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THE RIGHT OF SELF-DEFENCE OF STATES

BY

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ABSTRACT

The very essence of self-defence is to defend the territorial integrity and political independence of a State against the armed attack of another State. Nevertheless, what some States are now doing is abusing the right of self-defence. The right has been a useful tool in the hands of powerful States that violate the sovereignty, or intervene in the affairs, of weaker States in the name of self-defence. Governments of powerful States and jurists who support the policy of their own Governments have attempted to widen the scope of the right. Their main argument is that, States have the right of self-defence, entrusted to them by customary international law, which is much wider than that enshrined in Article 51 of the Charter of the United Nations. They rely on the *Caroline* incident that occurred at a time when States had unfettered right to use force. However, the fact is that the law governing the use of force has been radically changed with the emergence of the United Nations. The Charter in Article 2(4) prohibits the use of force in international relations.

The main objective of this research is to examine the true legal character and extent of the right of self-defence of States. To achieve this, the present writer explores the correct approach to the interpretation of Article 51 of the Charter in the light of the principle of non-use of force declared in Article 2(4). Customary international law on self-defence developed after 1945 has also been scrutinized on the basis of the contemporary State practice.

The research primarily focuses on the fact that the principle of non-use of force embodied in the Charter is of an imperative nature, that is, its observance is mandatory for all States. Certain exceptions from this prohibition are directly and clearly prescribed by the Charter, which allows for no other arguments or excuses to justify any State's departure from this principle. The right of self-defence of States enshrined in Article 51 is the only exception for unilateral use of force. Article 51 restricts the use of force in self-defence to the very specific case of the reaction to an 'armed attack', that is, of an attack that has already been launched by one State against another State. The present writer has shown that the views that self-defence would justify anticipatory attacks, or attacks aimed at protecting nationals or property abroad which is in danger, or attacks against a State which has supported terrorist acts, have no basis in the Charter. The major thrust of the present research is that only armed attack against a State could justify the use of force in self-defence.

ملخص

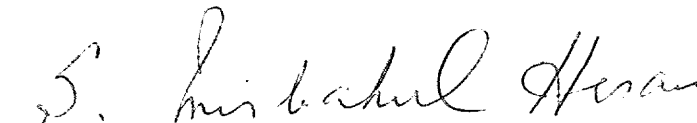
إن جوهر مبدأ الدفاع عن النفس هو الدفاع عن كمال الأراضي والاستقلال السياسي لأي دولة تعرضت لهجوم مسلح من دولة أخرى. إلا أن بعض الدول أساءت استخدام هذا الحق حيث صار وسيلة في يد بعض الدول القوية تنتهك بموجبه سيادة الدول الضعيفة أو تتدخل في شؤونها باسم الدفاع عن النفس.

وقد حاولت بعض الحكومات وبعض رجال القانون الذين يؤيدون سياسات حكوماتهم توسيع دائرة هذا الحق. وأقوى حججهم في ذلك أن الدول لها حق الدفاع عن النفس كما خوَّها بذلك عرف القانون الدولي. وهذا الحق أوسع من ذلك المقرر في البند 51 من ميثاق الأمم المتحدة. يعتمد هؤلاء القانونيين على حادثة "كارولين" التي وقعت في وقت كانت فيه الدول تمتلك حقاً غير مقيد لاستخدام القوة. لكن بظهور الأمم المتحدة تغير القانون الذي يحكم استخدام القوة تغيراً جذرياً. فالبند 2(4) من ميثاق الأمم المتحدة يجرم استخدام القوة في العلاقات الدولية. أن الهدف الرئيسي من هذا البحث هو استطلاع الوضع القانوني والبعده الحقيقي لحق الدفاع. ولتحقيق هذا الهدف يستطلع البحث التفسيرات الصحيحة للبند 51 من ميثاق الأمم المتحدة على ضوء مبدأ عدم استخدام القوة المعلن في البند 2(4). تستعرض الدراسة كذلك العرف القلنوني الدولي المتعلق بحق الدفاع والذي طوّر بعد 1945 بناء على العمل المعاصر للدول.

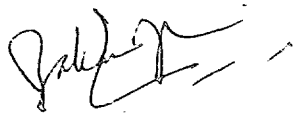
يركز البحث أولاً على أن مبدأ عدم استخدام القوة المجسد في ميثاق الأمم المتحدة مبدأ ضروري وتجب مراعاته والالتزام به على كل الدول. ثم إن بعض الاستثناءات عن هذا الحظر قد بينت بوضوح في ميثاق الأمم المتحدة بحيث لا تترك مجالاً لاحتجاج أو عذر يبيح لأي دولة تخليها عن هذا المبدأ. إن حق الدفاع عن النفس للدول المنصوص عليه في البند 51 من ميثاق الأمم المتحدة هو الاستثناء الوحيد لاستخدام القوة. ويحصر هذا البند استخدام القوة في حالة محددة، حالة الرد على "هجوم مسلح"، هجوم قد شن بالفعل من دولة ضد أخرى. وقد بين الباحث بطلان الرأي القائل بأن حق الدفاع يبرر استخدام القوة ضد هجوم متوقع أو هجوم يهدف لحماية رعايا أو ممتلكات دولة في حالة خطر في دولة أخرى أو هجوم ضد دولة تساند الإرهاب، إذ أن هذه التبريرات ليس لها أساس في ميثاق الأمم المتحدة. إن أهم نقطة في هذا البحث هي أن الهجوم المسلح ضد دولة أخرى هو المبرر الوحيد لاستخدام القوة كدفاع عن النفس.


APPROVAL PAGE

The thesis of Khin Maung Sein @ Abdul Ghafur Hamid has been examined and is approved by the following:


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* This thesis was approved by Prof. Tan Sri Datuk Ahmad Mohamed Ibrahim before his demise.

DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references and a bibliography is appended.

Name.....Khin Maung Sein @ Abdul Ghafur Hamid

Signature.......... Date..... 16 - 10 - 1998

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**IN THE NAME OF ALLAH, THE MOST GRACIOUS,
THE MOST MERCIFUL**

To my parents U Maung Sein and Daw Khin Yi:

May Allah grant them His Mercy

And the reward in the Hereafter

For the care and affection with which they have nourished me.

Also to my beloved wife San San May:

With deep appreciation for her love,

And encouragement.

And to my loving daughter Yi Mon Theint

And sons Zaw Zaw Htike and Kyaw Kyaw Htike.

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General Assembly Resolution ES-7/9, 14 September, 1982.
General Assembly Resolution 38/7, 2 November, 1983.
General Assembly Resolution 39/50 A, 12 December, 1984.
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General Assembly Resolution 41/31, 3 November, 1986.
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United Kingdom Treaty Series. 1892 - .
United Nations Treaty Series. 1946 - .
Yearbook of the International Law Commission, 1949 - .
Yearbook of the United Nations, 1946 - .

LIST OF ABBREVIATIONS

A. D.	Annual Digest of Public International Law (1919-1949)
A. J. I. L.	American Journal of International Law (American Society of International Law, Washington D. C., 1907-)
All E.R.	All England Law Reports
A. P. S. R.	American Political Science Review (Washington D. C., 1906 -)
A. S. I. L. Proceedings	Proceedings of the American Society of International Law (Washington D. C., 1907 -)
Belgian R. I. L.	Belgian Review of International Law
B. S. F. P.	British and Foreign States Papers (1812 -), published by Her Majesty's Stationery Office
B. P. I. L.	British Practice in International Law
Brooklyn J. I. L.	Brooklyn Journal of International Law
B. Y. I. L.	The British Yearbook of International Law (1920 -)
Cal. L. R.	California Law Review (Berkeley, 1912 -)
Cam. L. J.	The Cambridge Law Journal (London, 1921 -)
C. J. T. L.	Columbia Journal of Transnational Law
Cmd.	United Kingdom, Command Papers (1919-1956)
Cmnd.	United Kingdom, Command Papers (1956-)
Col. L. R.	Columbia Law Review (New York, 1901-)
Cor. L. R.	Cornell Law Review
D. S. B.	United States, Department of States Bulletin (Washington D. C., 1939-)
E. J. I. L.	European Journal of International Law
E. P. I. L.	Encyclopedia of Public International Law
F. 2d	Federal Reports (Second Series) (the United States)
Fed. Cas.	Federal Cases, the United States
Fordham I.L.J.	Fordham International Law Journal
G. A. Official Records	General Assembly Official Records
Georgia J. I. C. L.	Georgia Journal of International and Comparative Law
German Y. I. L.	German Yearbook of International Law
Harvard I. L. J.	Harvard International Law Journal
Harvard L. R.	Harvard Law Review (Cambridge, Mass., 1887-)
Hof. L. R.	Hofstra Law Review
I. C. J.	The International Court of Justice
I. C. L. Q.	The International and Comparative Law Quarterly (London, 1952-)
Indian J. I. L.	Indian Journal of International Law
I. L. C.	The International Law Commission
I. L. M.	International Legal Materials
I. L. Q.	International Law Quarterly (London, 1947- 1951)
I. L. R.	International Law Reports (1950-), (London, 1956-)
I. M. T.	Trials of Major War Criminals before the International Military Tribunal (" Blue Series")
Indiana J. I. L.	Indiana Journal of International Law

International Conciliation	International Conciliation, Carnegie Endowment (Nos. 1-375, New York, 1909-1941)
International Legislation	Manley o' Hudson, (edit.), International Legislation: A Collection of Texts of Multipartite Instruments of General Interest, (9 vols., 1919-1945)
Iowa L. R.	Iowa Law Review
Isreal L. R.	Isreal Law Review
I. Y. H. R.	Isreal Yearbook on Human Rights
Jap. Ann. I. L.	Japanese Annual of International Law, Tokyo
J. Y. I. L.	Jewish Yearbook of International Law (Jerusalem, 1949-)
Kansai U. R. L. P.	Kansai University Review of Law and Politics
Keesing's	Keesing's Contemporary Archives (Bristol, 1931-)
L. N. O. J.	League of Nations Official Journal (Geneva, 1920-1946)
L. N. T. S.	League of Nations Treaty Series
L. Q. R.	Law Quarterly Review
Mich. J. I. L.	Michigan Journal of International Law
Mich. L. R.	Michigan Law Review (1902-)
N. M. T.	Trials of War Criminals before the Nuremberg Military Tribunals under Control Council No. 10 ("Green Series")
New York Law Sch. J.I.C.L.	New York Law School Journal of International and Comparative Law
New York Uni. J. I. L. P.	New York University Journal of International Law and Politics
New York Uni.L.R.	New York University Law Review
N. I. L. R.	Netherlands International Law Review
Northwestern U. L. R.	Northwestern University Law Review
N. Y. I. L.	Netherlands Yearbook of International Law
Pace I. L. R.	Pace International Law Review
P. C. A.	Permanent Court of Arbitration
P. C. I. J.	Permanent Court of International Justice; Series A: Judgments and Orders (1922-1930); Series A/B: Advisory Opinions, Judgments and Orders (1931-1940); Series B: Advisory Opinions (1922-1930)
P. Y. I. L.	Pace Yearbook of International Law
Q.B.D.	Law Reports, Queen's Bench Division (United Kingdom)
Recueil des cours	Hague Recueil: Recueil des cours de l' Acad'emie de droit International (1923-); A. W. Sijthoff, Leiden, (1925-)
R. I. A. A.	Reports of International Arbitral Awards (1948-) (United Nations)
S. C. Official Records	Security Council Official Records
S. J. I. L.	Stanford Journal of International Law
South African L. J.	South African Law Journal
South African Y. I. L.	South African Yearbook of International Law
U. K. T. S.	United Kingdom Treaty Series

U. N. C. I. O.	Documents of the United Nations Conference on International Organization, San Francisco, 1945 (16 vols., 1945-46)
Uni. Of Chi. L. R.	University of Chicago Law Review (Chicago, 1933-)
U. N. T. S.	United Nations Treaty Series
U.S.T.S.	United States Treaty Series
Vir. J. I. L.	Virginia Journal of International Law
Vir. L. R.	Virginia Law Review
V. J. T. L.	Vanderbilt Journal of Transnational Law
West Vir. L. R.	West Virginia Law Review
Yale J. I. L.	Yale Journal of International Law
Yale L.J.	Yale Law Journal
Yearbook of the I. L. C.	Yearbook of the International Law Commission (1949-) (United Nations, 1956-)

TRANSLITERATION

ا	a	ط	t
ب	b	ظ	z
ت	t	ع	' (inverted apostrophe)
ث	th	غ	gh
ج	j	ف	f
ح	ḥ	ق	q
خ	kh	ك	k
د	d	ل	l
ذ	dh	م	m
ر	r	ن	n
ز	z	ه	h
س	s	و	w
ش	sh	ي	y
ص	ṣ	ء	' (apostrophe)
ض	ḍ		

Short vowels

َ	Fatḥah	a
ِ	Kasrah	i
ُ	Dammah	u

Long vowels

آ	ā
يَ	ī
وُ	ū

Diphthongs

وَ	aw
يَ	ay

Doubled

وُ	uww
يَ	iyy