THE DOVAL DOCTRINE: ANALYSING THE LEGALITY OF INDIA'S POLICY OF CROSS BORDER COUNTERTERROR OPERATIONS

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ABSTRACT

International law has evolved from allowing all forms of interstate use of force to limiting it to some circumstances and eventually prohibiting it completely in the post-Charter era. However, it has been maintained that this complete prohibition on the use of force is subject to exceptions, such as the 'inherent' right of self-defence recognized under Article 51 of the United Nations Charter. The contours of this right and the validity of anticipatory actions under this right have recently come under intense academic scrutiny owing to most cross-border counterterrorism operations basing their legality on this right. The paper aims to understand and settle the debate around legality of anticipatory self-defence by arguing in favour of such a right. Furthermore, it shall also posit the changes that this customary right has undergone since the events of the 9/11 attacks. Accordingly, the climatic part of this paper shall explain the new Doval

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Doctrine of India that involves cross border counterterror operations which include land-based strike operations, aerial strikes and even artillery strikes against the non-state actors based in foreign soil. This part shall also analyse the legality of such a policy based on the principles of general international law discussed herein. Lastly, the paper shall also give certain recommendations that can strengthen India's diplomatic and legal position in conducting such operations in the future.

I. INTRODUCTION

The use of force has for long been a subject of significant debate in the domain of public international law.[1] Initially regarded as a legitimate mode of dispute resolution, this activity has been increasingly restricted.[2] After the Just War Theory was propounded, the unilateral use of force by state was caveated on certain ethical and moral conditions.[3] Subsequently, the Peace of Westphalia raised eyebrows at how a state could ascertain whether another state's cause for employing force was genuine. This resulted in states respecting agreements that required them to make serious attempts at peaceful solutions before resorting to war.[4] After the First World War, states agreed to outlaw war as an instrument of national policy by signing the 1928 General

[1]D.J. Harris, *Cases and Materials on International Law* (6th edn, Sweet & Maxwell) 748.
[2]Malcolm Shaw, *International Law* (6th edn, Cambridge University Press) 1118-1119.
[3]Ian Brownlie, *International Law and the Use of Force by States* (OUP 1963) 5.
[4]Shaw (n 2) 1119-1120.

Treaty for the Renunciation of War.[5] Finally, after the world saw another armed conflict on a global scale, the victors resolved to completely outlaw and prohibit all forms of use of force through the mandate of the United Nations Charter ("**Charter**").[6] This expansive prohibition outlawed all forms of use of force ranging from wars to armed reprisals, and became a cornerstone principle of international law in the post Charter era.[7]

However, this all-encompassing prohibition on interstate use of force in the Charter came with certain exceptions such as force when authorized by the United Nations Security Council[8] and in instances of a state exercising its inherent right of self-defence.[9] The right to self-defence saw increased application by states and became the subject of academic scrutiny in the Cold War, with some authors interpreting the Charter to exclude anticipatory actions under the scope of the right.[10] This debate surrounding the validity of anticipatory use of force has become relevant once again in the context of the global war on terror, which is rooted in the supposed legality of anticipatory self-defence. Accordingly, this debate has also become germane to the Indian national security calculus for understanding the legality of the Doval Doctrine. This doctrine, which involves 'offensive-defence', has created a paradigm shift in the Indian foreign policy. This strategy of 'offensive-defence' involves Indian forces conducting operations on foreign soil to neutralize terror threats from non-state actors. It has been

[5]Brownlie (n 3) 266; Max Sorenson, *Manual on Public International Law* (St. Martin's Press 1968) 741; Leland M Goodrich & Edward Hambro, *Charter of The United Nations* (World Peace Foundation, 1946); Bruno Simma, 1 *The Charter of The United Nations: A Commentary* (2nd edn, 2002) 208.
[6]United Nations Charter, art. 2 (4).
[7]Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge 7th edn, 1997) 309; James Crawford, *Brownlie's Principles of Public International Law* (7th edn, 2008) 746.
[8]United Nations Charter, art 42.
[9]United Nations Charter, art 51.
[10]See Part II of this paper.

applied in eight cross-border counterterrorism operations conducted by the Indian forces against non-state actors operating out of foreign soil.

While India is not the first country to engage in such cross-border operations, assessing and understanding the legality of such operations in view of the principles of international law is imperative for Indian policymakers, academicians and the policymakers of other countries engaged in such operations. Furthermore, the scholarship which has discussed the validity of anticipatory actions in self-defence has never adequately addressed the same in the context of the terror threats from non-state actors in the Indian subcontinent.

Part II of this paper shall discuss the scholarly debate regarding the legality of anticipatory self-defence and shall argue in favour of the validity of such a right. Part III shall aim to understand the evolution of the law of self-defence after the 9/11 terrorist attack as a result of emerging threats from non-state actors. Furthermore, it shall highlight the role of the United States and other countries involved in counterterrorism operations to understand the new contours of the right to self-defence against non-state actors. Part IV of this paper shall entail an in-depth discussion of the Doval Doctrine and analyse the legality of operations undertaken in light of the doctrine. It shall also make certain recommendations that would help solidify the law on the anticipatory use of force against non-state actors and strengthen the diplomatic stance of India with respect to counterterrorism operations. Lastly, to conclude the paper shall endorse the legality of the Doval Doctrine in international law and the steps India can potentially take to strengthen its diplomatic and legal position on such operations.

II. BRIDGING THE DOCTRINAL DIVIDE REGARDING THE VALIDITY OF ANTICIPATORY SELF-DEFENCE

One of the most fundamental principles established by the United Nations Charter was outlawing the use of all forms of interstate force

by its members.[11] This was subject to some exceptions such as when a state exercises its inherent right to defend itself and uses force against an unlawful aggressor.[12] Article 51 of the UN Charter which recognizes this right of self-defence has been reproduced here for better understanding:

"*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.*"

A. The customary origins and nature of the right of self-defence

In order to discuss the scholarly debate surrounding the legality of anticipatory self-defence actions under international law, we must address the main points of contention between the scholars supporting the right and the ones that oppose its validity. The first point of contention is whether there was a pre-existing customary right of self-defence before the Charter.

There are several theories surrounding the origin of the right of self-defence.[13]Some legal scholars have regarded this right to have

[11]United Nations Charter, art 2(4).
[12]United Nations Charter, art 1.
[13]Murray Adler, *The Inherent Right of Self-Defence* (Springer 2012) 93.

originated from the very concept of state sovereignty.[14] The right has been regarded as a natural right aimed at ensuring self-preservation of the state.[15] However, the most commonly held view on this matter is that the right has its origin in custom and has been expressly recognized in the Charter.[16] The International Court of Justice (hereinafter "**ICJ**") has also recognized the inherent and customary nature of this right in the case of Nicaragua v. United States.[17] In the Nuclear Weapons case, the ICJ went on to delineate the functional difference between the customary right of self-defence and the entitlement of states to resort to self-defence under Article 51.[18] It opined that the customary right of self-defence laid down conditions of a lawful self-defence operation in an elaborate manner and the Charter had in a way recognized that right in express terms.[19]

In the pre-Charter era, the pre-conditions for the customary right to self-defence can be indisputably linked to the Caroline incident.[20] The incident entailed a British military action which destroyed a boat in the American waters that was being used to supply a group of rebels to the

[14]Lassa Oppenheim, *International law, Disputes, war and neutrality*, vol. 2, (7th edn London) 153-55; Ian Brownlie, *Principles of Public International Law*, (6th edn Oxford University Press) 5–6.
[15]Niaz A. Shah, 'Self-Defence, Anticipatory Self-Defence and Pre-Emption: International Law's Response to Terrorism' (2007) 12 Journal of Conflict & Security Law 95.
[16]Derek Bowett, *Self-Defence in International Law* (Manchester University Press, 1958), 187-93; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) 242-243; Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press, 2009) 120; Yoram Dinstein, *War, Aggression and Self-Defence* (2nd edn, Cambridge University Press, Cambridge, 2005) 243-244.
[17]*Nicaragua v. United States, (Military and Parliamentary Activities in and against Nicaragua)*, [1984] 76 ILR 349 [175] – [177], [193].
[18]Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports (1996), 226, 244.
[19]ibid.
[20]Brownlie (n 3) 42-43; Dinstein (n 16)101-243-244; Franck (n 16) 97-98.

Crown's rule in Canada.[21] Considering that the British operation had occurred in the American waters, this initiated an exchange of heated diplomatic correspondences between the two nations[22] This exchange between UK and the USA was surrounding the legality of the British self-defence operation in the American territory and both the parties here agreed that a self-defence operation to be lawful, must have a "*necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation"*[23] The action should be proportional to the extent of the threat perceived which means that for a self-defence operation to be lawful, it must be the only possible alternative to the threat that is being perceived by the state to the extent that all the diplomatic/other alternatives have been exhausted or proved futile. These words went on to become the 'Webster test' of self-defence operations in the Pre-Charter era and set the customary framework used by the judicial authorities, states and scholars in determining the validity of a lawful self-defence operation.[24]

However, whether there was a pre-existing custom of self-defence before the Charter came into force is a major point of contention in debate on the legality of anticipatory self-defence. Most of the arguments supporting this right have been premised on the pre-existence of custom.[25] The main argument of those in favour of the legitimacy of anticipatory self-defence is that Article 51 of the Charter is only a reiteration of the pre-existing customary right that was formed

[21]Robert Y Jennings, 'The Caroline and McLeod Cases', [1938] 32 American Journal of International Law. 82, 89.
[22]ibid.
[23]30 *British & Foreign State Papers* 193 (1843).
[24]Jennings (n 21).
[25]Bowett (n 16) 178–93; MS McDougal, 'The Soviet-Cuban Quarantine and Self-Defense' [1963] 57 AJIL 597; Peter Malanczuk, 'Countermeasures and self-defence as circumstances precluding wrongfulness in the International Law Commission's Draft Articles on State Responsibility' [1983] 43 German Yearbook of International Law 705–812, 764; Higgins (n 16) 242-243; John Yoo, 'International Law and the War in Iraq' (2003) 97 American Journal of International Law 563, 564; Christopher Greenwood, 'International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaeda, and Iraq' [2008]4 San Diego International Law Journal. 7, 16.

and interpreted around the Caroline Incident. Furthermore, they assert an argument based on logic and a literal interpretation of Article 51. They argue that the provision, though states that a lawful self-defence may occur when it is preceded by an armed attack, does not restrict the lawful exercise of that right to that situation exclusively.[26]

These arguments have been countered by scholars often referred to as the 'Restrictionists', who argue that a literal reading of Article 51 of the Charter closes the door on the permissibility of any anticipatory action under the right to self-defence and restricts the scope of any anticipatory self-defence action to instances where an armed attack has already commenced.[27] They have also questioned the customary authenticity of the Caroline conditions which have been set in the Pre-Charter Era where a comprehensive regime regulating the use of force was absent.[28] Furthermore, they have also argued that if at all such a custom existed, it was nonetheless modified and restricted to the extent permitted by the Charter.[29]

The arguments by the Restrictionists seem specious when we understand that the Caroline Criteria, as has been correctly pointed out by Gill, was already considered as reflecting the customary law for objectively determining the validity of a self-defence operation before

[26]Myer.S. McDougal & Florentio Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (New Haven, CT: Yale University Press, 1961) 237.
[27]Brownlie (n 3) 257–60, 275–8; J.L. Kunz, 'Individuals and collective self-defense in Article 51 of the Charter of the United Nations', (1947) 41 American Journal of International Law. 872, 878; Philip C. Jessup, *A Modern Law of Nations: An Introduction* (New York: MacMillan, 1948) 166; Hans Kelsen, *The Law of The United Nations: A Critical Analysis of Its Fundamental Problems* (London: Stevens, 1950) 797; Louis Henkin, *How Nations Behave. Law and Foreign Policy* (New York: Columbia University Press, 1979) 140-141.
[28]Ian Brownlie, 'The Principle of Non-Use of Force in Contemporary International Law', in Butler (eds), *The Non-Use of Force* 17–27.
[29]Tom Ruys, *Armed Attack and Article 51 of the UN Charter* (Cambridge University Press 2010).

the Charter came into force by scholars and states alike.[30] Even during the time the Charter was being drafted, the 'Caroline conditions' were relied on by the judicial authorities of the Nuremberg and the Tokyo Tribunal.[31] Therefore, these conditions undoubtedly reflected customary law at least till the time the Charter came into force. This refutes the argument of the Restrictionists that question the existence of such a right even before the Charter came into force.

However, as regards the existence of such a right after the Charter came into force, it would be imperative to mention that the ICJ had also recognized that assessing whether an operation was a lawful act of self-defence must be done through the customary framework of that law.[32] This is implied acceptance that the Article 51 is only a reiteration of the pre-existing customary and inherent right of self-defence.

B. Contextual interpretation of Article 51 of the charter

This brings us to the second point of contention which is whether the interpretation of Article 51 permits a scope of anticipatory action. As highlighted earlier, the right of self-defence originates from sources beyond the fine text of the Charter and bases itself on principles of natural law.[33] However, to comprehensively refute the arguments of the Restrictionists, and to understand the true contours of this right, it would be necessary to interpret Article 51 in the context it was inserted in the Charter. The text of Article 51 expressly states that it does not affect the 'inherent right of self-defence' if an armed attack occurs but

[30]Terry D. Gill, 'The Temporal Dimension of Self-Defence: Anticipation, Pre-emption, Prevention and Immediacy', [Winter 2006] 11 Journal of Conflict & Security Law, 361,366.
[31]Judgment of the International Military Tribunal (Nuremberg), (1 October 1946), reproduced in (1947) 41 American Journal of International Law 172–333, 205; International Military Tribunal at Tokyo (1948), in 2 *The Law of War: A Documentary History*1029, 1157-59 (Leon Friedman edn, 1972).
[32]Legality of the Threat or Use of Nuclear Weapons (n 18).
[33]Kinga Tibori Szabó, *Anticipatory Action in Self-Defence: Essence and Limits under International Law* (Springer 2011) 43-56 ("Szabó").

caveats this authority until the Security Council has taken measures to control that threat.[34] Furthermore, it also obligates the states to report to the UNSC all measures taken under the right to self-defence.[35] The concern that arises here regarding this right is that the Restrictionists interpret Article 51 in such a manner that it modifies the customary right by restricting its application to cases only where an armed attack has commenced.[36] This is the result of the literal interpretation of the provision drafted in 1945and can lead to manifestly absurd consequences if applied in the context of today's long-ranged missile technologies which can practically eliminate the difference between an attack and an imminent attack.[37] Accordingly, it would be apt to refer to the *travaux préparatoires* of Article 51 of the Charter in order to obtain a contextual interpretation of the provision.[38]

The drafting history of this provision does not entail any discussion on the scope of the right to self-defence or hint at any restriction of the right to self-defence based on the time of the armed attack.[39] In fact, Article 51 was not even present in the original Dumbarton Oaks Proposal which was the general framework for the Charter to be negotiated on.[40] One of the main reasons for inserting this provision was to assure the states of the legitimacy of regional security arrangements and self-defence under those security alliances.[41] This means that there was never any substantial discussion on the temporal scope of this right in San Francisco.

[34]United Nations Charter, art. 51.
[35]ibid.
[36]Ruys (n 29) 259.
[37]Brownlie (n 3) 368.
[38] Vienna Convention on the Law of Treaties 1969, (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 32.
[39]Szabó (n 33) 111.
[40]See Verbatim Minutes of the Fourth Plenary Session, April 28, U.N. Doc. 24 (1945), reprinted in *The United Nations Conference on International Organisation, San Francisco, California, April 25 to June 26, 1945, Selected Documents* 313 (1946).
[41]Adler (n 13) 83.

Therefore, it would be apt to state that the drafters of the Charter wanted to keep the customary essence of this right as intact and unimpaired. This would turn us back to the fine text of the provision to complete the exercise of giving a contextual interpretation to Article 51. Herein, it is evident that the very provision states this right as 'inherent'.[42] This provision when viewed by a French delegate becomes '*droit naturel*' which reiterates its natural law theory connotations and in Russia becomes '*neotemlemoepravo*' which means indefeasible right.[43] Consequently, this strengthens the assertion that the provision was just a reiteration of the pre-existing custom rather than the creation of a specific right.

As regards the aforementioned contentions, the Restrictionists have argued that the Article 51 is a provision which is an exception to the Charter's general prohibition on use of force and must be interpreted in a restricted manner.[44] The Restrictionist scholarship has omitted to discuss or deliberate on the abovementioned *travaux préparatoires* of the Charter. The only name's sake discussion offered by Ruys mentions an answer by a US delegate on the question regarding the scope of anticipatory action under the Charter.[45] This statement mentions that a state can only do a preemptive deployment when an enemy state has deployed its forces but is yet to mount an attack. Ruys, has cited the aforementioned statement to invalidate the existence of a preemptive right of self-defence, but he fails to understand that this discussion itself involved the Delegate suggesting methods which could constitute anticipation. Therefore, the preemptive methods that have been discussed in 1945 are restricted to the technological limitations of the day and would have to be interpreted regards the developments of the

[42]United Nations Charter, art. 51.
[43]Van de hole, Leo, 'Anticipatory Self-Defence Under International Law' (2003) 19 (1) American University International Law Review 69-106, 78.
[44]ibid.
[45]Ruys (n 29) 260.

21st century that have reduced the time that would require to mount an attack against a state.[46]

A reading of the provision indicates that it includes a procedural obligation to be fulfilled while exercising this right.[47] This is a due diligence obligation of reporting the self-defence operation to the Security Council in the manner provided in the provision.[48] However, this modification is not a substantive modification of the customary right but only imposes a procedural obligation on the state exercising the right of self-defence. Therefore, it must be understood that the essential preconditions of exercising the right of self-defence are still those prescribed in the framework surrounding the Caroline incident, and therefore include anticipatory self-defence.

Accordingly, the right to self-defence under Article 51 of the Charter must be read in light of the intention of the drafters. As has been clarified, this intent was to include customary principles of self-defence under international law as developed by the Caroline incident; ergo, no restriction on any form of anticipatory action can be held as valid.

C. Desirability of anticipatory self-defence from a policy perspective

Trying to counter the abovementioned arguments, the Restrictionists have tried to argue that from a policy perspective, the modern weaponry, including long-ranged supersonic missiles and the global proliferation of nuclear weapons, has prompted states to act in pre-emption and anticipation of military threats. Accordingly, permitting such a right in the nuclear era would be promoting and easing military escalation. This might lead to false alarms that should never be

[46]Franck (n 16) 50.
[47]Ruys (n 29) 259.
[48]Bruno Simma, 1 *The Charter of The United Nations: A Commentary* (2nd edn 2002) 210.

legitimized.[49] Furthermore, Henkins has also suggested rather counter intuitively, that authorizing preemptive strikes as anticipatory self-defence would reduce states' deterrence in their security outlook.[50]

The concerns of Restrictionists with respect to this are understandable. However, they fail to comprehend that if Article 51 is interpreted on the strict conditionality proposed by the Restrictionists, then states would be compelled to suffer the physical commencement and destruction caused by an armed attack before they could legally respond. This absurdity is aggravated when applied in the context of modern weaponry. This argument has been recognized by the United Nations Atomic Energy Commission which had declared that "*a violation [of a treaty or convention on atomic energy matters] might be of such grave a character as to give rise to the inherent right of self-defence recognized in Article 51 of the Charter of the United Nations*".[51]

Furthermore, the Charter's prohibition on the use of force also extends to the threat of use of force.[52] Therefore, as suggested by Erickson, if the states have to wait for an armed attack to occur, the duty to maintain international peace and security would diminish and would be replaced by the duty to restore the international order destroyed by illegal strikes which could have been prevented if anticipatory action was permitted.[53] Lastly, the desirability of such a right is evident in the context of non-state actors. This is because, unlike most modern militaries, an attack from such actors does not require large scale

[49]Ruys (n 15) 262.
[50]Henkin (n 27) 142.
[51]UNSC 'The First Report of the Atomic Energy Commission to the Security Council' (3 Jan 1947) AEC/18/Rev.1 24. See also 'Article 51, Chapter VII, Charter of the United Nations' (1945–54) 2 Repertory of Practice of the United Nations Organs 434–435 <www.un.org/law/repertory/> accessed 11 Jan 2021.
[52]United Nations Charter, art. 2(4).
[53]Richard J. Erickson, *Legitimate Use of Military Force Against State-Sponsored International Terrorism*, (Diane Publishing Company 1989) 139-41.

military deployment that is relatively easier to detect by states.[54] This makes the strikes unpredictable, and the criterion of imminence is diluted to a great extent. Therefore, it can be clearly stated that the right of anticipatory self-defence under international law is not only legally permitted but also highly desirable from a policy perspective.

Lastly, certain inconsistencies can be spotted in the scholarship that has been cited to oppose anticipatory self-defence.[55] Yoram Dinstein had asserted that anticipatory self-defence was extinguished by Article 51 of the Charter. He, however, drew an abstract distinction between the right of anticipatory self-defence and the right of interceptive self-defence. The latter right, having legitimacy under international law, involves self-defence when an armed attack has not occurred but is in the process of being mounted.[56] This is a vague categorisation that can be easily interpreted as permitting anticipatory actions in situations considering that the line between anticipatory actions and interceptive action can be very thin. Same is the case with Judge Jessup, who had suggested that anticipatory force cannot be permitted under the Charter[57] but later contradicted this by stating that Article 51 should be interpreted liberally to enable the inherent right of self-defence to be exercised at some time before a state is physically attacked.[58] Therefore, it can be said that there are inconsistencies in the arguments against the right to anticipatory self-defence made by those within the school of Restrictionists itself. Accordingly, it is undeniable that the right of self-defence that existed in a customary form before the adoption of the Charter continues to exist with a slight modification of

[54]W Michael Reisman and Andrea Armstrong, 'The Past and Future of The Claim of Pre-emptive Self-Defense' (2006) 100 American Journal of International Law 525, 538.
[55]Dinstein (n 16) 182.
[56]ibid.
[57]Jessup (n 27).
[58]Jessup (n 27) 166-167.

reporting the self-defence operation to the United Nations Security Council.

III. EVOLUTIVE INTERPRETATION OF ARTICLE 51 AFTER 9/11

The previous section had illustrated that Article 51 must be read liberally to validate the existence of the right of self-defence. The customary framework for assessing if an operation was a lawful self-defence operation has always been the Caroline criteria that broadly involves an assessment on the basis of necessity, proportionality and imminence. However, since the 9/11 Attacks and the rise of the threat of attacks by non-state actors, it has become clear that the concept of 'imminence' is diluted to the extent that the relevance of the oversimplified Caroline criteria is being questioned.[59] This is because most terror strikes occur without any warning or signs present before an attack which is in stark contrast to attacks by other states that generally show deployment of military forces which can be detected.[60] Therefore, it is very difficult to ascertain when a terror strike is imminent prompting states to stay in a state of constant *qui vive* to pre-empt threats from non-state actors. This has even led some authors to argue that the incessant state practice by states involved in counter terror operations has resulted in the traditional Caroline criteria being modified and broadened temporally when applied in the context of non-state actors.[61]This section shall examine these claims but shall initially explain the legal basis of self-defence operations against non-state actors.

[59]Gill, (n 30) 368.
[60]Reisman and Armstrong (n 54) 537-538.
[61]Christian M. Henderson, 'The 2006 National Security Strategy of the United States: The Pre-emptive Use of Force and the Persistent Advocate', (2007) 15 Tulsa Journal of Comparative & International Law, 7.

A. Right of self-defence against non-state actors

This has been regarded as a peculiar situation considering that the law of self-defence was customarily intended to be applied only against states and not non-state actors such as terror outfits. However, the imperatives have warranted its application to be extended to non-state actors; therefore, this right can be exercised on two preconditions. Firstly, the terror strike should be interpreted as an armed attack. Secondly, in order to exercise the right of self-defence against those non-state actors, it is to be seen as to what extent the countermeasures can be undertaken against the territory of the state from which these actors emanate.

a) Terror strikes as armed attacks

Thomas Franck, after analysing the state practice of self-defence against non-state actors, opined that the Security Council Resolution 1368 (2001)[62] passed in the backdrop of the 9/11 attacks is enough to confirm that international law recognizes the right of a victim state to treat a terrorist attack as an armed attack and use military force in a self-defence operation.[63] However, a detailed view has been presented by Murphy to analyse if a particular terrorist strike qualifies as an armed attack to invoke self-defence.[64] Firstly, the scale of the destruction of the terrorist attack must be akin to that of a military attack. Secondly, the state must perceive the attack as one at the scale of a military attack. Lastly, it must be ascertained if other states have also endorsed the victim state's interpretation of the terror strike as an armed attack.[65]

[62]UNSC Res 1368, (12 September 2001) UN Doc S/RES/1368.
[63]Franck (n 16) 55-62.
[64]Sean D. Murphy, 'Terrorism and the Concept of Armed Attack in Article 51 of the U.N. Charter', (2002) 43 Harvard International Law Journal 45, 41.
[65]ibid.

b) Countermeasures against the territory of origin of the terrorists

Thomas Franck has opined, placing reliance on extensive state practice, that the military force against a terror attack can be used by a state to the extent of not only neutralising the non-state actors which pose a threat to that state but also take countermeasures against the territory that is harbouring, supporting or tolerating activities that culminate in, or are likely to give rise to, insurgent infiltrations or terrorist attacks.[66] Ordinarily, a state cannot enter the territory of the other state without its permission; else, it would be a violation of customary law. However, in circumstances where terror attacks have been emanating from the territory of a state, then a limited right to perform a countermeasure by entering their territory without their consent to achieve the object of neutralising those terror threats is permitted in international law. This is subject to certain preconditions which are a prior illegality of the state against which the countermeasure is intended,[67] an attempt at pacific redressal with the state,[68] and proportionality of the response.[69]

Firstly, it has to be proven that the state against whom the countermeasure was taken had committed an illegal act. International law requires states to control the activities of persons within its jurisdiction or territory which can cause injury to the citizens of other states.[70] Furthermore, this duty has been broadened in the context of acquiescence by state in organized terrorist activities within its territory

[66]Franck (n 16) 55 - 62.
[67]International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, U.N. art. 49 (Aug. 3, 2001) GAOR, 53rd Sess., Supp. No. 10, U.N. Doc. A/56/10.
[68]International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, U.N. art. 52 (Aug. 3, 2001) GAOR, 53rd Sess., Supp. No. 10, U.N. Doc. A/56/10.
[69]International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, U.N. art. 51 (Aug. 3, 2001) GAOR, 53rd Sess., Supp. No. 10, U.N. Doc. A/56/10.
[70]Hersh Lauterpacht, 'Revolutionary Activities by Private Persons against Foreign States', 22 American Journal of International Law 105, 126 (1928).

and consistent state practice has shown that international law strictly prohibits tolerating or harbouring non-state actors that commit terror strikes in other states.[71]

As regards this duty, the standard of care which has to adopted by states to prevent an act of terrorism from emanating from its soil and to abstain from any involvement in a terrorist act involves two elements.[72] The first element is the knowledge of the non-state actors operating inside its territory and planning to conduct a terror strike. This knowledge can be actual or presumed through a liberal recourse to inferences.[73] The second element is fault, which does not entail any mental element of intent. Thus, only a responsibility on an objective basis, agency and causal connection are needed.[74]This means that a state from where there has been a consistent emanation of terror strikes can be held as being at fault to prevent such attacks considering that the attacks can be objectively linked to their territory. Furthermore, the causal connection i.e., the state's dereliction of duty in preventing the non-state actors in mounting such attacks which resulted in the terror strike being successfully executed against the victim state is also established. Therefore, a state from which armed attacks in the form of terror outfits have been originating would generally be violating its international obligation of preventing such acts of terrorism.

Secondly, the law of countermeasures involves an obligation to attempt pacific redressals. This obligation has been diluted in cases where in

[71]G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1970); UNGA Resolution 3034 A/RES/3034 (XXVII)18 December 1972; UNGA A/RES/32/147 adopted on 16 December 1977; UNGA Res 34/145; UNGA A/RES/36/109 10 December 1981.

[72]Kimberley Trapp, 'Obligations to prevent and punish acts of international terrorism' in *State Responsibility for International Terrorism* (Oxford: Oxford University Press, 2011).

[73]ibid.

[74]Ian Brownlie, *System of the Law of Nations: State Responsibility* Part I (Oxford, Clarendon Press, 1983) 39; *Case Concerning Avena & Other Mexican Nationals (Mexico v United States of America)* (Reprinted) [2004] 43 ILM 581.

the past, attempts at dialogue and redressals have been gone unheeded, with the states intentionally or unintentionally failing to cooperate to prevent the non-state actors in its territory to commit terror attacks. Accordingly, the obligation to make future attempts at redressal can be considered as waived under the abovementioned circumstances.[75]

Lastly, in the context of the proportionality of the countermeasure, the determination of proportionality cannot be accomplished with anything near mathematical certainty. It is observed that any response not obviously disproportionate to its provocation satisfies the requirement of proportionality. Furthermore, proportionality can be determined by reference to both past and future actions and a proportional action would be the one that was calculated to prevent an enemy from engaging in the threatened attack against the defending state.[76]Therefore, proportionality would have to be measured on the note that an act does not have to be obtusely disproportionate to the aims and objects of the countermeasure operation.

B. Temporally broad right of self-defence

a) The Pioneering USNSS

The United States in 2002, in the aftermath of the 9/11 Attacks, released the National Security Strategy ("**US NSS**").[77] This document stated that the conventional military threats to the USA needed great armies and industrial power to attack USA but the growth of non-state actors has resulted in small groups of individuals coupled with modern

[75]Derek Bowett, 'Reprisals Involving Recourse to Armed Force", (1972) 66 American Journal of International Law, 20, 30; Barry Levenfeld, 'Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisal under Modern International Law', (1982) 21 Columbia Journal of Transnational Law 1, 12.
[76]McDougal & Feliciano, (n 26) 682.
[77]President of the United States, *The National Security Strategy of The United States of America* (2002), <https://2009-2017.state.gov/documents/organization/63562.pdf> accessed 11 January 2021.

technologies threatening the American soil with chaos.[78] Accordingly, this document had recognized the urgency of neutralising these threats before they could cause any significant harm to the country and stated that the US government would take action against these threats before they have fully formed and have reached the US Borders.[79] Furthermore, it also stated that the USA shall not make any distinction between terrorists and those who knowingly harbour or provide aid to them.[80]

The most important part of the US NSS 2002 is that it states the position of the country on the legality of anticipatory self-defence, which is, international law does not oblige states to suffer an attack before they can engage in a lawful self-defence operation.[81] Furthermore, the legal scholarship conditioning the legitimacy of an anticipatory action on the existence of visible threats such as mobilisation has to be adapted to the imminence and capabilities of today's adversaries.[82] The noteworthy aspect of this position is that it broadens the temporal scope of anticipatory self-defence and takes it beyond the traditional Caroline conditions.[83] The US NSS was revised in 2006.[84] This strategy did not reduce the temporally broad scope of self-defence but proclaimed that before taking such actions, the US government shall aim to achieve the objectives through diplomacy.[85]

[78] ibid [5].
[79]US NSS (n 77) 5.
[80]US NSS (n 77).
[81]US NSS (n 77) 15.
[82]US NSS (n 77).
[83]Ruys (n 15) 309-310.
[84]President of the United States, 'National Security Strategy' (The White House, 23 Mar 2006) <https://georgewbush-whitehouse.archives.gov/nsc/nss/2006/> accessed 12 January 2021.
[85]ibid.

b) Criticism and endorsement of the US NSS

The adoption of the US NSS led to various other organisations adopting policies similar to the NSS, such as the North American Treaty Organisation's Prague Summit Declaration (2002),[86] the OSCE Strategy to Address Threats to Security and Stability in the Twenty-First Century (2003),[87] the European Security Strategy (2003),[88] the African Union's Solemn Declaration on a Common African Defence and Security Policy (2004),[89] as well as the report of the UN High-Level Panel on Threats, Challenges and Change (2004),[90] and the follow-up report 'In Larger Freedom'' of UN Secretary-General Kofi Annan (2005).[91] These declarations impliedly endorsed the temporally broad right of self-defence against non-state actors. Apart from these,

[86]7 North Atlantic Council, 'Prague Summit Declaration', Prague, NATO Press Release (2002) 127, (21 November 2002), <https://www.nato.int/cps/en/natohq/official_texts_19552.htm> accessed 12 January 2021.

[87]OSCE Ministerial Council, OSCE Strategy to address Threats to Security and Stability in the Twenty-First Century, Maastricht, (1–2 December 2003), <https://www.osce.org/files/f/documents/d/0/17504.pdf> accessed 12th January 2021.

[88]European Security Strategy, 'A Secure Europe in a Better World', approved by the European Council on 12 December 2003, <https://www.consilium.europa.eu/en/documents-publications/publications/european-security-strategy-secure-europe-better-world/> accessed 11 January 2021.

[89]Solemn Declaration on a Common African Defence and Security Policy', 2nd Extraordinary session of the African Union, Sirte, (28 February 2004), <www.africa-union.org/News_Events/2ND%20EX%20ASSEMBLY/Declaration%20on %20a%20Comm.Af%20Def%20Sec.pdf> accessed 11 May 2009.

[90]Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility', (1 December 2004), UN Doc. A/59/ 565.

[91]UN Secretary-General Kofi Annan, 'In Larger Freedom: Towards Development, Security and Human Rights for All', (21 March 2005), UN Doc. A/59/2005.

several states such as Israel,[92] United Kingdom,[93] France,[94] Australia[95]and Russia[96] have also voiced their support for anticipatory action in the form of self-defence to be used against non-state actors.

It has been regarded that the 9/11 attacks resulted in a paradigm shift in the customary international law of self-defence.[97] To be more particular, the US NSS and its endorsements across the globe have led to a change in the law of self-defence when applied against non-state actors.[98] Such a change in the customary law can come within a decade or a century and does not require any stipulated gestation period,[99] provided there is consistent state practice and *opinion juris*.[100] This state practice and *opinio juris* can be seen in the above listed examples of anti-terror policies.

Additionally, it is important to note that customary law is not made by the practice of the majority of states but rather by those states who are interested in that subject matter in which the law is going to change.[101]

[92]Charles J. Dunlap, 'Anticipatory Self-Defense and The Israeli-Iranian Crisis: Some Remarks', 19 ILSA Journal of International and Comparative Law 319.
[93]The National Security Strategy of The United Kingdom (March 2008) 8 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228539/7291.pdf>.
[94]Rubin AJ and Barnard A, 'France Strikes ISIS Targets in Syria in Retaliation for Attacks' *The New York Times (*November 15, 2015) < https://www.nytimes.com/2015/11/16/world/europe/paris-terror-attack.html?_r=0> accessed 15 February 15 2021.
[95]Nicole Abadee and Donald R Rothwell, 'The Howard Doctrine: Australia and Anticipatory Self-Defence against Terrorist Attacks' (2007) 26 Australian Yearbook of International Law 19.
[96]Putin: Russia to Tackle Terrorism 'Preventively', (17 September 2004) <https://www.nbcnews.com/id/wbna6025247> accessed 15 February 2021.
[97]Sean D. Murphy, 'The Doctrine of Preemptive Self-Defense', 50 Villanova Law Review (2005) 699, 719- 20.
[98]Reisman and Armstrong (n 61); Henderson (n 61).
[99]Harris (n 1) 38-39.
[100]G. M. Danilenko, *Law-Making in the International Community* (Martinus Nijhoff 1993) 94-98.
[101]Harris (n 1) 37; Hersch Lauterpacht, 'Sovereignty over Submarine Areas', (1950) 27 British Year Book of International Law. 376, 394.

For instance, the ICJ in the North Sea Continental Shelf cases had noted that maritime nations have more of an impact upon the law of the sea than land-locked countries.[102] Therefore, when considering the change in the customary law regarding the self-defence against non-state actors, then the practice of states who are actively involved in the war against terrorism would have a greater say in shaping the law as has been aptly argued by Henderson.[103] This means that the state practice of Brazil or Japan which are a few nations that are not involved in counter terror operations would be irrelevant. Herein, the state practice of countries such as the USA, Israel, India, France and Russia would be relevant and would chart the path of the development of the customary law.

Accordingly, it can be argued that the state practice of the abovementioned states who have been suffering from the scourge of terrorism has changed and modified the law of self-defence when applied in the context of threats emanating from non-state actors such as terrorists.

c) Clarifying the new law

It is pertinent to note that while the Caroline conditions form the general customary law on self-defence, a new framework applies to the situations involving a self-defence operation against non-state actors such as terrorists. While the Caroline conditions are germane in understanding the essential elements of a lawful self-defence operation, especially in cases of self-defence when a state is an aggressor, it must be noted that they were based around an operation that occurred in 1837. This framework could not account for the technological advancements which mankind has witnessed between the Industrial

[102]*North Sea Continental Shelf, Judgment (Germany v Netherlands)* [1969] ICJ Rep 3, 73.

[103]Christian M. Henderson, 'The 2006 National Security Strategy of the United States: The Pre-emptive Use of Force and the Persistent Advocate', (2007) 15 Tulsa Journal of Comparative & International Law. 1.

Age and the Information Age. It has even been remarked that those Conditions can be argued as "*a set of abstractions that froze the issue of anticipatory self-defence into the confines of the nineteenth century prose used to resolve a particular diplomatic incident.*"[104]

Accordingly, it can be remarked that the standard of necessity proposed by Caroline is very abstract and restrictive.[105]The necessity in the context developed by Caroline involved "*instant, overwhelming and leaving no choice or means*". It should be noted that often, the actions and the threat that the non-state actors possess are not instant and have been developing since months and years. A strict compliance by this customary criterion might leave states to use force against such threats only when they are at the tip of detonating the bomb or pulling the trigger. The Caroline conditions had developed in the 19th century where the diplomats and lawyers did not foresee the state-of-the-art weapon technologies that can be available to non-state actors, let alone states. Therefore, a newer standard suitable to countering such threats was required.

This was articulately answered by Professor Abraham D. Sofaer of the Stanford University after analyzing the traditional Caroline Conditions, the background in which these requirements were devised and other relevant imperatives of law of use of force that have made it necessary for proposing new criteria for assessing the legality of self-defence operations.[106] This criterion states that the old Caroline conditions should not be applied as a standard for assessing the legality of a preemptive operation and rather the necessity of the action should be judged on various other factors. Firstly, the nature and magnitude of the threat involved has to be assessed. For instance, if there is credible intelligence that a weapon of mass destruction can be used by non-state actors in the terror strike, it is likely that such a situation would warrant

[104]Gill, (n 30).
[105]McDougal & Feliciano, (n 26) 217.
[106]Abraham Sofaer, 'On the Necessity of Pre-emption' (2003) 14 European Journal of International Law 209.

extreme preemptive measures to be undertaken by the state. Secondly, the likelihood of that threat being realized has to be assessed based on the history of the state from which such threats can emanate and/or other credible intelligence inputs that show the attack would be imminent and likely to occur. Thirdly, alternatives to use of force such as diplomatic negotiations should have been exhausted; however, such a requirement would be subjected to the prior history and receptivity of the state from which such attacks are emanating. Lastly, it would have to be understood whether the use of force is consistent with the terms and purpose of the United Nations Charter that protect human rights and maintain international peace and security. Therefore, in view of the arguments given, the aforementioned criteria can be called as suitable for assessing the legality of any self-defence operation against terrorists.

IV. ANALYSING THE LEGALITY OF THE DOVAL DOCTRINE

Long before Mr. Ajit Doval became the National Security Advisor of India, he was vocal about the need for India to strategically respond to the terror attacks based out of Pakistan's soil.[107] He clarified that this strategy involved 'defensive-offence', meaning that the Indian forces would have to attack the origin of all terror strikes happening in India.[108] This policy is colloquially referred to as the Doval Doctrine (hereinafter, "**Doctrine**") in the Indian and especially Pakistan's intelligence community.[109] The policy has two major elements. The

[107]Ryan French, 'Deterrence Adrift?: Mapping Conflict and Escalation in South Asia' (2016) Strategic Studies Quarterly, 10 (1), 106-137; Ajit Doval, 'Islamic Terrorism in South Asia and India's Strategic Response', (2007) 1(1) Policing: A Journal of Policy and Practice, 63-69.

[108]ibid.

[109]Muhammad Feyaaz, 'Contextualizing the Pulwama Attack in Kashmir – A Perspective from Pakistan', Perspectives of Terrorism 13(2), 69-74; Doval (n 107) 68; Frontline, 'The Doval Doctrine' (*Frontline* 24 April 2018)

first element is the defensive-offence strategy involving surgical strike on the terrorist assets located on foreign soil. The other element is the 'Double Squeeze' strategy which involves pressuring Pakistan through international isolation and cutting the supplies and finances of the terrorists which have a safe haven in Pakistan.[110] The ensuing subsection details and analyses the legality of the instances of cross-border surgical strikes where this Doctrine has been applied.

A. Analysing the legality

a) Land based surgical strikes in Myanmar

This operation was the first surgical strike conducted by the Indian armed forces. This was conducted on 9, 2015 against the backdrop of the killing of 18 Indian soldiers by the militant groups of NSCN Khaplang ("**NSCN-K**") and Kanglei Yawol Kanna Lup ("**KYKL**").[111] The operation involved Indian Special Forces crossing the border to enter Myanmar and conducting a land-based operation to neutralise insurgents which, according to credible intelligence, posed imminent threats in the form of attacks on Indian armed forces.[112]

As regards the legality of these operations, the stance of the government on the exact nature of this operation has been unclear. The

<https://frontline.thehindu.com/the-nation/the-doval-doctrine/article7800194.ece> accessed 17 June 2021.

[110]PTI, 'Pakistan: NSA Ajit Doval's 'Double Squeeze' Strategy Will Never Succeed' (*The Economic Times* 13 July 2018) <https://economictimes.indiatimes.com/news/defence/nsa-ajit-dovals-double-squeeze-strategy-will-never-succeed-pakistan/articleshow/60791752.cms> accessed February 15, 2021.

[111]'Myanmar Operation: 70 Commandos Finish Task in 40 Minutes' (*The Economic Times*, 14 July 2018) <https://economictimes.indiatimes.com/news/defence/myanmar-operation-70-commandos-finish-task-in-40-minutes/articleshow/47617871.cms> accessed February 15, 2021.

[112]IndiaToday.in, 'Indian Army's Myanmar Operation: 10 Insider Facts' (*India Today 10* June 2015) <https://www.indiatoday.in/india/story/indian-army-myanmar-operation-details-indian-air-force-256665-2015-06-10> accessed February 15, 2021.

Ministry for Information and Broadcasting claimed that it was a hot pursuit operation, considering it was conducted within 72 hours of the earlier attack on the Indian forces.[113] The statement of the Army Chief mentioned that the attack was conducted on the Indo-Burmese border.[114] However, after a few years, it was clarified that the Indian forces had entered Myanmar to conduct this operation making it India's first surgical strike operation.[115]

Therefore, it would be imperative to assess if it was a lawful self-defence operation as under the Sofaer parameters explained in the paper. Firstly, the nature and magnitude of the threat has to be ascertained. Herein, it is clear that the insurgent outfits of NSCN-K and KYKL had been actively involved in various attacks against civilians and Indian forces in the North East region so the nature of the threat was lethal and could have resulted into many casualties. Secondly, as regards the likelihood of the threat being realised, it can be argued that the threat perceived from these outfits would have fructified into another attack based on their past experience and motives that have involved unlawful aggressions against Indian forces and civilians.

Thirdly, as regards the exhaustion of alternate diplomatic remedies, it must be remembered that India had been involved in peace negotiations with various such insurgent outfits of the North East.[116] Many of these

[113]Bhaumik S, 'Is Myanmar Raid Indian Counter-Insurgency Shift?' (*BBC News* 10 June 2015) <https://www.bbc.com/news/world-asia-india-33074776> accessed May 13, 2021.

[114]ibid.

[115]Haider S and Joseph J, 'Army Chief Rawat Going into Detail on Myanmar Surgical Strike Leaves Govt. Red-Faced' (*The Hindu* December 4, 2017) <https://www.thehindu.com/news/national/army-chief-rawats-remarks-on-myanmar-raid-leaves-centre-red-faced/article21255413.ece?homepage=true> accessed 13 May 2021.

[116]'Negotiations with Insurgents in India's Northeast' (*Negotiations with Insurgents in India's Northeast | Manohar Parrikar Institute for Defence Studies and Analyses* June 19, 2008) <https://idsa.in/idsastrategiccomments/NegotiationswithInsurgentsinIndiasNortheast_SMDSouza_100608> accessed May 13, 2021.

negotiations have resulted in cease fires but a few of these insurgent outfits, in utter disregard of these treaties, have been involved in acts of aggression against citizens and military. Accordingly, it is clear that this precondition of the Sofaer parameters was also satisfied. Lastly, it has to be assessed if the use of force is consistent with the terms and purpose of the United Nations Charter. The terms and purposes of the Charter are to maintain international peace and security and take effective collective measures for the prevention and removal of threats to the peace.[117] The neutralisation of these insurgent groups that had the history of being involved in strikes against Indian forces and civilians and creating a war-like situation in the North East India can be undeniably argued as an act that would further regional peace and security. Accordingly, this operation could be justified as a lawful self-defence operation.

b) Land-based surgical strikes in Pakistan administered Kashmir

On September 28, 2016, Indian forces conducted surgical strikes by crossing the border and entering militant launch pads located in Pakistan administered Kashmir to neutralise about 70 terrorists. This operation came in the backdrop of the Uri attacks that had occurred 10 days ago, which killed over 17 Indian soldiers. The official statement from India stated that India has evidence that terrorists hailing from Pakistan have been getting training and supply there to execute attacks on the Indian soil. Furthermore, the statement provided that talks regarding this at the highest diplomatic levels and the military levels at regular times have been futile and offered no solution.[118] Therefore, the Indian operation was based on credible and specific information which was received regarding an imminent attack being launched from the

[117]United Nations. Charter, art. 1(1).

[118]'Surgical Strikes – September 2016' (*Press Information Bureau,* 28 September 2018) <https://pibindia.wordpress.com/2018/09/28/surgical-strikes-september-2016/> accessed 17 June 2021.

launch pads located on the Pakistani soil. Furthermore, it was aimed at neutralising these threats posed to India.[119]

Herein, the very statement by the Indian Government had made it clear that the nature of the threat posed was grave and involved the militants infiltrating into India to attack Indian armed forces in Kashmir or conducting a bigger attack in the Indian metropolitan cities. The likelihood that this attack would have succeeded was great considering that India has had a history of being the victim of such strikes since the 1990s. Furthermore, it is common knowledge that the attempts of India and Pakistan to reach a pacific redressal of this dispute and the commitment of Pakistan to regulate these activities have all been in vain. The terms and purposes of the Charter would authorize such an operation to maintain international peace and security. Therefore, it is undeniable that this operation was a lawful exercise of self-defence by India.

c) Aerial surgical strikes in Pakistan

In the wee hours of February 26, 2019, the Indian Air Force successfully hit a terrorist training camp in the small town of Balakot in the Khyber Pakhtunkhwa province of Pakistan. This operation came in the backdrop of the Pulwama car bomb attack which claimed the lives of over 40 Indian paramilitary personnel operating in Kashmir. The Indian statement detailed the numerous attacks that Pakistan-based terrorists have carried out in India. It also stated that various training camps have been operating on the Pakistani soil, against which Pakistan had failed to take any action. Furthermore, it stated by the Indian government that on credible intelligence input, the terrorist outfit of *Jaish-e-Mohammed* was planning another attack in India; a

[119] 'India's Surgical Strikes across LoC: Full Statement by DGMO Lt Gen Ranbir Singh' (*Hindustan Times* September 29, 2016) <https://www.hindustantimes.com/india-news/india-s-surgical-strikes-across-loc-full-statement-by-dgmo-lt-gen-ranbir-singh/story-Q5yrp0gjvxKPGazDzAnVsM.html> accessed 15 February 2021.

necessary non-military pre-emptive strike was, therefore, carried out in the face of imminent danger.[120]

In order to assess the legality of this operation on the Sofaer criteria, we must read the statement of the Indian government which had sought to justify the strike. On applying the above mentioned Sofaer criteria to this case, it appears that the aerial strike was justified. This is because the statement had made it clear that there was significant threat posed by the non-state actors based out of Pakistan that according to intelligence inputs were mounting another attack on Indian forces. This means that the first two Sofaer criteria on the nature of the threat and likelihood of it being realised were met. Secondly, it would trite to repeat that Pakistan has failed to act on any of the Indian requests to take actions against terrorist's outfits operating in its soil. This means that once again, alternative remedies had been exhausted by India. Lastly, it is important to note that this strike was not aimed at any Pakistani military instalment and was surgical to the extent that it was aimed at neutralising the terrorist training camp in Balakot.[121] This makes the operation proportional to the threat posed. Therefore, it is argued that the concerned operation was nothing but a lawful self-defence operation conducted against non-state actors operating out of the soil of the Islamic Republic of Pakistan.

d) Artillery-based surgical strikes in Pakistan

The Indian army has been engaged in carrying out artillery strikes against terrorist launch pads located in Pakistan administered Kashmir.

[120]'MEA: Statements: Press Releases' (*Ministry of External Affairs, Government of India* 26 February 2019) <https://www.mea.gov.in/press-releases.htm?dtl%2F31091%2FStatement_by_Foreign_Secretary_on_26_February_2019_on_the_Strike_on_JeM_training_camp_at_Balakot> accessed 15 February 2021.

[121]Sharma D and Srivastava U, 'The Balakot Strikes: Analysing India's 'Non-Military Preemptive Action'' (*OpinioJuris*, 6 March 2019) <http://opiniojuris.org/2019/03/06/the-balakot-strikes-analysing-indias-non-military-preemptive-action/> accessed 15 February 2021.

These operations have been carried out at various instances such as on October 20, 2019,[122] April 11, 2020,[123] July 13, 2020,[124] and on November 19, 2020.[125] These strikes are surgical in the nature that they are mainly concentrated and pinpointed towards the terrorist infrastructure and are also cross-border in the sense that they are aimed at targets that are on foreign soil. Applying the Sofaer Conditions, it must be stated that the threats were of the nature and of the likelihood of being realised in a terrorist attack through an infiltration attempt. This terrorist attack had all the possibility of being of the lethal and destructive magnitude as previously suffered by the Indian forces and civilians in the Valley. Along with this, it must be reiterated that all the attempts at pacific redressal have been futile. Therefore, these surgical strikes, which involve artillery strikes, are also a lawful self-defence operation.

B. Recommendations

As has been explained earlier, the surgical strikes conducted under the Doval Doctrine stand on a strong legal footing. However, strengthening the diplomatic stance of India with respect to these operations is

[122]'Stunning New Details Emerge In Indian Army's Major Artillery Strike Targeting Terror Launch Pads In PoK' (*Swarajyamag* October 20, 2019) <https://swarajyamag.com/insta/stunning-new-details-emerge-in-indian-armys-major-artillery-strike-targeting-terror-launch-pads-in-pok> accessed 15 February 2021.

[123]Rajat Pandit , 'Indian Army Targets Terror Launch Pads & Ammunition Dumps across the LoC with Heavy Artillery Guns: India News - Times of India' (*The Times of India* 11 April 2020) <https://timesofindia.indiatimes.com/india/army-targets-terror-launch-pads-ammunition-dumps-across-the-loc-with-heavy-artillery-guns/articleshow/75085773.cms> accessed 15 February 2021.

[124]'3 Terror Camps Destroyed in PoK, 6-10 Pak Soldiers Killed: Army Chief Rawat' (*Hindustan Times* 12 July 2020) <https://www.hindustantimes.com/india-news/3-terror-camps-destroyed-in-pok-6-10-pak-soldiers-killed-army-chief-rawat/story-LPH7eYlCywJIFvDMX27ZaO.html> accessed 15 February 2021.

[125]'India Carrying out 'Pinpoint Strikes' on Terror Launchpads inside PoK: Report' (*mint* 19 November 2020) <https://www.livemint.com/news/india/india-carrying-out-pinpoint-strikes-on-terror-launchpads-inside-pok-report-11605791932830.html> accessed 15 February 2021.

important through certain policy-based means that would be recommended herein.

Firstly, the government must adopt an official national security strategy that would detail the exact contours of the rights that India can exercise in self-defence operations. This will not only clear its stance on acts of aggression by states but also act as a blueprint for tackling threats from non-state actors. It would also make it clear to the global community of the Indian resolve to tackle terrorist threats.[126]

Secondly, it is imperative for the world community to push for the passing of a UNGA Resolution clarifying the customary and treaty law of self-defence with regards to its applicability to non-state actors. This is a juridical imperative which will not only improve the legal stand of India on these operations but would also provide the much-needed legal basis for other nations to engage in such operations against terrorist threats emanating from foreign soil of rogue states.

V. CONCLUSION

Public International law has been continuously evolving in view of the changing dimensions of international relations. The international community's outlook and acceptance of changes in the custom on the law of self-defence in view of the security threats of non-state actors are applaudable. Furthermore, it would be correct to say that the Doval Doctrine has also brought about a paradigm shift in the Indian national security calculus. This doctrine can not only be instrumental in neutralising terror threats from abroad but also stands on a strong legal footing. This has been adequately explained on the principles of international law. However, as a responsible member of the international community, India must also release a detailed National

[126]Shyam Saran, 'Need for a Comprehensive National Security Strategy' (*Centre for Policy Research*, 4 June 2019 <https://www.cprindia.org/news/need-comprehensive-national-security-strategy> accessed 15 February 2021.

Security Strategy document that explains the contours of this doctrine and most importantly briefly details out the legal basis on which such operations are being carried out. This will not only act as the legal basis for India conducting such operations but will also go a long way in eventually ending the debate on the legality of anticipatory actions under the law of self-defence by showing a clear state practice in favour of such a right.

However, states exercising such a right must remember that this right must not be abused and used as an excuse to violate the territorial integrity of the other state without any genuine or just cause. The states which conduct such operations or plan to conduct such operations can take the example of the Indian operations as a template for a valid self-defence operation. This is because India, prior to adopting the Doval Doctrine, had always striven on the principles of mutual respect for states and relied on non-violent means for resolving the issue of cross-border terrorism emanating from Pakistan. However, as has been explained above, after decades of terror strikes and unheeded requests by India, conducting such operations was not only valid from a legal point of view but also justified from a moral standpoint. Lastly, the author would cite the complete version of an often-quoted *shloka* by Mahatma Gandhi, "अहिंसापरमोधर्मःधर्महिंसातथैवच" which translates to mean "*Non-violence is the ultimate Dharma. So too is violence in service of Dharma*."