

## The Law of State Responsibility in Relation to Border Crossing: An Ignored Legal Paradigm

### 1. Introduction

In this paper I revisit the law of State responsibility to ask whether, rather than invoking self-defence, there is a better way to conceptualise a State's violent engagement with an organised armed group (OAG) located in the territory of another State when the latter is not only unwilling to consent to foreign intervention but is itself unable and unwilling to stop the OAG from directing further attacks on other States. In posing this question my intention should not be misinterpreted as one that seeks to identify a broader exception to the general prohibition on the use of force; in fact, it is quite the reverse. That said, my overriding aim is simply to propose a more legally coherent account of recent State practice and, in that process, offer *an* explanation for the recent statements by the International Court of Justice (ICJ) that seem to rule out the option of invoking self-defence under Article 51 of the UN Charter against OAGs.<sup>1</sup> Although this stance by the ICJ has been criticised for not corresponding with the practice of States, if Article 51 cannot be invoked to justify the use of force against an OAG in the scenario described above, are there any existing laws which *would* permit States to cross an international border lawfully?

In section 2, I re-examine, through the prism of space or 'geography', the law on the use of force and self-defence as constituted under the UN Charter. I do so to demonstrate the need for maintaining a clear separation between the *jus ad bellum* and *jus in bello* since the tendency to conflate these two bodies of law has the effect of producing results that are legally dubious. Although the penultimate section of the paper will consider matters pertaining to the latter body of law, the primary concern of this paper is with exploring the right to use force rather than the rules that govern in the event of conflict. I argue that there are good reasons for *continuing* to hold that the normative system established in the post-war period was designed exclusively to regulate relations between States. To support this position, I identify the inherent weakness (as well as the attendant risks) in the legal reasoning that has emerged in recent years to justify, in the language of self-defence, the use of force against OAGs based in the territory of a State that is unwilling to consent to the armed intervention by the State under attack from the OAG. There seems to be little doubt that in such situations the State that allows its territory to be used by OAGs as a base from which to attack other States is in violation of its international law obligations. But it is difficult to see how *that* violation can give rise to the right to use force in self-defence under Article 51. Be that as it may, my

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<sup>1</sup> See §139 of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory 2004 and §147 of its Judgment in the Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) 2005. See also Judge Kooijmans' Separate Opinion §§36 to 31, and Judge Simma's Separate Opinion §§7–13.

interest is to ask what is 'gained' in law by the State which invokes self-defence to justify its use of force against the OAG situated in the territory of another State.

This question is pursued further in section three when I explore how and why the geographical location of the OAG appears to alter the legal relationship between the State and the OAG. Of course where the OAG is located within the territory of the State under attack, the violence is either governed by non-international armed conflict rules or domestic law informed by international human rights law. As Dinstein points out, in neither case is Article 51 relevant. He continues, 'an armed attack against a State, in the meaning of Article 51, posits some element external to the victim State. Non-State actors must strike at a State from the outside.' This reasoning is one that must be implicitly accepted by all who claim a right to use force against OAGs under Article 51. But why does the geographical location of the OAG fundamentally alter the relationship between State and the OAG *necessitating* the State to justify its use of force? If the answer to this question is simply that the crossing of the border is game-changing, an explanation of why this is so is warranted. But however illuminating the explanation, and notwithstanding the recent writings of the vast majority of legal commentators who point to State practice post-9/11, I argue that invoking Article 51 still cannot resolve the 'problem' of the border since the armed attack originates with the OAG and not with the State within which the OAG has sought sanctuary. Thus, the territorial integrity, sovereignty and sacrosanct borders of the State remain undisturbed. And if this indeed is the case, how might a border be lawfully crossed? History is replete with examples of OAGs attacking States from the territory of another State. The capacity of the OAG to 'wage war' against a State may have increased but the problem is not new. Did the Charter create a normative framework that left States with no remedy? Is there a legal vacuum that must be filled?

In section four I tentatively suggest that existing international law has the potential to provide a satisfactory legal framework within which to address all these questions. The UN Charter may have introduced a legal regime which codified two exceptions to the prohibition on the use of force but there is a long tradition demonstrated by consistent State practice that the wrongfulness of a use of force can be precluded in one, and possibly two, other exceptional circumstances. There is general agreement that international law imposes *primary* legal responsibility on the State in which the OAG is located to prevent attacks on other States. Where a State is unable to respond adequately to address the violence of an OAG within its territory, international law recognises that the State is entitled to consent to the intervention of foreign armed forces as long as that consent is regarded as 'valid' in the circumstances and does not involve the violation of a peremptory norm. This principle is set forth in Article 20 of the Articles on State responsibility. A second principle of international law that precludes the wrongfulness of an act that would otherwise be considered a violation of the law is the doctrine of necessity. I suggest that it is this customary international law principle that provides a far more coherent basis upon which to justify the use of force against the OAG located in the territory of another State that is unwilling to prevent further

attacks by that OAG. After exploring in detail the conditions that attach to the doctrine, I turn my attention to two intrinsic problems that demand comment: i) whether the doctrine of necessity can preclude the wrongfulness of a use of force in a post-Charter system; and ii) how the doctrine might be reconciled with State practice not least in the immediate post-9/11 period.

In section 5, I turn to assess the relevant rules that govern the parties to the conflict. The majority of experts are agreed that armed conflict between government forces and an OAG are governed by non-international armed conflict (NIAC) rules since the classification of a conflict is determined by the parties to that conflict. NIAC rules therefore bind the State in its armed conflict with members of the OAG even if that conflict is waged outside the territory of that State. A minority view argues that the crossing of the border in the absence of consent to the intervention of foreign forces has the effect of creating an international armed conflict (IAC). This view cannot be dismissed lightly given the commonly accepted definition of when and under what circumstances an IAC is said to exist between two States. However, the existence of an IAC between the two States does not alter the fact that the conflict between the State using force and the OAG remains non-international in character unless the OAG is found to be under the overall control of another State. But the most problematic assumption that is all too often made in the type of situation under discussion is whether a NIAC exists at all since the threshold for the existence of an armed conflict differs between IAC and NIAC. In the case of the latter, the *Tadic* criteria – intensity of violence and organisation – must be satisfied before a situation of violence is more properly governed by the law of armed conflict.

In the concluding section I argue that the conditions attached to the doctrine of necessity function to severely restrict its availability, possibly more so than self-defence. Thus, the critics of current State targeting policy in respect of members of OAGs in territories outside the boundaries of that State are no more likely to be convinced on the facts that a robust case of necessity has been made out. But by contrast to self-defence, invoking necessity to justify the use of force against an OAG in the territory of another State enables the former to cross a border lawfully. For the State claiming the right to use force in such circumstances, there are further legal hurdles thrown up by the *jus in bello* that must be satisfied before its conduct is considered lawful.

## **2. The geography of the jus ad bellum**

## **3. Crossing the border**

## **4. The Doctrine of Necessity**

Despite the evidence supporting the customary international law doctrine of a ‘state of necessity’ there has been little discussion as to its potential relevance and value in resolving the current legal quandaries facing States in their violent exchanges with OAGs

located in another State. Although not commonly invoked, the customary status of the doctrine was expressly recognised by the ICJ in the *Gabcikovo-Nagymaros Project* case when, after having carefully weighed the submissions by the parties and in light of the reports by the International Law Commission (ILC), the Court held that “the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation.”<sup>2</sup>

Necessity denotes a situation in which a State whose sole means of safeguarding an essential interest – for example, its national security – adopts conduct not in conformity with what is required of it by an international obligation to *another State* but is deemed justified in doing so because the harm it faces is imminent, serious and any other course of conduct is likely to result in even more serious consequences.<sup>3</sup> In other words, conduct that would otherwise be considered a violation of international law would not be regarded as an infringement of State responsibility on the grounds that, all things considered, the act was not wrongful.

Article 25 of the Articles on State Responsibility reads:

*1. Necessity may not 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 unless the act:*

- (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and*
- (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.*

*2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:*

- (a) the international obligation in question excludes the possibility of invoking necessity; or*
- (b) the State has contributed to the situation of necessity.*

Of critical importance is that by contrast to self-defence, necessity is not dependent on a prior wrongdoing by the State acted against. In fact, “the wrongfulness of an act committed in a state of necessity is not precluded by the pre-existence ... of a particular course of conduct by the State acted against”.<sup>4</sup> In the case of both self-defence and consent, the wrongfulness of an act – for example, the violation of a State’s territorial integrity and sovereignty – is precluded by the prior commission of an act by the State

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<sup>2</sup> *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* I.C.J. Reports 1997, p211 [para 51].

<sup>3</sup> Article 25 Necessity, Draft Articles on the responsibility of States for internationally wrongful acts (Draft Articles), 2001.

<sup>4</sup> Report of the International Law Commission on the work of its Thirty-second session, 5 May – 25 July 1980, Official Records of the General Assembly, 35<sup>th</sup> session, Supplement No. 10 (A/35/10) p. 34.

acted against.<sup>5</sup> Put simply, self-defence is conditioned on the State acted against to have launched an 'armed attack' while consent is contingent on the State acted against to have extended prior authority to the acting State. What is of vital significance is that necessity precludes the wrongfulness of an act that is *totally independent* of the conduct adopted by the State acted against. In doing so, it introduces the possibility of conceptually separating the 'perpetrator' of the original wrongdoing – the OAG – from what is otherwise a non-belligerent relationship between the acting State and the State acted against. The wrongful conduct on the part of the acting State is precluded by virtue of a situation brought about not by any prior conduct by the State acted against but by a completely separate act on the part of a third party or by some intervening event.

Insofar as the acting State is concerned, invoking necessity implies perfect awareness of having deliberately chosen to act in a manner *not* in conformity with an international obligation.<sup>6</sup> But the wrongfulness of the action taken is precluded by the intervening external factor that has placed the State in a situation that unless it acts in a manner not in conformity with an international obligation, it cannot avoid a "grave danger either to the essential interests of the State or of the international community as a whole".<sup>7</sup> While caution is required when comparing the responsibility of an individual with that of a State, the principle of necessity in both cases is founded on the recognition that it would be unjust to impose liability where the lesser evil was selected in the face of a bad choice.<sup>8</sup> At the level of the State, the threat posed must necessarily be of the utmost gravity. By way of example, the ILC has suggested that this may include the existence of the State itself, its political or economic survival, the maintenance of conditions in which its essential services can function, the keeping of its internal peace, the survival of part of its population, the ecological preservation of all or some of its territory, and so on. These examples would suggest that the threat must be of an equivalent gravity to an 'armed attack' as understood under Article 51.

The leading case involving a plea of necessity in which a State has used force against an organised armed group on the territory of another State without the consent of the territorial State is the *Caroline* incident of 1837. Although frequently cited as an example of self-defence, close scrutiny of the facts and exchanges between the

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<sup>5</sup> The Commentary to the Draft Articles states: 'Unlike consent (art. 20), self-defence (art. 21) or countermeasures (art. 22), [necessity] is not dependent on the prior conduct of the injured State'; paragraph 2 p. 80.

<sup>6</sup> 'The State organs which then have to decide on the conduct which the State will adopt are in no way in a situation that deprives them of their free will. It is certainly they who decide on the conduct to be adopted in the abnormal conditions of peril facing the State of which they are the organs, but their person freedom of choice remains intact. The conduct adopted will therefore result from a considered, fully conscious and deliberate choice'; (A/35/10) p. 35.

<sup>7</sup> See commentary to the Draft Articles paragraph 2, p. 80.

<sup>8</sup> It should be noted that the lesser harm test cannot satisfactorily explain how an objective comparison can be made of harms that are plainly not quantifiable or where the values being compared are manifestly incommensurable because qualitatively so different.

concerned States – the UK and US – indicate, as the ILC suggests, that the case centred on the plea of necessity. For its part, the British Government was adamant that it had the right to use force against the rebel groups that were launching attacks into Canada from bases within the US; consequently it argued that “the destruction of the *Caroline* was a justifiable employment of force, for the purpose of defending the British Territory [Canada] from the unprovoked attack of a band of British rebels and American pirates, who, having been ‘permitted’ to arm and organize themselves within the territory of the United States, had actually invaded a portion of the territory of Her Majesty.”<sup>9</sup> From the exchanges that followed, it is clear that while the US took offence with the inference that it had *allowed* the rebels to use its territory from which to launch such attacks, it was equally concerned to distance itself from the conduct of the rebels with the statement that it was the President’s “fixed resolution that all such disturbers of the national peace, and violators of the laws of their country, shall be brought to exemplary punishment.”<sup>10</sup>

The ILC’s determination that the *Caroline* case turned on the principle of necessity rather than self-defence is a compelling one because grounded in sound legal reasoning and merits being cited in full:

‘The “*Caroline*” incident of 1837, though frequently referred to as an instance of self-defence, really involved the plea of necessity at a time when the law concerning the use of force had a quite different basis than it has at present. In that case, British armed forces entered United States territory and attacked and destroyed a vessel owned by United States citizens which was carrying recruits and military and other material to Canadian insurgents. In response to the protests by the United States, the British Minister in Washington, Fox, referred to the “necessity of self-defence and self-preservation”; the same point was made by counsel consulted by the British Government, who stated that “the conduct of the British Authorities” was justified because it was “absolutely necessary as a measure of precaution”. Secretary of State Webster replied to Minister Fox that “nothing less than a clear and absolute necessity can afford ground of justification” for the commission “of hostile acts within the territory of a Power at Peace”, and observed that the British Government must prove that the action of its forces had really been caused by “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation”. In his message to Congress of 7 December 1841, President Tyler reiterated that:

“This Government can never concede to any foreign Government the power, except in a case of the most urgent and extreme necessity, of invading its territory, either to arrest the persons or destroy the property of those who may have violated the municipal laws of such foreign Government.”

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<sup>9</sup> Extract from note of April 24, 1841 from US Secretary of State, Dan Webster to the British Government following an exchange with the British Minister in Washington, Mr Fox.

<sup>10</sup> Extract from note of April 24, 1841

The incident was not closed until 1842, with an exchange of letters in which the two Governments agreed that “a strong overpowering necessity may arise when this great principle may and must be suspended”. “It must be so”, added Lord Ashburton, the British Government’s *ad hoc* envoy to Washington, “for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity”.<sup>11</sup>

Although the term ‘self-defence’ appears in these exchanges between the Governments, it was to a state of necessity that the each was referring since at no time was it suggested that the preclusion of wrongfulness (the violation the US’s territorial integrity by the British) depended on the existence of a prior or threatened aggression by the US or on any kind of wrongful act on its part despite the inference that the US could have taken stronger action against the rebels on its territory. But even if it is accepted that the *Caroline* case is an exemplary example of the doctrine of necessity, can it validly be invoked in a comparable situation in the post-Charter age?

There is consensus that necessity cannot be raised in cases involving a use of armed force against the territorial sovereignty of another state which falls within the meaning of the term ‘aggression’.<sup>12</sup> However, in posing the question of whether necessity can preclude wrongfulness where the conduct, although infringing the territorial sovereignty of a State, does not necessarily equate to an act of aggression, former Special Rapporteur, Roberto Ago in his Eighth report on State responsibility stated:

“the Commission is referring in particular to certain actions by States in the territory of other States which, although they may sometimes be of a coercive nature, serve only limited intentions and purposes bearing no relation to the purposes characteristic of a true act of aggression. These would include, for instance, some incursions into foreign territory to forestall harmful operations by an armed group which was preparing to attack the territory of the State, or in pursuit of an armed band or gang of criminals who had crossed the frontier and perhaps had their base in that foreign territory, or to protect the lives of nationals or other persons attacked or detained by hostile forces or groups not under the authority and control of the State, or to eliminate or neutralized a source of troubles which threatened to occur or to spread across the frontier. The common feature of these cases is first, the existence of a grave and imminent danger to the State, to some of its nationals or simply to human beings – a danger of which the territory of the foreign State is either the theatre or the place of origin, and which foreign State has a duty to avert by its own action, but which its unwillingness or inability to act allows to continue. Another common feature is the limited character of

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<sup>11</sup> See commentary to the Draft Articles paragraph 5, p. 81.

<sup>12</sup> Article 5 (1) of the 1974 Declaration on the Definition of Aggression, (GAR 3314) states, ‘no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression’; this is generally understood as meaning that necessity cannot preclude the wrongfulness of conduct in respect of jus cogens norms.

the actions in question, as regards both duration and the means employed, in keeping with their purpose, which is restricted to eliminating the perceived danger.”<sup>13</sup>

It is clear that contemporary US policy involving the use of force against members of OAGs in the territories of States with which the US is *not* engaged in an armed conflict is, as a matter of legal reasoning, better viewed as falling within the logic of necessity (if consent is unavailable) rather than self-defence which cannot justify the violation of the territorial integrity and sovereignty of the State acted against. But whether the use of force in the territory of another State without the consent of the territorial State can be deemed not wrongful in law must be assessed on a case by case basis since, for obvious reasons, the principle should be available only under “certain very limited conditions”.<sup>14</sup> As a matter of legal reasoning, in contrast to self-defence, necessity offers a far more coherent basis upon which to justify the extraterritorial use of force against members of OAGs where the consent of the territorial State is not forthcoming. This, however, still leaves two unresolved problems.

First, since Ago’s reasoning did not appear in the final version of the commentary to the articles on State responsibility, how much weight should be accorded to his statement, however compelling? Article 26 expressly rules out the possibility of precluding the wrongfulness of an act which is ‘not in conformity with an obligation arising under a peremptory norm of general international law’ and although the ILC expressly excused itself from delving into the question of what constitutes a peremptory norm, aggression is often cited as an example of such a norm. If this is the case, it prompts the question as to whether all unlawful uses of force necessarily amount to aggression thus excluding the possibility of invoking necessity to preclude the wrongfulness of deploying armed forces on the territory of another State that has not consented to their presence.

## 5. Jus in bello

## 6. Concluding comments

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<sup>13</sup> A/35/10, p. 44. See also Eighth report on State responsibility by Mr Roberto Ago, Special Rapporteur, A/CN.4/318/Add.5-7, p. 39, paragraph 56.

<sup>14</sup> See commentary to the Draft Articles, paragraph 14, p. 83. The threat must be ‘extremely grave’, the peril ‘imminent leaving no other means of escape’ and ‘conduct going beyond what is strictly necessary to preserve the essential interest threatened, will constitute a wrongful act per se’. This will mean that either the state has been subject to an armed attack – either directly or indirectly – or that there is compelling evidence to show that it or its interests are about to be attacked. As state practice and judicial decisions make clear, ‘once the peril has been averted, the conduct taken will immediately become wrongful if persisted in’ while ‘the state claiming necessity must not itself have provoked (deliberately or by negligence) the state of necessity’. Finally, necessity calls for a balancing assessment in which ‘the interest of the state towards which the obligation existed must itself be a less essential interest of the state in question’.