



The Doctrine of Use of Force in Self-defense and International Law: Prospects and Contours

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Abstract: *The law on "Use of Force in Self-Defense under International Law" aims to secure both state sovereignty and international peace. This is not only one of the most significant doctrines developed by the United Nations (UN) but is also most challenging to implement in true spirit as its interpretation often gets politicised. The controversies spark not on the legality of self-defense but on proper identification of the circumstances under which it applies, and the debate continues till date (Azubuike, 2011). Hence changing interpretations of this norm by states continue to arise different response and threats every time this notion is applied. The present article is an effort to analyse the true meaning of the doctrine of "use of force (UOF) in self-defense (SD)", it highlights the scope of SD, and examines its various aspects. The article concludes that while the principles on UOF in SD are very well drafted, there exist an immense need to understand the applicability of this norm, the willingness of states to exercise it in its true spirit, and collective effort by states, international organizations, and the UN can prove effective in this respect.*

Key Words: Use of Force, Self-Defense, International Law, Human Rights, Obligations

Introduction

The Law on "self-defense in international law" holds the integral "right of a state to use force" in response to an "armed attack". In *Nicaragua v United States* case, (1986) [International Court of Justice \(ICJ\)](#) has determined that: "an armed attack must rise to a certain scale and effect", hence it must be taken into consideration that not all the attacks fall under the qualification of an "armed attack." ICJ has elaborated the meaning of "armed attack" as "the gravest form of the use of force", without explaining on what can constitute it. (Upiencene, 2018)

The UN charter aims to maintain and secure international peace. As a general rule,

under Article 2(4), the UOF is prohibited. The doctrine of UOF in SD is an exception to this general rule. However, the fact that "whether the state has lawfully invoked the right to SD is a subject of ongoing conundrums for Scholars". It is sometimes alleged that the states use this principle to benefit their own agenda, and the states and human rights lawyers defend the act and justify the legality of the act as per their sweet will. Hence due to heavy politics on the subject, the issue that can undoubtedly be categorised as the heart of the charter is at mercy of controversies.

In this context, this paper analyses the true meaning of the doctrine of "use of force in self-defense", it highlights the scope of the right to self-defence under international law (RSIL),

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and examines its various aspects. The paper concludes that while the principles on UOF in self-defence are very well drafted, highly effective, and significant (save as they are interpreted and applied properly), collective efforts by States are needed to implement relevant provisions.

Principles on UOF in self-defence

The UOF is prohibited under UN Charter in general, save as: (i) where the state has been obtained the authorization of UNSC as to maintain “peace and security”; (ii) where the state is “exercising the right conferred under article 51 of Charter”.

These principles mentioned below are also known as Catham principles on self-defence. ([Wilmshurst, 2006](#)) These are related to the exceptions on UOF provided in art. 51 of the UN Charter.

1. “The principles on self-defence include more than the right to UOF in response to an ongoing attack”. Thus the UOF can be used “if an armed attack occurs, and the UNSC has taken measures”. It thus implies that it depends on the commencement of an “armed attack”. (*Nicaragua v USA*, 1986). However, if there is a threat exists to imminent attack, then this provision may be invoked. States may act in self-defence if an imminent attack from the other party lives. ([Report of Secretary-General, 2005](#)) However, such threatened attack must be imminent which endanger the life of the nation. The UOF may be proportionate, and it can be used in self-defence if necessary.
2. Right to UOF may brought in the exercise of “self-defence only in relation to an armed attack whether imminent or ongoing”. Article 51 can rightly be categorised as an exception to Article 2(4).
3. In order to secure the aim of the UN in maintaining global peace, principles on the right to UOF in self-defence are very carefully drafted, “force in self-defence may be used where it is necessary to avert an imminent attack or bring an end to an attack”. Furthermore, it must also be satisfied that: “There must be no

practical alternative to the proposed use of force that is likely to be effective in ending or averting the attack”. It means that for using force, the criterion of necessity is mandatory (Nuclear Weapons Case, 1996).

4. “A state may use force in self-defence against a threatened attack only if that attack is imminent”.
5. “The criterion of ‘proportionality’ is also required to be complied for the purpose of the right to use force in self-defence”.
6. “Article 51 is not confined to self-defence in response to attacks by states only, it also extends and applies to attack by non-state actors (NSAs)”.
7. “The rules governing the right to self-defence make only a part of international principles on UOF”.
8. “Military actions must be coherent with the principles of international humanitarian law (IHL) drafted in regard to governing the conduct of hostilities”. ICJ has noted that:

“Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence. Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case”. ([ICJ Wall's Case, 2004](#))

Thus these principles must be followed by states for invoking “inherent right to self-defence”.

The Doctrine of UOF under International Law

For law enforcement, the normative framework of IHRL is different than the conduct of hostilities (COH). The provisions of IHRL put restrictions and limitations on UOF during Law enforcement (LE) in occupied territory (OT). However, in case of necessity, it allows use of force, provided such necessity must be absolute. ([McCann and others v United](#)

[Kingdom, 1995](#)) Similarly, shooting to kill is forbidden under IHRL and obliged the occupying powers to avoid this to the best. ([McKerr v the United Kingdom, 2001](#)) Also, the force can be used when it is extraordinarily unavoidable and required. ([Basic Principles, 1990](#)) Even for capturing a suspect, there is a criterion and the occupying powers are required not to kill on the basis of suspects or suspicion. ([Israel v Government of Israel, 2005](#))

In general, provisions of IHL and IHRL apply in complementarity in complex situations. However, the provisions of IHRL apply as law enforcement in the case of occupation ([Sassoli & Olson, 2008](#)) or internal armed conflicts IHRL is referred as a legal paradigm in such cases. ([Abresch, 2005](#)) The "principle of *Lex specialis*" is also important, as highlighted by the ICJ in *Nuclear Weapon's Case*. It seems that there exist distinction and overlapping between normative legal frameworks, such as LA and COH.

In terms of UOF, Art. 43 of the Hague Regulations and art. 64 of GCIV are not much clear with regard to UOF, it has thus been suggested that the provisions of IHRL "would govern the use of force by the Occupying Power (OP) with respect to the OP's entitlement and obligation to restore and maintain public order and safety". ([Expert Meeting, 2005](#))

The provisions of IHRL regime also apply together with treaty provisions of IHL where complex situations occur, such as occupation. There is a overlap between provisions of IHL and IHRL. Also both bodies of law apply differently. For example, protection of right to life is available to occupied people in occupied territory under IHRL, but in the other connotation, right to life is interpreted in different under IHL particularly regarding combatants, lawful targets, and members of organized groups. ([Corn, 2010](#)) Another example is that self-defense is generally a matter of IHL but is also recognized under the treaty and customary law of IHL. ([Art. 31\(1\)\(c\) of Rome Statute, 1998](#))

Kneth Warkin argues that:

"The maintenance of public order and safety cannot be effectively addressed by viewing the situation as being exclusively one of law enforcement or the conduct of hostilities, nor

can such exclusivity exist in the application of the governing norms". (Watkin, 2012)

Thus there is overlapping in the application of norms of IHL and IHRL. However, if force is used by security forces, then norms of IHRL also apply. It is also dependent on the nature of conflict or the level of intensity that which the paradigm applies. However, both IHL and IHRL pose limits on UOF by the OP's. Protection of the rights of the occupied is common to both regimes.

Human Rights Obligations

Protection of the right to life of the people under occupation as an obligation

The protection of "right to life" is recognized in international instruments, "both in times of peace and war", it remains protected. In the case of occupation, though not expressly provided, the norms of international law signify that such right "must be respected and protected in all circumstances and in all respects". Thus application of the provisions of IHL and IHRL also extends in the case of occupation for protecting the right to life in particular. Both bodies of law share a common concern. ([Meron, 2000](#))

The provisions of IHRL specifically signify that:

"if life is deprived, it is impossible to enjoy any fundamental freedom." ([Dinstein, 1990](#))

For instance, ICCPR poses that arbitrary deprivation of life in any case is prohibited. Article 6(1) of ICCPR, 1966) The provisions of ICCPR have extraterritorial application, and derogation from these provisions is prohibited. These may also extend to the occupied territory. ([Meron, 1995](#)) It is also advanced by "Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms", which provides that:

"the right to life is not contravened where no more force than is absolutely necessary is used "in defense of any person from unlawful violence," "in order to effect a lawful arrest or to prevent escape of a person lawfully detained," or "in action lawfully taken for the purpose of quelling a riot or insurrection". ([Art. 2 of European Convention, 1950](#))

The European Convention also provides exception for "deaths resulting from lawful acts

of war". ([Art. 15\(2\) of European Convention, 1950](#)) The provisions of IHL and IHRL converge in some circumstances.

It is because the norms of IHRL are more general as compared to the provisions of IHL. For instance, no one can be deprived of his life under UDHR. This UDHR elaborates general rule "which is also applicable in times of occupation". As far as UOF against enemy is concerned, necessary force is permitted under "norms of International law". The purpose of such provisions is to ensure the protection of the right to life. In an OT, force can be used subject to certain conditions. In general, civil forces are used to tackle the situation if there exist threat to peace by armed actors or people at large.

Some states also employ paramilitary forces to perform duties in order to control the situation. It also varies from case to case. However, in general, necessary force may be used by forces or by the occupying powers. ([Canadian Forces Armed Assistance Directions, 1993](#)) The level of intensity and organization matters in times of use of force against the enemy. Some states also use military forces in order to rescue hostages, and it is permitted under the provisions of IHL. For instance, paramilitary or law enforcement agency can be incorporated in internal conflict under Article 43(3) of AP-I.

The protocol also provides for the incorporation of light-armed personnel who are considered to handle "emergency assistance in the restoration and maintenance of order in distressed areas". (Article 61 (1) (k) of AP-I, 1977) In terms of the status of police officials or forces during the occupation, Article 54 of GCIV stipulates that public officials shall maintain their status if the occupation has commenced. Thus certain norms of IHRL remain applicable in time of an armed conflict and occupation though IHL is specifically designed to regulate armed conflicts. This rule is advanced in the "*Nuclear Weapons Advisory opinion*", in which the ICJ has settled that norms of IHRL are applicable in general.

If there is a threat to "the violation of the right to life or deprivation", then the norms of IHRL would also apply in complementary to the provisions of IHL in times of occupation. Necessary force can be used in OTs, "if there is a threat existing to peace and security". (*Nuclear Weapons Case, 1996*) Nothing is more important than the life of the individual. If force is used, it must conform to the requirements of law.

Maintenance of public order and safety as an obligation

The specific provision regarding occupation is envisaged in art. 42 of the 1907 Hague Regulations, which provides that:

"Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised". ([Art. 42 of the Hague Regulations, 1907](#))

It thus implies that when authority is established by the occupying authorities, occupation begins. Hence the authority, once established and exercised, questions such as "conduct of hostilities, marinating law and order, and protection of civilians, etc arise".

The definition of occupation is not elaborated in detail in article 42. However, art. 43 of Hague Regulations and art. Sixty-four of the GCIV can assist in assessing "obligations of the occupying powers" in OT. Obligations are incumbent on occupying powers under Geneva Conventions. These include: "[Geneva Convention \(I\)](#) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August, (1949)", 75 U.N.T.S. 31, (GC-I); "[Geneva Convention \(II\)](#) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea", 12 August, (1949), 75 U.N.T.S. 85, (GC-II); "[Geneva Convention \(III\)](#) Relative to the Treatment of Prisoners of War", 12 August, (1949), 75 U.N.T.S. 135, (GC-III); and "[Geneva Convention \(IV\)](#) Relative to the Protection of Civilian Persons in Time of War", 12 August, (1949), 75 U.N.T.S. (GC-IV). Article 42, read with article 43, explains the scope of the OP. For instance, under art. 43, the OP may,

“take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country”. ([Article 43 of Hague Regulations, 1907](#))

It is obvious from the provision that since the legitimate power is conveyed to the occupying power after the establishment of authority, hence the occupying power is under an “obligation to take steps as to ensure the maintenance of public order and safety in OT”.

This article, however, cannot be read in isolation. The provision relevant is article 64 of GCIV states that:

“The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations . . . to maintain the orderly government of the territory...”. (Article 64, para. 3 of GCIV, 1949)

This thus certifies that occupying authorities have an "obligation to maintain the law and order and public safety in accordance with law". The GCIV deals purely with civilians, and under this convention, it provides for the rules to maintain law in territory occupied, it also strictly prohibits all acts of threats or violence against civilians. (Articles 27 and 47 of GCIV, 1949) Moreover, occupying power or authority may incorporate measures to engage the role of the local population to maintain public order and safety, however any forced involvement of protected persons is prohibited.

Article 51 of GCIV prohibits such forced involvements and maintains that they cannot be compelled to: “undertake any work which would involve them in the obligation of taking part in military operations”. (Article 51 GCIV, 1949) The next section analyses the scope of RSIL.

The Nature and Scope of RSIL

Self-defence Criteria

While UOF in SD is recognized, it requires the state to meet the strict the criteria established in this regard. Hence to establish the right to UOF in SD, the state must justify that “it was in response to the armed attack”. The burden of proof to validate the act lies on the state, as

pointed out by ICJ in case of “[Islamic Republic of Iran v United States of America \(2003\)](#)”. (Upeniece, 2018) The efforts to construct true meanings of the “armed attack requires effective consideration in international law”. As quoted by *Olga Jurasz*:

“in the *Nicaragua Case* and in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ rejected the idea that an armed attack may include ‘not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support’. (*Nicaragua Case*, para.195) Hence, it is vital to show that an armed attack is attributable to a state”.

Moreover, international law clearly acknowledges the act UOF in SD by a state where the state establishes its necessity to respond and uses the measures that are proportional. Hence the principles of "necessity" and "proportionality" are of prime importance. The principle of “necessity” reflects the need of measures adopted and signifies that the response must not be excessive or unnecessary; likewise the notion of “proportionality” implies that “the response to an armed attack must be reflective of the scope, nature and gravity of the attack itself”. ([Jurasz, 2019](#))

Right to Self-Defence under Limitations

As mentioned earlier, the UN prohibits UOF in general and article 51 is cited as an exception to it, hence art. 51 recognises the right to UOF in SD, this right comes with certain restrictions and hence states are required to meet the criteria set in this regard. These limitations include that:

“There must be an armed attack 2- the state needs to establish the necessity, proportionality and immediacy of its action. 3-State is required to report Security Council about “use of force” and as soon as the Security Council takes measures with regard the issue, states must cease using force”. ([Khdir, 2016](#))

The UN permits the use of force in self-defence in response to armed attack, however significant controversy on the subject is often witnessed. The ICJ in [Islamic Republic of Iran v United States of America case \(2003\)](#),

highlighted that: “burden of proof of the fact of showing the existence of such attack rested on the State which justified its own use of force as self-defence”. ([Upeniece, 2018](#))

Likewise, the state is required to show that “the action was necessary as well as proportional to the attack”, necessity here means that the state has not any other effective medium to respond, except UOF and proportionality denotes that the force used must be restricted to eliminate threat only and must not exceed the attack. ([Khdir, 2016](#))

The ICJ has emphasised on “the principles of necessity and proportionality” in *Oil Platform case* in following words:

“The United States must also show that its actions were necessary and proportional to the armed attack made on it and that the platforms were a legitimate military target open to attack in the exercise of self-defence”. ([Upeniece, 2018](#))

Another key limitation here is linked with the role and power of the SC, hence “art. 51 requires the state to report the response or action immediately to the SC, the charter also authorises the security council to take any such step as necessary for international peace and security”. ([Khdir, 2016](#))

Collectively Self-defence

The UN authorises “collective self-defence” under art. 51 in following words:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations...”

The principle of “Collective Self-defence” may come to exercise “where a state subject to an unlawful armed attack requests another state for aid in its defence with force”. Following two conditions along with other obligations that the charter enforce to maintain peace, need to be fulfilled in this regard, these two criterions are:

- a. “The requesting state must have been subject of an armed attack”.
- b. “The requesting state must forward a legitimate request for such assistance”.

Aadhithi Padmanabhan & Michael Shih have quoted that:

“An intervening state may, at a maximum, deploy the level of force the requesting state would be permitted to deploy were it acting for itself. The intervening state’s inquiry must turn on an objective assessment of the requesting state’s rights under the doctrine of individual self-defence. For this reason, an intervening state may not intervene in the requesting state—even when it receives an unequivocal request—without independently evaluating the legal basis for the use of force”. ([Padmanabhan & Shih, 2012](#))

In general, “collective SD refers to the right of State(s) to defend other State(s) as established and governed by the aims and principles of the UN Charter”. The notion of collective SD too has been facing several controversies almost every time when the principle is exercised by states.

Conclusions

It can be concluded from the above analysis of principle on UOF in SD that, the UN has made excellent efforts in forwarding the principles that can protect state's interest and international peace at large. However, its significance ultimately depends on the political will of states and the effectiveness of the UN organs and other international institutions. The aim and powers of the UN “to promote respect for human rights” and maintain global peace are clear. Likewise, the authorities bestowed to the UNSC to effectively fulfil its aim are unambiguous. Though the bulk of IHL create obligations on states and individuals “in times of war”, the states are under human rights obligation in particular to “protect right to life of people during occupation” and in all cases.

While the role of the UN and the SC specifically cannot be undermined to ensure that the states are exercising doctrine on UOF in self-defence in its true spirit, the states also hold immense responsibility in this regard. Greater understanding and political will among state towards the application of "use of force" is crucial as well as challenging to uphold the essence of said notion.

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