

Which State's Territory May Be Used for Self-Defence Against Non-State Actors?

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One of the most neglected problems of self-defence against non-State actors is the question of how the infringement of the territorial integrity of another State while exercising this self-defence can be justified. This omission can be explained by the fact that by now these interventions affected States which were very weak, more or less excluded by the international community or could be qualified even as failed States. Therefore, they were unable to react or their reactions were steadily ignored.

The very simple idea is that measures against non-State actors may be taken on the territory of the State where the latter find themselves. The United Nations Security Council (UNSC) Resolution 1373 introduced the “harbouring” of terrorists as an action which constitutes a violation of international law. However, quite often the State does not consent to the presence of such persons on its territory, and therefore cannot be said to “harbour” them. Therefore, in recent times the justification of an intervention in these cases was extended by relying on the concept of “the unwilling or unable State”, meaning that self-defence may lawfully be exercised by a State on the territory of another State which does not want or is not able to eliminate the risk of terrorist activities originating in its sphere of sovereignty. The definition of unwillingness presupposes a shared concept of who is a terrorist which – as is well known – does not exist in current international law. Had the Russian Federation bombed the radio-station of the Chechens in Poland from where they were supporting the armed fight against the Russian army, we would have witnessed a general outrage for good reason. Apart from this specific aspect, one may question if this concept has already turned into a norm under international law.

The main objection against this approach is that it still sticks to the old ideas of war which normally is territorially linked to a State. In contrast, terrorists normally are very mobile, they cannot be “identified” with a given territory. Al Qaida stretches from Pakistan through the Arab States to Nigeria, Islamic State (IS) can be found from Afghanistan to Mali. The crimes committed by these organisations are planned in one country, they are fi-

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nanced from another country, citizens of a third country participate, they get the training in a fourth State and the attack takes place in a fifth country. One may take as an example the attacks of 11.9.2001 in the USA. According to the findings of the US-American secret services they were plotted in Afghanistan – and it has never been claimed that the Taliban government has been involved. The cell which implemented them was composed by Arab students who had lived in Germany for many years free of all surveillance by the State. The financing of this plot can be tracked back to sources in Saudi-Arabia. The chief perpetrators took flying lessons in the USA – unfettered by any State control. The group which finally executed the plot was composed mostly by citizens of Saudi-Arabia (which was recently brought into the focus of US legislation in the context of this attack). Each of the elements described above were necessary for the perpetration of the crime, if one had been eliminated the crime could not have been committed. Each of the States which are named can be blamed for some form of negligence. Who is entitled to decide that self-defence may be lawfully exercised in Afghanistan and not in Saudi-Arabia? Is self-defence in Afghanistan still justified if it can be proven that Germany – by stricter surveillance of the activities of certain Islamist groups on its territory – or the USA – by the introduction of stricter rules for the admission to flying lessons - could have prevented the attack? If we assume that such a terrorist group commits crimes in all those States – will it be lawful that each of these States takes armed measures against the group on the territory of each other State claiming that an act which was indispensable for the successful commission of the attack had occurred there? This is not only a theoretical question. On 13.11.2015, Islamist terrorists committed an attack in Paris. France – and Germany – referred to the right to (collective) self-defence against these non-State actors on Syrian territory. The members of the group claimed to be linked to IS which was by that time very active in Iraq and Syria, including against the government of Assad. They met representatives of IS in Syria before the attack. The group was composed of nine persons, seven of them European citizens who had lived in Europe for many years. They allegedly obtained the money for the funding of the crime by bank-robberies in Europe. If there are so strong “personal” and “material” links to one region – can it be justified to exercise self-defence on the territory of a State in which the underlying ideology has its cradle? Could Syria, the other way around, take armed measures in Europe claiming that many IS fighters and their material support come from Europe and that the European States do not take sufficiently effective measures against this flux of people and money to Syria?

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All these questions have not been addressed when self-defence was exercised in the cases mentioned above. It was within the discretion of the stronger States to make the choice between the countries where they wanted to exercise self-defence. The weaker States have to put up with it. However, the law should be equal for all. Therefore, if ever one wants to promote the concept of self-defence against non-State-actors one has to establish rules which regulate the exercise of self-defence in such situations. This must include proper criteria for the justification of military actions in the territory of another State. Otherwise the international rules will end where they came from: the law of the jungle.

