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Salar Abbasi

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**A CONCEPTUAL INCONGRUENCE
BETWEEN INTERNATIONAL LAWS OF
SELF-DEFENSE AND THE
INTERNATIONAL CORE CRIME OF
AGGRESSION**

*Salar Abbasi**

* PhD candidate in International Law & Jurisprudence, Catholic University of Portugal, Lisbon, Global School of Law. FCT (Foundation for Research & Technology sponsored by the Ministry of Science & Education of Portugal) Scholar. Visiting Doctoral Researcher at the Nathanson Centre for Transnational Human Rights, Crime and Security, Osgoode Hall Law School of the York University, Toronto, Canada. I am deeply thankful to Prof Hengameh Saberi for her helpful comments. I especially thank prof. Sabine Swoboda for her enlightening comments on the earlier version of this article during my stay at the Ruhr University of Bochum in Germany. I am also grateful to the editors and reviewers of the Penn State Journal of Law & International Affairs who dealt with this article Timothy J. Cloud, Daniel Sawey, and Catherine Kellogg. All errors remain my own.

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I. INTRODUCTION

The justifications given by states that resort to the right of self-defense, under international law, are often unreasonable. Article 51¹ of the United Nations Charter (UN Charter) adopts a passive interpretation of the right of self-defense because it ignores *opinio juris* in giving justification to the right of self-defense in international law. It instead relies strictly on the static and narrow approach of state practice. In practice, the idea of state practice makes room for dominant states to create broad interpretations and resort to a use of force, by characterizing the action as self-defense, under Article 2(4) of the UN Charter. This resort to the right of self-defense has the

¹ U.N. Charter art. 51: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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-defense 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.”

potential to be driven by professionally impeccable legal arguments that look from rules to a dominant state's underlying reasons.

As international law suffers from a lack of harmonized standards in norm-identification – dominant states find room to pursue their self-interested interpretations in practice. Through this flaw, dominant actors are potentially capable of putting non-dominant states under pressure to keep in pace with their proposals in practice. If non-dominant actors wish to remain viable on the international plane and not be subject to a wide range of restrictive measures, they will find no alternative other than voting for, or abstaining from, proposals rendered by dominant actors. In other words, “the major states will always have an influence commensurate with their status, if only because their concerns are much wider, their interests much deeper and their power more effective.”²

The hazard of this customary law-Charter puzzle looms large in the era of the creation of the international core crime of Aggression in 2017. This state of affairs makes room for dominant states to tag and taint other non-dominant states with the label of having committed the crime of Aggression. This article proposes that there is a necessity to re-conceptualize the right of self-defense in international law. This task will require an understanding of the basic definition of the crime of Aggression and its applicability in 2017.

This article is structured in the following order: Part II is dedicated to both the evolutionary process of the right of self-defense in international law and also different schools of thought among international law scholarship in this regard. Part III delves into the constitutive elements of the crime of Aggression – its *actus reus*³ and *mens rea*⁴ requirements. This part also puts emphasis on the intrinsic interconnectedness of the crime of Aggression with the right of self-defense in international law. And Part IV features the final remarks of the article.

² MALCOLM NATHAN SHAW, INTERNATIONAL LAW 156 (7th ed, 2014).

³ Latin for guilty act.

⁴ Latin for guilty mind.

II. THE GENEALOGY OF THE RIGHT OF SELF-DEFENSE IN INTERNATIONAL LAW

International law generally prohibits the use of force unless such an action is borne out of the inherent right of individual or collective self-defense, or is authorized by the Security Council under Chapter VII of the UN Charter. Calling for a universal respect toward the sovereignty of all member states, Article 2 (4)⁵ of the UN Charter articulates the prohibition of use of force under international law. On the other hand, Chapter VII of the UN Charter on “Action with Respect to Threats to the Peace, Breaches of the Peace, and the Acts of Aggression”, delineates what would constitute an appropriate response to an actual threat to the peace. Article 51 of Chapter VII articulates the inherent right of individual or collective self-defense in case of an actual armed attack posed by a rogue entity against any of the members of the Charter. Thus, “the use of force by one state against another [on behalf of the fulfillment of the right to individual or collective self-defense] is one of the most significant foreign policy decisions that any State can make.”⁶

Realistically speaking, history has been fraught with persuading evidence of the reliance of dominant member states on hard power, under state-centric realistic approaches toward inter-polity relations, in order to fulfill their political desires.⁷ This was founded upon a Hobbesian approach toward inter-polity relations. This approach states that there is no super-sovereign on an inter-polity plane that may enforce agreements among states, and therefore, states are recognized as having a legal permission to resort to war against other states. This is indicative of the fact that the theory of just war during the 19th century’s international legal

⁵ U.N. Charter art. 2(4): “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.”

⁶ Donald R Rothwell, *Anticipatory Self-Defence in the Age of International Terrorism*, 24 U. QUEENSLAND L.J. 337, 338 (2005).

⁷ See generally JOHN BAYLIS, STEVE SMITH & PATRICIA OWENS, *THE GLOBALIZATION OF WORLD POLITICS: AN INTRODUCTION TO INTERNATIONAL RELATIONS* (5th ed., 2013).

scholarship lacked morality.⁸ In practice, states applied this approach to launch war as a prerogative en route to their political and economic ends.

There have been a plethora of incidents around the world addressing the right of self-defense, as one of the two justifications for a legal use of force, recognized in the aftermath of World War II. But, there is still considerable controversy surrounding a modern formulation of the customary-Charter nature of the right of self-defense. In fact, the primary concern is not the legality of the international laws of self-defense, for it intrinsically is an inherent right of self-help.⁹ Rather, the main concern is the extent to which they apply and “rather springs from a proportionate identification of the circumstances under which it [the law of self-defense] applies.”¹⁰

The extent to which international laws of self-defense apply has long been conceptually controversial. This issue has been theorized mainly by two schools of thought: restrictive and non-restrictive positions.¹¹ Through strictly adhering to the explicit wording of Article 51 of the UN Charter,¹² the restrictive position conditions the legality of the resort to the right of self-defense on an actual attack by an adversary. This approach does not allow self-defense in response to an imminent threat or instant political will-formation. Based on international legal positivism, state practice¹³ is the major axiom in determining customary laws of self-defense,

⁸ For instance see AMOS SHARTLE HERSHEY, *THE INTERNATIONAL LAW AND DIPLOMACY OF THE RUSSO-JAPANESE WAR* (Macmillan, 1906).

⁹ See David B Kopel, The natural right of self-defense: Heller’s lesson for the world, 59 SYRACUSE L. REV. 235, 237 (2008).

¹⁰ Eustace Chikere Azubuike, *Probing the Scope of Self Defense in International Law*, 17 ANN. SURV. INT’L & COMP. L. 129, 130 (2011).

¹¹ See Leo Van den hole, *Anticipatory self-defence under international law*, 19 AM. U. INT’L L. REV. 69 (2003).

¹² “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . “. See U.N. Charter art. 51.

¹³ To read about state practice and *opinio juris* see respectively SHAW, *supra* note 2, at 48, 52.

devoid of either *opinio juris*¹⁴ or moral standards. Article 38(1)(b) of the International Court of Justice's statute defines customary law as "General Practice" accepted as law and gives no weight to the role of *opinio juris*.¹⁵ Strictly adhering to the notion of state practice in international norm-making, positivist thinkers give a static, state-centric approach towards customary international law. So, under Article 38(1)(b) of the ICJ, custom, based on state practice, may serve as law and justify any course of action that complies with the general practice accepted as law.

On the other hand, the non-restrictive position sheds light on the importance of the instant custom and circumstantial realities shaping political will-formation rather than the actual armed attack launched by an adversary. This school of thought theoretically justifies the anticipatory self-defense under the notion of *opinio juris*, that does not necessarily comply with the wording of Article 51 and Article 2(4) of the UN Charter.¹⁶ Based on this understanding, in the wake of weapons of mass destruction that are mostly instantly deliverable, the fulfillment of the anticipatory self-defense is inevitable and even necessary to avoid being destroyed by instant deliverables.¹⁷ In other words, subjecting the right of self-defense to the actual armed attack by an adversary sounds irrational since actual attacks via devastating weapons of mass destruction will leave no time and capability for the state to respond and defend its territorial integrity. Therefore, the strict adherence of Article 51 of the UN Charter to the idea of state practice is in contrast with the inevitable and incontrovertible necessity of coping with instantly deliverable weapons of mass destruction before an actual armed attack by an adversary.

¹⁴ Special state of mind of the actors on the basis of their intuitive grounds that shapes customary international law.

¹⁵ Statute of the International Court of Justice art. 38 ¶ 1, June 26, 1945, 59 Stat. 1055, 1060, 3 Bevans 1153, 1187.

¹⁶ See Natalino Ronzitti, *The Expanding Law of Self-Defense*, 11 J. CONFLICT & SECURITY L. 343 (2006).

¹⁷ See Kalliopi Chainoglou, *Reconceptualising Self-Defence in International Law*, 18 KING'S L. J. 61 (2007).

It is worthwhile to note that there has been controversy over the constituent elements of custom among scholars. Customary rules of law remain among the least definable concepts in national and international legal theories, though they remain as the building block of law in both spheres. “The critiques over the formation of customary law have been around for more than half a millennium. There is, if you will, no settled customary practice governing how to define customary rules of law.”¹⁸ Based on the Orthodoxian approach towards the nature of custom in international law, ‘custom is itself non-law (or pre-law) but can be a source of law when it is formalized and rationalized’.¹⁹ Based on this approach, custom is composed of state practice – behavioral patterns or *opinio juris* – and the subjective source or state of mind of the actor, or a rational combination of both, calling for a more reasonable and fit notion of customary law that lays out a reconciliation theory amidst the above-stated debate.²⁰

In light of international law’s critique of indeterminacy, perplexity in international legal norm-identification,²¹ and improper function of international courts and tribunals in seeking to give weight and effect to identified values, states are gifted with leeway to act as judges in their own cause.²² This stream has provided them with the opportunity to render broad interpretations of the right of self-defense in international law and “legitimize” their military movements. This is why in the history of inter-polity relations, numerous non-defensive wars have been waged on non-aggressor

¹⁸ Emily Kadens and Ernest A Young, *How Customary Is Customary International Law*, 54 WM. & MARY L. REV. 885, 911 (2012).

¹⁹ Nicole Roughan, *Democratic Custom v International Customary Law*, 38 VICTORIA U. WELLINGTON L. REV. 403, 410 (2007).

²⁰ Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757 (2001).

²¹ See MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2005).

²² Gonçalo de Almeida Ribeiro, *Judicial Activism and Fidelity to Law*, in *JUDICIAL ACTIVISM* 39 (Luís Pereira Coutinho et al. eds., 2015).

states, validated by the language of preemption but not empirically or even reasonably persuasive.²³

A. Restrictive Position towards the Right of Self-Defense in International Law

1. The Theoretical Root

A Positivist approach toward international law had overwhelmingly been adopted following the dominance of empiricism in the Renaissance whereby “[law] was concerned not with an edifice of theory structured upon deductions from absolute principles, but rather with viewing events as they occurred and discussing actual problems that had arisen.”²⁴ “Positivist Philosophy restricts the object of scientific knowledge to matters that can be verified by observation, and thus excludes from its domain all matters of an *a priori*, metaphysical nature.”²⁵ So, the main pillar of positivistic legal philosophy is empiricism. The classical international legal positivism that was the dominant approach during the 19th and 20th centuries, has ostensibly become loose with resurgence of natural law theories.²⁶ In the wake of the critical analysis of the religious ideology on the one hand, and the over-arching progress of the empirical observations on the other, a changeover in legal theory occurred. In the realm of international legal theory, positivism regained its

²³ As an example of such misinterpretations was reflected in the so-called Bush doctrine. Following the 9/11 attacks, the U.S. administration responded to pressure calling for a more offensive posture against so-called rogue troops by sending military troops and launching military attacks against military and non-military people of Iraq in 2003. The Bush doctrine [which was formulated under the notion of instant custom] challenged even the idea of preventive war. According to the “Bush doctrine”, the reactive nature of the right of self-defense turns into an active one even if uncertainty remains as to the time and place of the enemy’s attack.

²⁴ SHAW, *supra* note 2, at 18.

²⁵ Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT’L L. 260, 261 (1940).

²⁶ *See id.* at 262-68.

importance among scholars²⁷ inspired by Hans Kelsen's "Pure Theory of Law."²⁸

Central to international legal positivism is what states do or consent to do, not what they ought to do. In other words, "[International legal positivism's] essentialist positions follow from the problem of order amongst sovereigns, an order binding them. States are the original, pre-legal subjects of international law and an order binding them cannot come into being without or against their will."²⁹ Based on this value-free, conduct-based approach, only those norms which are generated by a man-made set of legal procedures are recognized as law, independent of any moral or inherent value. These arguments are mostly influenced by "the general realist thesis that based upon that, political morality does not reach beyond the boundaries of the state, or that only a very minimalist morality does."³⁰

Thomas Hobbes (1588-1679) was one of the most well-known thinkers who injected positivistic approach, based on *egoism*, into the laws of war.³¹ Morality, according to Hobbes, is an agreement between a sovereign and people living under that sovereignty. Through this agreement, people who are acting wholly on behalf of their self-interest, state their content-independent willingness to comply with the rules established by the sovereign.³² So, to Hobbes, morality is a man-made creature enforced by a super-power sovereign not given from a supernatural entity, such as God, or from nature itself. He transmitted this standpoint from his thoughts on domestic legal theory to the theories on the laws of war in inter-polity relations. In the absence of a super-sovereign in the

²⁷ Augusto Zimmermann, *Evolutionary Legal Theories: The Impact of Darwinism on Western Conceptions of Law*, 24 J. CREATION 108, 111 (2010).

²⁸ See generally HANS KELSEN, *PURE THEORY OF LAW* (Max Knight trans., Univ. Cal. Press 1967) (1934).

²⁹ Jörg Kammerhofer, *International Legal Positivism*, in THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 411 (2016).

³⁰ Samantha Besson & John Tasioulas, *Introduction: The Emergence of the Philosophy of International Law*, in PHILOSOPHY OF INTERNATIONAL LAW 3 (Samantha Besson & John Tasioulas eds., 2010).

³¹ See McMahan, *supra* note 30, at 494-95.

³² *Id.*

international sphere to enforce agreements among sovereigns, “states could not be morally constrained in their relations with each other.”³³

The Hobbesian approach gives room for dominant state-actors to establish a prerogative to resort to war when they find it necessary for their interests. The Hobbesian account on the laws of war was dominant during the 19th and 20th centuries’ expansionism. The most invidious aftermaths of this approach were World Wars I and II, that faded in significance the theory of *jus ad bellum*³⁴ -- a theory conditioning the legitimacy of launching a war against a state to a non-contentious just cause – and shifted in shedding light on the importance of the theory of *jus in bello*³⁵ – laws on wartime conduct of the states engaging in a war. A piece by Amos Hershey in 1906 provides a clear picture of this realistic understanding under the influence of the Hobbesian account on laws of war:

”International law does not consider the justice or injustice of a war. From a purely legal standpoint, all wars are neither just nor unjust. International law merely takes cognizance of the existence of war as a fact, and prescribes certain rules and regulations which affect the rights and duties of neutrals and belligerents during that continuance.”³⁶

2. The Restrictive Position

Positivism dispenses with moral weight and refutes unprecedented current customary understandings on what ought to be in international law. This idea is mostly inspired by Hart’s claim that informal and unofficial norms and authority structures are prone to inertia and anomy since they lack “secondary rules” that are

³³ *Id.* at 495.

³⁴ See MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 63 (5th ed. 2015).

³⁵ See generally PAUL CHRISTOPHER, *Problems for International Law*, in THE ETHICS OF WAR AND PEACE: AN INTRODUCTION TO LEGAL AND MORAL ISSUES 104-14 (3d ed. 2004).

³⁶ HERSHEY, *supra* note 8, at 67.

adapting norms to changing circumstances.³⁷ This follows from the principal positivist understanding that states are [considered] both principal producers and principal consumers of international law.³⁸ Based on that, the legitimacy of the fulfillment of the right of self-defense in international law is restricted to an actual attack by the adversary or aggressor.

Based on what is posited in Article 51 of the UN Charter, the use of self-defense should be preceded by an actual armed attack by an adversary.³⁹ Strictly adhering to the wording of Article 51 of the UN Charter, one cannot give legitimacy to the fulfillment of the right of self-defense in response to an imminent but not actual threat by an adversary. In other words, according to the Charter's nature or restrictive position, the right of self-defense must be exercised only when one state objectively launches an attack against another. Given this, only a just-in-time defense could be legitimate in international law and covered by Article 51 and Article 2(4) of the United Nations Charter, and therefore, any interpretative method of norm identification on the basis of *opinio juris* such as preemptive self-defense is illegitimate.

Although a restrictive position may, at least in theory, remain a hurdle against illegitimate war creation in the international sphere, it is incapable of coping with weapons of mass destruction that are mostly instant deliverables. Reasonably, a state-actor must be capable of suppressing armed attacks before being devastated by these horrible weapons.⁴⁰ This is why the non-restrictive position has gained greater momentum in the age of proliferation of weapons of mass destruction.

³⁷ See H. L. A. HART, *THE CONCEPT OF LAW* 91-99 (3d ed. 2012).

³⁸ See generally ALEXANDER ORAKHELASHVILI, *THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW* 53 (2008).

³⁹ See Russell Powell, *The Law and Philosophy of Preventive War: An Institution-Based Approach to Collective Self-Defence*, 32 *AUSTL. J. LEG. PHIL.* 67 (2007).

⁴⁰ See Kalliopi Chainoglou, *Reconceptualising Self-Defence in International Law*, 18 *K.L.J.* 61, 76 (2007).

B. The Non-Restrictive Position towards the Right of Self-Defense in International Law

1. The Theoretical Root

Based on natural law theory, law, as an innate endowment, can be likened to the science of language that is a precious endowment bestowed upon mankind. This endowment is illuminated in practice by making different meaningful sounds through a well-organized man-made process on the basis of association, analogy, and correspondence. Law, similarly, in its very essence, is a natural innate endowment bestowed on mankind, and comes into practice through man-made institutions and constitutions on the basis of motives and purposes of the consent which constituted them. “Natural law refers to rules and principles deducible from nature, reason or the idea of justice,”⁴¹ but in order for that to be implemented, it must be constituted by man. In other words, “It is undoubtedly true that the great body of the law is founded upon the dictates of the right reason, natural justice, and common sense.”⁴² So, the very nature and end of law is reasoning, logical fitness, and reasonableness.

“The doctrine of the law of nature – first practically utilized in the administration of justice by the Roman jurists – whose primordial elements are uniformity, simplicity, harmony, and equality, and whose broadening influence upon the jurisprudence of the world has been so potent and permanent, is the doctrine of intrinsic reasonableness . . . It consists of a body of precepts which satisfy, and are in accord with, right human reason, and which are binding on all mankind by virtue of their inherent reasonableness.”⁴³ But considering law, including international law, as a natural bestowment that can only be progressed through a participatory consent (custom), traces back to the writings of Francisco Suarez (1548-1617), a Spanish theologian, in his Treaties on Laws and God the Lawgiver, in

⁴¹ ALEXANDER ORAKHELASHVIL, NATURAL AND CUSTOMARY LAW 71 (2008), http://www.zaoerv.de/68_2008/68_2008_1_a_69_110.pdf.

⁴² Le Baron Bradford Colt, *Law and Reasonableness*, 37 AM. L. REV. 657, 658 (1903).

⁴³ *Id.* at 662.

which he “equated the law of nations with custom.”⁴⁴ Based on this, jurisprudence and law, as sciences, consider their rules only as having their existence and authority by the appointment and institution of humanity, and refer to their fundamental causes as found in nature, only to explain their meaning and the extent of the power with which they were instituted.

Hugo Grotius (1583-1645), the founder of international law, first thought of applicability of moral and legal norms outside the polity.⁴⁵ “For Grotius the law naturally provided both language and a mechanism for the systematic application of reason to problems social order and conflict”⁴⁶ as well as complexities in inter-polity legal order. Accordingly, “[for Grotius] rights to self-defense, and certain property rights and contractual rights (all capable of being vested in individuals, sovereign states, and other entities), were embedded in Grotius’ natural law and applicable beyond [the territory of] any given polity.”⁴⁷ Moreover, Grotius identified international law completely with the law of nature that echoes morality, reasonableness, and equity above and in advance of any posited statutory letters of law.⁴⁸

What states actually ought to do and the customs they ought to take into account are the inherent and key rule of the law of nature. What entails “*ought to*” is the common sense, driven by the common morality, of the community within which the law serves. This is why “theories of natural law are reflective critical accounts of the constitutive aspects of the well-being and fulfillment of human persons and the communities they form.”⁴⁹ As a result, the stance of morality in natural law theory towards international law is of central importance. But the important question is how these moral values

⁴⁴ Kadens et al., *supra* note 12, at 887.

⁴⁵ See HUGO GROTIUS, *THE LAW OF WAR AND PEACE: DE JURE BELLI AC PACIS LIBRI TRES*, 3, (Francis W. Kelsey trans., 1925).

⁴⁶ See BENEDICT KINGSBURY, *A GROTIAN TRADITION OF THEORY AND PRACTICE: GROTIUS, LAW, AND MORAL SKEPTICISM IN THE THOUGHT OF HEDLEY BULL* 11, 11 (1997), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5584&context=faculty_scholarship.

⁴⁷ Besson & Tasioulas, *supra* note 30, at 44.

⁴⁸ See SHAW, *supra* note 2, at 18.

⁴⁹ Robert P. George, *Natural Law*, 31 HARV. J. L. & PUB. POL’Y 171, 172 (2008).

could be regulated and practically used in the international norm-making process. Morally structured principles backed by philosophical notions are the missing keys in sketching international legal order *and* moral “*ought to’s*” in international law. This viewpoint has best been approached by Immanuel Kant’s account of international law.

Based on the above-stated argument, the focal tenet of natural law is to bring existing rules into harmony with new, ever-changing and probably unprecedented public or political sentiments under the formats of moral principles backed by philosophical notions. The criterion of reasonableness is best reflected in the Kantian approach towards international law. One of the tenets of the Kantian approach towards international law is that “international law must be institutionally designed to ensure the peaceful settlement of disputes.”⁵⁰

Kant, with his idea of *perpetual peace*, “intended to offer a programmatic formula for peace, rather than a philosophical analysis of the nature of international law and relations.”⁵¹ His approach was an attempt to pragmatically implement moral orders in relations among states. In sketching a moral sphere for states, he stresses the necessity of taking into account all reasonable measures in coping with adversaries.⁵² Therefore, he dismisses the vindication of any sense of just-war in international relations and persists on referring to philosophical notions of reasonableness and pragmatically implementing them as tenets of a just world order toward international law.⁵³

After the resurgence of the natural law theory in international legal order following World War II, morality has begun to be considered as a kernel in the international law agenda based on a transition from a state-centric global governance to one based on

⁵⁰ Patrick Capps, *The Kantian Project in Modern International Legal Theory*, 12 EUR. J. INT’L. L. 1003, 1003 (2001).

⁵¹ Fernando R. Teson, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 57 (1992).

⁵² *Id.*

⁵³ *Id.*

human quest and humane anxiety.⁵⁴ Therefore, many proposals have been rendered by academia for a newly evolved international law agenda calling for a world order based on equality, morality, and justice.

2. The Non-Restrictive Position

The proponents of the non-restrictive position shed light on the word “inherent” in the initial sentence of Article 51 of the UN Charter: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense . . . “ They consider the right of self-defense to be an innate and morally justifiable right that cannot be nullified by any means, even by the UN Charter.⁵⁵ In fact, they consider the right of self-defense as a natural endowment bestowed upon member states that come into practice through a man-made process on the basis of association, analogy, and correspondence. This naturally indispensable fact can be gleaned from the comment of the Secretary-General regarding the report by the High-Level Panel on Threats, Challenges and Changes in 2005: “Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers imminent attack as well as one that has already happened.”⁵⁶

Based on this position, once a state actor is morally and politically convinced to resort to force in fulfillment of the right of self-help, it becomes a custom, based on *opinio juris*, and renders it as a norm in international law. So, the non-restrictive position does not require a state to suffer from the fearsome consequences of an actual armed attack before it can seek to defend itself from further attacks. This position accepts that a state anticipates the attack and acts in

⁵⁴ See RICHARD A. FALK, TOWARD HUMANE GLOBAL GOVERNANCE: RHETORIC, DESIRE, AND IMAGINARIES GLOBAL GOVERNANCE, GLOBAL GOVERNMENT: INSTITUTIONAL VISIONS FOR AN EVOLVING WORLD SYSTEM (2012).

⁵⁵ See Ronzitti, *supra* note 16.

⁵⁶ REPORT OF THE SECRETARY-GENERAL (UNITED NATIONS), IN LARGER FREEDOM: TOWARDS DEVELOPMENT, SECURITY, AND HUMAN RIGHTS FOR ALL, (UN Doc A/59/2005 (‘in larger Freedom’), 33 item 124, 2005).

such a manner as to preemptively neutralize the threat posed by the aggressor state. Therefore, this position justifies the use of self-defense once a threat has become imminent but before an actual blow from an adversary has been executed.

In the wake of the instant deliverables that have in most cases been instant, overwhelming, and left no moment for deliberation for the victim state, a natural desire of preemptive self-help has inevitably been set forth as a pragmatically reasonable interpretation of the international right of self-defense. The proponents of this standpoint argue that the first judicial articulation of anticipatory self-defense was pronounced in 1842 *Caroline Case*,⁵⁷ which occurred long before the UN Charter came into existence. The advocates of this claim articulated a three-pronged criterion of immediacy, necessity, and proportionality as characters of a legitimate fulfillment of the anticipatory self-defense in international law.

Given this, it has been argued that because of the proliferation of weapons of mass destruction, a just-in-time defense may not work in an age of instant deliverables.⁵⁸ Therefore, a state, or the elites of that state, are naturally entitled to do their best so as to not be harmed by their adversaries.⁵⁹ Based upon this interpretation, anticipatory self-defense appears to be fully consistent with the nature of the right of self-help. In other words, the right of self-

⁵⁷ In 1837, settlers in Upper Canada rebelled against the British colonial government. The United States remained officially neutral about the rebellion, but American sympathizers assisted the rebels with men and supplies, transported by a steamboat named the *Caroline*. In response, a British force from Canada entered United States territory at night, seized the *Caroline*, set the ship on fire, and sent it over Niagara Falls. At least one American was killed. The British claimed that the attack was an act of self-defense. In a letter to the British Ambassador, Secretary of State Daniel Webster argued that a self-defense claimant would have to show that the necessity of self-defense was instant, overwhelming, leaving no choice of means, and no moment of deliberation, and that the British force, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.

⁵⁸ See Chainoglou, *supra* note 40, at 76.

⁵⁹ See William H. Taft IV, *International Law and the Use of Force*, 36 *GEO. J. INT'L L.* 659, 659-62 (2004).

defense must be early enough to preclude devastation and gross harm and therefore, true anticipation is attached to the very process of self-defense.”⁶⁰

As stated above, the non-restrictive position relies on the notion of *opinio juris* in legitimizing empirically unprecedented and instant customary international law. Under the dominance of the interpretative methods of norm identification, *opinio juris*, state practice, for the most part, retains merely an auxiliary function to determine *opinio juris*.⁶¹ For instance, in the field of international human rights, certain obligations such as the prohibition of genocide and slavery are universally known as customary norms without any constitutive reference to *state practice* or any precedential behavioral patterns.⁶² Koskenniemi argues that it is really our certainty that genocide or torture is illegal that allows us to understand state behavior and to accept or reject its legal message, not state behavior itself.⁶³ This is why conditioning the identification of norms concerning fundamental moral principles on *state practice* is deemed inappropriate.⁶⁴

Based on the notion of instant custom, broad and permissive interpretations of the right of self-defense came into being based on the specific state of mind of the politically dominant actors when interpreting the law which did not necessarily comply with the wording of Article 51 and Article 2(4) of the UN Charter.⁶⁵ This has resulted in an unfathomable confusion about the dual customary-Charter nature of the right of self-defense.⁶⁶ In practice, some legally

⁶⁰ William. H. Taft, *The Legal Basis for Preemption* (2002) Council on Foreign Relations Memorandum: 17 November 2005. N 45. 333, <http://zionadvocate.com/the-legal-basis-for-preemption/>.

⁶¹ See Niels Petersen, *Customary Law without Custom-Rules, Principles, and the Role of State Practice in International Norm Creation*, 23 AM. U. INT’L L. REV. 275 (2007)

⁶² See Martti Koskenniemi, *The Pull of the Mainstream*, 88 MICH. L. REV. 1946 (1990).

⁶³ *Id.*

⁶⁴ See Petersen, *supra* note 61.

⁶⁵ See Ronzitti, *supra* note 16.

⁶⁶ See Terry D Gill, *The Temporal Dimension of Self-Defense: Anticipation, Pre-emption, Prevention and Immediacy*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 113, 113 (Michael N. Schmitt et al. eds., 2007)

untenable instances of the fulfillment of the right of self-defense, such as the so-called “*Bush Doctrine*,” were the result of such broad interpretations that relied on instant custom. This is why many scholars have argued that this natural and inevitable understanding of the right of self-defense, without a regulatory criterion in international law, may result in unreasonable and irrecoverable incidents⁶⁷ and potentially will result in departure from strict rules of law.

III. THE INTERNATIONAL CORE CRIME OF AGGRESSION

In June 2010 in Kampala, Uganda, states party to the International Criminal Court (ICC) agreed to make amendments to the Rome Statute and bring the international core crime of Aggression within the court’s jurisdiction, beginning in 2017.⁶⁸ In detail, the Resolution, RC/Res.6, states that these amendments enter into force in accordance with Article 121.5 of the Rome Statute, meaning for each ratifying state individually, one year after the deposit of its instrument of ratification or acceptance.⁶⁹ For the Court to actively exercise jurisdiction over the crime of Aggression, however, the amendments stipulate additional conditions: the amendments must have been ratified or accepted for one year by at least thirty State Parties, and in addition State Parties must “activate” the Court’s jurisdiction through an additional decision to be taken on or after January 1, 2017 by a two-thirds majority.⁷⁰

The international core crime of Aggression, defined in Article 8 of the Rome Statute of the ICC,⁷¹ is essentially the offense of using

⁶⁷ See Carl-Friedrich Stuckenberg, *Problems of “subjective imputation” in domestic and international criminal law*, 12 J. INT’L CRIM. JUST. J. 311 (2014).

⁶⁸ ROME STATUTE REVIEW CONFERENCE - KAMPALA, UGANDA, 31 May- 11 June 2010

⁶⁹ Resolution RC/Res.6, Adopted at the 13th plenary meeting, on 11 June 2010, by consensus.

⁷⁰ See Roger S Clark, *Amendments to the Rome Statute of the International Criminal Court Considered at the first Review Conference on the Court*, Kampala, 31 May - 11 June 2010, 2 GOETTINGEN J. INT’L L. 689 (2010).

⁷¹ The Rome Statute of the International Criminal Court, signed on 17 July 1998. Article 8:

force against another state without justification under international law. In detail, the *actus reus* of the international core crime of Aggression is the unlawful use of force which is rejected by the rules of international law. Moreover, the perpetrator and the victim of this crime are limited to states. The *mens rea* of this crime is an intentionally illegal use of force with a particular intention to encroach victim state's territory. In result, the international *core* crime of Aggression is merely committable by states against states. In other words, under the auspices of this definition, the international core crime of Aggression is a leadership crime, thus not applying to

1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) 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 the acts listed above, or its substantial involvement therein.

ordinary soldiers and other individuals.⁷² Moreover, only certain acts amount to the international core crime of Aggression, namely to the extent that the act “by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”⁷³

As elaborated above, there has been an unfathomable and unresolved controversy over the customary-Charter puzzle of self-defense in international law. Given the prevalence of positivistic interpretations on the very nature of customary law and also the right of self-defense in international law, use of force (Article (2) (4) of the UN Charter) has been legitimized only on behalf of defensive purposes. In other words, “Article 2(4) of the UN Charter places some limitations on the use of force by states in the everyday conduct of their international relations, without however going so far as to prohibit states from maintaining standing armies for purely defensive purposes.”⁷⁴ However, if a state uses military force, and by doing so aggresses the territorial integrity of another state, without resorting a justificatory mean such as the right of self-defense, it can be prosecuted for committing the international core crime of Aggression as of 2017.⁷⁵ This is why “the crime of Aggression is extremely controversial.”⁷⁶

The indeterminate terms “gravity”, “character”, and “scale” in the explicit wording of Article 8 of the Rome Statute have been subject to controversy among scholars.⁷⁷ “Gravity” and “scale” may point to the extent of an armed attack, and thus exclude mere border incursions of the type frequent in anti-terrorist warfare beyond borders.⁷⁸ “Character” seems to be a vaguer term; it seems to leave

⁷² See Andreas Paulus, *Second thoughts on the crime of aggression*, 20 EUR. J. INT'L L. 1117 (2009).

⁷³ See *supra* note 62.

⁷⁴ Rothwell, *supra* note 6, at 338.

⁷⁵ See *supra* note 74.

⁷⁶ Michael P Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARV. INT'L L. J. 357, 359 (2012)

⁷⁷ See Paulus, *supra* note 73.

⁷⁸ See Christian J Tams, *The use of force against terrorists*, 20 EUR. J. INT'L L. 359 (2009).

room for arbitrary interpretations of what the term “character” entails.⁷⁹

These terms seem to be useful in distinguishing between committing the international core crime of Aggression and interventionism calling for humanitarian assistance. “Recent attempts to legalize humanitarian intervention seem to have failed: while attempting a codification of sorts of the concept of the ‘responsibility to protect’, the UN Summit of 2005⁸⁰ clearly reserved the reaction to the non-observance of the responsibility of states to protect their populations from war crimes, crimes against humanity, ethnic cleansing, and genocide, to the UN, in particular the Security Council.”⁸¹ What marks the distinction between humanitarian and pro-democratic interventionism and the international core crime of Aggression is the specific *mens rea* of the latter that is deductible from the gravity, scale, and character of the crime committed.

A. Aggression or Self-Defense?

As described above, the right of self-defense, as one of the two justifications of the legality of the use of force, is under deep-rooted conceptual doubt. Any misuse of the right of self-defense by state actors forms the *actus reus* of the crime of Aggression. So, the right of self-defense being arbitrarily interpreted can, in practice, lead to devastating consequences, as of 2017, which marks the creation of the crime of Aggression under ICC jurisdiction.

For example, if state “A” misinterprets the anticipatory perspective of the right of self-defense and uses force against the territorial integrity of state “B” on the basis of a non-imminent threat, the aggressor state will scape justice and responsiveness before any criminal court including ICC. So, in the wake of the customary-Charter perplexity of the right of self-defense in international law, the

⁷⁹ See *supra* note 83.

⁸⁰ 2005 World Summit Outcome, UN Doc A/RES/60/1 (2005), at ¶139; see also SC Res. 1674 (2006), at ¶ 4; SC Res 1706 (2006), at preambular ¶ 2; implementing the responsibility to protect see SG report, 12 Jan. 2009, A/63/677 (2009), at ¶ 9–10.

⁸¹ See Paulus, *supra* note 73, at 1122.

practical existence of the crime of Aggression, to a large extent, would be affected by arbitrariness and bewilderment. Moreover, this will make room for the dominant political actors to tag legally tenable resorts to the right of self-defense with the crime of “Aggression” on the basis of their own political interests.

Human conduct is intrinsically constituted and driven by subjective presuppositions and premises, or the state of mind of the actor. Aristotle’s account of practical syllogism⁸² can be construed as providing a statement of natural conditions for intelligible human action and doing so in a way that must hold for any recognizably human culture.⁸³ Based on this universal concept, the primary element of any act in any sphere is the state of mind of the actor or the subjective element.

Based on this universal concept on human conduct, no one can refute the special state of mind of the actors, *opinio juris*, in times of being threatened by a potential adversary that is imminently about to launch a military attack. Given this, it is intrinsically incontrovertible and correct to prioritize the subjective element or special state of mind of the actors in international laws of self-defense. Therefore, broad, instant, and self-interested interpretations

⁸² The Nicomachean Ethics is the name normally given to Aristotle’s best-known work on ethics. The work, which plays a pre-eminent role in defining Aristotelian ethics, consists of ten books. This work was written Between 334 and 323 B.C. See BARTLETT, ROBERT C, AND COLLINS, SUSAN D., ARISTOTLE’S NICOMACHEAN ETHICS: A NEW TRANSLATION (2011).

⁸³ Aristotle’s account of Practical Syllogism is briefly touched as following:
I. Presupposed will -- intentions and goals that are presupposed but not expressed by the principal – such as believing in the fact that a state has the right to defend itself,
II. Major premise -- a universal truth or a moral maxim on a specific matter – such the fact that use of force can be permitted in case of fulfillment of the right of self-defense, whether this right be legitimized by instant custom or Charter,
III. Minor premise -- a particular truth or instance covered by the major premise – such as the instance that the adversary state (A) is launching an actual attack against state (B), or has shown its willingness to use WMD. So, State (B) has the right to defend its territorial integrity and public security, whether it be legitimized by instant custom or Charter,
IV. Conclusion – the imperative action – such as when State (B) fulfills its right to self-defense.

on behalf of the right of self-defense under the category of anticipatory self-defense are inherently inevitable. This is a natural extension that is fully consistent with universal propensity of not being harmed by even a potential adversary.

As stated above, in the absence of a written law valuing, and at the same time regulating *opinio juris* in international laws of self-defense, customary international law, primarily based on *opinio juris*, is of intrinsic priority in recognizing the legitimate fulfillment of the right of self-defense. But given the indeterminacy of international law, there are profound critiques on the nature of customary international law itself, for it makes *opinio juris* rather hazardous that makes room for dominant international actors to act on their own cause and remain unquestioned. And this has the potential for misinterpretations regarding the *actus reus* of the international core crime of Aggression before criminal courts. In other words, although this crime has been directed to bring aggressor states before criminal courts, given the customary-Charter puzzle of the right of self-defense, the crime of Aggression sounds like a new pretext for more wars under new headings. This is why this research is aimed at necessitating the conceptual re-thinking of the right of self-defense prior to practically bringing the crime of Aggression under the jurisdiction of the ICC in 2017.

IV. CONCLUSION

The explicit wording of Article 51 of the UN Charter is completely in contrast to the natural and logical process of human conduct. Article 51 of the UN Charter conditions the legitimacy of the fulfillment of the right of self-defense to an actual armed attack objectively launched by the adversary. This huge flaw has resulted in various interstate hostilities and a transparent departure from the rule of law on behalf of the fulfillment of the right of self-defense.

On the other hand, arguably, *opinio juris* is central to the very structure of the right of self-defense as a human (re)action. Therefore, Article 51 of the UN Charter remains theoretically dysfunctional. This has provided a deep-rooted perplexity on the nature and legitimate practice of the right of self-defense in

international law. Thus, in the current international legal structure, the international right of self-defense suffers from a conceptual deficit that makes the *actus reus* of the international core crime of Aggression highly indeterminate.

Based on the main argument of this article, it is extremely crucial for the international law-making apparatus to re-think the conceptual flaws of the right of self-defense before giving practical weight to the crime of Aggression. The reason for this is that the right of self-defense in international law and the crime of Aggression are intrinsically interconnected. Any malpractice on behalf of the fulfilment of the right of self-defense in international law forms *actus reus* of the international core crime of Aggression which, based on the Article 8 of the ICC Rome Statute, is merely committable by states against states. Therefore, the customary-Charter puzzle of the right of self-defense, coupled with the practice of the international core crime of Aggression as of 2017, provides room for an indeterminate and misinterpreted account of the crime of Aggression.