

Overview of the Doctrine of Self Defence

The doctrine of Self-Defence is commonly any act in response to an imminent threat of death or grave bodily harm to person or property. This right is however not just limited to individuals and is also available to States. The concept of Self-Defence has been an important doctrine of IL which has again gained importance in the light of growing acts of illegal use of force threatening world peace and security. Thus it becomes important to clearly understand this doctrine as it exists today and its application to the modern world.

For this purpose the researcher will first explain the entire concept of Self Defence as it existed under CIL and as it exists under Article 51 of the UN Charter. In addition, we will try to deal with the several controversial interpretational issues of this doctrine and its application.

THE DOCTRINE OF SELF-DEFENCE UNDER INTERNATIONAL LAW

Traditional:-

The traditional law of self-defence was interpreted in a very broad way before the entry into force of the Charter of the UN. The 19 C treaties did not generally prohibit the use of force, and thus self-defence required no definition. At those times, states enjoyed a right to wage war without any limitations.

Recourse to war to solve international controversies was outlawed by the Paris Pact (the Kellogg-Briand Pact) in 1928, although the two treaties lacked a definition of self-defence and the concept was not even mentioned. However, in the diplomatic correspondence before the ratification of the Pact, the UK made clear that it ***did not*** impair the right of self-defence, which was a right to defend the security of any part of the British Empire.

Modern:-

- This situation completely changed with the drafting of the UN Charter. Not only did it prohibit the threat and use of force, thus shifting the focus from ***war to force***, but also defined self-defence as a right which could not be impaired by prohibitions on the use of force.
- According to the original system of the UN Charter, collective security system was in the hands of the SC. States, if attacked, were permitted to act in self-defence against the attacker until the SC intervened. The framers however failed to substantiate the concept of self-defence, and nowadays, States exercise their right of self-defence to justify use of force for mainly three reasons:
 - Use of force has been completely prohibited by the Charter, and accordingly, self-defence is thus invoked even though it is in effect a violation of the UN Charter;
 - States have been obliged to rely on their own means in defending themselves against external aggression due to the collapse of the UN security system; and
 - Modern constitutions generally forbid war and use of force in violation of IL, and hence, self-defense helps overcome these constitutional constraints.

- To avoid accusations of aggression, states rely on Art 51 of the Charter by claiming an inherent right of self-defence, which provides in part: "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 UN, until the SC has taken measures necessary to maintain international peace and security" or a right of "humanitarian intervention" under CIL, when they lack express authorization from the Security Council acting under its enforcement powers provided for in Chapter VII to use force against another State.
- From the above discussion, Self-defense can best be understood by its defining features.
- ✓ First, under Art 51 of the UN Charter, it is described as a "right" not an obligation and therefore States generally have the freedom to exercise it.
- ✓ Second, it is recognized as a "legitimate form of armed self-help", thus allowing States to lawfully use force on their own authority.

- ✓ Third, it is available either individually or collectively and hence it can be invoked by a single state, by two states jointly, or under a multilateral arrangement.
- ✓ Fourth, it is not confined to survival situations and hence self-defense may be lawful resorted to even in non-catastrophic scenarios.

Moreover, Under IL, self-defensive force must observe two chief principles: ***necessity and proportionality***.

- ❖ **Necessity** requires that states resort to force as a sole resort available to defend itself against a threat. This implies that a state must exhaust all other measures to avert the use of force, such as diplomatic negotiations, imposing economic sanctions or unarmed intervention by the UN SC. Furthermore, states must also exhibit both that the external threat is real and that peaceful means have been exhausted.

❖ **Proportionality** is the second fundamental principle underlying self-defense and its meaning depends on whether it is applied in the context of jus ad bellum or jus in bello. In cases of jus ad bellum, proportionality does not refer to equality between the quantum, intensity or means of force, rather it is understood as the degree of force strictly required to repel a given threat.

The Caroline Doctrine:-

The Caroline incident is generally regarded as the reference point for any discussion on self-defence, as well as the criteria governing its use. In 1837, US Secretary of State Daniel Webster articulated a definition of self-defence, which evolved into CIL.

The Caroline was a US steamboat attempting to transport supplies to Canadian insurgents. A British force interrupted the Caroline's voyage, shot at it, set it on fire and let it wash over Niagara Falls. Webster said that Britain's act did not qualify as self-defence because self-defence is only justified "if the necessity of that self-defence is instant, overwhelming, and leaving **no** choice of means, and no moment for deliberation." This incident is important primarily for the following reasons:

- First, to limit the exercise of the right to self-defence to situations where the threat is real, the response is essential and proportional, and peaceful means have been exhausted,
- Second, it laid down the general framework for exercising self-defence, including anticipatory self-defence. Acceptance by British and American governments of self-defence as relevant in situations of necessity in anticipation of a threat of attack which was 'instant, overwhelming, leaving no choice of means and no moment for deliberation' clearly indicates that ***anticipatory self-defence*** formed part of traditional customary law.
- ❖ In general, ***the Customary right of self defence permits the use of force in any of the following circumstance:-***
 - ✓ In response to and directed against an ongoing armed attack against state territory e.g. Kuwait against Iraq in 1990
 - ✓ In anticipation of an armed attack or threat to state's security so that state may strike first with force, to neutralize an immediate but potential threat to its security e.g. Israel's strike against an Iraqi nuclear reactor in 1981

- ✓ In response to an attack (threatened or actual) against state interests, such as territory, nationals, property, and rights guaranteed under IL e.g. Israel use force against Uganda (Entebbe) in 1977, the US led interventions of Afghanistan and Iraq to counter the terrorist threat.
- ✓ Where the attack **does not** itself involve measures of armed force, such as economic aggression and propaganda

NB. All of the above required is that there is an imminent and overwhelming necessity for forceful action.

To sum up, Customary right of self defence **is not** narrow exception to the general ban of the use of force. It allows armed response in a variety of situation, so long as there is some element of defence of the state. Importantly, Customary right of self defence may go beyond the right guaranteed by the UN Charter.

Art 51, UN Charter:-

- The UN Charter, on the other hand, so as to avoid the horrors of the World Wars, seeks to establish a world order free from armed conflict. It requires States to peacefully resolve their conflicts. The purpose of the UN is to save the succeeding generations from the scourge of war. "All members are required to settle their international disputes by peaceful means and to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." To that end, the UN Charter sought to limit when states could act in self-defence.
- In other word, the UN Charter come up with restrictive approach to the use of force. It is argued that the customary wide right of self defence is **no**

Thus, according to Art 51 of the UN Charter, the right to self defence available only when ***an armed attack occurred***. Specifically, the right to use force ***is not*** available in anticipation of an attack or when threat is non violent or to protecting any thing other than state territory.

To sum up, Art 51 of the UN Charter limits the scope of that right. Self-defence is now only allowed in response to an 'armed attack' against a state and ***does not*** include anticipatory self-defence. Any use of force in self defence shall be reported to the SC immediately, which shall take necessary measures. The right to use force in self-defence thus seems an independent but transitory right and hinges on the occurrence of an armed attack. Of the four situations permissible under the customary right of self defence, only the first one remains.

As a result of the above conflicting view, there is considerable doubt as to the extent of self defence under the current IL.

However, many states have claimed the wider right of self defence in recent instances of the use of force and there are points that can be made in its support:

1. It is argued as before that Art 2(4) **did not** take away the right to use force absolutely, therefore, the customary right of self defence have never been abolished. It remains extant.
2. Art 51 was never intended to be a definitive statement of the right of self defence
3. The customary right of self defence is actually reserved by Art 51, as of reference therein to the **“inherent right”** and this is taken mean pre-existing in customary law, although it could also mean that self defence is an inalienable right of statehood that can never be denied.
4. Art 51 **does not** say that self-defence is only available if an armed attack occur and it **does not** indicate that the armed attack must be made by a state

- These are the powerful arguments and they do support the view that Art 51 was never intended to narrow such right of self defence that predated the UN Charter.

Other Legitimate Uses of Force

➤ **Invitation and Civil War**

It is quite clear that one state may request the deployment of another state's military force in its territory. E.g. in 1958, Jordan invited G.Britain, in 1983 Granada allowed the US to deploy

➤ **Reprisals**

It is an act of self-help by injured state responding to an act contrary to IL by the offending State.

Attack by US on Iraq in 1993 in retaliation for

Customary practice to the protection of nationals at abroad appears to have identified four preconditions:-

- The host state must be unable or unwilling to protect the nationals
- The nationals must be in serious and immediate danger of life threatening harm
- Use of force must be the last resort
- The force must be proportional and must vacate from the territory of the host state as soon as possible

➤ **Humanitarian Intervention/HI**

➤ **Self-determination**

The use of force to achieve self determination and for the assistance of national liberation movement has been claimed on the ground that it further s the principle of the UN Charter.

➤ **Hot Pursuit**

It is used to justify armed incursions into the territory of neighboring states for the purpose of destroying the military base of guerrillas who have launched or will launch, attack against the states.