



SELF-DEFENCE UNDER CUSTOMARY INTERNATIONAL LAW

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Abstract

The Charter of the United Nations was thought to establish a formative or detriment an international peace and security. According to the Article 51 of the United Nations Charter “Nothing in the present Charter shalom part inherent to individual or collective self-defense if an armed attack occurs.” However, Article 51 does not propose a legal definition of the conduction side deadnamed attack or the commencement of such an attack. As result of different constructions, thinner have been arising and continuing to change respond to seton new situations and threats.

Keywords: Self-Defense, Armed Attack, Threats, International, Law.

INTRODUCTION

This chapter explores self-defense as a concept in customary international law. However, the excuses provided by states invoking self-defense under international law are often unjustified. Article 51¹ of the UN Charter takes a restrictive approach to self-defense, disregarding expert opinions and instead relying solely on state practice. This narrow interpretation allows

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¹ U.N. Charter art.51: “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.”

powerful states to exploit self-defense as a concept, broadening its scope and justifying the use of force. Even though, Article 2(4) of the UN Charter emphasizes the importance of refraining from using force.

In modern international relations, the United Nations Charter sets the primary guidelines for resorting to war (*ius ad bellum*). It allows states to employ military tactics in two exceptional circumstances: firstly, in self-defense (individual or collective) when faced with an armed attack; and secondly, when the Security Council determines a threat to global peace and security and authorizes military action. These two scenarios represent exceptions to the general rule which prohibits using force as enshrined in the Charter, customary law, and peremptory norms (*ius cogens*).

The ongoing debate surrounding the limits of self-defense is linked to the interpretation of the UN Charter and the scope of the customary prohibition on using armed force.¹ To justify their actions, countries have argued that self-defense encompasses not only responding to an attack but also using force to prevent an imminent threat, citing Article 51 as support. This argument has been used to legitimize pre-emptive strikes. However, the introduction of the Bush Doctrine, which advocates for pre-emptive self-defense, has further complicated the assessment of the legitimacy of such actions. Ultimately, the influence of major states in shaping the interpretation of self-defense is significant, given their broader interests, deeper concerns, and greater power.

A conscience look into the Right to Self-Defence under International Law

¹ Article 51 UN Charter.



International law generally prohibits the use of force, but exempts cases of collective or individual self-defense or where the Security Council authorizes it.¹ Article 2(4)² of the UN Charter emphasizes the importance of respecting state sovereignty, while Chapter VII outlines appropriate responses to threats to peace.³ The right to self-defense, established after World War II, remains a contentious issue, with debates surrounding its modern application and scope⁴. The concern is not the legality of self-defense itself, but rather how to determine the circumstances under which it applies, and ensuring a proportionate response.⁵ In essence, the challenge lies in striking a balance between the inherent right to self-defense and the need to prevent abuse.⁶

The application of international self-defense laws has long been debated, with two main schools of thought: restrictive and non-restrictive.⁷ The restrictive approach strictly interprets Article 51 of the UN Charter, allowing self-defense only in response to an actual attack, not imminent threats or political developments.⁸ This view relies on state practice and customary law⁹, excluding opinions and circumstances.¹⁰

¹ See generally, Chapter II of the UN Charter.

² UN Charter Article 2(4): “ All members shall 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.”

³ Donald R Rothwell, Anticipatory Self-Defence in the Age of International Terrorism, 24U. QUEENS LAND LJ337,338(2005).

⁴ Abbasi Salar, A Conceptual Incongruence between International Laws of Self-Defence and International Core Crime of Aggression, Penn State Journal of Law and International Affairs Viol 691 (2018)170-202.

⁵ David B Kopel, The natural right of self-defence: Heller’s lesson for the world,59 SYACUSEL.REV.(2008)235-237.

⁶ Eustance Chikere AZubuike, Probing the Scope of Self-Defence in International Law, 17 ANN.SURV.INT’L&COMPLL (2011)129-130

⁷ See Leo van dan hole, Anticipatory self-defence under international law,19AM.U.INT’L.REV(2003)69

⁸ See UN Charter Article51.

⁹ Malcolm N Shaw, International Law (7thedn 2014)156

¹⁰ Special state of mind of the actors on the basis of their intuitive grounds that shapes customary international law.

In contrast, the non-restrictive approach considers instant customs, circumstances, and political will-formation, justifying anticipatory self-defense even if it doesn't align with Article 51 and 2(4)¹. Given the threat of instantly deliverable weapons of mass destruction, anticipatory self-defense becomes necessary, highlighting the limitations of strictly adhering to Article 51 and state practice². The need to address instant threats challenges the traditional interpretation of self-defense laws.

Due to the ambiguity and complexity of international law, as well as the limitations of international courts and tribunals in applying legal norms³, states have been able to exploit these weaknesses to justify their own actions.⁴ This has enabled them to broadly interpret the right to self-defense and legitimize their military actions, often leading to non-defensive wars against non-aggressor states under the guise of preemption, despite lacking empirical or reasonable justification. This has been a recurring pattern in international relations, where states have used vague legal language to justify their military interventions.⁵

The Caroline Incident: A Brief Summary

On December 29, 1837, a group of Canadian militia, acting under British authority, launched a nighttime raid on the American steamer *Caroline*, which was crippled at the Niagara River on the shore of the US. The vessel had been supporting Canadian rebels by transporting supplies and arms. The raiders set the ship ablaze, cutting it loose from its moorings, and it was swept away by strong currents, ultimately going over Niagara Falls. The incident resulted in

¹ See Natalino Ronzitti, *The Expanding Law of Self-Defence*, 11 *Conflict & Security* (2006) 343.

² See Kalliopi Chainoglou, *Reconceptualising Self-Defence in International Law*, 18 *King's L J* (2007) 61.

³ See Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005)

⁴ Goncalo de Almeida Ribeiro, *Judicial Activism and fidelity to law*, in *Judicial Activism* 39 (Luis Pereria Coutinho et al. eds., 2015)

⁵ Shaw (n10)



the likely death of one American during the raid and ensuing firefight, with subsequent accounts varying widely in detail and accuracy.

The Caroline incident is widely regarded as a landmark case in international law, shaping the concept of anticipatory self-defense.¹ The Webster-Ashburton exchange established a key principle: a state is allowed to employ self-defense that is proportionate to the impending danger, but only when faced with an "instant, overwhelming" necessity, leaving no time for deliberation. This precedent is often cited to justify self-defense against imminent threats. Notably, the US federal government's limited authority to resolve New York exists criminal case and the complex economic relationship between Britain and the US, which could have been severely strained by prolonged tensions or war, added to the incident's significance.

The rules governing the right to self-defense, known as *jus ad bellum*, remain a contentious and complex issue, with ongoing debates surrounding their practical application. Key points of contention include whether a certain level of violence is required to trigger self-defense, how self-defense applies to non-state-actors attack, and the timing of anticipatory self-defense. However, it is widely accepted that the lawfulness of self-defense depends on two essential criteria: necessity and proportionality. These principles have been linked to the use of force for centuries, originating from the just war tradition, and continue to form the foundation of modern self-defense laws, as enshrined in the UN Charter since 1945.

The Caroline incident remains a seminal case in international law, shaping the understanding of self-defense. Its influence on interpreting the UN Charter and developing customary international law, particularly the principles of necessity and proportionality, continues to be

¹ Jennings (1938)92.

felt today¹. While the original Webster formula and current international law (*lex lata*) are not identical, they share many similarities. Notably, legal scholars Jennings and Watts affirm that the Caroline incident accurately outlined the fundamental elements of self-defense, and Gardam concurs that it encapsulates the modern position.² This article will use the Webster formulation as a foundation to explore and clarify the concepts of necessity and proportionality.

State Action

States consistently cite necessity and proportionality to justify their actions, but these concepts require further examination. The widespread acceptance of necessity and proportionality as regulatory principles for self-defense underscores the significance of this article. By focusing on these requirements, we can gain a deeper understanding of how states perceive and exercise their right to self-defense, inform their decision-making processes, and evaluate the actions of other states. This analysis can help states develop policies, make informed decisions about resorting to self-defense, and provide justification for their actions to the international community.³

Conditions for the Legitimate Exercise of Self-Defense

As established by the Caroline incident case, customary international law sets specific requirements for the lawful exercise of self-defense. These essential factors include, among others, necessity, proportionality, and the intended purpose of the action.

Necessity and Proportionality: Guiding Principles of Self-Defense

¹ As noted, this thesis focuses on necessity and proportionality post adoption of the UN Charter, for review of how these requirements were perceived following Caroline incident and up till 1945.

²Gardam (2004)148.

³ Examples where states have expressly asserted that their actions are necessary and proportionate, as well as, as well as incidents where such criteria form the basis of reaction of other state and international organization



Necessity and proportionality are essential conditions that govern the exercise of self-defense.¹

Necessity determines when and where defensive force can be used to respond to an actual or imminent armed attack. Proportionality, on the other hand, limits the amount of force that can be employed. Together, these two principles regulate the scope of defensive action, ensuring that it remains proportionate and focused on repelling the attack. By adhering to necessity and proportionality, self-defense actions achieve their intended purpose without exceeding it.²

Necessity and proportionality are ongoing requirements that apply throughout an armed conflict triggered by self-defense, not just at its outset.³ This continuous obligation is often neglected in discussions, but it's vital to understanding the role of necessity and proportionality in limiting military action. The *jus ad bellum* (JAB) governs when states utilize force and demands constant monitoring and review. Simply put, if the use of force becomes unnecessary or disproportionate at any point, it ceases to be lawful self-defense and violates the UN Charter's Article 2(4). Assessing compliance with necessity and proportionality requires context, but this article provides frameworks for states, scholars, and courts to adopt a more consistent approach to evaluating defensive actions and preventing their misuse. This enhances international law's ability to regulate when and how states use force.

Understanding the Purposes of Self-Defense

The legitimacy of self-defense in international law hinges on various factors, including the purpose, nature, and direction of the action. This section highlights the importance of identifying the purposes of self-defense, which serve as bases for compliance evaluation with necessity and proportionality principles. The primary goals of self-defense are to halt, repel, or

¹ Nuclear Weapons, para 41.

² The purpose of Self-defence is discussed further in section 1.3.2

³ See in particular Section 3.3.1 and 3.4.

prevent an armed attack. When self-defense actions align with these purposes and meet proportionality and necessity requirement, they constitute using force lawfully. Establishing clear purposes is crucial, as it provides a standard against which to assess adherence to these fundamental principles.

The concept of preemptive self-defense against potential future threats that have not yet emerged is largely disputed among scholars and states. However, there is a growing consensus, particularly since the 9/11 attacks, that supports a limited right to respond to imminent armed attacks. While state practice is inconsistent, it generally aligns with this trend. If we accept a restricted right of preemptive self-defense against imminent threats, then the primary objectives of self-defense are to halt, repel, or prevent an armed attack from occurring.

A State's Right to Self-Defense Remains Valid Despite Multiple Motives

Though states may have additional motivations, over and above self-defense, for taking military action, it does not forfeit its right to self-defense once it has satisfied arm attack conditions. However, the specific motivations and outcomes of such action are relevant to determining whether the action is necessary and proportionate. The key question is whether the outcomes, regardless of whether they are intentional or coincidental, are necessary and proportionate to achieving a defensive purpose (i.e., repelling, halting, or preventing an armed attack), not whether they serve additional legitimate purposes of self-defense.

Necessity: A Crucial Limitation on Self-Defense

Necessity serves as an immediate constraint on the use of defensive force, being the first requirement that conditions a state's exercise of self-defense. In response to an actual or impending armed attack, necessity determines whether defensive force is necessary at all, or if peaceful alternatives are sufficient. It also limits the direction of defensive force. While



necessity is often clearly identifiable in state justifications and reviews of self-defense actions, it is a notoriously ambiguous concept. A clear understanding of its elements enables a definition of its parameters and its potential to restrict or prohibit the use of military force.

Necessity in International Law Beyond Self-Defense

Unlike self-defense, where necessity only applies after an armed attack, Article 25 of the Responsibility of States for Internationally Wrongful Acts (ARSIWA) establishes broader criteria for invoking necessity. A state can only use necessity to justify an act that violates international obligations if: (a) the act is the sole means to protect a vital interest from a severe and imminent threat; and (b) it does not significantly harm the essential interests of the affected state, other states, or the international community as a whole.

A claim of necessity should not be seen as a standalone excuse to bypass the prohibition on using force. Instead, necessity in the context of jus ad bellum (JAB) is a separate customary requirement, distinct from the laws of state responsibility, although related to them.

Proportionality: A Complex Concept

While proportionality is fundamentally a simple idea - a ban on excessive harm - its application and boundaries are more intricate than necessity. This complexity stems from ongoing debates among scholars and states about self-defense, as well as the challenge of extracting clear legal principles from state practice. States' views on proportionality are often ambiguous, influenced by political considerations, and may be based on subjective judgments rather than clear criteria. The term 'proportionality' is frequently used vaguely, without specifying whether it refers to the jus ad bellum (JAB) or international humanitarian law (IHL) frameworks, despite their

distinct meanings and purposes. As a result, flexibility is required when interpreting and applying proportionality in specific self-defense incidents.

Proportionate to What?

Proportionality is often oversimplified as a balance between two main factors, but the reality is more nuanced. The first factor concerns the defending state's response to an armed attack, which can be referred to as the defensive action, force, or operation. At first glance, this seems to relate only to the defending state's actual response i.e., what actions they take to exercise their right to self-defense. However, a more accurate understanding includes not only the actions themselves but also their effects, acknowledging that the consequences of the defensive response are an integral part of the proportionality assessment.

Evaluating Proportionality and Avoiding Excessiveness

When justifying self-defense actions, states often emphasize their defensive purpose, and other states focus on this purpose when assessing the legality of such actions. However, the right to self-defense is not unlimited, and its exercise must be balanced against the need to avoid harming civilians. While the defending state may have a 'superior right' to defend itself, this does not grant a blanket license to cause harm to non-combatants. The use of weapons in self-defense is more effectively regulated by specific provisions of International Humanitarian Law (IHL) and related conventions governing particular weapons. The provision gives states, the right to use all necessary weapons available at their disposal, which does not violate the fundamental rules of warfare in repelling aggressor's attacks. In the circumstance, a state full military power can be utilized by a state in quelling the aggressor's attacks.¹

¹Ibid.



A state may use the necessary force, including scale and means, to halt, repel, or prevent an armed attack, as long as it complies with International Humanitarian Law (IHL) and international law governing specific weapons. In fact, using less force than the initial armed attack may be sufficient to achieve the desired outcome, depending on the circumstances.

Assessing the Impact of Force on Both States: Key Considerations

When evaluating a proportionate defensive response, the defending state's situation is the primary concern. This involves assessing the severity and scope of the actual or anticipated armed attack, including factors such as:

- ❖ Overall damage to military capabilities, personnel, and equipment
- ❖ Harm to civilians and non-combatants
- ❖ Destruction of territory, infrastructure, and other property

These factors help determine the nature and extent of the threat faced by the defending state, informing the appropriate conditions for its defensive response.

Evaluating the Impact of Self-Defense on the Attacking State

The effects of self-defense on the attacking state¹ whether actual or anticipated, should also be assessed using similar criteria, including factors² like damage, harm to civilians, and destruction of property. However, this evaluation is not absolute and must be considered in the context of extreme circumstances, such as the potential use of nuclear weapons in self-defense when a

¹ Consider the position of NSA attackers and that of the host state.

This section assumes that the identity of the attacker is known. It is often the case that both sides to a conflict claim a right of self –defence, as well as maintaining that the other side is the attacker.

state's survival is at stake. In such cases, the complete destruction of the attacker might be envisioned.

Nevertheless, prolonged occupation or annexation is never justified. Occupation may only be considered proportionate if the threat to the defending state persists. Once the armed attack has been successfully halted, repelled, or prevented, ongoing occupation is no longer necessary, and proportionality is no longer relevant.

Understanding Article 51 of the United Nations Charter: Nature and Limits of the Use of Force

The United Nations was established through a series of wartime declarations and conferences, culminating in the 1945 San Francisco conference, where the UN Charter was adopted. The Charter is open to all peace-loving states that accept its obligations.¹ Article 51 of the Charter provides a significant exception, stating that:

When interpreting Article 51 of the UN Charter, we must consider the treaty as a whole and using literal interpretation of its words. In context, Article 51 is closely linked to Article 2(4), it provides that the charter does not limit the right to self-defense only when armed attack occurs on a UN member. Members may defend themselves until the Security Council acts and must report promptly their actions. While the Security Council retains the authority to take necessary action in maintaining peace and security at the international level.

In general, this means that the right to self-defense in Article 51 must be understood in conjunction with the prohibition on the use of force in Article 2(4), to ensure a comprehensive understanding of the Charter's provisions. Article 2 (4) enjoys member states to refrain from

¹ Art4 (1)UN Charter.



using threat or force against another sovereign on matters that violates the UN's objectives on maintaining peace and ensuring security amongst nationals.

Article 2(4) of the UN Charter establishes a comprehensive prohibition on the threat or use of force in international relations, preventing states from using force or coercion to resolve disputes. This principle, rooted in the Kellogg-Briand Pact, has become a fundamental norm of international law (jus cogens). The restrictionist view holds that self-defense is only justified in response to an actual armed attack, as stated in Article 51. They argue that the use of force is only permissible when physical force has crossed a state's borders, and that the UN Security Council has the exclusive authority to authorize preemptive force against a state. In their view, states must notify the Security Council before taking self-defense measures.¹

Proponents of the restrictionist² approach argue that the expansionist perspective relies on an outdated precedent, the Caroline incident of 1837, which occurred over a century before the UN Charter was signed.³ They point out that this incident took place in an era where states were permitted to face each other in wars and the rules governing self-defense were vastly different from those established by the Charter.⁴

Restrictionists raise additional objections to anticipatory self-defense. Firstly, they argue that the proportionality test, already challenging in reactive self-defense scenarios where damage has occurred, becomes even more difficult or nearly impossible to apply when no attack has yet occurred, and no material effects have been caused. Moreover, anticipatory self-defense

¹ Shaw (n)126.

² See Abdul Ghafur Hamid, The legality of Anticipatory self-defence in the 21st century world order: A reappraisal, in NILR2007, at 449-496.

³ E Gross, Thwarting Terrorist Acts by Attacking the perpetrator or their Commanders as an Act of Self-Defence: Human Rights Versus the State's Duty to protect its citizen, 15 Temple international and Comparative Law Journal 195-245 2001 at 213.

⁴ Preamble of the UN Charter.

requires a subjective test, where defending states prove the intentions of the aggressor states. Secondly, if a state has evidence of an impending danger, it must notify the Security Council, which has the powers to take action against the aggressor state as provided in Articles 39, 41, and 42 of the Charter.

Conclusion

In summary, despite the lack of clarity and inconsistent state practice, several key points emerge regarding states' views on proportionality in self-defense. This article demonstrates that states generally do not require a precise equivalence between the armed attack and self-defense in terms of nature, scale, means, or outcomes. While the threat of terrorists acquiring weapons of mass destruction may justify pre-emptive action, I argue that self-defense is not an effective tool against terrorism due to the restrictive conditions of necessity, proportionality, and imminence. Moreover, states must provide evidence of having impending or actual attack to justify the exercise of self-defense against terrorist attack.

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