

RELATIVE SOVEREIGNTY AND PERMISSIBLE USE OF ARMED FORCE

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Sovereignty is a term that does not appear in the United Nations Charter with respect to limitations on the use of armed force, but it is often part of claims and analyses regarding the difference between permissible and impermissible uses of force and intervention. Is sovereignty merely relevant with respect to claims of states to independent power or authority? Is it a construct or process that has been related also to other actors within the international legal process? How has the notion of sovereignty been used with respect to claims in favor of freedom from outside use of armed force and in favor of armed intervention?

First, when addressing such questions, it should be noted that there have been many formal actors and participants in the international legal process other than the state. Claims of rigid state-oriented positivists, especially at the beginning of the last century, that states were the only actors with competencies, rights, and duties under treaty-based and customary international law were patently false. Quite clearly, this recognition is relevant to the notion of sovereignty or retained authority since it would not be incorrect to note that sovereignty has not been held merely by states. Within the international legal process, other actors such as nations, tribal groups and peoples can be understood to have claims to relative sovereignty as well. Yet, the state remains a primary actor and one that claims a relative sovereignty or independence.

Interestingly, if you use Westlaw or Lexis to search for use of the term “sovereignty” in our federal courts, you will discover claims of the Founders and Framers that sovereignty is in the people of the United States, in all of us, and not in any particular political entity. That is because of our democratic revolution in the 1700’s and shared expectations that authority exists with and can be delegated by the people, and it is not simplistically in any institutional arrangement that people create. For example, the preamble to the United States Constitution states that “[w]e the People of the United States . . . do ordain and establish” the Constitution and the federal government, not the states or some magnanimous elite. This notion of authority in the people has also found expression in international law. For example, the preamble to the United Nations Charter states similarly that “[w]e the Peoples of the United Nations” have created the Charter, not the states or other actors in the international legal process. The United Nations Charter also identifies the right of self-determination as a right of peoples, not states, and certain forms of human rights law require that the legitimacy of any state’s government reflect the will of the people and not merely that

of state elites. An example of such a human right is reflected in Article 21(3) of the Universal Declaration of Human Rights.

A second aspect of sovereignty is worth stressing. Under international law, sovereignty is not absolute. This is especially so in an increasingly interdependent world. It was recognized, for example, by the Permanent Court of International Justice that sovereignty is relative. More generally, with respect to distinctions between permissible and impermissible intervention or what some term the norm of non-intervention, it is important to realize that one criterion often reiterated is contained in the delimiting phrase “external or internal affairs of” a particular state that is reflected, for example, in the normative statement that states have an “obligation not to intervene in the affairs of any other state.” But general patterns of practice and legal expectation over time have shifted the focus slightly to save from intervention that which is the affair merely of one state as opposed to that of the international community. Adding to the complexity, the affair of merely one state as such may not be the same as the affair of other actors within that state, such as a relevant nation or peoples, and the latter may more adequately relate to the affairs of a regional or global community.

Violations of human rights are not simply the affair of a single state, nor are international crimes such as genocide in Rwanda or Darfur. In 2005, the international community also recognized what it terms the state’s responsibility to protect—an obligation of all states. However, in 2005, the international community apparently would not go further than stating that a particular state has a responsibility to protect its own people from certain deprivations and that if it fails it can be subject to certain sanctions such as political, diplomatic, economic, and perhaps juridic sanctions if the state agrees to such; but the community did not declare that violators can be subject to military sanctions involving use of armed force and/or intervention. More generally, there has been a split within the international community concerning the propriety of humanitarian intervention involving the use of armed force without prior authorization from the United Nations Security Council or a relevant regional organization such as NATO, the Organization of American States (O.A.S.), or the Organization of African Unity (O.A.U.). Quite clearly, such forms of humanitarian intervention as a sanction response would be an inroad on state sovereignty, but state sovereignty is not absolute to begin with and international law clearly conditions what a state may do to its own people within its own territory.

Another inroad on state sovereignty that has been agreed to by the international community involves permissible use of force in self-defense. There is a rich history of use of such an inroad on sovereignty under customary international law, and today Article 51 of the United Nations Charter allows a member state to use self-defense “if an armed attack occurs.” Additionally, as Colonel Wollschlaeger remarked, parties to the U.N. Charter have recognized the power and authority of the Security Council to authorize the use of armed force as an enforcement measure in

case of a threat to the peace, breach of the peace, or act of aggression—assuming that a majority makes a decision to that effect and that it is not obviated by a veto of one or more of the five permanent members of the Security Council (which must be exercised, as the Soviet Union learned when it walked out of the room during the Korean war and had thought that its mere abstention would operate as a veto). This form of Security Council enforcement action occurred recently in the case of Libya. Clearly, the authority of the Security Council represents an inroad on sovereignty that has been accepted by each member of the U.N. and the international community as a whole.

An interesting example of such an inroad occurred with respect to use of apartheid by the regime in South Africa during the last century. I remember the claim of the apartheid regime in the 1980s when the Security Council recognized that the system of apartheid constituted a threat to the peace. “What do you mean threat to the peace,” they said, “just leave us alone and keep our neighbors out of our country and there will be no threat to the peace.” The Security Council did not back down and issued various types of sanctions not amounting to the use of armed force. The U.N. General Assembly also responded in 1984 that the apartheid regime was illegal, that the people of South Africa have a right to overthrow the government and to receive outside assistance during their struggle for political self-determination—what we term self-determination assistance involving the use of military force. Such outside armed force by other members in support of the people of South Africa did not occur, but the regime fell in the face of other forms of sanction and internal revolution. It is another example of Security Council and General Assembly inroads of sovereignty—inroads that are lawful and preferred by the international community in given contexts.

Another permissible inroad on sovereignty that can result in the use of armed force involves what the United Nations Charter terms “regional action.” Under Article 52 of the Charter, a regional organization concerned with peace and security can authorize “regional action,” at least until the Security Council decides that such is not appropriate, which decision of the Council would be subject to a veto by one or more of the five permanent members of the Security Council. “Enforcement action” as such can only be authorized by the Security Council, but the Charter expressly recognizes the possibility of “regional action” by a relevant regional organization, and such action would clearly be a permissible inroad on state sovereignty.

Use of armed force in Kosovo in the 1990s under the authorization of NATO was an example, although, in my opinion, too many European states and text-writers have not agreed on the propriety of use of force in Kosovo. Recently in the case of Libya, the Arab League authorized use of force to create a no-fly zone over Libya before the Security Council acted to do the same and to further authorize use of armed force in Libya to protect civilians from armed attacks and threats of armed attack. The United States

was involved in the 1960s in a regional action when interdicting Soviet missiles from coming into Cuba, under an authorization of the O.A.S. The U.S. did not say that it was engaged in a self-defense operation under Article 51 of the Charter. The U.S. stated that it was engaged in a regional action, according to an authorization from a regional organization; the U.S. was very careful not to mention the word “blockade,” which is an act of war, but that it was interdicting Soviet vessels. The remainder of my remarks will focus on issues concerning sovereignty, human rights, and the laws of self-defense and war in connection with U.S. use of armed drones in Pakistan as well as in Yemen. While doing so, I will address points that have been made in far more detail (often with extensive footnotes) in my article in Florida State University’s Journal of Transnational Law on *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*.

One of those points involves some disagreement with Colonel Wollschlaeger and others concerning the status of the ongoing armed conflict in Afghanistan and parts of Pakistan where the actual theatre of war has migrated. The Colonel was discussing issues concerning combatant status and combatant immunity of our military personnel that can pertain in case of an international armed conflict. Importantly, if the United States sends its armed forces abroad to engage in fighting and they engage in combat, we should recognize that such conduct has internationalized whatever armed conflict had been occurring, that our military personnel are participating in an international armed conflict so that they can have combatant and prisoner of war status as well as combatant immunity for lawful acts of war that pertains during an international armed conflict. What specifically does that give them? To lay this out a little bit more, any lawful military action during an international armed conflict is immune from criminal prosecution, and if you are not a combatant with combatant immunity, you are an unprivileged fighter, like various members of al Qaeda. Moreover, members of al Qaeda are not likely to be “combatants” as that term is used in the laws of war. Under the normal test, which requires that they be members of the regular armed forces of a party to an international armed conflict (such as the Taliban), most members of al Qaeda would not have combatant status. They would be unprivileged fighters that had engaged in actual fighting or unprivileged belligerents. I would not use the word “combatant” or the word “belligerent” because it gets confusing. Combatants are members of the regular armed forces of a party to an international armed conflict. They are subject to criminal prosecution for any unprivileged conduct, not as a war crime, but as the Colonel recognized, under relevant domestic law. Relevant domestic law might include that of Yemen, Pakistan, Afghanistan, or the United States. For example, members of al Qaeda who engage in unprivileged fighting or violence are subject to prosecution for murder for killing another person. The U.S. soldier fighting in Afghanistan would not be if the U.S. soldier has

combatant status and combatant immunity and kills in an otherwise lawful manner under the laws of war. That's why I think we should protect our military personnel by recognizing that they are participating in an international armed conflict whenever they are deployed abroad to engage in fighting.

Under 19th Century international law, if the U.S. aided a recognized government to fight insurgents, the U.S. would not be involved in an international armed conflict. Yet, if the U.S. aids the insurgents fighting the government, it is well recognized that the U.S. is engaged in an international armed conflict. And if you are directly involved in a belligerency, like the United States armed forces during the U.S. Civil War (when the Confederate States of America (CSA) controlled territory as its own, which al Qaeda never has; the CSA had the semblance of a government, which I don't think al Qaeda has had; the CSA could field military units in sustained hostilities, and I don't think al Qaeda has done that; and when the CSA had outside recognition as a belligerent by England and certain other countries and, therefore, met the test for a belligerent), you are directly involved in what is known as an international armed conflict to which all of the customary laws of war apply.

Moreover, under the laws of war, it is the fact of war that determines—that drives application of the laws of war and proper labeling of the conflict. So we should be looking at actual context, and it is not critical whether a particular state has recognized that it is involved in a war or international armed conflict. The critical issue is whether there is in fact an armed conflict—what is termed a *de facto* armed conflict. This criterion, the fact of war, is relevant to proper consideration of the fighting or armed conflict occurring in Pakistan, especially around fluid border areas near Afghanistan. Our soldiers are getting killed and wounded in and near those areas and we are killing and wounding an enemy, at least the Taliban. The armed conflict has migrated, as a *de facto* theatre of war, into Pakistan and the laws of war provide rights and duties as well as competencies in terms of who you can target and when you can target them. Application of the laws of war to this expanded international armed conflict should be part of one's use of the war and law of war paradigms and part of the recognition that they are applicable to parts of Pakistan even though one can disagree with the Bush Administration and the Obama Administration when they have stated that we are at war with al Qaeda (a non-state actor that has never achieved the level of an insurgent) because under international law the U.S. simply cannot be at war with al Qaeda as such.

Of course, we were at war with the Taliban, especially when we went into Afghanistan on October 7, 2001 and were immediately fighting their regular armed forces and, with some embarrassment, discovered military personnel from Pakistan who were helping the Taliban fight the Northern Alliance during an international armed conflict that had been at least a belligerency. Members of al Qaeda within that theatre of war were covered

under the laws of war. They had rights and duties as civilians and could be prosecuted under domestic law as unprivileged fighters, but they would not have been combatants or entitled to prisoner of war status like members of the regular armed forces of the Taliban. John Walker Lindh reportedly took an actual oath of allegiance with the Taliban military, and he might have been considered a combatant and entitled to combatant immunity for lawful acts of war, like shooting at enemy soldiers, but I suspect that his defense counsel did not adequately raise such claims before a relevant court. In any event, enemy combatants such as members of the armed forces of the Taliban and civilians who are taking a direct part in hostilities (DPH) are also lawfully targetable during an international armed conflict. Certainly each of these points about status, competencies, rights and duties under the laws of war are also potential inroads on state sovereignty, inroads that are applicable in the context of war.

One such inroad during war and within the war and laws of war paradigms involves who you can lawfully target in a foreign country when the *de facto* theatre of war has migrated to such a country. In the case of parts of Pakistan, for example, where the top Taliban leader in Pakistan is directly involved in operations and is directing attacks on U.S. soldiers in Afghanistan, the top Taliban leader in Pakistan can be lawfully targeted without Pakistani consent. This is because the theatre of war is partly there, over the head of the Taliban leader, as it was over the head of Osama bin Laden. If there was a breach of the neutrality of Pakistan and its sovereignty, it was a breach by al Qaeda and the Taliban. And it should be noted that private individuals and other non-state actors can breach neutrality under international law. For example, in 1793 the United States prosecuted Gideon Henfield, a private actor, for his conduct in breach of U.S. neutrality with respect to the war between England and France.

With respect to U.S. use of armed force in Pakistan to target those who are lawfully targetable under the laws of war and during a *de facto* war that has migrated into parts of Pakistan, some might claim that the United States would need the consent of Pakistan for each such targeting, that the targetings are violations of Pakistani sovereignty. As noted, however, such a claim would be incorrect. Such lawful inroads on sovereignty are permissible when viewing the use of force under war and law of war paradigms. But the alternative that one should use, some might say, is a law enforcement paradigm. Well, generally under international law, if one uses merely a law enforcement paradigm and the state is in a law enforcement mode, the state can only engage in law enforcement in a foreign state with the consent of the highest level officials of the government of that foreign state—therefore, with the consent of the government in the territory from which the attacks are emanating. With respect to armed attacks emanating from Pakistan, I would say that the situation is not simplistically one involving law enforcement or the law enforcement paradigm, especially when the U.S. is targeting the top Taliban leader who is involved in

ordering the killing of U.S. soldiers, or training people, directing operations from maybe a computer or cell phone, and so forth.

With respect to Yemen, when the United States targets a member of al Qaeda who is directly involved in armed attacks on the United States or even U.S. military in Afghanistan, is this a circumstance to be addressed simplistically as a mere law enforcement paradigm? If a member of al Qaeda is giving orders to kill U.S. soldiers in Afghanistan, has the theatre of war migrated to Yemen where he actually engages in such conduct? I would say yes, and it is not necessary to argue that we are at “war” with al Qaeda.

Are we stuck with two or three paradigms—a war and law of war paradigm on the one hand and a law enforcement paradigm on the other? My article on self-defense targetings demonstrates why the answer is no. There is another paradigm that we should be thinking about. It is the self-defense paradigm and it involves inquiry into the legality of conduct under Article 51 of the U.N. Charter. The article provides a great deal of detail concerning the propriety of targetings in a foreign state as a matter of permissible self-defense.

After 9/11, even some writers who were opposed to that kind of interpretation of Article 51 came on board. Article 51 states that use of force is permissible in the case of an armed attack. It does not limit permissibility of self-defense measures in terms of who engaged in an armed attack. Moreover, patterns of practice and patterns of expectation about such practice demonstrate, especially after 9/11, that a state can engage in self-defense against those who are attacking the country, its embassies abroad, and its military abroad. And it is fairly well recognized that an attack on a state’s nationals is an attack on the state. Al Qaeda has been attacking our nationals, at least since its attacks on our embassies, the attack on the USS Cole, and the attack on 9/11, and they continue to attack our soldiers, at least our soldiers in Afghanistan.

In Yemen, do we have a U.S. national who is engaged in more than recruiting people and propagandizing for al Qaeda? Is this person involved in operations? Think about the underwear bomber who came from Yemen and the bags that were placed on a FedEx aircraft and you start to see an interesting picture: maybe he is also directly involved in operations. And if he is, as noted more generally in my article, and we are outside of the context of war, we would not be talking about a person who was DPH (a Direct Participant in Hostilities) and a targetable civilian. But he could be a DPAA (a Direct Participant in Armed Attacks). If an al Qaeda operative is directly participating in armed attacks against the United States, I point out that he is targetable under the law of self-defense in time of peace or in time of war wherever he is engaging in such conduct. There is no geographic limitation on exercise of the right of self-defense. Clearly, permissible self-defense targetings can be an inroad on sovereignty and any other geographic limits.

I would like to challenge you to think about this further, but my conclusions have been that a state can use military force to target non-state DPAA who engage in such conduct within a foreign state, using the general principles that are well recognized to condition military force, under use of force principles of reasonable necessity and proportionality, and borrowing somewhat from related principles of the laws of war. In terms of the principle of distinction under the laws of war, we distinguish between civilians and DPH civilians (who are targetable) and combatants (who are targetable); and under the self-defense paradigm, one can use the same background or basic principles of reasonable necessity and proportionality and apply them as part of inquiry concerning restraints on the use of force.

Moreover, the United States and any other state that is being attacked by a non-state actor does not need special consent of the territorial state from which those attacks emanate. This may be problematic for some of our neighbors to the south who have for a hundred years been leery of Big Brother intervening, under various pretexts, in their countries. We generalize that a lot of Central American, especially Mexico, and South American states are very restrictive in their interpretation of Article 2, paragraph 4, of the U.N. Charter as if it prohibits all armed force instead of merely the three categories of force expressed therein. And they are very restrictive more generally about permissibility of use of force in self-defense. I am much more open regarding the proper interpretation of Article 2(4), but I agree with many others that in cases of self-defense under Article 51, you need an armed attack. In any event, with respect to al Qaeda, there has been a process of armed attacks against the United States and its nationals and we do not need the consent of the territorial state from which those attacks emanate in order to engage in legitimate responsive measures of self-defense.

Of course, this may create some diplomatic problems, but there has often been acceptance of such forms of self-defense. For example, there was acceptance during the famous *Caroline* incident in 1837 when the U.S. was rather weak and the British oppressors in Canada were still controlling Canada. At that time, there was an insurgent group of about one thousand people that had marched to Toronto and had failed to take over Toronto, but they took over Navy Island, near Niagara Falls. The *Caroline* was a ship that, on the day that it was attacked, had traversed back and forth into Canadian waters and had delivered arms, ammunition, and personnel to support the insurgency. It was targetable under the law of self-defense, but the U.S. and Britain disagreed whether the actual targeting was necessary under the circumstances. The British sent two teams into the U.S. and destroyed the *Caroline*. They did it at night, and as it was burning, it went over Niagara Falls. There were two deaths—one dead for sure and one missing. We complained that the British were using military force in our country without our consent. We recognized that Britain (on behalf of Canada) had the right of self-defense. The whole debate was about the

propriety of actual measures of self-defense that the British used. Self-defense against non-state actors—the insurgents—was not a problem, but we claimed that the method and means used had to meet a test that we preferred, although the British disagreed with the test. Under our fairly restrictive test at the time, there had to be an instant, overwhelming necessity tied to the actual method that they chose and, in context, they could have waited in those days until that U.S. ship entered Canadian waters. It would have been rather easy to grab the ship at that point as opposed to entering U.S. territory.

During the debate, U.S. Secretary of State Daniel Webster addressed sovereignty. He stated that sovereignty is an important or major principle that is related to equality, but we recognized that another major principle also exists: the right of self-defense, and in context, the right to engage in self-defense against non-state actor attacks without the consent of the territorial state. Nonetheless, Webster claimed that the British method and means violated relevant principles of necessity and proportionality. Later, one of the British participants wrote that there was no doubt that if there had been an artillery emplacement in the United States and it was firing across the river, the British would have had the right to take out that artillery emplacement. It is my point that such a claim would be correct today, that you can target the artillery emplacement without the consent of the territorial state.

One point needs to be emphasized because some text-writers have claimed that if you are not under the law of war paradigm, you have to meet the standards for law enforcement measures and you have to get consent from the territorial state. There is a stricter test of necessity in a law enforcement setting as such, and such claimants sometimes point to a restrictive view expressed by the European Court of Human Rights. However, the European Court has also recognized, for example, that Russia, with respect to the Chechnya conflict, was not simplistically involved merely in a law enforcement paradigm and necessity gave way to the type of reasonable necessity that is tolerated in the law of war context. From my perspective, when the right of self-defense against non-state actor armed attacks is claimed, we do not need the consent of the territorial state and we do not have to be at war with the state from whose territory the non-state actor attacks emanate. The United States and Britain did not think they were at war during the *Caroline* incident, and they were not. When Bill Clinton sent 75 cruise missiles into Afghanistan to take out al Qaeda, we did not think we were at war with Afghanistan and the international community did not think that there was an armed conflict between the United States and Afghanistan. Yet, after 9/11 occurred we did participate in an international armed conflict—in part because we did not merely go after al Qaeda, we also went after the Taliban.

Some raise another paradigm—a human rights paradigm. When one considers actual trends in decision over time and the many evidences of

patterns of legal expectation, at least from the 1860s, it is obvious that human rights apply during war. The critical questions are: what human rights apply, to what person, and in what context? One such human right is the right to life. What is the human right to life? I have read claims that the use of drones to target people in Pakistan may be a violation of the victims' or the targets' human right to life. Is that true? The human right to life, as phrased in various documents, is recognized as a freedom from "arbitrary" deprivation of life. But what is an "arbitrary" deprivation of life in the context of permissible self-defense or war? Moreover, human rights law does not reach certain persons unless they are within a state's jurisdiction or effective control. Was the top Taliban leader in Pakistan who was targeted by a drone within the jurisdiction of the United States? Not under international law. Was that person in our effective control when the drone might have been at 10,000 feet? Not in my opinion, and I think not in terms of common sense. If so, human rights law did not provide relevant protection to such a person. Moreover, if it had applied, the freedom with respect to the right to life would have been a freedom from arbitrary deprivation of life. You are lawyers, or going to be lawyers. You know that that word is malleable. It is the kind of word that you can drive trucks through. It is not self-operative. It has to be applied in context. It's a lower standard than that under the laws of war or the law of self-defense—much looser than reasonable necessity and proportionality in terms of targeting. In a given case, it may not be necessary to target someone, but it also may not be arbitrary to do so.

So human rights law does apply, but who does it apply to, and where, and who is in your jurisdiction or effective control? What exactly are the human rights that are at stake? When a state controls a detainee, of course, the detainee is in the effective control of the state, even if the detainee is outside the jurisdiction of the state and, of course, the state cannot lawfully engage in torture, cruel treatment, inhuman treatment, or degrading treatment. As we now know, such was part of an admitted policy and program of George Bush. He stated in October 2006 that he had a program of secret detention (which involves admitted crimes against humanity) and enhanced interrogation which included waterboarding—which the world knows amounts to torture and, if not, at least to cruel and inhuman treatment. Mistreatment of a detainee violates human rights law in time of peace or war, as well as the laws of war during war.

Finally, there have been some interesting aspects about who is targetable during war that were raised by the Colonel, concerning who is a DPH and, therefore, who is targetable during war. I would like you to also think about persons who are DPAA when using the self-defense paradigm. What restraints on the use of force would you recommend, and why? If you think we should change the law, if we should change it in a certain direction, what would you recommend and why?