

The use of force in international law

Law



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Introduction

From ancient epics like the Iliad to historical accounts to modern novels, appropriate justification for a state's use of force has long been a topic of fascination and controversy. Over the past century and a half, various court cases have expounded on and reinforced standards governing the acceptable use of force between states. The Caroline affair, along with the Nicaragua, Tadic, and Oil Platforms court cases, all set the stage for modern international law regarding the use of force. Through these cases, courts have set clear standards used to determine the responsibility (or lack thereof) of involved parties, the rights of states to neutral territory and freedom from intervention, and the exceptions for self-defense.

II. Responsibility of involved parties

When discussing appropriate limits for the use of force, courts need to determine which parties hold responsibility when force is used internationally. As early as 1840, precedents were set for favoring corporate responsibility over individual responsibility. In what is now called the Caroline affair, American citizens assisted Canadian rebels in their escape aboard the Caroline to an island in the Nicaragua River. In retaliation, British forces attacked the ship, set it on fire, and sent it over the Niagara falls. Three years later, New York officials captured Alexander McLeod, who served as deputy sheriff in Upper Canada. In a series of written exchanges between British and American authorities, British diplomat H. S. Fox emphasized that McLeod acted under orders of the British state and did not deserve full responsibility for the Caroline incident. U. S. Secretary of State Daniel

Webster agreed in April 1841, writing that persons involved in “ an act of public force...ought not, by the principles of public law, and the general usage of civilized States, to be holden personally responsible in the ordinary tribunals of law, for their participation in it.” Rather, Great Britain bore the primary responsibility, which was why the Caroline affair was eventually settled through diplomatic negotiations between both states.

Over a century later, the Nicaragua case dealt again with the issue of state responsibility. This case, however, did not revolve around a state ordering its officials to use force, but around the United States supplying resources and finances to contras who were rebelling against the Nicaraguan government. In this case, the International Court of Justice (ICJ) sought to answer the question: to what extent was the United States responsible for illegal uses of force committed by the contras? Was the “ relationship of the contras to the United States Government...one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government?” If the U. S. basically controlled the contras, then the U. S. would be responsible for the contras’ actions as well. Ultimately, the Court concluded, “ Financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient...[to prove] that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.” Later, the ICJ’s method of deciding whether or not a state essentially controlled a third party, thus

holding itself responsible for violations committed by the third party, became known as the Nicaragua “ effective control” test.

A decade later, the International Criminal Court for the former Yugoslavia (ICTY) further clarified the Nicaragua control test by outlining three possible scenarios in the Tadic case. First, individuals could hold sole responsibility if they acted “ on behalf of a State without specific instructions.” Second, a State could hold responsibility if a private individual or a group that was not militarily organized “ acted as a de facto State organ when performing a specific act,” and that “ specific instructions...had been issued by that State to the individual or group in question.” In other words, the State was responsible if “ the unlawful act had been publicly endorsed or approved ex post facto.” The State could also be held liable for actions by “ subordinate armed forces or militias or paramilitary unit” if its control comprised an “ overall character.” This had to comprise of “ more than the mere provision of financial assistance or military equipment or training,” but did not have to “ go so far as to include the issuing of specific orders by the State, or its direction of each individual operation.” Third, if a private individual acted “ within the framework of, or in connection with, armed forces, or in collusion with State authorities,” both the individual and the State could be charged, since the individuals acted as “ de facto State organs.” Each of the three possible scenarios highlights different parties that are considered responsible for any acts of force.

Rights to neutral territory and nonintervention

In addition to identifying parties that should be held accountable for usage of force, courts need to determine whether or not states have respected

international principles of neutral territory and nonintervention. In the Caroline affair, U. S. minister Andrew Stevenson accused the British forces of contravening the “‘ sacred’ principle of immunity of neutral territory.” Even though British authorities “ could treat U. S. citizens as enemies if they were captured fighting the British government in British territory,” they did not, thus interfering “ with U. S. ‘ right and sovereignty.’” Except in cases of “ extreme state necessity,” use of force in neutral territory constituted a breach of customary international law. In 1841, three years after receiving Stevenson’s letter, British Foreign Secretary Lord Palmerston finally replied, implicitly upholding the principle of neutral territory and Stevenson’s “ extreme state necessity” requirement by detailing “ assertions about the necessity and proportionality of the British attack.”

Even when state activities took place outside of neutral territory, the principle of nonintervention protects states from unwarranted attacks. In the Nicaragua case, the ICJ specifically defined the principle of nonintervention as “ the right of every sovereign State to conduct its affairs without outside interference.” Acknowledging nonintervention as a “ part and parcel of customary international law,” the Court declared that “ intervention is wrongful when it uses methods of coercion,” especially methods of coercion that use force, “ either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.” Previously, the Court had distinguished “ most grave forms of the use of force (those constituting an armed attack) from other less grave forms.” Grave uses of force included armed attack from a state’s armies, as well as attack from mercenaries sent by the state. Conversely, less grave uses of

force included assistance to rebels in the form of weapons or logistical support. The principle of nonintervention, however, prohibited both most grave and less grave uses of force. As the Court articulated, any “intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State,” is always prohibited.

Exceptions for self-defense

Given that uses of force cannot violate international principles of territory neutrality and nonintervention, courts can only allow legitimate uses of force in circumstances requiring self-defense, as stipulated by international precedents. In the same letter regarding the Caroline affair, Webster had “admitted that a ‘just right of self-defence attaches always to Nations, as well as to individuals, and is equally necessary for the preservation of both.’”

However, for the destruction of the Caroline to be justified, Britain had to show “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.” Furthermore, Great Britain had to demonstrate that “local authorities of Canada... did nothing unreasonable or excessive... but that there was a necessity, present and inevitable.”

Among the series of correspondence between the United States and Great Britain was an August 1842 letter from British diplomat Lord Ashburton. Referring to Webster’s 1841 letter, Lord Ashburton wrote, “Of the great general principle, we seem also to be agreed, and on this part of the subject I have done little more than repeat the sentiments, though in less forcible language, admitted and maintained by you in the letter to which you refer

me.” In essence, Lord Ashburton’s letter confirmed the British government’s acceptance of what is now called the Caroline rule.

The ICJ more clearly elucidated the self-defense exception in Nicaragua, allowing self-defense only in the case of armed attack. This exception allowed for both individual and collective self-defense, as the Court stated: “The language of Article 51 of the United Nations Charter, the inherent right (or “droit naturel”) which any State possesses in the event of an armed attack, covers both collective and individual self-defence.” Even though the Court also specified that an attacking state breaches the customary international law of nonintervention whether it uses grave or less grave forms of force, a victim state can only invoke the self-defense exception in the event of a grave, armed attack. Additionally, in order for collective self-defense to be permitted, the victim state must explicitly request aid. The Court specified that “there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack.”

Seventeen years later, in the Case Concerning Oil Platforms, the ICJ again considered whether or not the use of force by the United States against Iran was lawful. Agreeing with standards set in Nicaragua, the Court required the United States “to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature to be qualified as ‘armed attacks.’” On top of that, the ICJ also demanded that the United States show that “its actions were necessary and proportional to the armed attack made on it, and that the platforms were a legitimate military target open to attack in the exercise of self-defence.” Because the United States

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could not prove that its use of force was “ necessary and proportional” to the alleged Iranian attacks, the Court ruled that the United States’ actions did not qualify as acts of self-defense.

Conclusion

From the Caroline affair to the Nicaragua, Tadic, and Oil Platforms court cases, historical precedents have set guidelines to determine individual and/or State responsibilities is for the use of force, rights of states to neutral territory and freedom from intervention (whether that be grave or less grave uses of force), and the exceptions for necessary and proportional self-defense in occasions of armed attack. Although individual circumstances may not always be black and white, these precedents have formulated internationally accepted criteria that guide decisions by international tribunals and states. Justifications for a state’s use of force will always remain controversial in ancient epics, historical accounts, and modern novels, but at least guidelines exist in international law today to more clearly delineate between what is and is not acceptable.