

BOFAXE

Trumping Mexico's Sovereignty?

On a potential US extension of the "War on Terror" to a "War on Cartels"

President Trump [reportedly](#) planned to label Mexican drug cartels as foreign terrorist organizations, stating that the US considered to "go in and clear out". The Mexican response was quick to follow, expressing concerns about a possible US intervention and the concomitant threat to Mexico's sovereignty. Although President Trump has temporarily halted such designation in the face of Mexican protests (see [here](#)), questions remain: What (if any) consequences does the designation as a terrorist organization have under international law and what options does the legal framework provide to combat international terrorism without infringing upon state sovereignty? Importantly, labelling Mexican drug cartels as terrorist organizations would be a matter of US national law. Consequences under international law would only arise, if the international community followed the US in their designation. According to the customary definition (see [here](#), para. 85), international terrorism consists of criminal acts including transnational elements intended to create a state of terror in the general public or coerce an authority to do or refrain from doing something. The Mexican drug cartels are responsible for widespread and organized criminal activity and organized crime related killings in Mexico have cost roughly 150,000 lives since 2006 (see [here](#), at p. 3). Although the UN Security Council (UN SC) stated in its recent [Resolution 2482](#) that organized crime and terrorism are often linked, they are not equal. In case of the Mexican drug cartels the intent to cause a state of terror as well as the transnational element are doubtful, so that their terrorist status is at least not evident. Be that as it may, the purpose of this piece is not to undertake a precise legal classification of the cartels, but rather to assume, *arguendo*, terrorist status in order to examine what consequences this entails under international law.

Generally, Art. 2(4) [UN Charter](#) prohibits the use of force in the international relations of a state. As a matter of their sovereignty, states are, naturally, free to consent to the use of force on their territory against terrorists. The USA and Mexico already cooperate in the field of security and the fight against organized crime through various initiatives (e.g. the [Merida Initiative of 2008](#)). However, since this spring, [Mexico has contemplated ending the cooperation](#) and its government's reactions to Trump's statements make it unlikely that it would consent to a US military intervention on its territory. In this context, US use of force against the cartels would require justification. Art. 51 UN Charter provides the right to use force in self-defence for the victim of an armed attack. No major problem arises, where the conduct of armed groups (in this case the cartels) is attributable to a state. In this regard, the ICJ's [Nicaragua](#) (para. 115) and [Genocide](#) (paras. 398 et seq.) judgments provide guidance: the court held that the conduct of armed groups can be attributed, where the state exercises effective control over the group. Overall, Mexico rather combats than supports the cartels, so that the state is not connected in such a way to them that would justify attributing their conduct to Mexico.

This leads to the more interesting question, whether the US would be allowed to use force against the cartels under the premise that their actions are not attributable to Mexico. Given the context of Art. 51 in Chapter VII of the UN Charter, which is concerned with international peace, i.e. the peace between states, [it appears that Art. 51 solely aims to cover armed attacks conducted by a state](#) (also held by the ICJ in its [Wall Advisory Opinion](#), para. 139). In line with this, where states attempted to invoke Art. 51 against non-state actors (e.g. Israel or South Africa) this was not well received by the international community. The UN SC, for instance, reliably rejected such understanding of Art. 51 in the last century (e.g. in Res. [568](#) and [573](#)). Noteworthy though, its practice seems to have changed since the attacks of 9/11. In their aftermath, the UN SC has frequently expressed that its authority is not limited to interstate conflicts, but also encompasses conflicts between states and non-state actors and, importantly, has repeatedly stated that acts of terrorism constitute a "threat to the peace" in terms of Art. 39 UN Charter, making reference to self-defence in this regard (Res. [1373](#), [1368](#) and [1438](#)). While these resolutions show that the UN SC can take action against terrorists and specify the obligation of states not to support terrorism, they neither explicitly nor implicitly authorize the use of force against terrorists. However, the UN SC's recognition of the relevance of terrorism to Chapter VII of the UN Charter shows that the abovementioned contextual argument might not be the last word on the subject. This is all the more important since states increasingly often rely on Art. 51 to justify the extraterritorial use of force against non-state actors (e.g. ISIS or Turkey's operation Peace Spring in Syria).

To circumvent missing consent and the demanding criteria of attributing the conduct of non-state actors to states, two doctrines have gained importance over the last two decades. First, the safe-haven doctrine on the intentional harboring of terrorists within a State, initially used when the USA invoked Art. 51 to justify its attacks on the Taliban and Al-Qaida in Afghanistan. While the doctrine's legal recognition remains controversial, there is certainly no room for its application in this case, since Mexico has constantly been fighting the cartels and does not grant them a place of retreat or any other form of protection. Second, more recently, states have claimed that the territorial state had to tolerate self-defence measures, if it was itself unwilling or unable to prevent terrorist groups from cross-border attacks (the international intervention against ISIS being the most prominent example). As can be seen from Mexico's own efforts, it is clearly not unwilling to combat the cartels. However, in view of the scale and duration of their criminal activities, Mexico's ability to do so can be reasonably questioned.

Given this inability, would a US intervention be justified based on the unwilling or unable doctrine? Notably, this doctrine has been the subject of [criticism, especially after the operations against ISIS in Syria](#). In particular, the Latin American states ([ironically, above all Mexico itself](#)) lambasted the application of this extensive standard and expressed their concern that this reading of Art. 51 would lead to violations of their sovereignty. Moreover, no state practice or opinion juris to support this doctrine can be drawn from Turkey's invocation of Art. 51 to justify its military operation against non-state actors in Syria: Turkey did not specify on which grounds it invoked Art. 51 and, additionally, [the international community clearly expressed its conviction of the illegality of Turkey's operation](#). These critical reactions against an extensive reading of Art. 51, coupled with the silence of the majority of UN member states, illustrate that self-defence against non-state actors is not (yet) accepted under Art. 51. Hence, Mexican cartels do not qualify as perpetrators of an armed attack in terms of Art. 51. However, assuming that self-defence could be exercised against non-state actors, is the threshold of an armed attack even met? The recent (verbal) encounter between Mexico and the US was [triggered by](#) a Cartel ambushing and killing nine persons of dual US-Mexican citizenship in Northern Mexico, which would in and of itself clearly not suffice. Although much more large-scale attacks have occurred, they have been directed against Mexico, not the US. Moreover, Art. 51 would require the attack to be imminent, which does not cover acts of preventive self-defence. Instead, the Caroline-threshold ("*instant, overwhelming, leaving no choice of means, and no moment for deliberation*") remains decisive in determining the imminence of the armed attack – a criterion that is hard to establish considering the rather vague threat emanating from the cartels towards the US. In conclusion, Mexico's consent concerning a US extraterritorial intervention against Mexican cartels, terrorists or not, remains indispensable.