

THEORETICAL AND PRACTICAL CONSIDERATIONS ON SELF-DEFENSE IN INTERNATIONAL LAW

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Abstract

*Attempts to legitimize war have been made since ancient times. In ancient Greece, for example, war was considered legitimate for the winners. Nowadays, the old Latin phrase "jus ad bellum"**, in whose name states have frequently engaged in warfare, has been abolished.*

As a result, the UN Charter has established a complex system for the sanctioning of the aggressor state, designed to ensure and restore the international rule of law by putting an end to acts of violence and minimizing their consequences.

Self-defense is a right the states may exercise under well-established conditions and limitations only.

With respect to nations that are dominated by foreign states and are therefore seeking to gain their independence and exercise their legitimate rights by all means, including by war, it has been established that the use of armed force by the dominator-states is an act of aggression forbidden by the international rule of law.

The non-aggression principle is basically the one that has turned international law from a law of war into a law of peace, to the point where war is considered today as the most serious international crime.

Keywords: *self-defense, aggression, principle, force, war, Article 51 of the UN Charter*

Introduction

The use of armed force in international relations is probably the most profound of the problems which confront mankind.

Accordingly, the question of what uses of force are aggressive is inevitably of paramount importance. This is recognized on all sides.

Yet the possibility, the desirability, the practicality and the efficacy of defining aggression caused and still cause extreme controversy.

The problem of defining aggression goes back at least to 1923. The arguments then advanced, in the early days of the League of Nations, have continued to recur in United Nations debates, as recently as March 1972.

However, the same States have not always come with the same arguments. The principal proponent of a definition of aggression over the years has been the Soviet Union - a fact which, for more than one reason, has not promoted the adoption of a definition.

However, at times (for instance, in 1923 and 1945), representatives of the Soviet Government have opposed the adoption of any definition.

The principal opponents of a definition of aggression over the years have been the United Kingdom and the United States.

Still, in 1945, at the Nuremberg Trials, the United States favored adopting a definition, and, in 1968, it took an unenthusiastic lead, together with the United

Kingdom and four other States, in advancing a definition in the United Nations.

Aggression can certainly be defined. The question is not whether a definition is possible, but whether a definition is desirable.

A number of definitions have been submitted to the League and United Nations bodies over the years.

Some definitions have been adopted in transient treaties to which a restricted number of States are or were parties¹.

Therefore, clearly, a definition can be devised, which is or was acceptable at least to some States.

And it is not impossible that, within the next year or two, the United Nations may actually succeed in adopting a definition acceptable to the community of States.

But if it does, it would remain to be seen how valuable such a definition would really be.

Yet, it should be noted that, at times, certain States, international bodies, and distinguished scholars have maintained that a definition of aggression is not possible².

Thus the League of Nations Permanent Advisory Commission held in 1923 that, under the conditions of modern warfare, "it would seem impossible to decide, even in theory, what constitutes a case of aggression."

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** [from latin - "right to war"] - is a set of criteria that are to be consulted before engaging in war in order to determine whether entering into war is permissible, that is, whether it is a just war - https://en.wikipedia.org/wiki/Jus_ad_bellum.

¹ A. W. Sijthoff - Lectures at The Hague Academy of International Law; first published in *Receuil des Cours* 1972:11(1973), 136. Leiden.

² Stephen M. Schwebel - *Justice In International Law*, Cambridge University Press, 1994.

Content

Self-defense³ is a universally accepted exception⁴ from the principle forbidding the use of force in international law, and has been subject to a careful scholarly scrutiny over time.

In the current international political context, it is of great significance for the international order that states understand clearly the relevance and application of force in international law.

The relevant dispositions in the UN Charter are sufficient for approaching the whole range of threats to international peace and security.

For these purposes, the UN Security Council may order a number of coercive actions in order to maintain and restore international peace and security.

However, even when a state has the legal right to use force, there may be prudence and principle related reasons for it not to exercise such right.

In international law, this basic normative intuition is codified for states in the UN Charter, Article 51. Article 51 is an exception to the Charter's general prohibition on the use of force, as set forth in Article 2 (4).

The prohibition on the use of force is at the heart of the Charter, given that the fundamental aim of the Charter and the UN organization created by the Charter is to "save succeeding generations from the scourge of war." It stands to reason that any right to use force as an exception to the general prohibition on resort to force would be narrow.

Article 51 permits a state to act in unilateral or collective self-defense only "if an armed attack occurs".

UN Charter Article 51 is not the only UN sanction of self-defense⁵ to be disregarded by the ICJ. The Court also chooses to ignore a number of highly relevant United Nations Resolutions, passed by the General Assembly and the Security Council, addressing the legitimate and lawful use of force in self-defense by Member States.

For instance, the rationale behind General Assembly Resolution 3314 – "Definition of Aggression" – is highly relevant to the case at hand.

It states: "Convinced that the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to suppress them and

would also facilitate the protection of the rights and lawful interests of, and the rendering of assistance to the victim".

The reading of Article 51 shows that several requirements must be cumulatively fulfilled in order for the use of force in self-defense⁶ to be legally permissible:

- Force may be used in self-defense only in relation to an 'armed attack', whether imminent or ongoing;

The 'armed attack' may include not only an attack against a state's territory, but also against emanations of the state, such as embassies and armed forces;

It means that the use of force is permissible only if there is a direct act of aggression against the state, article 51 of the UN Charter becoming thus applicable;

- The performed act of aggression, or the armed attack, has to be serious. The Charter empowers the Security Council⁷ to decide whether the attack in question is a serious armed attack;
- The right of self-defense is activated only in case an unlawful act is committed.

Member states are not allowed to invoke the right of self-defense in order to implement the coercive measures imposed by the UN (for example: it is illegal to use force in order to impose peace and security when no armed attack has been previously committed);

- The exercise of the right of self-defense must comply with the criterion of 'proportionality' and 'necessity'.

Force is used to retaliate against the attacker, and it should stop when the threat is removed due to the force that has been primarily used;

- Force is legitimate only if there is an actual attack or the attack has already been committed.

Force is not allowed to be used in order to establish a certain type of justice, for conquering territories and carrying out reprisals;

- At the moment when UN Security Council has taken appropriate action against the aggressor, the individual right of self-defense turns into the collective⁸ right of self-defense.

Force may be used in self-defense only if related to an "armed attack", either imminent or ongoing.

The notion of "armed attack"⁹ may include not only an attack against the territory of a state, but also against some authorities of that state, such as its embassies and armed forces.

³ E. Colbert, *Retaliation in International Law*, 1948, pp. 202-203; J. Stone, *Conflict through Consensus: United Nations Approaches to Aggression*, 1977, p. 89; E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures*, 1984, pp. 39-40.

⁴ Raluca Miga-Besteliu – *Public International Law*, volume II, second edition, Ed. C.H.Beck (2014), page.163.

⁵ Avra Constantinou - *The Right of Self-Defense Under Customary International Law and Article 51 of the United Nations Charter*, publisher, ant. N. Sakkoulas, 2000.

⁶ The prohibition on the use of force among states, subject to the right of individual or collective self-defense after an armed attack, arises not only from U.N. Charter treaty obligations, but also reflects customary international law. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 99 (June 27); see also IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 279-80 (1963).

⁷ <http://www.arduph.ro/domenii/conducerea-ostilitatilor/folosirea-forței-si-a-amenintării-cu-forța-derogari-de-la-principiile-cartei-onu/> - <http://www.arduph.ro/fields/conducting-hostilities/the-use-of-force-and-threatening-force-exceptions-to-the-UN-Charter's-principles/>.

⁸ <https://dreptmd.wordpress.com/cursuri-universitare/drept-international-public/folosirea-legala-a-forței-potrivit-dreptului-international> - <http://dreptmd.wordpress.com/university-courses/public-international-law/legal-use-of-force-according-to-international-law>.

⁹ Tom Ruys – "Armed Attack" and Article 51 of the UN Charter, Katholieke Universiteit, Belgium, 2010.

Force in legitimate self-defense may be used only when¹⁰: the attack consists of threatening force or use of force, when the attacker has the intention and capacity to attack, and the attack is directed from outside the territory controlled by the state.

In the meaning of article 51, an armed attack does not include only an attack against the territory of the state, including the airspace and inland sea waters, but also the attacks against the state authorities, such as its armed forces or embassies abroad.

An armed attack may also include, in certain circumstances, the attacks against individual citizens from abroad or civil ships and planes.

Therefore, an "armed attack" is a deliberate intervention against another state, without the agreement of that state or its subsequent consent, which has no legal grounds.

On the one hand, a state may use force in legitimate defense against an attack, only if the attack is "imminent".

On the other hand, there is always the risk of an early abuse¹¹ of self-defense, and that is why the use of force should be applied in good faith and based on clear and solid proofs.

However, the "imminence" criterion should be construed by considering the current types of threats, and should be applied based on the specific circumstances of every separate case.

The imminence criterion is in close connection with the necessity requirement.

Force may be used only when any further delay would result in the incapacity of a threatened state to defend itself efficiently against the attack, or to avoid the attack and its negative and irreversible consequences.

Upon the assessment of the imminence of the attack, one may refer to the seriousness of the attack, the attacker's capacity and the nature of the threat, for example, when the attack is likely to occur without any warning.

Force may be used only on an appropriate basis and, in fact, following an assessment of the facts, in good faith.

In the context of contemporary threats, imminence may not be construed based only a temporal criterion, but it should also reflect the wider circumstances of the threat.

An irreversible emergency should exist. Whether the attack is "imminent" depends on the nature of the threat and the possibility of approaching it efficiently, in any given stage.

The concept of what constitutes an "imminent" armed attack should develop so as to meet new circumstances and new threats.

For example, the resolutions passed by the Security Council in the wake of 11th September 2001 recognized both that large-scale terrorist action could constitute an armed attack that would give rise to the right of self-defense, and that force might, in certain circumstances, be used in self-defense against those who plan and perpetrate such acts and against those harboring them, if that is necessary to avert further such terrorist acts.

It was on that basis that United Kingdom forces participated in military action against Al-Qaida and the Taliban in Afghanistan.

It is right for the states to be able to act in self-defense in circumstances where there is evidence of further imminent attacks by terrorist groups, even if there is no specific evidence of where such an attack will take place, or of the precise nature of the attack¹².

Two further conditions apply where force is to be used in self-defense, in anticipation of an imminent armed attack.

First, military action should be used only as a last resort. It is necessary to use force in order to deal with the particular threat faced.

Secondly, the force used must be proportionate to the threat faced and must be limited to what is necessary to deal with the threat.

In addition, Article 51 of the Charter sets forth that, if a state resorts to military action in self-defense, the measures taken must be immediately reported to the Security Council.

The right to use force in self-defense continues until the Security Council has taken the measures required to maintain international peace and security¹³.

Exercising one's right of self-defense should meet the "proportionality" criterion. The force to be used, on the whole, should not be excessive by comparison with the need for prevention or for putting an end to the attack.

The physical and economic consequences of the force used should not be excessive by comparison with the damage expected from the attack.

The proportionality principle was confirmed by the case law of the International Court of Justice and acknowledged as a well-established rule of the customary international law, the use of force in legitimate self-defense having to be "proportional to the armed attack and absolutely necessary for responding to such attack".

This means that the degree of force used should not be higher than the one required for putting an end to the attack or for removing the threat.

Given that the right of self-defense does not allow the use of force for "punishing" an aggressor, proportionality should not be construed as referring to

¹⁰ The International and Comparative Law Quarterly - The Chatham House Principles of International Law on the Use of Force in Self-Defence - Vol. 55, No. 4 (Oct., 2006), pp. 963-972, Published by: Cambridge University Press on behalf of the British Institute of International and Comparative Law.

¹¹ Amos N. Guiora, "Anticipatory Self-Defense and International Law- A Re-Evaluation " (2008) Journal of Conflict and Security Law.

¹² Christopher Greenwood KCMG, QC "War, Terrorism and International Law" in Essays on War in International Law (2006).

¹³ Eli E. Hertz - The Right to Self-Defence, 2009, web address - <http://www.mythsandfacts.org/ReplyOnlineEdition/chapter-5.html>.

some parity between the response and the damage already suffered because of an attack, for this could transform the concept of self-defense in some grounds for retribution, or could limit the use of force to less than required for resisting the attack.

The imminence criterion involves that any further delay in fighting against the deliberate attack would result in the incapacity of the state to defend itself efficiently against the attack.

For these purposes, necessity shall determine imminence: it is necessary to act before it is too late.

The question is whether "imminence" is a separate, independent criterion, or simply a part of the "necessity" criterion.

As an additional criterion, it serves, however, for emphasizing further that a response with force in such circumstances is at the limit of a judiciary category already exceptional and, as such, requires a corresponding high level of justification.

Forbidding threatening force, although as important as to its regulatory status regarding the interdiction of use, has been subject to fewer scholarly studies so far.

The relationship between the two interdictions – of use of force and threatening force should be constantly reviewed, and we should consider the possibility, hardly analyzed so far, of states using threatening force as a means of lawful defensive response: self-defense in the form of a threat.

The status of such concept according to international law is assessed, and the criteria it may govern are reviewed.

This article is based on an analogy between the traditional "forced" self-defense and the notion of threats as a means of self-defense.

However, the well-established self-defense rules may not be applied automatically to a defensive threat, mostly due to the practical differences between a response and threatening response involving real force.

That is why a clear understanding of the international law rules governing the use of force by states in self-defense is necessary.

The rules are challenged in light of what are considered the new terrorist threats and the possession of weapons of mass destruction; debates arose as to which ones need to be revised or redefined.

The study was based on various statements and actions of states, the latest developments at the level of the United Nations Organization, as well as on decisions of the International Court of Justice.

Conclusions

Currently, international law provides for self-defense and anticipatory self-defense for any situation threatening peace and security.

What is needed is to make the Security Council a reliable and effective body.

The doctrine of pre-emption cannot fit into the current international legal system, and it does not present compelling arguments for it to be accepted as a new norm of international law.

Self-defense must, as a right, reflect international realities and aspirations¹⁴.

International law provides states with the 'inherent' right to defend themselves, while making the exercise of that right subject to law.

Modern methods of intelligence collection, such as satellite imagery and communications interceptions, now make it unnecessary to sit out an actual armed attack in order to wait for convincing proof of a state's hostile intent.

With the advent of weapons of mass destruction and their availability to international terrorists, the first blow can be devastating - far more devastating than the pinprick attacks on which the old rules were premised.

Terrorist organizations "of global reach" were unknown when Article 51 was drafted¹⁵.

In order to flourish, they need to conduct training, raise money, and develop and stockpile weaponry – which, in turn, requires communications equipment, camps, technology, staffing, and offices. All this requires a sanctuary, which only states can provide - and which only states can take away.

After all, the final aim of any debates on this topic is to comply in full with the dispositions of the UN Charter, namely:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security¹⁶".

The use of force in contemporary international relations is one of the most significant acts any State can undertake.

Responding to an actual armed attack in self-defense, whereby the State seeks to protect its very existence¹⁷, is one of the fundamental values of statehood that can be exercised.

¹⁴ Al-Sharif, Emad - The Meaning of Self-Defense under Article 51 of the United Nations Charter, 2000.

¹⁵ Lackson Nyamuya Maogoto – Battling Terrorism, Legal Perspectives on the Use of Force and the War on Terror, first published 2005 by Ashgate Publishing.

¹⁶ U.N. Charter art. 51.

¹⁷ University of Queensland Law Journal - <http://www.austlii.edu.au/au/journals/UQLawJl/2005/23.html>.

The consequences, however, of launching anticipatory action and making an error of judgment that a presumed threat is not as great as anticipated, is

one that all States must bear the highest levels of accountability and state responsibility for.

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