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# Right to Self-Defence of States under International Law: A Conceptual Understanding

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## ABSTRACT

*Right to Self-defence is recognized as an inherent right of sovereign states in the realm of international law. Under Article 51 of the UN Charter, the member States may resort to the use of force as: i) a self-defence against an armed attack or ii) if use of force has been authorized by the Security Council. However, exercising right to self-defence comes with its own limitations.*

*This paper is an attempt to understand the concept of self-defence, its theoretical and legal dimension, and study its application and exceptions. The paper further provides an insight into two key concepts: legitimate right to self-defence and pre-emptive self-defence under international law. Moreover, the paper looks into different case laws decided by the International Court of Justice (ICJ) in relation to self-defence. Various secondary sources like books, research articles, and journals has been studied for the purpose of writing this paper.*

**Keywords:** *Use of Force; Right to Self-defence; International law; Armed attack.*

## I. INTRODUCTION

The Charter of United Nations was enacted to establish International Peace and security. After the end of Second World War, the drafters of UN Charter sought to confine the use of force to extremely restricted conditions, and avoid any unprovoked and forceful activity against a foreign State (Schachter 1991, 106-7). Article 2(3) and 2(4) of the UN Charter underlines the settlement of disputes between states by peaceful means, and prohibits the threat and use of force. Nonetheless, there certain special cases where the use of force can be lawfully advocated. According to Chapter VII of UN Charter, the circumstances where the member states of United Nations can resort to the use of force are:

1. Self-defence / Collective Self-defence

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## 2. Authority of Security Council

Self-defence, under UN Charter, can be understood as a legitimate reaction to the ‘armed attack’ by a state, to protect its sovereignty, territorial integrity, and political independence. The right to self-defence of State enables it to lawfully use force for the purpose of protecting its existence. However, states can only exercise this right in one particular circumstance – an armed attack. Furthermore, the state needs to inform the UN Security Council and must demonstrate that the use of force was necessary, immediate, and proportionate.

## II. HISTORICAL BACKGROUND ON SELF-DEFENCE

Traditionally, the right to self-defence is believed to be originated from the concept of defensive use of force. It was the sovereign right of a state to exercise defensive use of force for protecting itself, and thus, the origin of self-defence is related with protection of state sovereignty (Alder 2011, 115).

However, the modern origin of self-defence goes back to the *Caroline*<sup>2</sup> dispute of 1837 (Shaw 2008, 1131). The case arose while Canada was still under British rule during the first half of the 19th century. During that time, an armed rebellion occurred in Canada. The British suspected a ship, moored on the American bank of Niagara River, as being used by certain individuals for the purpose of supplying arms to Canadian rebels. British forces crossed the river, entered into the US territory, and attacked the ship. They killed twelve Americans and burned the ship. This incident created tension between US and Britain. The British forces tried to justify their attack as an act of self-defence. Later, the US Secretary of State, Daniel Webster, outlined the requirement of valid act of self-defence as:

*It will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.....(and) did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity and kept clearly within it* (Webster 1983, 42)

The case of *Caroline* is used for the interpretation of customary right to self-defence. The principles expressed by Daniel Webster has established the foundation of modern practice of right to self-defence in international law (Triggs 2011, 613-14). His statement introduced three major elements of self-defence as necessity, immediacy, and proportionality. It was only after the *Caroline* dispute where a jurisprudence regarding the practice of self-defence as an act of self-preservation got cemented, which could only be permitted in special circumstances

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<sup>2</sup> The *Caroline* Case (1840) 29 BFSP 1137

(Brownlie 1963, 729).

Later in 1945 A.D., at the San Francisco Conference, right to self-defence was placed under Article 51 which then formally became the part of international convention. Although the United Nations was formed to ensure international peace and security, it made the use of force was legally permissible under (a) the exercise of the right to self-defense, and (b) the Security Council's authorization. After the adoption of UN Charter, the right to self-defence became the subject of legal literature and scholarly writings (Kittrich 2008, 195).

### III. RIGHT TO SELF-DEFENCE IN INTERNATIONAL LAW

It has long been recognized under international law that it is an inherent right of a state to use force to defend itself, if an armed attack occurs against that state (Brownlie 2008, 742). Caroline incident resulted in the establishment of the use of force for the purpose of self-defense. This was a customary law of self-defence which involves use of force not only in the response of armed attack but also to counter an imminent threat of an armed attack. Using force in order to counter imminent threat of an armed attack is also known as anticipatory self-defence (Shah 2007, 111).

At present, Article 51 of UN Charter guarantees the 'inherent right' of the states to engage in individual or collective self-defence. Article 51 states:

*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. Measures taken by Members in the exercise of this right of self-defence 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.*

Principle of self-defence as mentioned in Article 51 is 'linguistically' understood to be narrower than the customary concept of right to self-defence. This is because, Article 51 recognizes self-defence only after an armed-attack has been occurred against the state. However, the customary concept of self-defence, as mentioned by Daniel Webster in the Caroline case, acknowledges anticipatory self-defence too. This has eventually created a room for discussion among scholars regarding the interpretation of Article 51.

The first group of scholars attempt to interpret the text literally. They interpret the text

restrictively and limit the scope for the use of force. They claim that only in reaction to an armed attack can a state exercise its right to self-defence. In order to use force in the name of self-defence, there has to be an actual attack creating actual victim, else the use of force would be illegitimate (Shah 2007, 111).

The second group of scholars go for wider interpretation of the text. They acknowledge that states may exercise their right to self-defence not only in order to counter an actual military attack, but also in circumstances where their political independence, sovereignty, and national security are considered to be imminently threatened. They argue that the phrase ‘inherent right of individual or collective self-defence’ mentioned in Article 51 is not only a general principle of law, but is the pre-existing customary international law and state practice which now has been codified in UN Charter without seeking to exhaust it (Shah 2007, 111). In the case of *Nicaragua*, the requirement of customary international law and state practice for purpose of self-defence has been further endorsed by the International Court of Justice (ICJ) as:

*[T]he United Nations Charter . . . by no means covers the whole area of the regulation of the use of force in international relations . . . Article 51 of the Charter is only meaningful on the basis that there is a ‘natural’ or ‘inherent’ right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter.*<sup>3</sup>

The above statement from ICJ illustrates that the right to self-defence exists as an inherent right of state under both customary international law and UN Charter.

#### **IV. LIMITATIONS ON THE RIGHT TO SELF-DEFENCE**

Article 51 of UN Charter acknowledges the right of states to use force in self-defence. However, right to self-defence isn’t absolute in nature. There are some conditions associated with it. The conditions are:

- a) Use of force must be in response of an armed-attack (Greenwood 2011)
- b) State needs to fulfill elements like necessity, proportionality, and immediacy (Martyn 2002)
- c) Reporting needs to be done to the Security Council (Greenwood 2011)

These conditions have been elaborated below:

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<sup>3</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* [1986] ICJ Rep 14, 93 (‘*Nicaragua case*’).

### a) Facing an Armed Attack

A significant precondition for exercising the right to self-defence is facing an armed attack. The term ‘armed attack’ hasn’t been explicitly defined in the Charter. For general comprehension, ‘armed attack’ may be understood as ‘a physical occurrence of an attack’ by one state breaching the borders of another. However, under international law, there is still no clear concept of armed attack. Due to this, there lies some uncertainty regarding what activities constitute an ‘armed attack’.

However, the International Court of Justice in the Nicaragua case has made an effort to define an ‘armed attack’ as:

*[A]n armed attack must be understood as including not merely action by regular armed forces across an international border, but also ‘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’ (inter alia) an actual armed attack conducted by regular forces, ‘or its substantial involvement therein.’*

For this description, the ICJ took reference of definition of aggression mentioned in Article 3(g) of General Assembly Resolution 3314 (XXIX). The Court has recognized GA Resolution to reflect customary international law.

The above definition of an ‘armed attack’ got reaffirmed by the International Court of Justice in the Oil Platforms case where it held that the state can resort to the use of force in self-defence only in response to ‘the most grave forms of the use of force’<sup>4</sup>.

### Who can commit an armed-attack?

The source of an armed attack is not expressly mentioned in Article 51 of the UN Charter. It states:

*“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.....”*

The UN Charter was primarily drafted for the purpose of governing relations between the States and thus, it was assumed that an armed-attack would emanate from a state (Dinstein 1994, 239-40). But, the ICJ while defining an ‘armed-attack’ in *Nicaragua* case has stated that the attack could be carried out by a state actor or a non-state actor<sup>5</sup>.

Moreover, the international law recognizes the conduct of a non-state actor to be attributable

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<sup>4</sup> *Oil Platforms* case (Islamic Republic of Iran v USA) [2003] ICJ Reports 161

<sup>5</sup> *Nicaragua* Case

to a state if there lies an adequate close proximity between the two entities<sup>6</sup>.

The UN Security Council declared 9/11 incident as an armed-attack and confirmed the right to self-defence against non-state actors (terrorist groups) in resolution 1368 and resolution 1373. In order to invoke right to self-defence against non-state actors, the attack must be of a particular scale and must have effect in terms of casualties and damages (Shah 2007, 111). The states cannot exercise their right to self-defence in case of non-military actions and threats like economic and social aggression, even if their impacts are serious and damaging (Greenwood 2011).

### **b) Necessity, Proportionality, and Immediacy**

The three main pillars of the 'Caroline Doctrine' are Necessity, proportionality, and immediacy (Gracheva 2013). They are well established as a requirement of self-defence both under customary international law as well as in international conventions.

#### **Necessity**

Necessity means that the state didn't have any other effective response available to deter the armed attack, except resorting to the use of force (Van de Hole 2003, 75). The state must first look at other non-forceful options such as, use of diplomatic avenues, reparations etc. before invoking their right to self-defence. The condition of necessity requires confirmation that the conflict cannot be resolved through peaceful measures. On the basis of proven evidence, it must be assumed that an armed attack is imminent and needs a response. (Shaw 2003, 1031).

In case of attacks by non-state actors, the state seeking to act in self-defence needs to explore whether or not the territorial state can take appropriate action in order to stop the non-state actor from launching further attack. In simple words, necessity implies that the use of force for self-defence should be used only if it is 'necessary' after exhaustion of all available remedies.

#### **Proportionality**

This element measures the extent of the use of force against an armed attack. Proportionality simply means that the use of counterforce must be limited to the elimination of the threat and should not exceed the amount of the attack (Shah 2007, 111). It implies that the use of force must be limited to the neutralization or abolition of an armed attack against which a state is defending itself (Gutman and Rieff 2007, 341).

Proportionality as a criterion of self-defence also considers the type of weaponry used in

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<sup>6</sup> International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, 53rd sess, UN Doc A/55/10 (2001) available at, <[http://www.un.org/law/ilc/texts/State\\_responsibility/responsibility\\_articles\(e\).pdf](http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles(e).pdf)>.

response of an armed attack. However, it doesn't require that the weapons used for the purpose of self-defence to be the same as that of an attack.

### **Immediacy**

Immediacy means that the response to an armed attack needs to be instant. The theory of immediacy, however, cannot be explicitly clarified, since it can take some time for the state officials to decide in order to respond to an armed attack. Therefore, the use of force can still be lawful if the delay has been objectively justified (Dinstein 1994, 242-43). The State practice suggests that a reasonable delayed response is acceptable where attacker's identity needs to be gathered or intelligence and military force of the state needs to be given appropriate order to strike back in a targeted manner (Martyn 2002).

### **c) Report to the Security Council**

Article 51 requires any action taken in self-defence by a member state to be 'immediately reported' to the Security Council. This provision has been mentioned in the Charter so that the international community can evaluate whether an armed attack has occurred or not, and further evaluate if the actions taken by the victim state in self-defence has met the elements like necessity, proportionality, and immediacy or not. Reporting to the Security Council is a completely new concept that did not have any roots in the Customary International Law.

The ICJ in *Nicaragua* Case has mentioned that it is vital for the victim state to report that it has acted in self-defence to the Security Council, in order to legitimately justify its use of force<sup>7</sup>.

## **V. COLLECTIVE SELF-DEFENCE UNDER INTERNATIONAL LAW**

Article 51 of UN Charter also guarantees inherent right of states to involve in 'collective self-defence'. The provision allows victim state to seek assistance from other states when it faces an 'armed attack'. But the question might arise as to when other states can legitimately assist a victim state under the ambit of Article 51.

In order to invoke collective right to self-defence, the assisting states cannot unilaterally decide to repel and intervene a perceived armed attack. *Nicaragua* case can be a prime source in order to understand the concept of collective self-defence. In this case, ICJ had emphasized on the principle of collective self-defence. The court stated that, in the absence of a request by the victim state, there is no rule in international law which allows the exercise of collective self-defence. The state who has been assisted must consider itself to be a victim state before looking

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<sup>7</sup> *Nicaragua* Case

for assist from other states.

More details of *Nicaragua* case and collective self-defence has been mentioned in the latter part of this paper.

## VI. ROLE OF INTERNATIONAL COURT OF JUSTICE (ICJ) ON SELF-DEFENCE

As stated in Article 92 of the Charter of the United Nations, the International Court of Justice (ICJ) is the principal judicial organ of the United Nations. It serves two major purpose, the first one being the settlement of disputes among the UN member states, and the second one is providing Advisory opinions to the organs of UN on any legal questions.

The interpretation of the principle of right to self-defence has been done by International Court of Justice (ICJ) in number of cases. Some of the important cases has been discussed below:

### 1. *Albania v. United Kingdom (Corfu Channel Case)*<sup>8</sup>

In May 1946, the Albanian force fired shots on the British Royal Navy ships while the ships were attempting to cross the Corfu Channel. No any casualties happened then. But in October, the British destroyers named *Saumarez* and *Volage*, while passing through the Corfu Channel, struck mines and were heavily damaged. 44 sailors died in this incident. In response, the Royal Navy engaged in mine sweeping missions in the Albanian territorial waters without the permission of Albanian government.

The issue went before the ICJ and the United Kingdom justified their minesweeping operation as an act of self-defence to protect the British ships and the lives of sailors. The UK dismissed the claim that it was violating Albania's territorial integrity and political independence.

The Court rejected UK's argument and unanimously held that an intervention such as minesweeping operation of the UK 'cannot.....find a place in international law'. Accordingly, UK was found not to have validly acted in self-defence while sweeping for mines in the territorial waters of Albania.

### 2. *Islamic Republic of Iran v. United States of America (Oil Platforms Case)*<sup>9</sup>

The incident occurred between 1980 and 1988. During that period, Iran and Iraq were engaged in a civil war. In 1984, Iraqi ships began to attack oil tankers on their way to and from Iran in the Persian Gulf. In retaliation, Iran too began to attack Iraqi ships which later became known as the Tanker War. Retaliatory strikes of Iran were often focused on neutral ships that were

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<sup>8</sup> *Corfu Channel (United Kingdom v Albania)* (Judgment) [1949] ICJ Reports 4.

<sup>9</sup> *Oil Platforms case (Islamic Republic of Iran v USA)* [2003] ICJ Reports 161,

sailing towards the ports in Kuwait or Saudi Arabia.

In October 1987, US-flagged oil tanker was struck by a missile nearby the Kuwaiti harbor. In response, the US attacked and destroyed two offshore Iranian oil station assuming that the attack was launched from a nearby Iranian oil platform. In 1988, the US further destroyed two Iranian oil platforms when another US vessel struck a mine in waters near Bahrain.

The issue was brought before the ICJ in 1992 by Iran, complaining the US attacks on the oil platforms in the Persian Gulf. The Court held that the US didn't act validly in self-defence. It further stated that the attacks on the Iranian oil platforms couldn't be shown as a justifiable response to an armed attack on US ships. The reason behind this is that it wasn't *necessary* for the US ships to respond by attacking on the Iranian platforms. Furthermore, attacking on four oil platforms wasn't considered to be a *proportionate* act. Since the attacks on the oil platforms didn't comply with the two major elements of self-defence i.e. *necessity* and *proportionality*, the court held that the conduct of United States was against the principle of self-defence.

### 3. **Nicaragua v. United States**<sup>10</sup>

US conducted armed activities against Nicaragua which was mainly carried out through the borders of Honduras and Costa Rica. Attacks against Nicaragua included support to 'Contras' (anti-government rebels) for fighting against Nicaraguan government, mining of Nicaraguan ports, attack on ports, oil installations, and naval base. The United States tried to justify its action stating that it acted in collective self-defence for the benefit of El Salvador because Nicaragua had been harboring the communist opponents of the El Salvador's government. (Gunaratne 2012)

The case went before the International Court of Justice (ICJ) and the court ruled in favor of Nicaragua. The court held that by helping the Contras and by mining Nicaraguan ports, the US had violated international law. The court further stated that to exercise collective right to self-defence, El Salvador must have suffered an armed attack which was not the case. Talking about collective self-defence, the court further mentioned that the states cannot engage in the acts of collective self-defence unless the target of an armed attack seeks for assistance. Moreover, if the assistance has been requested by the victim state, the intervening state needs to notify the Security Council in accordance with Article 51 of the UN Charter. Also, the court confirmed that the States exercising right to individual or collective self-defence must comply with the elements of necessity and proportionality as determined by Customary International Law.

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<sup>10</sup> Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Jurisdiction and Admissibility, 1984 ICJ REP. 392 June 27, 1986

Lastly, United States was bound to make reparation to Nicaragua for the damages caused.

#### 4. *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*<sup>11</sup>

United Nations General Assembly asked for an advisory opinion of the court on whether or not are the states permitted to use nuclear weapons under International law?

The Court held that neither customary nor conventional international law has provided for a substantive and universal ban on the threat or use of nuclear weapons. The court noted, however, that the threat or use of nuclear weapons, contrary to Article 2(4) and Article 51 of the Charter of the United Nations, is unlawful. The court claimed that it is a rule of customary international law to exercise right to self-defence adhering to the conditions of necessity and proportionality.

Also, the court said that there wouldn't be automatic prohibition on the use of nuclear weapons while adhering to the principle of proportionality. Furthermore, court mentioned that the deployment and threatened use of nuclear weapons can be permissible only in response to proportionate threat.

## VII. ANTICIPATORY SELF-DEFENCE

The provision of anticipatory self-defence hasn't been mentioned anywhere in Article 51 of UN Charter. This has led to number of controversies and scholarly debates. The question of anticipatory self-defence arises when there hasn't been an act of aggression, but the state believes that an armed attack is imminent. Advocates of anticipatory self-defence argue that the states must be allowed to use necessary and proportionate force in order to prevent imminent armed attack on its territory (McCormack 1991, 35-37).

Literal Interpretation of Article 51 of UN Charter suggests that the state needs to face an 'armed attack' in order to legitimately use force in self-defence. Thus, the language of Article 51 provides no space for anticipatory self-defence.

This has forced the supporters of anticipatory self-defence to cite customary international law in order to support their argument (Brownlie 1963, 729). They refer to the statement of US Secretary of State Daniel Webster, in the *Caroline* case where he said that the state can exercise anticipatory self-defence, provided that the adopted measures is instant, overwhelming, and there is no moment for deliberation (Brownlie 1963, 729).

Furthermore, the concept of anticipatory self-defence has been supported by the UN High-

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<sup>11</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 ('*Nuclear Weapons (Advisory Opinion)*').

Level Panel on Threats, Challenges and Change. In its December 2004 report, the panel outlined:

*A threatened state, according to long established international law, can take military action as long as the attack is imminent, no other means would deflect it and the action is proportionate. The problem arises where the threat in question is not imminent but still claimed to be real; for example the acquisition, with allegedly hostile intent, of nuclear weapons making capability.*<sup>12</sup>

This report tends to support the position that, in order to stop an armed attack on its own territory, the state could practice anticipatory self-defence.

### **VIII. PRE-EMPTIVE SELF-DEFENCE UNDER INTERNATIONAL LAW**

The pre-emptive self-defence theory grants the state the right to use military force to nullify an emerging threat to its sovereignty or territorial integrity. Pre-emption differs from anticipatory self-defence because, in order to invoke the rationale of a pre-emptive action, an armed attack does not have to be imminent (Greenwood 2004, 7-8). In other words, the state acting in pre-emptive self-defence can simply respond to a perceived military threat and need not expect an armed attack to occur (Bothe 2003, 230). Thus, this may lead to a military action against a state or a non-state actor before there is any proof that an attack is imminent.

The pre-emption principle is well beyond the range of Article 51 of the Charter of the United Nations. This is because, the perceived threat doesn't have to be imminent or even planned for pre-emption. The very nature of pre-emptive strike suggests that the attack isn't a defensive action, as there is no imminent threat to which a state is responding. Pre-emption is contradictory to general principles of international law and is not an act of self-defense, but rather a strategy of threat and aggression.

### **IX. CONCLUSION**

The Charter of United Nations is still the main source of international conventional law that evaluates the use of armed forces. Under International law, there is no concrete and crystal clear answer on whether or not the use of force is legally valid. The answer depends on the context and the purpose behind the use of force.

Despite the existence of a general prohibition on the use of force, there are a number of exceptions on it. Under Article 51 of the UN Charter, if an armed attack occurs against a state, it is an inherent right of that state to defend itself. A state exercising its right of self-defence

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<sup>12</sup> UN Doc. A/59/565, 2 December 2004, 54.

must immediately report the incident to the Security Council. The exception of self-defence extends beyond an individual state responding to an imminent threat to its territorial integrity which is also understood as anticipatory self-defence. Article 51 of the UN Charter permits collective self-defence, but the target state must explicitly request assistance and regard itself as the victim of an armed attack. However, the exception of self-defence does not extend to a pre-emptive attack on a foreign state where there is no apparent imminent threat.

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