

The Legal Basis for Crossing a Border During an Ongoing NIAC

Summary

Many NIACs take place largely within a single state's territory. This is the traditional "civil war" model. In some cases, however, members of a non-state armed group (NSAG) launch attacks against a state (the "victim state") from within the territory of another state (the "territorial state"). In recent years, the FARC has launched attacks against Colombia from within Ecuador; Hezbollah has attacked Israel from within Lebanon; the PKK has attacked Turkey and Iran from within Iraq; and al Qaeda plotted and trained for attacks against the United States from within Afghanistan. In this type of case, what international legal rules govern the victim state's ability to use force against the NSAG within the territorial state? In other words, how does the territorial state's sovereignty affect the victim state's ability to use force against the NSAG?

A number of states and scholars take the view that international law allows the victim state to use force extraterritorially against a NSAG when the territorial state is "unwilling or unable" to address the threat itself (or when the territorial state consents to the victim state's use of force). The United States, Russia, Turkey, and Israel all have invoked the "unwilling or unable" test to justify their uses of force in self-defense against NSAGs within the territory of other states. Note that this justification inherently assumes that NSAGs can engage in "armed attacks" that trigger the victim state's right of self-defense under UN Charter Article 51. Some dispute this position, taking the view that (1) only states may commit "armed attacks" or (2) NSAGs can engage in "armed attacks" only when those attacks are attributable to a state. Given the continuing debate about whether NSAGs, standing alone, may commit armed attacks, the "unwilling or unable" test remains controversial.

Perhaps another reason for skepticism about the test is that states (including victim states) have said little about what factors they believe the "unwilling or unable" test requires them to assess. Must the victim state ask the territorial state to take measures before the victim state may respond? How much time must the victim state give the territorial state to respond? What if the territorial state proposes to address the threat in a way that the victim state thinks may not be adequate?

In a recent paper, I examine two centuries of state practice involving extra-territorial uses of force in self-defense against NSAGs. Drawing from the justifications proffered by the victim states, I propose a core set of substantive and procedural factors that states might use to assess whether another state is "unwilling or unable." These principles include requirements that the victim state: (1) prioritize consent or cooperation with the territorial state over unilateral uses of force; (2) ask the territorial state to address the threat and provide adequate time for the latter to respond; (3) reasonably assess the territorial state's control and capacity in the relevant region; (4) reasonably assess the territorial state's proposed means to suppress the threat; and (5) evaluate its prior interactions with the territorial state. In my view, establishing more specific requirements will increase the legitimacy of the test; improve the quality of states' decision-making; and provide a common vocabulary by which third states may evaluate particular trans-border uses of force.

Three questions

1. What is the status of the “unwilling or unable” test in international law?
 - Has it become a principle of customary international law?
 - Is it a lower-level principle supported by state practice? or
 - Is it a test without basis in the UN Charter, used by powerful states to provide cover for improper military interventions?

2. Assuming the “unwilling or unable” test is a viable international legal principle, how much does the test currently constrain state action?
 - Some states (including the United States) claim the test imposes a specific limitation on their actions. How do these states actually apply the test in practice?
 - Other states use force against non-state actors extraterritorially but fail to invoke the test. Why do they fail to cite it?

3. Should states be required to defend publicly their conclusion that a territorial state is unwilling or unable to suppress a particular threat?