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Notes concerning Self-Defence

(interoffice memorandum sent to D.H. from
U.N. Legal Counsel)

Addison
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Notes Concerning Self-Defence

I Self-Defence in Municipal Law

1. The right of self-defence (légitime défense) is considered a fundamental or "inherent" right in national systems of law. In developed systems the right of self-defence is clearly distinguishable from a right of redress. "A person may prevent an injury from being done by all proper means, but, when done, he cannot take redress into his own hands." (Corpus Juris Secundum, Vol. 40, p. 983). "It (the law of self-defence) does not imply the right to attack, nor will it condone acts done for the purposes of retaliation, revenge, or redress." (ibid. p. 986).

2. In Vidal's Cours de Droit Criminel et de Science Pénitentiaire (Magnol, 8th ed. 1935) p. 325 the following appears:

Mais elles diffèrent en ce que la légitime défense tend à empêcher le mal et la violation imminente du droit par la réaction individuelle substituée nécessairement à la protection sociale absente et impuissante; tandis que la voie de fait employée pour l'exercice d'un droit tend seulement à faire cesser une violation réalisée, à faire reconnaître un droit méconnu et violé alors que l'on pourrait, pour cela, recourir à l'autorité judiciaire. — Celui qui exerce violemment son droit en excède les limites en ne recourant pas à cette autorité. En se faisant ainsi justice à lui-même il commet un délit.

3. Corpus Juris Secundum (Vol. 6, pp. 944-948) defines the following principles governing the extent and limits of the right of self-defence as it applies in cases of assault:

- (1) To justify an assault in self-defence there must be a reasonably well-founded apprehension of bodily harm or danger to the person.



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- (2) A person may use such force as is reasonably necessary to repel an assault upon him, but he is not entitled to employ excessive force in self-defence.
- (3) A person is not entitled to use a deadly weapon to repel an assault unless it is reasonably necessary under the circumstances.
- (4) One who provokes the assault is not entitled to the defence of self-defence unless he has, in good faith, actually withdrawn from the conflict.
- (5) One who voluntarily engages in the difficulty cannot ordinarily assert self-defence as a justification therefor.
- (6) A trespasser ordinarily cannot justify an assault on the grounds of self-defence.

4. Authorities in enumerating the elements of self-defence in homicide cases have referred to the following:

- (1) The absence of aggression or provocation on the part of the slayer in provoking or continuing the difficulty.
- (2) The actual and honest belief of the slayer that he was in imminent danger of death, great bodily harm, or some felony, and that there was a necessity to kill in order to save himself therefrom.
- (3) The existence of reasonable grounds for such belief.
- (4) The duty of the slayer to retreat or avoid the danger.
(Corpus Juris Secundum, Vol. 40, p. 984)

5. The duty of retreat as developed in homicide cases is not generally considered applicable with respect to assault. Moreover, the Ancient Common-law rule of "retreat to the wall" (i.e. that a person is not justified or excused in killing one who attacks him, unless he first retreats as far as he can do so without increasing his real or apparent peril) was not recognized on the continent, and has been qualified in many common law jurisdictions. In any event it would appear that even when the rule existed it was not necessary to retreat when in one's own house.

(1 Hale's Pleas of the Crown, 486; 158 U. S. 550).



II Self-Defence in International Law

6. Self-Defence is also considered a fundamental right in international law as well as in municipal law. "The right of self-defence against physical attack must be regarded as a natural right both of individuals and of states." (Oppenheim, International Law, Vol. II Lauterpacht's 7th edition, 1952, pp. 154-155). Kelsen in the American Journal of International Law, Vol. 42 (1948) pp. 784-785 states:

Self-defence is not identical with self-help; it is a special case of self-help. It is self-help against a specific violation of the law, against the illegal use of force, not against other violations of the law. Self-defence is the use of force by a person illegally attacked by another. The attack against which the use of force as an act of self-defence is permitted must have been made or must be intended to be made by force. Self-defence is that minimum of self-help which, even within a system of collective security based on a centralized force monopoly of the community, must be permitted. As such it is recognized by national as well as by international law, within the state as well as within international organizations.

7. The conditions governing self-defence in international law have not, however, been as fully defined, particularly since the prohibition of force (war) is a very recent development. It has been claimed that it is for each state to judge whether circumstances justify its recourse to war in self-defence. Lauterpacht (*ibid.* pp. 187-188) states with respect to the reservations made by the signatories to the Paris Peace Pact:



The right to use force (which in relations of States may assume the form of war) in self-defence constitutes a permanent limitation of the prohibition of recourse to force in any system of law. Equally, it is of the essence of the conception of self-defence that recourse to it must, in the first instance, be left to the unfettered judgment of the party which deems itself to be in danger. . . .

.... But elementary principles of interpretation preclude a construction which gives to a State resorting to an alleged war in self-defence the right of ultimate determination, with a legally conclusive effect, of the legality of such action.

8. The International Military Tribunal of Nuremberg in rejecting the argument that Germany alone could decide whether preventive action was necessary stated:

But whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced. (ibid. p. 188)

9. Traditional positions of international law have been fundamentally modified by Article 51 of the Charter of the United Nations, which has defined certain conditions governing self-defence. (See Section III immediately following).

III Self-Defence in Article 51 of the Charter of the United Nations

10. In an opinion prepared by the Legal Department in 1949 for Mr. Lie, with reference to the North Atlantic Treaty, self-defence under Article 51 was defined as follows:

Article 51 provides that nothing in the Charter "shall impair the inherent right of individual or collective self-defence...". It may at once be noted that this wording is a recognition of an existing or "inherent" right, not the creation of a new right. Further, it is recognized that a State may not only defend itself against direct attack



(individual self-defence) but may also join in collective self-defence if an attack occurs upon a third State.

However, Article 51 does not stop with this recognition, but sets forth specific conditions under which the right of self-defence may be exercised. These conditions have the legal effect of modifying the right of self-defence as it existed in customary international law at the time that the Charter was adopted. Under the Charter self-defence, individual and collective, may only be exercised subject to the following qualifications:

1. The right may only be exercised if an armed attack occurs against a Member of the United Nations;
2. The right may continue to be exercised only until the Security Council has taken measures necessary to maintain international peace and security;
3. Measures taken by Members in the exercise of this right must be immediately reported to the Security Council.
4. Most important of all, the right of self-defence does not in any way affect the authority and responsibility of the Security Council under the Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

IV Analogy of Self-Defence in Municipal Law to Self-Defence in International Law

11. Authorities in the field of international law consider that basically the right of self-defence is the same in both national and international law systems. (See para. 6 supra). However, as was pointed out, in traditional international law conditions for the exercise of the right of self-defence could not be as specifically defined as in well developed national systems.



12. It has also been argued that many analogies from municipal law are inapplicable to self-defence under Article 51 of the Charter. Josef L. Kunz in the American Journal of International Law, Vol. 41 (1947) pp. 877-878 argues:^{1/}

It seems also that the conditions of necessity, reasonableness, and a certain proportionality, which the municipal law prescribes for the exercise of the right of self-defence, are lacking in Article 51.

If "armed attack" means illegal armed attack it means, on the other hand, any illegal armed attack, even a small border incident; necessity or proportionality are no conditions for the exercise of self-defence under Article 51.

13. While it is true that Article 51 does not in itself provide the conditions of reasonableness and proportionality prescribed in national law systems, it may be questioned whether these analogies may not be drawn upon. Article 38 of the Statute of the International Court of Justice lists as a source of the law which the Court applies "the general principles of law recognized by civilized nations." Certain principles of reasonableness and proportionality with respect to self-defence would appear to come within this category. Moreover, with the development of a collective security system under the United Nations it is reasonable to look to Municipal law analogies. Kunz does not give the reasons for his conclusions referred to in the preceding paragraph, and there would seem to be weighty arguments of law and policy against hastily accepting such negative conclusions.

^{1/} On the other hand he points out: Article 51 prohibits "preventive war." The "threat of aggression" does not justify self-defence under Art. 51. Now in municipal law self-defence is justified only against an actual danger, but it is sufficient that the danger is imminent. The "imminent" armed attack does not suffice under Art. 51.



13. In applying analogies, however, the real and essential differences must be kept in mind and, from a purely military point of view, self-defence can probably not be limited entirely to action at the point of attack. Also the special problems relating to atomic weapons brought up during the proceedings of the Atomic Energy Commission in 1946 (See Repertory of Practice of United Nations organs, Vol. II, Article 51 pp. 434-435), while not relevant to the Palestine question, must be kept in mind in any general considerations of the right of self-defence under the Charter of the United Nations.

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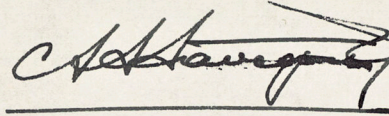
TO: The Secretary-General

Date: 28 May 1956

THROUGH:

FILE NO.: _____

FROM: The Legal Counsel



SUBJECT: Notes Concerning Self-Defence

..... In studying your Palestine Report I was interested to note the discussion concerning self-defence. In this connexion the attached notes on the subject may be of interest.