

# EVOLUTION OF PUBLIC INTERNATIONAL LAW FOR SELF DEFENCE FROM 1837 TO 2019

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## INTRODUCTION

The right to self-defence for a state specified in the United Nations charter is one of the most controversial provisions of rights in modern international law. The customary international law allows nations to exercise the right of self-defence under reasonable restrictions. The right to self-defence is drawn by Members of the United Nations under article 51<sup>a</sup> of the UN charter, which is an exception to the prohibitions stated in article 2(4) towards the use of force or threat against any state. Article 2(4)<sup>b</sup> of the UN charter lays down a general rule to prevent aggression by a state against any other state to disrupt their territorial and political independence. Use of force was prohibited in dealing with disputes with another state. This prohibition under Article 2(4), to the use of power by a state, is aiming to settle the inter-state disputes by peaceful means and to save states from inflicting wars. However, under exceptional circumstances when the state is faced by an armed attack, use of power for self-defence is enabled in Article 51. The legitimate use of force for self-defence by a state is a temporary procedure and subject to constraints and regulations satisfying the principles of international law. These restrictions are in the form principle of necessity of the use of power and principle of proportionality limiting the magnitude of use proportional to the armed attack and only to secure the permissible objective of self-defence [1]. Due its temporal characteristics, the right to use power for self-defence ceases after the United Nations Security Council intervenes to take necessary measures to maintain peace.

Despite these constraints, countries attitude to expand the interpretation of Article 51 led to several legal issues and international conflicts. This became a political cover for many countries to justify their proactive military operations in other countries based on legitimate self-defence. Owing to this, the international jurisprudence divided into two streams of interpretation of article 51. The first stream held the contracting view that right to defence is limited to the case of actual armed aggression on the country whereas the other stream

expanded the extent of the right to defence to include anticipatory defence [2]. After September 11, 2001 terror attacks in the US, international jurisprudence decided to adapt anticipatory defence (pre-emptive defence) as a legitimate defence against terrorist activities, under article 51 of UN charter [3].

While the right to self-defence is aimed at empowering the country to prevent an imminent or ongoing attack on them by an external agency. Lack of objectivity in limiting standards of necessity and proportionality and split among the states about the inclusion pre-emptive defence led to discretion taken by several countries in invoking the right to self-defence to carry out illegitimate military aggression in the number of incidences.

In this paper, we will discuss the provisions and restrictions levied to the member state under article 51 of the UN Charter to take military action in self-defence. Also, the interpretations of this article by the international court of justice in various instances, where its validity was put to the test in light of the idea of self-defence and principles of international law.

## **PRE-CHARTER ERA: THE CAROLINE CASE**

The notion of the right to self-defence by use of force by a state dates back to the famous Caroline Incident in 1837. The British Canadian troops destroyed the American Caroline Boat and sunk in the Niagara Falls. The boat was used by Americans to supply arms and ammunition to the group of Canadian rebels who were fighting against the Canadian government. One American was killed in this raid. The American government saw the act as unprovoked act against a neutral state. While the British government justified the attack by claiming the right to self-defence against the threat emanating from the US territory. The British government was put on trial for this act of aggression.

This incident led to several diplomatic efforts between two states which gave an initial outline to the idea of legitimate self-defence. In Webster-Ashburton Treaty following this incident, US secretary of State Daniel Webster stated that, for the act of anticipatory self-defence to be lawful in the international law, the British government must prove “a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation” [4]. And the intensity of the counteract justified by its necessity must be and proportionate to the necessity and exercised within its limits [5]. These statements set out the definition of

customary International law for the right to use self-defence. The Caroline incident is considered a touchstone to the international laws and right of self-defence.

## **RIGHT OF SELF DEFENCE: ARTICLE 51 OF THE UN CHARTER**

Article 51 of the United Nations Charter upholds the inherent right of states to exercise the act of self-defence against an armed attack. The right of self-defence which was earlier a part of the customary international law was also reproduced in the UN charter and later established by the International Court of Justice [6]. However, it was emphasised by the ICJ that the provisions under Article 51 of the UN charter is based on the natural right of self-defence and hence cannot subsume or supervene international customary law.

Article 51 of the UN Charter states that “nothing in the present Charter shall impair the inherent right of individual or collective self-defence 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” [7]. This allows a member state to defend itself using force in response to an act of armed attack; however, this is not permitted under all the circumstances and subject to the satisfaction of certain conditions.

A member can invoke Article 51 to resort to use of force in self-defence if, it is a necessary defensive measure against the armed attack [7], or it has been authorised by the UN Security Council when it deems necessary to maintain international peace [8].

A member state can exercise the right to use of force in self-defence only when it suffers an armed attack, and the state carries the burden of proof [9]. The framework to define an armed attack was initially not clear in international law. In the US-Nicaragua case [6], ICJ led down categories of acts of armed attacks that could prompt the invocation of article 51, when faced by a member state. These categories include attack by regular armed forces or mercenaries of another state, state encouraging the establishment of armed groups by providing logistics, financial support, and intelligence. Hence proxy attacks carried out by state using armed bands, irregulars, terrorist groups or mercenaries also qualifies as armed attacks by a state and may subject to pushback by a member state for self-defence under Article 51. Along with this, attacks by non-state actors like terrorist organisations were also included in the ‘armed attacks’ category after the 9/11 terrorist attack on the USA [10].

The member states are required to report the measures taken them in exercising the right to defence and the necessity of the same to the UN Security Council. And all the actions by the member states should cease in effect after the security council has taken necessary measures to resolve the conflict and maintain international peace and security. This practice was also exhibited in the international customary law [11].

### ***Constraints in the Rights of Self Defence (Article 51)***

In the Customary International Law formulated after the Caroline Incident, three elements need to be confirmed while exercising the right of self-defence which were, necessity of the response, proportionality of the response and the instantaneous nature of the response. The Principle of Necessity & Principle of Proportionality are key to the right of self in International Law to prevent excessive use of force by a member state. In comparison, the importance of immediacy of response is lesser because of the delay in gathering evidence of the armed attack, attacker's identity, and other intelligence to counter in a targeted manner and present this evidence in the UN Security Council to establish the legitimacy of the act of self-defence [12].

***Principle of Necessity:*** The necessity principle is a necessary evidential and substantive issue to be considered in the right of self-defence. It is important for the member state to substantiate the conclusion on the necessity of the use of power against the armed attack based on reasonable facts known at that time. Any kind of use of power under self-defence will be considered as illegitimate if it has not been deemed necessary by the United Nations security council.

***Principle of Proportionality:*** Principle of proportionality has two major aspects, a. Proportionality of the response to the attack, and b. Protection of humanitarian laws of war in the response.

- a. Proportionality of the response to attack: Estimating the correct proportionality of response can be a difficult task. In the Iranian Oil Platform Case [12], ICJ viewed it necessary to measure the scale of operation which included demolition of two Iranian oil platforms and many aircraft and naval vessels, though there was zero human casualty. This was reckoned as a disproportionate magnitude of counterattack relative to the imminent threat. The types of weapons used in the act of self-defence can be considered as a proportionality criterion. The proportionality principle does not specifically exclude the use of nuclear weapons, but

such a response should be strictly in accordance with the requirements of proportionality [13]. The issue in the incorporation of the principle is that the state undertaking such action will first have to make that determination which will be later deliberated by international courts or UN Security Council.

- b. Protection of humanitarian laws of war in the response: The act of self-defence by a member should be abided by the obligations under humanitarian law. The proportionality principle does not preclude the derogation of human rights in the conduct of self-defence. It was contentious to not explicitly forbid the use of nuclear weapons in the self-defence act. However, the ICJ deliberated over the breach of environmental obligations by member states when using nuclear weapons. The court does not prohibit state from exercising self-defence because of its obligations towards environmental law, however it is advised by states to take into consideration the environmental impact when assessing the proportionate use of force in defending themselves. Environmental impact can be taken into consideration while assessing the action against the principle of proportionality.

## **COLLECTIVE SELF DEFENCE: CASE OF MILITARY ACTIONS BY US AGAINST NICARAGUA**

Nicaragua is a small nation located south of the North American order; it is a member of the UN since 1945. In 1979, the newly formed left-wing government of Nicaragua was being opposed by the supporters of the former government and the National guard. Under the influence of USSR, Nicaragua was providing weapons and logistical support to guerrillas fighting against the neighbouring state, El Salvador. They allowed USSR arms and ammunitions for El Salvador gorilla war to pass through its ports. United States was in support of the El Salvador government and in cold war with USSR. Hence, the US president Ronald Reagan in 1981 acted against Nicaragua by terminating the economic aid to the state. In late 1981, US decided to take direct action against the Nicaragua government. US initially supported the guerrilla army (viz contras) fighting against the Nicaragua government by providing then arms support. It also used direct armed force by laying mines in Nicaragua territorial waters and attacking its ports, oil installations and naval bases.

After these attacks, Nicaragua approached ICJ claiming forceful intervention by US in its state affairs in violation of international law. The US initially did not acknowledge ICJ's jurisdiction



over the case. During hearing, the US claimed that it provided appropriate assistance to El Salvador to respond against Nicaragua's act of aggression, upon request by the state [14]. The US stated that it had relied upon the inherent right of collective self-defence which is provisioned in Article 51 of UN Charter.

In ICJ's ruling, it was stated that the justification by US for collective defence to be reasonable, El Salvador first had to suffer an armed attack. In this case, there was no direct armed attack by Nicaragua on El Salvador either through regular or contra forces. Court held that the necessity of use of force for self-defence was not justified and US acted against the sovereignty of another and violated the international customary law. Article 2(7) of the UN charter states the principle of non-intervention as, "sovereign states shall not intervene in each other's internal affairs and every sovereign state has the right to conduct its affairs without outside interference" [15]. The US was under violation of the non-intervention principle by arming and training guerrillas to fight against Nicaragua government, undermining its sovereignty.

Also, attacks by US on ports, naval bases and oil installations of Nicaragua was infringement of the prohibition of use of force proportionality principle. This confirms that the action taken under collective self-defence would always be subject to the requirement of necessity and proportionality in customary international law.

It is key to note that the ICJ in its judgement made an addendum to the definition of armed attack. The court observed that the armed attack includes, direct action by regular forces across borders or an attack of significant intensity as amount to actual armed attack by sending armed bands, mercenaries, or irregulars (contras) against another state. Also, mere assistance to the rebels by providing weapons does not qualify as an armed attack, but it can be regarded as an intervention by a state in the internal affairs of other state [16]. The court also looked upon the question of whether the US (third state) intervention in this conflict on behalf of El Salvador was authorized under the provisions of collective self-defence. The international law states that, the state who is allegedly under attack (El Salvador) must declare itself as victim of the attack and request the third state (US) for support [16]. The third state cannot exercise right of collective self-defence in favour of the victim state based on their own judgement. In this case, El Salvador did not declare itself as a victim of an armed attack and it did not request for military assistance by the US. Hence, the act of self-defence under Article 51 by US in the Nicaragua case could not be justified in the international law for collective self-defence.

US also did not oblige to the requirement in Article 51 of the UN charter by not reporting the measures taken under the act of self-defence to the UN Security Council. The absence of report questions the legitimacy of using the force for self-defence.

Therefore, the International court held United States culpable for the violation of customary international law on collective self-defence and overrun the provisions of Article 51 of the UN charter. And it was made to pay reparation to the Republic of Nicaragua for the damages on their territory [15].

## **HUMANITARIAN INTERVENTION: INDIAN MILITARY INTERVENTION IN BANGLADESH LIBERATION WAR**

Indian intervention in the Bangladesh Liberation war of 1971 has been considered as a humanitarian intervention to end the Bengali Genocide of 1971 by east Pakistan's military regime. This led to the formation of independent state of Bangladesh.

In 1979, after the fall of military dictatorship by general Ayub Khan in east Pakistan, a democratic election was held, and the Bengali led- Awami league Party won. Despite that, the East Pakistani parliament refused to identify them as a ruling government and the Punjabis-led Pakistani Peoples Party (PPP) held its power. This refusal frustrated the Bengali population and fuelled the Bengali nationalist uprising and self-determination movement called the Mukti Bahini. Fearing the accession by Bengalis in East Pakistan, the west Pakistani Military in leadership of General Yahya Khan launched indiscriminate military operations in East Pakistan targeting the Bengalis. This started a systematic oppression and genocide of Bengalis which killed around 300,00 to 3000000 Bengalis [17]. In response to that the Bengali Secessionist movement was triggered which led to Bangladesh Liberation War. Indian entered the war in 1971 on grounds of humanitarian intervention to seemingly prevent genocide of Bengalis, it was also facing heavy influx of Bengali refugees from East Pakistan. Around 1 million Bengali refugees entered Indian territory placing burden on India's economy and border security which prompted Indian intervention [17]. India initially helped the guerrillas by arming and training them to fight against the Pakistani military, however, it entered in conventional war with the state of Pakistan after multiple provocations by the state. The war ended with the formation of new state of Bangladesh.

Multiple international laws were put to test in India's role in the Bangladesh Liberation war. Pakistan claimed that the conflict between state and civil movements was a matter under their domestic jurisdiction. Therefore, Indian military intervention in the matters of the of east Pakistan was in violation of the principle of non-intervention under article 2(7) and prohibition of use of force under article 2(4). However, Indian justification the act can be an exercise of humanitarian intervention to stop the genocide. Also, due to influx of refugees in the Indian territory frontier stability of Indian was compromised, which is a matter of sovereignty of state [18]. Hence, the Indian intervention can be attributed to the right of collective self-defence under Article 51 of UN charter. However, the use of force in humanitarian intervention is still the matter of ambiguity in International law.

Article 1(2) of the UN charter talks about the right to self-determination of the people of state. By virtue of this they are free to determine the political, socioeconomic status and can ask for political independence or integration with a state [19]. This is also recognized by the UN International Covenant on Civil and Political Rights (ICCPR). Systematic oppression of Bengalis in the East Pakistan calls for right of self-determination of their people. Paragraph 138, 139 of the UN World Summit Outcome Document of 2005 states the concept of Responsibility to Protect, where the member state is liable to preserve welfare and protect its people from atrocities, war crimes or genocides. In case the state is failing to fulfil its responsibility to protect its citizens, the residual responsibility shifts to the broader community of member state to intervene on humanitarian grounds [20].

The right of self-determination of Bengalis in East Pakistan and the residual Responsibility to Protect the people of other state by the community member (if the state fails to do so) was a defence for Indian authorities to carry out the armed intervention in East Pakistan.

## **THE RIGHT OF SELF DEFENCE AGAINST TERRORISM: CASE OF 9/11 TERRORIST ATTACKS AND ITS AFTERMATH**

Till 2011 the general view in international community was that the terrorist attacks by non-state actors should be combated through domestic or international justice system. Many states did not accept the notion of calling a terrorist attacks by private party as a to be called as armed attacks to invoke the right of self-defence. And hence any attack claiming self-defence, on the territory of another state and targeting the terrorist group responsible for armed attack would



not be considered valid under the right of self-defence. In 1986, United States secretary of State G. Shultz showed resentment against the prohibition under international law, restricting states from using forces against terrorist organizations in international waters or on the soil of other nations. This motion however did not get any support from member states. Also, prior to 9/11 attacks, the test for attribution of the state with non-state terrorist state group's needs 'effective control' of the state over these terrorist groups [21]. Just supporting these states by arms and weapons will not establish the attribution of state to non-state terrorist groups.

After 9/11, 2001 terrorist attacks on the World Trade Centre by Al-Qaeda, an Afghan terror group, right of self-defence was expanded to be used against the terrorist organizations. This led to several developments in International law on self-defence against terrorist attacks. In the wake of these attacks, a UN Security council meeting was called, and Resolution 1368 & 1373 (2001) was passed condemning the violent attack and asking international communities to make efforts on preventing and suppressing these terrorist attacks [22]. On September 12, 2001 NATO identified the terrorist attacks on WTC as 'armed attack' and invoked collective defence under article V of Washington treaty.

In October 2001, United states launched a unilateral missile attack on terrorist base in Afghanistan. UK also joined US in carrying out these attacks. The US claimed these attacks to be an act of self-defence. This claim on right of self-defence against terrorists got almost a unanimous international support barring states like Iran and Iraq. The US also provided relevant evidence to prove that the attacks were linked to Al-Qaeda [22]. This led to significant change in understanding of the 'armed attack' requirement in the international customary law. It gave rise to new principles in the international law, which expanded the right of self-defence against non-state terrorist groups in response to armed terrorist attacks. The new principle recognised the pre-emptive nature of the right of self-defence against terrorists.

Another such principle is related to the attribution of states to these terrorist groups. After 9/11 attacks the threshold for attribution to states for hosting or tolerating terrorist groups in their territory is lowered. Hence, support or harbouring of any non-state terrorist organizations by a state will make the state responsible for attacks by these groups. And the victim state can exercise the right of self-defence by using force against these terrorist groups located in the hosting state.

These use force under the right of self-defence against terrorism however is subject to number of limiting condition. Minor terrorist attacks which are not comparable to the scale of 9/11 attacks would still be considered as criminal acts and not armed attacks. Also, actual attack by terrorists should have occurred to invoke the right of self-defence. Also, the principle of necessity and proportionality under international law holds true for self-defence against terrorist groups.

## CONCLUSION

The right of self-defence is basically derived from the customary international law after the Caroline incident and Article 51 of UN charter of 1945. The Article 51 of the UN charter gives inherent right to the member states of UN for individual or collective self-defence in case of an armed attack. The right of self-defence allows use of force under some prerequisite conditions such as the occurrence of armed attack on the state and justification of necessity of use of power. Also, the intensity of use of power is proportional to the magnitude of threat faced by the victim state. These acts are regulated by the UN security council and the International court of justice in case of conflicts with the expressed law.

Despite the number of jurisdictions placed, the right was interpreted and hence exercised beyond its limitations in practice. Definitions of victim state, aggressor, armed attack, and principles of the international law on self-defence has changed quite often over the years. These also lead to various discrepancies in interpretations of these definitions. Due to inherent vagueness in the principle of proportionality, US led a disproportionate attack on Nicaragua claiming the right to self-defence. This case also concreted the anticipatory nature of the provision of self-defence. Exercise of the right of collective self-defence under humanitarian grounds was seen in the case of Indian intervention in Bangladesh liberation war. After the 9/11 terrorist attack on WTC, US struck an attack on the terrorist group which was located in Afghanistan. This attack was widely accepted by international community which led to expansion of right of self-defence to permit use of military actions against the terrorist groups hosted by other countries I their territory.

Whether the expansion of the right of self-defence would prove to be desirable in containing the new threats to the international system or would be exploited by countries to satisfy their territorial goals remains to be seen. Right now, it can be said that the current idea of self-

defence is broader than when it was originated. The provision of pre-emptive self-defence carries the risk of exploitation by the states. In order to prevent this exploitation of boundaries, it is necessary to that the use of power in the right of self-defence should be exercised under the authorization of UN security council. And the exemption for taking unilateral action in self-defence should be considered only in exceptional circumstances.

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