

Reinterpretation of Jurisprudence of the Employment of Force: An Analysis Based on International Treaties, International Legal Precedents and Doctrines

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Abstract: The employment of force has always been a significant concern in international law. The advancements in science and technology, along with the diversification of combat methods, has significantly enriched the connotation and extension of the employment of force and its related concepts. Although the employment of force is no longer confined to weapons, it is essential to uphold the principles established in the UN Charter and essential international legal precedents. On that basis, it is important to consider the specific military conflicts currently taking place, which raises questions regarding the legality of the employment of force and the resulting responsibility in international conflicts. In terms of legality, the employment of force is generally forbidden in the UN Charter, with two exceptions: self-defense and actions taken by the Security Council. Nevertheless, the legality of these two situations remains ambiguous and requires further clarification through international treaties and legal precedents. Regarding responsibility, while states and individuals may be responsible for the consequences of armed conflicts in certain circumstances, the issue of attribution in armed conflict necessitates further discussion and analysis. This article will use two methods, legal analysis and case study, to illustrate the above problems.

Keywords: use of force, legality, responsibility, legal analysis, case study

1. Introduction

In recent years, to prevent Ukraine from joining the North Atlantic Treaty Organization, Russia launched several attacks over the territory of Ukraine, which led to a huge number of deaths and property loss. With the help of the NATO members, Ukraine managed to defend itself and the conflicts between Russia and Ukraine reach a further escalation. This event fully explains that though all residents on earth hate wars and are eager for peace, it is common to see two or more states come into collision and even launch a great war in order to satisfy their own needs. However, within the framework of international law, it is expected that all states should abstain from threatening or using force against the general principles of territorial integrity and political independence. Violations of this basic principle lead to strict responsibility of the states involved. This raises several questions: Is the employment of force ever permitted under international law? Should individuals be held responsible for damages caused by international armed conflict? What is the relationship between unlawful use of force and international crime?

Firstly, whether the employment of force is legitimate or not has been under discussion between international jurists for centuries. According to most authoritative jurists, the employment of force is permitted in agreement with international law in certain situations, such as self-defense or Security Council actions. However, further legal explanation and justification is necessary to prove its legality. Moreover, due to the devastating effects of international armed conflict, there is a need for discussions on whether states should bear the responsibility of cession and reparation. Additionally, the issue of liability for damages and potential commission of international crimes by individuals involved in the employment of force remains a subject of debate among scholars. This article aims to clarify the legality of the employment of force, examine issues of responsibility, and explore the relationships between unlawful use of force and international crime. The study draws on authoritative legal documents, prominent international cases, and expert opinions of jurists from diverse countries.

2. Clarification of the Employment of Force and Associated Concepts

After conducting extensive research, it has become clear that redefining the employment of force and associated concepts is a necessary starting point for exploring the jurisprudence of the employment of force. Accordingly, this paper will provide a comprehensive explanation of these concepts in detail.

2.1. Force and Use of Force

According to many legal scholars, force is often used to describe the exertion of physical or psychological power, as well as other forms of coercion, that are directed towards a person or object [1]. It takes many forms, including actual force, constructive force, excessive force, intervening force, irresistible force, non-deadly force and so on. Among all these forms, armed force is most closely linked to aggression, weapons, military, combatant, and other terms related to war. It is commonly used when a conflict or a war break out between states, and it is also reflected in the UN Charter. The definition of “armed force” as outlined in The UN Charter’s Article 51 pertains to an “armed attack” that endangers international peace and security, an act that is forbidden under international law. The interpretation of The UN Charter’s Article 2(4) is subject to continuing discussion and disagreement, specifically regarding whether the term “force” covers not only armed force but also other forms of coercion, such as economic pressure [2]. As there don’t exist a clear definition in terms of other forms of force included in Article 2(4), it seems unclear whether the other forms should also be refrained in accordance with international law.

“Use of force” is a frequently used term that is typically understood to refer to “the act of applying or employing force” [1]. Under international law, some types of use of force are permitted, while others are prohibited. Self-defense is considered a legitimate form of force and an inherent right when a country that is part of the United Nations is subjected to an armed attack. Economic retaliation, such as retorsion, has also been used historically, without widespread condemnation or opposition from the international community. In contrast, specific forms of force are explicitly banned by international law. The employment of force that violates the territorial integrity or breaches political independence of any country, or is incompatible with the objectives of the United Nations, is forbidden by The UN Charter’s Article 2(4).

2.2. Armed Attack

The UN Charter’s Article 51 constitutes the most prominent exceptional case to the forbiddance of the employment of force, allowing for self-defense responding to an armed assault, either individual or collective [3]. However, determining what qualifies as an armed attack has been a matter of ongoing debate.

Historically, armed attack was restricted to conventional attacks, such as direct physical injuries or the employment of weapons like guns during World War II. But with advancements in science and technology, the weapons are constantly being upgraded and the means of combat are more advanced and high-end, greatly enlarging the scope of the term. As clarified by the Court in the Nicaragua case, providing assistance, such as weapons or other aid, to rebels cannot be considered as an armed attack. However, it can be considered as an employment of force, a threat, or interference in the domestic affairs or foreign affairs of other countries. Nevertheless, there is still controversy surrounding whether providing support to one side of the hostile parties constitutes armed attack [4]. The court established in the Oil Platform case that any attack must have the specific intention of causing harm to be considered an armed attack, but the criterion of “specific intention” remains ambiguous and may make discerning intent in individual cases difficult [3].

In conclusion, the meaning of “armed attack” remains uncertain and needs further clarification during the process of hearing cases. On the other hand, it also leaves judges more room for discretion.

2.3. International Armed Conflict

As a widely term used in the context of International Humanitarian Law, international armed conflict is frequently contrasted with non-international armed conflict. International armed conflict is a specific manifestation of armed conflict, so in order to figure out the relationships between the employment of force and international armed conflict, it is necessary to clarify the definition of the term “armed conflict” first.

The concept of armed conflict has already been defined by some authoritative figures and gained wide recognition all over the world. Now it is believed that armed conflict occurs when force is used either between countries or involving prolonged violence between forces of government and armed groups within a country. Additionally, any divergence between states that leads to the involvement of armed forces is also considered an armed conflict [5].

The differentiation of international armed conflict with non-international armed conflict has traditionally been used to divide the responsibilities of international and domestic law in regulating such conflicts. However, as international communication has increased, the division has become increasingly blurred between international law and domestic law in recent years. As a result, the difference between international and non-international armed conflicts has been breaking down in recent decades, so international armed conflict can be referred to the term “armed conflict” most of the time. Despite this, it is still essential to figure out the exact meaning of “international armed conflict” when it comes to a certain case. Undoubtedly, the employment of force between two states can be defined as “international armed conflict”. Besides, according to the Appeals Chamber’s ruling in the Tadić case, it can be considered international conflict if either (i) a foreign country or state intervenes in conflicts with its armed force, or (ii) the participators of the internal conflict are acting for another country.

3. Analysis of the Legality of the Employment of Force

Although international law prohibits the employment of force in most circumstances, it has several exceptions which has already been recognized by international community and reflected in several authoritative legal documents, typical cases, and international treaties. This section will move on to give an analysis on forbidding the employment of force, and make an in-depth discussion about the exceptions.

3.1. Prohibition of the Employment of Force and Its Exceptions

The prohibition of resorting to war is a well-established legal principle in international law, reflected in various international treaties, customary law, authoritative judicial decisions, and official documents of the UN. As we know, the UN Charter's Article 2(4) claims that member countries have an obligation to abstain from threatening or using force against the independence in politics or territorial integrity of any country, or in manner that does not conform to the UN's intentions. This implies that refraining from the employment of force is an inherent obligation of all states, and any violation of this principle will result in international legal obligations and responsibilities for the state, regardless of whether it is a member of the United Nations or not. However, Article 2(4) of the UN Charter should not be interpreted as a complete ban on the employment of force. There are some exceptional cases to this forbiddance, such as the employment of force authorized by the Security Council and the self-defense right [6].

3.2. Self-defence Right

The right of self-defense is a universal principle across legal systems. In legal systems that lack centralized machinery, the enforcement of law and protection of members' rights becomes difficult, or where such machinery is ineffective or delayed in achieving these goals, so it is evident that the individuals should be granted the right to safeguard their own rights through their own actions when their rights are threatened by a violation of the law. The international society lacks centralized machinery and has an immature legal system, resulting in the enforcement of the law and protection of the rights falling on individual sovereign states. Therefore, it can be argued that all states possess an inherent right to defend themselves.

Positivist jurists argue that self-defence is a liberty that allows otherwise illegal conduct to protect specific rights *stricto sensu*. Thus, only essential security-related rights of states can be safeguarded by self-defence, and it entails a breach of legal duty, where a state violates a substantive right such as the inviolability of a state's borders.

The recognition of the self-defense right was first noted in a report by the Rapporteur of Committee I to Commission I during the San Francisco Conference, and eventually included in Article 51 of the UN Charter, gaining widespread acceptance. Though Article 51 is an exception of the employment of force, the application of Article 51 should be based on the compliance with the Article 2(4).

As for the precise extent of self-defence, there has always been extensive controversy. Some writers hold the opinion that Article 51 in compliance with Article 2(4) is a burden for the application of the UN Charter [6], while others believe the self-defence right has existed for a long time, already accepted by most of the states and should be treated as customary international law [7]. In Nicaragua case, the Court specified several limitations on right of self-defence. In accordance with international law, a country as the victim of an armed assault has the inherent right to defend itself. However, it is the responsibility of the country to provide evidence and substantiate its claim of being a victim of an attack, thereby proving the legitimacy of its employment of force in self-defense. It is a fundamental principle that the employment of force in self-defense must be essential and proportional. Furthermore, the Court has upheld that the right of self-defense does not extend to a third country that provides assistance to the victim country [4]. Additionally, the UN Charter places limitations on the action of self-defense, as outlined in Article 51. After the Security Council has taken action for the purpose of maintaining peace and security, a state must comply with the UN Charter and cease its actions. When executing its right of self-defense, a state is responsible for promptly informing the Security Council of the measures it plans to take.

The concepts of necessity and proportionality play a significant role in defining the scope of self-defense right, and they constitute important limitations on this right. For example, the International

Court of Justice highlighted the need to comply with these standards in its advisory opinion regarding the legality of nuclear weapons. Additionally, the opinion recognized the principle of self-defense as a component of customary international law [8]. Necessity means the armed attack is so instant, imminent, and overwhelming that it has no moment for deliberation and no choice of means for a state [3]. In some cases, a state might not have the luxury of time to exhaust non-violent options that could effectively prevent or halt an attack [9]. In international law, determining proportionality is often challenging and depends on the specific context. For instance, in the *Cofu Channel* case, the Court deemed that the actions taken by the UK government must be evaluated in light of the Albanian government's inaction in fulfilling its obligations following the explosions. According to the court, this constituted a mitigating circumstance that should be taken into account. Moreover, the court considered the employment of force by the British Navy as a violation of Albania's sovereignty and concluded that such action would be disproportionate [10]. As a result, the court didn't accept British claims of self-defence. The *Congo v. Uganda* case illustrates how proportionality is a crucial criterion for evaluating the legality of self-defence measures, where the court found that Uganda's actions, including the occupation of airports and towns far from its border, went beyond what was necessary in light of the transborder attacks it claimed had triggered its right to defend themselves. It highlights the significance of evaluating the legal and factual circumstances in each case to guarantee that any measures taken for self-defense are proportionate to the threat posed [11].

3.3. Forcible Measures Taken by Security Council

The primary objective of the United Nations is to maintain global peace and stability, while also encouraging nations to work collaboratively and establish friendly relations with one another. The Security Council, playing an important role as an efficient actuator in the United Nations, bears the first responsibility for taking enforcement action against violations of peace, endangerment of peace, or acts of aggression [3]. Based on the UN Charter's Article 39, the Security Council is empowered to assess the situation and take necessary actions as it deems fit, including provisional, non-forcible, or forcible measures, to uphold global peace and security. This implies that the Security Council is authorized to use military action against a state as part of its enforcement action.

The employment of military action by the Security Council is usually the last option and should only be considered when some other means are inadequate or fail to resolve the situation [12]. Based on the UN Charter's Article 42, it has been stipulated that the Security Council has the authority to take some indispensable measures, including the employment of air, sea, or land forces, to uphold global peace and security. Moreover, some other measures can also be taken such as demonstrations, blockade, and other actions by using armed forces of the member states. Although Article 42 was not utilized during the Cold War, it has been employed by the Security Council since 1990 [3]. For instance, during the Iraq-Kuwait conflict, after exhausting all non-forcible options to settle the dispute, the response of Iraq remained negative and unsatisfactory, so the Security Council granted member countries the authorization to use all possible measures to maintain and execute the resolution. As a result, the armed action committed by member states was treated as a legitimate armed action, compliance with the UN Charter.

The UN Charter sets forth restrictions on the use of force by the Security Council, consistent with the principles enshrined in Article 2(4). Additionally, based on the Article 24, the Security Council is obliged to operate by conforming to the fundamental objectives and values of the United Nations, and it must submit regular and additional reports to the General Assembly for evaluation. Moreover, the actions and decisions of the Security Council are expected to comply with high standards of conduct, including respect for peremptory norms and adherence to the criterion of necessity and proportionality, which also apply when considering the employment of self-defense [13].

4. Discussion on the Responsibility for the Employment of Force

This section mainly examines the legal prohibition of the employment of force in international relations and the issues of accountability that arise in connection with it. Although the employment of force is permitted in exceptional circumstances, most instances of armed conflict between states are generally prohibited. In this context, the concept of responsibility refers to obligations arising from a breach of inherent duties or compensation for wrongful acts. Under international law, responsibility can be categorized into state responsibility and individual criminal responsibility. This section provides a detailed exploration of these two forms of responsibility within the framework of a conflict between nations involving the employment of arms.

4.1. State Responsibility

The responsibility of state is a crucial criterion in international law that originates from the fundamental principles governing the global legal order, which encompasses concepts such as state sovereignty and the equal standing of states [2]. It means that if one state violates its international obligations, international responsibility will arise and consequently lead to the duty of reparation and cessation. As for the constituent elements of state responsibility, three basic factors should be met. Firstly, there exists a binding international legal obligation between two states. Secondly, when an act or omission occurs that constitutes a breach of international obligations, it can be attributed to the state. Thirdly, there is a direct causation between loss or damage and the international wrongful act.

The prohibition of employing force in an international armed conflict is considered a peremptory norm and has been included in various international agreements and legal decisions, thereby creating a legal obligation that must be upheld. Additionally, armed conflict can cause irreparable harm, including loss of life and property damage, to both sides. It is crucial to establish whether employing force can be attributed to a country since a country is an intangible entity that can only act through its authorized officials or special representatives. In the legal case involving the DRC and Uganda, it was determined that the actions of a state organ are considered to be representative of the state itself. In another notable case, it was found that the United States had sufficient authority and influence over the military or paramilitary actions of the rebels, and therefore responsible for their actions. The Genocide Convention case emphasized that a high degree of state control over troops is necessary to attribute their actions to the state [14]. In conclusion, when the actions of armed forces can be attributed to a country, the country bears the responsibility for the employment of force.

4.2. Individual Criminal Responsibility

According to the traditional legal perspective, only states, not individuals, are subject to and can violate international law. However, since the aftermath of World War II, there has been growing international focus on safeguarding individual rights, especially with respect to the employment of force, which has resulted in significant advancements in individual criminal responsibility. This consensus is reflected in various international agreements, including the Rome Statute, the Four Geneva Conventions, Three Amending Additional Protocols, multilateral conventions, and bilateral treaties.

The principle of individual criminal responsibility for international crimes has been upheld by international tribunals since World War II and is enshrined in Article 25 of the Rome Statute, which holds individuals criminally responsible for offenses falling within the Court's jurisdiction. Examples of such tribunals include the International Military Tribunal and the ICTY. The Rome Statute also identifies four types of offenses falling within the jurisdiction of the International Criminal Court. These types include genocide, crimes against humanity, war crimes, and the crime of aggression [15]. In international armed conflict, superior responsibility, also known as command responsibility, is the

sole form of individual criminal responsibility. This implies that military superiors may be held accountable for crimes committed by the forces under their authority if they fail to exercise appropriate control over them. The question of whether state officials, such as presidents, should also bear individual criminal responsibility remains a topic of debate.

5. Conclusion

At present, armed conflicts between countries occur from time to time, showing continuous and gradual characteristics, such as the well-known Sino-Indian border conflict, the Palestinian-Israeli conflict, and the Russian-Ukrainian war in the past three years. International armed conflicts are underpinned by complex political, economic, cultural, and social factors that make it difficult to judge the employment of force permitted in the international legal system, such as “self-defense”, and blur the line between “legal” and “illegal” employment of force. In this context, the reinterpretation of the jurisprudence of the employment of force is of great significance, which can provide the possibility to extend and expand the concepts of the employment of force and its relevant concepts. This could potentially facilitate the international community in reaching a consensus on the issue of armed conflict in the current complex international situation, as well as realize the legality, scientificity and flexibility of the criteria for judging and attributing responsibility in armed conflict. Besides, by reconsidering the jurisprudence of the employment of force, the international community can come to an agreement on the issue of conflict in the current complex international situation, protect national rights and interests to the greatest extent while maintaining the overall peace and stability of the international community, and ultimately realize the final goal of protecting human rights.

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