STATE PRACTICE ON THE USE OF FORCE AGAINST NON-STATE ACTORS: GENERATING NEW RULES OF CUSTOMARY INTERNATIONAL LAW

BY

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ABSTRACT

This research examines how states react to attacks by non-state actors from outside their territories since the coming into force of the Charter of the United Nations in 1945. Article 2 (4) of the Charter prohibits states from resorting to force in their international relations, a rule which has crystalized into a customary norm among states. This prohibition notwithstanding, states can use force in self-defence in response to an 'armed attack", a term understood to denote acts of states only. Notwithstanding, states have over the years resorted to forceful measures against non-state actors within the territories of other states apparently without satisfying the attribution requirement. Such practices, though not new, have gathered considerable momentum since the 9/11 terrorists' attacks on the United States of America leading to claims from states and authors alike, of the emergence of new customary rules. Considering the notoriety of the prohibition against the use of force in international law, this research investigates these claims. Using both doctrinal and non-doctrinal methodologies, the research surveys the relevant practices of states and the opinion of publicists on the issue. It finds that the 9/11 attacks have had tremendous effect on the way states and publicists react to and perceive attacks by non-state actors. Some states have claimed the right to self-defence against non-state actors without attributing their actions to the host-state. Such practices however, have been controversial and inconsistent, meeting stiff opposition from many states. Considering the requirements for the crystallization of new customary rules in international law therefore, the research finds that claims to new customary rules are premature, and not reflective of the general and uniform practices of states. It recommends among other things, that the UNSC fulfil its mandate of preserving global peace and security by taking timely and appropriate measures against all threats to international peace and security, including attacks by non-state actors and illegal use of force by powerful states.

خلاصة البحث

تبحث الدراسة في كيفية تعامل الدول مع الهجمات التي تستهدفها من قبل مجموعات غير رسمية من خارج إقليمها منذ دخول ميثاق الأمم المتحدة حيِّز التنفيد في عام 1945. حيث أن المادة 2 فقرة 4 من الميثاق والتي تحظر على الدول اللجوء إلى إستخدام القوة وهو ما تبلور في قاعدة عرفية تقضي بهذا الشأن، فإنها تُجيز في الوقت نفسه إستخدام القوة لدرء أي هجوم مسلح. إلا أنه وعلى الرغم من أنه يُفهم من النص المتقدّم أنه يقتصر على تنظيم إستخدام القوة بين الدول فيما بينها، إلا أنه وبالرجوع إلى تطبيقات هذه القاعدة يتبيّن أن الدول سبق لها وأن لجأت إلى إتخاد تدابير صارمة ضد الجماعات الأخرى غير الدول عند إرتكابها لأي خروقات لأقاليم تلك الدول، وعلى الرغم من ذلك، إلا أن تلك الممارسات لم تظهر في العلاقات الدولية بوضوح إلا بعد أحداث الحادي عشر من سبتمبر الإرهابية على الولايات المتحدة الأمريكية، مما تنامت معه إدعاءات وتوجهات بحثية تحاول التكريس لقاعدة عرفية جديدة لِتُطبَّق على مثل هذه الحالات. إلا أنه وبالنظر إلى مثالب إستخدام القوة في القانون الدولي، أستهدفت الدراسة التحقيق في تلك الإدعاءات، ومن خلال إستعراضها للممارسات ذات العلاقة والآراء التي تستند إليها تلك الإدعاءات بإستخدام المنهجين الكمي والنوعي، توصَّلت إلا أن الأحداث المتقدِّمة (9/11) كان لها الأثر البالغ في الطريقة العاطفية التي كُرِّست لتلك الإدعاءات، حيث أنها وعلى الرغم من عدم ربطها بين تلك الجماعات والدول المضيفة لها ضمن إطار الدفع بأحقيتها في الدفاع عن نفسها، إلا أن تُقرر ممارسات غير مُتَّسقة ومثيرة للجدل وتواجه معارضات واسعة من دول مختلفة، مما يُعيق إستقرارها كقاعدة عرفية ويجعلها سابقة لآوانها، مما نوصي معه بضرورة وفاء مجلس الأمن بمهامه في حماية السلم والأمن الدوليين تجاه تلك الجماعات وكذلم الدول القوية على حدٍّ سواء.

APPROVAL PAGE

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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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This work is dedicated to my biggest supporter, motivator, and role model; my late mother Aishatu Ahiwa Abubakar (Salti), for giving me her all. May The Almighty Allah forgive your shortcomings, and admit you to *Jannatul-firdaus*.

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LIST OF ABBREVIATIONS

9/11	The September 11, 2001 Terrorists attacks in the USA
ADF	Allied Democratic Forces.
ASEAN	Association of Southeast Asian Nations.
AU	African Union.
CIA	Central Intelligence Agency.
CIL	Customary International law.
CSO	Civil Society Organisations.
DRC	Democratic Republic of the Congo.
EU	European Union.
FARC	Revolutionary Armed Forces of Colombia.
ICJ	International Court of Justice.
ICTR	International Criminal Tribunal for Rwanda.
ICTY	International Criminal Tribunal for Yugoslavia.
ILC	International Law Commission.
INGO	International Non-Governmental Organisations.
ISIL	Islamic State of Iraq and the Levant.
ISIS	Islamic State of Iraq and Syria.
NLM	National Liberation Movements.
OAS	Organisation of American states.
OAU	Organisation of African Unity.
OSCE	Organization for Security and Co-operation in Europe.
PCIJ	Permanent Court of International Justice.
PKK	Kurdistan Workers' Party (Kurdish: Partiya Karkerên Kurdistanê).
PLO	Palestine Liberation Organization.
UAE	United Arab Emirate.
UK	United Kingdom.
UN	United Nations.
UNGA	United Nations General assembly.
UNSC	United Nations Security Council.
USA	United States of America.
USSR	United Soviet Socialist Republic.
VCLT	Vienna Convention on the Law of Treaties.
WMD	Weapons of Mass Destruction.

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CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

The emergence of the United Nations (UN) after the Second World War was a deliberate step towards averting the violence that hitherto characterised international relations. This much was reiterated as a basis for its formation as reflected in the preamble to the UN Charter.[1] As a result, the UN Charter explicitly prohibits nations from unilaterally resorting to the use or threat of force in their international relations with other nations.[2] The prohibition on the use of force in international law has since crystallised into a customary norm in international law.[3] This notwithstanding, nations are allowed to use force in cases of self - defence as a response to an "armed attack":[4] in addition, the Security Council may permit collective measures to preserve universal peace and security.[5]

However, as clear as the position is that states are prohibited from resort to force in international law, there have been arguments both from the academia and states as to the scope of the exception under article 51 of the UN Charter as it relates to self - defence.[6] It has not been argued that states cannot forcefully defend themselves; the

[1] Charter of the United Nations (adopted in San Francisco, adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter), preamble.
[2] Ibid., Art 2 (4).
[3] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits*) [1986] ICJ Rep 14. (hereinafter, *The Nicaragua Case*).
[4] UN Charter, Art 51.
[5] UN Charter, Cap VII.
[6] See the arguments of both Iran and the USA in *The Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ Rep 161. (hereinafter, *The Oil Platforms Case).*

argument has rather been "when can a state use force in self –defence." This brings to fore, the question of defensive force in response to attacks by non-state actors; notwithstanding the fact that states can use unilateral force in cases of an "armed attack", it had been understood that only states can carry out what could amount to an "armed attack".[7]

State practice since 1945 however indicates a pattern of frequent resort to force by states when confronted by non-state actors outside their borders justifying same as self-defence. This has become even more worrisome and pressing after the September 11, 2001 (9/11) attack on the USA besides the consequent declaration of the "war on Terror". These practices have been the subject of academic and judicial debates with scholars and legal luminaries proffering legal interpretations from both sides of the divide. While some see these practices as a clear and gross violation of international law, others justify them, or at least some of them, citing legitimate reasons in international law. Because these practices have become widespread and repetitive, they tend to raise the question whether the initial interpretations proffered reflect the contemporary position in international law; or are states departing from the norms on resort to war in international law. The frequency of these actions and the manner the international community has reacted to them in contemporary days amplifies this argument. Initially, there were wide and sustained condemnations of such actions believing them to be a violation of the law. With time however, these criticisms and oppositions have fiddled away giving way to gradual indifference, acquiescence, and even outright support.

[7] *The Nicaragua Case (Merits) 14, Para 195.*

The international community having no common legislator develops its laws by way of common practices referred to as custom or state practice among other sources. When states behave in a way for a long duration with the understanding that such behaviour is law (*opinio juris*), then there may be the presumption that such a behaviour amounts to a customary rule.[8] The jumbled nature of the emergence of customary rules notwithstanding, it constitutes an important source of international law and can undo or displace an existing rule or practice. This is so because states as sovereigns bind themselves in ways of their choosing: as such, whenever they indicate an intention to create new rules or change existing ones, all that is required is a clear move towards that intent.

Moreover, while contemporary state practice is rife with instances of states resorting to forceful measures against rebels, insurgents and terrorists outside their borders – a position also supported by some academic commentators, the legality of such practices has been the subject of debates.[9] Consequently, global state practice regarding unilateral use of force in response to attacks by non-state actors has been at the least complicated and somewhat unsettled. State practice in this area has led to quite some questions relating to the sovereignty of states on matters within their domestic jurisdictions. In the same vein, what happens to victim states' right to self - defence from an attack being planned or executed from across its frontiers? It is thus necessary to reconcile the unquestioned sovereignty of the host nation and the defensive rights inherent in other nations.

While states are entitled to defend their respective territories and populations from external armed attacks by other states, the matter is not as straight forward as it

[8] Malcolm N Shaw, *International Law*, (Cambridge: Cambridge University Press, 2008), 76.
[9] René Värk, "The Use of Force in the Modern World: Recent Developments and Legal Regulation of the Use of Force," *Baltic Defence Review*, vol. 2, no. 10 (2003): 27–44.

may look regarding non-state actors. The difficulty is partly brought about by the fact that they do not, legally speaking, have territories of their own. Thus, while trying to defend itself against such non-state actors, a state is also faced with the act of intruding into the frontiers of a sovereign nation which is also entitled to defend its territorial integrity and populations against external aggression. This has led to the development of the "unwilling" and "unable" doctrines to the effect that a state may respond to attacks by non-state actors outside its frontiers where the state from whose territory the attacks are coming is not able or not willing to curb them. How that is to be determined however, has proved to be another controversial and debatable topic.[10] Whether the "unwilling or unable" concept is a true reflection of contemporary international law is in itself debatable.[11]

Consequently, state practices on the use of force in response to attacks by non-state actors have been as complex and ambiguous as the theories and debates. From the coming into force of the UN Charter in 1945 to date there have been several instances of use of force by states in response to attacks or perceived attacks by non-state actors. But then, even those instances where force was used under claims of self-defence have not been clear cases - legally speaking at least. This is not unconnected with the fact that the attacks originate outside the borders of these nations, thus without consent from such a state, it becomes difficult to justify any unilateral use of force on its territories; yet it has been done repeatedly.

Furthermore, there was a "coalition of the willing" led by the US to nib the activities of *al-Qaida* in Afghanistan considered as imminently hostile against the US

[10] Ashley S Deeks, "'Unwilling or Unable': Toward a Normative Framework for Extraterritorial Self-Defense", *Virginia Journal of International Law,* vol. 52, no. 3 (2012): 483–550.
[11] Paulina Starski, "Right to Self-Defence, Attribution and the Non-State Actor – Birth of the 'Unable and Unwilling' Standard ?, *ZaöRV,* vol. 75, no 2 (2015): 456.

and its Western allies. The US invasion of Afghanistan stimulated debates regarding new concepts of self-defence against non-state actors. Of course, the September 2001 attacks on the US, resulted in irresistible sympathy on the backdrop of which the US military activity was hinged. Support for the US notwithstanding, questions arose as it relates to the legality of such an action. International law commentators were divided on the legality or otherwise of the military action: while some were quick to justify the action, others faulted its legal basis.[12]

The prolonged US led war against ISIS and similar groups, on the one hand, and Russia and Iran on the other in the Syrian conflict is still evolving though not the least controversial. Also, worthy of note here are the activities of Saudi Arabia and some Gulf countries against the Houthi rebels on the one hand and Iran on the other, regarding the Yemeni crisis. Though said to have been carried out pursuant to the invitation of the state in question, it also brings about the issue of consensual use of force and its legality under the current legal regime. As stated earlier, where non-state actors use a nation's territory, some writers suggest the 'unwilling or unable' principle to conclude that nations at the receiving end of attacks may respond in self-defence subject to first appeal to the host nation for permission.[13] Where the 'host state' permits the 'victim state', then that is easily settled as consensual and thus non-blameworthy. The problem however arises where the host state declines to give such permission notwithstanding the fact that it is a victim of hostile and violent activities emanating from the host state.

In addition, there are instances where the government of the host state might have lost control of its territory to rebel groups which have become strong and controls some parts of the territory of that state. In this situation, can permission by the

[12] Dominika Svarc, "The Military Response to Terrorism and the International Law on the Use of Force", *Political Perspectives,* vol. 1, no. 1 (2007): 7.
[13] Deeks, 507.

government authorising use of force against rebel or opposition forces be deemed legitimate in international law? This question is apt as the rebel or opposition group has already constituted itself into the authority within the territory it controls. Thus, seen from this perspective, an attack on such a 'non-state actor' tantamount to waging war against the government of the territory. This obviously is the position with respect to the activities of Saudi Arabia and its allies against the Houthis in Yemen and that of Russia and Iran against the opposition groups in Syria.

Moreover, where the government of a state loses control of a substantial part of its territory to an organised non-state actor which constitutes itself as a threat to other nations, can these victim states legally use force against such a group? This problem is manifest in the fact that notwithstanding the host state's failure to manage and police its area, it remains the legitimate government of that territory in law. Hence where it does not authorise another nation, any such use of force contravenes article 2 (4) of the UN Charter. However, where a state is witnessing consistent and destructive attacks from a 'non-state actor' being planned and orchestrated from outside its borders, it may seem absurd to expect such a state to be aloof to such attacks. The legality of a state's action against such 'non-state actors' could hence, only be hinged on its 'right to self-defence'. Having said that, article 51 of the UN Charter is only recognised in cases of an "armed attack"; the perpetrator of which can only be a sovereign nation.[14]

Most controversial however, is a situation where a nation which was not attacked by a 'non-state actor' outside its borders decides to use force against them. What could possibly be the legal reasoning in support of such a measure? Arguing from the perspective of self-defence may not hold water as there was no "armed attack" even in

[14] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment) (2005) ICJ Reports 168, para 146-7. (Hereinafter, *DRC v Uganda*). See also *The Nicaragua Case (Merits*) 14. Para 195.