

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 1

2023

© 2023 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to submission@ijlmh.com.

Exploring the Nuance Behind “Armed Attack” as given in the Union Charter

ANJALI TRIPATHI¹

ABSTRACT

Anticipatory self-defence, which refers to the use of force in self-defence in advance of an impending armed attack, is discussed in Article 51 of the UN Charter. Anticipatory self-defence needs to be addressed explicitly in the UN Charter, and legal experts debate over whether it is legitimate under international law. While some contend that anticipatory self-defence is acceptable in some situations and is per international law and the Charter, others disagree. The idea of collective self-defence, which denotes the use of force by one state to defend another that has been the target of an armed attack, has also come up for discussion. Collective self-defence is permitted under the UN Charter, although the circumstances for such permission need to be made clear. While some contend that Article 51's provisions should be interpreted liberally to provide states more latitude in collective self-defence, others contend that the article should be construed narrowly to prevent conditions from abusing their right to self-defence.

This paper analyses the letter of the law, as well as several landmark judgements, that were given by the ICJ to arrive at a nuanced understanding of the term ‘armed attack’ as seen in Article 51 of the Charter. It further discusses the challenges faced by the legal framework and concludes with appropriate solutions to the aforementioned issues.

Keywords: *International Law, Article 51, UN Charter, Armed Attacked, Self Defence of States.*

I. INTRODUCTION

The Preamble of the U.N. Charter states that all the countries that have signed and ratified the Charter need to help establish peace and justice to prevent future generations from going to war which has already brought untold sorrow to humanity twice. Another such provision which aims at a similar goal is Article 2², specifically paragraph 4, which states that in their international dealings, all member nations should abstain from threatening or using force against the territorial integrity or political independence of any State or in any other way that is at odds

¹ Author is a student at Jindal Global Law School, India.

² Nations, U., 2022. *Uphold International Law | United Nations*. [online] United Nations. Available at: <<https://www.un.org/en/our-work/uphold-international-law>> [Accessed 15 July 2022].

with the goals of the U.N.³ There are exceptions to this rule, the first being military action authorised by the United Nations Security Council under Articles 39 and 42 of the U.N. Charter⁴. Another one is Article 51, which states that nothing in the current Charter shall limit a Member of the United Nations' inherent right to self-defence if an armed attack occurs on them, whether the victim of such an attack is an individual or collective until the Security Council has taken the required action to ensure international peace and security.

This essay explores what Article 51 refers to as an “armed attack”, and then it will discuss the challenges faced by the legal framework regulating the use of force by states by critically analysing certain cases that occurred due to gaps in legislation⁵. It concludes by mentioning other issues within this domain and recommending appropriate solutions.

II. WHAT IS ARTICLE 51?

The interpretation of the phrase "individual and collective self-defence,"⁶ its relationship to other provisions of the Charter, and the scope of its applicability are all issues raised by Article 51 of the United Nations Charter. This Article may also come under the umbrella Latin term ‘Jus ad Bellum’, which describes the circumstances in which States may employ force militarily or declare war. This Article is viewed in a seemingly different light by two groups which come to be known as the restrictionists and counter-restrictionists.

In his book *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror*, Dr Jackson Maogoto provides a thorough overview of both the restrictionist and counter-restrictionist viewpoints. He demonstrates that Article 2(4) of the Charter is crucial from a restrictionist point of view. States are thus prohibited from employing force. This is, however, constrained by Article 51, which specifies that states may operate in self-defence in response to an "armed attack." Article 51 restricts the use of force by governments to prevent an armed assault, rendering the so-called "inherent right" of Article 51 meaningless because it does not alter the right to self-defence. Article 51 has been read by the International Court of Justice (ICJ) from a restrictionist viewpoint. The ICJ made it very apparent that an armed attack must originate from or be connected to a state in Nicaragua and the Israeli Wall Opinion. The ICJ had the chance to acknowledge the use of force against TOs after 9/11 in the 2005 case of DRC

³ Watney, M. (2014). Legal Solutions to State-Level Cyber Intrusion Under International law: A Maze of Legal Uncertainty or not? European Conference on Cyber Warfare and Security, 206.

⁴ Nations, U., 2022. *UN Charter | United Nations*. [online] United Nations. Available at: <<https://www.un.org/en/about-us/un-charter>> [Accessed 15 July 2022].

⁵ Article 2(4) and Cyber Warfare: How Do Old Rules Control the Brave New https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2128301

⁶ GIBSON, J. S. (1957). ARTICLE 51 OF THE CHARTER OF THE UNITED NATIONS. *India Quarterly*, 13(2), 121–138. <http://www.jstor.org/stable/45067909>

v. Uganda. Instead, it reiterated that self-defence could only be utilised in response to an armed attack by a state, maintaining its initial stance.

The phrase "inherent right"⁷ does have relevance from a counter-restrictionist point of view since it maintains the definition of self-defence that predated the Charter. Restrictionists hold that an armed assault must originate from a state since the Charter did not foresee attacks by non-state TOs that would result in a state's right of self-defence, in keeping with the ruling of the ICJ in the case of Nicaragua. Counter-restrictionists have argued that the Charter upholds customary law as it existed before the Charter by citing an aspect of the Nicaragua verdict, which says that Article 51 is a provision that 'subsumes and supervenes' customary law along with the Security Council's acknowledgement of the inherent right to self-defence. Therefore, it may be said that Article 51's wording is intended to uphold the right to self-defence as recognised by customary international law⁸.

Hence, while Article 51 sounds reasonable and modest at first glance, its simplicity is deceptive. Whether an act of self-defence can be carried out against non-state actors as well as against states needs to be made clear in the Article, along with many other crucial details that have been left ambiguous⁹. Additionally, it is unclear what an armed attack entails or under what circumstances self-defence may be used.

Due to this uncertainty, member nations are protected from liability for any aggression committed in self-defence. Years before the Charter was enacted, strong governments used a method quite similar to this one. The idea that one or more states may grant support to one or more other nations if those states are the target of an armed attack is effectively sanctioned by Article 51. Although it is expressed differently in Article 51, the notion of collective defence is not new in international law or international organisations. This is why it is imperative to understand what "armed attack" refers to under article¹⁰. This can be done in two ways:

- i. "Aggression" versus "armed attack"

The term aggression is used in Article 39¹¹ of the UN Charter. It reads as follows: "aggression is the use of armed force by a State against the sovereignty, territorial integrity or political

⁷ Kretzmer D (*Ejil.org*, 2022) <<http://www.ejil.org/pdfs/24/1/2380.pdf>> accessed 15 July 2022

⁸ Prix-henry-dunant.org, 2022. [online] Available at: <http://www.prix-henry-dunant.org/wp-content/uploads/2014_IRMAKKESEN_Paper.pdf> [Accessed 15 July 2022].

⁹ Kunz, J. (1947). Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations. *American Journal of International Law*, 41(4), 872-879. doi:10.2307/2193095

¹⁰ Suhubiana Maiseke-van der Boom, International and European Law, Universiteit Van Amsterdam,

¹¹ 'Chapter VII: Article 39 — Charter Of The United Nations — Repertory Of Practice Of United Nations Organs — Codification Division Publications' (*Legal.un.org*, 2022) <<https://legal.un.org/repertory/art39.shtml>> accessed 15 July 2022

independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.”

Resolution 3314 by the ICJ in elaborating on the concept of armed assault makes defining aggression vital for examining the meaning of armed attack. When analysing what constitutes an armed attack, the Court uses the Resolution as a starting point in all three cases—Nicaragua, Oil Platforms, and Armed Activities. Furthermore, it is interesting that the ICJ defines an armed attack as "the gravest form of the use of force," despite the Preamble of the Resolution referring to aggression as "the most severe and hazardous form of the illegal use of force." Most teaching now accepts that an armed attack automatically qualifies as aggression. Additionally, Brownlie notes that a show of force needs to be very serious to be classified as an armed attack.

ii. “Use of force” versus “armed attack”¹²”

It is generally acknowledged that the idea and an armed attack are related and that the former is a component of the latter. It is important to remember that using force is not limited to "armed force," but an armed attack entails using power. A "force gap" between the two Articles means that not every use of force may be met with the exercise of the right to self-defence, which is the obvious and most significant conclusion that can be reached from this divergence. The difference between the two ideas is determined mainly by the seriousness of the act or by its consequences.

Indeed, the Court has consistently emphasised the severity aspect as a crucial consideration for evaluating whether an armed attack occurred. Accordingly, "a reasonably significant size, [...] a considerable gravity, and [...] a substantial effect" are requirements for an armed strike under Article 51¹³. For instance, the ICJ says that "simple border encounters" lack the seriousness required to qualify as armed assaults. The Oil Platforms verdict suggests that the threshold of gravity is a variable that depends on each case's particular circumstances. The Court, however, does not outline the boundaries of what can constitute an armed attack in an obvious way. It can be stated that such an intensity level is not needed, or at least is significantly lower, for an act to qualify as the use of force, taking into account the contrast the Court made between the use of pressure and armed attack as its "most severe form."

Finally, we must bring up a recent argument. The only use of force prohibited by Article 2(4) of the Charter is between states. In other words, only the conditions are subject to their

¹² 'Armed Attack' (*Oxford Public International Law*, 2022) <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e241>> accessed 15 July 2022

¹³ 'Article 51 - Field Of Application' (*European Union Agency for Fundamental Rights*, 2022) <<https://fra.europa.eu/en/eu-charter/Article/51-field-application>> accessed 15 July 2022

obligations. The conventional understanding of the origin of an armed assault and, thus, the object of the exercise of self-defence was concurrent; only states were permitted to carry out such operations. However, arguments about whether non-state organisations might launch armed strikes following Article 51 of the Charter emerged in the wake of 9/11. The traditional hierarchical categorisation of the concepts will alter if such a possibility is acknowledged since it would result in the emergence of a set of actions that are not prohibited from using force but constitute armed attacks. This murkiness has led to many issues that the law is facing.¹⁴

III. CHALLENGES BEING FACED BY THE CURRENT LEGAL FRAMEWORK

a. Attacks by Non-State Actors:

Invoking and accepting the right of self-defence against non-State actors is becoming more commonplace among States¹⁵. The justification for the host state's rights, mainly its right to territorial sovereignty, is not violated by the self-defence force deployed on its soil must be provided for this right to be recognised. States using the defence of self-defence against non-State actors rely on the host State's association with those actors to support the use of force on its soil. For some people, participation equates to attribution. Others view participation as complicity. Others may worry that their participation may constitute a failure on the host state's part to exercise proper care in defending the rights of other states on its soil. These solutions are flawed in one way or another and have yet to be widely accepted. There are many instances where such issues were faced¹⁶.

Insurgents used cross-border force in one of the most well-known instances in the history of international law, the Caroline incident between the US and Great Britain in 1837. However, the threat presented using force by non-state actors is now higher than ever. The ability of non-State actors to cause havoc has expanded dramatically because of military and technological breakthroughs and the availability of these resources to private entities. International law has recognised a victim State's right to self-defence against the aggressor State solely in interstate relationships, at least since 1945. According to this theory, any use of force by armed groups or other groups had to be ascribed to a State, which would therefore be held responsible for the assault and the object of self-defence. For two well-known instances, the US's self-defence against Al-Qaida in 2001 was primarily acknowledged to have been justified. Iraq and its allies,

¹⁴ (Core.ac.uk, 2022) <<https://core.ac.uk/download/pdf/35282176.pdf>> accessed 15 July 2022

¹⁵ Rao P, 'Non-State Actors And Self-Defence: A Relook At The UN Charter Article 51' (2016) 56 *Indian Journal of International Law*

¹⁶ 'Use Of Force As Self Defence Against Non-State Actors And TWAIL Considerations: A Critical Analysis Of India'S State Practice' [2020] *Asian Yearbook of International Law*, Volume 24 (2018)

including France, the UK, and the US, have declared a right to self-defence (either individually or collectively) against ISIS in Syria. Syria has ISIS. It is still debatable whether this practice is adequate (and uniform enough)¹⁰ to demonstrate a shift in the conventional notion of self-defence.

There has also been an emphasis on state practice to support different opposing perspectives in light of the arguments for and against the right of self-defence against non-state actors acting from the territory of another state, even without that state's involvement. To determine if state practice resulted in an "accord amongst the Parties" about the interpretation of Article 51 of the UN Charter is one of the grounds for concentrating on state practice. There is a possibility of a state practice being elicited from collective actions. It is equally important to know individual state actions to understand the formation of customary international law and to look at the emergence of an agreement between the parties through subsequent practice.

The International Court of Justice ruled that the State claiming self-defence must demonstrate that it was a "victim of an armed attack" in the matter of Oil Platforms¹⁷. The State's claim of self-defence bears the burden of proof of the facts proving the presence of such an assault. - The International Court of Justice further underlined that an "armed attack" must be transboundary for Article 51 of the UN Charter to be applicable¹⁸ in its Advisory Opinion on the Legal Consequences of the Construction of a Wall¹⁹.

b. Alleged Right to Pre-Emptive or Anticipatory Self Defence:

Pre-emptive self-defence was brought up by the so-called "Bush doctrine," created in the 2002 National Security Strategy. The USA asserted a right to anticipate military measures, going beyond the necessary criteria, to address the new threats brought on by terrorism and the proliferation of Weapons of Mass Destruction (WMDs). The Bush doctrine holds that the United States must be ready to prevent rogue states and international terrorists from threatening to use weapons of mass destruction against it because it may be impossible to detect an imminent threat until it is underway or even completed and because the effects of such attacks are devastating.

The right to anticipate self-defence²⁰ was widely accepted before the establishment of the

¹⁷ Wrestler pallbearers and a winged royal: Tuesday's best photos. <https://www.theguardian.com/news/gallery/2019/feb/12/wrestler-pallbearers-racehorses-tuesday-best-photos>

¹⁸ Turkish official: Why US should partner with Turkey in Syria. <https://www.cnn.com/2018/02/01/opinions/turkish-official-why-us-should-partner-with-turkey-in-syria-opinion-kalin/index.html>

¹⁹ 'What Are Jus Ad Bellum And Jus In Bello?' (*International Committee of the Red Cross*, 2022) <<https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0>> accessed 15 July 2022

²⁰ Rothwell D, 'ANTICIPATORY SELF-DEFENCE IN THE AGE OF INTERNATIONAL TERRORISM' (2022) <<http://classic.austlii.edu.au/au/journals/UQLawJl/2005/23.html>> accessed 15 July 2022

Charter. According to Brownlie, "customary law allowed for pre-emptive action in the face of immediate peril." There is no doubt that anticipatory action was covered by the right to self-preservation and the theory of necessity. This notion was supported by the Caroline case, publicists' opinions, and instances of official conduct. However, in light of the UN Charter and the goal of its creators to establish a new international order in response to the events of the first 45 years of the 20th century, pre-1945 conceptions of ASD must now be considered.

The Israeli war on Iraq in 1981 and the US strike on Libya in 1986 are the two main instances of the alleged use of anticipatory self-defence during the UN era. A nuclear reactor provided by France was built in Osiraq, Iraq, when Israel launched an airstrike there on June 7th, 1981. Fourteen planes were involved in the military action. All the aircraft managed to elude detection and made it back to Israel without incident. Israel said that this action was necessary for self-defence. Israel has been worried about the Iraqi programme for several years because of its potential to build nuclear weapons that might be used against it. The only legal justification for Israel's conduct could be ASD because no armed assault against Israel had taken place at or around²¹ the time of the Osiraq strike. Although it is now evident from evidence acquired by the international community that Iraq intended to utilise the Osiraq plant to produce nuclear bombs, it is thought to have taken between 12 and 18 months before that capability was attained. It's still unclear what Iraq's ultimate plans were for how it may have used its nuclear weapons capacity. There was no definitive Security Council discussion in this case. Just like the debate on the right of self-defence against non-state actors, this debate on pre-emptive and anticipatory self-defence remains inconclusive and undecided.

IV. CONCLUSION

It is impossible to discount the value of the UN Charter in the era of WMDs. Its value comes from the need for states to resolve conflicts peacefully wherever feasible and that the use of force should only be resorted to in extreme cases. However, nations that must defend their citizens cannot be denied the right to self-defence, which is a basic one. Some scholars believe that the UN Charter failed to manage peace. In contrast, some believe it needs to be revisited to add specific other issues like cyberattacks and economic issues that severely cripple a country. Doing that, however, may lead to the prohibition of using armed force in interstate disputes and the encouragement of peace. Some other solutions that could be considered are the formulation

²¹ FREEDOM OF INFORMATION ACT 2000(SECTION 50) DECISION NOTICE Dated 15 https://ico.org.uk/media/action-weve-taken/decision-notices/2006/360472/DECISION_NOTICE_FS50070769.pdf

of new treaties or changing the scope of Article 51²². Article 39 of the UN charter states²³, “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken by Articles 41 and 42, to maintain or restore international peace and security²⁴,” could be used more efficiently to disallow cases to even rise to the level of Article 51, leaving no room for ambiguity or any other gaps and challenges.

²² 'The 21St Century Challenges To Article 51' (*E-International Relations*, 2022) <<https://www.e-ir.info/2011/06/30/the-21st-century-challenges-to-Article-51/>> accessed 15 July 2022

²³ THE OTHER SIDE OF WAR. <https://ablogaboutpeace.blogspot.com/>

²⁴ Kerr, P. (2015). Iran's Nuclear Program: Tehran's Compliance With International Obligations *. *Current Politics and Economics of the Middle East*, 6(4), 595.