-9/11 Era

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Self-Defense Against Non-State Actors in the Post-9/11 Era Afghanistan 2001, Lebanon 2006 and Lebanon 2010 revisited

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Introduction

One of the two only possibilities to prosecute war in the post-1945 era is self-defense (the other being UN Security Council-approved actions). The understanding of self-defense, its definition and stretching of claims to self-defense to seemingly borderless lengths by some states led to increase in debates on when self-defense can be actually invoked. Furthermore, with a proliferation of actors in the world politics and increase in non-state actors waging war on states, additional difficulties are added to the already complicated situation. Lastly, states have become more prone to prevent the attacks from happening and started to favor "pre-emptive self-defense".

The establishment of the United Nations (UN hereinafter) in the aftermath of the Second World War brought about an important development in the field of international law – the legal abolishment of war. The UN Charter allows only two reasons for waging war – UN Security Council (UN SC hereinafter) approved law enforcement actions (Art 42) and self-defense (Art 51).

The conflicts, however, changed since the end of the Second World War. This is not to say that the claims to self-defense against the non-state actors are new ones. Already in 19th and 20th century, countries were claiming self-defense against non-state actors. It must be nevertheless mentioned that the use of self-defense in that period was a mere rhetorical and political tool – war was considered to be a normal tool of foreign policy and no general prohibition of the use of force existed (Neff, 2005). *Caroline* case can be mentioned here as an example.

However, the inter-state conflict has receded significantly in favor of new wars in past years (for more empirical data, cf. Harbom & Wallensteen, 2007). These new wars involve actors who are not states and their tactics is different from that of state. They do not use massive armies, they rarely use sophisticated weapons system, the difference between combatant and non-combatant is receding (Kaldor, 2008). Mary Kaldor called actors of these new wars "the vultures on disintegrating state" (2008:80).

Not all post-1945 involving the non-state actors were the same. During the decolonization, the struggle of non-state actors was largely supported by the majority of states. Many countries tried to portray these struggles as internal conflicts (eg Portugal considered Mozambique to be an integral part of the territory, the same applies to France and Algeria). Recently, however, wars by non-state actors were not aimed at reaching national independence but were rather aggravated by collapse of states and subsequent inability of some states to control substantial parts of their territories.

"New wars" mentioned above are not entirely new. Of course, many features of the "new wars" have been present in the history of the civil strife (for the critique of the concept, cf. Kalyvas, 2001). What is new about the "new wars" is the combination of the proliferation of actors, traditional threats and increasing activity of these new actors in asserting these threats to established actors. Especially, the events of 9/11 are important in this respect. Al Qaeda was able to mount an extraordinary attack on the US without any state support. This point seems to be another turning point in the history of self-defense against non-state actors.

In this respect, then, one can argue that the attempts to stretch the self-defense to include the non-state actors is a response to the proliferation of actors and rise of significant non-state actors able to launch a significant attack on traditional actors (i.e. – states).

This paper seeks to answer a fundamental question to what extend the claims to self-defense against non-state actors and future attacks can be regarded as lawful under international law. In order to answer this question, the present paper is divided into two large chapters.
The first chapter is divided into four subchapters. In the first one, I will look into the legal question whether self-defense against non-state actors is permitted. Secondly, the issue of necessity of a attributability of an action of a non-state actor to a state will be scrutinized, bearing in mind the developments in the field of state responsibility for internationally wrongful acts. In the third section, I will look into the scope of possible action that can be undertaken under the aegis of self-defense. Lastly, I will analyze the possible use of pre-emptive self-defense.

All of these aspects will be in the second chapter applied to two past and one potentially future use of military force against a state under the pretext of self-defense against a non-state actor. The first two are US-led invasion to Afghanistan starting in October 2001 and the other one is Israel's military operation in Lebanon during the Second Lebanon War in summer 2006. The third, potential military operation is a potential military conflict between Hezbollah and Israel which may erupt at any point in 2010.

1. Mirror, mirror, on the wall, who in this land is fairest of all?

To address the question of legality of invocation of self-defense against non-state actors, several issues need to be addressed separately. First of all, I will address the question whether the mere idea of self-defense against non-state actors is permissible. Secondly, since the traditional understanding of the self-defense against non-state actors included necessary level of state attribution, I will address this issue. Thirdly, I shall deal with the extent of the actions that can be claimed to be the self-defense against non-state actors. Lastly, I will deal with the question of anticipatory self-defense.

Self-defense against non-state actors?

The understanding of the self-defense under current international law relies on Art 51 of the UN Charter. The essence of self-defense is a lawful unilateral response to an unlawful use (or imminent threat) of force (Dinstein, 2005). If A is using force against B lawfully, B cannot invoke self-defense. The wording of Art 51 declares the right of self-defense to be an 'inherent right of states'. The 'inherence' of this right does not come from natural law, but rather from the sovereignty of states (Dinstein, 2005). In *Nicaragua* case, the ICJ construed this right based on the customary international law, rather than on the basis of the treaty law. It can be thus said that the right of self-defense belongs to all states regardless of their

membership in the United Nations[1]. The fact that self-defense is considered to be an inherent right of states led some to claim that armed self-defense was justifiable also as a means of protection of citizens, property or economic interests abroad. This proposition seems to be too far-fetched and in fact could lead to re-introduction of unilateral use of force which abolition was one of the prime goals of UN Charter (Randelzhofer, 2002).

The International Court of Justice further elaborated on what constitutes an armed attack in Nicaragua judgment, where it made distinction between "the most grave forms of the use of force" constituting an armed attack and "less grave forms of the use of force". The distinction in this case is scale, when the former is not a mere frontier skirmish (Ruys & Verhoeven, 2005). In the parlance of the ICJ, some attacks are still a use of force but do not amount to an armed attack. This reasoning of the ICJ prompted severe criticism that the ICJ is becoming tolerant of low-intensity wars (Heinze, 2009)

Despite the fact that the wording of the article does not deal specifically with the question who the self-defense can be directed against, the traditional interpretation of the Art 51 assumed that the perpetrator of an armed attack should be a state (Ruys & Verhoeven, 2005). During the travaux préparatoires of the UN Charter, drafters explicitly wanted to include a clause which would say that states have an inherent right of self-defense against another state, but in the end, this proposition was dropped because it was understood by the drafters that states can sometimes use non-state actors as their proxies. In her Separate Opinion in *Wall Advisory Opinion*, Judge Higgins observed that nothing in the wording of the Art 51 required the armed attack must be made only by the state for a self-defense to be invokable ("Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Advisory Opinion of 9 July 2004," 2004). In *Armed Activities* case, the ICJ stated that since "the attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC", Uganda had no right to activate the right of self-defense against the Democratic Republic of Congo (Kammerhofer, 2007:96). This assertion did not however challenge the Ugandan right of self-defense. Rather, it was to say that the DRC could not be the target of the self-defense – the rightful targets were the militants operating in East Congo.

Traditionally, the goals of self-defense were to repel an attack, to re-assert the control over the territory and to prevent further attacks (Barbour & Salzman, 2008). In this respect the right to self-defense against non-state actors is not contested either. In the *Armed Activities* case, Judge Kooijmans in his dissenting opinion supported this view whereas Judge Simma in the same case stated that this right could be even claimed to be a part of the customary international law since we can find significant state practice as well as opinio iuris in this respect (Barbour & Salzman, 2008).

[1] This may seem to be an academic question since all states are currently members of the United Nations. Nevertheless, it is important to analyze what the term 'inherent' means and realize that it is not only derived from the rights arising from the UN Charter (treaty law).

Attributability to a state

During the decolonization struggle, direct help to the decolonizing movements was an oft-cited cause for invoking self-defense (Ruys & Verhoeven, 2005). Additionally, passive support ('knowingly harboring' of fighters) was also used as a cause for self-defense. Nevertheless, state still stood at the center of the justification. After the end of the Cold War, states in their use of self-defense against non-state actors started to rely more on the unwillingness to prevent armed attacks. Such actions, however, only seldom appeared on the UN SC agenda. In the post-9/11 world, the situation further changed. Since the attack on the WTC and Pentagon was exercised by a transnational non-state actor with no control whatsoever by any country. In this respect, therefore, we can observe that there is a shifting of law toward larger permissibility without necessity of attributing of action by a non-state actor to a given state (Ruys & Verhoeven, 2005).

We can distinguish two extremes when it comes to the state involvement needed in order to be able to launch self-defense against a non-state actor. On one hand, we have those who require no link to a state – according to them, always when the attack reaches certain gravity, self-defense is permitted. Their reasoning is based on the fact that Art 51 does not necessitate a state to be the aggressor (see cf. Dinstein, 2005). This opinion is however challenged by the perceived reluctance of UN SC to uphold the right of self-defense vis-à-vis non-state actors. Additionally, the state practice usually highlighted a link with a state (Ruys & Verhoeven, 2005). The second extreme, on the other hand, is the position that attributability to a state is required in order for a self-defense to be lawful. This seems to subscribe to the reasoning of the International Court of Justice in the *Wall* advisory opinion. However, this position seems to be too rigid and almost impossible to apply (Ruys & Verhoeven, 2005). Ruys and Verhoeven, therefore, suggest a movement towards a "substantial involvement" clause whereby states allow their territory to be used for an armed attack with knowledge thereof.

In an important case of terrorism, which is one of the most widely discussed cases nowadays, an important note in debate has been made by Gazzini, who noted that despite Art 51 being silent on the subject carrying out the attack, the legal relationship remains between two states (Gazzini, 2008). Gazzini makes distinction between three cases:

- a state controls terrorists – the kind and degree of control may be disputable, but the state can be a target of armed self-defense
- a state is supporting or tolerating terrorists – in this case, the state is violating the international law and can be held responsible under some circumstances. In this case, state might be violating its obligation "not to allow knowingly its territory to be used for acts contrary to the rights of other states", which comes from the *Corfu Channel* case (Dinstein, 2005). Additionally, sending terrorists on behalf of the state would probably constitute an act of aggression by virtue of Art 3(g) of Definition of Aggression resolution of UN GA which states that also "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 the acts listed above, or its substantial involvement therein" shall constitute acts of aggression (United Nations, 1970).

- a state is unable to prevent the use of its territory for armed attack – state is not responsible for the actions of the non-state actor and cannot be a target of armed self-defense. Gazzini makes point that under necessity clause, in exceptional circumstances, self-defense can be invoked. Cases of failed states would probably fall into this category. Ruys and Verhoeven, in this respect, mention that whereas there is a substantial state practice in this respect, problems arise due to the fact that most of such cases date back either to the pre-Charter era or were condemned by the UN SC (Ruys & Verhoeven, 2005).

In pre-9/11 era, most of international lawyers believed that the attack must be attributable to a state in order for the self-defense to be used. In *Nicaragua* case, the ICJ didn't believe that mere supply of arms and other support would amount to an armed attack. In this case, the standard of "effective control" (requiring an effective overall control over a non-state actor in order to attribute the attack to a state) emerged (Heinze, 2009). However, the ICJ also held that "if there were sufficient evidence of a persistent pattern of support for indirect aggression, that would indeed qualify the victim to resort to military force in self-defense under Art 51" (Franck, 2002:65). This view was later reiterated in *Wall* advisory opinion and in *Armed Activities* case, when the ICJ re-iterated that arming and financing of insurgents indeed constitutes a violation of international law (Kammerhofer, 2007). This requirement was seemingly relaxed in Tadić case, where the ICTY decided that the level required for attribution is overall control, which goes beyond mere arming and financing, but involves also participation in decision-making and planning. Such action can then be considered to constitute an internationally wrongful act under Article 8 of Draft Articles on State Responsibility which regulates conduct directed or controlled by a state (Crawford, 2002). It is clear that such attribution is going far beyond mere territorial link (Duffy, 2007).

Secondly, the attribution can be made on the basis of adoption of non-state actor's actions as its own by the state. This would be then done by virtue of Art 11 of Draft Articles (Crawford, 2002). An example of such adoption is Ayatollah Khomeini's endorsement of occupation of US embassy in Tehran in the aftermath of the Islamic Revolution.

In the post-9/11 era, the logic of attribution changed – suddenly, also encouragement, support, planning, preparation or reluctance to impede is present (Kattan, 2007). Partially, this change stems from older document, such as the Declaration on Friendly Relations, which requires states to prevent their territory from being used for launching terrorist attacks on other countries (United Nations, 1970).

What does the self-defense allow?

When exercising an act of armed self-defense, states have basically two options: to attack only the part of the country that is used by a given non-state actor or to attach the whole of territory. In the *Armed Activities* case, the ICJ ruled that Uganda had no right to launch an armed attack against the Democratic Republic of Congo and that there was no jurisprudence in this respect. All the jurists had were limited rules of necessity and proportionality. Therefore, such attack on a non-state actor in a foreign territory could be made in a very limited and targeted fashion, using force solely against the very source of attack (Heinze, 2009).

The condition of necessity allows opening a full-scale operation only after other means of settlement were exhausted. The proportionality condition, on the other hand, theoretically requires "symmetry […] in scale and effects […] between the unlawful force and the lawful counter-force" (Dinstein, 2005:237). Such symmetry is, however, difficult to achieve and, as Dinstein argues, even problematic from a practical point of view (as it would require the 'defending' part to approximate their own actions to those of the wrongdoer). Yet, as the current interpretation of the self-defense against non-state actor goes, use of force in self-defense should be limited to the scope of activities and areas tied to the activities of the attacking non-state actor (Duffy, 2007). Franck also argues that some measures cannot be used in self-defense – long-term occupation of a country is one of them (Franck, 2002).

Better be safe than sorry

The question of pre-emptive self-defense is one of the most intriguing issues of the contemporary self-defense, especially after publishing 2002 US National Security Strategy. As the AIV/CAVV report makes clear, there is a distinction against pre-emptive self-defense and preventive action. Whereas the first one is a defense against imminent attack, the other is prevention against more distant threat.

The legal framework for the anticipatory self-defense was laid down in *Caroline* case. In the commentary to the case, Webster famously defined "necessity of self-defence [as] instant, overwhelming, leaving no choice of means, and no moment for deliberation" ("Caroline," 1841). This case was already a part of the customary international law even before the UN Charter. The period when the Caroline occurred, however, was the one where war was generally allowed and there was no prohibition on the use of force, as there is nowadays. Additionally, another problem associated with the Caroline case is that the such necessity as described by Webster is difficult to ascertain by objective means and necessarily leaves the decision to political decision-makers (Randelzhofer, 2002).

Another aspect which could lead us to the acceptance of anticipatory self-defense is the inability of the ICJ to declare first-use of nuclear weapons to be contrary to the international law in its Advisory Opinion on legality of use of nuclear weapons ("Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996," 1996). There also seems to be opinio iuris that there is no need to wait until the threat materializes. In 1967, Israel used force to strike Egyptian air force and effectively destroyed all Egyptian fighter jets which were ready to strike Israel. Despite heated discussion in the UN SC, the Council did not reject Israel's claim of anticipatory self-defense. In 1981, when Israel used its military again to destroy the nuclear reactor in Iraq, the action was denounced not because the very idea of anticipatory self-defense was rejected, but rather because it was deemed that the reactor itself did not pose threat to Israel (Franck, 2002).

Thus, although there are some examples of anticipatory self-defense, states seem to be reluctant to include the definition as wide as the one used in the 2002 US National Security Strategy (AIV & CAVV, 2004). Preventive self-defense against distant threat is however forbidden, but self-defense as a reaction to a looming attack might be acceptable (Gazzini, 2008). Art 51 does not require the state to wait until an attack is launched. However, there should be a clear preparation for the attack and as Gazzini reminds us, terrorism requires

such reading because the successful tacking of it requires precisely detection and interception before the attack itself can take place (2008).

2. Three cases of self-defense

In the following chapter, I will look at two past and one possible future use of force in self-defense and scrutinize them in the light of the criteria outlined in the first chapter.

Afghanistan 2001

After the attacks of 9/11, the US were quick to point to Al Qa'eda as the perpetrator of the attacks. Al Qa'eda was back then known to be hiding in Afghanistan (although it is debatable whether at that very point the leadership was still there). On October 7, 2001, the US launched the the invasion of Afghanistan, the operation Enduring Freedom based on Art 51 of the Charter, without UN SC blessing.

The US attacked the Taliban-led Afghanistan because the Taliban harbored Al Qaeda and refused to hand them to the US (Bellinger, 2006). Dinstein even goes as far as stating that Taliban assumed responsibility for actions of Usama Bin Laden and Al Qa'eda by refusing to hand them over to the Americans (Dinstein, 2005).

When we however employ more sober look on the situation, we have to say that Al Qa'eda was not under neither effective nor overall control of Taliban[2]. It is therefore improbable that the events of 9/11 could be attributed to Taliban. Certainly, Afghanistan (under the Taliban) committed an internationally wrongful act by harboring terrorists of Al Qa'eda and by not complying with the UN SC resolutions. But did this wrongful act amount to an armed attack (in order for a self-defense to be used)? The failure to comply with international obligations could be responded by unfriendly, but lawful acts (Duffy, 2007)[3]. The artificiality of the link between a non-state actor (Al Qa'eda) and a state (Afghanistan) only underscores the transformation of perception of the necessity of state attribution.

In the reaction of the states, however, there was little doubt left about the legality of the use of self-defense as the justification for the invasion of Afghanistan. It seems that overwhelming majority of states accepted it (Duffy, 2007).

Lastly, it remains highly questionable whether the regime change was justifiable in self-defense. This seems to be hard to square with principles of proportionality and necessity (Duffy, 2007). Furthermore, the ensuing prolonged military occupation by US- and later NATO-led forces is also probably problematic as a measure of self-defense (compare with Franck, 2002 above)

Lebanon 2006

In Summer 2006, Israel attacked the positions of Hezbollah in Lebanon in retaliation for kidnapping of two Israeli soldiers, as a peak of mutual exchange of hostilities. Whereas majority of the UN member states would probably not have any problem accepting the right

[2] It could be very well argued that it was Al Qa'eda who to a considerable extend controlled the Taliban regime

[3] The truth is that most of these were already in place at the time of 9/11 with scant success.

of self-defense against non-state actors, this rule is far from established in the Middle East and North Africa (Kattan, 2007). However, it seems that most of the countries (including UN SC permanent members) accepted the right of Israel to protect itself from the attack of Hezbollah and therefore showed their opinio iuris in this respect (Heinze, 2009).

Hezbollah has not been under the control of the Lebanese state (Kattan, 2007). Despite the fact that the political wing of Hezbollah participates actively in the political life of the country, it is not a part of the armed forces of the country and in fact, the Hezbollah arms remain one of the main problems of contemporary Lebanon. It seems therefore to fall into the third Gazzini's category, whereby state is unable to prevent its territory from being used by a non-state actor for launching attack on another country. Whether Israel was in a situation of necessity seems debatable and it is clear that not all other channels were exhausted before the armed action was taken (Kattan, 2007).

Israel employed reasoning that at the certain point the Hezbollah actions reached level when they accumulated to an armed attack (Heinze, 2009). Kattan, however, persuasively argues that the same logic could be used by Lebanon, if it invoked self-defense against Israel, after countless border incursions and violations of Lebanese territory by Israel (2007). Majority of the UN SC members, however, recognized Israel's right to self-defense under Art 51. Many states approved the *ius ad bellum* dimension of the conflict, but most of them were very hesitant about the *ius in bello* dimension (the conduct of war) (Heinze, 2009). This recognition of Israel's right to self-defense marks a departure from the "most grave" clause of the *Nicaragua* case.

When we look at the Israeli actions in Lebanon during the Second Lebanon War, it is clear that Israel attacked sites in Lebanon which had nothing to do with Hezbollah. In particular, attacks against Beirut airport or some dual-use infrastructure seem to be most problematic (Heinze, 2009; Kattan, 2007). Heinze comments that acquiescence of the state towards the use of its territory for use by the terrorists becomes sufficient condition for the launch of large armed self-defense action. As he also notes, in the post-9/11 world, the two conditions previously separated – severity and state involvement – conflate (Heinze, 2009).

Lebanon 2010

Far from being an academic exercise, let us now imagine that Israel would launch an armed attack in self-defense against the actions of Hezbollah next spring (for an example of such predictions, cf. RIA Novosti, 2009). Now, we have seen that some of the Israel's actions in summer 2006 were hard to square with a principle of self-defense (especially the attack on Hezbollah non-affiliated targets). In the November 2009, Israeli Defense Minister Ehud Barak stated that if Lebanon let Hezbollah to escalate the conflict, the retaliation (doubtlessly branded as self-defense) would target Lebanon (Eyadat, 2009). At the same time, the newly-elected Lebanese government agreed Hezbollah to use their arms against Israel (AFP, 2009). Bearing these developments in mind, it seems that the Lebanese government is actually deliberately putting itself in a worse position by endorsing the activities of Hezbollah (or, in the terminology of Articles on State Responsibility, by adopting the actions of Hezbollah as its own).

While this action has certainly domestic roots, its international implication for justification of actions in potential conflict is enormous. If Israel truly launches an operation against Lebanon, it can actually target also Hezbollah non-affiliated infrastructure in the country (as long as it fulfills the criteria as set out by the international humanitarian law). This would have two severe repercussions. Firstly, bearing in mind only limited ability of the Lebanese Armed Forces to actually retaliate against actions of Israel, Israel would undoubtedly inflict severe damages upon Lebanon (bearing in mind, as we said above, it would not be required to limit its actions to symmetry with activities of Hezbollah and LAF). Secondly, from a political point of view, Lebanon would even more closely tie its political future with Hezbollah – undoubtedly not the smartest strategy.

Conclusion: Jump forward to the past

Are we slowly returning to the era when war was perceived as a state policy? This can be possible only if we accept that even a war in self-defense is a way to advance national interests (Neff, 2005). There are two problems with this assertion. Firstly, it completely contradicts the logic of self-defense, and secondly, such reading would be very cruel.

Additionally, the idea that war was a contractual state is severely contested in self-defense. Rarely states agree to engage in self-defense. If we, furthermore, take into account the *Caroline* clause which states that self-defense "leaves no time for deliberation" ("Caroline," 1841), the proposal seem to go against the very logic of self-defense.

Neff, however, seem to consider also wars of self-determination and civil wars with international involvement in his analysis (Neff, 2005). Then, these may resemble wars including non-state actors nowadays. It is however questionable to what extend is self-determination the final goal of these actors. What sort of self-determination would have Al Qaeda or Hezbollah in mind?

One of the similarities, however, is the fact that the rules of warfare still do apply in these wars (as in the period of wars as state institution). As Vöneky demonstrated, the US attempted to twist rules given by the Geneva Conventions to the enemy fighters and that terrorists are in fact in this respect similar to guerrillas and saboteurs, who are not unknown to international terrorists and thus constitute lawful targets (Vöneky, 2007).
The expansion of the borders of self-defense can be partly seen as a response to the proliferation of actors and increase in importance of non-state actors in the international politics. However, the legal aspects of the use of armed self-defense against these actors remain debatable. Although until very recently some sort of the state attribution was needed in order to be able to launch an armed attack in self-defense against a non-state actor, in the post-9/11 world these conditions were eased. Moreover, the condition of severity seems to conflate with the condition of state involvement, merging thus hitherto separated elements. The newly-expanded notion of self-defense against non-state actors does not seem to fit any of the past paradigms. It seems that after 9/11, the necessity of state attribution was eased as well as the scope of an action to be considered an armed attack was transformed. We seem to enter the new era when the use of military force under the guises of self-defense is used for an international policing action. What legal complications will this conflation bring in the future remains to be seen.

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