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US Attacks Inside Pakistan Territory: An Insight on International Law and Use of Force

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Post September 11, 2001 era gave new dimensions to the use of force under international law. New interpretations of the doctrine of self-defence emerged alongside the invention of the doctrine of pre-emptive strike devising legitimacy for the use of force. Where there are increasing concerns of international community for fully reliable evidence, as opposed to assumptions and probabilities, which may provide basis for a pre-emptive military action, there is fundamental jurisprudential divide among international lawyers over the circumstances that may give a legitimate right to pre-emptive use of force.

Although the issue of pre-emptive use of force is equally important in case of a full-fledged declaration of war against a State, such as the US invasion of Iraq, the most significant contemporary issue concerns the legitimacy of cross-border military action against the so-called “irregulars” hiding out and operating from a foreign territory, such as the US drone strikes on Al-Qaeda hideouts in Pakistan. The issue becomes even more problematic from an international law perspective if the target State is itself active against the targeted irregulars.

The Charter of the United Nations (the UN Charter) prohibits the use of force. Article 1 of the UN Charter envisages suppression of acts of aggression or other breaches of the peace. In Article 2(4), the UN Charter gives substance to the general statement contained in the Article 1 as follows:

“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state…”

In addition to the treaty law contained in the UN Charter, the International Court of Justice (the ICJ) in the famous Nicaragua v. USA (1986) case has affirmed, in similar circumstances, the prohibition of use of force in the customary international law. In this case, the ICJ clearly ruled that the US could not invoke the right of self-defence to justify the use of force against Nicaragua, although it was proved that Nicaragua had provided support to anti US irregulars.

The Congo v. Uganda (2005) is perhaps the most relevant case for this discussion. In this case, the ICJ ruled that Uganda was not legally entitled to use force against irregulars violating Congo’s territorial boundaries in the pretext of the right of self-defence.

Some examples of similar military actions are the US attacks in Sudan, Somalia and Libya, Turkish strikes in Iraq, Israeli strikes in Palestine, Lebanon and Syria, and most recently, the Columbian military strikes on Ecuador.

In all these cases, the attacking states have alleged that the targeted States have been promoting or supporting the irregulars hiding within their territories. Such promotion or support is sometimes assumed from the failure of target States in taking action against the irregulars.

However, in both of the above noted ICJ cases, States that resorted to the use of force were able to prove that the target States were supporting the irregulars in their territories. In both of the above cases, to justify the use force, the attacking States relied on the undeniable alliance between the target States and the irregulars.

The US might still claim its right under international law to conduct drone attacks in the tribal areas of Pakistan alleging that Pakistan is supporting or has approved the acts of terrorists operating from Pakistani territory, although the reliability of such claim has been disapproved by the ICJ in the Nicaragua and Congo cases.

However, Pakistani armed forces have taken stern action and successfully eliminated irregulars hiding in Fata, Swat, Angora and many other Pakistani tribal areas neighbouring Afghanistan, which proves that the State of Pakistan is not supporting the irregulars in its territory. Yet, there are doubts in the mind of US policy makers on the willingness and capabilities of the Pakistani armed forces to fight against and eliminate the threat of terrorism. Why?

The other argument in favour of the US drone strikes could be that Pakistan has completely lost control on its territory in the hands of irregulars, and cannot contain them to operate across borders into Afghanistan. The ground work to devise justification for such argument has already started. The recent Congressional Research Committee report asserts that only 30% of the country is under effective writ of the government of Pakistan. What can be perceived from such reports?

The recently leaked US “rules of engagement” with Pakistan reveal that the US military gave its elite units broad authority long ago to invade Pakistan to attack perceived terrorist hideouts. The pre-emptive use of force against Iraq was justified on the grounds of a “rogue state” alleged to have large quantities of “weapons of mass destruction”. Such weapons were never discovered. Is Pakistan going to be a “failed state”, which has lost control on its territory?

There might be different views on the willingness and capabilities of the Pakistani armed forces to maintain effective control on its territory, the existing legal and factual flaws in the US drone policy have however created a degree of normative ambivalence. This is resulting in a rapid increase of anti US sentiments in Pakistan, a country well equipped with nuclear arms. With an acutely corrupt government, population living in a highly chaotic society and becoming increasingly poorer, Pakistan has all the required mix for
producing persistent suicidal masses if the US continues to disrespect territorial integrity of Pakistan in an apparent violation of international law.