Sovereignty Verses Survival: Exploring the Thin Line between Counter-Terrorism and Incursion

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Abstract

Sovereignty refers to the right and power of a governing body to govern itself without any interference from outside sources or bodies in its internal affairs. It is an unspoken rule of the nation's right to exist and be self-contained without other nations interfering. Terrorism refers to a premeditated threatened or actual use of force or violence to attain a political goal through fear, coercion or intimidation. When it transcends national boundaries through nationality of perpetrators, victims, or location of the incident, it is known as Trans-national Terrorism. The present paper examines the conflict between upholding the sovereignty of a State and the Global War on Terrorism in the contemporary world where rise of trans-national terrorist organisations renders existing counter-terrorist policies redundant because of potential transgressions of sovereignty of States. The researcher has drawn parallels between the US operations in Pakistan and the NATO operations in Kosovo to show how disregarding sovereignty can corrode the spirit of International Law and yet, in some cases, yield favourable results. With the crisis in Syria and Iraq, and the ISIS offensive at the centre, the researcher aims at suggesting a shift in international legal doctrine so as to adapt to contemporary issues while balancing respect for the sovereignty of states, and cooperation and interdependence for the broader national and global interest. A stronger and clearer set of international rules will serve to provide legitimacy to actions against terrorist groups while preserving the spirit of International Law and respecting the sovereign authority of every state as enshrined in Article 2(4) of the United Nations Charter.

KEYWORDS: Terrorism, Sovereignty, United Nations, Intervention

Introduction

The attacks of September 11, 2001 on the United States of America marked a major paradigm shift in geopolitics and International Law. With the priority of the United States changing to "War on Terrorism", the 21st century has been distinctly transformed into the Age of Terrorism. However, the increasing use of terrorism as a legal term has not been accompanied by a discrete definition that can help tackle the methodological issues that emanate from lack of an agreed-upon definition of Terrorism. The acceptance of a common definition of Terrorism in the International sphere can strengthen counter-terrorism operations by intelligence sharing and

international co-operation that will provide legitimacy to the war and facilitate coalition building.[1]

The complex nature of terrorism can be broken down into two prominent conceptions, which are, terrorism as a crime and terrorism as warfare.[2] An act of terrorism fundamentally constitutes a series of acts which in themselves are criminal offences. A case in point would be the 26/11 attacks where the terrorist act consisted of, among others, the acts of illegal possession of arms and explosives, wrongful imprisonment, assault, murder, conspiracy and willful destruction of property. However, unlike other criminal activities, acts of terrorism are not motivated by personal, hedonistic motives, but by political and ideological motivations. This difference in nature, coupled with high level of threat to public safety, integrity of a nation and public order, commands a distinction to be made between criminal acts under ordinary criminal law and terrorism.[3] However, in the modern world, where terrorism has moved from within national boundaries to a more global sphere, treating terrorism merely as a criminal act is not sufficient as when States exercise jurisdiction over terrorist activities far removed from the reach of International Law, the world transforms into a conflicting and overlapping web of municipal jurisdictions which leads to disharmony and lack of international co-operation. Treating terrorism as an act of war is more in harmony with the international regime as, instead of focusing on individual guilt, it is more concerned with identification of a common political-military organisation that can be made subject to International Laws, and for implementing this, a more objective definition of terrorism is required. This becomes difficult because of the conflicting schools of thought which claim that "one man's terrorist is another man's freedom fighter."[4] Branding an organisation as a terrorist organisation is more often than not governed by political considerations. This solidifies the need for an objective definition of terrorism within the meaning of which certain organisations can be deemed to be terrorist organisations and consolidated efforts to combat such organisations can be taken by States as a whole without an overlap of jurisdiction or the question whether an organisation is actually a terrorist organisation or not.

A terrorist activity is transnational when any one or more of the perpetrators, victims or audience are from two or more countries. In such a case, when the act of terrorism involves the non-state actor posing a threat from across national borders, the utilization of military force by the state facing the threat is rendered illegal and illegitimate (subject to certain exceptions) as it would have to enter the territory of another State to counter the threat which will be a gross violation of the fundamental right of the receiving state i.e. its sovereignty.

[1]Reuven Young, Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Lawand Its Influence on Definitions in Domestic Legislation, 29 B.C. Int'l & Comp. L. Rev. 23 (2006), http://lawdigitalcommons.bc.edu/iclr/vol29/iss1/3

[2] ALEX CONTE, HUMAN RIGHTS IN THE PREVENTION AND PUNISHMENT OF TERRORISM 7-36 (Springer-Verlag Berlin Heidelberg 2010)

[3] BOAZ GANOR. THE COUNTER-TERRORISM PUZZLE.A GUIDE FOR DECISION MAKERS.(New Brunswick: Transaction Publishers 2005)

[4] WALTER LAQUER, THE AGE OF TERRORISM. (Little, Brown and Company, Boston, Toronto 1987)

Objective

The objective of the research is to firstly see the effect of the existing legal regime relating to the legitimacy of intervention, by seeing the compliance with these practices by sovereign nations. Thereafter, the blending of the various elements of these principles of customary international law and the stance of sovereign nations towards these principles in light of modern issues that were unforeseeable when these principles were derived is done to arrive at a coherent picture of the international scenario and to identify theoretical and practical issues. On the basis of the information presented, the final objective is to understand the reasons for the flaws in the existent law, and thereby suggesting recommendations for its improvement.

Research Methodology

The type of legal research undertaken in the present paper is doctrinal. The use of doctrinal research has been made to identify the issues and answering it through both theoretical information available and actual instances of intervention across the world in the contemporary era, as well as suggesting new ways to improve the law. The design of research is based in grounded theory as it looks to events related to the research topic that have taken place in the contemporary era and attempts to provide an explanation or a theory behind the events that ties it together. Another research method employed is phenomenological as the researcher seeks to put forward a new theory based on the motivation behind the actions of the participants in the events that have led to the research problem. The research has been presented with a narrative approach to illustrate how conflicting motivations and technological advancements have influenced individual instances of intervention. The use of secondary sources has been made in this respect.

The Eroding Pillars of Sovereignty

Sovereignty is the keystone on which the entire edifice of international law stands. It is the supreme authority that a State exercises over its territory not depending on any other earthly authority. It refers to the overall independence of a state within and without its borders. It is a multi-faceted concept. As regards to the fact that a state is not subject to authority of another, sovereignty is *independence.* Every State has supreme authority over all persons and things within its territory which is known as *territorial authority* and every state's authority over its citizens at home and abroad is referred to as its *personal authority.*

The United Nations has recognized sovereignty as a basic principle of international law by inclusion of Article 2(4) and Article 2(7) in the United Nations Charter:

Article 2(4) states:

> *"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."*[5]

Article 2(7) states:

[5]UN Charter Article 2(4)

> *"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."*[6]

These provisions, among others, have solidified the sovereign power of States through the doctrine of non-intervention. Article 2(4) prohibits the use of force in a general sense that goes beyond war by not using an exhaustive terminology.

The General Assembly *Declaration on the Principles of International Law* which is widely regarded as the interpretation of the United Nations Charter has clarified Article 2(4) by stating that the "force" mentioned in the Article refers to military force.[7] A deeper reading of Article 2(4) also serves to clarify that it is applicable only to international use of force and not to domestic disputes. It does not create a bar on a State to use force against insurgents, riots or belligerents within its territory without any external interference unless the Civil War-like situation is deemed to be a threat to international peace and security by the United Nations as per Article 2(7). Thus, when a conflict in a State reaches the status of a rebellion, assistance to the government may be given upon request as it continues to have sovereign authority; however, assistance to rebels is in contravention of the fundamental principle of sovereignty and non-intervention.

In the *Lotus* Case, the Permanent Court of International Justice held that *"the first and foremost restriction imposed by international law upon a State is that, failing the existence of a permissive rule to the contrary, it may not exercise its power in any form in the territory of another State."*[8]A similar principle was reiterated in the *Corfu Channel* case by the International Court of Justice: *"between independent States, respect for territorial sovereignty is an essential foundation of international relations."*[9]

Thus, the principle of non-intervention is *jus cogens* in international law. This creates trouble for counter-terrorism operations in the contemporary world where terrorist hide behind the veil of sovereignty by hiding in sympathetic territories or States which are incapable of eliminating their threat. To take an example, ISIS, largely based in Syria, has been carrying out attacks in France, but Syria being a sovereign State, a military intervention by France will theoretically be in violation of the sovereignty of Syria rendering the ISIS inviolate as Syria has largely proven to be incapable of handling the ISIS offensive on its own.

Extending the domestic dispute principle stated above, the ISIS offensive was launched as a part of the Civil War in Syria which fundamentally prohibits other States from intervening unless Syria asks for assistance or the Security Council passes a resolution under Chapter VII of the United Nations Charter deciding that the use of force to maintain international peace and security is required.

[6]UN Charter Article 2(7)
[7] GA Res. 2625 (XXV), 24 October 1970
[8] PCIJ, Series A, No 10, p 18
[9] ICJ Rep (1949), p 35

These fundamental flaws in international theory are gradually being cured in the contemporary world by moving from a view that sovereignty is absolute to a view that sovereignty is conditional. It is based on the idea that States are global citizens and have both rights and duties. While sovereignty is the right of a State, it has the duty to fulfill certain national and international obligations. By failing to fulfill these responsibilities, states forfeit their sovereignty.[10] These responsibilities, primarily, are environmental protection, promotion of peace and human rights of citizens.

The International Commission on Intervention and State Sovereignty in its 2001 report '*The Responsibility to Protect'* held that:

> "*The Charter of the UN is an example of an international obligation voluntarily accepted by member states. On the one hand, in granting membership of the UN, the international community welcomes the signatory state as a responsible member of the community of nations. On the other hand, the state itself, in signing the Charter, accepts responsibilities of membership flowing from that signature. There is no transfer or dilution of state sovereignty. But there is a necessary re-characterization involved: from sovereignty as control to sovereignty as responsibility in both internal functions and external duties."*[11]

This report takes the idea of contingent sovereignty further by holding that other states are obligated to intervene if a state fails to uphold its responsibility to protect. This has been a significant dilution of the idea of an absolute sovereignty as the norms provided by this report have frequently been referred to by the UN General Assembly and the Security Council. However, due to invocation of the provisions of this report injudiciously by NATO and the US, the normative value of this report as an authority has eroded and it is not considered to be authoritative in international law.

The Justification of Intervention

As the inviolate principle of sovereignty has been diluted in the contemporary world, there are several cases in which use of force by a State against the territorial integrity of another State is not considered to violate International Law. It must be clarified that intervention only refers to interference which is dictatorial in nature and is forcible. When a State asks another for military assistance, whether direct or indirect, the resultant deployment or detachment of armed forces is not covered by the doctrine of intervention.[12]

Intervention may still be justified subject to various restrictions regarding the manner and circumstances of the intervention.

1. To Protect Citizens Abroad
   If the citizens of a nation are being wrongfully treated abroad, the nation has a right to secure their proper treatment by intervention. This reason cannot be

[10]Amitai Etzioni, Defining Down Sovereignty: The Rights and Responsibilities of Nations, E&LA 5, (2016)

[11] Gareth Evans and Mohamed Sahnoun, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, Ottawa: IDRC 13, (2001)

[12] OPPENHEIM'S INTERNATIONAL LAW 427-451 (Sir Robert Jennings et al. eds., Pearson Education 9th ed. 2005)

used for military intervention when proper protection can be achieved through diplomatic means.

This justification was used by Israel when it raided the Entebbe Airport in Uganda in 1976 after Palestinian Freedom Fighters had hijacked an aeroplane and threatened to massacre Israeli citizens on board. Israeli intervention was a violation of Ugandan sovereignty but it was a requisite as there was no time to secure the release and ensure the safety of Israeli citizens through diplomatic means.

2. Humanitarian Intervention
When a State commits cruelties against its own nationals in such a way that even the most basic human rights have been denied, it ceases to be a domestic matter and international intervention in such a case is justified. The persecution of the citizens in such a case should be so severe that it shocks the conscience of mankind. The strength of this justification has been considerably weakened by States using it for their own purposes.

The 11 week armed intervention by NATO against the Federal Republic of Yugoslavia in 1999 is an example of intervention on humanitarian grounds. Seeing the outbreak of violence in 1997/98 in Kosovo, the UN Security Council adopted Resolution 1160 in 1998 to call for the Republic of Yugoslavia and Kosovo Albanians to reach a peaceful resolution. However, the condition continued to deteriorate and because of the lack of consensus among the 5 permanent members, the UNSC failed to reach a mandate over military intervention. In Resolution 1199, the UNSC determined that the situation was a threat to peace and security in the region and demanded cessation of hostilities but there was no improvement in the situation. At this point, seeing the inability of the UNSC, NATO stepped in and undertook military action of its own accord, without UN Approval after all diplomatic efforts to make peace failed.[13]

The action by NATO was based on the customary international law that gives States a right of military intervention in the affairs of other states for the purpose of protecting individuals from grave violations of their fundamental human rights. The constitution of the United Nations Security Council makes it unable to react to the impending needs of the current era which can be said to grant States justification to begin unilateral intervention with humanitarian objectives.

The NATO argues that the Security Council declaring the conflict in Kosovo to be a threat to peace and security in the region gave authority to act and that general international law principles provided for a right of intervention on the grounds of overwhelming humanitarian necessity.

However, in the current *opinio juris*, there is a huge lacuna for unilateral humanitarian intervention without a resolution by the UNSC. While NATO's

[13]Daniel H. Joyner, The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm 13 EJIL No. 3, 597-619 (2002)

arguments have moral justifications, but they lack legitimacy in international law making them inherently illegal and violative of Yugoslavian sovereignty. Even if the lacuna is filled, the idea that humanitarian necessity gives a State absolute right of intervention is inherently flawed.

3. Right of Self-Defence

If action is taken in exercise of an individual or a collective right of self-defence, that intervention is justified. This right of self-defence is a customary rule of international law which has developed through recurring usage. The *Caroline case* of 1837 is a landmark case that has established the contours of right of self-defence in International Law.

During the Canadian Rebellion in 1837, hundreds of insurgents chartered a vessel called the Caroline to carry supplies from the American side of the Navy Island to the Canadian side to help the insurgents. The Canadian Government sent a British force to counter this threat and the British force seized the ship, set her on fire and sent her adrift Niagara Falls. Two Americans were killed and the American Government complained that the British violated their territorial sovereignty by entering its territory. However, Great Britain asserted that it was merely exercising its right of self-defence by preventing an imminent American invasion.

Daniel Webster, American Secretary of State, formulated the following principle which has been widely accepted:

> "*There must be shown a necessity for self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation: the action taken must involve nothing unreasonable or excessive, since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it.*"

This right has been recognised in Article 51 of the UN Charter,

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

In the Military and Paramilitary Activities Case[14], the ICJ stressed on the necessity and proportionality of measures taken in self-defence. A violation of another State's sovereignty is permissible only when an armed attack is imminent, there is an urgent necessity to take action against the attack, there is no alternative, and action in self-defence is limited to what is necessary to stop the attack.

However, in the post-9/11 era, the United States of America has stretched the doctrine of self-defence to pre-emptive use of military force. This began under the Bush Administration where it was argued that the United Nations paradigm isn't reflective

[14] ICJ Rep (1986) p.14.

of the contemporary scenario and therefore America is justified in violating international law claiming it to be archaic. The Bush administration contended that due to the threat posed by Weapons of Mass Destruction, hereafter referred to as WMD, there is always an imminent threat of attack by terrorist organisations and the United States is in a perpetual state of war with Al-Qaeda and other such organisations. These organisations are capable of posing a major threat to any State in the World, which has clearly been displayed in the unfortunate 9/11 attacks. The Bush doctrine claims that the UN Charter is a pre-atomic document and was prepared only to prevent wars between States. Non-state entities and terrorist organisations were not taken into deliberation when the Charter was drafted. Determining whether a terrorist organisation possesses WMD is difficult and if they do possess WMD, it is virtually impossible to take preventive action against the threat by the time the use is imminent. Thus, it would be a part of the nation's right of self-defence to target terrorist organisations which are known to show hostile intent towards the State.

This justification was used by the United States for violating Pakistan's territorial sovereignty by entering Pakistan and killing Osama bin Laden.[15] In international law, a State is duty bound to prevent terrorist activities from taking place using their territory as a base. According to Declaration on Principles of International Law concerning Cooperation and Friendly Relations among States,

"*Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organised activities within its territory directed towards the commission of such acts, when the acts referred to in the paragraph involve a threat or use of force.*"[16]

The Pakistani and American Government were co-operating in the War on Terrorism but Osama bin Laden was hiding in Abbottabad, near the military academy of Pakistan. This pointed to the fact that Pakistan was either incapable of dealing with the threat or was harbouring terrorists. Al-Qaeda posed a threat to the United States and harboured a hostile intent towards the United States which gave America the right to self-defence against the Al-Qaeda. Laden being a key figure of Al-Qaeda was a justified object of a targeted attack by the United States. There was an ongoing concern that Pakistan might have warned Laden if it had been aware of the Operation and Pakistan's inability to deal with the threat itself has been used as a justification by the United States to act unilaterally.

Such unilateral action as observed in the case of NATO in Kosovo and USA in Pakistan, while illegitimate and illegal as per existing international law paradigm, has proven to be largely successful. However such violations of international law are highly problematic.

If humanitarian concern becomes a valid justification for unilateral intervention, who shall define the quantum of persecution and oppression that will validate such an intervention? Which body will then determine the extent of the involvement of the intervening State and prevent setting up of proxy governments like the Russia-backed government in Afghanistan that led to the rise of Taliban? If the existing government is deposed by the intervening State for being oppressive, who makes sure that the

[15] Anthonly Clark Arend, International Law and the Pre-emptive Use of Military Force.
[16] GA Res 3314 (XXXIX), 1974.

right of the people of self-determination stays in place when the intervening military is still in the receiving nation and a new Government is to be chosen?

The Israeli attack on the Osirak reactor in 1981 clearly displayed the fallacies of the 'imminent threat of WMD' justification. If this is taken as a valid justification, it will be a ground for India to invade Pakistan, South Korea to attack North Korea and Iraq to target Israel. Hostile-intent as a criterion is also fallacious as it would allow States to use pre-emptive force against other States who are developing weapons programs.

The United Nations Charter paradigm has failed to keep a check on intervention by States. There is a long list of force used between States without the authorization of the Security Council and cannot be placed within any reasonable justification of intervention. Although United Nations does prohibit use of force by States, over its short history, such prohibition does not seem to be realized in practice. The use of force by States cannot be justified by any charter paradigm.

If the charter framework is not controlling of State practice, it cannot be said to reflect existing international law. Although UN is the umbrella authority for legitimising State practice, it cannot be considered to reflect International Law.

Policy Considerations

Given the legal discussion above, it is crucial that State actions against transnational terrorism be provided legitimacy by international law. With regard to legitimacy, the classical realist E.H. Carr said,

"*Just as within the state every government, though it needs power as a basis of its authority, also needs the moral basis of the consent of the governed, so an international order cannot be based on power alone, for the simple reason that mankind will in the long run always revolt against naked power. Any international order presupposes a substantial measure of general consent*."[17]

The counter-terrorism operations are strongly pivoted around the question of legitimacy. If a nation pays too much heed to legitimacy and lowers its military strength for an offensive against a terrorist group taking refuge in another State, it runs the risk of failing to accomplish the operation and eradicating the terror threat. If the question of legitimacy is ignored and a stronger offensive than required is mounted, the efforts in the receiving State are delegitimized and appears more like an occupying force than a credible effort to restore security and stability in the receiving State.

In light of the recent troubles in Syria, the Syrian government will be unwilling to seek assistance from the United States because of the indirect support to the rebellion provided by the US. Just like proxy governments set up during the Cold War Era, seeking American help to counter ISIS, the Assad regime runs the risk of America turning out to be an occupying force instead of an ally that provides stability. However, the Syrian government needs to balance its need to protect its citizens or to maintain its absolute perception of sovereignty. The ISIS offensive has been going on for years and no end is in sight. Until and unless an international coalition is authorized by the Security Council to use military force against the ISIS, the problem

[17]EDWARD HALLETT CARR, THE TWENTY YEARS' CRISIS, 1919 1939, 235-236 (New York: Perennial, 2001).

will go on. The Security Council has condemned ISIS actions on multiple occasions but it has yet to issue a directive authorizing military action. Such a directive will most likely be vetoed by Russia, being allied with the Assad regime.

This lays bare the problems with the current regime in which the customary international law has no recourse against a visible international security threat that is violative of the fundamental human rights of the people in its controlled territory to such an extent that it shocks the collective conscience of humankind.

These issues call for a change in the international law paradigm. The suggested change is threefold-

1. The traditional understanding of anticipatory self-defence as per the guidelines in the Caroline case should be met. The extension given to this doctrine by introducing the principles of pre-emptive military action should be aside. An international policy should be articulated the conditions of which should be met before pre-emption will be permissible. In absence of imminence, there should be no unilateral military action without the authorization of the Security Council.
2. Terrorism as a threat was completely unanticipated at the time the UN Charter was signed. The customary international law that is followed till date has proven to be inconsistent with the contemporary sphere and there is a requirement to reinterpret the criterion for intervention and armed conflict with non-state actors.
3. The UN Charter has largely failed to control State actions and it is no longer authoritative and controlling. US Offensives post 9/11 have violated almost all fundamental principles as envisaged at the time of the United Nations' conception. The UN Security Council has failed to be flexible and adoptive enough to counter threats to international peace and security. The veto power of the 5 permanent members leads to politically motivated decisions. To take an example, when intervention in Kosovo was crucial, Russian and Chinese veto prevented the UNSC from authorizing use of military force. NATO had to violate international law to bring stability to the region. It is high time to declare the UN Charter framework dead. However, before phasing out the United Nations completely, a more authoritative regime should be put in place before the world takes advantage of a lawless regime and descends into chaos.

The dynamics of geopolitics are shifting. The era of States being a threat to each other is over and now non-state actors have the capacity to launch strategic attacks against the world's biggest superpowers. International Law paradigm has been too slow to adapt to this shift and the rise of the Taliban, ISIS, Boko Haram, etc. is a result of that. Pro-active military action against these organisations is required to neutralize their threat. It is impossible to eliminate terrorist organisations, but damaging them to such an extent so as to render them unable to mount strategic attacks or pose a serious threat. The current *opinio juris* and *jus cogens* is valid only for peace time, but the world is currently at war. Until the War on Terrorism is over, there is a need for pro-active and offensive laws which are somewhere between the peacetime laws and wartime laws.

Until counter-terrorism is given legitimacy in the international sphere, it is impossible to prevent the corrosion of the spirit of international law while balancing sovereignty, safety and security.

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