

ARTICLES

Collective Self-Defense or Collective Security? Japan's Reinterpretation of Article 9 of the Constitution

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The concept of self-defense takes such an important place in the UN Charter and international law. The concept of collective self-defense should also be interpreted and applied within the clear parameters of stated principles of the UN Charter. This is not a concept that can be elastically applied so as to cover a wide range of instances that require military action by like-minded States acting in response to contingent situations. The discussion of collective self-defense within the specific context of Japan at the moment, however, seems to involve issues larger than or beyond the traditional concept of self-defense. Arguably, some aspects of the issues posed seem to fall under the collective security realm which is reserved to the authority of the UN Security Council or which at least requires authorization or delegation from the Security Council. Using the term collective self-defense to address a wide spectrum of military contingencies to be tackled by collective security regime may not square with the provisions of the UN Charter.

Keywords

Self-Defense, Collective Self-Defense, Collective Security, UN Security Council, Chapter VII Enforcement Action

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I. Introduction

“Collective self-defense” has a long history in the international community.¹ It is not uncommon for a State (A) to invoke collective self-defense to justify their military actions against another State (B) that has invaded yet the third State (C). The recent past has also witnessed references to the concept, on the occasion of the US military action against Taliban in Afghanistan² with her allies, and in the multinational forces’ military action against Iraq after the Iraqi invasion of Kuwait.³ In many instances, the invocation of collective self-defense has been made possible through military alliance treaties concluded between a victim State and a rescuing one.⁴ The invocation of the concept, however, does not necessarily require a pre-existing treaty framework.⁵

The concept of collective self-defense is now attracting increased global attention.⁶ Arguably, it has become one of the most frequently cited terms in international law since mid-2013 when the discussions over the possibility of Japan’s more

¹ G. Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, 31 CORNELL INT’L L. J. 324 (1998); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 27, ¶ 34 (June 27). Traditionally, this concept has also received wide support from States. As the delegate from Colombia observed after the Conference, states unanimously approved the insertion of collective self-defense into the Dumbarton Oaks Proposals:

The origin of the term “collective self-defense” is identified with the necessity of preserving regional systems like the Inter-American one. The Charter ... legitimizes the right of collective self-defense to be carried out in accord with regional pacts so long as they are not opposed to the purposes and principles... expressed in the Charter... The approval of this article implies that the Act of Chapultepec is not in contravention of the Charter.

See T. RUYS, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER 62, n. 33 (2010).

² M. O’Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889 (2002). See also J. CRAWFORD, BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 749 (8th ed. 2012).

³ G. Walker, *The Crisis over Kuwait, August 1990 - February 1991*, 25 DUKE J. COMP & INT’L L. 32 (1991). It can be said that the use of force before the actions on the basis of Resolution 678 are taken on the basis of collective self-defense and the use of force after the effective date of Resolution 678 are taken on the basis of collective security.

⁴ Indeed, a number of treaty arrangements have been concluded on the basis of a right of collective self-defense, establishing a presumption that ‘an attack against any one party is an attack against the other party or parties to the treaty.’ See e.g., M. McDougall & F. Feliciano, *Legal Regulation of Resort to International Coercion: Aggression and Self-defense in Policy Perspective*, 68 YALE L. J. 1155 (1959); D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 234-6 (1958); North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

⁵ S. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 101-2 (1996). See also W. Kohn, *Collective Self-Defense under a Revised UN Charter*, 22 SOC. RES. 232-3 (1955); C. GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 167-73 (3d ed. 2008).

⁶ See, e.g., L. Repeta, *Japan’s Proposed National Security Legislation, Destruction of the Rule of Law?*, GLOBAL RES. (June 23, 2015), available at <http://www.globalresearch.ca/japans-proposed-national-security-legislation-destruction-of-the-rule-of-law/5457528> (last visited on Nov. 4, 2015); Kamiya Mataka, *Japan-U.S. Defense Guidelines Revised*, 27 JAPAN FOREIGN POL’Y F. (June 12, 2015), available at <http://www.japanpolicyforum.jp/archives/diplomacy/pt20150612210052.html> (last visited on Nov. 4, 2015).