LIMITS OF SELF-DEFENCE IN INTERNATIONAL LAW WITH SPECIFIC REFERENCE TO THE MODERN-DAY USE OF FORCE

Gayathri. U, Postgraduate, LLM – International Law and Organizations, Department of Legal Studies, University of Madras

ABSTRACT

Every state has an inherent right to defend itself from unlawful aggression or attack by another state or non-state actors. The concept of self-defence underwent a significant change after the 9/11 attack, where its application extended to terrorist attacks or non-state actors. Though this right is inherent, it has certain limitations that must be considered by the state exercising such self-defence, i.e. the Principles of Necessity and Proportionality. Only when the attack or aggression is of a high degree or the survival of the state is in jeopardy and there exist no other peaceful means to stop the threat and only when there exists a grave necessity, self-defence can be used. The use of force must be only to the extent of neutralizing the attack and must not cause excessive injury or damage than that was needed to repel the threat or armed attack. War cannot be prohibited and the death of civilians in war is inevitable. Due to the changing nature of conflicts and threats, it is of predominant importance that self-defence has to be studied with the present-day scenarios to analyze its legality and to what extent it can be used. This research analyzes the status and usage of self-defence in modern-day conflicts with specific reference to Non-State Actors and Cyber-attacks and it interprets the notion of limits fixed by international law on self-defence, and analyses whether such limitations be violated to protect the state's own interest, its citizens, and territorial integrity.

Keywords: Self Defence, International Law, Modern Day Use of Force, Non-State Actors and Cyber Attacks.

Introduction

"*Self-defence is a use of force to protect one state from the attack of another"*[1]. *Jus Ad Bellum* deals with *"when a state may resort to the use of force"*. Under *Just War* theory, *if a war is conducted to restore peace, then such war is justifiable*[2]. A war is just when it is *waged to defend its territory and waged by a legitimate authority*.[3] In the 21st century, *"the term war in Jus Ad Bellum has been replaced with military intervention or armed conflict"*[4]. Hugo Grotius in his book *On the Law of War and Peace, 1625* stated that *a war is just only when it is waged against an imminent danger and force and when the principles of necessity and proportionality are followed*.[5] The right to protect oneself from that of others has been an inherent right under the nature of law. Article 2(4) of the UN states that *states must refrain from using threat or use of force against the territorial integrity, political independence of any state or in a manner inconsistent with the purposes of the UN*[6]. However, there exist 3 exceptions to this rule, the State can use force under Chapter 7 of the UN (Security Council Mandate), Self-defence and humanitarian intervention. Article 51 of the UN deals with self-defence. It is an inherent right of every state, it applies against an armed attack, and it must be used to an extent of maintaining international peace and security. The state claiming self-defence must prove that it was subjected to an armed attack, the alleged aggressor is responsible for the attack[7], existence of threat or injury to the state's security interest,[8] and the principles of necessity, proportionality, and immediacy must exist. It is of paramount importance to state that the right to self-defence is the last resort in the resolution of any dispute. However, the self-defence must be exercised in a reasonable manner and must not exceed the limitations. This research relies on both primary and secondary sources.

The **objective** of this research paper is to analyse the limits of self-defence under international law and its applicability in modern-day use of force, with specific reference to non-state actors

[1] Collins dictionary
[2] Hugo Grotius, The Rights of War and Peace, The Online Library of Liberty, 1901
[3] Mr. Richimoni Proma, *"The Paradox of „Jus Ad Bellum" and „Jus in Bello' in Modern World: Justifications of Just War vs. Forced Intervention"*, IPEM Law Journal, Vol. 7, December 2023
[4] Ibid
[5] Ibid
[6] Article 2(4) of UN Charter 1945
[7] Elma Catic, "A right to self-defence or an excuse to use armed force? About the legality of using self-defence before an armed attack has occurred", Stockholms Universitet, 2020
[8] Sophie Charlotte Pank, "What is the scope of legal self defense in International law? Jus ad bellum with a special view to new frontiers for self defense"

and cyber-attacks.

The **hypothesis** is that *"The state exceeds the limits of self-defence to protect its state interest"*

Chapter 1 – Limits of Self Defence Under International Law

The right to self-defence is not unlimited, but limited under International Law. There exist three important limitations which must not be exceeded by the State in its defence against any aggression or armed attack. These limits act as a frontier to prevent the overuse of force in the name of self-defence by the states. The main purpose behind the evolution of limits under self-defence is to ensure the lawfulness of the use of force and to avert the unlawful use of force as self-defence. These limits make states more vigilant in exercising their force and have restrictions to prevent them from using retributive or punitive force against such attacks. As the inherent meaning of self-defence is only to defend the state from its aggressor and not to retaliate or punish the aggressor for the aggression or armed attack, the limitations play a significant role in reinstating the defensive use of force of the state. Necessity, Proportionality and Immediacy are the core limitations of self-defence. Exceeding these principles violates international law and renders such an act of self-defence unlawful under the notion of law.

Necessity:

This principle is highly concerned with the initial use of force as a defence by the state in the first place. This states whether using force was the only means to defend a state's territorial integrity, political independence and that of its interests and civilians from that of the aggressor. There must exist a strong necessity or need for the state to resort to the use of force as an act of defending itself. Only where there exists a sheer necessity for the state to use its forces in the name of defending itself, the legality of self-defence is justified. Only when the attack or aggression is of a high degree or the survival of the state is in jeopardy and there exist no other peaceful means to stop the threat and only when there exists a grave necessity, self-defence can be used. It determines whether defensive force was required in the first place. A sheer necessity to use force for the purpose of defending the state must exist. Only when no alternative means to solve the dispute exist, the state can use self-defence, which means the use of force must be the last resort[9]. Though these principles are not expressly stated in the UN Charter, but they are

[9] James A. Green (2015) *"The ratione temporis elements of self defence",* Journal on the Use of Force and International Law

a part of the Customary International Law[10]. A centric evolution of these principles lies in the Caroline Incident 1837[11] which instated the importance of necessity and proportionality in the use of self-defence by the state. *"State must show necessity of self-defence, instant, overwhelming, leaving no choice of means, and moment for deliberation"*[12] When viewed under the lens of these principles, self-defence must be *used only to repel an armed attack and not to take revenge*. Further the act of self-defence is only a temporal act and cannot be used for a long-term armed attack or subsequent annexation[13], which means self-defence can be used to an extent necessary for the state to guard and protect its interest[14] and when that necessity is overridden or when it exceeds the temporal effect, then it will be transformed from an act of self-defence to an actual armed conflict, and the self-defence will cease to exist and the actions of the states will be governed by the Jus In Bello and International Humanitarian Law. The notion of necessity has been given a predominant importance in the Nicaragua Case[15] by the ICJ. Where the ICJ has instated that *not all attacks will fall under the scope of armed attack, the attack has to meet certain threshold and gravity to count as an armed attack* and for the state to claim defence[16]. However, the threshold limits gravely depend on the circumstances of each case and have not been accurately determined by the ICJ. However, under *Article 25 of the International Law Commission Articles on State Responsibility*, the *threshold limit for the use of Self-defence must be very high, or must be grave and imminent peril*.[17] In the Oil Platform case 1992, the ICJ stated that the self-defence stands taken by US against Iran did not meet the essentials as that attack did not necessarily affect the security interest of US and that US did not exhaust other means available to solve the dispute, as it did not complain to Iran on the ongoing military activity[18]. This again reinstates that only when the state security is at jeopardy or when the attack has threatened or has injured the state's security interest, the principle of necessity comes into play, without this sheer necessity, a self-defence cannot exist as a justification. The self-defence ceases when the armed attack ceases

[10] Sophie Charlotte Pank, "What is the scope of legal self defense in International law?
[11] Daniel Webster, Correspondence between Great Britain and The United States, respecting the Arrest and Imprisonment of Mr. Mcleod, for the Destruction of the Steamboat Caroline – March, April 1841
[12] Ibid
[13] Elma Catic, "A right to self-defence or an excuse to use armed force?", 2020
[14] Sophie Charlotte Pank, "What is the scope of legal self defense in International law?
[15] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) 1986
[16] Ibid
[17] Christine Chinkin, *"Self-Defence as a Justification for War: The Geo-Political and War on Terror Models"*, May 2017
[18] Sophie Charlotte Pank, "What is the scope of legal self defense in International law?

or when the attack is repelled.[19]

Proportionality:

It determines the degree of force used as defence. Such degree must not exceed what was reasonably required. The defensive force must be used only to repel the attack or to remove its consequences[20] and such force must not exceed the force duly and reasonably required. Such defensive force must be *proportionate to neutralise or destroy the armed attack and must not exceed its intended military objective*[21]. The self-defence must be proportionate with the armed attack and must be to an extent which is needed to repel the armed attack and it must not cause more harm or force than necessary[22]. *Nothing unreasonable and unnecessary must be done by the state in the act of self-defence*[23]. This *proportionality does not deal with scale or means of attack* but with the *manner which is proportional to the defensive necessity*.[24] It does not deal with the *numerical equivalence of the scale or means or civilian causalities*[25]. State can use whatever force it wants but only to the extent of repelling the armed attack.[26] Once the armed attack or threat is repelled or neutralised, then the self-defence ceases to exist and no more force can be used by the victim state. It does not deal with the *same means and methods of force* to be used, but it rather focuses on the *use of force to an extent of repelling or destroying the armed attack or threat*.[27] However, using more force than necessary would also be *disproportionate to abate the armed attack* [28]as stated in the Nicaragua and Oil Platform case. However, the principle of proportionality is seen under the lens of halting and repelling the armed attack[29] and it doesn't dwell much upon the scale and means of the attack.

Immediacy (Imminency):

The defensive force must be immediate without any delay or deliberation. There must be no

[19] Natalia Ochoa-Ruiz and Esther Salamanca-Aguado, *"Exploring the limits of International Law relating to use of force in Self Defence*", The European Journal of International Law Vol. 16 no.3, June 2005
[20] Ibid
[21] Christine Chinkin, *"Self-Defence as a Justification for War",* 2017
[22] Sophie Charlotte Pank, "What is the scope of legal self defense in International law?
[23] James A. Green (2015) *"The ratione temporis elements of self defence"*
[24] Ibid
[25] Sina Etezazian (2016) The nature of the self-defence proportionality requirement, Journal on the Use of Force and International Law
[26] James A. Green (2015)
[27] Sina Etezazian (2016)
[28] Ibid
[29] Ibid

delay in use of force, it must not be too early or too late. There must be some relationship between the time the defensive force is used and the armed attack or aggression that has taken place[30]. No retaliatory force must be used. This principle also evolved from the Caroline doctrine. *Timing is important in deciding whether a state of emergency exists and whether such use of defensive force is justified*[31]. This also connotes the timing when the *armed attack is ongoing, or occurred, or is going to occur at some point in future*[32]. When the armed attack is ongoing, then the state has all reasons to use self-defence, and the other principles of self-defence would come into play till the repelling of such threat or attack. When the armed attack occurred, then self-defence is exercised only to the extent of removing the attack or aggression, and once the attack is terminated[33], then the self-defence ceases to exist. But the dynamics change when the armed attack is going to occur, or when it has not yet occurred. However, if such an attack is by all probability sure to occur, then anticipatory self-defence comes into play. This has been recognised in the Caroline incident[34], where *a state need not take a first shot, it can act in anticipatory self-defence even before it is attacked*. Though this view is contrary to Art 51 of the UN, it has been widely used after the Caroline incident and the 9/11 attack. However, there must be a *reasonable sense of certainty that an armed attack will occur in future* and *such threat must be specific and identifiable*.[35] This draws a thin line between Anticipatory self-defence and Pre-emptive Self-defence. The nature and gravity of the attack must also be taken into consideration, it must be *serious, immediate and incapable of being countered*[36]. Immediacy revolves around the timing of the armed attack and the response to it, where such response must not be too late or too early[37]. The response must be immediate, within a reasonable time frame and without deliberation or unreasonable delay[38]. However, if such delay was reasonable, i.e., if the victim state tried other means to solve the issue peacefully but had failed, then the state has the right to use defensive force even if there is a delay.[39]

[30] Michael Schmitt, International Law and the Use of Force, JMO Lecture 2005, US Naval War College
[31] Christopher O'Meara, Necessity and Proportionality and the Right of Self-Defence in International Law, July 2018
[32] Ibid
[33] Natalia Ochoa-Ruiz and Esther Salamanca-Aguado, *"Exploring the limits of International Law relating to use of force in Self Defence*", The European Journal of International Law Vol. 16 no.3, June 2005
[34] Ibid
[35] Ibid
[36] Ibid
[37] Onder Bakircioglu, The Right to self-defence in National and International law: the Role of the Imminence requirement, 2009
[38] Christopher O'Meara, 2018
[39] Ibid

Chapter 2- Self-Defence against Non-State Actors

Due to the development in science and technology, the concept of the use of force had undergone a significant shift from traditional to modern. The means and methods of warfare have changed, which subsequently altered the nature of threat, armed attack and aggression. As the gravity and consequences of these modern-day use of force are of much higher degree than that of the traditional means, and as they pose much graver threat than the previous armed attacks, the right to self-defence has undergone a significant evolution after the 9/11 attack. The evolution of nuclear weapons, missiles, cyber-attack and the emergence of non-state actors had pushed the limits of self-defence further, thereby bringing 2 new concepts to force: Anticipatory and Pre-emptive self-defence. The limits of self-defence have been extended to accommodate the rising changes and challenges.

The concept of self-defence underwent a significant change after the 9/11 attack, where its application extended to terrorist attacks or non-state actors. The view of the international community towards non-state actors significantly changed after this incident. Under the scope of this research, the non-state actors are narrowed down as terrorist groups who act against other states either independently or through the aid and assistance of other states. Since non-state actors have no territory of their own, they are hard to track and control[40]. The concept of Pre-emptive self-defence or Bush doctrine evolved after the 9/11 Al-Qaeda attack against the USA. There lies a thin distinction between the Anticipatory Self-defence or Caroline Doctrine and Pre-emptive self-defence. Where the former needs an imminent threat or attack, i.e., the threat or attack must happen or was going to happen immediately, however, in the latter, the attack or threat must be a possible future event, which does not happen immediately[41]. However, the strict interpretation of Article 51 of the UN does not permit the self-defence before an actual armed attack occurs. Which means as long as the Article 51 is rigidly interpreted, the UN does not entertain the anticipatory and pre-emptive self-defence. However, the French version of Article 51 states otherwise, it gives much predominance to the anticipation of an armed attack, where it does not dwell much into the occurrence of an armed attack, but *if a state is an object of an armed attack*, then self-defence can be exercised[42]. But it must be noted that, when the UN Charter was drafted, there was not much attention or

[40] Brijesh Kumar Singh, Chapter 4 - Use of Force and Non-State Actors, University of Delhi, 2019
[41] Michael Schmitt, International Law and the Use of Force, JMO Lecture 2005, US Naval War College
[42] Ibid

importance given to the non-state actors or terrorist groups as they were not capable of carrying out such horrendous attacks against the state, as they lacked capacity and power. And the 1945's abstract notion does not pave the way for defending emerging new threats, hence the scope of self-defence has extended to fit the current notions. As the terrorist attacks were of high gravity, these were considered as armed attacks by the international community and the right to self-defence was exercised against them. Due to new modern weapons and machinery at the hands of terrorist groups, the Bush Doctrine was highly accepted by the international community. *Neutralising and destroying the threat even before it fully emerged or acting against a possible future threat*.[43] There exist 3 essentials in the use of defensive force against these threats - capability, intent and preparation. The state can use pre-emptive force against terrorist groups only when such groups have enough capability to threaten or attack the victim state with weapons of much capacity. Such a terrorist group must have an intention to threaten or attack the victim state. And they must have active preparation before attacking the state.[44] In the Caroline doctrine it has been greatly emphasised that *"a state need not wait to take the first shot; it can defend itself even before it is attacked or it is on the verge of being attacked"*[45]

In the Nicaragua Case, it has been stated that an *attack by a terrorist can be considered as an attack of the state, if such state was substantially involved in actions of the terrorist attack*[46]. The attack of Afghanistan by the USA under the lens of self-defence after the 9/11 attack has been controversial due to its extended application of limits of self-defence. However, it reinstated the extension of the right of self-defence, if the state's sovereignty or territorial integrity or its interest are at jeopardy. A grave threat, and even though such threat might be a future possible event, but if such threat persists or occurs, then the state shall use their inherent right of self-defence against the non-state actors.

Every state under international law has responsibility and obligation to maintain international peace and security and to have control over its territory. If a terrorist group is not connected with a particular state but operates from the territory of any state, then the territorial state has an obligation and duty to neutralise and destroy such terrorist groups. If it is unable or unwilling to do so, then the victim state can exercise its right to self-defence to neutralise or destroy such a threat / terrorist group with or without the consent of the territorial state under the unwilling

[43] Ibid
[44] Ibid
[45] Michael Schmitt, International Law and the Use of Force, Ibid
[46] Ibid

and unable doctrine.[47] However, the principles of necessity and proportionality must be followed duly.

As the international world has shifted from unipolar to multipolar and the presence of the (WMD) weapons of mass destruction[48] at the hands of many states and even non-state actors has been a grave threat to the peace and security of the international community. Hence the use of pre-emptory and anticipatory self-defence has been justified by the international community at various instances.

Anticipatory Self Defence:

The term *"Anticipatory"* means *"ability to foresee consequences of future action and take measures to counter it"*[49]. When a state is under *threat of attack* or when another state or non-state actor is *preparing* or *planning to attack,* then the victim state can defend itself even before such attack has been carried out against it and it need not wait for the actual attack to take place.[50] The Caroline Incident of 1837 had articulated a new standard for the use of self-defence in anticipation, where the Great Britain vessel set fire to the US Streamer "Caroline" as it was used for supplying arms to the Canadian rebel groups. Even before the attack could be perpetuated against the victim state, self defence was used in anticipation of the attack and in neutralising the threat. It was further justified by the British forces in their correspondence with the US, that, despite of warnings given to both the US government and the Caroline, they failed to stop illegal arms aid to the Canadian rebels group and that this act of Britian was necessary to avert the much greater loss or threat or attack which was imminent and precedented. Israel's attack on the Iraqi Nuclear reactor in 1981 in the name of self-defence was controversial, as Israel used force even when the threat or attack was not carried out by Iraq[51]. The justification from Israel was that it had all reasons and sources to believe that Iraq was building its nuclear reactors to destroy Israel and hence it acted to prevent its state from such a lethal attack. Though the ICJ in the Nicaragua[52] case does not expressly state about the legality of anticipatory self-

[47] Christopher O'Meara, Necessity and Proportionality and the Right of Self-Defence in International Law, July 2018
[48] Ibid
[49] Christopher C. Joyner and Anthony Clark Arend, Anticipatory Humanitarian Intervention: An Emerging Legal Norm, 10 USAFA Journal of Legal Studies, 1999
[50] Brijesh Kumar Singh, *"Use of Force by India in Self Defence, Chapter 3 - Legality of Anticipatory Use of Force in Self Defence"*, University of Delhi, 2019
[51] Ibid
[52] Ibid

defence, but Judge Schwebel in a dissenting opinion stated that *Article 51 must not confine or narrow down the scope of self-defence under customary international law, and at the same time the state must not freely use the anticipatory self-defence*. Only when there exists imminent danger and when the existence of the state will be in jeopardy, can such a state use anticipatory self-defence with limitations. According to various scholarly interpretations of imminence in anticipatory self-defence, its essentials are *"the gravity of the attack, the capability of the aggressor, the nature of the attack and other factors such as the geographical situation of the victim State, and the past record of attacks by the State concerned"*[53]. Further, the *"immediacy of the threat, probability of attack, scale of attack, and the probability that non-forceful measures would avert such attack"*[54] As per the scholarly interpretation, the certainty of danger, and high probability of attack i.e., there must be compelling evidence[55] that the attack is going to take place and its immediate occurrence are crucial, and apart from that the *damage prevented must be greater than the damage caused*[56].

Further, the UN Secretary General, through his several reports[57] instated that *"a threatened state can take military action as long as the threatened attack is imminent"*[58].

Pre-emptory self-defence:

Pre-emptory self-defence or Bush doctrine, emerged after the 9/11 attack, to counter terrorism. Though its usage is controversial, it gains support from the international community as the concern against the weapons of mass destruction (WMD) and NSA increases. The nature of attacks has significantly changed due to the significant development in science and technology. Due to the proliferation of WMD and its access to NSA, the state can no longer wait for the armed attack to occur as stipulated under Article 51 to use self-defence. As these attacks are more lethal and could wipe out the entire state and entirely weaken the defence system, the pre-emptive self-defence has gained much significance in this 21st century. The international

[53] Chatham House, 'The Chatham House Principles of International Law on the Use of Force in Self Defence' (2006) 55(4) The International and Comparative Law Quarterly and Toby Fenton, *"An analysis of pre-attack self-defence doctrines through a risk-based lens"*, Journal on the Use of Force and International Law, 2024
[54] Daniel Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defence Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 The American Journal of International Law and Ibid
[55] Kalliopi Chainoglou, 'Reconceptualising Self-Defence in International Law' (2007) 18(1) King's Law Journal
[56] Mark Rockefeller, 'The Imminent Threat Requirement for the Use of Preemptive Military Force: Is It Time for a Non-Temporal Standard' (2004) 33(1) Denver Journal of International Law & Policy
[57] UN Secretary General Reports *"A more secure world, our shared responsibility"* 2004 & *"In larger freedom – towards development, security & human rights for all"* 2005
[58] Christopher Greenwood, *"Self Defence"*, Max Planck Encyclopaedia of Public International Law, Oxford Public International Law, 2011

community is fitting this concept of self-defence to meet the present needs. Article 51 is outdated as it was drafted much before the proliferation of weapons took place, much before the WMD and NSA started to evolve, hence trying to follow its principles rigidly would not fit the current rays of development and would not potentially protect the interests of states in maintaining peace and security. However, it is also interpreted that Article 51 mentions *self-defence as an inherent right*, which again refers to the *pre-charter custom,*[59] which means conditions stipulated under Article 51 are not to be rigidly interpreted as this right being inherent is wider than that strictly reinforced in the article.

In pre-emptive self-defence, the attack or threat must be a possible future event, which does not happen immediately, unlike anticipatory self-defence where the threat or attack must be immediate. Pre-emptive self-defence is also known as Preventive Self-defence.[60] Though the Caroline doctrine tends to narrow down the self-defence as only applicable to imminent threat, however, the Bush Doctrine widens its scope as to its applicability even in the absence of such imminence. Essentials of Pre-emptive self-defence according to various scholarly interpretation are, *"the timing of the future attack, degree of the threat, probability of attack, its severity and the exhaustion of non-forcible measures"*[61]. As far as the scholarly interpretations are concerned, *the proximity of the attack, its probability, impact or severity of the future attack and reliable evidence* are necessary.[62]

Chapter 3– Self Defence against Cyber Attacks

The modern use of force not only includes advanced machinery or weapons but also cyber-attacks. These attacks are more prevalent than before. Since crucial *governmental, economic, political and public services and critical infrastructures*[63] are highly interconnected with digital systems, these attacks affect the state to a greater extent than a traditional use of force, such as actual armed attack. However, a question could arise, whether cyber-attack falls within the preview of armed attack under Article 51 of the UN Charter. Since the traditional interpretation of an armed attack includes *causal and considerable loss of life or extensive*

[59] Toby Fenton, *"An analysis of pre-attack self-defence doctrines through a risk-based lens"*, Journal on the Use of Force and International Law, 2024
[60] Pre-Emptive Self Defence, Meaning and Legality under International Law, Facto IAS, 2020
[61] Kalliopi Chainoglou, 'Reconceptualising Self-Defence in International Law' (2007) 18(1) King's Law Journal
[62] Stan Kaplan, *'The Words of Risk Analysis'* (1997) 17(4) Risk Analysis and Toby Fenton, *"An analysis of pre-attack self-defence doctrines through a risk-based lens"*, Journal on the Use of Force and International Law, 2024
[63] Sara Pangrazzi (MLaw), *"SELF-DEFENCE AGAINST CYBERATTACKS? DIGITAL AND KINETIC DEFENCE IN LIGHT OF ARTICLE 51 UN-CHARTER",* ICT4Peace Publishing, Geneva, February 2021

destruction of property[64], hence under the modern interpretation of a threat or armed attack, a cyber-attack would fall under this perspective to an extent where grave casualties and destruction occur. Since the international community at large had understood cyber-attack as an armed attack due to its disastrous nature and grave destruction, but it is still debated and highly controversial. The nature of conflict and use of force has diversely changed, due to the increasing rise of hybrid war[65] and conflicts. It's crucial to note that cyber-attacks are not only committed by states but also by non-state actors. But for any attack including cyber-attack, to fall under the scope of armed attack, it must reach a certain threshold of scale and effects. It must reach a certain intensity of consequences.[66] In Nicaragua case, the ICJ had established that *"not all use of force would amount to armed attack, for any force to amount to armed attack it must be more grave"*, *"it must be of a particular scale and effect and for mere frontier incidents, a state cannot claim self-defence"*[67]. This means if an attack falls below the threshold of grave intensity and violence, then it won't qualify as an armed attack.[68] Though armed attack is not defined anywhere in the charter, but it means an attack of much graver or serious capacity than a mere use of force. If it falls below such gravity, then non-forceful measures will be used, and the matter will be taken before the Security Council, and no military force would be used. However, when a cyber-attack that does not lead to more destruction, or death or of not significant gravity, won't be considered as an armed attack[69] under Article 51. Hence, *"mere disruptions or destructions of the information infrastructure not leading to serious physical damage would not be sufficient"*[70] and won't be considered as an armed attack. According to the restrictive view, for a cyber-attack to be considered as an armed attack, it must have a certain degree of casualties and destruction, such as fatalities caused due to disruption of essential services – *medical database, extensive electricity blackout causing severe causalities, flooding due to shutdown of water or dam services, deadly aircraft crashes due to disruption of air craft systems*[71], etc. However, according to expansive view, any cyber-attack which is impairing or jeopardising the national interest will be considered as an armed attack[72]. Stealing vital data concerning the security interest of the state and cyber attacking critical national

[64] Ibid
[65] Ibid
[66] Ibid
[67] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) 1986
[68] Michael Schmitt, International Law and the Use of Force, JMO Lecture 2005, US Naval War College
[69] Sara Pangrazzi (MLaw), *"SELF-DEFENCE AGAINST CYBERATTACKS? DIGITAL AND KINETIC DEFENCE IN LIGHT OF ARTICLE 51 UN-CHARTER",* ICT4Peace Publishing, Geneva, February 2021
[70] Ibid
[71] Dinstein Yoram, Computer Network Attacks and Self-Defense, 76 International Law Studies (2002)
[72] Tallinn Manual 2013, Rule 13, p. 56–57 and Sara Pangrazzi (MLaw), n67

infrastructure[73] will be qualified as an armed attack. However, whether a state can use self defence against these attacks is highly controversial and debatable, under international law. However*, espionage and mere stealing of sensitive data are not generally qualified as armed attacks*[74] and any economic damage caused due to such cyber-attacks or by manipulation or disruption of the state's stock market, won't necessarily be termed as an armed attack, but it will be viewed as economic coercion.[75] Similarly, cyber attacking a critical national infrastructure won't by itself fall under the realm of armed attack, if there exist no grave physical causalities[76]. A mere disruption of the state's critical network system without any serious physical loss or not meeting certain scale or degree of gravity won't be termed as an armed attack[77].

Further, it is of great importance that the cyber-attacks need not be carried out only by states but also by non-state actors and private individuals[78] or companies or organisations. Hence, it is of great difficulty to find out the real aggressor or attacker behind the cyber veil, though a cyber-attack may originate from a certain territory, but its attribution or involvement with another state is very difficult to find[79]. If the involvement of state or non-state actors in such a cyber-attack has been confirmed, then the victim state can use self-defence against such aggressors. The unwilling and unable doctrine plays a significant role in defending against non-state actors attacking from another state, as when the territorial state is not willing to obey its obligation under international law or when its unable to prevent such crimes by non-state actors, then the victim state can directly use force to defend itself against such non state actors, even if they are in another state's territory[80]. Since it's very difficult to attribute the cyber-attack to a particular state or non-state actors, counterattacking or using self-defence against a wrong state or uninvolved party, would amount to an escalation of conflicts[81]. This uncertainty discourages the use of self defence against a cyber-attack if its attribution to the aggressor could not be found.

---

[73] Ibid
[74] Woltag Johann-Christoph, Cyber Warfare: Military Cross-Border Computer Network Operations under International Law (Cambridge: Intersentia 2014 and Sara Pangrazzi (MLaw), n67
[75] Ibid
[76] Ibid
[77] Woltag Johann-Christoph, Cyber Warfare: Military Cross-Border Computer Network Operations under International Law (Cambridge: Intersentia 2014 and Sara Pangrazzi (MLaw), n67
[78] Ibid
[79] Sara Pangrazzi (MLaw), n67
[80] Ibid
[81] Ibid

It is to be kept in mind that most (60%) of the cyber-attacks are not physically but economically concerned, hence they would be considered as international criminal acts and not as acts of war against which a state can use its military force or self-defence[82]. However, when such a cyber-attack causes significant casualties, thereby constituting an armed attack, still the usage of self-defence is to be exercised carefully, as it at many times would lack certainty over the attribution or participation of the state or non-state actors or it lacks *"instant and overwhelming necessity of self-defence, leaving no choice of means, and no moment for deliberation"*[83].

The corresponding importance of defending the state against lethal cyber-attacks, has further extended the applicability of self defence in the 21st century. But the states must be cautious while using defence against such cyber-attacks, due to their impending uncertainty, and the states must first try to settle the issues through non-forceful measures or the UN Security Council[84].

Conclusion and Suggestion

As self-defence is an inherent right, it cannot be taken away by law or principles. Though it can be limited to preserve its very nature of usage, but it cannot be completely restricted. By the virtue of the state's sovereignty, a state has inherent right to protect its territorial integrity, political independence, and its national interest. Due to vast development in science and technology, the very nature of self-defence and its limitations have been extended as to accommodate the growing concerns of the international community such as non-state actors and cyber-attacks.

Though limitations concerning self-defence are considered as a part of customary international law, however, they are being exceeded by the states in protecting their own interest and territorial integrity. As the rigid application of limitations of self defence would affect the state in effectively protecting its territory, it can be flexibly used as to a just and reasonable cause, but if such limitations are easily allowed to be exceeded by the state, then it would disrupt the customary nature of its practice, thereby establishing a new order as to the non-application of such limitations.

[82] Ibid
[83] Daniel Webster, Correspondence between Great Britain and The United States, respecting the Arrest and Imprisonment of Mr. Mcleod, for the Destruction of the Steamboat Caroline – March, April 1841
[84] Sara Pangrazzi (MLaw), n67

Hence, these limitations have to be strictly adhered by states in exercising their self defence and at the same time a state could be allowed to deviate from following such limitations only when there exists a reasonable ground.

Furthermore, using self defence against the modern use of force must be cautiously used and the nature of armed attack under Article 51 must be extended to all forms of grave attacks and that of cyber-attacks having such gravity.

As far as cyber attacks or terrorist attacks are concerned, clear guidelines have to be established for attributing these crimes. The most difficult part is to fix the liability or responsibility on the state responsible for the conduct of these crimes in the international arena, hence clear guidelines for attribution must be fixed.

As the dimension of self-defence is changing, it is necessary to establish norms for cyber self-defence in terms of its application and usage. The deviation of armed attack from tradition to modern weapons has altered the usage of self-defence in this aspect; hence, when a cyber-attack can be constituted as an armed attack must be defined to curtail the misuse or overuse of self-defence.

A serious effort must be taken to improve international cooperation, as all the states are deeply interconnected; the assistance of other states is highly needed to find out the attribution of the liable state.

Hence, the international community must alter the principles of international law to accommodate the growing notions of threats and at the same time, it must not exceed the customary principles without a just cause.