

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 7 | Issue 1

2024

© 2024 *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.

Indian Perspective on the Legality of Surgical Strikes

VIDHISH MUTHANNA C. A.¹

ABSTRACT

The national security of a state is an important objective as the ability to provide a peaceful life without any harm from foreign actors or states is the capability of a strong government. Considering these circumstances, states have been using surgical strikes as a common tool for warfare in recent years against terrorist and insurgent outfits. The legality of such an act of using force on another country is a violation of peace and has been in question in the minds of thinkers. Use of force, whether in respect to an act of aggression or in defense is subject to the provisions provided under the UN charter. India has conducted multiple surgical strikes in response to external threats and the legality of such attacks have been studied in this paper. International law is an important factor in determining the legality of surgical strikes. This is especially true when it comes to cross-border military operations. Surgical strikes are a form of targeted military action that is designed to minimize civilian casualties and to damage property. As such, international law must be considered before any such action can take place. This article will discuss the legal framework surrounding surgical strikes, including relevant treaties, international organizations, and national laws. It will also examine cases of India's surgical strikes and their implications for international law.

Keywords: Surgical Strike, Article 51, UN Charter.

I. INTRODUCTION

A surgical strike is a military operation intended to inflict casualties on the enemy, while minimizing harm to civilians and civilian infrastructure. Generally, the definition of a surgical strike is applied in the context of counter-terrorism operations in which an air or ground campaign is required to destroy a significant group of militants, but not all members of that group.

International laws regarding surgical strikes and military actions are regulated by international treaties, as well as by national laws. Each country must abide by these treaties and laws to be a member state. The most important treaty with regards to surgical strikes is the United Nations Charter which defines the way military force can be employed and what constitutes a threat to

¹ Author is a student at Symbiosis Law School, Pune, India.

peace through aggression. Articles 1 and 2 outline the main objectives of the U.N Charter. It also the responsibility of each state which a signatory to the U.N. to not use force except against an aggressor or in self-defense during threat to sovereignty, territorial integrity, or political independence under Article 2². This treaty plays an important role in regulating military action even today. However, Article 2(4) of the UN Charter prohibits the use of force while Article 51 of the charter provides scope for countries to access use of force for self-defense³.

Domestic laws also play a major role in determining the legality of surgical strikes as countries may have their own laws that govern the use of force by their country's military. The method to understand the legality of these surgical strikes and the need for use of force can be analyzed from the different circumstances of each operation. It is equally important for these countries to adhere to the international legal norms to avoid the potential consequences of international condemnations and sanctions for breaking its norms.

II. LEGAL FRAMEWORK OVER THE USE OF FORCE AND RIGHT OF SELF DEFENSE

Use of force is safeguarded by the provisions given under Article 2(4) of the UN Charter and therefore, every state who is party to this has to abide by these principles. However, Article 51 of the Charter provides exceptions to a state to use force for the purpose of self-defense against a terror act caused by another state against the victim state. Another exception is available under Article 42 of the Charter which allows the victim state to use force against aggression causing state with the authorization of the United Nations. Therefore, we may understand that the Article 42 of the UN Charter envisages the collective/group security response against the violation of Article 2(4) of the charter by another state.

The incident of 9/11, which aimed at four designated locations and carried out a coordinated attack by the terrorist organization Al-Qaeda (Islamic Extremist group), led to the increase in discussions about the means and scopes to reduce such terrorist acts which are protected under the provisions of Art.51 of the UN Charter. Art.51 of the charter discusses an armed attack without referring to who is the attacker. Therefore, one of the provisions under Art.51 is that force can be used as self-defense against any actors like a state, terrorist groups or non-state actors but the focus is to understand that the right of self-defense is available to anyone against who an armed attack has been conducted.

It is important to note that Art.51 is an exception to Art. 2(4) as this use of force has been

² Elizabeth Wilmschurst, "The Chatham House Principles of International Law of the Use of Force in Self-Defense" vol: 55, International and Comparative Law Quarterly, pp-963 (2006).

³ Srinivas Burra, "Use of Force as Self Defense against Non-State Actors and TWAAIL Considerations: A Critical Analysis of India's State Practice", Brill (2020) DOI:10.1163/9789004437784

prohibited in matters relating to interstate relations. In accordance with Art.3 and Art.4 of the UN charter, both define a state who is recognized by the UN as its member and limit the extents of prohibition of use of force against only another state. The disconnection between Art.2(4) and Art.51 of UN charter is supported by legal analysis conducted. The provision of Art.51 was created by the drafters in exception to Art 2(4) because it encompasses the nature to use force against non-state actors and terrorist groups. This serves as a huge logical incoherence of the purpose for which the statute was created under the framework of the charter.

The customary international laws safeguarding the right to self-defense is not limited to the UN charter only but has rather been formed years ago and is a practice of a secured state. The retaliation by means of self-defense against an actor for armed attacks or conflicts should not be unreasonable and excessive in nature⁴. It is the Caroline incident⁵ that led the UK and the US to adopt the practice of customary international law to have the power to take self-defensive actions against incoming and potential threats.

Prior to the UN Charter of 1945, nation states fairly had the freedom of power to use self-defense against an aggressive state. Clarificatory principles were also adopted by the scholars and some examples of these principles are Chatham House Principles, The Leiden Policy Recommendations and the Bethlehem principles⁶.

III. INDIA'S POLICIES AGAINST ARMED ATTACKS

India is a nation state with a variety of foreign policies and a doctrine of only taking military actions against acts by another state or actor causing violence and threats to the national security of India. Since independence, India has had armed conflicts with its neighboring countries particularly Pakistan and China⁷. Though self-defense was already in use by countries in interstate disputes, the prominence for right of self defense mainly came after the 9/11 incident which led the discussions to matters on armed attacks by non-state actors. India has 2 major instances from 2016 and 2019 which dealt with the issues of right to self defense and use of force. These are namely the Balakot air strike and the Surgical Strike on Line of Control (LoC).

(A) Doval Doctrine

⁴ Ojaswa Pathak, "The Doval Doctrine: Analysing the Legality of India's Policy of Cross Border Counterterror Operations", Vol:10 NLIU L. REV, pp-533 (2021).

⁵ Michael Wood, "The Caroline Incident-1837", vol:5, The use of force in International Law: A case-based approach (2018)

⁶ Daniel Bethlehem, "Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors", vol.no:106 American Journal of International Law pp-770 (2012)

⁷ India – Pakistan war (1948-49), Sino- Indian War (1962), India – Pakistan War (1965), India – Pakistan (1971), India Pakistan war (1999)

India has had strong regulations against acts of terrorism and has always retaliated against it with immediate effects after an inbound attack. India's National Security Advisor Mr. Ajith Doval became vocal over the issues of Pakistan originated/inflicted violence in India and to respond to that, he suggested that India undertakes the strategy of Defensive Offense which allowed the Indian forces to hit back at all the original sites from where an attack was launched against India. This policy brought forward by Mr. Ajith is referred to as the Doval Doctrine which is now well known to China and Pakistan intelligence. There are two means by which India can enforce the its policy of defensive offense. This would include the sudden rebuttal or responding attack to the foreign state that caused armed attack or by means double squeeze which is a means by which international restrictions and isolations of the attacking country can be made thereby leading to cutting of supply for terrorist activities.

- **Myanmar Strike 2015**

India conducted its first surgical strike on September 2015, fighting against the inhumane killing of 18 Indian soldiers by the National Socialist Council of Nagaland Khaplang (NSCN -K) and Kanglei Yawol Kanna Lup (KYKL). The strategic operation was conducted by the Indian Special Forces namely the Para Troops who had crossed boarder of Myanmar and neutralized the insurgencies via land-based attacks. Some media reports claim that Indian forces sustained serious injuries but no official release was made by the Ministry of Information and Broadcasting. It only published the news that Indian Forces had conducted 72-hour secret operations to neutralize insurgencies following the earlier attack made on India⁸.

In this instance, if we look into the legality of India's attack, we can justify its act and take the defense of Art.51 of the UN charter due to 3 main reasons.

1. According to reports, it was clear that the group which had constructed the attack on India was belonging to the NSCN-K and KYKL outfits and therefore, the act of using force is not regulated as is a right according to customary laws which a state follows.
2. The impact of the attack on India was a surprise and led to a bad reputation of India's defense sector. At the same time, the attack had created such destruction and raised the concern of probable future attacks and thus the need to neutralize them is important.
3. India has always adopted a practice of alternate dispute resolution therefore it has many negotiations with such insurgent groups who act in North Eastern regions but

⁸ Bhaumik S, "Is Myanmar Raid Indian Counter-Insurgency Shift?" (BBC News, 10 June 2015) retrieved from <https://www.bbc.com/news/world-asia-india-33074776>

still some of this outfits intend and show aggression to cause hurt and danger to the life of people and thereby it is imminent for Indian forces to neutralize such groups and take control to maintain peace which is also the main agenda of UNSC and its charter

- **Surgical Strike 2016**

On the morning of 26th September 2016, India had successfully completed its second surgical operation across the Line of Control (LoC) situated between the disputed land of India and Pakistan. The Director General of Military Operations (DGMO) had announced that India conducted cross border surgical strike on the launch pads of terrorist groups situated in Pakistan⁹. The press release also addressed that the attack launched over these terrorist groups were in reiteration about India's national security and in response to the earlier attacks at Pooch and Uri.

There are many criticisms made against India for its show of power in POK. On one hand, we have nationalists who argue that the act is justified, and it should be considered legal. Also, when a surgical strike is conducted, it need not be in immediate response to an incoming attack but can be done after proper planning. Thus, timing of response attack may not be immediate and the planned response can be considered a surgical strike. On the other hand, there are some individuals who also claim that the area occupied by Kashmir belongs to India and thus an act of neutralizing insurgent and terrorist outfits is an internal matter and does not attract the attention of International Law¹⁰.

- **Balakot Strike 2019**

A JeM based outfit group had launched a suicide bomb attack on the CRPF officers who were travelling to Pulwama, Kashmir. The attack resulted in the death of over 40 officers and the Pakistani outfit Jaish-e-Mohammed (JeM) claimed responsibility and this further led to the increase in tensions between India and Pakistan. In response to this, India sent its top officers from the IAF to shoot down the biggest training facility of JeM, located in the thick forest areas of Pakistan. After the attack concluded, Indian forces returned back safely and announced the news through media.

⁹ Transcript of Joint Briefing by MEA and MoD, Ministry of External Affairs, Government of India (Sept. 29, 2016), https://www.mea.gov.in/media-briefings.htm?dtl/27446/Transcript_of_Joint_Briefing_by_MEA_and_MoD_September_29_2016

¹⁰ Bharat H. Desai, "Surgical Strikes' by India: Taking International Law Seriously", *Economic and Political Weekly* (2017), <https://www.epw.in/journal/2017/5/commentary/%E2%80%98surgical-strikes%E2%80%99-india.html>

Pakistan claimed the it to be an act of aggression by India as India crossed the LoC and Pakistan airspace to launch an attack. In response to this, Pakistan wanted to show their right, will and capabilities for which they sent in their troops on the same day to attack India which was defended by the IAF following which a Pakistani flight was shot down. India also lost one of its MiG21 flight but the pilot landed in Pakistan¹¹. The officer was initially abused and hurt physically but India took reference of the International Humanitarian laws and Geneva conventions to release the officer in custody following which the Pak PM agreed on with an agenda of de-escalating tensions between the two¹².

IV. RECOMMENDATIONS/SUGGESTION

India has been following a practice of non-provocative defense policy, it is important that the government continue to follow the Doval Doctrine. Along with this, the Central Government can take a few steps to increase the national security of India.

1. India needs to develop its internal national security policy by outlining the limits and extent to which force can be used in exercise of right to self-defense. This is because the act of self-defense should not be overused or abused, but instead should be made with the agenda of maintaining and securing peace in the nation.
2. It is important that the United Nation General Assembly clarify the acceptance or recognition of customary laws and traditional treaty laws, which the states have been using for self-defense from the aggression caused by a group originating from the foreign soil. It is only after this that a state can take actions over non state actors without considering the regulations and restrictions imposed by international laws.

V. CONCLUSION

Surgical strikes have been performed by the elite forces of different countries against state actors and both non state actors. Though customary laws and domestic laws govern the use of force by means of surgical strikes, in the international regulations, it has been restricted under the provisions of Art.2(4) of the UN charter. But the loopholes provided under Art.51 of the charter grants the right to use self defense in case of an armed incoming attack. The wording of the Art.51 is limited to an armed attack but doesn't mention the attacker and hence it has been

¹¹ Pakistan Demarched on the Act of Aggression Against India, Ministry of External Affairs, Government of India (Feb. 27, 2019), https://www.mea.gov.in/press-releases.htm?dtl/31100/Pakistan_demarched_on_the_act_of_aggression_against_India.

¹² Statement by Foreign Secretary on 26 February 2019 on the Strike on JeM Training Camp at Balakot, Ministry of External Affairs, Government of India (Feb. 26, 2019), https://www.mea.gov.in/Speeches-tatements.htm?dtl/31089/Statement_by_Foreign_Secretary_on_26_February_2019_on_the_Strike_on_JeM_training_camp_at_Balakot.

interpreted in many ways. Non state actors have never been accepted by the international organization and any acts of aggression conducted by them can be retaliated against under the cover of self-defense. While on the other hand, for nation states, they are restricted from the act of using force against another state and if violated, a collective act of punishments and security actions are applicable against the violator. In the case of India's use of power in respect to self-defense from the NSA and terrorist organizations, is justified under the UN charter. There is also news about US support who had provided support to India for performing surgical strikes against terrorist groups in Pakistan¹³.

¹³ Readout of Telephonic Conversation Between National Security Advisor Ajit Doval and US NSA Amb John Bolton, Ministry of External Affairs, Government of India (Feb. 16, 2019) https://www.mea.gov.in/press-releases.htm?dtl/31058/Readout_of_Telephonic_Conversation_between_National_Security_Advisor_Ajit_Doval_and_US_NSA_Amb_John_Bolton

VI. REFERENCES

1. Bhaumik S, “*Is Myanmar Raid Indian Counter-Insurgency Shift?*” (BBC News, 10 June 2015) retrieved from <https://www.bbc.com/news/world-asia-india-33074776>
2. Bharat H. Desai, “*Surgical Strikes’ by India: Taking International Law Seriously*”, Economic and Political Weekly (2017), <https://www.epw.in/journal/2017/5/commentary/%E2%80%98surgical-strikes%E2%80%99-india.html>
3. Daniel Bethlehem, “*Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*”, vol.no:106 American Journal of International Law pp-770 (2012)
4. Elizabeth Wilmshurst, “*The Chatham House Principles of International Law of the Use of Force in Self-Defense*” vol: 55, International and Comparative Law Quarterly, pp-963 (2006)
5. Michael Wood, “*The Caroline Incident-1837*”, vol:5, The use of force in International Law: A case-based approach (2018)
6. Ojaswa Pathak, “*The Doval Doctrine: Analysing the Legality of India's Policy of Cross Border Counterterror Operations*”, Vol:10 NLIU L. REV, pp-533 (2021).
7. Pakistan Demarched on the Act of Aggression Against India, Ministry of External Affairs, Government of India (Feb. 27, 2019), https://www.mea.gov.in/press-releases.htm?dtl/31100/Pakistan_demarched_on_the_act_of_aggression_against_India
8. Readout of Telephonic Conversation Between National Security Advisor Ajit Doval and US NSA Amb John Bolton, Ministry of External Affairs, Government of India (Feb. 16, 2019) https://www.mea.gov.in/press-releases.htm?dtl/31058/Readout_of_Telephonic_Conversation_between_National_Security_Advisor_Ajit_Doval_and_US_NSA_Amb_John_Bolton
9. Sean D Murphy, “*Self Defence and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*”, vol.99, The American Journal of International Law 62.64 (2005)
10. Srinivas Burra, “*Use of Force as Self Defense against Non-State Actors and TWAAIL Considerations: A Critical Analysis of India’s State Practice*”, Brill (2020) DOI:10.1163/9789004437784
11. Statement by Foreign Secretary on 26 February 2019 on the Strike on JeM Training Camp at Balakot, Ministry of External Affairs, Government of India (Feb. 26, 2019),

https://www.mea.gov.in/Speeches-statements.htm?dtl/31089/Statement_by_Foreign_Secretary_on_26_February_2019_on_the_Strike_on_JeM_training_camp_at_Balakot.

12. Transcript of Joint Briefing by MEA and MoD, Ministry of External Affairs, Government of India (Sept. 29, 2016), https://www.mea.gov.in/media-briefings.htm?dtl/27446/Transcript_of_Joint_Briefing_by_MEA_and_MoD_September_29_2016
