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SELF-DEFENSE AGAINST NON-STATE ACTORS[1]

САМООБОРОНА ОТ НЕГОСУДАРСТВЕННЫХ СУБЪЕКТОВ

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Abstract. In the doctrine of international law, there is a division around the question: Is the right of self-defense available to states against non-state actors who undertake armed attacks? According to one doctrinal point of view, such possibility does not exist in general international law. The Charter of the United Nations does not provide for this possibility either, because it bound the right to self-defense exclusively to states. Therefore, any armed attack carried out by non-state actors, which cannot be attributed to states, cannot provoke an armed response by the affected state, that is, the legitimate exercise of the right to self-defense. However, according to another doctrinal point of view that prevails in international practice, such a possibility still exists in situations of high-intensity and large-scale armed attack by non-state actors. Since non-state actors do not have full legal capacity and often act under the influence and control of foreign governments, the use of force by attacked states in self-defense seems a legitimate right under ius ad bellum. This approach would be a logical set of circumstances in light of the transformation of international relations and the progressive development of international law. However, its legal justification remains highly disputed since the right of self-defense is interpreted contrary to the rule from Article 51 of the United Nations Charter, and with reference to the existence of the customary rule on self-defense, which was allegedly not derogated after its adoption. Starting from the fact that this conceptual division in international legal doctrine has far-reaching consequences in the international practice of preserving international peace and security, the following study will consider the questions whether positive international law allows self-defense and under what conditions against non-state actors and whether the illegal use of force by non-state actors can be attributed to the state from whose territory these actors act against other states?

Аннотация. В доктрине международного права существует разногласие по вопросу: доступно ли государствам право на самооборону против негосударственных субъектов, совершающих вооруженные нападения? Согласно одной доктринальной точке зрения, такой возможности в общем международном праве не существует. Устав Организации Объединенных Наций также не предусматривает такой возможности, поскольку он закрепляет право на самооборону исключительно за государствами. Следовательно, любое вооруженное нападение, совершенное негосударственными субъектами, которое не может быть приписано государствам, не может спровоцировать

вооруженный ответ пострадавшего государства, то есть законное осуществление права на самооборону. Однако, согласно другой доктринальной точке зрения, преобладающей в международной практике, такая возможность все еще существует в ситуациях высокоинтенсивного и крупномасштабного вооруженного нападения негосударственных субъектов. Поскольку негосударственные субъекты не обладают полной правоспособностью и часто действуют под влиянием и контролем иностранных правительств, использование принудительных мер государства, подвергшегося нападению, в целях самообороны, по-видимому, имеют законное право в соответствии с международным правом, объявленным всеобщим достоянием. Такой подход был бы логичным в свете трансформации международных отношений и прогрессивного развития международного права. Однако его юридическое обоснование остается весьма спорным, поскольку право на самооборону толкуется вопреки норме ст. 51 Устава Организации Объединенных Наций и со ссылкой на существование обычной нормы о самообороне, которая, как утверждается, не была нарушена после ее принятия. Исходя из того факта, что это концептуальное разделение в международно-правовой доктрине имеет далеко идущие последствия для международной практики сохранения международного мира и безопасности, в следующем исследовании будут рассмотрены вопросы о том, допускает ли позитивное международное право самооборону и при каких условиях против негосударственных субъектов, а также является ли незаконная оборона незаконной деятельностью. Применение силы негосударственными субъектами может быть отнесено на счет государства, с территории которого эти субъекты действуют против других государств?

Keywords: Right to self-defense, use of force, non-state actors, international law, United Nations.

Ключевые слова: право на самооборону, применение силы, негосударственные субъекты, международное право, объединенные нации.

INTRODUCTION

Contemporary international relations are characterized by the multiplication of centers of world power and the fragmentation of the existing international legal order. In such circumstances, there was also

the emergence of new international entities that do not have international legal subjectivity stricto sensu, that is, whose subjective powers are based more on the functional principle than on the principle of state territorial sovereignty. In international relations, these subjects are treated as non-state actors, and may include organizations or individuals whose role is constructive in achieving the general interests of the international community (through the activities of non-profit and non-governmental organizations, humanitarian agencies, labor unions and lobby groups, multinational corporations and civil society). On the other hand, non-state actors can have a very destructive role in international relations acting subversively on the existing international order (e.g. through the action of rebel and paramilitary formations, transnational criminal groups and terrorist organizations). In this last mentioned case, the influence of non-state actors and their ability to use force is growing more and more, so international law should accept this reality and regulate their status at least in the part related to international legal responsibility, ensuring at the same time that state responsibility remains an available option. This is all the more necessary because non-state actors are not considered parties to an armed conflict, its members do not have the status of combatants guaranteed by international law, and their armed actions directed against states often exceed the framework of international law of armed conflicts and violate the rules of international humanitarian law. Although formally it may appear that non-state actors are autonomous entities, they are often under the control or influence of foreign states and governments. This is particularly important in revealing their legal nature, bearing in mind that some non-state actors such as insurgent militant groups or terrorist organizations (such as the Islamic State of Iraq and the Levant – ISIL, Al-Qaeda, Boko Haram in Nigeria, Al-Shabaab in Somalia, Palestinian paramilitary organizations – HAMAS, Revolutionary Armed Forces of Colombia – FARC, etc.), apply hybrid models of warfare uncharacteristic of traditional ways, both in terms of trategy and tactics, as well as in terms of the goals to be achieved through violent activities on the territory of the home state or on the territory of other countries. The increasing proliferation of such non-state entities in the world that

undertake violent and subversive activities represents a serious challenge and threat for international peace and security[1]. In order to respond to such risks in a timely manner, it is necessary to reaffirm the role of the United Nations and expand the existing legal framework for the prohibition of the use of force by states and the prohibition of the use of force by non-state actors against the territorial integrity and independence of other states. Only in this sense would it really be possible to interpret the prohibition of the use of force in international relations from Article 2(4) of the Charter and its exception prescribed by Article 51 as ius contra bellum, which was embodied in the legal order after the end of the Second World War[2]. At the same time, this prohibition (which excludes ius ad bellum) must be interpreted in a way that respects the goals and principles of the United Nations, as well as complementary other provisions contained in the Charter on the basis of which this universal organization acts for the purpose of preserving international peace and security[3].

PROHIBITION OF THE USE OF FORCE IN INTERNATIONAL LAW

The prohibition of the threat or use of force is a rule of customary international law and is recognized as its imperative norm (*jus cogens*). The interpretation of this provision in doctrine and practice, however, causes certain disagreements. There is an opinion that the use of force and threats of force would be permitted if they were not directed against the objects specified in the definition in Article 2(4) of the Charter, that is, against territorial integrity and political independence. However, such

[1] Wood Michael. The Role of the UN Security Council in Relation to the Use of Force against Terrorists. In: L. van den Herik and N. Schrijver (eds), Counter-Terrorism Strategies in a Fragmented International Order: Meeting the Challenges. Cambridge University Press. Cambridge, 2013, p. 317, etc; Barnidge Jr. Robert P. , Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle. Asser Press. The Hague, 2007, p. 250.

[2] Corten Olivier. Le droit contre la guerre: L'interdiction du recours à la force en droit international. Éditions A. Pedone. Paris, 2014, p. 1, etc.

[3] Brownlie Ian. International Law and the Use of Force by States. Clarendon Press. Oxford, 1963, pp. 251–280.

an opinion is not correct, because the Charter not only prohibits force or the threat of force against territorial integrity and political independence, but also force or threat that is in any other way contrary to the goals of the United Nations. Since the goals of the United Nations, in addition to preserving peace and security, also include the sovereign equality of states, the right of peoples to self-determination, basic human rights and freedoms, and various obligations regarding the development of international cooperation, the use of force or threats is not compatible with those goals[4]. As a result of the legal order established in the Charter, the question of the existence of adequate criteria according to which it would be possible to determine the type of force, that is, the threat of force, which is covered by this peremptory prohibition, remained open. In this regard, in doctrine and practice, opinions are diametrically divided. The divisions date back to the founding conference in San Francisco, when their closer definition was omitted in the preparatory works (*travaux préparatiores*). The originally presented viewpoints have not changed significantly even to the present day[5]. Thus, Western and developed countries continue to insist that the prohibition of the use of force and the threat of force refers to the use or threat of military armed force, that is, to the use of direct or indirect force that has military effects[6]. On the other hand, developing countries and successor states of the «communist camp» have a much

[4] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. United Nations General Assembly Resolution. A/RES/2625(XXV), 24 October 1970.

[5] Russel B. Ruth. A History of United Nations Charter: The Role of the United States, 1940–1945. Brookings Institutions. London, 1958, 648 p.; Hilederband Robert C. Dumbarton Oaks: The Origins of the United Nations and the Search for Postwar Security. University of North Carolina Press. Chapel Hill, 1990, pp. 93, etc; Gavranov Velibor. Principi i primena sistema kolektivne bezbednosti Ujedinjenih nacija. Institut za uporedno pravo. Beograd, 1969, p. 26.

[6] In this sense, states often refer to the resolution of the General Assembly № 3314 of 14 December 1974, which adopted the Declaration on the Principles of Defining Aggression, which, inter alia, confirm the prohibition of the use of direct and indirect armed force in the context of the interpretation of aggressive acts. See: General Assembly Official Records, 29th Session. Supplement, no. 19, 14 December 1974; A/RES/9619 and Corr. 1; Yearbook of United Nations, 1974, pp. 846–848.

broader approach, according to which the general prohibition includes, in addition to armed, also unarmed forms of use of force or threat of force, such as economic and political pressures and threats[7]. In doctrine, on the other hand, there is a division between supporters of traditional and progressive understandings. Traditionalists believe that the principle of the prohibition of force includes only armed force, i.e. a threat through a hint of the immediate use of armed force[8]. This point of view is grounded in the Preamble of the Charter, which mentions the term «armed force», which «can only be used in the general interest» (paragraph 7). From that formality, traditionalists further draw the conclusion that the general prohibition of the use of force from Article 2(4), as well as its legal use according to the United Nations decision from Article 42 of the Charter, constitutes one and the same «armed force»[9]. On the other hand, supporters of the progressive understanding include in the term «force» other forms of it that are manifested through various types of threats and pressures that are applied within the framework of the policy of force in international relations. Interestingly, the progressives also start their reasoning from the interpretation of the Preamble in which they find justification for the stated point of view. Namely, they claim that in addition to the general prohibition of the use of force from Article 2(4) of the Charter, there is also an obligation for member states to «apply tolerance and live in peace with each other» (paragraph 5). If to the

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[7] Documents of the United Nations Conference on International Organisation. 1945, vol. 6, p. 334, etc.

[8] Humphrey Waldock. The Regulations of the Use of Force by Individual States in International Law. Recueil des Cours. Académie de Droit International, la Haye, 1952, vol. 81, p. 455. International practice has confirmed the rule according to which the illegal use of force entails ipso facto the illegality of the threat of this force. See: Legality of the Threat of Use of Nuclear Weapons. Advisory opinion. International Court of Justice Report. 1996.

[9] Bentwich Norman, Martin Andrew. A Commentary of the Charter of the United Nations, Columbia Univeristy Press. New York, 1950, p. 13; Brierly James Leslie. The Law of Nations. Oxford University Press. Oxford, 1963, p. 415; Cassese Antonio. International Law. Oxford University Press. Oxford, 2005, p. 56.

mentioned obligation is added the one prescribed in Article 2(3) of the Charter, according to which the members are obliged to «resolve their mutual disputes by peaceful means», it is clear why supporters of the progressive understanding draw a conclusion about the duty of states to refrain from resorting to force or threats in all their forms[10]. The stated differences in viewpoints on the prohibition of the use of force and the threat of force had negative consequences in international practice. Due to the vagueness of the text of the Charter, linguistic and teleological, and to a certain extent, historical interpretation prevailed[11]. However, despite this, the importance of the prohibition of force in international relations was great, because its restrictive validity established a regime of rules that deeply permeate the positive international legal order. Although the prohibition did not succeed in completely eliminating armed conflicts in the world, it certainly had the effect of significantly reducing their number. Given the contemporary trends in the international community from the beginning of the 21st century, which, in addition to states and intergovernmental organizations, have emphasized the role of non-state actors in international relations, extending the validity of this prohibition in relation to these very specific subjects of international relations is something quite logical[12]. All the more so, because Article 2(4) of the Charter does not sufficiently specify the application of the prohibition of the use of force outside the context of interstate relations,

[10] Kelsen Hans. The Law of the United Nations. Stevens & Sons. London, 1950, p. 726, etc.

[11] Heselhaus Sebastian. International Law and the Use of Force, in: The Role of International Law and Institutions, EOLSS, UNESCO, 2002, p. 226, etc; «Draft Report on Aggression and the Use of Force», ILA, Washington, 2014.

[12] Henderson Christian. Non-State Actors and the Use of Force. In M. Noortmann, A. Reinisch, and C. Ryngaert. Non-State Actors in International law. Hart Publishing. Oxford, 2014, p. 4; Wood Michael. The Role of the UN Security Council in Relation to the Use of Force against Terrorists. Op. cit, p. 322; Gazzini Tarcisio. The Changing Rules on the Use of Force in International Law. University Press. Manchester, 2005, p. 33.

which makes it rational to examine the possibility of using the right to self-defense by victim states against non-state actors[13].

THE RIGHT TO SELF-DEFENSE UNDER THE UNITED NATIONS CHARTER

The prohibition of the use of force does not only imply limitations in the use of means available to states in achieving their political goals, but also certain limitations in the use of force according to the values on which the international community rests. Hence, no goals of the state as the main actor in the international community can be justified by the use of force, except in exceptional cases that are foreseen and prescribed by rules within general international law. One of such cases is precisely the right to individual or collective self-defense, embodied in the provisions of Article 51 of the Charter. This provision stipulates that, «nothing in this Charter shall affect the natural right of individual or collective self-defense in the event of an armed attack against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security». It follows from the above that the Charter recognizes the right to self-defense of states as an «inherent» or «natural» right. That right is time-limited, since it can be taken by states until the Security Council reacts and takes the

[13] Due to uneven practice, contradictory positions expressed before the Security Council, but also other United Nations bodies, the question of the legal qualification of the use of force in internal conflicts remained open. It is not disputed that the use of force in internal relations can lead to a threat to peace. General Assembly Resolution 2189 (XXI) of December 13, 1966, adopted in order to implement the Declaration on the Granting of Independence to Colonial Countries and Peoples 1514 (XV) of 1960, established that the mere continuation of colonial rule would threaten international peace and security. Per analogiam, the same statement could be applied to internal conflicts and civil wars. Formally-legally, all conflicts of an internal character cause a violation of internal peace and security per se. However, at a later stage, the situation may lead to an intensification of conflicts that would eventually turn into a threat to international peace. In this sense, the Security Council is in a position to legally state this requalification from a «threat to peace» to a «violation of peace». See: Moore John Norton (ed.). Law and Civil War in the Modern World. The Johns Hopkins University Press. Baltimore, 1974, pp. 1–648.

prescribed measures, which may include coercive measures from Chapter VII of the Charter. The Charter does not elaborate on the specific content of the right to self-defense, but it is assumed that the use of the right is limited, *per se*[14]. The issue of determining the limits of the right to self-defense has led to divergences in legal doctrine[15]. Thus, the restrictive concept starts from the statement that the use of the right to self-defense is conditioned by a previous armed attack, which, given that self-defense is an exception to the prohibition of the use of force, should be interpreted as extremely limited. In justifying this approach, the supporters of the mentioned concept refer to the preparatory works (*travaux préparatiores*), during the adoption of the Charter, as well as to the later international practice of justifying the use of the right to self-defense before the United Nations[16]. On the other hand, the extensive concept of self-defense moves beyond the limits of the right to respond to an armed attack because the provision from Article 51, on the «inherent» or «natural» right to self-defense, refers to the existence of a customary rule in addition to the one established in the Charter. Unlike the supporters of the restrictive concept, who interpret the right to self-defense in the context of the rules from Article 51 of the Charter and the primary responsibility of the Security Council for the maintenance of international peace and security, the supporters of the extensive concept start from the duality of the rules,

[14] Dimitrijević Duško. Pravo na samoodbranu u funkciji očuvanja međunarodnog mira i bezbednosti. Srpska politička misao. 2012, vol. 37, № 3, pp. 157–191.

[15] Yepes Jesús María. Les accord régionaux et le Droit International. Recueil des Cours. Académie de Droit International, la Haye. 1947, vol. 71, p. 303. etc; Brownlie Ian. International Law and the Use of Force by the States. Clarendon Press. Oxford, 1963, pp. 251–280; Henkin Louis. Intervention and Neutrality in Contemporary International Law. Proceedings of the American Society of International Law. 56th Annual Meeting. Washington, 1963, pp. 148–153; Zourek Jaroslav. La notion de légitime défense en Droit International. Annuaire de l'Institut de Droit International, 1975, vol. 56, p. 1. etc; Alexandrov Stanimir. Self-Defense aganist the Use of Force in International Law. Kluwer. Hague, 1996, pp. 1–359.

[16] Military and Paramilitary Activities in and aganist Nicaragua. International Court of Justice Report. Merits. Judgment, 1986, pp. 14, 103, para. 194; Oil Platforms Case. International Court of Justice Reports, 2003, p. 161.

so they interpret the rule of self-defense in the context of customary international law which was present in practice until 1945, and which, according to them, continued to exist alongside the rule from Article 51 after the adoption of the United Nations Charter[17]. As an argument for this interpretation, the supporters of the extensive concept emphasize not only the dynamics of the development of international law and legal practice after the mentioned date, but also the absence of a provision of the Charter that expressly changes or abolishes the existing customary rule. In the above context, the right to self-defense may include the use of so called «pre-emptive» and «anticipatory» self-defense[18].

Pre-emptive self-defense

As a result of the aforementioned, the basis for the implementation of «pre-emptive self-defense» is allegedly found in the right to self-defense as it existed in international law before the adoption of the Charter, and which after that event was supplemented by particular customary rules and international practice. The necessity of the application of self-defense was never limited by an actual armed attack, but by the danger of an attack to the extent that it would have to involve the effective use of violent means by the affected state. From the mentioned ideological assumptions, the conclusion should have emerged that the goal of codifying the right to

[17] In the case of Nicaragua, the International Court of Justice confirmed that Article 51 of the Charter can be reasonably understood solely on the basis of the existence of a «natural» or «inherent» right of self-defense and that it would be very difficult to see the existence of a right of self-defense other than ordinary, even if its current content was confirmed and amended by the Charter. According to the court opinion, it is not possible to accept that Article 51 «covers and supersedes» customary international law. See: Military and Paramilitary Activities in and against Nicaragua. Ibid, pp. 14, 94.

[18] Dinstein Yôrām. War, Aggression and Self-Defence. University Press. Cambridge. 2005. P. 184, etc; Schwebel Stephen M. Aggression, Intervention and Self-Defence in Modern International Law, Recueil des Cours, Académie de Droit International, la Haye, 1972/II, vol. 136, p. 463; O'Connell Daniel P. International Law. Stevens and Sons. London, 1970, vol. I, p. 317.

self-defense in the Charter of the United Nations was contained in the preservation of the right, and not in its limitation!? Starting from the fact that the meaning of the right to self-defense from Article 51 is judged from the point of view of the norm contained in the provision of Article 2(4) of the Charter, which represents an integral part of general international law, i.e. its progressive development, the said understanding has no major legal foundation, because the Charter not only did it prohibit the use of force, but it also confirmed the prohibition of waging a war of aggression that was contained in common law prior to its adoption. Hence, the Charter not only «preserved, but also developed the aforementioned rule, which generally limits the possibility of using force and the threat of force in international relations, and thus the possibility of unjustified use of the right to self-defense». Since the provision from Article 51 represents a special rule in relation to the general rule contained in Article 2(4) of the Charter, it would be logical to derive from the Charter the concept of «right to self-defense» as an exception to the imperative prohibition of the use of force and threats by force. However, due to insufficient precision of the text of the Charter regarding the terms «force» and «threat of force», and the impossibility of drawing a clear line between armed and unarmed use of force, the concept of «preventive self-defense» found space in state practice. Although the previous efforts of the United Nations to define the mentioned terms contributed to overcoming the existing inaccuracies, some significant dilemmas still exist. The definition of «pre-emptive self-defense» starts from the presumption that self-defense is carried out based on the threat of force, which means explicitly or tacitly making it known that the threatening state will resort to force if the other threatened state does not accept its demands. In other words, the threat of force is intended to cause «justified apprehension in the threatened party that it will be exposed to serious and irreparable harm», which per se, justifies its preventive action. The threat of force is directly correlated with the term «threat to peace». Both concepts are in a cause-and-effect relationship – the threat of force, as well as the threat of various forms of pressure,

causes a threat to peace, which in the further stage of development can be transformed into an armed attack, the inevitable consequence of which is the violation of peace. Determining the difference between the threat of force from Article 4(2) and the threat to peace from Article 39 of the Charter will depend on how the term «force» is understood. If force is understood exclusively as armed force, then the threat of force and the threat to peace are mutually approaching. On the other hand, if force means different forms of unarmed pressure, in that case the threat to peace qualifies as a condition arising from the failure to resolve the dispute peacefully[19]. The problem of determining the legal argumentation that would justify «pre-emptive self-defense» arises from the different assessments of the parties regarding the facts that have been presented. The determination of the existence or non-existence of an armed attack and imminent threat is left to subjective assessment in each individual case[20]. In the post-World War II period, preventive use of force was justified on the grounds of «defense of national security», «defense of the hemisphere», «defense of allies», «destructive nature of weapons of mass destruction», «defense against terrorism» and other more or less by illegal grounds whose roots were in the «balance of fear» between the superpowers. From the American thesis according to which the violation of the atomic energy production control system would entitle other countries to resort to the «right to self-defense» (the so-called *Baruch plan*), through conceptual constructions on taking preventive actions to eliminate the «first nuclear strike» (*first act principle*), to the concept of the United States of America for combating weapons of mass destruction presented in the Congress of the United States of America in 2002 (the so-called *Bush Doctrine*), which was conceived as a response to brutal terrorist attacks, attempts were made to legalize the preventive

[19] Franck Thomas. Who Killed Article 2(4). American Journal of International Law, 1970, vol. 64, p. 821.

[20] Mayers McDougal. The Hidrogen Bomb Test and International Law of the Sea. American Journal of International Law, 1955, vol. 49, p. 356.

use of force[21]. All of them have in common the justification that derives from a subjective assessment that is not limited by the existence of an actual armed attack, but by the danger of a possible attack to the extent that it would have to involve the effective use of violent means by the affected state.

Anticipatory self-defense

«Anticipatory self-defense» rests on a discretionary assessment of the existence of an imminent threat of an actual armed attack which, given the possible consequences, it requires the use of force for the purpose of deterrence. It, like «pre-emptive self-defense», supposedly has a basis in customary international law, which is «preserved» by Article 51 of the Charter. Due to the fact that in international practice there were extremely arbitrary interpretations of the right to «anticipatory self-defense», suggestions were made in the doctrine that it is necessary to create a certain line of separation. Thus, a distinction was established between «anticipatory self-defense», in which there is no possibility to foresee an armed attack with certainty in advance (which is why preventive or premature action is taken), in relation to «interceptive self-defense», in which there is a possibility to a real and inevitable armed attack is foreseen in advance (which is why it acts as a warning). In «anticipatory self-defense» there is a certain legal uncertainty for the state that uses force against another state, while in «interceptive self-defense» there is no such uncertainty, since it is always about the use of force against the aggressor state. Thanks to the presented doctrinal distinction, it was considered that it would be possible to reconcile different approaches in international practice. However, this did not happen, on the contrary,

[21] Mayers McDougal. The Hidrogen Bomb Test and International Law of the Sea. American Journal of International Law, 1955, vol. 49, № 3, p. 356; Soviet Cuban Quarantin and Self-Defence. American Journal of International Law, 1963, vol. 57, № 3, p. 598; Murphy Sean D. Contemporary Practice of the United States relating to International Law. American Journal of International Law, 2002, vol. 96, № 3, p. 237, etc; National Security Strategy of the United States. International Legal Materials, 2002, p. 1478.

unilateral armed actions were taken by a state or a coalition of states in many disputed situations. Given that the inclusion of the provision on the right to collective self-defense in the Charter made a significant concession in order to open the possibility for the autonomous use of force outside the universal collective security system of the United Nations, in practice this possibility led to the undertaking of armed actions by regional military-political organizations in situations that were not preceded by an armed attack[22]. Although «anticipatory self-defense» opens the possibility for a voluntarist interpretation and use of the right to self-defense, there are much stronger reasons in favor of the fact that every case of self-defense must be viewed in the context of the validity of the prohibition of force and the threat of force, as well as other principles of the United Nations. In this regard, an aggravating circumstance is the fact that the burden of proof regarding the legality of this type of self-defense would be a very difficult task for the state that resorts to preventive action. This is all the more so because the burden of proof in such cases depends on a realistic assessment of the situation that led to the use of force. Admittedly, the possibility of parallel reference to the provisions of the Charter and certain rules present in customary law would not be completely excluded[23]. At the same time, the application of «anticipatory self-defense» would be justified only if the Security Council would not be able to take the prescribed measures and if the state against which the right to «anticipatory self-defense» is applied would clearly violate international law[24]. Although international practice is developing in this direction, a large part of the international community has never, nor would it, give legitimacy to this way of acting

[22] Gray Christine. A Crisis of Legitimacy for the UN Collective Security System. International & Comparative Law Quarterly, 2007, vol. 56, № 1, pp. 157–170. Pindić Dimitrije. Regionalne organizacije zasnovane na Povelji Ujedinjenih nacija. Institut za međunarodnu politiku i privredu. Beograd, 1978, p. 211.

[23] Cassese Antonio. International Law in a Divided World. Univeristy Press. Oxford, 1986, p. 236, etc.

[24] Van den Hole Leo. Anticipatory Self-Defence under International Law. American University International Law Review, 2003, vol. 19, № 1, pp. 72, 97–98, etc; Walker Geogre K. . Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said, Cornell International Law Journal, 1998, vol. 31, № 2, pp. 325–374.

in international relations. International practice, however, represents in a certain sense a certain corrective, because through practice, certain principles are crystallized that confirm the conditions for the legally permissible exercise of the right to self-defense. This circumstance is very important if it is taken into account that in the post-Cold War period, the belief that states may have the right to self-defense against non-state actors in certain situations was strengthened[25].

THE RIGHT TO SELF-DEFENSE AGAINST NON-STATE ACTORS

Positive international law does not provide any clear instructions and guidelines on how to behave in the event of an armed attack by a non-state entity on member states of the international community[26]. Hence the international legal doctrine remained divided over the question, do states have the right to self-defense against non-state actors? According to one view, such possibility does not exist in general international law[27]. The Charter of the United Nations does not provide for this possibility either, because it bound the right to self-defense exclusively to states. Therefore, any armed attack carried out by non-state actors, which cannot be attributed to states, cannot provoke an armed response by the affected state, that is, the legitimate exercise of the right to self-defense[28]. According to another doctrinal point of view, such a possibility would exist if the state, after an armed attack by non-state actors of high intensity and on

[25] Stephanie A. Barbour, Zoe A. Salzman. The Tangled Web: The Right of Self-defense against Non-State Actors in the Armed Activities Case. International Law and Politics, 2008, vol. 40, pp. 81–83.

[26] Dimitrijević Duško. Nedržavni akteri i upotreba sile u međunarodnim odnosima, in: Vučić M. (ed.), Nedržavni akteri u međunarodnom pravu, Intitut za međunarodnu politiku i privredu, Beograd, 2020, pp. 33–78.

[27] Kunz Josef L. Individual and Collective Self-Defence in Art 51 of the Charter of the United Nations. American Journal of International Law, 1947, № 41, pp. 872–878; Bothe Michael. Terrorism and the Legality of Pre-emptive Force. European Journal of International Law, 2003, № 1, p. 227, etc.

[28] Military and Paramilitary Activities in and against Nicaragua. Judgment, op.cit., p. 14, para. 195.

a wide scale, used force in self-defense within the framework of *ius ad bellum*. The use of force in self-defense would be even more inevitable in situations where the state on whose territory a non-state actor is located is unwilling or unable to suppress or stop an attack from its territory[29]. From the mentioned approach, it follows that in addition to the large scale and strength of the armed attack, the exercise of self-defense also requires the unwillingness or inability of the territorial state to prevent this attack by non-state actors. As a justification for this point of view, it is stated that neither the provision from Article 51 of the Charter nor customary law exclude the use of force in self-defense against the state that has suffered an attack[30]. At the same time, it is emphasized that the Charter does not prescribe that a violent response to an armed attack is possible only in the case when the attack originates from the states[31]. In other words, the Charter does not determine from which sources an armed attack can originate, and whether this attack can be carried out by non-state actors in addition to states? The answer to the mentioned question was given by international practice in the post-Cold War period when, in the circumstances of the unipolar world, a coalition of states led by the United States of America declared a «war on terrorism» in which, for the first time in history, non-state actors were on the side of the enemy, as territorially undefined subjects[32]. The occasion was the case of terrorist attacks on the United States of America in September 2001, which enabled a broad interpretation of the right to self-defense, which had certain repercussions on international practice. Then the resolutions

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[29] Lubell Noam. Extraterritorial Use of Force against Non-State Actors. University Press, Oxford, 2010, p. 81.

[30] Schachter Oscar. The Extraterritorial Use of Force against Terrorist Bases. Houston Journal of International Law, 1989, vol. 11, pp. 309–311.

[31] Stahn Carsten. Terrorist Attacks as «Armed Attacks»: The Right to Self-Defence, Article 51(1/2) of the UN Charter and International Terrorism. The Fletcher Forum of World Affairs, 2003, vol. 27, p. 42.

[32] Müllerson Rein. Jus ad Bellum and International Terrorism, in: Y. Dinstein, F. Domb (eds). The Progression of International Law. Beill/Nijhoff, Hague, 2011, pp. 543–591.

of the Security Council 1368 and 1373 approved the formation of the International Security Assistance Force (ISAF), with the task of building peace in Afghanistan, while at the same time requesting to take concrete measures against the terrorist organization Al Qaeda[33]. As the resolutions unequivocally confirmed the right to self-defense, in the armed action called «Operation Enduring Freedom», the United States of America destroyed terrorist bases and overthrew the Taliban government, which it considered responsible for providing support to the terrorist organization Al Qaeda[34]. Terrorist attacks on the United States that were previously qualified as armed attacks gave this state the right to unilaterally use force against a non-state actor and the state on whose territory that non-state actor is located, based on «indirect aggression», where responsibility is based on the principle of attribution[35]. Thus, this case was a turning point for the development of international practice and extensive interpretation of the right to self-defense against non-state actors. This tendency was not directly justified by the aforementioned resolutions of the Security Council, because the resolutions did not authorize the United States of America to wage war in Afghanistan, nor for the extraterritorial use of force against non-state actors located on Afghan territory. In addition, the unilateral armed action of the United States of America, invoking the exercise of the right of self-defense against Al-Qaeda, was undertaken without the consent of the territorial state[36]. Although the legitimacy of this and similar unilateral armed actions by states (e.g. Israel against

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[33] Threats to International Peace and Security caused by Terrorist Acts. UN Security Council Resolution, S/RES/1368, 12 September 2001; UN Security Council Resolution, S/RES/1373, 28 September 2001.

[34] Wolfrum Rüdiger. The Attack of September 11, 2001, the Wars Against the Taliban and Iraq: Is there a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict? Max Planck Yearbook of United Nations Law, 2003, vol. 7, p. 1, etc.

[35] Azubuike Eustace Chikere. Probing the Scope of Self Defense in International Law. Annual Survey of International & Comparative Law, 2011, vol. 17, № 1, pp. 157–159.

[36] Ratner Steven. Jus ad bellum and Jus in bello after September 11. American Journal of International Law. 2002, vol. 96, № 4, p. 909, etc.

Hezbollah and against Hamas) or a coalition of states (e.g. the anti-ISIS coalition in Iraq and Syria) was not contested in the later period, the question of their legality remained open considering the prevailing international legal position according to which self-defense against non-state actors cannot be exercised without attributing responsibility for armed attacks to the states themselves[37]. This is also indicated by the practice of the International Court of Justice, which refrained from recognizing the legality of acting in self-defense against non-state actors, relying instead on the principle of imputability[38].

The question arises, why is this so? This is primarily because Article 2(4) of the Charter does not apply to crisis situations within states that arise due to the actions of national liberation movements or based on the actions of political non-state groups, which are related to the exercise of the right to self-determination. Also, because any expansion would the right to self-defense had to derive its legitimacy from the goal and purpose of the prohibition prescribed by Article 2(4) of the Charter, which refer to the context of interstate relations. However, as Article 51 of the Charter does not prescribe the origin of an «armed attack», it is necessary to make certain changes in the conventional interpretation of the right to self-defense based on certain principles derived from international practice that support the exercise of the right to self-defense against non-state actors and the application of which includes the fulfillment of specific conditions in connection with the lawful use of force in international relations.

This kind of thinking is also indicated by the Resolution on Self-Defense of the *Institut de Droit International*, which states that in the

[37] Lubell Noam, op. cit., p. 31; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, op. cit., paras. 136, 139, 142, 194-195; Tladi Dire. The Non-Consenting Innocent State: The Problem with Bethlehem's Principle. American Journal of International Law. 2013, vol. 107, № 3, p. 570, etc.

[38] Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Advisory Opinion. International Court of Justice Reports, 2004, p. 194, para. 139; Oil Platforms. Judgment. International Court of Justice Reports, 2003, p. 161, paras. 51, 61, 71; Armed Activities on the Territory of the Congo. Judgment. International Court of Justice Reports, 2005, p. 168, para. 146.

event of an armed attack by non-state actors, Article 51 of the Charter, supplemented by the customary law of self-defense, is applied in principle, in a way that allows the use of force against non-state actors in the country from which the attack originates. At the same time, it is emphasized that this country has an obligation to cooperate with the targeted country[39]. In this sense, the use of force in self-defense on the territory of another state is legal only if that state bears responsibility for a violation of international law tantamount to an «armed attack»[40].

CONDITIONS FOR LAWFUL EXERCISE OF THE RIGHT TO SELF-DEFENSE AGAINST NON-STATE ACTORS

First condition: Necessity, proportionality and immediacy

It is known that the right to self-defense derives from the natural right to survival, and that its lawful exercise requires the fulfillment of certain conditions contained in the Charter and customary international law. The conditions refer first of all to the criteria of necessity and proportionality between an armed attack and acts undertaken on the basis of the right of self-defense[41]. What specifically constitutes the content of these criteria (necessity and proportionality) is determined by the rules derived from long-standing international practice that has its roots since the famous «Caroline case» from 1837. Thus, it is considered that self-defense is necessary only in case of immediate danger that does

[39] Present Problems of the Use of Armed Force in International Law A. Self-defence. Institut de Droit International. M. Emmanuel Roucounas Rapporteur. Santiago, Session of 27 October 2007.

[40] Contre une invocation abusive de la légitime défense pour faire face au défi du terrorisme – A plea against the abusive invocation of self-defence as a response to terrorism, Centre de Droit International, Universite Libre de Bruxelles, 2016.

[41] Regarding the case concerning the legality of the use of nuclear weapons, the International Court of Justice adopted an advisory opinion in which it stated that «the exercise of the right to legal self-defense in conditions of necessity and proportionality is a rule of customary international law». See: «Legality of the Threat or Use of Nuclear Weapons». Interntional Court of Justice Report. 1996, p. 226, paras. 41, 263.

not give the possibility of choosing means and leaves no time for thinking. In other words, self-defense against the threat of force should be carried out immediately, i.e. while the threat is still ongoing, not after it has ended. On the other hand, acts taken in accordance with self-defense must not be unreasonable and excessive, but must be justified, limited and harmonized with the necessity of undertaking self-defense[42]. It follows from the above that necessity, proportionality and immediacy determine the qualitative and quantitative criteria for the lawful use of force in the body of rules of *ius ad bellum* and *ius in bello*[43]. However, although the stated criteria represented the *locus classicus* of international law used even in the trial conducted against Nazi criminals for starting the Second World War before the tribunal in Nuremberg, in modern international relations, their existence is quite debatable[44]. Whether self-defense is truly necessary and proportionate to an armed attack will depend on the circumstances of the case. It is generally the duty of the state that undertakes the action to consider the necessity of self-defense and its proportionality with the armed attack. Therefore, in international practice, the state that undertakes self-defense has the obligation to consider the necessity of self-defense and its proportionality with the armed attack carried out in terms of the scope of the attack, the means used and the amount of damage caused by the attack. Additionally, if the threat or attack in question consisted of a series of consecutive acts, and there is sufficient reason to expect a continuation of acts from the same source, it is necessary to examine the requirement of immediacy

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[42] Malcolm N. Show, International Law, Cambridge University Press. Cambridge, 1997, p. 787; Robert Y. Jennings. The Caroline and McLeod Cases. American Journal of International Law, 1938, vol. 32, № 1, p. 89, etc.

[43] Judith Gardam, Necessity, Proportionality and the Use of Force by States. University Press. Cambridge, 2004, p. 5, etc; Enzo Cannizzaro. Contextualizing Proportionality: Jus ad bellum and Jus in bello in the Lebanese War. International Review of the Red Cross. 2006, vol. 88, № 864, p. 782, etc.

[44] Jean-Pierre Cot, Alain Pellet. La Charte des Nations Unies: Commentaire article par article. Economica, Paris, 1991, p. 772, etc.

of self-defense actions in the light of those acts as a whole. A similar rule applies when undertaking collective security measures from Article 42 of the Charter, according to which the Security Council undertakes armed actions necessary for the maintenance or promotion of international peace when it turns out that non-armed measures from Article 41 are insufficient or unavailable. In both cases, the existence of an armed attack is assumed, which is a *conditio sine qua non* for activating the right to self-defense. True, in international practice there is no uniform position on when an armed attack really exists and in which situations a state can claim with certainty that an attack was carried out against it. States generally agree that an armed attack constitutes a deliberate violent intervention, a military attack on the territory of another state without its consent, or an «overt» form of armed aggression[45]. In international legal doctrine, there are disagreements regarding the question, what really constitutes an armed attack? Opinions generally differ on whether an armed attack represents only a violent intervention by regular forces or if it includes broader cross-border actions by irregular forces, and then the use of unconventional weapons whose destructive nature can lead to threats to state inviolability[46]. Considering the differences shown, a parallel was drawn between aggression and armed attack, according to which these two terms stand in a vertical or cascading relationship[47]. Based on the interpretation of the provisions of the Charter and the definition of aggression contained in the resolution of the General

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[45] Fitzmaurice Gerald. Definition of Aggression. International and Comparative Law Quarterly. 1952, vol. 1, p. 135, etc; The Chatham House Principles of International Law on the Use of Force by States in Self-Defence. International and Comparative Law Quarterly. 2006, vol. 55, № 4, pp. 963-972; Art 1 of the Annex to the General Assembly Resolution 3314, A/RES/3314 of 14 December 1974; Ian Brownlie, International Law and the Use of Force by States, op.cit., p. 278.

[46] Gray Christine. International Law and Use of Force. University Press. Oxford, 2004, p. 108.

[47] Ruys Tom. Armed Attack and Article 51 of the UN Charter: Evolutions in Customary Law and Practice. University Press. Cambridge, 2010, p. 127, etc.

Assembly 3314 from 1974, the conclusion was drawn that aggression and armed attack have an identical meaning[48]. That point of view, however, was not generally accepted, because armed attack as a form of aggression in international practice has a much narrower meaning[49]. Therefore, all aggressive acts that lead to a violation of the prohibition on the use of force, and whose qualification is the responsibility of the Security Council, do not automatically have to constitute an armed attack stipulated by Article 51 of the Charter[50]. *A fortiori,* states that are victims of a serious armed attack have the right to individual self-defense, and states that are not victims of severe forms of use of force that can qualify as an armed attack do not have the right to collective self-defense. Consequently, this does not mean that in the last mentioned case, states would not have the possibility to use necessary and proportionate countermeasures against acts that, by definition, represent a violation of the prohibition of the use of force from Article 2(4) of the Charter (as for example in the case of terrorist attacks which do not represent *stricto sensu* armed attacks undertaken by states, but acts undertaken with the intention of causing fear among the population in order to achieve certain political goals)[51]. In this regard, there are certain limitations established by international practice, so the use of force, which would include revenge or punishment and which would not be aimed at stopping or repelling the attack, would mean reprisals not permitted under international law, and not the legal exercise of

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[48] O'Connell Mery Ellen. Lawful Self-Defense to Terrorism. University of Pittsburgh Law Review, vol. 63, 2001/2002, p. 893, etc.

[49] Carrie McDougall, The Crime of Aggression under the Rome Statute of the International Criminal Court, University Press, Cambridge, 2013, p. 68, etc.

[50] Kolesnik D.N. The Development of the Right to Self-Defence, in: W.E. Butler (ed.). The Non-Use of Force in International Law. Kluwer Academic Publishers. Dordrecht, 1989, p. 156.

[51] Davorin Lapaš. What Does the «War against Terrorism» Tell Us about the Contemporary Concept of International Legal Personality?, in: Becker S. W., Derenčinović, D. (eds), International Terrorism: The Future Unchained? Faculty of Law. University of Zagreb. Zagreb, 2008, p. 112.

the right to self-defense[52]. Finally, it follows from the aforementioned statements that the criteria of necessity and proportionality represent not only a condition but also an optimal test for the legal use of force, when there are practically no alternative ways to prevent or repel an armed attack[53].

Second condition: Temporariness

The validity of the exercise of the right to self-defense presupposes the fulfillment of the conditions of temporariness. In Article 51 of the Charter, it is expressly stated that self-defense will last until the Security Council, *a posteriori*, *post factum,* does not take the concrete measures required by Title VII, which relate to the maintenance of international peace and security. Centralization and limitation of the right to use force according to the Charter should thereby contribute to taking control over actions initiated on the basis of the right of self-defense[54]. The time limit for taking control of the Security Council over acts of self-defense assumes that each state act must have limited effects whose effect is subsidiary to

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[52] Norman Menachem Feder. Reading the UN Charter Connotatively: Toward a New Definiton of Armed Attack. New York University Journal of International Law and Politics. 1987, vol. 19, p. 395; Jean-Pierre Cot, Alain Pellet. La Charte des Nations Unies: Commentaire article par article. Economica. Paris, 1991, p. 772, etc; Stanimir A. Alexandrov. Self-Defence against the Use of Force in International Law. Kluwer Law International. Hague, 1996, pp. 166-167; Thomas M. Franck. On Proportionality of Countermeasures in International Law. American Journal of International Law. 2008, vol. 102, № 4, pp. 715–767.

[53] This test is particularly important when determining «quasi-legal self-defense» which, for example, can be manifested through prolonged occupation of state territory. Thus, in the case of the construction of a wall in the occupied Palestinian territory, the International Court of Justice confirmed that this act is not in accordance with international law and the exercise of the right to self-defense, since it represents Israel's intention to annex this area. See: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Advisory Opinion. International Court of Justice Reports. 2004, paras. 115–139.

[54] Đuro Ninčić. Samoodbrana u novom međunarodnom pravu. Jugoslovenska revija za međunarodno pravo. 1955, br. 2, p. 186.

the acts undertaken by the Security Council. However, due to the unclear time limit stipulated in Article 51 of the Charter, extensive application of the right to self-defense often occurred in practice. This specifically means that force in self-defense was not used immediately and in a timely manner to stop an ongoing attack, but afterwards (for example, after the accumulation of several individual armed incidents which, according to a subjective assessment, should achieve the effect of an armed attack), which was not the case in synchronicity with the content and meaning of the provision from Article 51 of the Charter of the United Nations[55].

THIRD CONDITION: TIMELY REPORTING TO THE UNITED NATIONS SECURITY COUNCIL

In United Nations practice, timely reporting means a duty to act promptly. Until now, reporting has mainly served as a basis for later adoption of specific measures by the Security Council. However, this practice did not result in the custom rule that a state that requests the use of individual or collective self-defense must submit a report to the Security Council. However, this did not mean that the state could behave in an extremely non-transparent manner invoking the right to self-defense. The lack of a report itself did not affect the exercise of the right to self-defense, but it was certainly one of the procedural factors that indicated whether the state was convinced that it had acted in self-defense[56]. The absence of a report could serve *prima facie* as evidence that self-defense

[55] Simma Bruno, Khan Daniel-Erasmus, Nolte Georg, Paulus Andreas, Wessendorf Nikolai (eds). The Charter of the United Nations: A Commentary. University Press. Oxford, 2012, p. 1406; James A. Green. The International Court of Justice and Self-Defence in International Law. Hart Publishing. Oxford, 2009, p. 98, etc; Oil Platforms Case. International Court of Justice Reports. 2003, op.cit., para. 64; Armed Activities in the Territory of the Congo. Judgment, International Court of Justice Reports. 2005, para. 146; Military and Paramilitary Activities in and aganist Nicaragua, op. cit., para. 231.

[56] Greig Don W. Self Defence and the Security Council: What does Article 51 Require? International and Comparative Law Quarterly. 1991, vol. 40, № 2, p. 366; Akehurst Michael B. Humanitarian Intervention, in: Bull Hedley (ed.), Intervention in World Politics. Clarendon Press. Oxford, 1984, p. 95.

was not undertaken legitimately and in accordance with accepted rules. Finally, the Charter does not allow the use of the right of self-defense to turn a victim state into an aggressor state. In this sense, it is important to point out that according to the provisions of Article 51 of the Charter, the use of the right to self-defense is conditioned by the condition that, «the measures taken shall not in any way call into question the authority and responsibility of the Security Council to undertake at any time such action, if he considers it necessary for the maintenance or establishment of international peace». The aforementioned limitation of the right to self-defense underlines the primary responsibility of the Security Council regarding the preservation of collective security. In addition, the limitation highlights the discretionary powers of the Security Council to make decisions on the lawful use of force in international relations.

RESPONSIBILITIES OF NON-STATE ACTORS FOR THE USE OF FORCE

A special legal issue to which the author pays attention here is related to the violation of the prohibition on the use of force or the threat of force by non-state actors. *In concreto*, the question is, in such situations, is it possible to attribute responsibility for armed attacks by non-state actors to the states from which the non-state actors carry out their activities[57]? According to the rules codified in the provisions of Articles 1 and 2 of the 2001 Draft on the Responsibility of States for Unlawful Acts, prepared by the Commission for International Law of the United Nations, any unlawful act of a State that may consist of certain actions or omissions that violate its international obligations, entails its international legal responsibility. The condition for withdrawal

[57] Cenic Sonja. State Responsibility and Self-Defence in International Law Post 9/11: Has the Scope of Article 51 of the United Nations Charter been Widened as a Result of the US Response to 9/11? Australian International Law Journal. 2007, vol. 14, pp. 201–202.

of international responsibility in the case of illegal acts of non-state actors located on the territory of a state therefore presupposes the attribution of these acts to that state[58]. However, taking into account that state responsibility is different from individual responsibility, only in exceptional situations the illegal behavior of individuals or groups (including non-state actors) can be attributed to the state. As states function through human actions, the illegal behavior of a state official (agent), who acts on its behalf, or of state bodies (legislative, judicial and executive), is considered an illegal act of the state itself. In order for the conduct of a non-state actor to be equated with the conduct of state officials, it must be proven that the non-state actor was completely dependent on the state or was under its effective control. The criterion of effective control implies situations in which states lead certain operations or control them[59]. The connection between the state and the non-state actor in such situations must be so strong and pervasive that it practically does not differ from the relationship that exists between the state and its officials or authorities[60]. According to the established rule from international practice contained in Article 8 of the Draft on the responsibility of states for illegal acts, the state is responsible for the acts of groups or individuals if they acted on the order, under the leadership or control of the state[61]. From international jurisprudence, however, it is not possible to determine with certainty the lower gravity threshold required for the attribution of international responsibility of non-state actors to states, and the attribution varies

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58 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries. Yearbook of the International Law Commission. 2001, vol. II, Part Two, pp. 32–36.

59 Military and Paramilitary Activities in and aganist Nicaragua, op. cit., para. 115; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs Serbia and Montenegro), 2007, para. 46.

60 Nielsen Elizabeth. State Responsibility for Terrorist Groups. UC Davis Journal of International Law & Policy, 2010, vol. 14, № 1, p. 158.

61 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, op. cit., p. 47.

depending on the circumstances of each individual case[62]. Generally speaking, the attribution of responsibility depends on the degree of control, which differs for individuals in relation to organized armed groups that have a command structure. When attributing responsibility for the illegal acts of non-state actors, determining the participation of states in their control is usually reduced to examining logistical, coordination, financial and military assistance, but not assistance in the tactical planning of armed operations, identifying targets and giving orders in respect of which non-state actors they have some autonomy[63]. In the period of post-Cold War international practice, the aforementioned approach led to a shift of the gravitational threshold for attributing the responsibility of non-state actors upwards, since it was considered by certain interventionist countries that the execution of several unrelated armed attacks by non-state actors triggers the right of these states to self-defense[64]. Therefore, in the process of determining responsibility, the application of the general control test with the standard of effective control is suggested, which in certain situations provides a more optimal possibility for attributing the responsibility of non-state actors to states that provide them with a special type of support compared to the one that is common in international practice (for example, in the management and planning of armed operations)[65]. Unlike cases in which states sanction, recognize or in some other way accept or approve illegal acts of non-state actors, there are also such cases in international practice where states refuse responsibility for illegal acts

[62] Prosecutor vs. Dusko Tadic. International Tribunal for the Former Yugoslavia. Case IT-94-1-A, 1999, paras. 131–132, 137.

[63] Prosecutor vs. Delalic et al. International Tribunal for the Former Yugoslavia (Appeals Chamber), Case: IT-96-21-A, Judgment, 2001, paras. 42, 47.

[64] Kreß Claus. Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts. Journal of Conflict & Security Law, 2010, vol. 15, № 2, pp. 249–252.

[65] Cassese Antonio. Symposium: Genocide, Human Rights and the ICJ: The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia. European Journal of International Law, 2007, vol. 18, № . 4, pp. 649–666.

of non-state actors, because they believe that this responsibility cannot be attributed to them[66]. Thus, if circumstances arise in which non-state actors undertake extraterritorial armed actions against third countries that, in response to such actions, legitimately exercise their right to self-defense, the very state from which the armed actions of non-state actors are carried out may become a victim of such actions, because it bears the risk of indirect responsibilities for activities that, although undertaken without its approval, are nevertheless undertaken in the territory under its control[67]. Accordingly, the question of attributing the responsibility of non-state actors is inextricably linked to the question of whether the exercise of the right to self-defense constitutes a violation of the prohibition of the use of force against the state in which the non-state actor is located. The answer to the mentioned question presupposes the right of the victim state to respond to an armed attack by a non-state actor with armed force. However, the fact that the armed attack took place from the territory of the state where the non-state actor is located does not indicate, per se, the immediate international legal responsibility of that state. If, on the other hand, an armed attack could be attributed to this state, then it is considered that the justified use of force in self-defense and against it is possible. On the other hand, if the responsibility for an armed attack could not

[66] Brown Davis. Use of Force against Terrorism after September 11th: State Responsibility, Self-Defence and other Responses. Cardozo Journal of International & Comparative Law, 2003, vol. 11, № 1, p. 10, etc; Ruys Tom, Verhoeven Sten. Attacks by Private Actors and the Right of Self-Defence. Journal of Conflict & Security, 2005, vol. 10, № 3, pp. 300-301; Cenic Sonja, op.cit., p. 202; Murphy Sean D. Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ? American Journal of International Law, 2005, vol. 99, № 1, pp. 64–70; Schachter Oscar, op.cit., p. 311.

[67] Brown Davis. Use of Force against Terrorism after September 11th: State Responsibility, Self-Defence and other Responses. Cardozo Journal of International & Comparative Law. 2003, vol. 11, № 1, p. 10, etc; Ruys Tom, Verhoeven Sten Attacks by Private Actors and the Right of Self-Defence. Journal of Conflict & Security. 2005, vol. 10, № 3, pp. 300–301; Murphy Sean D. Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ? American Journal of International Law. 2005, vol. 99, № 1, pp. 64–70.

be attributed to this state in any way, because the state, for example, is unable to take any measures against a non-state actor, this does not mean that that state did not violate another a rule of international law relating to the unlawful acts of a non-state actor located on its territory[68]. The mere reluctance or inability of the state from whose territory non-state actors undertake armed acts, however, does not withdraw the right of the victim state to use force against it in self-defense[69]. It further follows from the above that self-defense against armed attacks by non-state actors implies that when using it, the victim state must comply with all conditions related to the lawful use of force in international relations, which, inter alia, concern necessity and proportionality, as well as temporary and territorial restrictions. If self-defense involves the use of force exclusively against non-state actors and not against the states in which those actors are located, and if such use of force is not accompanied by the consent of these states (due to the fact that non-state actors exercise effective control over parts of their territory), the attribution of international legal responsibility that derives from *ius ad bellum*, it will be difficult to be accepted by the wider international community[70]. In such circumstances that may pose a threat to peace, the United Nations Security Council is the only one that has the power to act properly by taking action against non-state actors, while providing assistance to the states from whose territory they operate, thereby reducing the risk that states themselves assess whether there is an armed attack which gives them the right to respond with their armed forces in self-defense[71].

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[68] Deeks Ashley. Unwilling or Unable: Toward a Normative Framework for Extra-Territorial Self-Defence. Virginia Journal of International Law. 2012, vol. 52, № 3, p. 483.

[69] Barnidge Jr. Robert P. Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle. Asser Press. Hague, 2008, pp. 1–250.

[70] Elizabeth Wilmshurst (ed.), International Law and the Classification of Conflicts. University Press. Oxford, 2012, pp. 1–568.

[71] Final Report on Aggression and the Use of Force. Rapporteur Noam Lubell. International Law Association. Sydney Conference. 2018, p. 17.

CONCLUDING REMARKS

Although the use of the right of self-defense as an exception to the rule against the use of force is relatively easy to determine in theory, it is still difficult to implement in practice. It is especially complicated to do this in the conditions of modern security threats that include transnational terrorism and hybrid forms of warfare. This trend came to a particular expression in the post-Cold War period, when the question of the obsolescence of the existing legal system on the prohibition of the use of force was raised. In response to this question, the General Assembly, at the jubilee Summit of Heads of State and Government held in 2005, confirmed that the relevant provisions of the Charter are sufficient to resolve a whole series of threats to international peace and security, and that the Security Council is fully empowered to implement coercive measures that would ensure the execution of these goals and principles of the world organization[72]. The aforementioned position on collective security has remained valid until today, since the rules in general international law are a sufficient guarantee for the legality of the use of force in modern international relations, especially if they are correctly interpreted and applied in practice when they can satisfy the demands of the wider international community for dealing with all new threats such as those related to the illegal actions of non-state actors[73]. I guess this is where the belief comes from, that in intensified mutual cooperation and with greater involvement and support of the Security Council, but also of the international criminal justice system, they could overcome these challenges without additional escalation resulting from the extensive interpretation of «armed attack» as a prerequisite for exercising self-defense not only against non-state actors, but also against states from whose territory these actors carry out armed

[72] World Summit Outcome. United Nations General Assembly Resolution. A/RES/60/1, 24 October 2005, para. 79.

[73] Wood Michael. International Law and the Use of Force: What Happens in Practice? Indian Journal of International Law, 2013, vol. 53, pp. 345–367.

actions, which are not directly involved in international armed conflicts and which cannot be attributed or charged with the illegal acts of non-state actors. Namely, it is considered that the danger of using force in a voluntaristic manner and contrary to the right to self-defense enshrined in the Charter of the United Nations would be eliminated. Whether it is really possible to achieve this at the universal international level and whether it is possible to direct the use of self-defense for the sake of achieving international peace, and not for the sake of escalating the conflict, remains to be seen. The reality of international relations does not speak in favor of this, since the world is increasingly faced with situations in which the states themselves encourage and use non-state actors as their «proxies» in an effort to preserve their own impunity (as evidenced by the latest war situations in the world in which there was direct use of paramilitary organizations or private military companies in achieving their own strategic or geopolitical goals). The restrictive interpretation of the International Court of Justice on the application of Article 51 of the Charter to non-state actors «opened the door» to the indirect involvement of states in the so-called «surrogate warfare» that is conducted through non-state actors. This certainly weakens the effect of the imperative international rule on the prohibition of the use of force in international relations, on which the collective security system of the United Nations is based[74]. Since non-state actors are not explicitly bound by the limitations prescribed by the rule on the prohibition of the use of force, as well as by other rules concerning the application of *ius in bello* and *ius ad bellum*, there is a justified fear that they can become an effective tool in waging «dirty wars» that cause serious humanitarian consequences for certain regions, and thus for the entire world. In order to avoid this outcome, the international community must continue to work diligently on the international legal regulation of the status of non-state actors and the progressive

[74] Barbour Stephanie A., Salzman Zoe A. The Tangled Web: The Right of Selfdefense Against Non-State Actors in the Armed Activities Case, op. cit., p. 192.

development of rules on their international legal responsibility[75]. Any further neglect of this issue would affect the coherence of international law and its greater fragmentation[76].

References

1. Akehurst Michael B. Humanitarian Intervention. In: Hedley Bull (ed.), Intervention in World Politics. Clarendon Press. Oxford, 1984.
2. Alexandrov Stanimir A. Self-Defence against the Use of Force in International Law. Kluwer Law International. Hague, 1996.
3. Azubuike Eustace Chikere. Probing the Scope of Self Defense in International Law. Annual Survey of International & Comparative Law. 2011, vol. 17, № 1.
4. Barbour Stephanie A., Salzman Zoe A. The Tangled Web: The Right of Self-defense against Non-State Actors in the Armed Activities Case. International Law and Politics. 2008, vol. 40.
5. Barnidge Robert P. Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle. Asser Press. Hague, 2008.
6. Bentwich Norman, Martin Andrew. A Commentary of the Charter of the United Nations. Columbia Univeristy Press. New York, 1950.
7. Bothe Michael. Terrorism and the Legality of Preemptive Force. European Journal of International Law. 2003, № 1.
8. Brierly James Leslie. The Law of Nations. Oxford University Press. Oxford, 1963.

[75] Krivokapić Boris. Rat i pravo – teorija i praksa oružanih sukoba i međunarodno pravo, Udruženje pravnika Republike Srpske, Akademija nauka i umjetnosti Republike Srpske. Banja Luka. Fakultet bezbednosti Univerziteta u Beogradu. Banja Luka, 2023, pp. 1333–1334.

[76] On the current positions of states regarding the issue of the possibility of using armed force against non-state actors expressed at the informal meeting of the Security Council in February 2021. See: Haque Adil Ahmad. Self-Defense Against Non-State Actors: All Over the Map Insights from UN Security Council Arria-Formula Meeting. URL: https://www.justsecurity.org/75487/self-defense-against-non-state-actors-all-over-the-map/, 24.03.2021.

9. Brown Davis. Use of Force against Terrorism after September 11th: State Responsibility, Self-Defence and other Responses. Cardozo Journal of International & Comparative Law. 2003, vol. 11, № 1.
10. Brownlie Ian. International Law and the Use of Force by the States. Clarendon Press. Oxford, 1963.
11. Cannizzaro Enzo. Contextualizing Proportionality: Jus ad bellum and Jus in bello in the Lebanese War. International Review of the Red Cross. 2006, vol. 88, № 864.
12. Cassese Antonio. Symposium: Genocide, Human Rights and the ICJ: The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia. European Journal of International Law. 2007, vol. 18, № 4.
13. Cassese Antonio. International Law. Oxford University Press. Oxford, 2005.
14. Cenic Sonja. State Responsibility and Self-Defence in International Law Post 9/11: Has the Scope of Article 51 of the United Nations Charter been Widened as a Result of the US Response to 9/11? Australian International Law Journal. 2007, vol. 14.
15. Cot. Jean-Pierre Pellet. Alain. La Charte des Nations Unies: Commentaire article par article. Economica. Paris, 1991.
16. Duško Dimitrijević. Pravo na samoodbranu u funkciji očuvanja međunarodnog mira i bezbednosti. Srpska politička misao. 2012, vol. 37, № 3.
17. Duško Dimitrijević. Nedržavni akteri i upotreba sile u međunarodnim odnosima. In: Vučić M. (ed.). Nedržavni akteri u međunarodnom pravu, Intitut za međunarodnu politiku i privredu. Beograd, 2020.
18. Deeks Ashley. Unwilling or Unable: Toward a Normative Framework for Extra-Territorial Self-Defence. Virginia Journal of International Law. 2012, vol. 52, № 3.
19. Dinstein Yôrām. War, Aggression and Self-Defence. University Press. Cambridge, 2005.
20. Feder, Norman Menachem. Reading the UN Charter Connotatively: Toward a New Definiton of Armed Attack. New York University Journal of International Law and Politics. 1987, vol. 19.

21. Fitzmaurice Gerald. Definition of Aggression. International and Comparative Law Quarterly. 1952, vol. 1.
22. Franck Thomas M. On Proportionality of Countermeasures in International Law. American Journal of International Law. 2008, vol. 102, № 4.
23. Thomas Franck. Who Killed Article 2(4). American Journal of International Law. 1970, vol. 64.
24. Mayers McDougal. The Hidrogen Bomb Test and International Law of the Sea. American Journal of International Law. 1955, vol. 49.
25. Gardam, Judith, Necessity. Proportionality and the Use of Force by States. University Press. Cambridge, 2004.
26. Gavranov Velibor. Principi i primena sistema kolektivne bezbednosti Ujedinjenih nacija. Institut za uporedno pravo. Beograd, 1969.
27. Gazzini Tarcisio. The Changing Rules on the Use of Force in International Law. University Press. Manchester, 2005.
28. Gray Christine. International Law and Use of Force. University Press. Oxford, 2004.
29. Gray Christine. A Crisis of Legitimacy for the UN Collective Security System. International & Comparative Law Quarterly. 2007, vol. 56, № 1.
30. Green James A. The International Court of Justice and Self-Defence in International Law. Hart Publishing. Oxford, 2009.
31. Greig. Don W. Self Defence and the Security Council: What does Article 51 Require? International and Comparative Law Quarterly. 1991, vol. 40, № 2.
32. Haque Adil Ahmad. Self-Defense Against Non-State Actors: All Over the Map Insights from UN Security Council Arria-Formula Meeting. URL: https://www.justsecurity.org/75487/self-defense-against-non-state-actors-all-over-the-map/, 24.03.2021.
33. Henderson Christian. Non-State Actors and the Use of Force. In M. Noortmann, A. Reinisch and C. Ryngaert. Non-State Actors in International law. Hart Publishing. Oxford, 2014.

34. Henkin Louis. Intervention and Neutrality in Contemporary International Law. Proceedings of the American Society of International Law. 56th Annual Meeting. Washington, 1963.
35. Heselhaus Sebastian. International Law and the Use of Force. In: The Role of International Law and Institutions. EOLSS. UNESCO, 2002.
36. Hilederband Robert C. Dumbarton Oaks: The Origins of the United Nations and the Search for Postwar Security. University of North Carolina Press. Chapel Hill, 1990.
37. Jennings Robert Y. The Caroline and McLeod Cases. American Journal of International Law. 1938, vol. 32, № 1.
38. Kelsen Hans. The Law of the United Nations. Stevens & Sons. London, 1950.
39. Knight Andy W. A Changing United Nations: Multilateral Evolution and the Quest for Global Governance. Macmillan. London, 1999.
40. Kolesnik D.N. The Development of the Right to Self-Defence. In: W.E. Butler (ed.). The Non-Use of Force in International Law. Kluwer Academic Publishers. Dordrecht, 1989.
41. Kreß Claus. Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts. Journal of Conflict & Security Law. 2010, vol. 15, № 2.
42. Krivokapić Boris. Rat i pravo – teorija i praksa oružanih sukoba i međunarodno pravo, Udruženje pravnika Republike Srpske, Akademija nauka i umjetnosti Republike Srpske, Banja Luka, Fakultet bezbednosti Univerziteta u Beogradu. Banja Luka, 2023.
43. Kunz Josef L. Individual and Collective Self-Defence in Art 51 of the Charter of the United Nations. American Journal of International Law. 1947, vol. 41.
44. Lapaš Davorin. What Does the «War against Terrorism». Tell Us about the Contemporary Concept of International Legal Personality? In: Becker S.W., Derenčinović D. (eds). International Terrorism: The Future Unchained? Faculty of Law. University of Zagreb. Zagreb, 2008.
45. Lubell Noam. Extraterritorial Use of Force Against Non-State Actors. University Press. Oxford, 2010.

46. McDougal Mayers. The Hidrogen Bomb Test and International Law of the Sea. American Journal of International Law. 1955, vol. 49, № 3.
47. McDougal Mayers. Soviet Cuban Quarantin and Self-Defence. American Journal of International Law. 1963, vol. 57, № 3.
48. McDougall Carrie. The Crime of Aggression under the Rome Statute of the International Criminal Court. University Press. Cambridge, 2013.
49. Moore. John Norton (ed.). Law and Civil War in the Modern World. The Johns Hopkins University Press. Baltimore, 1974.
50. Müllerson Rein. Jus ad Bellum and International Terrorism». In: Y.Dinstein, F. Domb (eds). The Progression of International Law. Beill/ Nijhoff. Hague, 2011.
51. Murphy Sean D. Contemporary Practice of the United States relating to International Law. American Journal of International Law. 2002, vol. 96, № 3.
52. Murphy Sean D. Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ? American Journal of International Law. 2005, vol. 99, № 1.
53. Nielsen Elizabeth. State Responsibility for Terrorist Groups. UC Davis Journal of International Law & Policy. 2010, vol. 14, № 1.
54. Ninčić Đuro. Samoodbrana u novom međunarodnom pravu. Jugoslovenska revija za međunarodno pravo. 1955, br. 2.
55. O'Connell Daniel P. International Law. Stevens and Sons. London, 1970, vol. I.
56. Pindić Dimitrije. Regionalne organizacije zasnovane na Povelji Ujedinjenih nacija. Institut za međunarodnu politiku i privredu. Beograd, 1978.
57. Ratner Steven. Jus ad bellum and Jus in bello after September 11. American Journal of International Law. 2002, vol. 96, № 4.
58. Russel Ruth B. A History of United Nations Charter: The Role of the United States, 1940–1945. Brookings Institutions. London, 1958.
59. Ruys Tom, Verhoeven Sten. Attacks by Private Actors and the Right of Self-Defence. Journal of Conflict & Security. 2005, vol. 10, № 3.

60. Ruys Tom, Armed Attack and Article 51 of the UN Charter: Evolutions in Customary Law and Practice. University Press. Cambridge, 2010.
61. Schachter Oscar. The Extraterritorial Use of Force against Terrorist Bases. Houston Journal of International Law. 1989, vol. 11.
62. Schwebel Stephen M. Aggression, Intervention and Self-Defence in Modern International Law. Recueil des Cours. Académie de Droit International, la Haye. 1972/II, vol. 136.
63. Show Malcolm N. International Law. University Press. Cambridge, 1997.
64. Simma Bruno, Khan Daniel-Erasmus, Nolte Georg, Paulus Andreas, Wessendorf Nikolai (eds). The Charter of the United Nations: A Commentary. University Press. Oxford, 2012.
65. Stahn Carsten. Terrorist Attacks as «Armed Attacks»: The Right to Self-Defence. Article 51(1/2) of the UN Charter and International Terrorism». The Fletcher Forum of World Affairs. 2003, vol. 27.
66. Tladi Dire. The Non-Consenting Innocent State: The Problem with Bethlehem's Principle. American Journal of International Law. 2013, vol. 107, № 3.
67. Van den Hole Leo. Anticipatory Self-Defence under International Law. American University International Law Review. 2003, vol. 19, № 1.
68. Waldock Humphrey. The Regulations of the Use of Force by Individual States in International Law. Recueil des Cours. Académie de Droit International, la Haye. 1952, vol. 81.
69. Walker Geogre K. Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said. Cornell International Law Journal. 1998, vol. 31, № 2.
70. Wilmshurst Elizabeth (ed.). International Law and the Classification of Conflicts. University Press. Oxford, 2012.
71. Wolfrum Rüdiger. The Attack of September 11, 2001, the Wars Against the Taliban and Iraq: Is there a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict? Max Planck Yearbook of United Nations Law. 2003, vol. 7.

72. Wood Michael. International Law and the Use of Force: What Happens in Practice? Indian Journal of International Law, 2013, vol. 53.
73. Wood Michael. The Role of the UN Security Council in Relation to the Use of Force against Terrorists. In L. van den Herik and N. Schrijver. Counter-Terrorism Strategies in a Fragmented International Order: Meeting the Challenges. University Press. Cambridge, 2013.
74. Yepes Jesús María. Les accord régionaux et le Droit International. Recueil des Cours. Académie de Droit International, la Haye. 1947, vol. 71.
75. Zourek Jaroslav. La notion de légitime défense en Droit International. Annuaire de l'Institut de Droit International. 1975, vol. 56.