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Prohibition of Use of Force and Right to Self-Defence under International Law: Where does India's Surgical Strike hold under International Law?

By Abhishek Trivedi*

Abstract:

After the Second World War, UN Charter came into existence which is based on the Principle of sovereign equality of States, peaceful settlement of disputes, observance of International obligations by States arising out of International Law, prohibition of use of force…among them, prohibition of use of force and respect to territorial sovereignty and political independence of another State is of vital importance under International Law. Though, some exceptions of Article 2 (4) have also been recognized under International Law. Right to self defence is one among them. Sometimes it becomes very complicated how to form a harmonious balance between the Article 2 (4) and Article 51 of the Charter. Right to self-defence is an inherent right of the State against armed attack by another State. Problems arose after the attack of 9/11, where a crucial question before the International Law was whether the acts of non-State actors (especially terrorist acts) would be construed as an act of 'armed attack' within the meaning of Article 51 of the Charter. Growing danger of terrorist acts to the International peace and Security, it has become inevitable to interpret the terrorist's acts in such a manner so as to include them within the meaning of the term 'armed attack'. In the light of these principles and rules of International Law relating to Prohibition of use of force and Right to self-defence, legality of India's surgical strike conducted on 29 September 2016 is required to be analyzed.

Keywords: UN Charter, Use of force, armed attack, surgical strike, right to self-defence

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1. Introduction:

One of the primary aims of the UN, according to Article 1(1) of the Charter[1], is to maintain the international peace and security. On the other hand, in order to achieve this aim, there are other provisions given in the Charter itself. Article 2(3) of the Charter[2], in order to maintain international peace and security, and to prevent future wars, place an obligation on member states to settle their dispute peacefully. Article 2 of the Charter further laid down the principle of International Law relating to sovereign equality of States, observance of International obligations in good faith, respect for territorial sovereignty and political independence of any State and doing so no State shall use force against another State. Apart from all these obligations and responsibilities, Article 51 of the Charter also acknowledges inherent right of the State's 'right to self-defence'. Article further states under what circumstances this right can be exercised and what procedures must be followed by the State while exercising this right. Right to self-defence in an inherent right of every State, this also forms a part of customary rule of international law. Right to self-defence can be justified either under the provision of Article 51 of the Charter or under the Customary International Law (CIL). Under CIL, right to self-defence can be justified by taking the recourse of Principle of 'necessity and proportionality'. In this way, customary right to self-defence runs parallel and side by side with right to self-defence given under Article 51 of the Charter.

2. Use of Force under International Law:

To begin with, the relevant International Law in this regard is the Article 2 (4) of UN Charterwhich provides that "All members shall refrain in their international relations from the threat or use of force against the **territorial integrity** or **political independence** of any State, orin any other manner inconsistent with the purposes of the United Nations".

Now what constitutes use of force is a question of pertinent importance under international law. Whether direct action by military force in physical form is the only criteria

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[1]. UN Charter, Article 1(1), which says that "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of (1) threat to the peace, and for the (2) suppression of acts of aggression or (3) other breaches of the peace, and to bring about by peaceful means…adjustment or settlement of international disputes or situations which might lead to a breach of the peace''.

[2]. UN Charter, Article 2(3), which says that "All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

to constitute use of force (as happened in the case of Nicaragua where United States of America conducted directly military action against Nicaragua) or "Government may also act by means of completely 'unofficial' agents, including armed bands, and 'volunteers', or may give aid to groups of insurgents on the territory of another States".[3]

Hans Wehberg reached the same conclusion in 1951. The application of "physical" force, he maintained, is necessary for a violation of Article 2 (4)**,** but physical force must be defined to include certain forms of indirect aggression[4] and sometimes use of irregulars to carry out armed attacks against another State is, "from a functional point of view", a use of force[5]
Rosalyn Higgins pointed out that the focus was on conventional methods of armed attack, but "the unhappy events of the last fifteen years" necessitated a substantial re-evaluation of the concept of the use of force.[6]
The Draft Declaration on Rights and Duties of States, adopted by the International Law Commission in 1949, imposed a duty upon State:

"To refrain from fomenting civil strife in the territory of another State, and to prevent the organization within its territory of activities calculated to foment such civil strife".[7]

2.1. Status of Article 2 (4) under International Law:

Former president of the ICJ, Jimeneze de Arechaga, has written:

"The paramount commitment of the Charter is Article 2, paragraph 4. This is the cardinal rule of international law and the cornerstone of peaceful relations among states"[8]

On the matter of *jus cogens*, **Lord McNair**, in his authoritative work on the Law of Treaties, says that Article 2 (4) "creates legal rights and duties that possess a constitutive character,

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[3]. Brownlie Ian, International Law and the Use of Force by States, 1963, Oxford Clarendon, p. 361.
[4]. Hague Recuell (1951-I), pp. 68-69.
[5]. Higgins, "The legal Limits to the Use of Force by Sovereign States, United nations practice", 37 British Year Book of International Law 269 (1961), p. 278.
[6]. Ibid, pp. 288-289.
[7]. Report of the International Law Commission, Article 4, 4 UN GAOR, Supp. (No. 10), p. 8, UN doc.A/925 (1949).
[8]. "International Law in the past Third of a Century", 159 Hague Recueil (1978), p. 87.

with the result that any member States can not contract out of them or derogate from them…"[9]

In the case of Nicaragua, ICJ said that principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations "has come to be recognized as *jus cogens*".[10] The Court further found it material that this principle is a "universal norm", a "universal international law", a "universally recognized principle of international law", and a "principle of *jus cogens*".[11]

2.2. Exceptions to this Rule

However, this prohibition has two exceptions that allow states to employ force. The **first exception** is the use of force with authorisation from the UN Security Council (UNSC) under Chapter VII of the charter. In this regard, Article 42 of the Charter is relevant. Article 42[12] of the Charter empowers the Security Council to use necessary force to maintain international peace and security. Because the Security Council does not have a military force of its own, the Security Council authorizes member States to use force.

The **second exception** is the use of force to exercise the right to self-defence under Article 51 of the charter.

Another possibility is also that a state can use force against the territory of another state by the latter's invitation. However, besides above mentioned exceptions, using force on any other grounds amounts to a violation of Article 2(4) of the UN Charter.

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[9]. Mc Nair, The Law of treaties, 1961, Cambridge University Press on behalf of the British Institute of International and Comparative Law, p. 217; ILC Yearbook, 1966-II, draft Articles on the Law of Treaties, Article 50, p. 253, available at http://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf> accessed on 11 November 2016.
[10]. Military and paramilitary Activities in and against Nicaragua (Nicaragua v. United State of America) Merits, Judgment, I.C.J. Reports, 1986, p. 14, Para 190.
[11]. Ibid.
[12]. UN Charter, Article 42, which says that "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of members of the United Nations".

India’s surgical strike is required to be evaluated in light of these legal possibilities. In other words, whether India’s surgical strike falls under the purview of above mentioned exceptions.

So first point in this regard is clear that the surgical strikes were not authorised by the UNSC, nor were they conducted on Pakistan’s invitation. Thus the only legal possibility left to justify India’s surgical strike is India’s right of self-defence under Article 51 of the UN Charter. One more possibility may also be there that India’s surgical strike may be justified under customary rule of international law.

3. Right to self-defence

Article 51[13] of the UN Charter provides for a member State to use force in self-defence when there is an armed attack against that state.

3.1. Status of Article 51 of the Charter, i.e. Right to Self-defence, under International Law

In the case of Nicaragua, ICJ said that Art. 51 of the Charter is a customary rule of international law.[14] Even if principle of CIL is codified into treaties, the former continues to exist side by side with the latter. The term ‘inherent’ used in Art. 51 of the Charter recognized that customary law of rights to self-defence existed alongside treaty provisions.[15]

As per the mandate of Art. 51 States have the right of individual and collective self-defence if an armed attack actually takes place against a member of the UN. The second part of the Article says that measures taken by the State in self-defence must be “immediately reported” to the Security Council. Now, here, a pertinent question arises is that whether it is *sine qua*

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[13]. UN Charter, Article 51, which says that “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 has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the security council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

[14]. Military and paramilitary Activities in and against Nicaragua (Nicaragua v. United State of America) Merits, Judgment, I.C.J. Reports, 1986, p. 14. Paras, 176, 177.

[15]. Ibid, Para 176.

non under the CIL as well as under the Charter that the procedural requirements prescribed under Art. 51 of the Charter must be complied of at any cost?

In this regard, CIL does not require following any procedure of reporting to UNSC. Even if State does not report to UNSC under CIL, it would mere amount to irregularity rather than an action illegal per se.

ICJ in Nicargua case said that "The Court, whose decision has to be made on the basis of customary international law. It has already observed that in the context of that law. The reporting obligation enshrined in Art. 51 of the Charter of the United Nations does not exist."[16]

What happens if the case is decided under the Charter? Whether failure to report to the UNSC under Art. 51would result into the measures illegal per se under the Charter.

As the International Court of Justice (ICJ) in Nicaragua case observed that "a principle enshrined in a treaty, if reflected in customary international law, may well be so unencumbered with the conditions and modalities surrounding it in the treaty."[17]

So it can be said that if the dispute is decided under the Charter then the rule of reporting to the UNSC may be relaxed. But up to what extent it may be relaxed or what its possible legal repercussions would be flow out of it may be the questions of debate & discussion under International Law.

3.2. Armed attack under Article 51 of the Charter

ICJ in Nicaragua Declared that 'a definition of "armed attack" which, if found to exist, authorizes the exercise of the "inherent right" of self-defence, is not provided in the United Nations Charter, and is not part of treaty law'.[18] Court used to show that Art. 51 UN Charter was actually referring to pre-existing Customary International Law. Customary law thus determines the content of the term 'armed attack'. Court in its later part of the Judgment said

[16]. Ibid. I.C.J. Reports, 1986, p. 14, Para 235.
[17]. Ibid. I.C.J. Reports, 1986, p. 14, Paras, 178, 188 and 200.
[18]. Ibid. Para. 176.

that "There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks'".[19]

To illustrate the agreement, the Court cited the description, contained in Article 3 para. (g) of the definition of aggression[20]. Given that the French text of Art. 51 UN Charter uses the term *'agression armée'* for 'armed attack'.

In order to take the defence of Art. 51 of the Charter, armed attack must be attributed to State.

4. Right to Self-Defence is subject to the Principle of Necessity and Proportionality under Customary International Law

From the historical origin of the two criteria in the famous case of Carolina incident[21]till now, these two criteria of 'necessity and proportionality have been recognized and accepted in customary practice as well. In sum, the two criteria have not only been upheld in the case law of the ICJ, but also are relatively consistently supported in customary practice.[22]

4.1.What is Necessity? Necessity is halting and repelling an existing armed attacks and terrorist attacks. In order to pass the test of necessity, three things should be justified. These are:

a. Self-Defence as a last resort.
b. Immediacy.
c. Targeting.

4.1.1. Self-Defence as a last resort:

A first component that can be identified the need for 'self-defence to be a last resort'. This imply that a State can only resort to armed force against another State when there are no realistic alternative means of redress available. In other words, self-defence is permissible

[19]. Ibid, Para. 195.
[20]. UN General Assembly Resolution 3314 (XXIX): Definition of aggression, UN Doc A/RES/3314(XXIX), GAOR 29th Session Supp 31, vol 1, 142.
[21]. See, e.g., R. Jennings, 'The Caroline and McLeod cases', (1938) 32 AJIL 82-99, at 85; 29 BFSP 1137; 30 BFSP 195-6, as cited in Tom Ruys, 'Armed Attack and Article 51 of the UN Charter', Evolution in Customary Law and Practice, 1st Ed., 2013, CUP, p.92.
[22]. Brownlie, 'The use of Force in self-defence', 229; Gardam, Necessity, proportionality, pp. 4-6, 28 et seq: E.g., Gray, The Use of Force, PP. 148-9.

only when peaceful means have reasonably been exhausted.[23]Practice indeed indicates that the need to exhaust peaceful means only plays a subsidiary role for the assessment of self-defence claims in response to a prior attack, and that unlawfulness will only result when a manifest unwillingness to address diplomatic channels can be demonstrated.[24]

According to Corten, in practice, the necessity requirement is generally interpreted in a relatively flexible manner. Action in self-defence need not be strictly 'indispensable' to repel the armed attack(s), but must be 'essential, important'.[25]

4.1.2. Immediacy:

It is generallyaccepted that for action undertaken in self-defence to be lawful, it should in principle be undertaken while the original armed attack which triggered it still in process and that there should be a close proximity in time between the start of the latter attack and the response in self-defence.[26] Again, this condition is inevitably subject to a degree of uncertainty, as no precise time limit can be fixed. It depends upon the facts and circumstances of each case.

The immediate aspect thus serves as an important factor to distinguish lawful self-defence and unlawful armed reprisals and makes clear that hostilities may not be re-opened at a much later stage without the occurrence of a new *casus foederis*.[27] This need for a temporal link between the armed attack and the response in self-defence also finds support in customary practice.[28]Temporal proximity between the armed attack and the response in self-defence, this condition should not be construed too strictly.[29]A certain degree of flexibility is needed.

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[23]. Tom Ruys, 'Armed Attack and Article 51 of the UN Charter', Evolution in Customary Law and Practice, 1st Ed., 2013, CUP, p.95; T. Gazzini, The changing rules on the use of force in international law (Manchester University Press, 2005), p. 144.
[24]. Ibid.
[25]. Corten, Le droit contre la guere, pp. 718-23, as cited in Tom Ruys, 'Armed Attack and Article 51 of the UN Charter', Evolution in Customary Law and Practice, 1st Ed., 2013, CUP, footnote 244, p.98.
[26]. Ago, 'Addendum', 70; Redsell, 'Israel's use of force in Lebanon', 80.
[27]. Gazzini, The changing rules, p. 147, as cited in Tom Ruys, 'Armed Attack and Article 51 of the UN Charter', Evolution in Customary Law and Practice, 1st Ed., 2013, CUP, p.99.
[28]. UN Doc. S/PV. 1644, 27-28 February 1972.
[29]. Constantinou, 'The right of self-defence, pp. 160-1; Gazzini, 'The changing rules, p. 144; Redsell, 'Israel's use of force in Lebanon', 80, as cited in Tom Ruys, 'Armed Attack and Article 51 of the UN Charter', Evolution in Customary Law and Practice, 1st Ed., 2013, CUP, p. 100.

Thus if the premeditated nature of the response has sometimes been perceived as evidence of its retaliatory character,[30] this is not always so.[31]

In the Oil Platforms case, Iran, in its reply to the US counter-memorial, interpreted the principle of immediacy as implying that, in case of single armed attack, self-defence could not be exercised when the incident was over.[32]The USA argued instead that the right to use force in self-defence is not strictly limited to the repelling of an attack in progress, but may extend to the use of force to remove continuing threats to its security.[33]

In the end, the ICJ did not pronounce on whether the immediacy requirement excluded measures of self-defence aimed at preventing future aimed attacks.

In all, customary practice indicates that if a State has been subject not to an isolated attack, but to a series of armed attacks, and if there is a considerable likelihood that more attacks will imminently follow, then self-defence is not automatically excluded.[34]This seems altogether that since the opposite position would imply that States would have little defence against consecutive pin-prick attacks whereby opposing forces withdraw immediately after having carried out an attack. This is particularly important in the context of attack by non-State actors, since these groups often rely on hit-and-run tactics.

4.1.3. Targeting:

A final aspect of the necessity criterion is the choice of targets of the defensive actions. Use of force must be used, and adequate, for the repelling of an armed attack. For this reason, it is not sufficient that the target is a legitimate military objective; it must also be connected with

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[30]. UN Doc. S/PV. 1107, 3 April 1964, $ 15 (Iraq), $ 48 (UAR).

[31]. D. Bowett, 'Reprisals involving recourse to armed force', (1972) 66 AJIL 1-36, at 7.

[32]. ICJ, Oil Platforms case, Reply and Defence to counter-claim submitted by the Islamic Republic of Iran, 10 March 1999, P.7.47: "It means that the employment of counter-force must be temporarily interlocked with the armed attack triggering it. In the case of the invasion of another State's territory, in principle an attack still exists as long as the occupation continues. But in cases of single armed attacks…, the attack is terminated when the incident is over. In such a case the subsequent use of counter-force constitutes a reprisal and not an exercise of self-defence."

[33]. ICJ, Oil Platforms case, Counter-memorial and counter-claim submitted by the United States of America, 23 June 1997, pp. 4.27-4.29.

[34]. Cf. Corten, 'Le Droit contre la guerre, pp. 725-8; T. Gazzini, 'The rules on the use of force at the beginning of the XXI century', (2006) 11 JCSL 319-42 at 331, as cited in Tom Ruys, 'Armed Attack and Article 51 of the UN Charter', Evolution in Customary Law and Practice, 1st Ed., 2013, CUP, p. 106.

the force to be repelled.[35] In short, the action undertaken in response of right to self-defence should be directed against the source(s) of the armed attack(s).

4.2. What is Proportionality? This is the second customary criteria that the exercise of self-defence must comply with the principle of proportionality. In essence, the controversy boils down to one question: what must be the scale and effects of the defensive action be proportionate to? A first, quantitative approach holds that there must be some sort of equation between the gravity of the armed attack and the defensive response, in term of relative casualties, damage caused and weapons used.[36]Further a number of States explicitly claimed that proportionality should be measured against the objective of self-defence.[37]

In DRC v. Uganda, the DRC used the same standard which has been used by Iran in the Oil Platforms case, and argued that Uganda invasion and occupation of large parts of its territory had far exceeded the goal of repelling aggression.[38]Uganda did not disagree on the principle itself, but only on its application to the facts, arguing that its actions had been 'directly related to defensive objectives'.[39]

5. Right of Self-Defence against Non-State Actors

Article 51 does not specifically say that the armed attack should be undertaken by states alone. However, the structure of the UN Charter in general, and understanding of the use of force in particular, implies that it is considered an interstate affair under the charter. Since the attack of '9/11' the question whether a terrorist attack of that magnitude qualifies as 'armed attack' in the sense of Art. 51 UN Charter has become the subject of debate. The ICJ maintains the position expressed in the Nicaragua Case judgment, that only acts attributable to a State can constitute an 'armed attack'

[35]. Constantinou, 'The right of self-defence, pp. 170-1, as cited in Tom Ruys, 'Armed Attack and Article 51 of the UN Charter', Evolution in Customary Law and Practice, 1st Ed., 2013, CUP, p. 108.
[36]. Remark: the Security Council debates dealing with the 2006 conflict between Israel and Lebanon provide a good example. In Casu, a broad majority of States condemned the large-scale destruction of the Lebanon civilian infrastructure as a disproportionate useof force, albeit without distinguishing between the proportionality standard under Jus ad Bellum and Jus in Bello. See UN Doc. S/PV.5489, 14 July 2006.
[37]. UN Doc. A/AC.134/67-78, 83 (Iraq), 84 (UK).
[38]. Armed Activities on the Territory of the Congo, (Democratic Republic of the Congo v. Uganda), ICJ, memorial of DRC, 6 July 2000, Paras, 5.26 et seq.
[39]. Armed Activities on the Territory of the Congo, (Democratic Republic of the Congo v. Uganda), ICJ, Rejoinder of Uganda, 6 December 2002, Paras 278 et seq.

Treating international terrorists as initiators of an 'armed attack' in the sense of Article 51 of UN Charter is, however, complicated by their lack of international personality and of territory in the sense of international law. No generally agreed definition of international terrorism and its actors exist. Terrorist acts which occurred prior to 9/11 were not connected with Article 51 UN Charter. This is explained by the Court's construction of Art. 51 UN Charter which requires the imputability of the attack to a foreign State.

As the Court observed, in the case of Palestine Wall advisory opinion (2004), that Israel had argued that the construction of the 'barriers' was consistent with the right of States to self-defence enshrined in Art. 51 of the Charter.[40] According to Israel, Security council resolutions 1368 (2001) and 1373 (2001) 'had clearly recognized the right of States to use force in self defence against terrorist attacks, and therefore surely recognize the right to use non-forcible measures to that end.[41]

However, Court rejected Israel's arguments of self-defence and concluded that: the situation which contemplated by Israel that 'Israel does not claim that the attacks against it are imputable to a foreign State' is different from the situation contemplated by Security Council resolutions 1368 (2001) and 1373 (200l), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence. Consequently, the Court concludes that Art. 51 of the Charter has no relevance in this case.[42]
As for attacks by 'trans-boundary terrorists', based in neighbouring States and operating there from, they may sometimes show elements of an armed attack, but did not, in the past, amount to the scale required by the ICJ.

If the Court wished to limit the scope of application of Art. 51 exclusively to attacks 'imputable to a foreign State'- as most scholars have deducing from the phrasing[43]- it is unclear why it felt compelled to declare that Israel 'could not in any event' rely on resolution 1368 and 1373 (2001). Significantly, separate opinions of **Judges Kooijmans, Higgins** and declaration of **Judge Buergenthal** criticised the Court's State-centric reading of Art. 51 of the Charter. Judge Kooijmans conceded that it had been the generally accepted interpretation

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[40]. Ibid, Para, 138.
[41]. Ibid.
[42]. Ibid, Para 139.
[43]. Canor, "When Jus ad Bullem meets Jus in Bello: the occupier's right of self-defence against terrorism stemming from occupied territories', (2006) 16 EJIL 963-78, at 967.

for more than fifty years that 'armed attack' should be committed by another State.[44] In his view, however, resolutions 1368 and 1373 had introduced a completely new element vis-a-vis 'acts of international terrorism'.[45] **Judge Buregenthatl and Higgins in turn emphasized that nothing in Art. 51 stipulate that self-defence is available only when an armed attack is made by a State**.[46] Judge Higgins stressed that that qualification was rather the result of the Court so determining in Nicaragua and grudgingly accepted that this ought to be regarded as a statement of the law as it now stands.[47] Judge Buergenthal noted that resolutions 1368 and 1373 supported a more flexible construction of Art. 51 of the Charter.[48]

Again in the case of **DRC v. Uganda[49]** (or Armed Activities), Court narrowly interpreted Art. 51 of the Charter and concluded that right to self-defence under Art. 51 does not extend to armed attack by non-State actors.

Court stated that, accordingly, it has no need to respond to the contentions of the parties as to whether and under what conditions customary international law provides for a right of self-defence against large scale attacks by irregular forces.[50]Several scholars have objected that the ICJ answers in the negative the contentions it vows not to respond to.[51]The Court in this case not only rejected self-defence in response to non-State attacks which a State fails to prevent, but also reaffirmed the restrictive State-centric approach developed in Nicaragua.[52]

Judge Kooijmans observed that attacks by irregular forces would, because of their scale and effects, have to be classified as an armed attack had they been carried out by regulars armed forces, there is nothing in the language of Art. 51 that prevents the victim State from exercising its inherent right of self-defence.[53]

Kooijmans drew attention to a phenomenon which in present-day relations had unfortunately become as familiar as terrorism, complete absence of government authority in the whole or

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[44]. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, Separate opinion of Judge Kooijmans, Para 35.
[45]. Ibid.
[46]. Legal Consequences cf the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, Declaration of Judge Buergenthatl, Para6; Separate opinion of Judge Higgins, Para 33.
[47]. Ibid. Separate opinion of Judge Higgins, Para 33.
[48]. Ibid, Declaration of Judge Buregenthal, Para 6.
[49]. Armed Activities on the Territory of the Congo, (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 168.
[50]. Ibid. Para. 147.
[51]. KammerhoferJorg, "The armed activities case and Non-State actors in self-defence law", Leiden journal of International Law, 20 (2007), PP. 83-113.
[52]. Corten, Ledroitcontre la guerre, PP. 702-3, as cited in Tom Ruys, 'Armed Attack and Article 51 of the UN Charter', Evolution in Customary Law and Practice, 1st Ed., 2013, CUP, p. 483.
[53]. Armed Activities on the Territory of the Congo, (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 168, Separate opinion of judge KOOIjmans, Para 29.

part of the territory of a State.[54] He stressed that if irregular bands carried out cross-border attacks from such territory; the permissibility of self-defence should not be made contingent upon any concept of State attributability, but should be judged on the basis of the gravity of the attacks and the necessity and proportionality of the response.[55] Kooijmans regretted that the Court had foregone an opportunity to fine-tune the much criticise threshold set out in its Nicaragua judgment.[56]

Judge Simma fully agreed with honourable colleague and accepted that when armed attacks were carried out by irregulars forces operating from territory falling beyond State's government mental authority, these activities still qualified as 'armed attack', even if they could not be attributed to the territorial State.[57]

As with Palestine Wall, Armed Activities case was a high time that the Court missed another opportunity consistently to address the legal issues surrounding the law of self-defence 'in a time in which a clear and unequivocal answer is highly desirable.

2. Can non-State actors commit 'armed attack': a legal uncertainty

In this regard, some important question of International Law arises here. To what extent do cross border attacks by non-State actors amount to 'armed attack', warranting a defensive response against the non-State presence abroad and possibly against the infrastructure of the State from whose territory the attacks were prepared, directed and/or launched?

If we look inter alia at the US intervention in Afghanistan (1998 and 2001) and Sudan (1998), the Israeli intervention in Lebanon (2006) and the Turkish intervention in Iraq (2007-8), or at "*opinio juris* expressed by States such as the US, Russia, Australia, France, the Netherlands, Rwanda, Ethiopia and Iran",[58] it is difficult to avoid the impression that both State and opinion juris have undergone important shifts since 1986, and especially since 2001. This shift in customary practice has crystallized in the unequivocal emergence of a new '*ratione*

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[54]. Ibid, Para 30.
[55]. Ibid, Para 31.
[56]. Ibid, Paras, 25, 35.
[57]. Ibid, Separate opinion of judge Simma, Paras, 4-15, especially 12.
[58]. Tom Ruys, 'Armed Attack and Article 51 of the UN Charter', Evolution in Customary Law and Practice, 1st Ed., 2013, CUP, p.95; T. Gazzini, The changing rules on the use of force in international law (Manchester University Press, 2005), p. 486, Para 2.

personae' threshold, replacing the traditional one. First and most importantly, as explained above, State practice since 2001 has been far from coherent.[59]

For now, the only thing that can not be said about proportionate trans-border measures of self-defence against attacks by non-State actors in cases falling below the Nicaragua threshold is that they are 'not unambiguously illegal'.

6. India's surgical strike as a result of Necessity and Proportionality: A critical analysis

As it has already been discussed above, as to what constitutes the criteria of Necessity and Proportionality we may apply the same test in the case of India's surgical strike.

Prima facie India's surgical strike raises no question of interfering or violating the territorial sovereignty or political independence of Pakistan as India (Joint media conference of External and Defence Ministry) has already confirmed that India conducted surgical strike not against the Pakistan but against terrorists to destroy their launch pads. It can also not be denied that India conducted surgical strike in the territory of Pakistan without taking Pakistan into confidence. So consent of Pakistan was absent in this regard.

As far as test of **'Self-Defence as a last resort'** is concerned, on several International occasions, India raised its serious concern about danger of terrorism to the world community as a whole. The recent one is just two days before the surgical strike; India raised the issue of terrorism in UNGA annual meeting.[60]

Besides this, the matter has also been taken up at the highest diplomatic levels and military channels regularly. India has also offered consular access to the apprehended terrorists to Pakistan to verify their confessions. Furthermore, India had proposed that fingerprints and

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[59]. Corten, Le droit contre la guerre, pp. 694-9, 704; Naert, "The impact of the fight against terrorism on the Ius ad Bellum", 155 (referring to the Israeli strike against Syria in 2003), as cited in Tom Ruys, 'Armed Attack and Article 51 of the UN Charter', Evolution in Customary Law and Practice, 1st Ed., 2013, CUP, p. 486.

[60]. External Affairs Minister's address at the 71st UNGA, New York (September 26, 2016), she said that terrorism is undoubtedly the biggest violation of human rights... We will not be able to win against terrorism by making specious distinctions between your problems and mine, between terrorists who attack you and those who attack me... there are nations that still speak the language of terrorism, that nurture it, peddle it, and export it... Just as we need a more contemporary approach to combating terrorism..., whole speech is available at https://www.mea.gov.in/Speeches-Statements.htm?dtl/27435/English_Rendition_Of_External_Affairs_Ministers_address_at_the_71st_UNGA_New_York_September_26_2016> accessed on 20 November 2016.

DNA samples of terrorists who had been killed in the Uri and Poonch encounters can also be made available to Pakistan for investigations.[61]

Two days after the Uri attack which took place on 18 September 2016, Foreign Secretary of India called in the High Commissioner of Pakistan, Mr. Abdul Basit, and reminded him that the Government of Pakistan had made a solemn commitment in January 2004 to not allow its soil or territory under its control to be used for terrorism against India.[62]

As far as, **second test is concerned, immediacy** is a condition which is inevitably subject to a degree of uncertainty, as no precise time limit can be fixed. India has continuously been raising the issue of terrorism for a long time.

Recent Uri attack was a triggering point for India to exercise Right to Self-defence against non-State actors and so for surgical strike. Uri attack occurred on 18 September 2016 and surgical strike conducted on 29November 2016. A mere time gap of 10 days does not bar India's right to self-defence. In such kind of extra-ordinary situations of terrorist attacks, immediacy can not be calculated in terms of hours as more reasonable time is required for preparation and to conduct a successful surgical strike against the acts of non-State actors (especially acts of terrorism in this case).

The latest terrorist attack in Uri only underlines that the infrastructure of terrorism in Pakistan remains active. We demand that Pakistan lives up to its public commitment to refrain from supporting and sponsoring terrorism against India.[63]

India has claimed that, beginning with the Pathankot airbase attack; there have been continuous attempts by armed terrorists to cross the LoC and International Boundary in order to carry out attacks in India. This is reflected in the terrorist attacks on 11 and 18 September 2016 in Punch and Uri respectively. Almost 20 infiltration attempts have also been foiled by the Army at or close to the Line of Control during this year, resulting in the elimination of thirty one terrorists and preventing their intended acts of terrorism.[64].

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[61].Transcript of Joint Briefing by MEA and MoD (September 29, 2016), Ministry of External Affairs, Government of India, available at http://www.mea.gov.in/media-briefings.htm?dtl/27446/transcript+of+joint+briefing+by+mea+and+mod+september+29+2016> accessed on 11/11/2016.

[62]. Pakistan High Commissioner summoned over Uri attack, available at https://www.mea.gov.in/press-releases.htm?dtl/27421/pakistan+high+commissioner+summoned+over+uri+attack> accessed on 20 November 2016.

[63]. Ibid.

[64]. Press Information Bureau, Government of India, Ministry of Defence, Press Statement by DGMO, available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=151242> accessed on 20 November 2016.

As far as **third test of targeting** is concerned, DGMO of India has confirmed it that based on very specific and credible information that some terrorist teams have positioned themselves at launch pads along the Line of Control with an aim to carry out infiltration and terrorist strikes inside Jammu and Kashmir and various other metros in our country. The Indian Army conducted surgical strikes last night at these launch pads. The operations were focused on ensuring that these terrorists do not succeed in their design of infiltration and carrying out destruction, endangering the lives of the citizens of our country. **The operations aimed at neutralizing terrorists have since ceased**.[65]As far as question of reprisal from India against Pakistan is concerned, in this regard, position of India is clear that India does not have any plans for further continuation of the operations.[66] This argument is further corroborated when DGMO says in the same joint briefing that India has just spoken to the Pakistan Army's Director General of Military Operations and explained its concerns and also shared with the Pakistan the operations India conducted last night.[67]

From the above mentioned facts, it is clear that India's surgical strike was specifically targeting against the terrorists acts.

6.1. Position of India's surgical strike under International Law: An Uncertainty

India claimed that it conducted surgical strike at terrorist launch pads positioned along the Line of Control which was denied by Pakistan. Under International Law the moment one State claims something against another State and another State denies the same against the former, it becomes a dispute. A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.[68]On the other hand, there is a principle of CIL which requires that a State must give notice of its claim to that State, such notice being a condition of the existence of a dispute.[69]

India is claiming that it has just spoken to the Pakistan Army's Director General of Military Operations and explained its concerns and also shared with the Pakistan the operations which

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[65]. Transcript of Joint Briefing by MEA and MoD (September 29, 2016), Ministry of External Affairs, Government of India and Ministry of Defence, available at http://www.mea.gov.in/media-briefings.htm?dtl/27446/transcript+of+joint+briefing+by+mea+and+mod+september+29+2016>accessed on 11/11/2016.

[66]. Ibid.

[67]. Ibid, Para 7.

[68]. Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J., Objection to the jurisdiction of the Court, (Ser. A) No. 2, ICGJ 236, (PCIJ 1934), Aug. 30, 1924;

[69]. Obligation concerning negotiation relating to cessation of the nuclear armed race and to nuclear disarmament, (Marshall Islands v. United Kingdom), Preliminary objection, ICJ, Judgment, 5 October 2016, Para. 27.

India conducted against terrorist's launch pads. But there is a lack of evidence from the side of India to show that it really conveyed post-details of its operation to Pakistan. On the other hand, Pakistan is continuously denying that such kind of operation took place on its land or India shared with Pakistan details of the operation or surgical strike. So until and unless India shows to Pakistan some evidence of its claim on surgical strike, it is hard to put India's claim in the category of a 'dispute' under International Law.

6.2. Denial of Pakistan on India's surgical strike: A Critical Analysis

Inter-Services Public Relations (ISPR) of Pakistan said'At least two Pakistan Army soldiers were killed as Indian troops fired across the Line of Control in Azad Jammu and Kashmir'.[70]

The Pakistani military confirmed the deaths of its soldiers yet dismissed the Indian claim of 'surgical strikes'. "There had been cross border fire initiated and conducted by India which is [an] existential phenomenon,"[71] said an ISPR statement released shortly after the Indian DGMO held a press conference making claims about surgical strikes.

A Pakistani military officer at Chhamb, near the LoC, contradicted the Indian version, saying the attack had been repelled. "They (Indian soldiers) ran back, leaving many dead bodies on their side,"[72] This statement also contradicts the statement of ISPR.

Ban Ki-moon's spokesperson Stephane Dujarric said "The UN Military Observer Group in India and Pakistan (UNMOGIP) has not "directly observed" any firing across the LoC related to the latest incidents."[73] In response of this, India's permanent representative at the UN said "Facts on the ground do not change whether somebody has observed it or not. Facts are facts, India presented the facts and that's where it stands"[74]

Now the whole question is that how one would interpret the term "directly observed" used by Stephane Dujarric. Might be it carry two different meaning. Might be it observed 'indirectly'.

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[70]. Army rubbishes Indian 'surgical strikes' claim as two Pakistani soldiers killed at LoC, available at http://www.dawn.com/news/1286881/military-rejects-indian-claim-of-surgical-strikes-as-two-pakistani-soldiers-killed-at-loc> accessed on 21 November 2016.

[71]. Ibid.

[72]. Ibid.

[73]. No proofs of any 'surgical strikes' on LoC: UN Monitoring Group (UNMOGIP), available at https://en.dailypakistan.com.pk/pakistan/there-were-no-surgical-strikes-on-loc-un-mission-monitoring-loc-unmogip/> accessed on 21 November 2016.

[74]. Pakistan not getting support in UN on surgical strikes issue: Akbaruddin, available at http://www.thehindu.com/news/international/Pakistan-not-getting-support-in-UN-on-surgical-strikes-issue-Akbaruddin/article15421015.ece> accessed on 21 November 2016.

Pakistan permanent representative to the UN, Malleha Lodhi, said India's "claim" of carrying out surgical strikes across the LoC was 'false' but added that India had by its own admission "committed aggression" against Pakistan.[75]

Pakistan Prime Minister, Nawaz Sharif, said that "We strongly condemned the unprovoked and naked aggression of Indian forces resulting in martyrdom of two Pakistani soldiers along Loc.[76]

So what India did was not a surgical strike but unprovoked and naked act of aggression (According to Pakistan). What India termed its operation along LoC a surgical strike denied by Pakistan and termed that an act of aggression.

Article 1 of 'definition of aggression' adopted by UNGA says that "Aggression is the use of force by a State against the sovereignty, territorial integrity or political independence of another State...[77] The First use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression. Use of any weapons by a State against the territory of another State or an attack by the armed forces of a State on the land of another State constitutes an act of aggression.[78]

Brownlie concludes that Aggression and Self-defence are by and large seen as two different sides of the same coin: recourse to force either constituted justified action in self-defence or it amounted to unlawful agression.[79]

So less or more, it is clear that an act of aggression involves use of force. On the other hand, India claimed that the surgical strike conducted by it at the terrorist launch pads along LoC caused significant causalities to the terrorists and those trying to support them. Here one thing is clear, that India used some kind of force, at least, either from this side of LoC or that side of LoC. Because it is very hard to believe that significant casualties can be made to launch pads without using any force. Pakistan said that only two of ours soldiers killed in cross-border firing but insisted surgical never happened. In this situation too, India used some kind of force against Pakistan from India's side of LoC (as per Pakistan's statement). In both the situation, one thing is common that 'some kind of force' was used by India. But continuous denial by Pakistan keeps India's claim under uncertainty in International Law.

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[75]. Ibid.
[76]. Nawaz Sharif condemns attack, Calls for peace, available at https://www.thequint.com/india/2016/09/29/multiple-surgical-strikes-carried-out-on-night-dgmo-ranbir-singh-pakistan-vikas-swarup-indian-army-infiltratiom> accessed on 18 November 2016.
[77]. UN General Assembly Resolution 3314 (XXIX) 1974, 'Definition of Aggression, Article 1.
[78]. Ibid, Article 2, and Article 3 (b) and (d), in this regard, see Article 3 (d) also.
[79]. I. Brownlie, 'The use of force in self-defence', (1961) 37 BYBIL 183-268, at 222.

Concluding remarks: On the one side, we have Art. 2 (4) of the UN Charter which in principle prohibit use of force and cast an international obligation upon State to respect territorial sovereignty and political independence of another State in order to maintain international peace and security. On the other side, there is an 'inherent' right of State (Article 51 of the Charter) to use of force against an armed attack by another State. After discussing and analysing case laws and statutory provisions I found that the scope of the term 'armed attack' under UN Charter is limited and applicable to only those acts which are attributed to State. After 9/11 attacks, question arose whether terrorist acts may also be fallen in the category of 'armed attack' even without attributing those acts to any State. Resolution 1368 passed by UNSC. But, unfortunately, ICJ, in the cases of Wall Construction (2004) and DRC v. Uganda, 2005, again after Nicaragua, narrowly interpreted the term 'armed attack' under Article 51 and precluded acts of non-State actors from the ambit of 'armed attack' unless attributed to any State. Minority opinions (Judges Kooijmans, Higgins, Simma and declaration of Judge Buergenthal) in both the cases held different positions and criticised the Judgment. ICJ once again missed a golden opportunity. In this regard, almost entire academia holds that minority opinion was correct and now this is the high time to correctly interpret resolution 1368 in the context of 'armed attack' under Article 51. As far as India's surgical strike is concerned, it may hold its validity under the customary principle of 'Necessity and Proportionality'.