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“A CRITICAL ANALYSIS OF NON-FORCIBLE MEASURES WITHIN THE LAW OF SELF-DEFENCE”

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Introduction:

The principle of self-defense, as established in both treaty and customary international law, comes with several limitations and responsibilities. The prevailing consensus is that the entitlement to self-defense may only be asserted in reaction to a "armed attack," and any defensive measures used must be commensurate and indispensable¹. In addition, governments must disclose cases of self-defense to the UN Security Council, and this right is temporarily revoked when the Security Council implements actions to uphold global peace and security.

Historically, governments have used self-defense as a justification for activities that would otherwise violate the ban on the use of force as outlined in the UN Charter and customary law. Nevertheless, there is a widely held belief that self-defense is restricted to retaliating with physical aggression against armed assaults. The limited interpretation presents difficulties, since nations may choose non-coercive actions in response to military attack.

Instances such as the enforcement of economic sanctions or the establishment of security barriers prompt inquiries on the compatibility of these measures with international law. Although they may not include physical aggression, they might nonetheless contradict ideals such as territorial sovereignty or international commerce agreements.

A significant number of international law academics contend that non-forcible actions used in reaction to armed assaults should be categorised as countermeasures. Nevertheless, this categorization may not be suitable, since the concept of countermeasures is accompanied by its own array of prerequisites and constraints.

¹ Corn, Geoffrey S. "The Essential Link between Proportionality and Necessity in the Exercise of Self-Defense." *Necessity and Proportionality in International Peace and Security Law*, by Geoffrey S. Corn, Oxford University Press, 2020, pp. 79–112. DOI.org (Crossref), <https://doi.org/10.1093/oso/9780197537374.003.0004>.

This article presents a different perspective by suggesting that self-defense is a more extensive entitlement according to international law. The argument posits that governments should have the authority to use both coercive and non-coercive methods to resist armed assaults. This more expansive view not only grants nations with more efficient choices for responding, but also aids in averting unwarranted intensification of crises by permitting non-violent reactions when suitable.

In order to substantiate this claim, the article analyses the origin of the right to self-defense, the wording and organisation of the UN Charter, and the actions taken by states in relation to Article 51. Additionally, it differentiates between self-defense and countermeasures, illustrating that non-violent reactions to armed assaults should be seen as acts of self-defense rather than countermeasures.

Self-Defence as Counter-Force:

In 2002, Israel constructed a security barrier inside the occupied Palestinian territories with the intention of protecting its population from terrorist threats². Despite the international community's assertion that this construction violated human rights and humanitarian law, Israel justified it as a self-defense measure in accordance with Article 51 of the UN Charter.

The UN General Assembly requested an Advisory Opinion from the International Court of Justice (ICJ) to clarify the legal consequences of Israel's wall, in light of the ongoing debate. The ICJ determined that the building of the wall was in violation of international human rights and humanitarian law³. Additionally, the ICJ rejected Israel's claim of self-defense. The Court concluded that self-defense could not be claimed against non-state actors and could not justify measures against assailants situated beyond the defending state's territory or area under its control.

Curiously, Judge Higgins expressed a similar opinion to that of other international legal experts, but did not provide any legal reasoning or reference any sources⁴. The experts, who are Special Rapporteurs for the International Law Commission's project on state responsibility, typically see self-defense as a limited circumstance in which the use of force is allowed, notwithstanding the

² ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory | How Does Law Protect in War? - Online Casebook. <https://casebook.icrc.org/case-study/icj-israel-separation-wall-security-fence-occupied-palestinian-territory>.

³ Falk, Richard A. "Toward Authoritativeness: The ICJ Ruling on Israel's Security Wall." *The American Journal of International Law*, vol. 99, no. 1, 2005, pp. 42–52. JSTOR, <https://doi.org/10.2307/3246088>.

⁴ Franck, Thomas M. "On Proportionality of Countermeasures in International Law." *The American Journal of International Law*, vol. 102, no. 4, 2008, pp. 715–67. JSTOR, <https://doi.org/10.2307/20456680>.

general ban⁵. Roberto Ago and others believed that self-defense was a subordinate concept that allowed nations to avoid accountability for violating the norm of non-use of force. James Crawford and others argue that self-defense is an essential part of the ban on the use of force, and should be regarded a fundamental law alongside Article 2(4) of the UN Charter.

Crawford's viewpoint, endorsed by the International Law Commission, highlights that Article 51 of the UN Charter upholds a nation's fundamental entitlement to self-defense while adhering to the ideal of refraining from using force. The perspective mentioned is further clarified in Article 21 of the Articles on State Responsibility, which states that self-defense, while it may excuse violations of some commitments, is nonetheless bound by the fundamental principle of abstaining from the use of force as stated in Article 2(4).

This article challenges the commonly held belief that self-defense only permits the use of force. Instead, it argues that self-defense allows for both forceful and non-forceful actions to resist armed attackers. Although a few authors have mentioned this argument, it has not been thoroughly examined in terms of theory or doctrine.

Extending Self-Defense: Justifying Defensive Measures:

This chapter states that self-defense may be used to defend against an armed assault under current legislation. This claim is supported by the historical foundations of self-defense in customary law, Article 51 of the UN Charter, its organisational structure, and nations' behaviour respecting Article 51.

i. The Foundation of Self-Defense in Customary Law:

Article 51 of the UN Charter recognises self-defense as a "inherent right," which the ICJ has read as being based on established customary international law⁶. This section seeks to maintain the traditional entitlement to self-defense as outlined in the Charter, however with certain modifications. Thus, in order to fully comprehend the present comprehension of this entitlement in international law, it is crucial to scrutinise its historical implementation prior to the advent of the UN Charter.

⁵ International Law Commission. <https://legal.un.org/ilc/guide/annex3.shtml>.

⁶ Editor_4. "The Use of Force Vis-à-Vis Self-Defence in the United Nations Charter." SCC Times, 10 June 2023, <https://www.sconline.com/blog/post/2023/06/10/the-use-of-force-vis-vis-self-defence-in-the-united-nations-charter/>.

Originally, the idea of self-defense was closely connected to the wider responsibility of self-preservation, which represented a moral requirement for governments to protect their fundamental interests according to natural law. Gradually, this developed into a more sophisticated form of the right to protect oneself, based on the actions and beliefs of states, and thereby establishing a legal claim according to customary law. In the mid-nineteenth century, governments started implementing restrictions on the practice of self-defense, including the condition that defensive acts must be both necessary and appropriate.

Crucially, self-defense was not just limited to the use of physical force. Historical instances illustrate that governments were prepared to use various tactics, even if they violated other international law rules, in order to save themselves from damage. In the nineteenth century, the United States engaged in military operations in Mexico to preempt invasions by Native Americans, citing self-defense as the rationale for its activities. Instances such as the destruction of the *Caroline* in 1837 and the Bering Sea dispute in 1886 demonstrate how nations used the concept of self-defense to rationalise encroachments on territorial sovereignty or the freedom of the seas.

During this era, the legitimacy of such actions was evaluated according to concepts such as territorial sovereignty and non-intervention, since there was no explicit restriction on the use of force under international law until a later time. Thus, self-defense functioned as a universal entitlement according to customary law, enabling governments to legitimise diverse measures targeted at protecting their fundamental interests.

It is important to highlight that the norm of non-use of force was established at a later stage in international law, and governments did not thereafter reframe self-defense as an exception to this principle. On the contrary, they asserted that self-defense continued to be a universal entitlement according to international law, distinct from the ban on the use of force.

These historical case studies demonstrate the development of self-defense as a basic right in international law, which came before the concept of non-use of force and is still acknowledged as such by governments.

ii. Implications of Article 51 of the UN Charter:

The incorporation of the customary right of self-defense into the new collective security framework occurred with the ratification of the UN Charter in 1945. Article 51 of the Charter

defends this entitlement while putting certain limitations to ensure its alignment with the purposes of the Charter. States that claim self-defense must notify the Security Council, and this right is temporarily revoked if the Security Council takes action to restore peace and security.

Nevertheless, Article 51 does not specifically restrict self-defense only to the use of force. According to Tams, the text acknowledges that self-defense might be justified via tactics other than force, such as blockades. This view is substantiated by the legal doctrine of "in eo quod plus sit semper inest et minus," which signifies that the bigger always encompasses the weaker. This theory, often used in the interpretation of treaties, posits that whenever a treaty confers a certain right or authority, it necessarily encompasses subordinate variations of that right or authority.

Within the framework of the UN Charter, this concept signifies that the authority to use force in self-defense also includes the authority to utilise non-violent alternatives. Israel's envoy to the UN implied that since international law acknowledges the right to use force in self-defense against terrorist assaults, it logically follows that non-violent tactics may also be used for the same objective.

Article 51 of the UN Charter does not restrict self-defense only to the use of force. It permits a wider range of defensive actions to be justified under the concept of self-defense.

iii. Structural Analysis of the UN Charter:

The composition of a treaty often offers valuable understanding about the elucidation of its clauses. Article 2(4) of the UN Charter, which establishes the principle of non-use of force, is located in Chapter 1 of the Charter, which specifically explains the aims and principles of the United Nations. On the other hand, Article 51, which deals with the entitlement to protect oneself, is located in Chapter VII, which governs the collective security system of the United Nations. The division of these structures creates questions about whether self-defense is interpreted only as a rationale for using force, implying that Article 51 functions as a deviation from Article 2(4).

Nevertheless, the fragmented arrangement of these articles within the Charter implies a different conclusion. Article 51 is not an exemption to the principle of non-use of force but rather an exception to the UN's collective security framework, since it is situated inside Chapter VII.

According to Article 51, nations have the authority to take defensive action in response to armed

assaults without needing agreement from the Security Council. This power remains in place until the Council steps in to restore peace and security. This perspective is further substantiated by the preliminary efforts made for the UN Charter. During the drafting process, the Chinese representative at the San Francisco conference described Article 51 as an exception to the enforcement procedures created by the Security Council.

Hence, the organisational structure of the UN Charter implies that Article 51 should not be seen as a deviation from the principle of refraining from using force as stated in Article 2(4), but rather as a specific exception within the scope of the UN's collective security system.

The Falklands War: Economic Sanctions:

Argentina began its invasion of the Falkland Islands, which are a part of the United Kingdom and are governed by the British government, on April 2, 1982⁷. The very following day, the United Nations Security Council (SC) published Resolution 502 (1982), which condemned the acts of Argentina as a violation of the peace and demanded that Argentine military leave from the area immediately. On the other hand, the Supreme Court did not provide its approval for any enforcement action against Argentina.

On the other hand, the United Kingdom responded by invoking Article 51 of the United Nations Charter and beginning military actions against Argentina. After that, on April 10, 1982, twelve European states imposed a temporary embargo on Argentine commodities in response to a request from the United Kingdom. Imports from Argentina were subject to broad embargoes not long after that, which were enforced by the European Economic Community (EEC), as well as by Australia, Canada, and New Zealand.

Argentina has filed a complaint with the Council of Representatives of the General Agreement on Tariffs and Trade (GATT), claiming that these embargoes violate the terms of the GATT. In response, Australia, Canada, and the EEC defended their actions by using Article XXI of the GATT, which allows for derogations from trade agreements to be made in order to preserve important security interests during times of war or crises in international relations.

On the other hand, the reason that these nations supplied, in conjunction with the fact that they

⁷ "A Short History of the Falklands Conflict." Imperial War Museums, <https://www.iwm.org.uk/history/a-short-history-of-the-falklands-conflict>.

violated sectoral trade agreements with Argentina, suggests that the legal foundation for the embargoes extended beyond the particular terms of Article XXI of the GATT. It has been stated by some that these embargoes were implemented as a collective kind of countermeasure in order to help the United Kingdom. The idea of collective countermeasures, which would enable governments to react collectively to violations of duties due to the international community, has been the subject of discussion in the realm of law.

There is ongoing debate on the legality of collective countermeasures; nevertheless, the rhetoric that was used by the countries participating, such as making reference to their inherent rights, gives the impression that they justified the embargoes as acts of collective self-defense in order to show their support for the United Kingdom. By way of illustration, Canada has made it clear that the embargo it imposed was a reaction to Argentina's use of force against the United Kingdom. Furthermore, when the European States submitted their imposition of embargoes to the Supreme Court, they cited Argentina's invasion of the Falkland Islands as the foundation for their measures, showing that they were acting in the interest of collective defence.

The rhetoric that was used and the circumstances in which these embargoes were enacted show that they were justified, at least in part, as actions of collective self-defense in reaction to Argentina's aggression against the United Kingdom. This is despite the fact that the legal foundation for these embargoes may have several facets.

Contrasting the Aims of Countermeasures and Self-Defence:

Countermeasures and self-defense are both reactions to perceived wrongs; yet, within the context of international law, they serve different goals⁸. Countermeasures provide a mechanism for states that have been harmed to ensure that they are in accordance with international law and to protect their own legal rights. The concept of self-defense, on the other hand, is not a system for law enforcement but rather a weapon for states to defend themselves against armed assaults.

Countermeasures are basically legal acts that are performed by states in order to remedy breaches of international law. They serve as a decentralised enforcement mechanism within the framework of international law. In situations when there is no fast recourse to a central authority such as the United Nations Security Council, they provide states with the ability to react to perceived wrongs. Self-

⁸ O'Connell, Mary Ellen. "Unilateral Countermeasures." *The Power and Purpose of International Law*, by Mary Ellen O'Connell, 1st ed., Oxford University Press New York, 2008, pp. 229–64. DOI.org (Crossref), <https://doi.org/10.1093/acprof:oso/9780195368949.003.0007>.

defense, on the other hand, has its origins in the need for states to possess the ability to defend themselves against military assault. It is invoked to protect the security and territorial integrity of a state, and it functions within a conceptual framework that is similar to that of war.

Therefore, despite the fact that both self-defense and countermeasures include reactions to violations of international law, they are fundamentally separate and serve different purposes. Describing non-forcible reactions to armed assaults as countermeasures is misleading; instead, such activities are more aptly characterised as acts of self-defense.

i. Legal differences

The legal frameworks that regulate self-defense and countermeasures are notably different from one another in a number of important respects. In the first place, while the right to self-defense enables a state that has been attacked to seek aid from other states in order to defend itself against armed assaults, countermeasures cannot be conducted by third-party states on behalf of the state that has been attacked. The nature of both ideologies gives birth to this distinction: countermeasures are believed to be justifications for unlawful activities, while self-defense is considered to be a justification for protective actions.

A second limitation of countermeasures is that they are only applicable to actions against states that have violated international law. Non-state actors, such as armed groups, are not included in this category. Self-defense, on the other hand, is permitted under Article 51 of the United Nations Charter. This means that defensive action against armed assaults may be taken regardless of the identity of the attacker, whether it be a state actor or a non-state actor.

In the third place, anticipatory countermeasures are not practicable since countermeasures are only allowed in reaction to previous breaches of international law. Self-defense, on the other hand, may be used to ward off an impending danger of armed assault. This kind of self-defense is often referred to as anticipatory self-defense, and there is some disagreement about whether or not it is lawful.

In the fourth place, one of the most basic aspects of countermeasures is the necessity to warn the person who committed the wrongdoing before beginning the countermeasures. Nevertheless, in situations when an armed assault is about to take place, such notice may not be feasible. For identical reasons, acts taken in self-defense may not need prior notice. This is particularly true when individuals are confronted with serious threats to national security.

The fifth need is that countermeasures should be reversible and should work towards restoring the legal status quo. On the other hand, there is no provision that stipulates that acts taken in self-defense must be reversed.

Last but not least, while the principles of necessity and proportionality are applicable to both doctrines, the application of the proportionality principle is different across the two doctrines. The idea of proportionality is less demanding in the context of self-defense, but countermeasures must be appropriate to the damage that was experienced and the rights that were violated. Self-defense activities, on the other hand, must be proportionate to the act of resisting the armed assault. There is a contrast between the fundamental right to self-defense and the exceptional character of countermeasures, which is the reason for this discrepancy.

Conclusion:

This article presents an argument that questions established beliefs by contending that self-defense, recognised as a universal right under international law, grants states the authority to employ any required actions in response to armed assaults, regardless of whether they entail the threat or actual application of force. The aforementioned argument is substantiated by doctrinal evidence. Historical state practice indicated a comprehensive comprehension that self-defense encompassed both non-coercive and coercive responses prior to the adoption of the United Nations Charter. Although treaty law and customary law place restrictions on the circumstances under which self-defense may be invoked, they have never restricted it to the use of force alone. It is apparent that both the language of Article 51 and the organisation of the United Nations Charter do not limit self-defense to the use of force. In addition, state practices concerning Article 51 validate the notion that self-defense warrants the implementation of any actions required to repel an armed assault.

Since the UN was founded in 1945, self-defense has been expanded. Some argue that any illegal use of force is an armed attack that incites self-defense, or that preemptive self-defense may be used to defend against emerging dangers. The expansion of self-defense legislation raises concerns among international community members because it could compromise international law and enable unilateral behaviour, which could marginalise the UN's collective security framework. Some argue that include non-combustible measures in self-defense breaches ethics, although this is untrue. No matter the kind of defensive actions used in response to an armed attack, proportionality, Security Council reporting, and suspension upon the Security Council's

involvement to restore peace and security apply. These restrictions balance the freedom of states to self-defense with the avoidance of unilateral international law violations. Indeed, acknowledging the validity of self-defense through non-coercive means could potentially aid in the reduction of hostilities. As an example, should a nation-state ascertain that non-coercive strategies could adequately deter an armed assault, prohibiting their utilisation could force the nation-state to resort to force, thereby increasing the risk of an unwarranted escalation. Advocating for the use of both non-combatant and combatant force in self-defense is consistent with principles of international law and policy, thereby fostering a more judicious approach to resolving conflicts.

