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Self-Defence against Non-State Actors

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Abstract

The preconception of international law, and especially of the prohibition on the use of force, is state centric. For many decades, the right of self-defence has been understood, interpreted and practiced as an interstate right as well. As a consequence, the admissibility of self-defence against non-state actors was exclusively depended on a narrowly constructed attribution of the armed attack to a state. The core concern of the first chapter was to shed light to the challenges and consequences arising for the regime of self-defence when including non-state actors. In essence, every change to the right of self-defence should be weighed against the inevitable requirement entailed in Art. 51 UN Charter that the addressee of any self-defence measure must either be the trigger of the armed attack or – at least – to some extent be responsible for it. The primary focus on the question whether a non-state actor can carry out an armed attack at all should not obscure the fact that the loss of the protection of the prohibition of the use of force is, however, a central question of responsibility. Growing acceptance that not only attacks by states but also (terroristic) attacks by non-state actors can trigger the right of self-defence does not simultaneously answer the question of the responsibility of the host state – on the contrary, it raises it anew. This thesis scrutinized various justification patterns cited by states as well as international law scholars since the entry into force of the UN Charter. On that basis, three categories of the right of self-defence against non-state actors were presented, which exemplify different degrees of responsibility requirements within the framework of Art. 51 UN Charter: direct, indirect and derived responsibility. These categories serve as a dogmatic foundation of this work in order to evaluate relevant state practice.

The second chapter examined the unwilling or unable-doctrine. The doctrine is based on the premise that, under international law, states have a duty to curb terrorist activities within their territory. This duty derives especially from the UN General Assembly's Friendly Relations Declaration, which has been declared as customary international law by the International Court of Justice and confirmed and further clarified particularly by the UN Security Council in Resolution 1373. On the basis of these UN acts, this thesis then discusses

different elements of the unwilling or unable-doctrine and elaborates on the practical consequences and structural risks associated with it.

The third chapter analyses methodological parameters required for a change of the right of self-defence. While these parameters only reveal the processes and means by which a norm of international law acquires validity, they do not contain a materiel answer. At its core, customary law formation remains inductive and requires a sufficient degree of state practice accompanied by *opinio iuris*. The requirements for normative change in customary law and treaty law are essentially the same; the prerequisites for change in the law of self-defence can be accurately mapped alongside the elements of customary law. Crucially, however, an extensive view that places greater weight on acts of powerful states for legal development must be rejected. The change of the realm of self-defence towards a broader scope requires the will of the – if not all, at least the majority – states and thus creates a sufficient basis for new binding norms.

In the last chapter, a multitude of cases in which states have attacked non-state actors on the territory of another state (these are predominantly, but not exclusively, terrorist groups) were examined with respect to the legal justification pattern. According to the evaluation of the case studies, only the USA, Israel, Canada, Australia and Turkey explicitly supported the unwilling or unable-doctrine. Defensibly, but not with absolute certainty, the Netherlands, the United Kingdom, and Iran also ascribed to the legal view underlying the unwilling or unable doctrine. In light of this result, the verdict is clear: the unwilling or unable-doctrine has not become customary international law. In fact, the respective precedents of the unwilling or unable-doctrine were met with considerable opposition from the overwhelming majority of the international community, and the US practice in particular shows considerable inconsistencies. Even if the doctrine found more positive resonance in the practice of states in the future, the arguments elaborated in the context of this thesis argue against it: The unwilling or unable-doctrine bears the potential for misuse and unduly weakens the prohibition on the use of force. Because of all this, it is seriously doubtful that the unwilling or unable-doctrine will ever gain customary status. Nevertheless, the states have the last word in this respect.

The situation is different in the category of direct responsibility: In its 1986 Nicaragua decision, the International Court of Justice still held to the criterion of effective control as the basis for attributing armed attacks to a state. Here, a gradual relaxation has resulted from a state practice of the last decades. The attribution standard of substantial involvement represents the prevailing law under Article 51 of the UN Charter. Nevertheless, a tendency toward self-defence against non-state actors can be discerned, with the host state providing only indirect support to the non-state actors. However, this tendency has not passed the threshold of customary law.

This work finds that self-defence against non-state actors maintains depending on the attribution of the armed attack to a state. Only if a state has been directly responsible for the armed attack, a self-defence measure against that state is permitted. This result reinforces the normative power of peacekeeping law by maintaining the balance between the comprehensive prohibition of the use of force and its restrictive exceptions.