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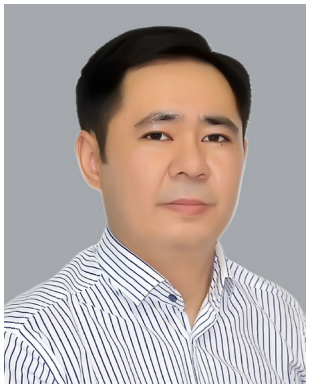
WHETHER AND TO WHAT EXTENT DOES INTERNATIONAL LAW ALLOW STATES TO USE MILITARY FORCE AGAINST ARMED NON-STATE ACTORS ON THE TERRITORY OF ANOTHER STATE?[1]



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Whether and to what extent does international law allow states to use military force against armed non-state actors on the territory of another state?

The relevance of the paper is due to the importance of understanding the legal boundaries of state actions in the context of the growth of transnational terrorism, insurgent movements and asymmetric wars. Recent conflicts and military interventions highlight the urgent need to clarify international law regarding the acceptable use of force against armed non-state actors located in the territory of another state. Finding the delicate balance between respecting state sovereignty and ensuring the right to self-defense poses a significant challenge. The subject of the research is primarily the contemporary attribution concepts that may be used during the justification of the use of military force by states against armed non-state actors on the territory of another sovereign state. The purpose of the research is to critically examine legal aspects and state practice relating to the aforementioned concepts. The novelty of the study lies in the fact that by bringing together legal developments, state practice and some issues in using force sphere, the article offers new insights into the complex interrelation between state sovereignty and the right to self-defense.

Brief conclusions: 1) According to some states and experts, using military force against armed non-state actors on the territory of another state violates the sovereignty of that state, whereas others claim that it may be justified under the right of self-defense. In this regard, state practices have been inconsistent. 2) Nowadays, the «effective control» test is the only legally justified approach that triggers the right to self-defense against armed non-state actors on foreign soil. 3) There is no well-established state practice and *opinio juris* relating to other examined attribution tests or the «Unable or Unwilling» doctrine.

Keywords: international law, state sovereignty, use of force, armed non-state actors, collective security, self-defense, effective control, customary international law, modern conflicts, global security

Introduction

Fundamental tenets of international law include the idea of state sovereignty and the prohibition of using force against other states. However, the adverse activity of armed non-state actors (ANSAs), like terrorist organisations, has tested the traditional view of using force in international law.

[1]This article draws on a coursework during my study (LLM) at the University of Reading.

A defending state may try to justify the use of military force on the territory of another state (host state) as self-defence against ANSA if the host state has «effective» or «overall» control over the ANSA or if the host state is a «harbouring state» for ANSA, or «unwilling» to take adequate steps against ANSA according to the «Unable or Unwilling» doctrine (UU). Another possible variant of justification for using force against the host state is by referring to the «Unable» part of the «Unable or Unwilling» doctrine. Also, the use of military force on the territory of another state could be related to targeted killings.

Suppose the ANSA's actions in one way or another may be attributed to the host state. Such circumstances might allow the defending state to employ its right under Article 51 of the UN Charter. However, when it may be challenging to attribute ANSA's actions to the host state, some defending states may try to justify using military force by pointing out that the host state is unable to take adequate measures against ANSA. Furthermore, some states have practised using military force in the form of targeted killings of the members of the ANSA located in another country, even if members of the ANSA did not carry out any armed attack. The reasoning is that the defending state may have a «global» non-international conflict against ANSA or that the armed attack has been «imminent».

However, today, it could be claimed that the «effective control» test is the only criterion allowing lawful usage of the right to self-defence against ANSA on another state's territory. Other tests and UU doctrine are not supported by widely accepted state practice and *opinio juris*. At the same time, the standards of necessity and proportionality should always be met when the right to self-defence is invoked.

Basic Provisions
Materials and Methods

The study analyzes international law's stance on states using military force against ANSAs on foreign territory. Reviews of major international treaties, UN resolutions, and legal journals constituted the main part of the methodology. An analysis of some cases related on using force by defending state against ANSAs in the territory of another state was carried out. By applying mentioned above approaches, a nuanced understanding of how and when states are allowed to use force in such contexts was enabled, enhancing in-depth exploration of the legal justifications and limitations.

Results
I. General considerations

In general, international law prohibits states from allowing the utilisation of their territory by ANSA for activities aimed against the interests of other countries.

For example, Article 2 of the Definition of Aggression defines aggression as «the use of armed forces by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations» and Article 3(g) equates aggression to: «The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its *substantial involvement* therein (emphasis added)».

In 1965, the UN General Assembly stated that «… no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist, or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State».[2] Later, in the Declaration on Principles of International Law concerning Friendly Relation and Co-operation among States in Accordance with the Charter of the United Nations (1970), the UN General Assembly adopted the following provision: «States are required to take all reasonable steps to ensure that their territory is not used by nonstate actors for purposes of armed activities – includ-

[2]Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty 1965 [A/RES/2131(XX)]

ing planning, threatening, perpetrating, or providing material support for armed attacks – against other states and their interests».[3]

According to another UN General Assembly Declaration: «States shall fulfil their obligations under international law to refrain from organizing, instigating, or assisting or participating in paramilitary, terrorist or subversive acts, including acts of mercenaries, in other States, or acquiescing in organized activities within their territory directed towards the commission of such acts».[4]

In the *Corfu Channel* case, the International Court of Justice (ICJ) stated that states have obligations under the principle of international law that they should «not to allow knowingly its territory to be used for acts contrary to the right of other states».[5]

Thus, states have *due diligence* responsibility to prevent using their territory by ANSAs against the interests of other states.

At the same time, some ICJ judges and scholars admit the lawfulness of using military force to defend a state against the ANSA located on the territory of another state. For instance, in the *Armed Activities* case, in Separate Opinion, Judge Kooijmans acknowledged that states have the right to self-defence even if the source of armed attack is ANSA.[6] Judge Simma supported this view: «if armed attacks are carried out by irregular forces from such territory against a neighbouring State, these activities are still armed attacks even if they cannot be attributed to the territorial State».[7] Henderson believes that in international law, «limited action in self-defence solely against [non-state actors] was not actually ruled out».[8] Müllerson has noted that «[s]tates must be able to use their inherent right to self-defence against whoever commits an armed attack against them».[9] As former Legal Advisor of the British Foreign Office Daniel Bethlehem says: «reasonably clear and accepted that states have a right of self-defense against attacks by non-state actors – as reflected, for example, in UN Security Council Resolutions 1368 and 1373 of 2001, adopted following the 9/11 attacks in the United States».[10]

Probably, the most famous case of using military force by a defending state on the territory of another country against the ANSA was the *Carolina* (1837) case.[11] During the incident, correspondence between Secretary of State Daniel Webster and Special Minister to the United States (US) Alexander Baring, 1st Baron Ashburton, highlighted the conditions under which it is acceptable for one country to legally violate another's territorial sovereignty («Carolina test»): «…exceptions [to right to territorial integrity] do exist [. Nevertheless] those exceptions should be confined to cases in which the «necessity of that self-defence is instant, overwhelming, and

[3]Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. 1970 [A/RES/2625(XXV)]

[4]Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations: resolution / adopted by the General Assembly 1987 [A/RES/42/22]

[5]*Corfu Channel Case (United Kingdom v Albania); Merits* [1949] ICJ Rep 1949 22.

[6]*Armed Activities (Congo v Uganda)* [2005] ICJ Rep 168. Separate Opinion of Judge Kooijimans, para 29.

[7]Idem. Separate Opinion of Judge Simma, para 12.

[8]Henderson C. The use of force and international law. Cambridge, United Kingdom; New York: Cambridge University Press, 2018. P. 316.

[9]Müllerson R. Self-defence against Armed Attacks by Non-State Actors // Chinese journal of international law (Boulder, Colo.). 2019. № 4. P. 753.

[10]Bethlehem D. Self-Defense Against an Imminent or Actual Armed Attack By Nonstate Actors // The American journal of international law. 2012. № 4. P. 774.

[11]Avalon Project – British-American Diplomcay: The Caroline Case. URL: https://avalon.law.yale.edu/19th_century/br-1842d.asp (accessed: 20.03.2023).

leaving no choice of means, and no moment for deliberation».[12] Therefore, at that time, the US Government admitted that provided the abovementioned criteria, a state might have the right to extraterritorial use of military force in self-defence against ANSA.[13]

II. Use of military force against ANSA whose actions could be attributable to a host state through «effective control», «overall control», or «harbouring state» tests

«Effective control» test

To justify the legality of using military force against ANSA on the territory of another state, the defending state may employ the «effective control» test. If the host state has «effective control» over the ANSA on its territory, the actions of the ANSA are attributed to the host state. In such a case, the defending state could justify its actions as self-defence under Article 51 of the UN Charter. For example, in response to the 1986 bombing of a West Berlin nightclub that killed American personnel, the US launched airstrikes on military targets in Libya. As justification for using military force, the Reagan Administration insisted that the US acted in self-defence.[14] President Reagan noted that the terrorist operation that killed Americans was «planned and executed under the direct orders of the Libyan regime».[15] Although Libya was believed to be directly responsible for the attack,[16] the UN General Assembly adopted the Resolution, which condemned the US» responsive military actions.[17]

In consonance with Article 8 of the International Law Commission»s (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA): «The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the *instructions of, or under the direction or control of*, that State in carrying out the conduct (emphasis added)».[18]

In the *Nicaragua* case, the ICJ stated that to attribute the actions of ANSA to the state, «it would in principle have to be proved that [state] had effective control of the military and paramilitary operations».[19] In the context of the *Nicaragua* case, the Court did not explicitly explain what it meant under «effective control». However, the court ruled that the evidence of American involvement in Nicaragua (including training and providing financial and logistical assistance) was insufficient to establish that the *contras* were under «control» and «dependency» on the US government to the extent necessary to warrant attributing their actions to the US. In the *Genocide*

[12]Wood M. The Caroline Incident – 1837 // The use of force in international law: a case-based approach / ed. T. Ruys, O. Corten, A. Hofer. Oxford, United Kingdom: Oxford University Press, 2018. First edition.. Oxford University Press 2018. P. 9.

[13]There is an opinion that the «Caroline test» stays a recognised component of international law. See: Nichols T. Eve of destruction: the coming age of preventive war. Philadelphia: University of Pennsylvania Press, 2008. P. 2.

[14]Goshko J. M. Administration Acts on «Self-Defense» Principle Espoused by Shultz // Washington Post. 1986.

[15]Woodward B. and others. Libyan Cables Intercepted And Decoded // Washington Post. 1986.

[16]Michael B. Responding to attacks by non-state actors: the attribution requirement of self-defence // Australian international law journal. 2009. № 16. P. 147.

[17]Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the aerial and naval military attack against the Socialist People's Libyan Arab Jamahiriya by the present United States Administration in April 1986.

[18]Responsibility of States for internationally wrongful acts 2001 [A/RES/56/83]

[19]Case concerning military and paramilitary activities in and against Nicaragua [1986] ICJ Rep 1986 para 115.

case,[20] the Court used the «effective control» test to define if Belgrade was responsible for the actions of Bosnian Serbs in Srebrenica. At this time, again, it was not revealed by the Court the clear criteria of the «effective control» test. However, from the context of the *Genocide* case, it may be concluded that «effective control» may mean that the state should give direct instructions on how to act in each situation or has complete control over the actions of ANSA as if it were an organ of the state.

Nevertheless, some authors criticised the ICJ for relying too on its own experience instead of using states» practice and *opinio juris* to define the justifications for the «effective control» test's criteria.[21] Also, the «effective control» test was accused of creating a «heavy evidentiary burden on the [defending] state».[22] It is argued that it is «hardly ever be possible to prove»[23] that a particular state has «effective control» over ANSA. Moreover, Boon argues that «[t]he elements developed by the ICJ were intended to apply to the determination of *effective control* during a military operation subject to the laws of war. This approach meant that the portability of the effective control test has been problematic from the start because it is tied to violations of the [International Humanitarian Law] (emphasis added)».[24]

«Overall control» test

The «overall control» test does not require proving the existence of profound control by a host state over ANSA like the «effective control» test. In the «overall control» test, the threshold required to attribute the ANSA's actions to the host state is lower.

In *Tadić* case, the ICTY challenged the «effective control» test elaborated by the ICJ. The ICTY stated that «for the attribution to a State of acts of [an organised and hierarchically structured group like ANSA], it is sufficient to require that the group as a whole be under the overall control of the State».[25] Unlike the «effective control» test, the «overall control» test does not require that each concrete ANSA's activity be «specifically imposed, requested or directed» by the host state.[26] Thus, the «overall control» test does not require the existence of instructions from the host state to ANSA.[27] To «pass» the «overall control test» for a host state, it is enough to equip, finance or assist in coordinating or planning the ANSA's activities,[28] supply with a territorial base, or allow the ANSA to act.[29]

[20]Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v Yugoslavia) [2007] ICJ Rep 43.

[21]Cassese A. The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia // European journal of international law. 2007. № 4. P. 649.

[22]Khaitan B. Alternative to the Existing Rule of Attribution for Use of Force by Non-State Actors in an Armed Conflict // Journal of conflict & security law. 2021. № 1. P. 44.

[23]Henderson. Op. cit. P. 313.

[24]Boon K. Are control tests fit for the future? The slippage problem in attribution doctrines // Melbourne journal of international law. 2014. № 2. P. 19.

[25]*Prosecutor v Duško Tadić (Appeal Judgement)* [1999] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 IT-94–1-A, para 120.

[26]Idem. Para 122.

[27]Boon. Op. cit. P. 9. defining the legal relationship between states, international organisations ('IOs'

[28]Henderson. Op. cit. P. 316.

[29]Moir L. Action Against Host States of Terrorist Groups // The Oxford Handbook of the Use of Force in International Law / ed. M. Weller: Oxford University Press, 2015. P. 723.

However, the ICJ did not uphold the proposed «overall control» test. Instead, in the *Armed Activities* case, the ICJ reaffirmed the legality only of the «effective control» test.[30] Furthermore, the ICJ believes that the «overall control» test «has the major drawback of broadening state responsibility well beyond the fundamental principles governing the law of international responsibility».[31]

«Harbouring state» test

After 9/11, the world witnessed new justification for using military force in self-defence against ANSA situated on the soil of another state and the host state itself – the «harbouring state» test.

The phrase, «We will make no distinction between the terrorists who committed these acts and those who harbor them»[32]pronounced by US President Bush on 11 September 2001, may be considered as a source of less strict attribution standard than «effective control» or «overall control» tests to use military force in self-defence extraterritorially.

The fact that following 9/11, by Resolution 1368, the UN Security Council reaffirmed «the inherent right of individual or collective self-defence in accordance with the Charter»[33] and that the «international community has been practically unanimous that the US invasion of Afghanistan was a lawful exercise of self-defence»[34] might be regarded as a broad acceptance of the «harbouring state» test. Moreover, on April 21, 2004, Lord Goldsmith, the Attorney General of the United Kingdom (UK), declared: «The resolutions passed by the Security Council in the wake of 11 September 2001 recognised both that large-scale terrorist action could constitute an armed attack that will give rise to the right of self-defence and that force might, in certain circumstances, be used in self-defence against those *who plan and perpetrate such acts and against those harbouring them*, if that is necessary to avert further such terrorist acts (emphasis added)».[35]

In any event, to be considered a «harbouring state», the host state must readily give access to and use of its land, knowing that ANSA was conducting armed attacks or meant to do so.[36] Some writers argue that the host state should comply with additional requirements to be acknowledged

[30]Khaitan. Op. cit. P. 44; See also: Boon. Op. cit. P. 9. It is important to directly regulate their conduct under the law. Control tests under prevailing doctrines of attribution compound problem of ‘slippage’ – why control tests are common in international law – evaluation of control tests under law of state responsibility – International Law Commission’s proposed effective control test for responsibility of international organisations – duties and techniques to overcome limitations of control tests – consideration of whether alternative routes to state and international organisation responsibility address problem of slippage.;When do subjects of international law bear responsibility for the acts of others? It is often a question of control. Control is an essential element of the doctrine of attribution, defining the legal relationship between states, international organisations (‘IOs’).

[31]Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia). Op. cit. Para 406.

[32]Statement by the President in Address to the Nation. URL: https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010911-16.html (accessed: 19.12.2023).

[33]Resolution 1368 2001 [S/RES/1368 (2001)].

[34]Milanovic M. Self-Defense and Non-State Actors: Indeterminacy and the Jus ad Bellum. URL: https://www.ejiltalk.org/self-defense-and-non-state-actors-indeterminacy-and-the-jus-ad-bellum/(accessed: 17.03.2023).

[35]Lords Hansard text for 21 Apr 2004 (240421-07). URL: https://publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text/40421-07.htm (accessed: 19.12.2023).

[36]Ruys T. «Armed attack» and Article 51 of the UN Charter: evolutions in customary law and practice. New York: Cambridge University Press, 2010. P. 503.

as a «harbouring state» – at least, it should provide training and weapons to ANSA. Such support should «substantially contribut[e] to» carrying out armed attacks by ANSA.[37]

With that, regarding self-defence measures of a defending state, according to Bethlehem's Principle 11, defensive actions against the «harbouring state» or ANSA should comply with the principles of necessity and proportionality.[38]

III. Use of military force against ANSA under the «Unwilling or Unable» doctrine

In 2002 Russia used military force in Georgia against Chechen irregulars based on a decision that Georgia was unable or unwilling to take appropriate measures to stop rebels' armed activities.[39] «If the United States has al-Qaeda, (Osama) bin Laden, top-level lieutenants in our sights, and Pakistan is unwilling or unable to act, then we should take them out», President Obama declared in 2008.[40] But «the Government of Pakistan objected to the «unauthorized unilateral action» of the United States»[41] that resulted in Osama bin Laden's death. Also, when on 29 February 2019, India, supposedly acting in self-defence against terrorist attacks, carried out an air strike on Pakistani territory without notifying the Pakistani government, the reaction of France was: «the legitimate right of India to guarantee its security against transboundary terrorism and called Pakistan to put an end to activities of terrorist groups on its territory».[42]

In a Report on the Legal and Policy Frameworks Guiding the United States Use of Military Force and Related National Security Operations, the White House provided a detailed description of the UU doctrine's essentials: «With respect to the «unable» prong of the standard, inability

[37]Hofmeister H. «To harbour or not to harbour»? Die Auswirkungen des 11. September auf das Konzept des «bewaffneten Angriffs» nach Art 51 UN-Charta // ZÖR. 2007. № 4. P. 503.

[38]Bethlehem. Op. cit. P. 776. for example, in UN Security Council Resolutions 1368 and 1373 of 2001, adopted following the 9/11 attacks in the United States. The reality of the threats, the consequences of inaction, and the challenges of both strategic appreciation and operational decision making in the face of such threats frequently trump a doctrinal debate that has yet to produce a clear set of principles that effectively address the specific operational circumstances faced by states. Bethlehem emphasizes the challenge to formulate principles, capable of attracting a broad measure of agreement, that apply, or ought to apply, to the use of force in self-defense against an imminent or actual armed attack by nonstate actors. Here, sixteen principles are proposed with the intention of stimulating a wider debate on such issues.;There has been an ongoing debate over recent years about the scope of a state's right of selfdefense against an imminent or actual armed attack by nonstate actors. The debate predates the Al Qaeda attacks against the World Trade Center and elsewhere in the United States on September 11, 2001, but those events sharpened its focus and gave it greater operational urgency. While an important strand of the debate has taken place in academic journals and public forums, there has been another strand, largely away from the public gaze, within governments and between them, about what the appropriate principles are, and ought to be, in respect of such conduct. Insofar as these discussions have informed the practice of states and their appreciations of legality, they carry particular weight, being material both to the crystallization and development of customary international law and to the interpretation of treaties.

[39]Letter dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General 2002 [S/2002/1012].

[40]Obama vows to «take out» terror targets in Pakistan (The Sydney Morning Herald, 27 September 2008). URL: https://www.smh.com.au/world/obama-vows-to-take-out-terror-targets-in-pakistan-20080927-4p6u.html (accessed: 26.11.2023).

[41]Death of Osama bin Ladin-Respect for Pakistan's Established Policy Parameters on Counter Terrorism – Ministry of Foreign Affairs. URL: https://mofa.gov.pk/death-of-osama-bin-ladin-respect-for-pakistana%c2%a2a%c2%aca%c2%a2s-established-policy-parameters-on-counter-terrorism/ (accessed: 26.11.2023).

[42]Julien Bouissou, 'Escalade depuis une «frappe» contre un camp terroriste au Pakistan' *Le Monde.fr* (26 February 2019). URL: <https://www.lemonde.fr/international/article/2019/02/26/le-pakistan-accuse-l-inde-d-incursion-aerienneau-cachemire_5428279_3210.html> (accessed: 19.12.2023).

perhaps can be demonstrated most plainly where, for example, a State has lost or abandoned effective control over the portion of its territory where the armed group is operating. With respect to the «unwilling» prong of the standard, unwillingness might be demonstrated where, for example, a State is colluding with or harboring a terrorist organization operating from within its territory and refuses to address the threat posed by the group».[43]

Deeks argues that «there is little question that the [UU] test exists as an internationally-recognized norm governing of the use of force, given how regularly states and commentators invoke it».[44] There is even a possibility that UU «has become customary international law».[45] The UU was endorsed by Chatham house principles,[46] Leiden Policy Recommendations,[47] and «Bethlehem's Principles».[48]

[43]Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations (The White House, Washington 2016). URL: <https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf> 10 (accessed: 23.12.2023).

[44]Deeks A. «Unwilling or unable»: toward a normative framework for extraterritorial self-defense // Virginia journal of international law. 2012. № 3. P. 503.

[45]ibid; Also, for instance, there is a view that: «Some support raising a new right under international law to use force in self-defence directly against NSA, regardless of the territorial host State's noninvolvement in the attacks. From this point of view, such a new rule, although incipient, is based on [customary international law]. Therefore, States would be able to intervene militarily only targeting NSA located in foreign territory». See: Paola Diana Reyes Parra. Self-Defence against Non-State Actors: Possibility or reality? // Revista Facultad de Jurisprudencia. 2021. № 9. Journal Faculty of Jurisprudence. P. 169."plainCitation":"ibid; Paola Diana Reyes Parra, 'Self-Defence against Non-State Actors: Possibility or reality?' (2021).

[46]See: Principles of Internationa Law on the Use of Force by States in Self-Defence' [2005] Chatham House. URL: https://www.chathamhouse.org/sites/default/files/publications/research/2005-10-01-use-force-states-selfdefence-wilmshurst.pdf (accessed 23.12.2023). For instance: «If the right of self-defence in [the result of large scale armed attack by NSA] is to be exercised in the territory of another state, it must be evident that that state is unable or unwilling to deal with the non-state actors itself, and that it is necessary to use force from outside to deal with the threat in circumstances where the consent of the territorial state cannot be obtained (emphasis added)».

[47]See: Herik L. van den, Schrijver N. Annex Leiden Policy Recommendations on Counter-Terrorism and International Law // Counter-Terrorism Strategies in a Fragmented International Legal Order. United States: Cambridge University Press, 2013. Para 42. For example: «Where a state is itself supporting or encouraging the actions of terrorists on its territory, it may well be unwilling to avert or repel the attack and action in self-defence may be necessary. Self-defence may also be necessary if the armed attack *cannot* be repelled or averted by the territorial state».

[48]Bethlehem. Op. cit. P. 776 (principles 11 and 12). for example, in UN Security Council Resolutions 1368 and 1373 of 2001, adopted following the 9/11 attacks in the United States. The reality of the threats, the consequences of inaction, and the challenges of both strategic appreciation and operational decision making in the face of such threats frequently trump a doctrinal debate that has yet to produce a clear set of principles that effectively address the specific operational circumstances faced by states. Bethlehem emphasizes the challenge to formulate principles, capable of attracting a broad measure of agreement, that apply, or ought to apply, to the use of force in self-defense against an imminent or actual armed attack by nonstate actors. Here, sixteen principles are proposed with the intention of stimulating a wider debate on such issues.;There has been an ongoing debate over recent years about the scope of a state's right of self-defense against an imminent or actual armed attack by nonstate actors. The debate predates the Al Qaeda attacks against the World Trade Center and elsewhere in the United States on September 11, 2001, but those events sharpened its focus and gave it greater operational urgency. While an important strand of the debate has taken place in academic journals and public forums, there has been another strand, largely away from the public gaze, within governments and between them, about what the appropriate principles are, and ought to be, in respect of such conduct. Insofar as these discussions have informed the practice of states and their appreciations of legality, they carry particular weight, being material both to the crystallization and development of customary international law and to the interpretation of treaties.

However, UU is not a *carte blanche* for the use of military force. In the host state's inability or unwillingness to stop ANSA activities on its territory, UU may be a «factor in assessing the need to act in self-defense».[49] Thus, if a defending state decides to employ UU, it should use military force to achieve only relevant goals (for example, to stop ANSA's harmful activity).[50]

As of 2016, UU was explicitly supported by ten countries. Three countries have endorsed it implicitly.[51] At least four countries explicitly objected.[52] The possible reason why some countries oppose may be that the «test could lead States to consider that self-defence always offers a sufficient legal basis for military intervention abroad and there is thus no need to search multilateral solutions».[53]

Now, let's pay particular attention to the «Unwilling» part of the UU.

The «Unwilling» test provides a considerably lower attribution threshold that may trigger the right to self-defence than «effective control», «overall control», or even «harbouring state» tests. In Müllerson's view, the sole unwillingness of the host state to stop ANSA's activities on its territory may be enough to attribute the ANSA's conduct to the host state.[54]

For instance, in 2001, the Taliban's refusal to extradite leaders of al-Qaida was a demonstration of the unwillingness of the Taliban to counter al-Qaida's terrorists, which Washington regarded as abetting al-Qaida.[55]

But, in 1985, when Israel, justifying its actions by the «Unwilling» test,[56] used military force against the Palestinian Liberalization Organization (PLO) located in Tunisia, the military action was widely condemned.[57] The UN Security Council adopted Resolution 573, stating that the Israeli actions were «an act of armed aggression in flagrant violation of the [UN] Charter».[58] At the same

[49]Gill T., Tibori-Szabó K. Twelve Key Questions on Self-Defence against Non-State Actors - and Some Answers // Israel yearbook on human rights. 2020. № 50. P. 500.

[50]Idem. 499.

[51]In support: the United States, the United Kingdom, Germany, the Netherlands, Czech Republic, Canada, Australia, Russia, Turkey, and Israel. Implicitly endorsed: Belgium, South Africa, Iran. See: Chachko E., Deeks A. Which States Support the «Unwilling and Unable» Test?. URL: https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test (accessed: 17.12.2023).

[52]Syria, Ecuador, Venezuela, Cuba. See: Chachko E., Deeks A. Which States Support the «Unwilling and Unable» Test? URL: https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test (accessed: 17.12.2023). Moreover, in 2016, the Non-Aligned Movement demonstrated its anxiety relating to UU: «Consistent with the practice of the UN and international law, as pronounced by the International Court of Justice (ICJ), Art. 51 of the Charter of the United Nations (UN Charter) is restrictive and should not be rewritten or re-interpreted». See: 7621st meeting 2016 [S/PV.7621].

[53]Christakis T. Challenging the "Unwilling or Unable" Test // Heidelberg Journal of International Law. 2017. № 77. P. 20.

[54]As Müllerson notes: «If a State is unwilling to prevent an NSA, operating from its territory, from attacking third States (even if the attacks of an NSA are not attributable to the territorial State), it becomes an accessory-after-the-fact to armed attacks of the NSA. Self-defensive, either individual or collective, measures can be carried out on the territory of such a State even without its consent» See: Müllerson. Op. cit. P. 775.

[55]Idem. P. 770.

[56]Ruys. Op. cit. P. 423-424.

[57]UN Security Council Official Records (2611th Meeting) 1985 [UN Doc. S/PV. 2611].

[58]Resolution 573 1985 [S/RES/573 (1985)]. The representative of Australia stated: «Australia condemns Israel's action and calls upon Israel to respect the norms of international law» (para 55); While France's position was: «…such an operation constitutes an inadmissible violation of the rules of international law» (para 9); According to the representative of Denmark: «[My country], together with the other members of the European Community, has vigorously condemned the bombing by the Israeli air force of the headquarters of the PLO in Tunis. That action violates the sovereignty and territorial integrity of Tunisia in contravention of the principles of the Charter of the United Nations and the rules of international law» (para 17).

time, it should be taken into account that the states' opinion in 1985 that Tunisia had no responsibility for the conduct of PLO located in its territory was in «line with some of the contemporaneous thinking on the right of self-defence».[59]

However, when in 2008, members of the Revolutionary Armed Forces of Colombia located in Ecuador's territory were bombed by Colombian military forces, the diplomatic reaction was almost similar to 1986's events – «immediate and intense».[60] The Organization of American States condemned Colombian actions and disregarded its self-defence arguments.[61]

As for the «Unable» part of the UU, the defending state may try to justify the use of military force against ANSA located on the territory of another state, claiming that the host state is unable to stop ANSA's activities.

In 2014, the US justified using military force in Syria against ISIL by stating: «The Syrian regime has shown that it *cannot* and will not confront these safe havens [used by ISIL for carrying out armed attacks against Iraq] effectively itself (emphasis added)».[62] In 1996, Turkey determined to use military force against the Kurdish Workers' Party (PKK) situated on Iraqi territory, explaining that Iraq was *unable* to prevent PKK's armed activities.[63]

The UN Security Council's position concerning the right to use military force if the host state cannot stop ANSA's activities on its territory remained unclear. For instance, although UN Security Council Resolution 2249 declared that the so-called Islamic State of Iraq and the Levant (ISIL) was a «global and unprecedented threat to international peace and security»,[64] the Resolution did not «authorize any actions against [ISIL], nor does it provide a legal basis for the use of force against [ISIL] either in Syria or in Iraq».[65] However, on September 23, 2014, making a statement regarding the US military operation against ISIL in Syria, the UN Secretary-General indicated: «I am aware that today's strikes were not carried out at the direct request of the Syrian Government, but I note that the Government was informed beforehand».[66] This, and other admitted statements of the Head of the main international organisation responsible for peace and security worldwide, was interpreted by some authors as a «surprising level of permissiveness if not support for current US airstrikes».[67]

[59]Trapp K. Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors // The International and comparative law quarterly. 2007. № 1. P. 149.

[60]Deeks. Op. cit. P. 10.

[61]Ibid.

[62]Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General 2014 [S/2014/695].

[63]Letter dated July 2, 1996 from the Minister for Foreign Affairs of Turkey addressed to the Secretary-General and to the President of the Security Council 1996 [S/1996/479].

[64]Resolution 2249 2015 [S/RES/2249 (2015)].

[65]Akande D., Milanovic M. The Constructive Ambiguity of the Security Council's ISIS Resolution. (November 21, 2015). URL: https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/ (accessed: 17.12.2023).

[66]Full Transcript of Secretary-General's Remarks at Climate Summit Press Conference (Including Comments on Syria) | United Nations Secretary-General. (September 23, 2014). URL: https://www.un.org/sg/en/content/sg/press-encounter/2014-09-23/full-transcript-secretary-generals-remarks-climate-summit (accessed 21.12.2023).

[67]Ryan Goodman and Sarah Knuckey, «Remarkable Statement by UN Secretary General on US Airstrikes in Syria» (*Just Security*, 23 September 2014). URL: <https://www.justsecurity.org/15456/remarkable-statement-secretary-general-airstrikes-syria/> (accessed 20 March 2023)."plainCitation":"Ryan Goodman Knuckey Sarah, 'Remarkable Statement by UN Secretary General on US Airstrikes in Syria' (Just Security, 23 September 2014).

Interestingly, some scholars see no necessity to apply «effective control» or «overall control» tests, or even «harbouring state» or «unwilling» tests to attribute the activities of ANSA with the host state for a self-defence justification, as the «self-defence does not require that armed attack by terrorists be attributable to the territorial state under the rule of state responsibility».[68] Furthermore, Moore argues that «it is well established in customary international law» that «a belligerent Power may take action to end serious violations of neutral territory by an opposing belligerent when the neutral Power is unable to prevent belligerent use of its territory…».[69]

But what if the host state is *willing* but unable to stop the armed activities of the ANSA located on its territory? Some host states, such as Syria, had tried (though unsuccessfully) to fight against ANSAs. Hence, it may raise the question: Is a defending state obliged to get the consent[70] of a *willing* host state to use military force on the host state's land against the ANSA?

The US' 2014 air strikes on Syrian territory were carried out without informing and the consent of the Syrian government.[71] According to a letter from the Permanent Mission of Germany to the UN regarding the using military force against ISIL located on Syrian territory: «States that have been subjected to an armed attack by ISIL originating in this part of Syrian territory, are therefore justified under Article 51 of the Charter of the United Nations to take necessary measures of self-defence, even *without the consent* of the Government of the Syrian Arab Republic (emphasis added)».[72]

Kenya's 2011 military operation against ANSA in Somalia was also carried out without consent from the Somali government, and the Somalian government's reaction to the intervention was «generally muted».[73] But, Iraq objected when in 2015, Turkey carried out a military operation against ANSA on Iraqi territory without its consent: «Iraq rejects, strenuously opposes and condemns … military movements aimed at countering terrorism that take place without prior consultation with the federal Government of Iraq and without its approval».[74] Also, as it is known, the League of Arab States deeply condemned the Turkish 2015 incursion into Iraqi land.[75]

Host states did not control ANSA's situated parts of their territory in all mentioned cases. Therefore, such practices of defending states may mean that «seeking consent is not required, at least for strikes within the areas over which the host state does not exert control».[76] Furthermore, in accordance with Daniel Bethlehem's Principle 12, the necessity for getting consent «does not operate» if there is «reasonable and objective» ground to think that the host state is unable to «restrain» the ANSA's activities provided there are no other ways for defending state except to act in self-defence.[77]

[68]L. Herik and N. Schrijver. Op. cit. Para 42.

[69]Moore J. Legal Dimensions of the Decision to Intercede in Cambodia // The American journal of international law. 1971. № 1. P. 51.

[70]Meanwhile, Deeks listed thirty-nine cases between 1817-2011 when states used military force against ANSA on the territory of another (host) state without the host state»s consent. See, Deeks. Op. cit. P. 549-550.

[71]Müllerson. Op. cit. P. 772.

[72]Letter dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council 2015 [S/2015/946].

[73]Henderson. Op. cit. P. 328.

[74]Letter dated 11 December 2015 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council 2015 [S/2015/963].

[75]Resolution No. 7987 2015.

[76]Henderson. Op. cit. P. 329.

[77]Bethlehem. Op. cit. P. 774. for example, in UN Security Council Resolutions 1368 and 1373 of 2001, adopted following the 9/11 attacks in the United States. The reality of the threats, the consequences of inaction, and the challenges of both strategic appreciation and operational decision making in the face of such threats frequently trump a doctrinal debate that has yet to produce a clear set of principles that effectively

However, Corten argues that UU «was not accepted by the international community of states as a whole in the Syrian case».[78] The Arab countries, «which form a significant part of the states participating in the [2014] coalition [on Syria], refused to endorse the «unwilling or unable» argument».[79] What is more, Müllerson has suggested that state practice supports the necessity to get permission from a willing but unable host state to carry out military operations on its territory controlled by the NSA.[80] Otherwise, using force could be considered as disregarding the host state's sovereignty and illegal intrusion in interior affairs.[81] Müllerson has claimed that the US failure to get consent from the Syrian government could be regarded «at least, to non-respect of sovereignty of Syria and interference in the internal affairs that State».[82] Akande believes that even if the defensive measures are not against the government or not coercive for the host state's government, using force by a defending state on the territory of another country against the ANSA without the host state's consent amounts to using force «against the [host state]».[83]

Moreover, in 2016, more than 240 international lawyers and professors from 36 countries[84] signed a Plea where among other things, they argued that the «unableness» of the host state to stop ANSA's activities on its territory «is insufficient to justify» the use of military force on the host state's land without its consent.[85] As Christakis explains, «[the plea] is just another proof of the fact that [UU] is still far away from universal acceptance, both in international legal scholarship and State practice and *opinio juris*».[86] Additionally, the host state's «unableness» to prevent ANSA's activities should not mean that it cannot be protected by Article 2(4) of the UN Charter and international law as it is «well established» that under the due diligence principle, the host state has obligations *to conduct*, «rather than [to provide] result».[87]

address the specific operational circumstances faced by states. Bethlehem emphasizes the challenge to formulate principles, capable of attracting a broad measure of agreement, that apply, or ought to apply, to the use of force in self-defense against an imminent or actual armed attack by nonstate actors. Here, sixteen principles are proposed with the intention of stimulating a wider debate on such issues.;There has been an ongoing debate over recent years about the scope of a state's right of selfdefense against an imminent or actual armed attack by nonstate actors. The debate predates the Al Qaeda attacks against the World Trade Center and elsewhere in the United States on September 11, 2001, but those events sharpened its focus and gave it greater operational urgency. While an important strand of the debate has taken place in academic journals and public forums, there has been another strand, largely away from the public gaze, within governments and between them, about what the appropriate principles are, and ought to be, in respect of such conduct. Insofar as these discussions have informed the practice of states and their appreciations of legality, they carry particular weight, being material both to the crystallization and development of customary international law and to the interpretation of treaties.

[78]Corten O. The 'Unwilling or Unable' Test: Has it Been, and Could it be, Accepted? // Leiden journal of international law. 2016. № 3. P. 777.

[79]Idem. P. 783.

[80]Müllerson. Op. cit. P. 772.

[81]Idem. P. 771.

[82]Idem. P. 772.

[83]Akande D. Classification of Armed Conflicts: Relevant Legal Concepts // International Law and the Classification of Conflicts / ed. E. Wilmshurst: Oxford University Press, 2012. P. 73-74.

[84]Christakis. Op. cit. P. 21.

[85]A plea against the abusive invocation of self-defence as a response to terrorism // Revue Belge De Droit International. 2016. №. 1. P. 31–41.

[86]Christakis. Op. cit. P. 21-22.

[87]Idem. P. 20.

IV. Use of military force against ANSA in the form of targeted killings

There are cases when some countries carried out targeted killings of ANSA members on the territory of another state.[88] In the absence of an armed attack by the ANSA against defending states, those states might justify their use of military force by claiming the existence of a «global» non-international armed conflict against the ANSA or/and with the «imminent threat» of an armed attack.

In 2015 the UK conducted a targeted killing via drone of Reyaad Khan, a British citizen suspected of terrorism. The UK Prime Minister, in his speech on 7 September 2015, acknowledged: «I want to be clear that the strike was not part of coalition military action against ISIL in Syria: it was a targeted strike to deal with a clear, credible and specific terrorist threat to our country at home».[89]

Many years before, in 2002, the US bombed a car in Yemen. In the vehicle, among other people, was Ali Qaed Senyan al-Harithi, a suspected al-Qaeda terrorist connected to the October 2000 attack on the USS Cole off the coast of Aden. Then, the US deputy defence secretary, Paul Wolfowitz, characterised the strike as a «very successful tactical operation».[90] Anna Lindh, the foreign minister of Sweden, contrasted this by calling the attack a «summary execution that violates human rights».[91] Downes has described the US' operation as a «flagrant breach of international law».[92]

In 2020, a US drone strike near the Bagdad International Airport killed Irani General Qasem Soleimani. Due to this, President Trump stated: «Soleimani was plotting imminent and sinister attacks on American diplomats and military personnel…».[93] Benjamin Ferencz, the former Nuremberg War Crimes Prosecutor, noted that the killing of Soleimani was a «clear violation of national and international law».[94] About that situation, Kondoch argues: «It appears that international law has not played a major role in the decision-making process by the Trump administration».[95] In cases noted, defending states tried to justify targeted killings by self-defence or «imminent threat» of an armed attack but met condemnation from some states and international lawyers.

Nevertheless, as President Obama's Legal Adviser, John Brennan, has emphasised, the US, for example, holds the position that the existence of the armed conflict (and the right to self-defence) against al-Qaida entitles the US to target its members anywhere: «The United States does not view our authority to use military force against al-Qaida as being restricted solely to «hot»

[88]According to Henderson, targeted killing – is «the extraterritorial use of lethal force against a specific non-state actor located in the territory of another state». See: Henderson. Op. cit. P. 333.

[89]Gray C. Targeted killing outside armed conflict: a new departure for the UK? // Journal on the use of force and international law. 2016. № 2. P. 198.

[90]US "still Opposes" Targeted Killings' (6 November 2002). URL: <http://news.bbc.co.uk/1/hi/world/middle_east/2408031.stm> (accessed 29.11.2023).

[91]Brian Whitaker and Oliver Burkeman, «Killing Probes the Frontiers of Robotics and Legality» (The Guardian, 6 November 2002). URL: <https://www.theguardian.com/world/2002/nov/06/usa.alqaida> (accessed 28.11.2023).

[92]Downes C. «Targeted Killings» in and Age of Terror: The Legality of the Yemen Strike // Journal of conflict & security law. 2004. № 2. P. 294.

[93]Remarks by President Trump on the Killing of Qasem Soleimani – The White House (3 January 2020). URL: <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-killing-qasem-soleimani/>accessed (28.11.2023).

[94]Benjamin Ferencz, Opinion | The "Immoral" Killing of the Iranian General' The New York Times (15 January 2020). URL: https://www.nytimes.com/2020/01/15/opinion/letters/us-iran-killing.html (accessed 28.11.2023).

[95]Kondoch B. The Killing of General Quassem Soleimani: Legal and Policy Issues // Journal of East Asia and international law. 2020. № 2. P. 433.

battlefields like Afghanistan».[96] Moreover, al-Qaeda members in different countries do not have to be the first to carry out an armed attack to be attacked by the US. The US may employ defensive measures against al-Qaida each time «when they are planning, engaging in, or threatening an armed attack against U.S. interests if it amounts to an «imminent» threat»[97] as they did in Operation Neptune Spear against Osama Ben Laden in 2011. The argument has explained the rationale of the anticipatory self-defence against terrorists that terrorists usually target defenceless civilians who are inevitably destroyed if attacked. Hence, Müllerson has claimed, that in some situations, in the face of an «imminent» armed attack, anticipatory self-defence could be the only way of preventing ANSA from reaching its aims.[98]

However, suppose the defending state could not claim that it has a «global» armed conflict against ANSA. In that case, it may be difficult to justify applying targeted killings or other anticipatory self-defence measures because it might be challenging to determine whether the anticipated attack will be enough «grave» to be considered an armed attack or the «imminent threat thereof».[99] Nonetheless, according to Henderson, for carrying out targeted killings against an individual on another state's territory, defending a state must get consent from the host state.[100] With that, a host state has no right to consent to use force that would breach norms of international humanitarian law (IHL) or international human rights law (IHRL) as «obligations under those regimes are owed to individuals, not states».[101]

Discussion and Conclusion

In contemporary international law, the «effective control» test has a solid legal basis. Considering mentioned states practice, the ICJ's jurisprudence, and the ARSIWA, one can argue that international law allows the use of military force in self-defence against ANSA on the territory of another state provided the host state has the «effective control» over the ANSA.

However, the «effective control» test was criticized for its high attribution threshold and impracticability. Such a critique may be one of the reasons for the elaboration by the International Criminal Tribunal for the Former Yugoslavia (ICTY) of another attribution threshold – the «overall control» test. As for the «overall control» test, despite it appearing more practical (mainly due to lower attirbution threshold), the ICJ did not find serious ground to acknowledge its compliance with international law. Hence, it is difficult to say if extraterritorial self-defence against ANSA is lawful by employing the «overall control» test.

At the same time, the gravest terrorist attacks of the XXI century heavily contributed to the emergence of even lower threshold tests as «harbouring state» test. But it should be noted, given that in practice, only the US utilised the «harbouring state» test.[102] Considering the absence of acceptance in international treaties and the ICJ's jurisprudence, it is impossible to claim the legality of the «harbouring state» test as justification for using military force against ANSA extraterritorially. At the same time, even if, from the US invasion of Afghanistan (2001), states

[96]Remarks of John Brennan, «Strengthening Our Security by Adhering to Our Values and Law» (*whitehouse.gov*, 16 September 2011). URL: <https://obamawhitehouse.archives.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> (accessed 20.12.2023).

[97]Ibid.

[98]Müllerson. Op. cit. P. 760.

[99]Henderson. Op. cit. P. 337.

[100]Ibid.

[101]Heyns C., Akande D., Hill-Cawthorne L. The international law framework regulating the use of armed drones // The International and comparative law quarterly. 2016. № 4. P. 796.

[102]Henderson. Op. cit. P. 319.

have not explicitly applied the «harbouring state» test, the intrusion served as a basis for the emergence of the most controversial test of attribution – the UU doctrine.

It should be noted UU was not used in the ICJ practice,[103] nor reflects customary international law.[104] The UU has not been well established in international law because «there is a more general lack of state practice and *opinio juris* in favour of it».[105] For instance, Bhaskaran has noted that «[t]here does not exist enough *opinio juris* for the test to be classified as part of customary international law, with proponents of the test tending to favour the occasional practice of powerful Global North States in the face of the constant rejection of the test by Global South States».[106]

Thus, considering aforementioned, it can be asserted that in spite of some powerful states have used the UU doctrine, supported by several institutions and endorsed by some scholars, many states openly object to it, there is no case law concerning it, and its acceptance as an international customary law rule is heavily disputable.

Moreover, the «Unable» part of the UU is more controversial than the «Unwilling» one. There is clear disapproval of the «Unable» test from countries such as Syria, Iraq, Ecuador, and some regional organisations (for example, the League of Arab Nations). Furthermore, in situations when the host country is unable but willing to stop ANSA's activities on its territory, according to academia, which made such a conclusion based on provisions of international law, the using military force on the host state's territory against ANSA should be considered as an internationally wrongful act.

The legality of targeted killings is also questioned. Despite some states practising targeted killings for several decades, such activities do not meet much support. However, even if targeted killing is conducted with a host state's consent, the lawfulness of it may be questioned from the perspective of IHL or IHRL.

To conclude, generally, using military force against ANSA on the territory of another state is a complicated topic in international law. Some contend that it infringes on the sovereignty of the state whose territory the ANSA are located, while some claim that it may be justified under the right of self-defence. State practice has been inconsistent in this regard. Nowadays, it may be argued that only the «effective control» test can lawfully trigger the right to self-defence against ANSA on the territory of another state. As for other tests and UU doctrine, there is no well-established state practice and *opinio juris*. In any event, being used, self-defence should comply with the criteria of necessity and proportionality.

Ж.Р. Темірбеков, PhD in Jurisprudence, LLM in International Law, teaching professor Maqsut Narikbayev University (Астана қ., Қазақстан): **Халықаралық құқық мемлекеттерге басқа мемлекеттің аумағында мемлекеттік емес қарулы топтарға қарсы әскери күш қолдануға мүмкіндік береді ме және қаншалықты береді?**

Мақаланың өзектілігі трансұлттық терроризмнің, көтерілісшіл қозғалыстардың және асимметриялық соғыстардың өсуі жағдайында мемлекет әрекеттерінің құқықтық шекараларын түсіну маңыздылығына байланысты. Соңғы қақтығыстар мен әскери интервенциялар басқа мемлекеттердің аумақтарында орналасқан мемлекеттік емес қарулы топтарға қарсы күш қолданудың рұқсат етілген түріне қатысты халықаралық құқықты нақтылау қажеттілігін көрсетеді. Мемлекеттің егемендігін құрметтеу мен өзін-өзі қорғау

[103]Starski P. Right to Self-Defense, Attribution and the Non-State Actor // ZaöRV. 2015. № 75. P. 455.

[104]Kevin Heller, «The Absence of Practice Supporting the "Unwilling or Unable" Test» (*Opinio Juris*, 17 February 2015). URL: <http://opiniojuris.org/2015/02/17/unable-unwilling-test-unstoppable-scholarly-imagination/> (accessed 16.11.2023).

[105]Ibid.

[106]Bhaskaran S. Self-Defence Against Non-State Actors: Reconceptualising the Legality of the 'Unwilling or Unable' Test in Light of the Doctrine of Necessity in International Law. // LSE Law Review. 2021. № 3. P. 301.

құқығын қамтамасыз ету арасындағы нәзік тепе-теңдікті табу айтарлықтай қиындық тудырады. *Зерттеу пәні* – басқа егеменді мемлекеттің аумағында елдердің мемлекеттік емес қарулы топтарға қарсы әскери күш қолдануын негіздеу үшін пайдаланылуы мүмкін атрибуцияның заманауи негізгі тұжырымдамалары болып табылады. *Зерттеудің мақсаты* – жоғарыда аталған тұжырымдамалармен байланысты құқықтық аспектілер мен мемлекеттік тәжірибеге сыни тұрғыдан талдау жасау. *Зерттеудің жаңалығы:* құқық, мемлекеттік тәжірибе және күш қолдану аясындағы кейбір мәселелерді біріктіре отырып, зерттеу мемлекеттік егемендік пен өзін-өзі қорғау құқығы арасындағы қарым-қатынас саласына жаңа көзқараспен қарауға мүмкіндік береді.

Қысқаша тұжырымдар: 1) кейбір мемлекеттер мен сарапшылардың ұстанымдарына сәйкес, басқа мемлекеттің аумағында мемлекеттік емес қарулы топтарға қарсы әскери күш қолдану осы мемлекеттің егемендігін бұзады. Бірақ бұл өзін-өзі қорғау құқығымен ақталуы мүмкін деген пікір бар. Осыған байланысты мемлекеттердің тәжірибесі сәйкес келмейді. 2) қазіргі уақытта «тиімді бақылау» тұжырымдамасы шетелдік аумақтағы мемлекеттік емес қарулы топтардан өзін-өзі қорғау құқығын ақтауға болатын жалғыз заңды негізделген тәсіл болып табылады. 3) атрибуцияның немесе «Unable en Unwilling» доктринасының басқа қарастырылған тұжырымдамаларына келетін болсақ – оларға қатысты мемлекеттердің қалыптасқан тәжірибесін қалыптастыру және *opinio juris* туралы айту қиын.

Түйінді сөздер: халықаралық құқық, мемлекеттік егемендік, күш қолдану, мемлекеттік емес қарулы субъектілер, ұжымдық қауіпсіздік, өзін-өзі қорғау, тиімді бақылау, әдеттегі халықаралық құқық, заманауи қақтығыстар, жаһандық қауіпсіздік.

Ж.Р. Темирбеков, PhD in Jurisprudence, LLM in International Law, teaching professor Maqsut Narikbayev University (г. Астана, Казахстан): Допускает ли и в какой степени международное право государствам применять военную силу против негосударственных вооруженных групп на территории другого государства?

Актуальность статьи обусловлена важностью понимания правовых границ действий государства в условиях роста транснационального терроризма, повстанческих движений и асимметричных войн. Недавние конфликты и военные интервенции подчеркивают острую необходимость внести ясность в международное право относительно приемлемого применения силы против вооруженных негосударственных субъектов, находящихся на территории другого государства. Поиск хрупкого баланса между уважением государственного суверенитета и обеспечением права на самооборону представляет собой сложную задачу. *Предметом исследования* являются, прежде всего, современные концепции атрибуции, которые могут быть использованы при обосновании применения государствами военной силы против негосударственных вооруженных групп на территории другого суверенного государства. *Целью исследования* является критический анализ правовых аспектов и государственной практики, касающихся вышеупомянутых концепций. Новизна исследования заключается в том, что, объединив право, государственную практику и некоторые проблемы в сфере применения военной силы, исследование позволяет взглянуть по новому на сферу соотношения государственного суверенитета и права на самооборону.

Краткие *выводы:* 1) Согласно позициям некоторых государств и экспертов, применение военной силы против негосударственных вооруженных групп на территории другого государства нарушает суверенитет этого государства. Но существует мнение, что это может быть оправдано правом на самооборону. В этом отношении практика государств непоследовательна. 2) В настоящее время концепция «эффективного контроля» является единственным юридически обоснованным подходом, которым можно оправдать право на самооборону от негосударственных вооруженных групп на иностранной территории. 3) Что касается других рассмотренных концепций атрибуции или доктрины «Unable or Unwilling» – в их отношении трудно утверждать о формировании устоявшейся практики государств и *opinio juris*.

Ключевые слова: международное право, государственный суверенитет, применение силы, вооруженные негосударственные субъекты, коллективная безопасность, самооборона, эффективный контроль, обычное международное право, современные конфликты, глобальная безопасность.

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