India's Pre-emptive Strike in Pakistan: The Legal Perspective

Dr Imdad Ullah[*]

Abstract

Within the realm of pre-emptive self-defence, any recourse to the use of force remains a delicate legal undertaking. This is because such a military manoeuvre is conceived and carried out without the evidence of an armed attack that has *already* occurred. Instead, it is justified on the basis of understanding that such an armed attack is *underway*. It involves, thus, numerous pieces of practical measures — meant to prove the coming of harm. These are hostile intentions; capability to inflict harm; and actual movements of the adversary. In this context, provision of precise justifications for these prerequisites is what makes the application of pre-emption complex. Hence, the Indian pre-emptive strikes inside Pakistan to eliminate so-called 'terrorists' and their infrastructure becomes an important case of enquiry and analysis. This study, therefore, seeks to discuss the legal merits of India's recourse to use of force. In terms of its theoretical orientation, it is set within the framework of *positivist* legal traditions. During the course of argumentation, thus, it engages both customary international law and treaty law, relevant to pre-emptive self-defence.

Keywords: Necessity of Self-Defence, 'Unwilling or Unable', Customary International Law, Caroline Criteria, State Responsibility, Treaty Law.

[*] The author is a DAAD Fellow and Assistant Professor, Centre for International Peace and Stability (CIPS), NUST Institute of Peace and Conflict Studies (NIPCONS), National University of Sciences and Technology, Pakistan. He can be contacted at: imdad.ullah@daad-alumni.de.

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Background

Jammu and Kashmir, a disputed region between Pakistan and India, has been a source of persistent antagonism since 1947. During the past 73 years, numerous instances of mass violence and subsequent rounds of talks have failed to resolve the conflict. Arrival of India's Prime Minister Narendra Modi in 2014 with a promise of abolishing the *special status* of Jammu and Kashmir, once more, renewed violence in the disputed region. The latest outbreak of violence climaxed on February 14, 2019, when a young Kashmiri boy rammed an explosive-laden vehicle into a convoy of vehicles carrying Indian paramilitary personnel through the Pulwama region. The suicide attack killed 40 paramilitary personnel.[1] For the Indian military, this was the worst loss of lives in the last few decades. The government was quick to blame Pakistan-based terrorists for this attack and promised retribution.[2] On its part, Pakistan denied involvement, as well as that of any terrorist group based on its soil in the terrorist attack. It extended, moreover, its full cooperation in investigating and apprehending those behind it.[3]

According to various news reports, Jaish-e-Muhammad (JeM), a proscribed terrorist outfit, based in Pakistan, accepted responsibility for the Pulwama attack.[4] India was quick to link it to the Pakistani state.[5] The Indian government, thus, delegated authority to its Armed Forces to take military action against the terrorists, allegedly operating from Pakistani soil. The Indian Air Force launched aerial raids in Balakot region, bordering the Pakistani-administered Kashmir on the night of February 26, 2019. India's Ministry of External Affairs was quick to share the news of this

[1] A version of this story appears in print on February 16, 2019, Section A, Page 8 of the New York edition with the headline "India Accuses Pakistan in Deadly Kashmir Attack." Maria Abi-Habib, Sameer Yasir and Hari Kumar, "India Blames Pakistan for Attack in Kashmir, Promising a Response," *New York Times*, February 15, 2019, https://www.nytimes.com/2019/02/15/world/asia/kashmir-attack-pulwama.html.

[2] Ibid.

[3] "Pulwama Attack: Pakistan Warns India against Military Action," *BBC.com*, February 19, 2019, https://www.bbc.com/news/world-asia-india-47290107.

[4] Ibid.

[5] Abi-Habib, Yasir and Kumar, "India Blames Pakistan for Attack in Kashmir," A8.

military action the next morning. In its media briefing, the Government of India claimed to have carried out 'non-military pre-emptive strikes' against terrorist hideouts in Pakistan. The claim was suggestive that terrorists were planning and training for future attacks.[6] However, it is important to note that India did not claim to avenge the past crime. Instead, she chose to justify the military raid on the basis of credible intelligence available to her—pointing towards an impending terrorist attack — originating from Pakistan's territory.[7]

Theoretical Substructure

The legal notion of pre-emptive self-defence, as we understand it today,[8] has undergone various changes during the course of its application in justifying recourse to the use of force among states. Different theories treat it differently. For better understanding, it is important to study this concept, however, within the paradigm of a certain theoretical framework. In the course of present discussions, therefore, the Theory of Positive International Law shall guide understanding the spirit as well as legal contours of pre-emption. It is assumed that unlike its other legal contenders and relatives like natural law, Islamic law, Marxism etc., the Theory of Positive International Law is well grounded and sound. Indeed, it is based

[6] "Full Text: Indian Government's Statement on Surgical Airstrike in Pakistan," *India Today*, February 26, 2019, https://www.indiatoday.in/india/story/indian-government-s-full-statement-on-surgical-airstrike-in-pakistan-1465217-2019-02-26.

[7] Ibid.

[8] For current understanding of pre-emptive self-defence, see Christopher C. Joyner, *International Law in the 21st Century: Rules for Global Governance* (Lanham, Maryland: Rowman & Littlefield Publishers, Inc., 2005), 168-69; Michael Byres, *War Law: International Law and Armed Conflict* (London: Atlantic Books, 2005), 73-75; David Rodin, *War and Self-Defence* (Oxford: Oxford University Press, 2002), 113-14; Antonio Cassese, *International Law*, 2nd ed. (Oxford: Oxford University Press, 2005), 362-63; Thomas M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002), 52; Yoram Dinstein, *War, Aggression and Self-Defence*, 4th ed. (Cambridge: Cambridge University Press, 2005), 187; Malcolm Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008), 1139; Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford & New York: Oxford University Press, 2008), 733-4; and Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge: Cambridge University Press, 2010), 252.

on state consent denoting the actual practice of large number of states.[9] It comprises treaty law and customary international law.[10] Recent estimates, according to the United Nations Treaty Collection Unit, suggest that there are around 560 multilateral conventions and treaties among states.[11] In addition to this, there are hundreds of bilateral treaties. These facts alone, thus, speak of the widespread recognition of the Theory of Positive International Law.

In context of the doctrine of pre-emptive self-defence, treaty law and customary international law — enshrine as well as help explain contours of the former. In this context, while treaties denote the element of state consent, customs appeal to the centuries' old practice of states vis-à-vis pre-emption. Inside treaty law, it is Article 51 of the United Nations Charter, which deals with the use of force among states in instances when 'an armed attacks occurs'.[12] It is important to underscore, however, the said article does not claim to grant any new kind of right to states when it emphasises that the states have 'inherent right of self-defence'[13] rather, it protects the already *existing right* of states to defend themselves in the face of a security threat to their survival and existence. Thus, the purpose of including the term *inherent*, according to international legal scholars, is to bring past practices of self-defence into relevance.[14]

Furthermore, while positive law consists of those elements which are deliberately posited — for its interpretation, however, it depends upon the veracity of evidence. The role of evidence is even more crucial in terms of

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[9] Martti Koskenniemi, "The Legacy of the Nineteenth Century," in *Routledge Handbook of International Law*, ed. David Armstrong (London: Routledge, 2009), 141-53.

[10] See Shaw, *International Law*, 72-98; and Hans Kelsen, *Principles of International Law* (New York: Rinehart & Company Inc., 1952), 307-10.

[11] United Nations Treaty Collection, "Multilateral Treaties Deposited with the Secretary General," accessed May 14, 2020, https://treaties.un.org/Pages/HistoricalInfo.aspx.

[12] For details of Article 51, see United Nations, "UN Charter," accessed May 15, 2020, https://www.un.org/en/sections/un-charter/un-charter-full-text/index.html.

[13] Ibid.

[14] Shaw, *International Law*, 1139. Meanwhile, renowned legal scholar Yoram Dinstein notes that this form of self-defence can be called 'interceptive self-defence'. He subscribes to the permissibility of it under the UN Charter framework, regulating the use of force. Dinstein, *War, Aggression and Self-Defence*, 191.

pre-emptive self-defence, which in fact, states deploy against those security threats not exhibited, thus far. In such an instance, if a state declares that she has irrefutable evidence of an impending harm, then, it is absolutely imperative that she makes it public for scrutiny. Indeed, it is very crucial in an age where 'fake news' and 'alternative facts' have the potential to exaggerate a given security threat to the point of self-serving interpretation and applications of laws, which in return, can undermine the positivistic *essence* of laws.

Law and Pre-emption

Being the oldest law — the right of self-defence, literally and conceptually, continues to journey along the human history on warfare. In its literal sense, it started finding expression inside treaty laws after the end of World War I. The Locarno Pact of 1925 formally incorporated and acknowledged that every state has the right of 'legitimate defence'.[15] Later, it was also mentioned in the Kellogg-Briand Pact in 1928, where in its commentary, US Secretary of State, Kellogg emphasised the 'inherent' character of the right of self-defence. The framers of the United Nations Charter also, in view of the customary relevance of self-defence, chose to incorporate it in treaty law by inserting the phrase 'inherent right of self-defence'.[16] To establish the relevance of customs to treaty law in context of self-defence, the International Court of Justice (ICJ) in the *Nicaragua* case also noted that reference to 'inherent' in Article 51 of the Charter is, in fact, an attempt to marry customary laws with the treaty laws.[17]

Caroline Criteria and Pre-emption

The law related to pre-emptive self-defence informs that though, as such, there is no specific law of pre-emption, instead, it is the law of self-defence — enshrined in Article 51 and its reading in context of the Caroline criteria, which then makes this law and its contours understandable and

[15] The Locarno Pact 1925, Germany- Belgium, France, Great Britain and Italy, October 16, 1925, http://avalon.law.yale.edu/20th_century/locarno_001.asp.

[16] Derek Bowett, *Self-Defence in International Law* (New York: Frederick A. Praeger, 1958), 184-5.

[17] *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, (Nicaragua v United States of America), Judgement, ICJ Reports 1986, 176, at 94.

comprehensible. So, for any meaningful understanding of the legal significance and status of pre-emptive self-defence, it is important to take into account the incident of the forcible sinking of the steamboat Caroline in 1837 and loss of lives as a result of a violent border clash between the British security forces and Canadian rebels and their American sympathisers.[18] In its justification, the British government laid down that the bordering areas in question were not under active control of the US government, and moreover, the scale of rebel activities in the area underscore that the government was 'unwilling or unable' to establish its writ to control the unlawful cross-border movements.[19] In this backdrop, the British security forces took it upon themselves to cross the border and destroy the facilities and property being used to attack them across the US-Canadian border.

British security forces claimed that they conducted the cross-border armed raids to exercise their right of self-preservation,[20] at a time when, the US government was not either ready or able to curtail the security threat posed by its citizens.[21] These justifications, however, failed to convince the US government. As a consequence, a lengthy and argumentative correspondence ensued between the US Secretary of State Webster and his British counterpart. Whereof, Secretary Webster, eventually, came up with the legal requirements to avail the right of self-defence to counter the impending security threats. He underlined that, in such a context, it is imperative for the state claiming to avail the right of self-defence to show that the 'necessity of self-defence [is] instant, overwhelming, leaving no choice of means, and no moment of deliberation'.[22]

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[18] Robert Jennings, "The Caroline and McLeod Cases," *American Journal of International Law* 32, no. 1 (1938): 82-4.

[19] James Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Oxford: The Clarendon Press, 1928), 158.

[20] It is pertinent to mention here that during the contemporary era, in absence of the birth of right of self-defence, the right of self-preservation was in vogue; and states employed this term to express and avail their right to defend themselves against foreign security threats. Hugo Grotius, *The Rights of War and Peace*, Book I, ed. Richard Tuck (Indianapolis: Liberty Fund Inc., 2005), 180-183.

[21] Jennings, "The Caroline and McLeod Cases," 83-8.

[22] Ibid., 89.

In the preceding era, these pre-conditions became the legal standard to justify the use of force to pre-empt an impending harm. In this context, moreover, it is important to note that this criterion did not differentiate between state and non-state armed actors. Rather, the instance of use of force, in this context, was in fact, between armed non-state and state actors. However, in case of involvement of non-state armed actors in any episode of the use of force against other states — it is imperative for states adopting the recourse to counter-armed force to establish the link of non-state armed actors with the state actors. Wherein, it is important to show that the non-state armed actors were operating under the 'direct and effective control' of the state actors.[23] Similarly, as noted by the International Court of Justice (ICJ), without any 'effective control' of state actors, no state can be held responsible for the violence perpetrated by non-state armed actors against other states.[24] Keeping in mind that only supplying weapons and any other material resources to carry out violent activities shall also not make a state liable for the actions of non-state violent actors.[25]

The UN Charter and Pre-emption

In view of the issue of the centrality of the use of force among states, Article 51 of the United Nations (UN) Charter sought to adhere as well as give legal expression to the right of self-defence, within the bounds of treaty law. It reads as follows:

> 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.[26]

It has two operative parts. The first one emphasises the role of history in understanding and crystallising relevant customs by incorporating the word 'inherent'. Whereas, the second one seeks to regulate as well as divorce the history of use of force out of religious, economic and social

[23] Franck, *Recourse to Force*, 55.

[24] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America), 115, at 64-5.

[25] Ibid., 109-12, at 62-3.

[26] For details of Article 51, see United Nations, "UN Charter."

motives by adding the qualification 'if an armed attack occurs'. It is generally understood among international law scholars that both the operative parts are complementary in nature, and they also address the issue of use of force in instances where an armed attack is underway.[27] With clear evidence of an armed attack, the states are not bound to wait too long and let the adversary strike first.[28] After all, the UN Charter framework, governing the use of force, is not a 'suicide pact'.[29] Furthermore, in an attempt to introduce the more *expansionist* understanding of the meaning of 'armed attack', ICJ Judge Stephen Schwebel, in his dissenting opinion in the *Nicaragua* case underlined that Article 51 does permit the use of force, in instances, other than in an event of a 'prior armed attack'.[30] Such an interpretation and understanding, thus, keep the door open for the use of force in pre-emption.

However, those who support a more *restrictive* reading of Article 51 do not conform to any interpretation which claims justifying the use of force in the absence of a prior armed attack. For them, any such interpretation is 'counter-textual, counter-factual and counter-logical.'[31] Such legal scholars, strictly, adhere to the circumstances of adoption of the UN Charter. They believe that any interpretation of Article 51 should not ignore the motives of the framers of the Charter. The emerging legal discourse in the aftermath of the September 11 terrorist attacks in the US, however, has opened up a new debate about the nexus between state and non-state violent actors and their internal dynamics for deciding to punish the state for actions of non-state violent actors. On the one hand, the United Nations Security Council (UNSC) Resolutions 1368 and 1373 in the backdrop of

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[27] Stephan Neff, *War and the Law of Nations* (Cambridge: Cambridge University Press, 2005), 327

[28] Michael Schmitt, "International Law and the Use of Force: Attacking Iraq," *RUSI Journal* 148, no. 1 (2003): 535. Also, see Bowett, *Self-Defence in International Law*, 188-9.

[29] Emanuel Gross, "Self-Defence against Terrorism – What Does It Mean? The Israeli Perspective," *Journal of Military Ethics* 1, no. 2 (2002): 96.

[30] Dissenting Opinion of Judge Schwebel, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, (Nicaragua v United States of America), ICJ Reports, 1986, 172-3, at 347-8.

[31] Dinstein, *War, Aggression and the Self-Defence*, 183-6.

September 11 terrorist attacks did not directly mention any specific state for the terrorist acts (non-state armed violence), and even then invoked 'the inherent right of self-defence' under Article 51.[32] The Security Council also did not discuss and settle the issues of 'gravity of armed attacks' and 'effective control' for establishing state responsibility. These very issues, otherwise, have been at the centre of numerous ICJ judgements related to the use of force issues in the past. Among these the *Nicaragua* case and *Armed Activities* case are important ones. More specifically, in its judicial practice, in the backdrop of September 11 attacks, the ICJ has been consistent in invoking another requirement for availing the right of self-defence—the *gravity of an armed attack*. As in the Oil Platforms case (United States v Iran), the Court emphasised that a state, claiming to avail the right of self-defence, shall bear responsibility for showing that the scale of violence perpetrated by either state or non-state violent actors, is at par with state actors, in terms of resultant damage out of any such violent attack.[33]

In contrast to the consistent adherence of the ICJ to the somewhat conservative interpretation of rules—judges, albeit separately, continue to pen dissenting opinions over the emerging issues of use of force. As Judge Kooijmans in his dissenting opinion in *The Israeli Wall Opinion* pointed out that the UNSC Resolution 1373 has introduced a 'new element' in the interpretation of Article 51. He notes that the said resolution invoked the right of self-defence without attributing the armed attack to a certain state.[34]

In view of this evolving nature of security threats and the lawful means to counter them, it is submitted that there seems to be emerging a legal norm, though nascent, to treat non-state armed violence — the very

[32] For further details, see United Nations Security Council, Resolution 1368, "Threats to International Peace and Security Caused by Terrorist Acts," September 12, 2001, http://www.unscr.com/en/resolutions/1368; and United Nations Security Council, Resolution 1373, "Threats to International Peace and Security Caused by Terrorist Acts," September 28, 2001, http://www.unscr.com/en/resolutions/1373.

[33] *Case Concerning Oil Platforms* (Islamic Republic of Iran v United States of America), Judgement, ICJ Reports, 2003, 51, at 29-30.

[34] Separate Opinion of Judge Kooijmans, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), ICJ Reports, 2004, 35, at 229-30.

violence, if having the gravity of an *armed attack* as a measure of use of force — unlocking the right of self-defence under Article 51 of the UN Charter.[35] The terrorist attacks in Paris and Brussels in recent years led to the unlocking of right of self-defence under Article 51, and it was duly recognised by the UNSC in its different resolutions, relevant to these two cases of terrorist attacks — claimed and perpetrated by the Islamic State. [36] It is pertinent to mention here that the UNSC reaffirmed all the previous resolutions, relevant to non-state violence, invoking the right of self-defence as well as terming the threat of violence by non-state actors as a threat to international peace and security.

Pre-emption: Past State Practice

There is no denying that the relationship between the justifications for necessity of self-defence and threat perception of an impending armed attack is always delicate one. States facing a security threat, directly, have a somewhat different perception about the severity of security threats as compared to states not directly threatened and only scrutinising the justifications from a safe distance. That is why we see that every case of pre-emptive self-defence becomes a contentious issue among legal scholars on the one hand, and between two states — involved in an armed struggle, on the other hand. In an attempt to lay down the interpretive principle, however, ICJ in the *Oil Platform* case was categorical in underlining that any claim of self-defence under evolving security circumstances should be objective. It should not leave any 'room for discretion' whatsoever, on part

[35] Ruys, *'Armed Attacks' and Article 51 of the UN Charter*, 252-62; Murray Colin Alder, *The Inherent Right of Self-Defence in International Law* (Dordrecht: Springer, 2013), 177; Sean Murphy, "The Doctrine of Pre-emptive Self-Defence," *Villanova Law Review* 50, no. 3 (2005): 699-748, https://digitalcommons.law.villanova.edu/vlr/vol50/iss3/9; Anthony Clark Arend, "International Law and the Pre-emptive Use of Military Force," *The Washington Quarterly* 26, no. 2 (Spring, 2003): 78-97; and William Lietzau, "Old Laws, New Wars: Jus ad Bellum in an Age of Terrorism," *Max Planck Yearbook of United Nations Law* 8, no.1 (2004): 384-455.

[36] For details, see United Nations Security Council, Resolution 2249, "Threats to International Peace and Security Caused by Terrorist Acts," November 20, 2015, http://www.unscr.com/en/resolutions/2249.

of the state claiming to avail such a right.[37] Looking at the post-World War II history, we find that the Arab-Israel war in June 1967, wherein Israel pre-emptively attacked Arab military installations — while comes closer to justifying the necessity of self-defence in the face of an impending attack, yet the Israeli attack failed to convince all the UNSC members as well as Arab states.[38] Nevertheless, a large number of legal scholars have pointed out that this particular case even without the approval of the Security Council becomes a case of pre-emptive self-defence fulfilling the legal requirements of lethal force application in an armed conflict.[39] However, like any case, it failed to create unanimity about the point-of-view among legal scholars, and few of them did refuse to subscribe to the legality of Israeli pre-emptive attacks to defend herself against a coming harm.[40]

Later, although numerous other states continued to avail the right of self-defence to face off brewing security threats; yet the era preceding the September 11 terrorist attacks saw the emergence of large-scale state practice and strategic shift in propagating and employing pre-emptive self-defence as a counter-armed measure to thwart impending security threats. The US being the victim of deadly terrorist attacks was quick to announce that it would not wait too long and let the terrorists strike first, rather it would take the fight to them and their safe havens.[41] Following through its change in policy, the US waged pre-emptive attacks in Pakistan, Somalia, Yemen, and Niger. Other states like Russia, France and India were also quick to express their willingness to strike terrorists within their strongholds

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[37] *Case Concerning Oil Platforms* (Islamic Republic of Iran v United States of America), Judgement, ICJ Reports, 2003, 73, at 39.

[38] John Quigley, "The Six Day War-1967," in *The Use of Force in International Law: A Case-based Approach*, eds. Tom Ruys, Olivier Corten, and Alexandra Hofer (Oxford: Oxford University Press, 2018), 136.

[39] Neff, *War and the Law of Nations*, 329; William V. O'Brien, *The Conduct of Just and Limited War* (New York: Praeger Publishers, 1981), 133; Christine D. Gray, *International Law and the Use of Force*, 3rd ed. (Oxford: Oxford University Press, 2008), 130; Antony Lamb, *Ethics and the Laws of War: The Moral Justification for Legal Norms* (London and New York: Routledge, 2013), 95.

[40] Stanimir Alexandrov, *Self-Defence against the Use of Force in International Law* (The Hague: Kluwer Law International, 1996), 153-54.

[41] White House, *National Security Strategy of the United States of America* (Washington: Government of United States, 2002).

before they choose to commit deadly violence against innocent civilians.[42] Herein, it is important to note that all these states were direct victims of terrorist violence in one way or the other; and therefore, they seem more receptive to the idea of pre-emption. It also speaks about past experience and its impact on the evolution of strategic thinking of states vis-à-vis their security environment.

In terms of the relationship between threat perception and subjective security environment of a state, instances of pre-emptive uses of force by Israel and the US in the Twenty-first Century underscores that states, directly endangered by a terrorist threat and violence, may seem more willing to opt for pre-emption. British attacks against Islamic State terrorists in Syria and Iraq, Israeli attacks against Hezbollah in Lebanon and Syria, and the US' attacks against al-Qaeda and its affiliated groups in Libya, Pakistan, Somalia, Middle East, etc., are among numerous cases of this emerging state practice of taking on security threats pre-emptively. More so, in relation to this emerging state practice, the absence of any condemnation on the part of other states gives the impression that might be condoning such a state practice. However, it remains to be seen if this state practice has emerged as a customary norm to avail the right of self-defence in the face of an impending attack.

In the backdrop of these discussions, it is important to mention that characteristically, the violence perpetrated by terrorists is altogether different from that of states. The UNSC has duly acknowledged this in different resolutions related to tackling the threat of terrorism. However, the UNSC resolutions cannot be a blank cheque to make transgressions of one's own choice in any instance of terrorist violence. Likewise, the UNSC resolutions cannot set precedents of interpretive character.[43] In laying down

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[42] "Russia Not Planning to Give up Right of Pre-emptive Strikes-Defence Minister," *BBC Int'l. Rep*., October 20, 2003, LEXIS, Individual Publications; Molly Moore, "Chirac: Nuclear Response to Terrorism is Possible," *Washington Post*, January 20, 2006, https://www.washingtonpost.com/archive/politics/2006/01/20/chirac-nuclear-response-to-terrorism-is-possible/6e3a56f3-50d3-48da-9f43-5c46b2e6c971/; and "Every Country Has Right to Pre-emption, Jaswant," *Press Trust of India*, September 30, 2002.

[43] Frederic Megret, "War? Legal Semantics and the Move to Violence," *European Journal of International Law* 13, no. 2 (2002): 375. Also, see Louis Henkin, "War and

principles for the interpretation of Article 51, ICJ decisions provide concrete foundations. Adherence to the interpretations of ICJ is even more important at a time when the certain status of the emergence of customary norms out of state practice to thwart terrorism *pre-emptively*, remains disputed.

India's Justifications for the Pre-emptive Strike

India's Ministry of External Affairs in its statement justifying the launch of pre-emptive strikes inside Pakistan noted that:

> On 14 February 2019, a suicide terror attack was conducted by a Pak-based terrorist organisation Jaish-e-Mohammad (JeM), leading to the martyrdom of 40 brave *jawans* of the CRPF. JeM has been active in Pakistan for the last two decades, and is led by Masood Azhar with its headquarters in Bahawalpur. This organisation, which is proscribed by the UN, has been responsible of a series of terrorist attacks including on the Indian Parliament in December 2001 and the Pathankot airbase in January 2016. Information regarding the location of training camps in Pakistan and PoJK has been provided to Pakistan from time to time. Pakistan, however, denies their existence. The existence of such massive training facilities capable of training hundreds of *jidhadis* could not have functioned without the knowledge of Pakistan authorities. India has been repeatedly urging Pakistan to take action against the JeM to prevent *jihadis* from being trained and armed inside Pakistan. Pakistan has taken no concrete actions to dismantle the infrastructure of terrorism on its soil.[44]

Terrorism: Law or Metaphor," *Santa Clara Law Review* 45, no.4 (2005): 824-5, https://digitalcommons.law.scu.edu/lawreview/vol45/iss4/2.

[44] "Full Text: Indian Government's Statement on Surgical Airstrike in Pakistan," *India Today*.

Ostensibly, the purpose to bring in the past here was to put across the message that India is trying to portray that Pakistan may be (or is) 'unwilling or unable' to take action and curtail the violent activities of JeM. In fact, according to the Indian threat perception, JeM was still operating from within the territory of Pakistan. Hence, it is evident, at least for the Indian assessment, that either Pakistan lacks *will* or *capability* to curtail JeM. It becomes important for India, thus, to initiate a military action against this organisation. The Government of India (GoI)'s justificatory statement further adds that:

> Credible intelligence was received that JeM was attempting another suicide terror attack in various parts of the country, and the *fidayeen jihadis* were being trained for this purpose. In the face of imminent danger, a pre-emptive strike became absolutely necessary.[45]

It is pertinent to note here that the Indian government did not claim the right of self-defence under Article 51 of the UN Charter for the past attack though it mentioned Pulwama attack in its statement.[46] Perhaps, the purpose of referring to the past attack was to show the outreach and severity of the security threat posed by JeM and its sympathisers. On the contrary, the GoI invoked its right of self-defence against future attacks, for which, she underlined that according to credible intelligence sources, JeM was training its members and planning large-scale suicide attacks against Indian targets in the near future. And because such an attack was 'imminent', therefore, it had no option but to strike first.[47] Here again, it is noteworthy that India did not invoke any legal right or precedent in state practice to justify the pre-emptive strikes to avail its right of self-defence under treaty law or customary international law. Rather, she tried to emphasise that the military attack was against the alleged terrorists and their infrastructure, and

[45] "Full Text: Indian Government's Statement on Surgical Airstrike in Pakistan," *India Today*.
[46] Ibid.
[47] Ibid.

in no way, aimed at and meant to target any military installations.[48] It seems that the Indian government attempted to underscore the point that its military attack had nothing to do with threatening the security of the state of Pakistan or violating its 'territorial integrity'. However, there is no denying that the targeting of the non-state violent actors deep inside the geographical bounds of another state, and that too, without proving any link of such non-state violent actors to the state itself, raises questions about the legality of the act.

India's Claim and its Legal Merit

It is important to point out that while laying out justifications for a pre-emptive strike, the GoI attempted to attribute the Pulwama attack to JeM, and then to the failure of Pakistan to curtail this terrorist organisation. Yet, all the operational and logistic elements of the said attack point to the fact that the militant, directly involved in the attack, the explosive used and the vehicle — were local.[49] On its part, Pakistan categorically denied, any role of the state or JeM based on its soil, in this attack.[50] Whereas, India underlined that the mere presence of the JeM leader on Pakistan's soil should be sufficient proof for Pakistan to take action against this terrorist organisation. Herein, any failure to do so amounts to state failure to act against terrorists, stressed India.[51] While we see that due to its past role and support for the Kashmiris' struggle for self-determination, JeM has an ideological appeal inside Jammu and Kashmir, and due to this link, Kashmiri youth may have ideological leanings towards JeM and vice versa. Yet, this link does not impute JeM, based in Pakistan, for any kind of violent activity inside Jammu and Kashmir against the Indian military.

Even ICJ in its judgement on *Military and Paramilitary* case involving Nicaragua and the US during the 1980s underlined that while the

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[48] Ibid.

[49] Abi-Habib, Yasir and Kumar, "India Blames Pakistan for Attack in Kashmir," A8.

[50] "Pulwama Attack: Pakistan Warns India against Military Action," *BBC.com*, February 19, 2019, https://www.bbc.com/news/world-asia-india-47290107; and Dhruva Jaishankar, "Pulwama Attack: What Are Modi's Options?" *BBC.com*, February 19, 2019, https://www.bbc.com/news/world-asia-india-47278145.

[51] Ibid.

provision of weapons and logistical support to non-state actors amounts to the violation of principles of non-use of force and non-interference in the domestic affairs of other states, yet such an activity shall not amount to the direct responsibility of state for the use of violent means by any non-state actor.[52] In a similar vein, the Court stuck to this criterion for judging state responsibility for violent acts in other cases of use of force like the *Oil Platform* case between Iran and the US in 2003 and *Armed Activities* case between Congo and Uganda in 2005.[53] This jurisprudential practice underscores that in case of violent acts involving non-state actors, it becomes extremely difficult to attribute acts of non-state actors to the state. The mere presence of alleged non-state violent actors on one's soil and the appeal of their ideology cannot suffice as evidence to target the state, and violate its 'political sovereignty and territorial integrity'. It is also noteworthy that in contemporary times, one cannot ignore the role of contemporary state practice as well as the interpretation of Article 51 by the UNSC. As discussed earlier, ICJ Judge Kooijmans has pointed out that the UNSC Resolution 1373 has added a 'new element' in the interpretation of Article 51 and self-defence rules. For resolution, without establishing state responsibility for the September 11 terrorist attacks — has given the right of self-defence to the aggrieved state — in this instance the US.[54]

India claimed that the targeted terrorist sanctuaries were being used to train terrorists for suicide bombing missions inside India in the near future. However, the GoI did not share any evidence to corroborate its claims of terrorist casualties in the pre-emptive strike. Whereas in its press release, the GoI claimed to have killed more than 300 alleged non-state violent actors in the pre-dawn military raid inside Pakistan.[55] The GoI, however, did not chose to share any concrete evidence to back its claims.

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[52] *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports, 1986, 227-8, at 118-9 and 109-16, at 62-65.

[53] For further details, see *Case Concerning Oil Platforms*, ICJ Reports, 2003, 61-2, at 33; and *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda), Judgement, ICJ Reports, 2005, 146-7, at 58-9.

[54] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), ICJ Reports, 2004, 139, at 136.

[55] "Full Text: Indian Government's Statement on Surgical Airstrike in Pakistan," *India Today*.

On the other hand, the Government of Pakistan denied India's claims of large-scale terrorist fatalities and loss of infrastructure. In addition, local residents in media interviews noted that no one was killed as a result of India's air raids.[56]

In terms of their evidentiary value, the claims of both states are far apart. In view of normative practice, in these contexts, it was incumbent upon the GoI to bring forth evidence about the killing of those terrorists, planning and training to strike its security interests. Pakistan, meanwhile, termed the Indian military attack on its territory as an act of aggression and violation of state sovereignty.[57]

In view of the principle of necessity of self-defence according to the Caroline Criteria — the element of *temporality* in 'imminence of the security threat' is also problematic to justify in the context of this instance, use of force by India. As evidentiary details in the Pulwama attack bear testimony to the fact that the perpetrator was local and all the operational means of attack were procured locally. Hence, to claim that a future attack would emerge from within Pakistan is an overstatement of security threat perception on part of the GoI, and an attempt to downplay the emerging violent patterns of militancy in Jammu and Kashmir. The choice of the alleged terrorists and their infrastructure in Balakot — far away from the Line of Control (LoC) and inside Pakistan's territory also raises questions about the imminent nature of alleged future non-state violent attacks against India. According to the Caroline Criteria, it is important for the invading state to show that the security threat was *overwhelming* and *no alternative option* was available to address it. Any pre-emptive measure of the use of force to target an adversary merely on the basis of its *intent* and *capability*

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[56] Joanna Slater, "India Strikes Pakistan in Severe Escalation of Tensions between Nuclear Rivals," *Washington Post*, February 26, 2019, https://www.washingtonpost.com/world/pakistan-says-indian-fighter-jets-crossed-into-its-territory-and-carried-out-limited-airstrike/2019/02/25/901f3000-3979-11e9-a06c-3ec8ed509d15_story.html, B12.

[57] Srinivas Burra, "Legal Implications of the Recent India-Pakistan Military Standoff," *Opinio Juris*, March 8, 2019, https://opiniojuris.org/2019/03/08/legal-implications-of-the-recent-india-pakistan-military-standoff/.

while may echo the so-called 'Bush Doctrine',[58] and Israel's preventive attack against the Osirak Nuclear Reactor in Iraq in 1981,[59] it cannot fully conform to the legal requirements — laid down in the relevant treaty and customary laws of the use of force among states. However, it is submitted that the Indian practice in this case is not exceptional conduct, especially in the backdrop of emerging norms of the use of force to hunt down non-state violent actors. At the same time, it is noted that as underscored by ICJ in its Advisory Opinion on *The Israeli Wall*, no state can be the only judge of its conduct in applying the exceptional right of self-defence in the face of a brewing security threat, rather it is imperative that the state should share all the evidence of an impending security challenge, while laying down the justifications for availing the right of self-defence to counter such a threat.[60]

Overall, it seems that in this instance of justifying use of pre-emptive strikes inside Pakistan, the GoI remains content with showing that, because the Pakistani government appears 'unwilling or unable' to take action against non-state violent actors; hence, it is necessary for India to take action.[61] Yet, one needs to be mindful that any failure and lack of political will on the part of Pakistan's government to curtail non-state violent threat — does not *automatically* give India the right to invoke the right of self-defence to thwart future attacks. Instead, such a scenario merely puts the GoI at the doorstep of proving *necessity of self-defence* before launching any pre-emptive strikes. So, India cannot rely on the customary norm, which is somewhat disputed, in its attempt to avail lawful self-defence,

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[58] It is a series of counter-terror armed measures which President Bush announced in the aftermath of September 11 terrorist attacks. For details of 'Bush Doctrine', see White House, *National Security Strategy of the United States of America*; William Bradford, "The Duty to Defend Them: A Natural Law Justification for the Bush Doctrine of Preventive War," *Notre Dame Law Review* 79, no. 4 (2004): 1365-1492, https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1444&context=ndlr.

[59] For further details, see "The Israel's Raid on Iraq's Nuclear Reactor," *Journal of Palestine Studies* 11, no. 1 (Autumn 1981): 192-201.

[60] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), ICJ Reports, 2004, 140, at 136.

[61] Christian Henderson, "Tit-for-Tat-for-Tit: The Indian and Pakistan Airstrikes and the Jus ad Bellum," *EJIL Talk*, February 28, 2019, https://www.ejiltalk.org/tit-for-tat-for-tit-the-indian-and-pakistani-airstrikes-and-the-jus-ad-bellum/.

which on its own, is a framework of numerous supplementary procedural requirements.

Pre-emption and Emerging State Practice

As discussed earlier, India's military action inside Pakistan, however, when viewed in the backdrop of emerging patterns of state behaviour, does not seem to be an isolated incident of violent use of pre-emptive force against terrorists. Instead, in present times, states often take the recourse of pre-emption to hunt down terrorists. For instance, Turkish military actions in Iraq and Syria against Kurds; Israeli attacks against Iranian backed militias in Iraq and Syria; British attacks against Islamic State terrorists in Syria and Iraq; and French military actions against Islamic terrorists in northern Africa, point to this widespread state practice. Nonetheless, it is difficult to conclude that such an emerging state practice with regard to pre-emptive self-defence has succeeded in transforming relevant norms, thus far. The formula of 'unwilling or unable' while may replace state responsibility and state complicity,[62] it does not seem to be emerging as a singular norm unlocking pre-emption. Similarly, the interpretive practices regarding criteria of imminence of security threat though seems to be rapidly evolving, at times, when terrorists by dent of modern weapons give states no option to respond timely, yet there is no clear evidence suggesting that states have absolute consensus over armed measures to kill terrorists just because they intend to inflict harm. For instance, the recent pre-emptive killing of an Iranian military leader General Qasem Soleimani by the US military in Baghdad raised various legal questions about fulfilling the norms of pre-emptive self-defence, especially of the imminence of security threat.

[62] For further details, see Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Oxford: Hart Publishing, 2006); Elizabeth Wilmshurst, "The Chatham House Principles of International Law on the Use of Force in Self-Defence," *International and Comparative Law Quarterly* 55, no. 4 (October 2006): 969; and principle 11 in Daniel Bethlehem, "Self-Defence against an Imminent or Actual Armed Attack by Non-State Actors," *American Journal of International Law* 106, no. 4 (2012): 776.

Conclusion

India's pre-emptive strikes in Pakistan, no doubt, conform to emerging state practice, when it comes to the issue of targeting non-state violent actors inside the territory of other states. However, India's legal justifications with regard to the doctrine of pre-emption makes this violent episode contentious. India put forward weak evidentiary facts to support its claim of attribution of the terrorist event in Kashmir to JeM, and hence, to Pakistan. As explained above, all the material links in the Pulwama incident remain confined to Jammu and Kashmir. Any link to JeM leadership in Pakistan can be only of an *ideological* appeal. In this context, therefore, no legal norm fixes responsibility on a state for an injury just because the ideology of non-state violent actors, operating within its territory is influencing non-state violent actors in the victim state. Ideological appeal, moreover, can also not be a justification to show that a state is 'unwilling or unable' to curtail non-state violence.

Specifically, in terms of the fundamental procedural requirements of the doctrine of pre-emption under the Caroline Criteria, the application of necessity of self-defence is also problematic here. This is because the military targets of Indian pre-emptive strikes were located deep inside Pakistan's territory and not along the disputed border between the two states. Now to show and prove that the non-state violent actors were posing any *imminent* danger may also be difficult. This is because any reasonable explanation of imminence involves *temporal* as well as *geographical* aspects. Above all, the relationship of India's claims about the losses to the justifications of pre-emption also raise questions. By contrast, there is no denying that though falling short of the established norms of pre-emptive self-defence — Indian practice to hunt down non-state violent actors before they strike — sits closer to emerging state practices. Support of the international community for India's military act was one such proof. It is also a fact that although majority of the states did not openly favour India's pre-emptive strikes yet their silence can be taken as acquiescence for the acceptability of this emerging customary norm among states—with regard to cross-border armed actions against would-be terrorists.■