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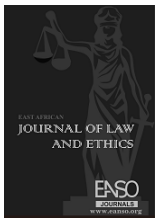

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Original Article

Pre-emptive Use of Force in Self-Defence Under International Law

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Pre-emptive use of Force, Right of Self-Defence Under International Law, Legality of self-Defence, Imminent Attack, Requirement for the Right to Self-defence.

ABSTRACT

Pre-emptive use of force in self-defence is one of the most controversial areas under International Law. States attack each other even if the attack appears more distant. The Right of self-defence can only be invoked against an armed attack. Pre-emptive use of force allows states to use coercive measures against perceived future threats. This type of self-defence is used by the states prior to an armed attack which is contrary to the UN Charter. The defending states do not follow the requirement of necessity and proportionality when using force. The Research Questions were to what extent Pre-emptive use of force under International Law is legal and to what extent Pre-emptive use of force in self-defence is stipulated under the United Nations Charter. The objectives were to examine if Pre-emptive use of force under International Law is Legal and to examine if Pre-emptive Use of force in self-defence is stipulated under the United Charter. The study findings based on Primary Data have shown that Pre-emptive use of force in self-defence is not legal under the UN Charter 1945. Also, it was found that Pre-emptive use of force in self-defence under international Law is not stipulated anywhere in the United National Charter of 1945. Also, it was found that the UN Charter does not allow states to defend themselves in pre-emption of an armed attack where there is no actual armed attack or imminent threat. The study recommends that Pre-emptive use of force in self-defence could now be appropriate due to advanced technology, like Artificial Intelligence and cyber attacks. Also threats of terrorism and non-state Actors. The UN Charter should be amended to copy modernized warfare.

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INTRODUCTION

Pre-emptive use of force in self-defence is one of the most controversial areas under International Law. States attack each other even if the attack appears more distant. The right of self-defence can only be invoked against an armed attack. In contrast, pre-emptive use of force in self-defence allows states to use military force in anticipation of an armed attack. It permits states to use coercive measures against perceived future threats. This type of self-defence permits states to use force prior to an armed attack which is contrary to the UN Charter. The defending states do not follow the requirement of necessity and proportionality when applying pre-emptive use of force for the expectation of future attacks of the aggressor.[1]

Pre-emptive self-defence means the use of force in self-defence to halt a particular tangible course of action that the victim state perceives will shortly evolve into an armed attack against it. The attack might appear more distant but the potential victim state has good reason to believe the attack is likely, is near at hand, and, if it takes place, will result in significant harm[2].

The term International Law was first coined by Jeremy Bentham in 1780.[3] Every country is referred to as a state in International Law. That is to say International Law is the body of law that governs the relations and conduct of sovereign states with each other, as well as with international organizations and individuals. It is a complex and dynamic system of law that covers a wide range of topics, including trade, human rights, diplomacy, environmental preservation, and war crimes.[4]

Background of the Problem

For a long time in history, there was no prohibition to start a war or use armed forces against another state actor. War was considered a direct link to State sovereignty, an unavoidable natural phenomenon, and a legal method of solving disputes between states. At the end of the First World War, this standpoint started slowly to shift towards a more restrictive approach of the *jus ad bellum*, the law on the right to use force.

The classic formulation of Pre-emptive self-defence is the Caroline incident when a British force in 1837 destroyed the US steamer, Caroline. Caroline was the name of a ship owned by the Americans and used to support an insurgency against British rule in Upper Canada in 1837. The ship was subsequently captured and burned and sank near Niagara Falls under the command of Colonel Alan MacNab, leading a militia force, and Captain Andrew Drew of the British Royal Navy. Americans saw this as an encroachment on their state's honour. Immediately, Americans along the border asked the US government to go to war against Great Britain in Canada. A diplomatic crisis in relations between Britain and America emerged. This crisis, which is best known by the names the Caroline affair, the Caroline case, the Caroline incident and the Caroline controversy, led to threatened to ignite a war between the two countries. The British justified their actions by invoking self-defence. However, the then secretary of state Daniel Webster stated that the British must show that they acted against an imminent threat; the requirements of necessity and proportionality were fulfilled. The British implicitly accepted this test.[5]

[1] D. Bowett, *Self-Defence in International Law* (University of Manchester Press, 1958).
[2] Deeks A. (2015), The Doctrine of Pre-emption, in Marc Weller (Ed) Part III The Prohibition of the Use of Force, Self-Defence, and Other Concepts, The Oxford Handbook of the Use of Force in International Law
[3] Ibid
[4] Gordon A. Christenson, *The World Court and Jus Cogens,* 81 A.J.I.L. (1987).
[5] Collins, E. The Caroline Incident of 1837, the McLeod Affair of 1840– –1841, and the Development of International Law, "*American Review of Canadian Studies*" 1990, Vol. XX, No. 1, p. 81

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In the old Roman Empire, the law had a very religious aspect to it. Priests were the ones who knew the secrets of law and they would be the ones who could declare if an action was right or wrong. The priests called fetiales had the power to determine whether a State had breached its obligations to Rome and if that was the case, the custom practice was that the state had the duty to repair the damage done, to pay for its mistake. If it refused to do so, the fetiales would inform the Roman Senate that there was a reason for just war[6]. With the Christianization of the Roman Empire, Christians had abandoned their pacifist ways and embraced the concept of just war. St. Augustine defined just wars as those, which avenged the injuries that were caused by the State towards which war actions were taken[7].

The end of the First World War gave rise to the need for a system that would attempt to solve disputes without directly resorting to war. The birth of the League of Nations represented a new step on the path to an international community governed by peace. It was declared in the Preamble of the Covenant that the members were striving for international peace and security by not resorting to war. The Covenant imposed a set of obligations on member States. First, if any dispute arose between them, they would submit it for an arbitrary or judicial decision to the Council of the League. Second, if they did not agree with the decision, the members could not go to war until after three months from the arbitrary award or judicial decision. This was seen as a cooling-off period and to give members a chance to change their minds and not start the war[8]. It can be seen that although it was a step in the right direction, the League of Nations system did not prohibit war, it only regulated it, imposing obligations on member States to try to solve their problems peacefully. However, if everything else failed, they could resort to war. So, war was still seen as a legitimate way to settle disputes between States only.[9]

In 1919, during the Paris Peace Conference, the Treaty of Versailles entered into force and resulted later in 1920. The foundation of the first intergovernmental organization, the League of Nations started regulating the use of force among member states. In that period, the *jus ad bellum* was mainly regulated by a combination of customary law and treaty law. The Treaty of Versailles did not fully prohibit the use of force, but it enacted some limitations. It established inter alia the term “aggression”, which at that time was weakly equivalent to the meaning of an unlawful use of force. The agreement famously stipulated a ban on to use of war as an instrument to resolve international conflicts between states. Even though the international community adopted this restrictive development, it could not prevent the beginning of World War II.[10]

In 1945, the United Nations (UN) Charter was enacted and laid down in its Preamble "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind. The purposes of the organization are to maintain international peace and security, to develop friendly relations between states and to achieve international co-operation. The principle of solving disputes by peaceful means is the main objective of the United Nations, whereas it prohibits not only war but also force in general and the threat of force.[11] However, after World War II many states have invoked the use of force in self-defence regardless of the United Nations (UN) Charter restrictions and requirements.

In 2022 Russia invaded Ukraine claiming that it was a special military operation, sidestepping a formal declaration of war. The statement was, however, regarded as a declaration of war by the Ukrainian government and reported as such by

[6] Yoram Dinstein, War, Aggression and Self-defence, 4thedn, Cambridge University Press, 2005, at 63.
[7] St. Augustine De Givitate Dei Conra Paganos Book XiX, xvii (6Loeb Classical ed. 150-1(W.C. Greene Trans.1960))
[8] The League of Nations Covenant, articles 10-16.
[9] The Kellogg-Briand Pact, articles 1and 2.
[10] Yoram Dinstein, War, Aggression and Self-defense, 4thedn, Cambridge University Press, 2005, at 63
[11] Article 2(3) of the United Nations UN Charter, 1954

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many international news sources. The Russian invasion of Ukraine violated international law and the Charter of the United Nations. The invasion has also been called a crime of aggression. Russia invoked pre-emptive use of force against Ukraine justifying that it was necessary to safeguard its territory, when Ukraine Showed interest to join NATO. Russia argues that if Ukraine could join the North Atlantic Treaty Organization, there could be a possibility of being attacked by NATO.[12]

Currently, after 7 October 2023 when Hamas attacked Israel and took its hostage to Gaza. Israel invoked the use of force for self-defence to invade Palestine in Gaza and attack them for the justification that, it was necessary to do so to rescue the hostage taken by Hamas fighters. Since then, Israel is still in Gaza waging war against Hamas until it archives its objectives. Israel is still at war against Palestine, using air strikes, ground invention and drones in deference parts of Gaza, including Del Bella, Rafa, Nasser Hospital, Khan Younis, the West Bank and refugee camps.[13]

The United Nations (UN) has tried to prohibit its member states from invoking Pre-emptive use of force in self-defence against another member state, without prior permission from the United Nations Security Council (UNSC). Despite all these efforts, still states invoke pre-emptive use of force against one another and they justify that it is for self-defence without seeking permission from the UNSC.

Statement of the Problem

Pre-emptive use of force in self-defence is one of the most controversial areas under International Law. States intervene with each other even if the attack appears more distant. The right of self-defence can only be invoked against an armed attack. In contrast, pre-emptive use of force in self-defence allows states to use military force in anticipation of an armed attack. It even goes further and permits states to use coercive measures against perceived future threats. This type of self-defence permits states to use force prior to an armed attack which is contrary to the UN Charter. The defending states do not follow the requirement of necessity and proportionality when applying pre-emptive use of force for the expectation of future attacks of the aggressor. They cause harm to the civilian population and civilian objects. The killing of the civilian population is usually exacerbated by the occupying state attacking without giving any information, as it is in pre-emptive use of force, no information is required of the belligerent state.

The UN Charter has failed in its framework. The Charter framework is meant to prohibit the threat and use of force by states against the territorial integrity or political independence of states or in any other manner inconsistent with the purposes of the UN. However, this prohibition does not seem to be realized in practice. Pre-emptive use of force has been used against the political independence and territorial integrity of states, which have not been authorized by the UN Security Council and cannot be said to be within any reasonable conception of self-defence. For example, the U.S. invasion of the Dominican Republic (1965); the U.S. invasion of Panama (1989); the Iraqi attack on Kuwait (1990); the Soviet action in Czechoslovakia (1948) and the Operation Desert Storm in Iraq.

METHODOLOGY

The approach for this study is purely doctrinal research, which is qualitative in nature. The reason for adopting this method is because; doctrinal research improves the substantial part of the law by means of which could result in achieving the broader goal of the study.[14] Doctrinal research enables the researcher to have sufficient knowledge of the problem under study

[12] https://www.aljazeera.com/search/the%20beginning%20of%20russia%20-ukraine%20war accessed on 12/04/2024

[13] https://www.aljazeera.com/search/the%20beginning%20of%20russia%20-ukraine%20war accessed on 12/04/2024

[14] Amrit Kharel, Doctrinal Legal Research, Securities Board of Nepal Silver Jubilee Publication 2018, SEBON, Lalitpur, Nepal (2018) 237-252

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and it helps to enrich legal content and interpretation of statutes. Also, the researcher chose this method because it is less efficient.[15] It provides the researcher with significant information and legal theories and reported court decisions in order to analyze the outcomes within a limited time framework. The significance of using doctrinal research as a method of collecting data is that it is inexpensive and economical in the form of data[16] which are easily available, and the researcher does not need to be present during data collection.

The research methodology is referred to as a systematic approach to collecting and evaluating data throughout the research. It consisted of the techniques, strategies, and tools to be used by the researcher to find the solution to a research problem. This study deployed doctrinal research, which is based on the collection and interpretation of materials that relate to the research topic. As far as the research objective, the researcher selected this method as it requires a deep analysis of laws that relate to the topic of this research. The researcher visited the University of Iringa (UoI) and the Library in Mbeya Campus. This type of research methodology-based analysis of all materials, such as international laws in which the researcher employed the library source to obtain information related to the international law's instruments, case law reports, books, journals, articles, papers, and documents related to the topic.

Sources of data

In order to compile facts and information on the pre-emptive use of force, this research employed Primary sources of data which are the laws themselves, decided cases and different documents as well as from internet sources, to dig dip the violation of the UN Charter. The selected variety of pertinent Laws that were retrieved from university libraries and internet archives were used to gather data because the methodology is Purely Doctrinal. Additional pertinent documents in digital format were obtained from the official websites of the United Nations, UNSC, and the International Court of Justice.

INSTITUTION AND THEORETICAL FRAMEWORK ON PRE-EMPTIVE USE OF FORCE IN SELF DEFENCE UNDER INTERNATIONAL LAW

Introduction

The regulation of military force in international relations remains at the forefront of international concern and academic debate. States, the International Court of Justice and academic commentators have long ruminated over the meaning and scope of the prohibition of the threat or use of force contained in Article 2(4) UN Charter and the inherent right of individual and collective self-defence recognized by Article 51. States almost invariably invoke self-defence to justify using force extra territorial, even in the most dubious of circumstances when their acts are subsequently condemned.[17]

The Kellogg-Briand Pact of 1928 and the Nuremberg Tribunal

Through the signing of the General Treaty for the Renunciation of War (the Kellogg-Briand Pact) of 1928, the real breakthrough to legally condemning war in international law was made. This Treaty provided that, the *Parties* "solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations to one another."[18]

Thus for the first time war as such was to be seen as no proper and lawful instrument of national policy. The Pact did not of course prevent World

[15] Terry Hutchinson &Nigel Duncan, Defining and Describing What We Do: Doctrinal Legal Research, 17(1) DEAKIN. L. REV. 84 (2012).

[16] Kothari, C. R. (2004). Research methodology: Methods and techniques (2nd Ed.). New Delhi: New Age International (P) Ltd.

[17] Bowett (1958) 59–60, although he affirms that Webster's principles apply to both necessity and self-Defense. The International Law Commission ('ILC')

[18] Kellogg-Briand Pact (Treaty signed in Paris on 27th Aug.1928 for the Renunciation of War as an Instrument of National Policy, it entered into force on 24th July,1929 stat.46,2343,Ts No.796,94 LNTS 57

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War II. Nevertheless, it had an effect, as it formed the basis for crimes against peace which, after World War II, were described in the Charter of the Nuremberg Tribunal as those crimes aimed at the planning, preparation, initiation or waging of the war of aggression or the war in violation of international treaties.[19]

The Covenant of the League of Nations

The First World War marked the end of the balance of power system and through the creation of the League of Nations; a different approach to the use of force in international law was established. The Covenant of the League of Nations placed "resort to war" under international supervision, and rendered it unlawful in four situations:

- When made without prior submission of the dispute to arbitration or judicial settlement or to inquiry by the Council of the League.
- When begun before the expiration of three months after the arbitrary award or judicial decision or Council Report.
- When commenced against a member who had complied with such award or decision or recommendation of a unanimously adopted Council report.
- Under certain circumstances, when initiated by a non-member state against a member state.

Hence, the League of Nations system did not prohibit the use of force as such but did set up a procedure designed to restrict it to tolerable levels.[20]

The United Nations Charter

On October 24, 1945, the United Nations Charter[21] (from now on referred to as the Charter) was brought into force. Since then, the Charter has provided the legal framework for the use of force in international law. Almost all States are parties to the Charter. The Preamble to the Charter expresses a determination to save succeeding generations from the scourge of war to practice tolerance and live together in peace with one another as a good neighbourhood, to unite our strength to maintain international peace and security and to ensure 'that armed force shall not be used, save in the common interest.

United Nations Charter[22] provides that, to maintain international peace and security; and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

According to the *United Nations Charter*,[23] all members shall settle their international disputes by peaceful means in such a manner that international peace security, and justice, are not endangered.[24] All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations. In the case of *Nicaragua v United States.*[25] The International Court of Justice (ICJ) described Article 2 (4) as a peremptory norm of international law, from which States cannot derogate. Thus, the effect of Articles 2 (3) and 2 (4)[26] is that the use of force can only be justified as expressly provided under the Charter, and only in situations where it is consistent with the UN's purposes.

[19]Charter of the Nuremburg International Military Tribunal August 8th,1945
[20] See League of Nations Covenant, June 28th, 1919, article 12 ff reprinted in: J.A.S. Grenville and Bernard Wasserstein eds.,The major Treaties of the twentieth century,2001.
[22] Article 1 of 1945
[22] Article 1 of 1945
[23] Article 2(3) 1954
[24] Ibid, Article 2(4)
[25] (1986) ICJ Rep.14,at para.190
[26] UN Charter 1945

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The Right to Self-defence under the UN Charter

Development of the right to self-defence Article 2(4)[27] comprises the prohibition on the use of force of one state against another state. This norm constitutes the cardinal norm of public international law. There have been attempts to restrict the scope of Article 2(4)[28] due to its wording. It also provides for force against the 'territorial integrity', the 'political independence' or 'in any other manner inconsistent with the purposes of the UN'. According to this argument, actions that are not aimed against one of these legally protected rights are not covered by the prohibition on the use of force and do not constitute a violation of Article. 2(4) of the United Nations Charter. The ICJ rejected this line of argument in Corfu Channel.

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 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-defence 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 security.[29]

Exceptions to the Prohibition of the Use of Force

The charter allows self-defence as an exception to the prohibition on the use of force based on some requirements. The most important requirement, the right of self-defence, recognized in the UN Charter is limited to situations in which an armed attack has occurred. It is not established that an attack necessarily has to come from another state, but conventionally it is understood that one state has to attack another in order for a use of force to amount to an armed attack within the meaning of the UN Charter.[30]

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 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-defence 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 security.[31]

Pre-emptive use of force against non-State Actors

The Paris shootings and France's reaction have once again triggered debate on states' right to self-defence against attacks by non-state actors. Discussions normally focus on *jus ad bellum* issues, such as the unwilling or unable test or when a threat is imminent. A question that receives strikingly little attention is whether the invocation of the right to self-defence against a non-state armed group under *jus ad bellum* would provide a sufficient legal basis for attacking this group by military means. The lawfulness of strikes against a non-state entity does not only depend on *jus ad bellum* but also on a second layer of legal examination: does the attack form part of an armed conflict and comply with international humanitarian law, or is the attack in question governed by international human rights law and possibly infringes on the targeted person's right to life? How the use of military force in self-defence against non-state armed groups may be justified under *jus in Bello*.

[27] UN Charter 1945
[28] Ibid
[29] Article 51 of the UN Charter 1945
[30] European Journal of International Law,Tilman Rodenhause (implementation of international humanitarian law), -self-defense Operations Against Armed Groups and the Jus in Bello
[31] UN Charter, Article 51

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France's President Hollande made it clear that he considered the Paris attacks an 'acte de guerre' and that France is now engaged in a war against terrorism. Political rhetoric aside, what he probably meant is that he considers France to be engaged in an armed conflict with *Daesh*. As *Daesh* is a non-state entity, this conflict must be non-international. For international lawyers, he seemed to state the obvious. Reportedly, France joined the US-led anti-*Daesh* coalition in 2014. This coalition initially supported the Iraqi government in its non-international armed conflict (NIAC) against *Daesh*. When France expanded its airstrikes from Iraqi into Syrian territory in August 2015, this could probably be considered part of a spillover of the conflict that commenced in Iraq. As France's recent attacks against *Daesh* form part of the same conflict, IHL applies to them, and such attacks appear lawful as long as they comply with applicable IHL. Nonetheless, the increasing involvement of states in self-defence operations against non-state actors sparks the question of under which conditions this use of force falls under the scope of IHL. Only in that case could air bombardments against military targets be lawful.[32]

Responsibility for acts of war relates back to the tenets of *jus ad bellum* as well as *jus in bello*, for the justification of going to war involves responsibility as well as the acts ordered and committed in war. In reviewing the stories from military ethics readers, the acts of bravery that attract our attention involve soldiers standing up to do the right thing against either the prevailing momentum of the platoon or the orders from higher up; the realist rejects such acts as infrequent or unnecessary performances that do not alter the main characteristic of war and its innate brutality, yet such acts also remind the critic as well as the soldier of the importance of returning to the civilian mode with good conscience.[33]

What constitutes an armed attack under the UN Charter?

According to the UN Charter,[34] provides among other things that, an armed attack includes not only an attack against the territory of the State, including its airspace and territorial sea, but also attacks directed against emanations of the State, such as its armed forces or embassies abroad. Proponents of the expanded view distinguish two lines of arguments as to why an armed attack should embrace imminent threats:

First, it is noted that the inherent right of self-defence, which existed under customary international law and allowed using of force against an imminent threat, survived after the adoption of the UN Charter.[35] The intention of the drafters of the UN Charter, is stated, was not to eliminate the inherent right of self-defence which already existed at that time[36] but to preserve or even to codify it.[37] In addition, it has been maintained that there should be clear evidence that the drafters of the UN Charter wanted to restrict member states' rights which existed under customary international law. Without such clear proof of their intention, the right of self-defence should be left unchanged under the present regulation of the UN Charter.[38]

Second, scholars argue that the concept of an armed attack is changing[39]. The adoption of more destructive weapons and new methods of warfare requires that self-defence should not be limited only to an armed attack.[40] It should be adapted to new circumstances in which the force is used. To require a state to suffer a devastating attack in order to invoke its right of self-defence would be unreasonable. Moreover, developments in

[32] European Journal of International Law,Tilman Rodenhause (implementation of international humanitarian law), -self-defense Operations Against Armed Groups and the Jus in Bello
[33] European Journal of International Law,Tilman Rodenhause (implementation of international humanitarian law), -self-defense Operations Against Armed Groups and the Jus in Bello
[34] Article 51 1945
[35] See ibid note 35:C.H.M. Waldock
[36] See ibid note 35:D. Bowett
[37] See ibid note 6:Sean D. Murphy
[38] See ibid note 40:Fun-Shun,Lin
[39] See ibid note 40:Fun-Shun,Lin;N.M. Feder,Reading the U.N. Charter Connotatively: Toward A New Definition of Armed Attack,19 N.Y.U. J. International Law and Politics 395 (1986-1987)
[40] John C. Yoo,Using Force,71 U. Chi. L. Rev. (2004)

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contemporary weaponry allow delivering a fatal blow against a state more rapidly than before. Therefore, states faced with an exigency to use force in self-defence should not be required to act as "sitting ducks". It would be ineffective in taking into account the core purposes of the UN Charter and the demands expressed by member states before entering into that multilateral treaty.[41] As a result, the creation of atomic and other types of weapons of Mass Destruction requires that an armed attack be interpreted accordingly to these new dangerous means of destruction.[42] In contrast to the opinion that the introduction of new kinds of weapons and methods of warfare necessitates that an armed attack should not be restricted to obvious aggression, it is said that the existing regulation of the use of force by the UN Charter is appropriate to deal with new challenges.[43] Accordingly, the advent of these new devastating weapons, even more, requires that states would not be allowed to use force in pre-emptive of an armed attack. If pre-emptive self-defence was allowed, states would be encouraged to strike first under the pretence of prevention. Therefore, the argument that an armed attack should embrace imminent threats is not only fallacious but also pernicious.[44]

In the case *US vs. Nicaragua*,[45] the court declined to analyze that question, because it was stated that an actual armed attack had already occurred and there was no need to analyze additional questions. The ICJ pointed out that: In view of the circumstances in which the dispute has arisen, reliance is placed by the parties only on the right of self-defence in the case of an armed attack, which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised.[46] Likewise, in the case of *the Democratic Republic of Congo vs. Uganda* (2005), the ICJ refused to analyze that question.[47] It took the same position as in the case of US vs. Nicaragua,[48] stating that the parties did not raise that question. Therefore, it is not clear what the position of the ICJ regarding the legality of pre-emptive self-defence is.

Exceptions to the Prohibition of the Use of Force

The United National Charter 1945 prohibits the use of force in general. Nevertheless, there are exceptions to this rule, which have found their way into the provisions of the Charter. There are three possible exceptions in international law at present, namely Security Council authorization under Chapter VII of the Charter, the case of individual or collective self-defence under Article 51 of the Charter and, more contested, the case of humanitarian intervention, which is not clearly regulated in the Charter, but which may be international customary law. 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 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-defence 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 security.[49]

ANALYSIS OF FINDINGS ON THE PRE-EMPTIVE USE OF FORCE IN SELF - DEFENCE UNDER INTERNATIONAL LAW

Introduction

This chapter presents the findings of the study based on Primary Data which is the law itself. It also analyses the findings based on Research Questions, general objectives, specific objectives

[41] Myres S. McDougal, The Soviet Cuban Quarantine and Self-Defense,57 A.J.I.L., 597 (1963)
[42] See ibid note 35:Philip Jessup
[43] See ibid note 35:Louis Henkin
[44] Ibid
[45] 1986
[46] See ibid note 32: Military and Paramilitary Activities in and Against Nicaragua, para. 194
[47] ICJ:Armed Activities on the Territory of the DRC (DRC v Uganda)(2005)ICJ Rep.
[48] See ibid note 32: Military and Paramilitary Activities in and Against Nicaragua, para. 194
[49]Article 51UN Charter 1945

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and documentary reviews. This chapter gives answers to a number of questions that were raised in the first chapter of this study in the quest to achieve the objectives that depict the violation of the United Nations Charter 1945 and the International Law. Those questions are presented hereunder as follows: -

- To what extent Pre-emptive use of force under International Law is legal?
- To what extent Pre-emptive use of force in self-defence is stipulated under the United National Charter?

The legality of pre-emptive use of force under international law

The first research question posed was: To what extent Pre-emptive use of force under International Law is legal? This question aligns with the second objective of this study, which, inter alia, seeks to examine whether international law allows preemptive use of force. The finding has revealed that pre-emptive use of force in self-defense as formulated by President Bush of the United States of America during the National Security Strategies 135 (2002) is not legal under the UN Charter 1945. First of all, in the pre-emptive use of force, there is no actual armed aggression or even imminent threat against which a state can legally defend it. Secondly, there are no limitations regarding the use of pre-emptive military force against emerging threats. States are left for themselves to decide what they consider threats and how to respond to those perceived dangers. If pre-emptive self-defence were established, states could use force without any justification, as in the 19 century and the UN Charter's regulation would be completely undermined.

Also, the pre-emptive use of force in self-defence is illegal because the use of force under the UN Charter 1945 is centralized in the hands of the Security Council under Chapter VII of the UN Charter. Only the Security Council is delegated to ascertain whether there is a threat to the peace. If a particular instance is within the realms of possibility to jeopardize international peace and security, states have to look for help from the Security Council or undertake peaceful means only.

However, sometimes the Security Council fails to act due to its inability to agree on what measures to adopt between permanent members of that institution, especially in the Cold War or when the Security Council refuses to take measures and a victim state finds itself threatened. In this regard, when the Security Council fails to act, a state can only legally respond if there is an actual armed attack or an imminent threat, but when there is no armed attack or a threat hasn't materialised yet, a state takes its own risk in using force preemptively. In this situation, it is more likely that a state will be proclaimed as an aggressor, or violator of the law and not as an entity which legally used its right of self-defence.

Pre-emptive use of force in self-defence and the United National Charter

The second research question asked was to what extent Pre-emptive use of force in self-defence is stipulated under the United National Charter. This reflects the second objective of this study, which sought to review if the Pre-emptive use of force in self-defence under the Charter of the United Nations is absolute. The UN Charter established a general prohibition on the use of force. The United National Charter[50] provides that, all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The UN Charter has two exceptions to the general prohibition on the use of force: the right of self-defence established in Article 51 and collective action undertaken by the Security Council under Chapter VII. T*he United National Charter*[51] provides that nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs

[50]Article 2(4) 1945

[51] Article 51 1945

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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-defence 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 security.

The UN Charter 1945 allows self-defence as an exception to the prohibition on the use of force based on some requirements: The first and most important requirement, the right of self-defence recognized in the UN Charter is limited to situations in which an armed attack has occurred.[52] It is not established that an attack necessarily has to come from another state, but conventionally it is understood that one state has to attack another in order for a use of force to amount to an armed attack within the meaning of the UN Charter 1945.

With the above provisions, decided cases and prominent writers, the finding has revealed that Pre-emptive use of force in self-defence is not stipulated under the United Nations Charter. Because pre-emptive use of force in self-defence means, the use of force in self-defence to halt a particular tangible course of action that the victim state perceives will shortly evolve into an armed attack against it. The attack might appear more distant in time but the potential victim state has good reason to believe the attack is likely, is near at hand, and, if it takes place, will result in significant harm. For example, Russia attacking Ukraine was not under armed attack.

Requirements of the right to self-defence

In Nicaragua, the ICJ also ruled that the right to self-defence requires an armed attack by another state on the victim state. Unfortunately, it did not give a definition of an armed attack. The Court did state though that, the gravest forms of the use of force constitute an armed attack. It said that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to inter alia: an actual armed attack conducted by regular forces or its substantial involvement therein.[53]

Moreover, only force of particular scale and effects can be considered an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. That is to say, the actions taken in self-defence must be necessary and proportionate. Self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it. So a state may act in self-defence when there is a strong necessity to defend itself.

United National Security Council authorization on the Right to use force

Chapter VII grants the right to use force if the Security Council authorizes it. The Security Council may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.[54] Thus, an exception is created where the Security Council authorizes the use of force in a resolution. Such a resolution must comply with the constitutional principles of the United Nations and with the objects and purposes of the Charter.[55] The Security Council must be convinced that, the state against which the force is to be used poses a threat to peace and that this cannot be averted in any way other than by the use of force.[56] Nevertheless, if

[52] Allen S. Weiner, The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?,59 Stan. L. Rev. 415 (2006)
[53]Abraham D. *On the Necessity of Preemption,* 14 Eur. J. Int'l L. (2003).
[54]Article 42 of the UN Charter
[55]Rabinder Singh QC,Alison Mcdonald:Legality of Use of Force Against Iraq,Opinion,Public Interest, Lawyers on behalf of Peacerights,Matrix Chambers, Gray's Inn. London WC1R 5LN 2002,p.15
[56]UN Charter,Article 39

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these criteria are fulfilled the Charter provides for the legal use of force.

The finding has revealed that the defending States use self-defence against the belligerent state without prior permission from the United Nations Security Council. For example, Israel's inversion in Palestine. It did not seek for UNSC Resolution. But also Iran launched 200 ballistic missiles at Israel very currently on 1st October 24, 2024. Did not seek permission from the United Nations Security Council.

CONCLUSION, SUMMARY OF FINDINGS AND RECOMMENDATION

Based on the findings from the primary data which was the law itself, the research question, and general and specific objectives, pre-emptive self-defence is not legal under the UN Charter 1945. Because for a state to use force, there must be an actual armed attack or even imminent threat against which a state can legally defend itself.

It was also found that; pre-emptive self-defence is illegal because the use of force under the UN Charter is centralized in the hands of the Security Council. In reality, under the regulation of the UN Charter, only the Security Council is delegated to ascertain whether there is a threat to the peace. If a particular instance is within the realms of possibility to jeopardize international peace and security, states have to look for help from the Security Council or undertake peaceful means only.

Moreover, it was found that the Pre-emptive use of force in self-defence under international Law is not stipulated anywhere in the United National Charter of 1945. It was just formulated by the President Bush of the United States of America in 2002. It was after the tragic events of September 11, 2001, that the latter US military operations in Afghanistan and Iraq led to a revived interest in the rules governing the use of military force.

The finding has revealed that the defending States use self-defence against the belligerent state without prior permission from the UNSC. For example, Israel's inversion in Palestine. It did not seek for UNSC Resolution. But also Iran launched 200 ballistic missiles at Israel very currently on 1st October 24, 2024. Did not seek permission from UNSC. Also, it was found that the UN Charter does not allow states to defend themselves in pre-emption of an armed attack where there is no actual armed attack or imminent threat.

Recommendation

Pre-emptive self-defence can now be appropriate due to advanced technology of means and methods of warfare. For example, Artificial Intelligence, Cyber-attack and Drone. Also, an emerging threat of terrorism, non-state Actors and the introduction of WMD (bacteriological, chemical etc.). The UN Charter should be formulated to cope with modernized warfare.

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