

The Legitimate Use of Force for Self-Deference under International Law: A Literature Review

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Abstract

The United Nations Security Council (UNSC) has the ultimate responsibility for the maintenance of global peace and security, which is considered the most critical, precise and sensitive organ of the United Nations. Article 2 (4) of the United Nations (UN) Charter prohibits the use of force against other sovereign states, whether direct or indirect. Consequently, in the event of aggression, self-defense is a right of states as it is for individuals and groups. However, international law does not make the right of self-defense of states "unrestricted." Some rules govern and restrict the act of self-defense that countries must adhere to. International law laid down conditions that must be met before states can exercise the right of self-defense in the event of aggression. First, all peaceful measures of resolving the issue have to be exhausted before force can be used to repel the aggression. Second, the act of self-defense should be against the source of the attack and that the defense shall be temporary until the Security Council intervenes. Thus, this paper addresses the legitimate use of force and its conditionality's for self-deference by states under international law to repel aggression.

Keywords: Aggression, International Law, Legitimate Use of Force, Self-Deference, United Nations

Introduction

Since the dawn of history, man has sought to preserve his security and stability and to avoid all the dangers that surround him and find ways to protect him in various ways. In antiquity, man has equipped himself with self-defense tools against dangerous predators, including dress and simple primitive tools that defend himself and repel the dangers that surround him from all directions, to provide him with the power of complete deterrence against these risks.

As human societies grew and became complex, interpersonal and group relations became increasingly dangerous and unpredictable (Huxley, 2009). Human became a danger to his fellow men, and wars, battles and invasions became inevitable, which were aimed at killing lives and obtaining supplies and equipment for self-security (Fry, 2007).

In the contemporary time, even after the Westphalian system, states have continued to threaten each other with various forms of approaches such as conquest, annexation, colonial domination and the plundering of goods began. The spread of influence is the basis for the beginning of the colonial expansion and the extension of the territory controlled by these countries (Moseley & Norman, 2018). This new reality brought into fore the notion of the legality of self-defense in the event of aggression. In the particular sense of legitimate defense, if we are to show what legitimate defense is, it begins by using force and exploiting the human potential in repelling an impending danger that deprives rights protected by law (White, 2018).

The importance of the right to self-defense is one of the most important and controversial issues at the domestic and international levels. The right to self-defense in the international criminal law is one of the significant subjects dealt within the scope of international criminal law, as it is dealt with in domestic criminal law. However, the subject has not been adequately addressed to this day and has not been given due attention. Although the right to self-defense was practiced by individuals right from the ancient time up to contemporary time, it has been and remains a subject of jurisprudence and legal debate (O'Meara, 2017).

Legitimate defense can be defined as the use of force necessary to repel a threat that threatens a right protected by law. Through this definition it is concluded that in the event a danger that threatens the individual, his properties or honor, the legislation has allowed him to defend himself against this danger or in proportion to the gravity and seriousness of this danger. In essence, the issue can be addressed from two dimensions. First, the legitimate defense in the face of aggression and second, the legal use of force in international law and the conditions of the act of defense (Mori, 2019).

When we address legitimate defense in its general sense and within the framework of international criminal law, the Charter of the United Nations, in particular Article (51), has been dedicated for the right of legitimate defense and considered it as an exception from the rule of prohibiting the use of force in international relations (Mori, 2019). This is because the state cannot be left a victim of armed attack without any assistance, waiting for the United Nations to intervene and deter it. The right of legitimate defense under the Charter of the United Nations is not "absolute" without restrictions. On the one hand, it is restricted in terms of state's vulnerability to an armed attack. On the other hand, it is restricted to that such defense can be used temporarily by the state until the UN Security Council exercises its responsibility to take effective measures against the aggressor State (Dinstein, 2017).

Some interpreters of international criminal law have defined "legitimate defense" as the right established by international criminal law of a state or group of States to use force to repel an armed attack against its territorial safety or political independence, provided that the use of force at that time was the only means of preventing such attack. It is noticed from this definition that legitimate defense is a legitimate right of states as a legitimate right of

individuals. However, in the case of states, there is a greater danger and consequences in the event of an attack against them and against their territories, sovereignty and sources, protected by international laws, legislations, charters and treaties (Brunnée & Toope, 2018). Thus, one of the principal purposes of the United Nations must be to maintain international peace and security and to take effective collective measures to prevent threats to peace and the elimination of acts of violence and others. The Charter of the United Nations requires states not to resort to the use of force in their international relations and to resolve their international disputes by peaceful means in such a way as not to endanger international peace and security (Kelsen, 2017).

In view of the foregoing, it is noted that the reason for the establishment of the United Nations and the ultimate goal of its establishment - as in the case of the League of Nations, treaties and conferences held previously - was to prevent and criminalize aggression and to ensure that the relations of states were based on respect for sovereignty and incline to peace, and to strive to preserve it by all possible and available means.

Legitimate Defense in the Face of Aggression under International Law

In reference to the Charter of the United Nations, the use of force is authorized in two cases. The first is in case of an individual or collective legitimate defense under article (51) which states that:

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 (Friman, 2017).

The restrictions to this article include that there has been an actual attack against the state. The second restriction is in case of collective security. But this is an exception to the principle of the prohibition of the use of force in international relations. Through the Charter of the United Nations, the system of collective security is based on two sets of means; preventive means and remedial means. Preventive means include the prohibition of the use of force in international relations and the application of peaceful resolution of disputes and disarmament (Friman, 2017). As for remedial means, they shall be provisional measures under the provisions of Article (40) of the Charter of the United Nations, such as military measures in accordance with Article (41) of the Charter of the United Nations and military measures as provided for in Article (42). However, there are certain restrictions that control the right of legitimate defense based on the article that requires that such attack shall be armed, and the legitimate defense has two conditions: the self-defense shall be existing, and that the actions taken shall be justified (Von Glahn & Taulbee, 2015).

Thus, the international legal system, like other legal systems such as the Islamic Law and Roman Legislation have recognized the notion of legitimate defense for a long time. Article (5) of The Hague Convention of 1907 on the rights and duties of states and neutral persons provides for this right in the event of war. Article (10) states that: no act is considered as an act of combat by neutral states, even if it involves the use of force to deter the attack. To consider such act as "an act of aggression" which justifies the right of legitimate defense - of a legitimate and legal nature - there should be already an armed grave and illegal aggression (Kretzmer, 2013).

Condition of International Aggression

There are some specific elements and conditions to be observed when talking about an act of international aggression. If these conditions are met, the act can be described as "aggression". These conditions are summarized as follows:

There must be an Armed Aggression against a Member of the United Nations

It includes the use of armed force against the state, such as the ground forces of the state attacking the territory of a neighboring state that is a member of the United Nations. A military attack does not necessarily be under uniformed services, but rather the attack may be waged by a militia operating under the instructions of a particular state. This involves the training of armed militia to provoke sedition and unrest in a neighboring country. This is known as indirect armed aggression (Conte, 2017). Also, aggression may be conducted through airstrikes by the air force against civilian or military installations on the territory of a neighboring country, or by naval forces attacking neighboring state ports. The invasion of the armed forces of any State, the attempt to annex any territory to another state, the sending of militias or armed groups to another state, the striking or blockade of its coasts, the bombing of the State or the use of any weapon against any other state, be it by land, sea, air or any operation, any of which is considered as aggression (Weiss, 2018).

Furthermore, political or economic aggression is another form of unarmed aggression as a threat to some states' economic interests. For example, Israel has launched a war of aggression against Egypt in 1967 under the pretext that Egypt closed the Straits of Tiran and prevented the passage of strategic material through these straits. Israel took this as a legal pretext for launching the war (Schmitt, 2011). Another example of economic aggression was when the Iraqi army moved towards Kuwait on August 2, 1990, based on an economic aggression by Kuwait against it, and peaceful means of settlement failed to reach a solution when Kuwait disclosed its non-compliance with its export quota of crude oil and insisted on a quota of 1,350,000 Barrels per day, which led to a drop in the price of a barrel of oil to (11 dollars) and this caused product surplus what made Iraq suffered a loss estimated at (89 billion dollars) due to this policy (Foreign Broadcast Information Service, [FBIS] 1990).

Kuwait has also exploited Iraq's preoccupation with its war with Iran with a gradual and programmed march within the Iraqi borders and has established military installations, oil installations and farms on Iraqi territories, and Iraq has sent through its Foreign Minister a letter to the Secretary of the Arab League, describing these actions as an aggression against Iraq on 18/7/1990 (FBIS, 1990).

There is also indirect armed aggression. In addition to the economic aggression, there is ideological aggression, which is considered as unarmed - indirect aggression. Some support that the right of legitimate defense applies in the face of indirect aggression, but most do not consider this aggression as a threat to the political entity (Schmitt, 2011). Therefore, the element of urgency is not necessarily present in the example of this type of aggression. In the case of armed aggression, there is an imperative threat to international sovereignty and independence of the state, and the element of urgency must be available. This is what Article (51) supports, which stipulates that the attack must be armed in order the state is allowed to defend itself. Because non-armed aggression is like economic aggression as it does not have the element of urgency, it is necessary that the aggression is aimed to find a pretext to use

the right of legitimate defense. Although the dominant opinion in international jurisprudence requires armed aggression to justify the right of legitimate defense, there are indications that this view is subject to debate and that scientific development may produce more dangerous forms than the use of armed force (Banks & Criddle, 2016).

Banks & Criddle (2016) further pointed out the danger of scientific development in threatening the existence and stability of countries, including the penetration of computer systems used in the economic and financial field, leading to the bankruptcy of the state what makes the state subject to the risk of large economic shaking and leads to the collapse of international trust in it. Also, the crimes of international terrorism have become a substitute for conventional war between countries. Therefore, this view concludes that aggression cannot be restricted to military action only. Rather, it is preferable to say that any act which seriously threatens another state is sufficient to permit legitimate defense, even if it is not of military nature.

The Armed Aggression is Already Existing and Direct

This means that this aggression has already taken place, but it has not yet ended since it is ongoing and already existing. This is a justification for giving the state the right of legitimate defense away from the prior consent of the Security Council. On this basis, it is not legitimate to defend against possible aggression, even if it is imminent. In this respect, international law differs from domestic law, where the right of legitimate defense arises in the latter law whether the aggression is existing or imminent (Fenton, 2017). In international law, in accordance with Article (56) of the Charter, the right to legitimate defense arises only if aggression is possible. The reason for this difference is the nature of international relations and the gravity of the consequences of the use of the right to the legitimate defense because to say otherwise means simply considering the possession of lethal weapons by the State, such as nuclear weapons, carries an armed attack that justifies legitimate defense (Damrosch, 2019).

Direct aggression refers to the unlawful use by the State of its armed forces against another State. This represents the meaning of war in its traditional sense. Indirect armed aggression is intended to provide support to irregular armed groups that use military force in the face of the existing regime in any country, as the aggressor seeks, through agents, to destroy the political entity of the state under attack using armed force (McDougall, 2013).

Restricting the Exercise of the Right of Legitimate Defense in Terms of Duration

The use of force for the purpose of legitimate defense is temporary and does not constitute a substitute for the collective security measures taken by the Security Council to restore international peace and security to their normal situation. Therefore, the state under attack exercises the right of legitimate defense until the Security Council takes the necessary measures to bring things back to normal. We cannot say that the state will cease to exercise its legal protection if the Security Council does not decide its right, but must continue to use force until the Security Council takes a decision (Vark, 2013).

The Act of Aggression Should Be Serious and Dangerous

Not every act of aggression creates the right of legitimate defense, especially if the act of aggression is simple and not grave where it can be resolved diplomatically. There were many

cases in which states relied on minor border differences to justify their aggression against a neighboring nation under the pretext of using the right to legitimate defense (Kurtz & Turpin, 1999). For example, the United Nations rejected Israel's complaint of the fedayee (Arab guerrilla operations) inside its territory originating from Egyptian territory, which was claimed by Israel and the United Nations accordingly rejected Israel's adherence to legitimate defense to justify its aggression against Egypt in 1956, because such attacks were below the level of armed attack (Alexander, 2017).

Subjecting the Legitimate Defense Act to the Supervision of the Security Council

The importance of this requirement is that it prevents states from arbitrariness in exercising this right. Notifying the Security Council of these measures is significant for the Council to assume its responsibilities by ensuring that the principle of prohibiting the use of force shall not be abstract and the Council review the facts and whether the state has to exercise the right of legitimate defense or not. Since it is the state that decides in principle whether or not it is subjected to armed aggression, which gives it the right of legitimate defense and to prevent the state from using such power arbitrarily. This issue was subjected to the decision of the Security Council (O'Meara, 2019).

The Use of Force in International Legality Laws and the Conditions of the Act of Defense

International criminal law permits the exercise of all acts by the victim state to repel armed aggression. International criminal law does not prohibit the use of certain actions by that State, but it can resort to all acts it deems necessary and appropriate.

Article (39) of the Charter stipulates that:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security (Bellamy, 2016).

This Article is an introduction to the application of Chapter VII of the Charter, where it specifically refers to cases in which the Security Council can resort to the use of the measures contained in Chapter VII, where the application of collective security measures in Chapter VII of the Charter requires a situation that poses a threat to peace or cases of aggression, and then a decision by the Security Council containing a decision on the situation (Fenton, 2017). Below are examples of some important cases in which force is used are alleged to be based on the right of self-defense:

Israeli Attack on Iraqi Nuclear Reactor

The Israeli forces carried out their blatant aggression against the Iraqi nuclear reactor on 17 June 1981 and justified its aggression as a legitimate defense. The Security Council condemned the assault as a clear violation of the Charter of the United Nations in its resolution of 19 June 1981 (Ruys, 2018).

The Israeli Attack on the Entebbe Airport in Uganda.

Israeli forces attacked Entebbe Airport in Uganda in 1976 to free Israeli hostages abducted by some Palestinian militants. Israel's representative in the Security Council justified the attack on the Airport as a legitimate defense to protect its citizens. This justification, however, is not

consistent with Article 15, since Israel was not the object of armed aggression and it was concerned with the protection of nationals abroad, which could not be used to protect them since it was not a legitimate defense (Stevenson, 2015).

United States Military Operation to Save American Hostages in Tehran in 1980

The United States carried out a military operation inside Iran to free a group of American citizens abducted by Iranian students after they seized the US embassy in Tehran in 1979. The United States had earlier applied to the International Court of Justice on 29 November 1979, appealing to the Court to issue immediate precautionary measures to release the hostages, facilitate their departure and evacuate the embassy building. During the court's consideration of the issue, the United States carried out the operation but failed. The United States Government has defended this attempt as being based on its right to legitimate defense under Article 51 of the Charter (Banks & Criddle, 2016; Tabaar, 2017).

However, this justification is invalid because aggression against the headquarters of diplomatic and consular missions is not considered an attack which justifies legitimate defense under Article 51 of the Charter. The terms of the defense are summarized as follows:

- **Defense is the Last Resort of Repelling Aggression**

In a situation where there is no other way to repel aggression, and all other means by which the state can resort to repelling attack are unavailable, such as resorting to an international organization promptly, then the act of defense is permitted. The act of defense must also be the last legitimate means of ensuring the preservation of the rights, integrity and independence of the State. There are examples that do not deprive the state of its right to legitimate defenses, such as a state requesting another state to give up part of its territory in return for the cessation of the act of aggression against it, the waiver of the state here is not a substitute for legitimate defense because this deprives off one of the most important rights of the state which is the territorial integrity (Boserup & Neild, 2016).

- **Directing the Act of Defense Against the Source of Armed Aggression**

Under this condition, the defense shall be against the State which is the source of danger. If the defense was against another neutral State, the defense would be considered as aggression. The source of armed aggression is also intended not only for the state which uses its armed forces to launch aggression against another State but also for the State whose territory has been submitted for use by the aggressor State (Von Glahn & Taulbee, 2015). This case is one of the cases of aggression referred to in Article III of General Assembly Resolution no. 3314 of 1974 on the definition of aggression. One example is that Britain permitted the passage of US aircraft in its airspace when it was on its way to launch its aggression against Libya in 1986. In this case Libya's right to legitimate defense arises not only against the United States but also against Britain, which was a partner in the act of armed aggression by allowing the use of its territory to wage such aggression (Dinstein, 2017).

- **The Temporality of the Act of Defense and the Commensurability of the Act of Defence**

The defense measures taken by the victim state should cease in accordance with the legitimate defense upon the intervention of the Security Council. Since the Security Council is primarily responsible for maintaining peace and security and taking the necessary measures for the right to peace and international security. The defense's commensurability means that

the use of force in the act of defense is commensurate with the aggression in the sense that the proportionality between the gravity of the threat and the gravity of the act of defense will be achieved. If it turns out that the abused State has used this proportion of defense or less, then, the proportion has been achieved (Burley, 2017). Also, the weapons used in such defense shall be at the same level. For example, the use of conventional weapons by the aggressor state shall not be repelled by nuclear weapons by the defending State because nuclear weapons are totally different from conventional weapons in terms of destructive capacity and their effects on the people, and their destructive capacity that extends to the atmosphere of neighboring countries (Friman, 2017).

Conclusion

Conclusively, the existence of legal provisions prohibiting the use of force and aggression against other states does not mean and should not be relied solely on the expectation that the use of force and aggression has disappeared, but there must be firm and practical measures taken against the aggressor to deter him and others who are considering the use of force and attack other states. These measures and means include holding the aggressor liable to international civil responsibility as well as making room for acts of international criminal liability and criminal penalties for the aggressors, as happened in Nuremberg and Tokyo (McDougall, 2013). States have approved the establishment of a tribunal to try those who commit international crimes in general in Rome in 1999. The Court now has jurisdiction over war crimes, crimes against humanity and terrorist crimes. It is regrettable that some major powers, led by the United States of America, are postponing their ratification and preventing applying sanctions to their armies in the present circumstances because they are at risk of being charged with these crimes (Värk, 2013).

Thus, the notification to the Security Council of the measures taken by the victim State to exercise its right to legitimate defence examines the facts and decides whether the victim State is rightful in its defence, condemns the aggressor State and takes the necessary measures to maintain international peace and security, or it determines that such defence is unjustified and considers its action as an act of aggression and orders it to cease immediately and impose sanctions for violating the rules of the international organization (Bellamy, 2016). Lastly, coercive measures that do not require the use of armed force for the enforcement of Security Council resolutions, including the suspension of economic, air, rail, road, telecommunications and other communications and communications, in part or in full, and the severance of diplomatic relations with the aggressor States. This resolution is binding not only on Member states but also on non-member States based on the theory of comprehensive international security. Where the Security Council has recourse to military measures if it deems that non-military measures are inadequate and may take the necessary action to maintain and restore international peace and security by the air, sea and ground forces (Conte, 2017; Weiss, 2018).

Finally, this paper is significant in contributing to the body of existing knowledge in various ways. First, it is an additional literature in the field international law; second, it will also serve as a wakeup call to stake holders and policy makes; third, it will be a guide to future research in the academic field of international law.

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