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ANTICIPATORY SELF-DEFENCE IN THE MODERN WORLD

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INTRODUCTION

The primary purpose for the formation of the United Nations was to save "succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind".[1] In this context, the most significant development in the latter half of the twentieth century has been the regulation of the use of force and right of States to wage war. The corollary development as a result of this regulation has been invocation of the age old doctrine of self-defence and the emergence of a controversial debate as to the limits of this doctrine. Another interesting aspect of this debate is that it has time and again been contended that maters of self-preservation and security of the State are not subject matters of International law.

The purpose of this paper is to establish that the concept of 'anticipatory self-defence' falls within the justifiable limits of 'self-defence' as enshrined under Art. 51 of UN Charter. The justification stems from the need to give a dynamic interpretation to Art. 51 in light of the recent developments in science and technology which has resulted in States possessing nuclear arms capable of complete destruction of other States in no time.

SELF-DEFENCE - HISTORICAL PERSPECTIVE

It has been opined by many that self-defence is an inherent and automatic right. The naturalist doctrine of Grotius was that:-

> right of self-defence has its origins directly and chiefly in the fact nature committed to each other of his protection.[2]

This view is reflected in the UN Charter as to make self-defence an

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1 See Preamble of the UN Charter.

2 H. Grotius, *De Jure Belli Ac Pacs*, 125 (1925) *c.f.* Oscar Schaster, "Self-defence and Rule of Law", 83 *A.J.I.L.* 259, 260 (1989).

inherent right.[3] The authoritative interpretation of self-defence was given in the *Nicaragua Case (Merits)*.[4] It has been held that:-

> Art. 51 of the Charter is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defence and it is hard to see how this can be other than of customary nature, even if the present content has been confirmed and influenced by the Charter.[5]

If the UN Charter reinforces the customary law on 'self-defence', then let us examine the same prior to the Charter.

The Caroline Case (1837)[6]

The case involved an American ship 'Caroline' which was sunk by Great Britain on the ground of self-defence. The test evolved by the then American Secretary of State Daniel Webster popularly known as the 'Webster Doctrine' has commonly been accepted as indicating when the pre-UN Charter, customary international law right of self-defence could be exercised.[7] The justification for such an action is that there was necessity for self-defence which was instant, overwhelming, leaving no choice of means and no moment for deliberation. This right is however not unqualified. An attack which is made in self-defence must necessarily be proportional and not excessive.

Further, the Kellogg-Briand Treaty for Reunification of War in 1928 recognised that self preservation was an inherent right to States under customary international law.

AGGRESSION - AN OVERVIEW

Since the right of self-defence is dependent on occurrence or imminent threat of 'armed attack', understanding of the same is necessary. The concept of warfare has undergone a drastic transformation in the modern day ever since Quincy Wright defined it after the Dumberton Oaks Conference. It has a character of ambiguity that Greenwood describes as 'confusion'.[8] In recent

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3 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....

4 *Case Concerning the Military and Paramilitary Activities in Nicaragua (Merits)*, 1986 I.C.J. Reports p. 14.

5 *Ibid.* at 94, para 176; *But see* H. Kelson, The Law of United Nations, 791 (1950).

6 *c.f.* Oppenheim, International Law, Vol. 1, 300 (1955).

7 D. J. Harris, Cases and Materials of International Law, 849 (1992).

8 C. Greenwood, "The Concept of War in Modern International Law", 36 *I.C.L.Q.* 303 (1987).

times States do not employ the traditional means of war but employ terrorism and insurgency in their proxy wars. Moore has gone to the extent of calling it "politically invisible aggression".[9]

The International Court in the *Nicaragua Case (Merits)*[10] has held that the Resolution on the Definition of Aggression, 1974[11] must be held to be customary international law on what amounts to 'armed attack'. The General Assembly had favoured a mixed definition of aggression and had laid down a list of acts by way of example to illustrate the concept of 'aggression'.

Art. 1 of the resolution defines aggression as follows:-

> Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another.

Art. 3 provides that invasions or attack by armed forces of a State, military occupation as a result of invasion or attack, annexation by use of force, blockade of ports or coasts of a State, and the sending of armed bands, groups or mercenaries or a substantial involvement therein by the sending State in bombing by these people would amount to aggression.

Both the International Law Commission[12] and jurist Brownlie[13] have supported the view in Art. 3 of the General Assembly Resolution. In an attempt to restrict the meaning, Antonio Cassesse has argued that for a terrorist attack and activities to fall within the definition of 'aggression', the same should be consistent and not sporadic or isolated.[14]

The importance of this definition need not be stressed as it is the only means by which State can justify the exercise its right of self-defence.

ANTICIPATORY SELF DEFENCE - THE DEBATE

At a conceptional level there has been a debate as to whether the UN

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9 J. N. Moore, "The Secret War in Central America and the Future of the World Order", 73 *A.J.I.L.* 43 (1986).

10 *Supra* n. 4.

11 G. A. Resolution 3314 (XXIX), (1974).

12 Art. 5(a) of the Crimes against Peace and Security of Mankind defines aggression on as "encouragement by the authorities of a State of terrorism activities in another State or toleration by the authorities of a State of organised activities to carry out terrorist activities".

13 Ian Brownlie, "International Law and Activities of Armed Bands", 7 *I.C.L.Q.* 712 (1958).

14 Antonio Cassesse, "The International Community's Legal Response to Terrorism", 38 *I.C.L.Q.* 599 (1989). The Resolution is not very different from the USSR Draft Resolution in 1954: See John N. Hazard, "Why try to define aggression again?", 62 *A.J.I.L.* 701, 703 (1969).

Charter by virtue of Art. 51 has incorporated the customary principle given by the Webster doctrine in the *Caroline Case*.[15]

On the one hand we have eminent jurists like the former I.C.J. President Philip C. Jessup ruling out the right to anticipatory self-defence by arguing that an alarming military preparation by a neighbouring State would only justify a resort to the Security Council but not a resort to force.[16] This view has been supported later in the 1960s when, this debate was revived in light of the 'Cuban Missile Crisis' and the embargo by the United States on the ports of Cuba by Prof. Quincy Wright by stating that

> Obligation of States to refrain from threats to peace under Art. 2(4) and competence of the UN to take actions in case of threat to peace under Art. 39 were not intended to give a unilateral right to military self-defence in case of such threats. For that reason, self defence against threats were excluded in Art. 51 and States were explicitly advised and obliged to submit disputes or situations which they think threaten peace, to the UN and refrain from unilateral use of force.[17]

Disagreement with the above stance was first voiced by Morten Kaplan and the former Secretary of State of U.S. Katzenbach who argued that such a stance was futile in an atomic and nuclear age.[18]

Further, the former I.C.J. President Humphry Waldock also disagreed with Jessup and argued that the drafters of the Charter did not intend to cut down the right of self defence beyond the scope of the Webster doctrine in the *Caroline Case*.[19] He opined that where there was convincing evidence not merely of threats or danger but of an armed attack being actually mounted, then an armed attack may be said to have occurred it had not passed the frontiers.[20]

Waldock's view was further extended rightly by Prof. Myres Macdougal who stated that there was no prohibition against the use of force in anticipatory self-defence. He argued that:-

> "Nothing on the plain and natural meaning of the words of the Charter require an interpretation that Art. 51 restricts the custom-

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15 *Supra* n. 6.

16 *c.f.* D. Sullivan, "Legal Restrictions on the Right to Use of Force against International Terrorism", *ASILS Int'l L.J.* 169 (1986).

17 Quincy Wright, "The Cuban Quarantine", 57 *A.J.I.L.* 546 (1963).

18 *c.f.* Rowles, "Secret Wars, Self Defence and Charter", 80 *A.J.I.L.* 568 (1986).

19 *Supra* n. 6.

20 *Supra* n. 16.

> ary right of self-defence. The proponents of such an interpretation substitute for the words "if an armed attack occurs" the very different words "if and only if" an armed attack occurs."[21]

Macdougal further argued that, self-defence was legal under international law even if pre-emptive in nature, provided that the force used was proportionate and proper in intensity and magnitude to secure the objective of self-defence under the established conditions of necessity.[22]

The above arguments supporting the right of States to anticipatory self defence has been tacitly recognised by the world community.[23]

ANTICIPATORY SELF DEFENCE - VIEW UNDER ARTICLE 2(4)

Art. 2(4) of the UN Charter is a general bar against the use of force. Under this provision States are required to refrain from the threat or use of force against the political independence and territorial sovereignty of other States. Anthony D'Amato has analysed the above in light of the Israeli air attack and the consequent destruction of Iraqi Nuclear reactors in 1983.[24] He argues that Israeli attack on Iraq was justified since neither the political independence nor territorial integrity of Iraq was taken away, even though there was a transboundary attack by Israeli as:-

a) No portion of Iraq was taken away by the bombardment and

b) The Israeli action is analogous to a limited humanitarian intervention which can be justified on similar lines.[25]

Thus the Israeli action was sought to be justified on the basis of the above two propositions. The arguments are valid as the very fact of Iraq possessing a nuclear reactor in an already unstable region of political uncertainty was itself a threat to Israeli existence and their political integrity. Second, the intervention was humanitarian as a strike by Iraq by using its nuclear capabilities would lead to a cruel end of the whole lot of Israelis.

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21 M. Macdougal, "The Soviet -Cuban Quarantine", 57 *A.J.I.L.* 597 (1963).

22 M. Macdougal and W. M. Reisman, International Law Essays 145 (1981).

23 Abel A. Emiko, "The Impact of International Terrorism and Hijacking of Aircrafts on State Sovereignty: The Israeli Raid on Entebbe Airport Revisited", 23 *I.J.I.L.* 91 (1981). *See* Withdrawal of Argentina not England in the SC Res. 502 (3rd April 1982), US bombing of Libya - Excerpts in 80 *A.J.I.L.* 632 (1986). *See also* Mallison, "Aggression or Self-Defence in Lebanon?" 77 *A.S.I.L. Proc.* 174 (1983). See also, SC Res. 228 (25th Dec. 1966), SC Res. 265 (1st Apr. 1969), SC Res. 332 (21st Apr. 1973), on Israeli attack on Palestinian Organisation in Jordan and Lebanon.

24 Anthony D'Amato, "Israeli Air Strike upon Iraqi Nuclear Reactor", 77 *A.J.I.L.* 584 (1983).

25 *Id., See also* Thomas C. Carey, "Self Determination in the Post Colonial Era: The Case of Quevec, *ASILS Int'l L.J.* 47 (197).

The second part of Art. 2(4) mandates that the use of force must not be inconsistent with the purposes of the United Nations. Macdougal and Feliciano suggest three factors to see whether actions involving the claim of anticipatory self-defence are inconsistent with the purposes of the United Nations.[26]

a) Extension or Conservation

If the attack made in self-defence is only for conserving that State's values rather than extending them by acquisition or destruction of the values held by the opposition, then it would be legitimate.[27] Israel merely wanted to check possible nuclear proliferation.

b) Degree of consequentiality

This factor is of extraordinary significance in the present day context. It has its foundations in the principle that there is hardly a more fundamental value than the preservation of the lives of the inhabitants of the claimant State. The existence of the State itself is in jeopardy. Thus Israel may have been justified in attacking a nuclear reactor but not a plant manufacturing tanks and artillery. Therefore there is a requirement of drawing a qualitative line between conventional and nuclear capabilities is so far as Art. 2(4) is concerned.[28]

c) Inclusivity or exclusivity of Israel's objectives

The question posed is as to how the action of Israel would be in conformity with the purposes of the UN. It is enumerated in the Charter that one of the purposes of the UN through the General Assembly is under Art. 11, concerning disarmaments and regulation of armaments. Art. 26 concerns with the Security Council duty to promote international peace and security. The Charter is not exclusive as it is also understood that nuclear proliferation and the weapons constitute the gravest threat ever faced. International stability is compromised every time there is anew acquisition.[29]

The actions of Israel may be confused with the prohibited act of reprisals. It is therefore necessary to distinguish between defence and reprisal. Bowett[30]

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26 M. Macdougal and Feliciano, Law and Minimum World Public Order, 201 (1961).

27 *Id., See also* Anthony D'Amato, "The Concept of Human Rights in International Law", 82 *Columbia Law Review* 1110,1118 (1982).

28 Thomas M. Frank, "Who Killed Article 2(4)?". 64 *A.J.I.L.* 809 (1970).

29 S.C. Res. 393 (1976), Self-defence claims to justify intervention in Afghanistan was rejected. S.C. Res. 387 (1976), where South Africa's attack against neighbouring States were condemned.

30 D. W. Greigh, "Self Defence and the Security Council - What does Article 51 Require?", 40 *I.C.L.Q.* 366 (1991).

gives the illustration of this by guerilla activities being carried out by State A against State B. The continuous acts provoke State B to destroy these camps from where guerilla activities are being carried out. A strict construction of Art. 51 would not permit self-defence as it requires actual armed attack. It is opined that it would be an inadequate interpretation. It is unrealistic and it was never the intention to prevent the concept of anticipatory self-defence.[31]

CONCLUSION

The two interpretations on the scope of the right to self-defence of States under International law could be classified as restrictive and expansive interpretations. The former tries to interpret Art. 51 narrowly and has erroneously understood that the UN Charter is a total prohibition on the use of the same under all conditions as undesirable. The expansive interpretation sees to reconcile Art. 51 with the customary international law and realizes that force could be legitimately used for achieving certain noble and predominant purposes. The school also realises that the use of force might be the only solution in certain circumstances. State practice seems to justify the above stance.

A State seeking defence under the expansive interpretation would have to show the following conditions specified by Art. 51 and customary international law are complied with:

a) Necessity

b) Proportionately and

c) Evidence of impending strike.

Art. 51 requires that the 'victim State' report to the Security Council of the existence of an armed attack on it. This 'obligation' has not found enough support to be termed 'mandatory'.[32] In cases involving anticipatory self-defence declaration as to the existence of circumstances justifying the exercise of this defence can obviously be made only after the right has been exercised. The criticism that since the determination of the circumstances justifying the exercise of the right of anticipatory self-defence is made by the claimant State alone, it would lead to abuse of the concept, applies equally to the traditional doctrine of self defence also and the international community has always indulged only in a post-mortem analysis to fix responsibility.

The impotency of the United Nations to prevent nations from breaching peace and its inability to take positive action to protect interests of a State

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31 *See* USSR action on Czechoslovakia in 1968, *c.f.* Bowett, *op.cit.* (1972).

32 *Supra* n. 30.

which are infringed upon by another State greatly dilute the prohibition on the use of force by States.

This is an era where the mere pressing of a button could result in the anhiliation of over half the world by nuclear weapons and missiles, the right of anticipatory self-defence becomes indispensible. Would it not be ridiculous to argue that States must wait for the missiles to cross their borders before exercising their right to self-defence? The restrictive interpretation to the right of self-defence is an anachronism in the present day context and has outlived its utility. The time has come to give the restrictive interpretation a burial as it threatens the very existence of States and perhaps international law also which cannot survive without States.