



The legality issues of the US intervention in Afghanistan

ABD'nin Afganistan Müdahalesinin Yasallık Sorunu

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ABSTRACT

Before the establishment of UN, all nation-states were using immeasurable power at every opportunity that they have according to their interest. It is because of that, there was no law to limit the use of force on that time. Therefore, the UN treaty is the only treaty which regulates the right of self-defense as well as use of force. It is explicitly stated in article 51. Of UN treaty under which condition states can apply to the self-defense. According to UN treaty, the only exception of self-defense is armed attack. At the same time, according to unwritten law, it is necessary to supply the principle of urgency, necessity and proportionality. The right of self-defense is limited to protect of itself. It is not immeasurable right. Recently, some states are trying to legitimize their aggressive acts through "preventive legitimate defense". However, this situation has no validity in terms of International law. The intervention of US in Afghanistan in 2001 was implemented based on the principle of "preventive legitimate defense". That is why, the validity of this intervention is under discussion. The purpose of this research is to find answer to the question of whether this intervention was valid in terms of International law.

Keywords: USA, Afghanistan, UN, International law

ÖZET

BM kurulmadan önce, tüm ulus devletler kendi çıkarları doğrultusunda her fırsatta ölçsüz güç kullanmaktaydı. Bu durumun en önemli sebebi, onların kuvvet kullanımı sınırlandırılacak herhangi bir yasanın olmamasıydı. Dolayısıyla, meşru müdafaa hakkını düzenleyen, bu kavramdan açıkça bahs eden ve devletlerin güç kullanımını sınırlandıran ilk ve tek antlaşma BM antlaşmasıdır. Bir devletin hangi şartlar altında meşru müdafaa hakkına başvurabileceği işbu antlaşmanın 51. Maddesinde açıkça beyan edilmiştir. BM antlaşmasına göre, meşru müdafaa'nın tek istisnası silahlı saldırıdır. Aynı zamanda yapılageliş kurallarına göre, Aciliyet, gereklilik ve orantılık ilkelerinin de sağlanması gerek. Meşru müdafaa hakkı, her devletin kendini savunmakla sınırlı olup, ölçsüz kullanılacak bir hak değildir. Son zamanlarda bazı devletler "önleyici meşru müdafaa" sayesinde saldırganlık fiillerine meşruiyet kazandırmak çabasındadır. Fakat bu durum uluslararası hukuk açısından herhangi bir geçerliliği yoktur. ABD'nin 2001 Afganistan müdahalesi de "önleyici meşru müdafaa" ilkesine dayanılarak hayata geçirilmiştir. İşte bu yüzden bu müdahalenin geçerliliği tartışılmaktadır. Bu araştırmanın amacı ABD'nin 2001 Afganistan müdahalesinin Uluslararası hukuk açısından geçerli olup olmadığı sorusuna cevap bulmaktır.

Anahtar kelimeler: ABD, Afganistan, BM, uluslararası hukuk.

Introduction

Before the establishment of the United Nations organization, nation states exercised the right of self-defense in an unlimited way according to their interest. The reason for this was the lack of a law which could limit the use of force during that period. During that period, "jus in bello" was the rule governing military conflicts. The UN treaty is the first international treaty to regulate the right to self-defense and to give its place by explicitly talking about this concept. Under what circumstances can the right to self-defense be applied, section VII of the UN treaty

and Section 51 of the UN treaty. Clearly stated in the article. Accordingly, the only exception to the right to self-defense is armed attack. In addition, all other attacks do not allow the exercise of the right to self-defense against the aggressive state. The right to self-defense is limited to self-defense and is not a right that can be used without limit. This right continues until the UN Security Council has taken the necessary measures. The right to self-defense is "inherent" right. All states with state status, whether they are UN members or not, can benefit from this right.

There are three other criteria besides an armed attack that requires the right to self-defense. They are a requirement of necessity, urgency and proportionality respectively. These conditions are set out as rules of arrival. So for the right to self-defense, it must be in these three conditions, along with the armed attack. In recent times, the concept of "preventive self-defense" has been proposed by some forces in an effort to give legitimacy to a number of aggressive activity through this concept. States like the United States and Israel. This concept has no validity under international law and does not give the right to self-defense. U.S. intervention in Afghanistan was carried out on the grounds of preventive self-defense. That's why its validity is being debated. This intervention caused thousands of lives to lost in the country and displaced. The lack of peace and security from the country today shows that this attack was carried out for different purposes, not to fight terrorism. The purpose of this research is to examine whether US intervention in Afghanistan is legal under international law and rules of development.

Self-Defens Before the Esablishment of UN

Before the UN was established, sovereign states exercised their right of self-defense under the common law. Therefore, states had the opportunity to use this right to the any extent that they want according to their national interest. "Jus in bello" was one of the rules to be respected in military conflicts. At the beginning of the XX century, the League of Nations and the Paris Pact, which were related to the use of force, brought a number of limitations. Thus, on the one hand, the laws governing your application to the force have begun to gain a place in international law, on the other hand we can say that the importance of self-defense is gaining momentum.¹

Self-defense in the UN Treaty

The UN Treaty is the first international document that explicitly express the right of self-defense. Under the title of "acts in the event of the threat, deterioration and acts of attack of peace", section 51 of Section VII of the Treaty will be held in the event of an attack. "No provision of the UN Treaty would illegitimate the individual or joint right of this member to self-defense, which is natural, until the Security Council has taken measures to protect international

¹ Ulaş Can Değdaş, "Uluslararası Hukukta Meşru Müdafaa Hakkı"(Right to Self-Defense in International Law), **Anadolu Üniversitesi Hukuk Fakültesi Dergisi**, Cilt 1, Sayı 6, 2018, S.23-24.

peace and security if one of the United Nations members is the target of an armed attack.² When its members exercise this right of self-defense, their measures are immediately notified to the Security Council and do not affect the Council's authority and duty to act at any time as required by this agreement to protect or re-establish international peace and security.³ Article 2/4 of the UN treaty. Article 51. When we take the article together, we can clearly make it clear that self-defense is gaining even more importance, especially with the implementation of the UN treaty. From now on, nation states are obligated to use force on the basis of their right to self-defense or within the framework of the powers envisaged by the UN treaty. However, some states believe that the implementation of the UN system will prevent the use of force in article 51 of the UN treaty. It is noticed that it is trying to put it into his article. It's like the Soviet invasion of Afghanistan, when Britain didn't bomb Albanians over the Confu strait issue. That is why the terms and scope of Article 51 of the UN treaty need to be interpreted.⁴

A- Armed Attack; The only way to apply for self-defense is to be attacked with a gun. If there is no armed attack, the act of self-defense will not be considered legitimate. The main problem here is which action will be considered an armed attack. Because this issue is not described in detail in the treaty. This problem was only resolved in 1974 by the decision of the definition of attack number 3314. Here, more than identifying the armed attack, an effort was made to explain the aggressive verb. Some of the actions to be considered armed attacks include;

- A- Invading and annexing the territory of another state.
- B- bombing places in another country.
- C- blockade the ports and coasts of another country.
- D- carry out attacks against air, land and sea forces of another country.
- E- the state that settles in another country as a result of a treaty goes outside the treaty or does not leave that country even though the time of the treaty is over.
- F- placing military ammunition in another country capable of an armed attack against that country.

B-Natural Rights Status; According to Article 51, it has been made clear that self-defense states have a natural right, whether individual or joint. So if a state is subjected to an armed attack by another state, it naturally has the right to defend itself.

C- Role of the Security Council; The attacked state may exercise its right to self-defense until the Security Council takes action. 2/4 of the treaty. By article, self-defense is an exception to the use of force, but it is not a right that it can use without limitation. When the Security Council takes the necessary measures to eliminate the current problem and ensure peace and security, the state, which exercises its right to self-defense, is obliged to inform the Council of all measures it has taken. Because it has now lost the authority to exercise its right to self-defense with the serious commissioning of the Council.

General Assembly; According to Article 51, the General

² Angus Martyn, "The right of Self-Defence under International law- the response to the terrorist Attacks of 11 september", **Departement of the Parliamentary Library**, no. 8, 2001-02, s. 8-11.

³ Birleşmiş Milletler Antlaşması ve Uluslararası Adalet Divanı statüsü"(United Nations Treaty and International Court of Justice status) <https://www.ombudsman.gov.tr/contents/files/6535501-Birlesmis-Milletler-Antlasmasi.pdf>

⁴ Umut Kedikli, BM antlaşmasında meşru müdafaa hakkı(Right to self-defense under UN Treaty), Yayınlanmış Yüksek lisans tezi, Ankara, **Ankara Üniversitesi sosyal bilimler Enstitüsü**, 2005.

Assembly has no role in exercising the self-defense rights of the states. The Security Council is the only institution responsible for providing international peace and security. Article 11 of the UN treaty. According to its article, the General Assembly may advise the Security Council if necessary, or if there is any threat to international peace and security, it may draw the Council's attention in this direction.⁵ **Right to joint self-defense;** Article 51 of the UN treaty. According to the article, self-defense is a natural right when the individual is carried out, as well as a natural right to be implemented in a joint way. There is no problem with this in terms of international law. The right to self-defense is also considered to be one of the exceptional states of the prohibition on the use of force. When helping another state in self-defense, it does not necessarily have a vestily vestimate interest, but it can do so in universal interest. This was accepted by the UN treaty. The best example of joint self-defense was the US intervention in Afghanistan.⁶

Self- defense in common Law

The rules of common law generally derive their basis from the conditions created by Webster who was the head of US foreign affairs at the time, as a result of the Caroline incident. The Caroline incident was a result of Canadians rebelled against British sovereignty. The organization was organized on both U.S. and Canadian soil. As a result, the British crossed into the United States via Canada and set fire to a ship in The Port of Schloesel. In the wake of this incident, when the British foreign minister claimed that he had carried out this act on the basis of his right to self-defense, the US foreign minister stated that this action was done outside these circumstances, claiming that self-defense had conditions such as necessity, urgency and proportionality. Later, these conditions were also approved by the British. Thus, when these principles were self-defense, the conditions sought came to an 19th-by-day situation.⁷ **Necessity condition** According to the principle of necessity, which is the first requirement of the formula developed by Webster regarding to self-defense, the state that has been attacked by any state armed with an armed attack must have no choice but armed defense to defend itself. **Emergency Condition** According to Webster's second condition, the principle of urgency, the threat must arise unexpectedly. In addition, there shouldn't be enough time to solve the problem. The attacked state could be in a position to use force against the aggressive state. The most important thing to note here is that the use of self-defense by the states differs from each other. For example, it is clear that Israel's 1966 Jordan, 1969 Lebanese attacks took place far beyond the right to self-defense. **Proportionality Policy** This principle, which states that its response based on the right of

⁵ Funda Keskin, "Uluslararası Hukukta Kuvvet Kullanma: Savaş, Karışma ve Bileşmiş Milletler"(Using Force in International Law: War, Meddling and United Nations), Ankara, **Mülkiyeliler Birliği Vakıf Yayınları**, 1998, s. 34-50.

⁶ <https://www.aph.gov.au/binaries/library/pubs/cib/2001-02/02cib08.pdf>

⁷ Kedikli,s. 29-31.

self-defense should be on par with the armed attack, is the 51st state of the UN treaty. He didn't find a place in his article. However, this issue is a principle that has always been taken into consideration within the framework of the rules of arrival before the UN. Under this principle, the state that exercises its right to self-defense cannot retaliate militarily against the aggressive state. Even if this action is defensive. Moreover, the victimized state cannot target the civilian people of the aggressive state. Because the right to self-defense is limited to eliminating an attack.⁸

Preventive Self-Defense

Before we get to the bottom of this, it's important to know what the concepts of preventive and priority mean first. preventive means the disposal of a low-probability attack. First is an action aimed at eliminating a high-probability fear-threat. That's why, in terms of international law, the priority operation from the preventive operation was more accepted. In both notion, the US claimed that he had the right to eliminate this threat to himself by being thrown there by the United States as a result of the 9/11 attacks. They have called this "pre-emptive" concept to give legitimacy to this intuitive preventive action developed by the United States, which is even more radical than its "preventive" action, which has no place in international law.⁹ Thus, it aims to reduce the reaction sparked by the world public opinion. When we take the concept of self-defense in more detail, we see that "preventive self-defense" takes refuge behind the concept of "classic priority" (pre-emptive self defense). The only exception to the right to self-defense is armed attack. according to the rules of common law, international law and Article 51 of the UN. Just because a state assumes the existence of such a threat over probabilities does not mean that the state can exercise its right to self-defense. In other words, it is not appropriate for international law for the A state to apply in self-defense, saying it would be subject to armed attacks by state B. In this context, it can not be a coincidence that the UN treaty specifically prefers the use of the term "armed attack" rather than the concept of "attack". Because the term "attack" means quite a lot. During the construction of the UN treaty, the participating states did not take a look at the legalization of the right to preventive self-defense. Because they predict that this concept will cause many problems in the future.¹⁰

⁸ Ulaş Karadağ, "Birleşmiş Milletler Antlaşması'na göre Meşru Müdafaa Hakkı"(Right to Self-Defense under the U.N. Treaty), İnönü **Üniversitesi Hukuk Fakültesi Dergisi**, Cilt 7, Sayı 2, 2016, s. 7-10.

⁹ Ahmet Buğra Aydın, "Uluslararası Hukukta Önleyici ve Öngörücü Meşru Müdafaa Hakkı"(Right to Preventive and Foresighted Self-Defense in International Law), Genç Hukukçular Hukuk Okumaları.

¹⁰ Hüseyin Özer, 11 Eylül sonrası ABD müdahaleciliği ve BM sistemi temelinde Uluslararası hukuk(International law on the basis of post-9/11 US interventionism and the UN system), yayınlanmış doktora tezi, Ankara, **T.C. Ankara üniversitesi, sosyal bilimler enstitüsü**, 2010.

¹⁰ Ayşe Özkan "Uluslararası hukukta Birleşmiş Milletler ve Afganistan Operasyonu"(United Nations and Operation Afghanistan in international law), Avrasya dosyası.

Right to Self-Defense Based on U.S. Operation

The only exception to self-defense is armed assault. If we look briefly at the point of armed attack, it is that one state is operating with its regular armed forces to another state for a comprehensive and lasting purpose. In other words, it's invading. For example, Ethiopia's invasion of Somalia in 2010, the Soviet Union's invasion of Afghanistan in 1979, the Israeli invasion of Gaza, the U.S. invasion of Iraq in 2003. However, when a state is subjected to such an operation, it can apply for the right to self-defense. Otherwise, in any case, it is forbidden to exercise the right to self-defense. For example, if a state is subjected to air operations by another state, then it cannot exercise its right to self-defense. Because it's not an armed attack, it's an act of aggression. The United States was subjected to such an attack on September 11, 2001. That wasn't enough for the USA to apply for self-defense. But the United States launched a war against Afghanistan under the pretext of its right to self-defense because the goal of the United States was to invade this country. The United States had many options, such as sanctions, cutting off economic support, or using diplomatic methods to resolve this issue. But the USA didn't do any of that.¹¹

Let's take this operation within the framework of three other criteria that give you the right to self-defense except for an armed attack. 1. The condition of Requirement; First of all, there has to be a need, there should be no way to solve the problem in other ways. Well, didn't the U.S. have other options? For Example sanctions, cut of economic aid and so on. The U.S. didn't do any of these. In other words, the requirement does not give the United States the right to self-defense. 2. the condition of urgency, was there an urgency? No, because all the perpetrators of the attack were dead, there was no way going to be a second attack. Or let's think of it as an act of terrorism, is the U.S. facing a 2nd terrorist attack? No. Therefore, it does not give the United States the right to attack in this benchmark.¹² The U.S. goal of entering Afghanistan, citing the 9/11 attacks, was due to its strategic position. The United States had a chance to have a control over Russia and China, two global powers from Afghanistan, and Iran, India and Pakistan regional powers. If the U.S. goal was to achieve peace in Afghanistan, there would be peace in the country today. Or if it were the fight against terrorism, many terrorist organizations in Afghanistan today would not be operating, especially the Taliban.¹³

¹¹ Ayşe Özkan "Uluslararası hukukta Birleşmiş Milletler ve Afganistan Operasyonu"(United Nations and Operation Afghanistan in international law), Avrasya dosyası.
<https://www.21yyte.org/assets/uploads/files/238-257%20Ayse.pdf> (Erişim Tarihi: 08.11.2019)

¹² David Harris, **Case and Materials on International law**, Sweet&Maxwell, London, 2010, s. 447-450.

¹² دلایل اشغال افغانستان توسط امریکا / بخش دوم **Payam aftar haber sitesi**, 7 Mart 2010.

¹³ دلایل اشغال افغانستان توسط امریکا / بخش دوم (Reasons for the U.S. invasion of Afghanistan/ part two) **Payam aftar haber sitesi**, 7 Mart 2010.

Conclusion

Befor the UN, the right of self-defense was used without limit. because there was no internationally accepted law regulating and limiting it. Although the Society League of Nations and the Paris pact made some initiatives in this regard after world war I, but it was not that much effective. With the establishment of the UN organization after World War II, the right to self-defense has been limited and it has been made clear in what circumstances it will step in. The UN treaty is the first international treaty to regulate the right to self-defense. The first condition requiring the right to self-defense is an armed attack. In addition, the requirements, urgency and proportional conditions developed within the framework of the rules of common law must be provided. Recently, some states have applied for the right to self-defense by exercised their right to preventive self-defense. Preventive self-defense is not an internationally accepted right. Therefore, the operation of the states applying for the right to self-defense, citing this right, is considered inetensified in terms of international law. The U.S. operation in Afghanistan was implemented on the grounds of preventive self-defense. That's why we can't say it's legal. Moreover, shortly after September 11, 2001 attacks, the president of the United States changed the way he made contradictory statements, showing that the operation would be carried out for a different purpose. It also appears that this operation lacks the conditions of armed assault, urgency, necessity and proportionality. Therefore, we can say that this operation was implemented outside of international law. We can also point out that the purpose of this operation against Afghanistan was not to fight against terrorism. Because there's still no security in the country in 19 years. 60% of the country's territory is dominated by various terrorist organizations operating in the country, especially the Taliban terrorist organization. If the U.S. really wanted to fight against terrorism, peace would be made in the country today. The United States has its own interests in this country. Forthermore, the United States has the opportunity to control global and regional actors such as Russia, China, İndia and Iran very easily as long as they are in Afghanistan. That's why the U.S. does not willing to leave the country. As a result of this reseach, the U.S. intervention in Afghanistan was found to be illegal. The basis of this finding is international law and common law..

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¹ دلایل اشغال افغانستان توسط امریکا / بخش دوم (ABD'nin Afganistan işgalının nedenleri/ ikinci bölüm)
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