SELF-DEFENCE IN INTERNATIONAL LAW: NEED FOR A NEW STANDARD TO DIFFERENTIATE LEGITIMATE CASES OF PEREMPTORY ACTION

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ABSTRACT

The ongoing Israel-Hamas conflict along with the Russia-Ukraine conflict has shed light on several intersectional loopholes regarding the legality of the use of the phrase "self-defence" in the context of international law. The most prominent existing literature that is actively used by states in the international forum to justify the use of "threats of force" or counters to such said threats, is Article 51 of the UN Charter. However the problem with the verbatim of the various articles under the UN charter is their limited scope of coverage, lack of definition and details, and a highly rigid framework that has led states to misuse the privileges presented under the notion of "self-defence" under the UN charter, and violate various customary international laws such as the principle of proportionality. In this article, we shall examine how the international legal forum examines and categorise related literature to self-defence such as threats of force, proportionality and force, and most importantly the ramifications of the threat of elevated nuclear hostility. The cross-examination of the use of article 51 has been done prior by legal experts in the aftermath of 9/11 and the first Gulf War, this paper summarises all the arguments presented against and in favour of the above-mentioned international events. The conclusion and analysis part will ascertain the solutions for the world to develop a standard for peremptory action and what literature needs to be expanded upon.

Keywords: Self-Defence, Article 51, Threats Of Force, Proportionality, International Legal Framework, Nuclear Hostility.

INTRODUCTION

This essay shall explore the doctrine of self-defence in accordance with existing current international law and also the immense requirement of an evolving apparatus of the same to assess legitimate cases of peremptory action. Before proceeding with case-based intricacies, it is imperative we build a basic understanding of the concept of "self-defence." Article 51 under

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Chapter VII of the UN Charter serves as an exception to the Charter's general prohibition on the use of force found in Article 2(4). Article 51 permits the use of force by individual or collective self-defence if an armed attack occurs against a member state of the United Nations until the security council intervenes[1]. This single article has served as the basic fundamental scope of the legitimatisation of self-defence in international law and affairs. There have been several instances of its misuse in recent events such as Russia legitimising its unethical "special military operation" in Ukraine as a pre-emptive strike allowed under the provisions of Article 51[2]. At the same time, Ukraine pleads the violation of Article 2(4) of the UN charter and the unethical use of Article 51. Israel's war on Hamas, which has been carried out so far using a disproportionate response to the terrorist attack and taking a huge toll on Palestinian civilians, is also justified by Israel as a use of Article 51 of the UN charter[3], given that all the triggers have been satisfied. Israel's case, however, is a special context if we draw similarities to the US war on terrorism after 9/11. This essay will discuss the existing literature on the notion of self-defence and use of force in the next part, and then further examine the right of states to use Article 51 in reference to the same literature.

EXISTING LITERATURE ON FORCE AND SELF-DEFENCE

The prohibition of the threat of force is binding on all members of the United Nations, as explicitly stated in Article 2(4) of the UN charter. The prohibition of the threat of force has also been restated in a soft law format in subsequent international instruments, such as the 1970 Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States and the 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations[4]. However, neither of these soft law instruments goes beyond the restatement of Article 2(4) of the UN charter, and neither do the declarations reinforce the prohibition by giving any apparent guidance as to when a threat of force is unlawful or under what circumstance it is

1 United Nations Charter art 51

[2] Council on Foreign Relations, 'How Russia's Invasion of Ukraine Violates International Law '(18 January 2024) https://www.cfr.org/article/how-russias-invasion-ukraine-violates-international-law accessed 18 January 2024.

[3] K Purohit, 'Does Israel Have the Right to Self-Defence in Gaza?' (Al Jazeera, 17 November 2023) https://www.aljazeera.com/news/2023/11/17/does-israel-have-the-right-to-self-defence-in-gaza accessed 18 January 2024

[4] UN General Assembly, 'Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations', GA Res 42/22, UN Doc A/42/22/766 (18 November 1987) [hereinafter Use of Force Declaration], accessed 19 January 2024.

permissible[5]. We hence turn to the jurisprudence of the ICJ for guidance on the nature and scope of "threats of force". However only a few ICJ decisions refer to threats of force, let alone provide substantial definitions and details about defining the lawfulness of a threat of force.

The first case to consider in terms of "threats of force" was the Corfu Channel merits decision of 1949, which arose after the destruction of two British destroyers by mines off of the Albanian coast. In response to the UK's application to the ICJ, Albania asserted that the British destroyers and supporting vessels, which were in a tactical formation, had twice violated Albanian sovereignty[6]. With regard to the claim, the ICJ took the view that the British action was threatening but lawful.

The second incident of sovereignty violation occurred in Operation Retail. This operation involved the sweeping for and removal of mines in the Corfu Straits by the Royal Navy following the initial sinking of the British destroyers[7]. Even though the ICJ stated pertaining to this incident that it was a "manifestation of a policy of force that cannot find a place in international law"[8], ICJ went on to state that it did not see this action as an unnecessarily large display of force. The court implies that this use of force was not threatening or intended to be threatening, yet it was still an unlawful breach of Albanian sovereignty. The judgment is confusing in the sense that the court did not explicitly examine the kinds of threat of force that were in play in Corfu Channel, but the court indicates clearly that not all threatening behaviour is necessarily a breach of Article 2(4).

In the judgement of *Nicaragua v. United States 1986* the ICJ defined the concept of an "armed attack". According to the ICJ judgment, an "armed attack" does not include assistance to rebels in the form of weapons provision, logistical or other forms of support. The court deemed such "assistance" to rather be a "threat or use of force, or … intervention in the internal and external affairs of other States". For example, if State A supplies weapons and ammunition to a PMC for use against State B, then according to the ruling, no use of force has been commenced by State A against State B, even indirectly

The court's most important decision on the status of threats in international law is the Nuclear

[5] Corten O, The Law Against War: The Prohibition on the Use of Force in Contemporary International Law (Bloomsbury Publishing 2021).
[6] *Corfu Channel (U.K. v. Alb.)* (1949) I.C.J. 4, 10 (Apr. 9).
[7] ID at 8
[8] ID at 8

Weapons Advisory Opinion of 1996, in which it considered whether the threat or use of nuclear weapons was permitted under international law. The ICJ stated that "states sometimes signal that they possess certain weapons to use in self-defence against any state violating their territorial integrity or political independence[9]. Hence based on the above cases and decisions, it is pretty evident that there is a lack of clarity in international instruments prohibiting the threat of force and the ambiguity of state practice on this issue. However, from the wider literature, it can be ascertained that if actual force is unlawful, then, retroactively, so is the threat to use that same force. Similarly, lawful force can be lawfully threatened[10]. Article 2(4) is a binding international customary law, and the only universally accepted means of legally justifying the use of force is under Article 51 of the UN charter, which has also been under scrutiny of international legal debacles regarding its alleged misuse by multiple state actors to reinforce their justification of the threat of force or force itself against another actor. In the next part, We shall examine a state's condition for invoking Article 51, emphasising the international legal aftermath of 9/11.

WHEN CAN STATES USE ARTICLE 51

The US coalition against the war on terror, after 9/11, which led them to use military force against the Taliban and Al Qaeda in Afghanistan, has been continuously a debacle regarding the proportionate use of Article 51 of the UN charter. Several international lawyers and legal scholars, all the way back in 2001[11] have criticised the illegality of the US invasion based on four main premonitions:

(1) It violated Article 2(4) of the Charter which prohibited the use of force except when authorized by the Security Council under Chapter VII.

(2) Self-defence is impermissible after an attack has ended.

(3) Self-defence can only be exercised against a state.

(4) Self-defence may only be exercised until the Security Council has taken measures necessary tomaintain international peace and security. Since the Security Council had already taken such measures in Resolution 1373 of September 28, 2001, the right to self-defence had been superseded.

[9] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 1 (July 8).
[10] Green G, 'The Threat of Force as an Action in Self-Defense Under International Law '(2011) 44 *Vanderbilt Law Review*
[11] Byers M and Nolte G, United States Hegemony and the Foundations of International Law (Cambridge University Press 2003).

Counter-critics of the premonitions[12] posed above state that the US coalition's act of aggression does not violate Article 2(4) of the UN charter because in the context of Article 51 of the same charter, which reinstates the "inherent right" of self-defence, due to the well-founded concern regarding the languishing of the provisions made in Article 43, a concern which held true for the most part, and a major void at that which was exploited by the member and non-member states to initiate disproportionate acts of self-defence. Moreover, the unanimous resolution passed on the day after the attack put the Security Council on record as "recognising the inherent right of individual or collective self-defence in accordance with the Charter," while condemning "in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001".

In the same charter, or neither in the travaux preparatoires, is there any statement that prohibits the use of self-defence after an attack has ended because it defies logic? Accordingly, the notion that self-defence requires immediate action comes from a misunderstanding of the Caroline case[13]. Legal scholars have accepted that the strict provisions of the doctrine cannot be met in the modern type of armed conflict, and hence it cannot be regarded as customary law[14], moreover, the doctrine deals only with anticipatory self-defence, while in the case of US, Osama Bin Laden had explicitly promised to continue attacks on the United States.

Even though Al Qaeda is not a state, the inherent right to self-defence still holds due to the nonspecific verbatim of Article 51, which authorises a victim state to act in self-defence, yet does not limit the scope of who the right is being exercised. In para 3 of resolution 1368, the right of individual or collective self-defence of states against international terrorism, which is a threat to international peace and security, has been specifically stated.

Affirmative actions taken by the Security Council against the attacking vessel/state also do not supersede the practice of self-defence by a state. After the Iraqi invasion of Kuwait, The SC, for instance, affirmed the inherent right to use force in individual or collective self-defence[15], four months later, it authorised the UN members to use "all means necessary" to

[12] Franck TM, 'Terrorism and the Right of Self-Defense '(2001) 95 *American Journal of International Law* 839.
[13]' Treaties and Other International Acts of the United States of America, Edited by Hunter Miller. Volume IV, Documents 80–121; 1836–1846. (Washington: Government Printing Office. 1934. Pp. Xxvi, 855. $4.00.) ' [1936] *The American Historical Review* <https://academic.oup.com/ahr/article/41/4/777/172746/Treaties-and-Other-International- Acts-of-the> accessed 18 January 2024.
[14] Maria Benvenuta Occelli, "Sinking the Caroline: Why the Caroline Doctrine's Restrictions on Self-Defense Should Not Be Regarded as Customary International Law" (2003) 4 *San Diego Int'l LJ* 467, accessed 18 January 2024.
[15] United Nations Security Council, *Resolution 661 (1990)* UN Doc S/RES/661 (6 August 1990).

repel the Iraqi forces[16]. This exhibits that the Security Council's actions do not necessarily supersede the individual or collective rights of states of self-defence; rather the Council's authority can supplement and co-exist with the inherent right of a state and its allies to defend against the armed attack[17].

In the case of the *jus ad bellum* claims by Russia in regard to using Article 51 to justify the invasion of Ukraine, all such claims are critically baseless[18]. When tested against the non-exhaustive lists of 'acts of aggression' in the UN General Assembly's definition of aggression, the "special military operation" ticks every box and hence illegitimates all burden of proof Russia presents regarding the legality of their Ukraine invasion[19]. Article 51 also holds that the right of self-defence is triggered if an armed attack occurs against a member of the United Nations. The term armed attack is widely understood to refer to a "grave use of force." It is abundantly clear that no use of force 'grave' or otherwise was employed against Russia by NATO before the invasion of February 24th. Putin has also used nuclear threats against the West to support Ukraine in the invasion. The threats were made so often and gravity of tone that top Russian officials had to clarify that Russia's nuclear doctrine is still intact, that it does not advocate the first use of nuclear weapons, but the doctrine does not rule out first use in response to a conventional attack that threatens the existence of the state[20]. Russia had also used its vessel state Belarus to station nuclear weapons even nearer to NATO territory in an act of reinforcing their deterrence principles. While the NPT refers to a prohibition on the transfer of nuclear weapons, and control and access to such weapons, the treaty does not explicitly forbid the stationing of nuclear weapons in non-nuclear allied states. Similarly, The US has justified nuclear sharing amongst the NATO members without violating the NPT[21]. Moreover taking into Account the ICJ Nuclear Weapons advisory opinion of 1996, the judgment legitimises the use of Russia's threat of nuclear force as an act of self-defence against territorial sovereignty breaches. However in this case, even if Russia reserves its stance on the right to self-defence, it is glaringly clear to the international community that Russia's use of Article 51 is baseless and illegal, and they have clearly violated Ukraine's

[16] United Nations Security Council, *Resolution 668 (1990)* UN Doc S/RES/668 (20 September 1990).
[17] ID at 4
[18] Green JA, Henderson C and Ruys T, 'Russia's Attack on Ukraine and the Jus Ad Bellum '(2022) 9 *Journal on the Use of Force and International Law* 4.
[19] ID at 18
[20] Mills C, 'Russia's Use of Nuclear Threats during the Ukraine Conflict ' <https://commonslibrary.parliament.uk/ research-briefings/cbp-9825/> accessed 19 January 2024.
[21] Alberque, Sophie, 'Origins of the Non-Proliferation Treaty: NATO and Nuclear Disarmament' (2017) https://www.ifri.org/sites/default/files/atoms/files/alberque_npt_origins_nato_nuclear_2017.pdf accessed 19 January 2024.

right to territorial sovereignty under Article 2(4) of the charter.

In the case of the Israel-Hamas war, it draws similarities to the previously discussed US coalition war on terrorism after 9/11. Israel's case ticks all the boxes and hence, its use of Article 51 against Hamas can be justified on grounds set in the context of the case, but not on the basis of multiple humanitarian convention violations that Israel can be held accountable for such as starvation war crime[22], indiscriminate killing and the bombing of targets in Gaza without any effort to minimise civilian casualty[23], as well as forceful displacement of the civilian population from their homes outside of combat zones[24]. All of this is a violation of the Rule of Proportionality stated in Article 51(5(b)) of Protocol I of the Geneva Conventions that Israel is being held liable for violating as they are held as "norms of customary international law, binding on all parties", even though Israel is not a signatory to Protocol I of the conventions[25].

CONCLUSION AND ANALYSIS

The world is an interconnected global village, with the need of every nation, especially superpowers and those backed by superpowers to keep whatever remains of international peace and armistice intact. But many times, it is this sensitive, intricate web of interconnectedness and interdependence that can lead to innocent lives and the civilian populace being held hostage. In the case of the ongoing Israel-Hamas war, Israel still holds its right to self-defence against Hamas under the obligations of Article 51. The legal black hole that arises is whether a violation of the principle of proportionality is enough to discredit a state's use of Article 51 of the UN Charter. The ICJ's judgment on the Corful Channel dispute as well as nuclear threats, has been quite confusing and contradictory. The international legal apparatus still lacks proper details and categorisation on the kinds of "threats of force" or what sort of use of force is legal against a state or non-state actor in the pretext of self-defence. The ICJ, Rome statute, and the various international humanitarian conventions available at our disposal are applied best at examining a state's use of self-defence and provide guidance for future instances to be swiftly

[22] Dannenbaum T, 'The Siege of Gaza and the Starvation War Crime '(Just Security, 11 October 2023) <https://www.justsecurity.org/89403/the-siege-of-gaza-and-the-starvation-war-crime/> accessed 19 January 2024.
[23]' Israeli Attacks Wipe out Entire Families in Gaza '(Amnesty International, 20 October 2023) <https://www.amnesty.org/en/latest/news/2023/10/damning-evidence-of-war-crimes-as-israeli-attacks-wipe-out-entire-families- in-gaza/> accessed 19 January 2024.
[24]' As Israel's Aerial Bombardments Intensify, "There Is No Safe Place in Gaza", Humanitarian Affairs Chief Warns Security Council | UN Pres 'https://press.un.org/en/2024/sc15564.doc.htm accessed 19 January 2024.
[25]' April 2001 ADVANCE COPY 'https://www.hrw.org/reports/2001/israel/hebron6-04.htm accessed 19 January 2024.

dealt with. Yet legal loopholes and debacles will remain, leading to a delay in justice towards civilian lives lost to warfare, unless and until the Security Council strictly codifies the legitimacy of these documents into the fabric of international law, which would be the best and the only peremptory action available.