

## A STUDY ON NOMENCLATURE DEBATE ON THE 'USE OF FORCE,' 'ARMED ATTACK' AND 'AGGRESSION' AS THE RIGHT TO SELF DEFENCE

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### ABSTRACT

International Law on Armed Conflict lays down specific guidelines on the conduct of the States, the parties who are signatories and conform to the international comity. The paper highlights the implications of the preamble of the United Nations Charter, which was introduced by the comity of international players in the Second world war to mitigate any possibility of another war. The state signatories to the charter not only aspired to restore peace but also to bring about standard norms of the conduct of civilized states through this Charter. The present paper discusses the juxtaposition of specific terminologies, which are considered one of the most important provisions of the UN Charter. The paper attempts to study Article 2(4), which prohibits the use of force by the member states. However, the juxtaposition of Article 51 along with Chapter VIII of the Charter is also discussed, giving regard to the peculiarity of the expression 'armed attack and 'aggression' in light of states' right to self-defence. The paper throws light upon the negotiating history of these Articles along with other important documents like UN General Assembly Resolution 3314 and the Statute of Rome of the International Criminal Court, which has defined and illustratively underlined the meaning and context of the term 'aggression.' The jurisprudential evolution is also brought astute by the pronouncement of the International Court of Justice. The paper deliberates upon the interpretational journey of the text and the context of the provisions of the Charter and other documents and attempts to read between the lines of these terminologies to understand the present-day relevance and meaning of these provisions akin to the ongoing international armed conflicts in the world.

**Keywords** - Aggression, Armed Attack, Use of Force, Self Defence

## INTRODUCTION

United Nations Charter, hereinafter called the 'UN Charter,' is the most prominent document regarding the regulation of international relations in the supranational globalized world. The real import and implication of the text of the UN charter have been indicative from its Preambular words firstly, that is to mitigate the possibility of war in the coming time, which has brought wrath on humanity, and secondly, to invoke respect for human life and human dignity, and thirdly, to entrust a general obligation upon the civilized societies of the world to respect and uphold the international agreements and conventions. Lastly, the charter also enables one peculiar sense of entitlement to upgrade the standard of life for one and all to attain higher standards for freedom. Underlying the goals and aspirations the charter attempted to achieve on 24 October 1945, these principles were adopted for a civilized society.

Use of force has been historically viewed as being used for exerting power, undermining the authority of the subservient, and commanding ideological and political dynamics.<sup>i</sup> The insertion of Article 2(4) to the Charter would have raised many eyebrows of the international comity had the Charter not co-jointly inserted Article 51, which declares a right to self-defence, in case of violation of Article 2(4) takes place. A plain reading of Article 2(4) gives a two-fold understanding that, firstly, it is the state's duty to refrain from using force. Secondly, such use of force should not be committed to affect the territorial integrity or jeopardize the political independence of another state. The article also provides for a wide modus operandi through which the negative or prohibitive provisions of this Article come into operation.<sup>ii</sup>

## RIGHT TO SELF DEFENCE

In totality, there are three exceptions when the measures of 'use of force' would be used by a state which are consistent with the purpose and aims of the Charter.<sup>iii</sup> Consent, which is instead a customary exception to the use of force, has been viewed beyond the scope of the charter to be titled as an exception.<sup>iv</sup> The Security Council of the United Nations also holds the power to authorize any state to use force so as to take actions by air, sea or land forces, premising, despite

in a restrictive sense, to states to restore peace and security.<sup>v</sup> This authority is also exercised through the collective actions taken by signatories. The third exception is the right to self-defence of the member states.<sup>vi</sup>

As far as Article 51 is concerned, it is instead a positive right provided to state signatories in their individual and collective capacity to take defensive actions. This article is supplanted at the instance of an ‘armed attack’ upon any member of the UN. The rider is also affixed towards the conclusive portion of the article, which attaches to the proviso that unless the Security Council has taken necessary actions to restore the peace and defensive measures, the former part of the Article cannot be allowed until this proviso is satisfied. Addressing Article 51 of the Charter is invoked by the state in case of acts committed by the aggressor state attributed to armed aggression. Such a manner of use of force merely needs to defeat the purpose upon which the principles of the Charter were laid out. Having a wide amplitude to this provision, the standard view provides a strict interpretation of the Article. Furthermore, both Article 2(4) and Article 51 aptly excludes the non-state actors from the applicability of ‘use of force’ or self-defence measures and entail only state actors to be put under their purview.<sup>vii</sup>

## MEANING OF ARMED ATTACK

The charter per se does not define an ‘armed attack.’ However, the armed attack has been termed as a pre-requisite or a ‘conditio sine qua non’ for suppressing or victim state to take defensive action against the aggressor or the attacking state.<sup>viii</sup> The lack of explanation has incurred judicial interpretations of the words ‘armed attack’ to be developed since many believe that the word is so self-explanatory even to remain untouched definition-wise by the San Francisco Conference.<sup>ix</sup> The amount of ‘use of force’ which may constitute an armed attack suffers significant ambiguity even by the International Court of Justice since the gap to bridge between the amount of force to reach an armed attack by a state requires a certain threshold amount to be fulfilled.<sup>x</sup> The determining test adopted and practised by the ICJ, ‘hereinafter called as the International Court of Justice,’ has always remained to figure out the ‘scale and effects’ of differing cases.<sup>xi</sup> In the case of *Nicaragua v United States*, the International Court of Justice underlined some guidelines to differentiate between the low level of ‘use of force’ and sufficient risky level of ‘use of force,’ which can constitutively amount to an ‘armed attack.’<sup>xii</sup> For example, the court quoted “a mere frontier incident” would lack the degree of severity to

be constituted as an ‘armed attack’ enabling the victim state to exercise the right of self-defence or collective action. The threshold discussed in the Nicaragua case was supported by other instances like assisting in terms of weapons or arms to the rebellion by the supporting state to the aggressor would not satisfy the ‘armed attack’ but at the same time, deployment of irregular militia or groped armed with weapons across the border lines, is grave and sufficient to fall within the purview of the armed attack.<sup>xiii</sup> However, in some instances, even a singular attack and not a series of attacks fall within the ambit of the ‘armed attack’ like in the case of Iran v. U.S., wherein bombardment of an oil vessel has been deemed an armed attack by the ICJ.<sup>xiv</sup>

Similarly, the meaning of armed attack was deliberated in Eritrea v Ethiopia, wherein the Permanent Court of Arbitration has held that the remoteness of clashes which are limited to specific geographical areas or disputed borders, even entailing loss of life or property, does not necessarily fall within ‘armed attacks.’<sup>xv</sup> On the same footing, the aggression by one state cannot necessarily involve invoking an ‘armed attack.’<sup>xvi</sup> The UN Resolution 3314 states explicitly that an ‘armed attack’ shall comprise a level of violence or force which satisfies the grave threshold. Establishing that ‘armed attack’ per se is an essential ingredient of enabling self-defence and is more critical to define the ‘use of force.’

### **CONNOTATION OF ‘AGGRESSION’ AS ‘ARMED ATTACK’**

There has also been an alternate draft article of the UN Charter which has attempted to throw some light on the thin line between the acts of ‘aggression’ and ‘armed attack’ and explicitly states that “a State may oppose by force an unauthorized use of force made against it by another State.” However, not seeing the light of day, the provision is not applicable.<sup>xvii</sup> The drafters of the Charter also viewed the aggression as a sufficient cause for self-defence which can be considered from the text of the subcommittee, which was not desirous of excluding the manifest of aggressive acts from the Article and did not want it to be ‘diminished.’ The first draft of the Charter which the United States circulated had expressly made ‘use of aggression’ as a ground for self-defence, singularly or collectively and with or without any particular undertaking or arrangement between the states as per the Act of Chapultepec, which stated that every Act against an American State is deemed as an act of aggression, however, the rider of security council’s prior attempt to subjugate that aggression was still existent.<sup>xviii</sup> The representatives

of the other states quickly realized the lacunas concerning defining and differentiating aggression, and the word ‘aggression was replaced with ‘armed attack.’

During the negotiation stage of the Charter, the discussion also contributed to the armed attack being read as ‘aggression’ but considering acts of ‘armed attacks’ as aggression by that state alone or by states under a collective arrangement by ways and means involving solidarity amongst each other, or by regional arrangements and agreements. The Pact of the League of Arab States had not differed much between act and aggression and combined them under a singular provision for calling a meeting of the council of Arab states.<sup>xix</sup> Chapter Seven of the Charter headnotes provide “*Action with respect to threats to the peace, breaches of the peace, and acts of aggression,*” which, per se, includes all acts under the one blanket for self-defence. The proviso under Article 51, which holds the security council’s permission and attempts to restore peace before resorting to defensive action by states, is in tune with Chapter Seven of the chapter, which first allows the Security Council to identify the existence and determine the extent of the ‘aggression’ and then decide the measures which are required to be adopted for restoration of such peace and international security.<sup>xx</sup> Notwithstanding the linguistic etymological variations, the French text of Article 51 and Chapter Seven expressly replaces the French translation of ‘armed attack’ with the French expression “*agression armée*” and “*act d’agression,*” respectively.

Presently, the UN General Assembly has declared aggression as part and parcel of Armed attack and for it to include grave use of armed force.<sup>xxi</sup> As per the Statute of the International Criminal Court, an Act of aggression holds the same meaning as that given by the UN General Assembly, which means that when a state uses armed force which is directed against one or more of the three requirements, that is, firstly the sovereignty, secondly, the territorial integrity and thirdly the political independence of another State, in manners violative of the provisions of UN Charter and as per the meaning prescribed under the Resolution 3314 of the UN General Assembly.<sup>xxii</sup> The definition includes that whenever there is any invasive activity by the armed force of a state upon another involving an act of occupation, regardless of being temporal in nature, but has been caused by ‘use of force,’ it would fall under the aggression. Acts comprising of bombardment or the use of weapons, or blockade of the ports or coasts, or attack on land, sea, air force, or air fleet by the armed forces of one state against another.<sup>xxiii</sup> Other examples involve the complex acts falling within the purview of aggression, like the armed

forces of one state being present in the territory of another state under a special agreement or arrangement and the guest state using armed forces upon the receiving state violating and contravening the agreement or remaining present in the receiving state beyond the date of termination of such an agreement. Even when a state does not itself commits such acts but allows the other state to come upon its territory to attack, a third state would fall under the Act of aggression committed by the state which has allowed its territory to be used for this purpose. The exhaustive list under this definition concludes with the act of the state of sending its bands or groups or mercenaries or any group of irregulars to another state who are armed and who perpetrate acts similar to that of armed forces or have substantial involvement with armed forces and of the gravity equated with the other kinds of acts of aggression would be viewed as the act of aggression.<sup>xxiv</sup>

## **USE OF FORCE AND FORCE-GAP**

The recourse to force has been considered a primary ground for kindling the import of Article 51, that is, self-defence. The international jurisprudence also lacks defining 'use of force' but focuses more on regulating, governing and minimizing it. UN Charter establishes using force as a last resort for exerting power replicated in its Preambular goals and aspirations. Force merely being lower in degree but accompanying conscious attempts of violence and attaining gravity with other armed violent acts reaching to 'scale and effect' of such magnanimity to fall within the armed attack. Therefore, 'use of force,' which is prohibited by the Charter and 'armed attack,' which enables self-defence, might ensue more 'armed attack,' which is permitted by the Charter, have to be read together in harmony not only to limited the circumstances for the use of force during the self-defensive measures and also to exclude the minor incidents of force from the meaning of armed attacks so that such small scale incidents would turn into the full-scale armed conflagrations between the states.<sup>xxv</sup> Nicaragua case also highlighted the logic and intent of the drafters of the UN Charter behind Article 2(4) and Article 51, which presumed and farsighted the misuse of the term 'use of force.'<sup>xxvi</sup> Had the low-level incidents of 'use of force' not been excluded from the armed attack, the small regressive actions would encourage retaliatory measures sufficient to initiate a third world war, which would have nonetheless become a human life-endangering catastrophe of the world, defeating the UN Charter to the fullest.<sup>xxvii</sup> However, Article 51 does not become restrictive or merely a dead

provision for it being read in a strict notion. Still, the subjective approach of the article has a more extensive connotation of prevention of escalation of conflicts or quick escalation of disputes. Nomenclature has been fruited from this skilful reading of ‘armed attacks’ as a subset of the ‘use of force,’ which focuses on the peaceful outcomes rather than retaliatory or defensive outcomes, which is referred to as ‘force-gap.’<sup>xxviii</sup> Any threat or danger to a state does not necessitate defensive actions as peaceful settlement of dispute measures always remain as a choice to conditions, like recourse to judicial settlement, arbitration, conciliation, mediation and food offices, to name a few.<sup>xxix</sup>

## CONCLUSION

Conclusively, regarding the “scale and effect” threshold of ‘armed attacks,’ it remains impossible to determine the extent, which significantly differs from case to case. The gravity of the offending acts is only the criteria since modern technology has rendered even cyber attacks to constitute full-fledged ‘armed attacks.’<sup>xxx</sup> The ‘force gap’ making the low levels of violent actions beneath the threshold limit of the ‘armed attacks’ fetters the uncalled retaliatory actions, avoiding a full-fledged war, which is the ultimate purpose of the UN Charter. The trajectory of Article 2(4) flows with the definition of Aggression under UN General Assembly Resolution 3314 and Chapter Seven of the Charter and the ‘armed attack’ under 51 of the Charter. Article 51 only allows self-defence measures to be invoked if it qualifies the test of ‘armed attack.’ Thereby the right to self-defence cannot be apprised by the state without the permission of the security council and against the ‘use of force,’ which is insufficient. Self-defence is also neither permitted nor addressed against a non-state actor. However, the scope of interpretation of the Charter can be evolved through judicial proceedings following the precedence set by the ICJ in the Nicaragua case. Furthermore, the Charter could also be interpreted in a new light through the agreement between the signatory states, as in the case of customary acceptance of the ‘consent’ as the exception to the use of force. The measures of exercising anticipatory self-defence as a collective measure are also reckoning among states. Ultimately, the states hold the integrity of international law, being both the maker and the subject.

## ENDNOTES

- <sup>i</sup> Sir Franklin Berman, *The UN Charter and the Use of Force*, Sing. Year Book of Int. Law and Contributors, 2006, at 9.
- <sup>ii</sup> W. Michael Reisman, *Article 2(4): The Use of Force in Contemporary International Law*, Proceedings of the Annual Meeting (American Society of International Law), 1984 at 77.
- <sup>iii</sup> Laurie R. Blank, *Irreconcilable Differences: The Thresholds for Armed Attack and International Armed Conflict*, Notre Dame L. Rev. 2020, at 251.
- <sup>iv</sup> *International Law Association Final Report on Aggression and the Use of Force*, International Law and Operational Law Department, Law of Armed Conflict Textbook, 2018 at 31.
- <sup>v</sup> UN CHARTER, art. 42.
- <sup>vi</sup> UN CHARTER, art. 51.
- <sup>vii</sup> Himanil Raina, *Article 2(4) & 51 Force Gaps & The Unilateral Exercise of the Right of Self Defence Against Non State Actors*, Academia (April 25, 2023) [https://www.academia.edu/14887515/Article\\_2\\_4\\_and\\_51\\_Force\\_Gaps\\_and\\_The\\_Unilateral\\_Exercise\\_of\\_the\\_Right\\_of\\_Self\\_Defence\\_Against\\_Non\\_State\\_Actors?email\\_work\\_card=title](https://www.academia.edu/14887515/Article_2_4_and_51_Force_Gaps_and_The_Unilateral_Exercise_of_the_Right_of_Self_Defence_Against_Non_State_Actors?email_work_card=title)
- <sup>viii</sup> Nicaragua v. United States, Judgment on Jurisdiction and Admissibility, ICJ GL No 70, [1984] ICJ Rep 392
- <sup>ix</sup> Ian Brownlie, *The Use of Force in Self-Defence*, 37 BRIT. Y.B. INT L L. 1961 at 244..
- <sup>x</sup> Monica Hakimi & Jacob Katz Cogan, *The Two Codes on the Use of Force*, 27 EUR. J. INT L L., 2016 at 256.
- <sup>xi</sup> Nicaragua v. United States, Judgment on Jurisdiction and Admissibility, ICJ GL No 70, [1984] ICJ Rep 392.
- <sup>xii</sup> *Id.*
- <sup>xiii</sup> *Id.*
- <sup>xiv</sup> Iran v. U.S., 2003 I.C.J. 72.
- <sup>xv</sup> Eritrea v Ethiopia, Partial Award, ICGJ 350 (PCA 2003), 1st July 2003, Permanent Court of Arbitration [PCA]
- <sup>xvi</sup> Nicar v. U.S., 1986 I.C.J. at 195.
- <sup>xvii</sup> Documents of the United Nations Conference on International Organisation, San Francisco (Volume III) Dumbarton Oaks Proposals Comments and Proposed Amendments (United Nations Informational Organisations, London, 1945).
- <sup>xviii</sup> *Id.*
- <sup>xix</sup> Pact of the League of Arab States.
- <sup>xx</sup> UN CHARTER, art. 39, 41, 42.
- <sup>xxi</sup> Un General Assembly Resolution 3314.
- <sup>xxii</sup> ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art. 8 bis, (Inserted by resolution RC/Res.6 of 11 June 2010).
- <sup>xxiii</sup> *Id.*
- <sup>xxiv</sup> A ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art. 8 bis (2) (a)-(e), (Inserted by resolution RC/Res.6 of 11 June 2010).
- <sup>xxv</sup> Tom Ruys, *The Meaning of "Force" and the Boundaries of the Jus ad Bellum: Are "Mini-mal" Uses of Force Excluded from UN Charter Article 2(4)* AM. J. INT L L. 2014, at 159.
- <sup>xxvi</sup> Nicargua case (1986).
- <sup>xxvii</sup> Jared Zimmerman, *Assessing How Article 51 of the United Nations Charter Prevents Conflict Escalation*, RealClear Defense (April 20, 2023), [https://www.realcleardefense.com/articles/2018/06/04/assessing\\_how\\_article\\_51\\_of\\_the\\_united\\_nations\\_charter\\_prevents\\_conflict\\_escalation\\_113507.html](https://www.realcleardefense.com/articles/2018/06/04/assessing_how_article_51_of_the_united_nations_charter_prevents_conflict_escalation_113507.html)
- <sup>xxviii</sup> Benjamin Zweifach, *Note, Plugging the Gap: A Reconsideration of the U.N. Charter's Approach to Low-Gravity Warfare*, 8 INTERCULTURAL HUM. RTS. L. REV. 2012 at 379.
- <sup>xxix</sup> UN CHARTER, art. 2(3).
- <sup>xxx</sup> Natalino Ronzitti, *The Expanding Law of Self-Defence*, 11 J. Conflict & Sec. L. 2006, at 243.