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A Doctrinal Study on the Evolution of Self-Defence in International Law

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ABSTRACT:

This study explores the evolution of the concept of self-defence in international law, tracing its roots from ancient civilizations through theological interpretations to the contemporary legal framework established under the United Nations Charter. By examining historical doctrines such as the Just War Theory and the perspectives of thinkers like Cicero, Augustine, Aquinas, Vitoria, Gentili, and Grotius, the research highlights how the notion of self-defence has been shaped by philosophical, religious, and legal traditions. The work further evaluates the shift from natural law to positivist interpretations following the Peace of Westphalia, and the codification of self-defence as a right of states in response to imminent threats, particularly after the Caroline incident. Emphasis is placed on the interplay between necessity, proportionality, and immediacy as core principles governing the lawful use of force in self-defence. This doctrinal study ultimately illustrates how self-defence has remained a vital and adaptive principle of international law, balancing the imperatives of state sovereignty and global peace.

Keywords: Self Defence, Evolution, Jus ad bellum, Just War Theory, and International Law

Introduction:

Self-defence is the primary right of the state, and it could be exercised against serious and immediate dangers. The right to self-defence is perceived as an inherent right inculcated right from the inception of time. The conceptualisation of this idea took place long before the existence of the state or the formation of the United Nations. When there is a prohibition, there is an exception; if the use of force is prohibited, then the same is exempted under the guise of self-defence. Throughout history, from the fall and rise of several kingdoms and states, a grave predominance was given to the right to self-defence. Without the same, the survival of the state would be in jeopardy.

This research focuses on the origin and development of self-defence and Jus ad bellum. It analyses the evolution of Just War theory and its relation to self-defence from ancient to modern times.

The ***objective*** of this research is to analyze the origin and development of self-defence in international law to understand its usage and extent of application by the state.

This research relies on both primary and secondary sources.

ORIGIN AND DEVELOPMENT OF SELF-DEFENCE AND JUS AD BELLUM

The word *"inherent"* in Article 51 of the United Nations Charter 1945 depicts that the right to self-defence had existed for centuries, even before the official adoption of the Charter[1]. It represents the permanent existence of that right in the law of nature. Before World War 1, the state had the right to wage war, and it was an indisputable right of the sovereign.[2] The existing state practices obligated the state to justify its necessity to wage war. Jus ad bellum recognizes *when a state may resort to war*, and it inculcates the conditions for the same. Just cause or legitimate purpose, legitimate authority, right intention, good faith, last resort, and proportionality are the core justifications for resorting to war. Several international scholars had reinstated that, right to indulge into war has always been a matter of sovereign right. Roda Mushkat states that *"violence was a part of human life and could not be wholly suppressed or denied"*[3]. The use of force cannot be totally banned or prohibited under international relations, it can only be limited and restricted.

[1] Kinga Tibori Szabo, *Anticipatory Action in Self Defence – Essence and Limits under International Law, Part 1 – Pre Charter Customary Law on Self Defence*,29, TMC Asser Press, Netherlands, 2011

[2] Mulwa Mwende Valentine, *Re-assessing the Right to Self-defence in International Law: Revisiting Article 51 of the Charter of the United Nations*, 27, University of Nairobi, Kenya, 2016

[3] Mushkat, Roda. "Who May Wage War? An Examination of an Old/New Question." 97-151, American University International Law Review 2, no. 1 (1987) and *Ibid*

According to the *Just War Theory*, the principle that constitutes to just war includes a war must be waged only for right and just reason, war must be waged by legitimate authority, war must be waged in response to wrong committed, war should be reasonable, ultimate goal of war is not to cause destruction but to achieve peace, war must not cause excessive injury, and war must be the last resort.[4]

After World War 1, the just war theory started to diminish due to the influences of positivism. The principles of state sovereignty and equality began to take strong roots, and the ethical or moral part of the war was started to be overseen by the states.

CONCEPT OF JUST WAR AND SELF-DEFENCE IN ANCIENT GREECE AND ROME

The conceptualization of war in ancient times provides a great insight into the usage of self-defence and the evolution of war traditions since today's contemporary international law gained most of its major parts from the ancient war traditions. *"Ancient Greek and Romans recognized several causes for legitimate war"*[5]. A warfare that was not legitimate was prohibited both under law and the religion. This depicts the larger importance played by religion in defining the legitimate use of force in ancient times. In ancient Greece, warfare was permitted under both natural law and customary practice. Under the scope of natural law, the war was visioned under the perspective of whether such war was just and unjust and in accordance with nature. In both Greece and Rome, only when a state justified its right or legitimacy to wage war, a war commences. The justification for waging war, or *"justum bellum,"* was given predominant importance in the context of Greece and Rome. The most reasonable grounds under which war was justified were *"violation of treaty, withdrawal from alliance, offence committed against state or an ally, breach of neutrality, offence against envoys and so on"*[6]. According to *"Ius fetiale"* or the sacred laws in Rome, a war was just and in accordance with the divine law. Furthermore, according to Cicero, war had its own rules and restricted application, as it must be formally declared, and limits were imposed on the states on what form of retribution or punishment it would impose on its enemy state.[7] Survival and prosperity of the state was given predominance and was subsequently seen as a part and parcel of nature in ancient times. Further defending the state from its enemies was also considered natural by both ancient Greek and Roman philosophers. Two visions were of paramount importance under both Greek and Roman law, the vision of Cicero and Aristotle in defending the state's resort to war to safeguard itself, to live in peace and be unharmed. It was conveyed that a state can justify its resort to war under the following pretext: *"avoid becoming enslaved to others"* and *"we may live in peace unharmed"*[8]. Another vision was that a state could resort to war for supremacy and glory. Though the second part is prohibited under contemporary international law, it widely prevailed from ancient to medieval times and also could be witnessed in the pre-modern times as colonisation. The concept of preventive war has its page written even in ancient Greece as a justification for Spartan military action.[9] As both ancient Greece and Rome largely followed natural law, the concept of self-defence for both individual and state was viewed as a natural right emerging from the law of nature or God. Further, the early and medieval Christians adopted the same.

EARLY CHRISTIAN PERSPECTIVE ON SELF DEFENCE AND WAR

Early Christianity followed the elements of Greek philosophy, which was dominant in the Roman empire, and the Jewish religion from the Old Testament. At that time, warfare and violence were severely avoided. There was a general prohibition on war, and predominant importance was given to the justification of any military action taken by the state. In the beginning of the 4th century, the resort to war was severely limited, and any such justification for war had to be accepted by both divine and state authorities. Augustine was one of the most important thinkers in the early periods. His writings on just war were inspired by the fallouts of Cicero's writing on *"justum bellum"*[10]. On the views of Augustine, Cicero and other Christian predecessors, a war should be waged only based on divine command, to defend the state's safety or honour, to avenge injuries, to punish a state for its wrongful acts or failure to prevent such acts and on the name of defence of the state's allies[11]. Augustine further reinstated that war can never be fought for territorial expansion and that a war must be properly authorised by state authority. According to Augustine's interpretation of self-defence, it was reiterated that *"the necessity of self-defence arises under two situations, against an attacking enemy or an assassin lying in ambush"*[12]. Augustine's view on self-defence against an assassin lying in ambush presumably supports preventive or anticipatory self-defence.

An act of self-defence for defending others, protecting the public order, or for the common good was justified and permitted. However, it cannot be used for retaliatory measures.

MEDIEVAL CHRISTIAN PERSPECTIVE ON SELF DEFENCE AND WAR

After the fall of the Roman Empire in the 5th century, the catholic church gained a prominent role in the control of European affairs. The medieval church leaders or popes acted as political rulers to maintain public order. Later, the church and the European leaders were forced to follow strict military actions due to barbarian invasion, which took place between the 4th and 8th centuries.

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[4] *Ibid*
[5] *Ibid* at 32
[6] *Ibid* at 33
[7] *Ibid* at 34
[8] *Ibid*
[9] Cicero, *De Officiis*, Book I, Chapter 12, Walter Miller, Harvard University Press, Loeb Classical Library No. 30, Cambridge, 1968
[10] *Supra*, note 4 at 36
[11] *Ibid*
[12] *Ibid*

During the 12th century, the *decretum*, which was a collection of Canon Law, stated, *"that war is just which is waged by an edict in order to regain what has been stolen or to repel the attack of enemies"*[13]. It was also stated that defending against invasion was just cause. Further, the concept of holy war was acknowledged as the one fought for just cause. The concept of self-defence was seen as the fallout of natural law, which required no permission from the authority. The medieval Christian perspective allowed *self-defence against an ongoing attack or against an enemy in ambush*[14]. Importance was given to the time frame for carrying out self-defence. Self-defence was justified only when it was exercised immediately before and during the attack. Self-defence after an attack was seen as an act of revenge or vengeance, but it was permitted only if the attacker or enemy was preparing to attack again.[15]

The sole aim for carrying out self-defence was to repel an attack that was already in progress or about to commence[16]. There was a distinction between self-defence against an imminent attack or ongoing attack and retaliation. In the latter, self-defence loses its integrity and would not be considered as self-defence but retaliatory attack or war. According to Aquinas, *a war is just only when it is ordered by public authority, has just cause, and is fought for the right intention*[17]. He also limited the states' right to wage war for religious expansion. Necessity was given predominance as a deciding factor of whether a war was just or not, which means a war to be just it must be fought out of necessity.

From the 15th to 16th centuries, the ancient and medieval Christian conceptualisation of war was retained. Though some aspects underwent a change but the significant part remained the same. War must be based on fairness and goodness. However, this concept underwent a significant change to protect the safety and preserve the freedom of the country. Morality and ethics were given the least importance for upholding the state's security over the just war tradition.[18]

Francisco de Vitoria, in his two lectures *De Indis* and *De iure belli*[19]discussed the resort to war. His contribution has been significant for the evolution of the Christian doctrine of just war and for the development of international law. He further reinstated Aquinas's view that war cannot be justified if it is conducted for religious propagation. He distinguished between offensive and defensive war; the former is conducted for a retaliatory purpose to inflict pain or punishment, and the latter is justified by both natural and divine law. He further stated that *"it was lawful to resist force with force"*[20]. This view confirms the usage of force to repel another force as a part of the law of nature. It was also stated that war cannot be resorted to remove trivial conflicts. Only when offences are of grave nature could the resort to war be justified. This view confirms that war must be a last resort and must be conducted only when necessary. Paramount importance was given to limiting the power of the sovereign to exercise defensive rights, as the ultimate right to use defensive force would lead to more destruction and chaos. Vitoria presumed self-defence as *"resistance of force by force"*[21].

Later, in the 16th century, Alberico Gentili, in his work *De jure belli libri tres*, reinstated that war must be the last resort, and when another peaceful means exists, only the latter must be used first. The father of international law, Hugo Grotius, in his work *De jure belli ac pacis libri tres* (On the Laws of War and Peace), reinstated the same view of Gentili by stating that resort to war should be the last resort. He further stated four just causes for war: *self-defence, recovery of property, punishment, and pursuing an obligation not fulfilled by the other*[22].

GENTILI AND GROTIUS PERSPECTIVE OF SELF DEFENCE

In the views of Gentili and Grotius, self-defence could be exercised to the *time before or during the attack*[23]. According to Gentili, *"One who is attacked by an armed enemy makes a necessary defence, and his action is that of necessary defence, and so also does one against whom an enemy has been making preparations."* [24]grave importance was given to necessary defence, which means defence can be exercised only when necessary, and this acted as a restriction and limit to the use of self-defence. According to Hugo Grotius, war was not prohibited but permissible *"if an attack by violence is made on one's person, endangering life, and no other way of escape is open."*[25] Hence, Grotius was also of the same view that necessity was an essential element in the exercise of self-defence and is directly a part of the nature. The nature of the attack must be immediate and imminent for the lawful exercise of self-defence. According to Gentili, "*defence is just which anticipates dangers that are already meditated and prepared, and also those which are not meditated, but are probable and possible"*[26]*."No one ought to expose himself to danger. No one ought to wait to be struck, unless he is a fool. One ought to provide not only against an offence which is being committed, but also against one which may possibly be committed."* This view reiterates the acceptance of anticipatory and preventive self-defence in international law. However, it does not extend to mere threat. This view was not accepted by Grotius as he did not accept preventive self-defence or war. Gentili's views on preventive war were wider, but Grotius' view was restrictive. According to Grotius, a mere fear or threat could not be justified for exercising self-defence. However, according to Gentili, it was the right of the sovereign to defend the state against any possible danger.

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[13] *Ibid* at 38
[14] *Ibid* at 39
[15] *Ibid*
[16] *Ibid*
[17] *Ibid*
[18] *Supra*, note 4
[19] *Ibid* at 45
[20] *Ibid*
[21] *Ibid* at 46
[22] *Ibid* at 49
[23] *Supra*, note 4
[24] *Ibid* at 50
[25] *Ibid*
[26] *Ibid*

Three elements of self-defence according to the Christian conception of natural law are that there must be an *"ongoing or imminent attack, immediate need for response and self-defence had to be exercised with moderation.*[27]*"* Anticipatory self-defence had always been an intrinsic part of natural law, and the above-mentioned elements tend to impose limits on it.

CONCEPT OF SELF-DEFENCE UNDER POSITIVE LAW

In the 17th Century, realist thinking was adopted, and the positivist view started to develop. As the old conceptualisation of self-defence on Natural law started to fade and lose its dominance, the positive law was beginning to embark its vision. This view changed the way in which sovereignty, war, and self-defence were perceived. It diverted the conceptualisation of war from Christian just war doctrine, and a positive approach was imbibed. Though natural law was still used by several prominent thinkers, it was highly challenged and reinterpreted to accommodate new views. The status of the state and the rights of the sovereign underwent a change due to the adoption of realist views and further due to the significant influence of Peace of Westphalia (1648). This treaty gave rise to three important principles: sovereign equality, sovereign right to religion, and the balance of power[28]. War was considered as the sole right of the sovereign, and the sovereign could take any efficient action to save the vital interest of the state. It was further stated that the survival and national interest of the state was given predominance over any other foreign policy. The security of the state was never compromised under the light of morality and ethics, and this view directly challenged the tenets of Christian natural law.

From the 18th Century, usage of positive law was expanded beyond horizons. Emerich de Vattel, in his work *"Le Droit de Gens"*[29] (the law of nations), acknowledged the old just war doctrine and the emergence of international law in the 18th century. His work was published and used as a handbook by statesmen and diplomats until the beginning of the First World War[30]. Vattel did not denounce natural law, but he claimed the adoption of positive law was necessary to regulate the affairs between nations. According to Vattel, the sovereign had the *right to resist by force any attack upon the state or its rights*[31]. He supported preventive war, while a nation must be subjected to any attack or threat to use force as the last resort, a state need not wait till the injury was carried out.

During the late 18th and early 19th centuries, the positivist approach was dominant, and the concepts of unrestricted right of war flourished due to constant colonisation and capture of territories. The French Revolutionary Wars and the Napoleonic Wars gave rise to the system of the *total war*[32] concept, which included *large blockades and the manipulation of commerce*[33].

During the 17th to 19th centuries, due to the significant development of international law and the increasing dominant position of treaty law, the concept of war must be lawful and based on sovereign equality. It was viewed that self-defence was a primary right. In the 19th century, self-defence was seen as a customary right due to abundant state practice. Due to the occurrence of the Caroline Incident, anticipatory self-defence was made explicit in the state's understanding.

SELF DEFENCE AND SELF PRESERVATION

The 17th and 18th Centuries' imperfect wars were justified based on self-preservation. According to Vattel, the sovereign had a grave obligation to preserve its state and take any action necessary for ensuring its survival. This view states that the state can use force or self-defence for its survival, and the same falls under the fundamental obligation of the state. According to him, the right of self-preservation was the law of nature. In the 19th century, the principle of self-preservation was given significant privilege in international law[34]. Self-preservation was seen as an exception to territorial inviolability, which included both attacking and repelling an attack. It has its origins traced from natural law, implying it was the state's primary duty. Further, all duties of the state were subordinate to the right of self-preservation[35].

SELF DEFENCE FROM 19TH TO 21ST CENTURY

The usage of self-defence depended on the way war and use of force were perceived. The conceptualisation of war and self-defence underwent a significant change during all periods of history; however, its relevance remains the same.

The **Caroline incident** contributed great significance to the evolution and understanding of self-defence and its anticipatory nature. The Webster Ashburton correspondence between the United States and the United Kingdom gave light to these emerging concepts in international law. It was stated that the *"state must show necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation"*[36]. This reiterates the historical views and extension of self-defence, that this right can be exercised even before the attack has materialised or carried out.

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[27] *Ibid at* 56
[28] *Supra*, note 4
[29] *Ibid* at 63
[30] *Ibid*
[31] *Ibid*
[32] *Supra*, note 4
[33] Neff SC, *War and the law of nations: General History*. Cambridge University Press, United Kingdom, 2005
[34] *Supra*, note 4
[35] *Ibid* at 69
[36] *Ibid*

With the growth of international law and the rights and obligations of the state, the concept of self-defence, though being a part of nature and prevalent in customary law, gained further express notion under two important pillars of international law: League of Nations and United Nations. As the concept of war began to change[37] after industrialisation and scientific developments, the destruction it possessed made the need for the states to expand the scope and applicability of self-defence for self-preservation and maintenance of peace and security.

The **League of Nations** was against war, and it took all possible attempts to reduce the state's resort to the use of force as a means of dispute resolution. However, it is pertinent to mention that the League of Nations does not explicitly mention self-defence anywhere in its covenant. Article 10[38] of the League of Nations indirectly discusses this right. It states that every member state must respect and preserve against external aggression, territorial integrity, and political independence of other member states.[39] This part focuses on the obligation of the state to respect and preserve these rights. The next part of this article focuses on the role of the Council in addressing a situation, such as an act of aggression. Upon the advice of the Council, the member states should act to fulfil their obligations under this covenant. The provisions relating to self-defence were not modulated explicitly because of the vision of the League of Nations during the 19th century. The devastating impact of World War 1 had made the League completely prohibit the resort to war or use of force. To curb or prevent states from using force, the League of Nations did not make any express provision of the circumstances when the use of force can be exempted. However, the 2nd part of Article 10 indirectly states the member states' right to fulfil their duties and obligations in defending against aggression with the mandate of the Council.

The eruption of the 2nd World War marked the ultimate failure of the League of Nations and the birth of the **United Nations**. Unlike the League of Nations, the United Nations had explicit mentions of self-defence in its charter. Though it expressly prohibited or restricted the use of force by the states through Article 2(4), it allowed the same under 3 exceptions. Through Security Council mandate and authorisation, self-defence and humanitarian assistance. However, humanitarian assistance is not directly mentioned in the charter.

Article 51 is the heart and soul of the UN Charter. It expressly mentions that the right of self-defence is inherent, and the state can exercise individual or collective self-defence against the aggressor. However, this right is subject to control by the Security Council. The state cannot use this right without restriction.

Several international treaties, inculcates the right of collective self-defence to its member countries, e.g., Article 5 of the North Atlantic Treaty Organisation (NATO). Further the emergence of new actors and highly powered destructive weapons had stated to expand the scope and usage of self-defence by the states in this 21st century.

Conclusion:

The concept of self-defence is one of the most deeply rooted principles in both the moral and legal traditions of international relations. From its origins in ancient civilizations and religious doctrines to its current form under the UN Charter, the right to self-defence has constantly reflected the shifting balance between state sovereignty, necessity, and legal restraint. This paper has shown that while the formal structures of international law have evolved, the underlying justification for self-defence - preserving the existence and integrity of the state remains constant. The historical journey from *jus ad bellum* to Article 51 of the UN Charter illustrates a long-standing tension between moral legitimacy and legal permissibility.

As modern threats become more complex and unconventional, particularly with the rise of non-state actors and cyber warfare, the interpretation of self-defence continues to be contested and redefined. However, understanding its historical and philosophical roots is crucial for understanding the inherent meaning of self-defence. Ultimately, self-defence is not merely a legal doctrine, it is a reflection of a state's fundamental instinct for survival, shaped and reshaped by the values, fears, and ambitions of each era.

[37] Michael H. Brody, *Contemporary Jus Ad Bellum on Use of Force in Self Defense by States against Non-State Terrorist Groups- Limitations, Evolutions and Alternatives*,12, Naval Postgraduate School, California, 2011

[38] Article 10 of the League of Nations: *The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.*