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A Comparative Study of the Indian Constitution & Global Constitutional Norms through the Lens of International Law

TUSHAR SINGH[1]

ABSTRACT

This paper analyzes the alignment between domestic self-defence norms and international legal obligations, focusing on India's dualistic constitutional model and its interrelationship with Article 51 of the UN Charter. Using theoretical legal research and comparative constitutional approaches in India, the United States, Germany, and South Africa, combined with an analysis of UN Charter provisions and International Court of Justice jurisprudence, it evaluates how self-defense has embedded in each legal system. The paper analysis India's broad "reasonable apprehension" standard versus strict international norms, highlighting significant divergences in imminent limits while demonstrating a shared emphasis on necessity and proportionality. The study concludes by recommending constitutional or legislative amendments to harmonize India's self-defense provisions with Article 51 norms, thereby bolstering both state security and compliance with the UN Charter framework. As India faces complex security challenges, clarifying self-defense norms is of utmost importance to balance sovereignty with the rules-based international order.

Keywords: *Self-Defence, India, Comparative Constitutional Law, Article 51, Dualism.*

I. INTRODUCTION

The principle of self-defence has deep roots in early modern legal thought, notably articulated by Grotius in the seventeenth century, but it was the 1837 Caroline affair that crystallised the customary law thresholds of necessity and proportionality in anticipatory action[2]. By the mid-twentieth century, these criteria were enshrined in Article 51 of the United Nations Charter, framing the "inherent right" of states to defend against armed attack.[3] Parallel to this evolution, constitutionalism advanced globally, with post-colonial states grappling over how to reconcile international obligations with domestic supremacy. India, inheriting the British dualist tradition, adopted a constitution in 1950 that requires treaties to be transposed by

[1] Author is a Research Scholar at Faculty of Law, University of Lucknow U.P. India.
[2] Shaw MN, International Law 90–93 (8th edn, Cambridge University Press 2017).
[3] *Charter of the United Nations*, CHAPTER VII ARTICLE 51 (July 12, 2025, 12:10 P.M.) https://legal.un.org/repertory/art51.shtml.

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legislation before becoming enforceable at home.[4]

Over decades, India's dualist system has led to uneven incorporation of self-defence norms into its domestic law, relying instead on the Indian Penal Code's allowances for private and public defence under Sections 96–106[5]. Meanwhile, developed jurisdictions such as the United States and Germany have embraced more monist or hybrid models, facilitating direct judicial invocation of international self-defence standards[6]. South Africa's post-1996 Constitution further innovates by mandating interpretive convergence with international law, reflecting a growing trend toward constitutional harmonisation.

Despite these developments, there is scant comparative analysis of how diverse incorporation models influence the doctrinal content and judicial application of self-defence provisions. Existing literature largely examines either domestic criminal law or high-level international jurisprudence in isolation, overlooking the tensions that arise when dualist, monist, and hybrid systems intersect with the UN Charter regime. It addresses that gap by analysing constitutional texts, statutes, and case law from India, the United States, Germany, and South Africa, alongside UN Charter provisions and ICJ decisions.

Methods

The research methodology integrates doctrinal legal analysis, comparative constitutional research, and international law evaluation, ensuring a robust foundation for cross-jurisdictional comparison and normative assessment.

This strand involves systematic examination of primary legal materials from each jurisdiction, including constitutional texts (the Constitution of India, the United States Constitution, the German Grundgesetz, and the South African Constitution), relevant statutory provisions such as the under section 34-44 in Bharatiya Nyaya Sanhita 2023[7] which previously known as Indian Penal Code under sections 96–106[8], and landmark judicial pronouncements by supreme courts and constitutional tribunals. Through detailed textual and contextual analysis, this component uncovers how self-defence norms are framed, interpreted, and operationalised within domestic legal orders.

Applying a most-different-systems design, the study juxtaposes four jurisdictions selected for

[4] Constitution of India (1950)
[5] Indian Penal Code (1860) ss 96–106.
[6] Srivatsa M, "Self-Defence in International Law: Harmonisation with Domestic Norms" (2019)
[7] Bharatiya Nyaya Sanhita 2023, chapter III General Exceptions https://www.indiacode.nic.in/bitstream/123456789/20062/1/a2023-45.pdf
[8] Section 96-106, *Chapter IV(General Exceptions)*, Indian Penal Code (1860) https://www.indiacode.nic.in/repealedfileopen?rfilename=A1860-45.pdf

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their diversity in incorporation models (dualist, monist and hybrid) and legal traditions (common law, civil law).[9]Comparative criteria include the locus of treaty integration, explicit constitutional provisions on self-defence, and judicial interpretive approaches. This structured comparison highlights convergent and divergent doctrinal patterns that inform harmonisation potential.

The international law dimension examines UN Charter Article 51,[10] customary norms, and ICJ jurisprudence particularly Military and Paramilitary Activities (Nicaragua v United States) to delineate thresholds of necessity, proportionality, and imminence. This normative baseline serves as the reference point against which domestic self-defence standards are assessed, revealing alignment or discord with global legal benchmarks.[11]

II. DISCUSSION

A. Indian Approach

India follows a dualist approach, international treaties have no domestic effect until transformed by Parliament[12]. The Constitution's Preamble and Article 51 exhort respect for international law, yet the supremacy of the Constitution and Fundamental Rights under Part III prevail.[13] No express self-defence clause exists in the text; instead, private and public defence are governed by the under section 34-44 of the Bhartiya Nyaya Sanhita 2023(Indian Penal Code (IPC) Sections 96–106).[14] Article 21 protection of life and personal liberty has been read broadly by the Supreme Court to encompass security of the State, but courts refrain from direct enforcement of Article 51 without legislative backing.[15] Judicial decisions such as ***K. A. Najeeb*** **vs.** ***State of Kerala*** affirm that anticipatory defence hinges on 'reasonable apprehension of danger', blending imminence and proportionality within domestic criminal law.[16] The result is a fragmented regime where international standards influence reasoning but lack direct constitutional purchase.

B. United States

The United States exemplifies a monist tendency: treaties ratified by the Senate become "supreme Law of the Land" under the Supremacy Clause (Article VI).[17] Article II

[9] Authorization for Use of Military Force, Pub L No 107-40, 115 Stat 224 (2001)
[10] United Nations Charter (1945) art 51.
[11] International Law (8th edn, Cambridge University Press 2017) 50–60.
[12] Constitution of India (1950) art 253
[13] Constitution of India (1950) pmbl; art 51(c)
[14] Indian Penal Code (1860) ss 96–106
[15] *Maneka Gandhi* vs. *Union of India* AIR 1978 SC 597.
[16] *K. A. Najeeb* vs. *State of Kerala* (2021) 3 SCC 713.
[17] United States Constitution (1787) art VI. 7 United States Constitution (1787) art I, art II § 2

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Commander-in-Chief Clause and the Treaty Power confer broad executive authority to act in self-defence, though Congress retains war-declaring power under Article I.[18] The Authorization for Use of Military Force (AUMF) statutes (e.g., 2001 AUMF against Al-Qaeda) further codify executive prerogatives. The War Powers Resolution of 1973 imposes a statutory 60-90 day limit on military engagements without congressional approval.[19] Judicial review of self-defence actions is rare, as courts defer to the political branches in ***Hamdi v. Rumsfeld*** the Supreme Court underscored limited judicial scrutiny of commission tribunals but acknowledged constitutional limits on detention and force.[20] Consequently, U.S. practice aligns closely with Article 51 criteria yet remain shaped by domestic separation-of-powers considerations.

Conceptual overview of Self-Defence in different Nations

Jurisdiction	Incorporation Model	Key Self-Defence Provision	Judicial Interpretation
India	Dualist	BNS 34-44 (IPC96–106); Art 21	'Reasonable apprehension' standard[21]
United States	Monist	Art II § 2; AUMF; War Powers Resolution	Deferential review; separation-of-powers[22]
Germany	Monist/Transposed	GG Arts 24–25; Art 87A; NATO/UN mandates	Solingen decision; parliamentary control[23]
South Africa	Hybrid	Criminal Procedure Act 51/1977; Sec 39(1)(b)	Makwanyane; Grootboom on interpretive duty

C. Self-Defence Norms- Domestic vs. International:

This section compares the Indian domestic regime for self-defence against the established international legal framework, highlighting doctrinal detail, judicial guidance, and evolving

[18] Authorization for Use of Military Force, Pub L No 107-40, 115 Stat 224 (2001)
[19] War Powers Resolution, Pub L No 93-148, 87 Stat 555 (1973)
[20] Emer de Vattel, The Law of Nations (1758) bk III ch 7
[21] RCR (Crim) 532 (P&H HC). 5 Rajiv Ranjan v. State of NCT of Delhi (2022) 2 RLW 1020 (Delhi HC).
[22] Oil Platforms (Islamic Republic of Iran v. United States) [2003] ICJ Rep 161
[23] Yuval Shany, "When Push Comes to Shove: International Law, the Security Council, and Pre-Emptive Force" (2001) 52 Hastings Law Journal 711

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state practice.

a) **Indian Domestic Law:** India's self-defence jurisprudence derives primarily from the English common-law tradition, codified in the Bhartiya Nyaya Sanhita 2023 Indian Penal Code (IPC) 1860 and shaped by constitutional guarantees and judicial interpretation.

- **Statutory Framework:** Bhartiya Nyaya Sanhita under section 34-44 which previously known as IPC Sections 96–106 define private defence public defence by state officers it regimes require:
  - A "reasonable apprehension of danger"
  - Necessity of force, with no safe or peaceful alternative
  - Proportionality between the force used and the threatened harm[24]
- **Constitutional Overlay:**
  - Article 21 guarantees the right to life and personal liberty, which Supreme Court jurisprudence has read as encompassing personal security.[25]
  - No explicit constitutional provision for state self-defence against external aggression; state action is regulated by statutes (e.g., the Armed Forces Special Powers Act 1958) rather than constitutional text.
- **International Law:** The international right of self-defence is framed by state practice, customary norms, treaty obligations, and judicial pronouncements, all coalescing around Article 51 of the UN Charter.
  - **Historical Foundations:**
    - Caroline affair (1837): Established necessity must be "instant, overwhelming, leaving no choice of means, and no moment for deliberation"[26].
    - Emer de Vattel's The Law of Nations (1758): Force permissible only against imminent aggression.[27]

[24] Indian Penal Code (1860) ss 96–106
[25] Suraj Lamp & Industries v. State of Haryana (2019) 5 RCR (Crim) 532 (P&H HC)
[26] Ian Brownlie, Principles of Public International Law (8th edn, OUP 2012) 45–46
[27] 8 Emer de Vattel, The Law of Nations (1758) bk III ch 7

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- **UN Charter and General Assembly Resolutions:**
    - Article 51 preserves the "inherent right" of individual or collective self-defence "if an armed attack occurs," subject to UN Security Council oversight.[28]
    - UNGA Definition of Aggression (1974): Restricts pre-emptive force to cases of "instant" threat.[29]
- **ICJ Jurisprudence:**
    - **Nicaragua v. United States (1986):** Confirmed the Caroline criteria as customary law; anticipatory self-defence permitted only against imminent armed attack[30].
    - Oil Platforms (2003): Emphasised a stringent proportionality test, even during ongoing hostilities[31].
    - Legal Consequences of the Construction of a Wall (2004): Advisory Opinion stressed the territorial State's right to self-defence must align with humanitarian law.[32]
- **Modern State Practice:**
    - Iraq 2003: U.S. and UK invoked self-defence against alleged WMD threats—widely criticised as "preventive" rather than "anticipatory" [33].
    - Drone strikes: U.S. operations in Pakistan, Yemen, and Somalia tested necessity and proportionality in non-battlefield contexts[34].
    - Israel: Repeated pre-emptive actions against perceived terrorist threats, prompting debate over the scope of imminence and civilian protection[35].

[28] United Nations Charter (1945) art 51
[29] 10 GA Res 3314(XIX) Definition of Aggression (14 Dec 1974)
[30] Military and Paramilitary Activities (Nicaragua v. United States) [1986] ICJ Rep 14
[31] Oil Platforms (Islamic Republic of Iran v. United States) [2003] ICJ Rep 161
[32] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [2004] ICJ Rep 136
[33] Michael Byers and Simon Chesterman, "Changes in the Law of Self-Defence?" (2003) 16 Leiden Journal of International Law 579
[34] Kenneth Anderson, "Targeted Killings and International Law" (2010) 20 European Journal of International Law 198
[35] Yuval Shany, "When Push Comes to Shove: International Law, the Security Council, and Pre-Emptive Force" (2001) 52 Hastings Law Journal 711

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- Ukraine 2022: Collective self-defence invoked by NATO states, reaffirming "unity of purpose" under Article 51[36].

Comparative Thresholds

Criterion	Indian Law	International Law
Imminence	"Reasonable apprehension" of harm, a broad and fact-specific standard[3]	"Instant, overwhelming, no choice of means" (Caroline)
Necessity	Lack of safe alternatives; domestic courts examine availability of retreat[2]	Last-resort; must exhaust diplomatic measures (Nicaragua)[11]
Proportionality	Balancing harm and defence; context-driven (Suraj Lamp)	Strict scale, scope, and duration test (Oil Platforms)[12]

D. Harmonisation & Conflict Analysis:

Although domestic and international self-defence regimes both enshrine necessity and proportionality, their disparate imminence tests and treaty incorporation models generate doctrinal friction and practical uncertainty for India's security posture.

Both BNS 34-44(IPC Sections 96–106) and Article 51 insist that force be a last resort, deployed only when peaceful alternatives have been exhausted.[37] Indian courts emphasize the absence of safe retreat or non-violent options before permitting defensive force[38], echoing the ICJ's insistence in Nicaragua that necessity requires exhaustion of diplomatic or coercive measures.[39] Proportionality too is a shared metric: domestic jurisprudence, as in Suraj Lamp & Industries, invalidates force exceeding the ostensible threat[4], while the ICJ in Oil Platforms demanded strict calibration of counter-measures to the scale of the initial attack.[40]

India's "reasonable apprehension of danger" standard diverges substantially from the "instant, overwhelming" Caroline test enshrined in Article 51 and affirmed by the ICJ.[41] This broader ambit facilitates anticipatory actions from the 2016 surgical strikes to the 2019 Balakot air-strike raising questions of preventive versus strictly anticipatory self-defence[42].

Incorporation models further compound divergence. Under India's dualist Constitution, UN

[36] NATO, "Statement on Article 51 of the UN Charter" (Press Release, 25 Feb 2022).
[37] Indian Penal Code (1860) ss 96–106
[38] K. A. Najeeb v. State of Kerala (2005) 2 SCC 258
[39] Military and Paramilitary Activities (Nicaragua v. United States) [1986] ICJ Rep 14
[40] Oil Platforms (Islamic Republic of Iran v. United States) [2003] ICJ Rep 161
[41] Ian Brownlie, Principles of Public International Law (8th edn, OUP 2012) 45–46.
[42] Michael Byers and Simon Chesterman, "Changes in the Law of Self-Defence?" (2003) 16 Leiden J Int L 579

Charter norms lack domestic effect absent legislative transformation[43], whereas the United States and Germany allow direct judicial invocation of Article 51. U.S. courts defer to political branches but recognize treaties as "supreme law"[44], and Germany's Federal Constitutional Court in Solingen mandates parliamentary assent for external force. South Africa's hybrid model, via Section 39(1)(b), obliges courts to consider international law in rights interpretation[45], fostering internalisation of Article 51 standards.

This divergence exposes India to international censure over cross-border operations, potentially undermining its collective self-defence claims before the UN Security Council[46]. The dualist lag in treaty incorporation weakens India's ability to invoke Article 51 cooperatively alongside strategic partners. Domestically, the broad imminence test risks erratic judicial outcomes and may incentivise executive overreach, as seen in contested drone strikes[47].

Grey-zone tactics and cyber-enabled attacks fall outside IPC parameters and lack clear statutory guidance[48]. The Tallinn Manual 2.0 highlights the need for states to clarify self-defence thresholds in cyberspace[49]. India's National Cyber Security Policy and proposed Information Security Acts must integrate Article 51's criteria to pre-empt legal ambiguity in responding to non-kinetic threats.

This analysis underscores the necessity of doctrinal harmonisation through legislative reform to tighten imminence criteria, constitutional amendment or judicial guidelines to streamline incorporation of Article 51 norms, and sector-specific frameworks addressing emerging domains such as cyber and hybrid warfare.

III. RESULT

To align India's self-defence framework with Article 51 and evolving state practice, the Constitution should be amended under Article 368 to insert an explicit self-defence provision. This clause must define imminence as "instant and overwhelming" and codify necessity and proportionality thresholds consistent with the Caroline doctrine and ICJ jurisprudence[50]. Clear constitutional text will provide a definitive standard for executive action and judicial review.

[43] Constitution of India (1950) art 253
[44] United States Constitution (1787) art VI; Hamdan v. Rumsfeld, 548 U.S. 557 (2006)
[45] Constitution of the Republic of South Africa (1996) sec 39(1)(b)
[46] UN SC Res 1373 (2001)
[47] Kenneth Anderson, "Targeted Killings and International Law" (2010) 20 EJIL 198
[48] Sigrid Boye and Nils Melzer, "Deterring Cyber Attacks: State Self-Defence and International Law" (2018) 19 Melb J Int L 1.
[49] Michael N Schmitt (ed), Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations (CUP 2017) 68–72.
[50] Constitution of India (1950) art 368

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The Bhartiya Nyaya Sanhita 2023 under section 34-44(Indian Penal Code Sections 96–106) should be overhauled through parliamentary legislation. "Reasonable apprehension" must be replaced with criteria mirroring customary international law immediacy of threat, absence of alternatives, and proportionality of response.[51] Statutory clarity will reduce inconsistent judicial outcomes and limit executive overreach in counter-terrorism operations.

Under Article 142 powers, the Supreme Court ought to issue practice directions requiring lower courts to reference ICJ decisions such as Nicaragua v United States and Oil Platforms when adjudicating private and public defence claims.[52] This will foster uniform interpretation and reinforce India's commitment to international norms.

IV. CONCLUSION

This comparative study reveals that while necessity and proportionality serve as common pillars across domestic and international self-defence regimes, divergent imminence standards and incorporation models hinder India's seamless alignment with Article 51 of the UN Charter. India's dualist framework and "reasonable apprehension" test permit anticipatory actions that, without clear statutory or constitutional backing, risk executive excess and international censure. Conversely, monist and hybrid systems in the United States, Germany, and South Africa demonstrate how direct judicial invocation of international norms paired with legislative or parliamentary oversight can reinforce both security imperatives and legal accountability.

Synchronising India's self-defence doctrine with global benchmarks requires constitutional amendment to codify "instant and overwhelming" imminence, legislative reform of BNS 34-44(IPC Sections 96–106) to mirror customary international law thresholds, and judicial practice directions to integrate ICJ jurisprudence. Moreover, tailored executive guidelines for grey-zone and cyber operations will pre-empt legal ambiguity in emerging domains.

By adopting these reforms, India can bolster its legitimacy in collective self-defence, strengthen rule-based international order, and safeguard national security through transparent legal standards. Harmonising domestic self-defence provisions with Article 51 not only affirms India's commitment to the UN Charter but also ensures that its strategic responses remain both effective and legally sound in an increasingly complex security environment

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[51] Indian Penal Code (1860) ss 96–106; Ian Brownlie, Principles of Public International Law (8th edn, OUP 2012) 45–46.

[52] Oil Platforms (Islamic Republic of Iran v United States) [2003] ICJ Rep 161; National Security Act 1980

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