Anticipatory action in self-defence: The law of self-defence - past, presence and future

Tibori Szabó, K.J.

Citation for published version (APA):

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: https://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

UvA-DARE is a service provided by the library of the University of Amsterdam (http://dare.uva.nl)
TABLE OF CONTENTS

SUMMARY OF CONTENTS .......................................................................................................................... 1

TABLE OF CONTENTS .................................................................................................................................. 3

ACKNOWLEDGMENTS ................................................................................................................................... 9

ABBREVIATIONS ........................................................................................................................................ 11

1 Introduction .............................................................................................................................................. 13

1.1 Statement of purpose ....................................................................................................................... 13

1.2 Main research questions .................................................................................................................. 18

1.2.1 First research question ................................................................................................................ 19

1.2.1.1 Choosing the best methods of research .............................................................................. 19

1.2.1.2 Rationale of legal-historical research .............................................................................. 20

1.2.1.3 Rationale of comparative case studies .............................................................................. 20

1.2.1.4 Objectives of the first research question ........................................................................... 21

1.2.2 Second research question .......................................................................................................... 21

1.2.2.1 Choosing the best methods of research .............................................................................. 22

1.2.2.2 Rationale of legal-historical research .............................................................................. 22

1.2.2.3 Rationale of comparative case studies .............................................................................. 22

1.2.2.4 Objectives of the second research question ....................................................................... 23

1.3 Structure and methods of research ............................................................................................... 23

1.3.1 Main structure ............................................................................................................................. 23

1.3.2 Tracing the evolution of customary law .................................................................................... 24

1.3.2.1 Main controversies regarding custom-formation .............................................................. 24

1.3.2.2 Approach adopted regarding custom-formation ............................................................... 26

1.3.2.2.1 What constitutes state practice ................................................................................... 26

1.3.2.2.2 Continuity of state practice ........................................................................................ 26

1.3.2.2.3 ‘Opinio juris’ ............................................................................................................... 27

1.3.3 Structure and methods of research for Part I ............................................................................ 28

1.3.3.1 What kind of legal-historical research? ............................................................................ 28

1.3.3.2 ‘Normative frameworks’ ................................................................................................... 28

1.3.3.3 Structure of Part I ............................................................................................................. 30

1.3.3.4 Findings of Part I .............................................................................................................. 30

1.3.4 Structure and methods of research of Part II ............................................................................ 31

1.3.4.1 Structure of Part II ........................................................................................................... 31

1.3.4.2 Selection of cases in Part II ............................................................................................. 31

1.3.4.3 Findings of Part II ............................................................................................................ 32

1.3.5 Rationale of Part III .................................................................................................................... 32

1.4 Notes on terminology ....................................................................................................................... 32

1.5 Disclaimers ....................................................................................................................................... 33

1.6 Contribution ..................................................................................................................................... 34

Part I - Pre-Charter Customary Law on Self-Defence ........................................................................... 35

2 Self-defence in ancient and medieval natural law ............................................................................. 37

2.1 War in ancient Greece and Rome .................................................................................................... 38
2.2 Early and medieval Christianity ................................................................. 40
  2.2.1 Early Christian approach to war during the Roman Empire .......... 41
  2.2.2 Christian approach to war in the Middle Ages ....................... 43
  2.2.3 The impact of chivalric codes on the Christian approach to war .. 48
  2.2.4 The medieval Christian normative framework and self-defence .... 49

2.3 Christian legalism ...................................................................................... 51
  2.3.1 Probabilistic arguments and the first rejections of the just war theory 52
  2.3.2 Late Spanish scholasticism ............................................................... 53
    2.3.2.1 War in the scholastic view ..................................................... 53
    2.3.2.2 Self-defence in the scholastic view .................................... 55
  2.3.3 Protestant legalism ............................................................................ 56
    2.3.3.1 Protestant lawyers about war – Gentili and Grotius ............. 56
    2.3.3.2 Self-defence – as seen by Gentili and by Grotius ............... 59
  2.3.4 The Christian legalist normative framework and self-defence ....... 62

2.4 Concluding remarks .................................................................................. 64

3 Self-defence as a measure short of war ...................................................... 67
  3.1 The rise of positive law ........................................................................... 67
    3.1.1 The departure from the Christian concept of natural law ......... 68
    3.1.2 Positive law and war in due form ............................................. 70
    3.1.3 ‘Perfect’ wars ............................................................................. 72
    3.1.4 ‘Imperfect’ wars ......................................................................... 73
  3.2 War as an instrument of policy ............................................................... 75
    3.2.1 Positive Law and War as a Legal Institution ......................... 75
    3.2.2 State practice and ‘measures short of war’ ......................... 76
      3.2.2.1 The Caroline incident (1837) ...................................... 79
      3.2.2.2 The Virginius affair (1873) ........................................... 82
  3.3 Concluding remarks .............................................................................. 83

4 Self-defence as an exception to the prohibition of war ......................... 87
  4.1 Pacifist trends of the nineteenth century ............................................. 87
  4.2 The Hague Conventions (1899, 1907) .................................................. 88
  4.3 The Covenant of the League of Nations ............................................. 90
    4.3.1 War in the regulatory system of the Covenant ..................... 91
    4.3.2 Self-defence in the League system ....................................... 92
  4.4 State practice in the 1920s and the League’s dispute settlement role ... 93
    4.4.1 The drafting of the Kellogg-Briand Pact and the right of self-defence 94
    4.4.2 The importance of the Kellogg-Briand Pact ......................... 97
  4.5 State practice in the 1930s and the collapse of the League of Nations ... 98
    4.5.1 The invasion of Manchuria by Japan (1931-1932) ............... 99
    4.5.2 The Italian invasion of Ethiopia (1935-1936) ....................... 101
  4.6 The Second World War ...................................................................... 102
    – Operation Catapult (1940) .......................................................... 103
  4.7 Concluding remarks ............................................................................. 105

5 The right of self-defence and the drafting of the UN Charter ................ 107
  5.1 Preliminaries ......................................................................................... 107
  5.2 Self-defence in the Dumbarton Oaks Proposals ............................... 107
  5.3 The drafting of the UN Charter at the San Francisco Conference .... 109
    5.3.1 Proposals ahead of the Conference ..................................... 109
    5.3.2 The plenary discussions of the San Francisco Conference .......... 110
    5.3.3 The work of Technical Committee 4 (Committee III/4) ........... 110
  5.4 The final provision on self-defence – Interpretation ......................... 114
  5.5 Concluding remarks ............................................................................ 117

6 The temporal dimension of self-defence at the time of the Charter ......... 119
Part II - Post-Charter Customary Law on Self-Defence

7 Self-defence in the immediate aftermath of the adoption of the UN Charter

7.1 Introduction

7.2 The Nuremberg and Tokyo trials

7.2.1 The Nuremberg trials

7.2.1.1 The creation of the Nuremberg International Military Tribunal

7.2.1.2 The trial and judgment of the major war criminals (1945-1946)

7.2.1.3 Self-defence and the Major War Criminals’ Trial

7.2.1.4 Interpretation of self-defence by the Nuremberg Tribunal

7.2.2 The Tokyo Tribunal

7.2.2.1 The trial and judgment of the Japanese war criminals (1946-1948)

7.2.2.2 Self-defence as interpreted by the Tokyo Tribunal

7.2.3 Importance of the Nuremberg and Tokyo tribunals

7.3 The International Court of Justice and the *Corfu Channel* case

7.4 Concluding remarks

8 Self-defence in State-to-State conflicts

8.1 Introduction

8.2 The Jewish War of Independence (1948)

8.3 The Korean War (1950)

8.4 The Sinai Campaign (1956)

8.5 The UK bombing of a Yemeni fort (1964)

8.6 The Gulf of Tonkin incident (1964)

8.7 The Six-Day War (1967)

8.8 The ‘Yom Kippur War’ (1973)

8.9 The Iran-Iraq War (1980-1988)

8.10 The Falklands War (1982)

8.11 US bombing of Libya (1986)


8.13 US missile attack against Iraqi intelligence headquarters (1993)

8.14 The South Ossetia War (2008)

8.15 Concluding remarks

9 Self-defence and weapons of mass destruction

9.1 Introduction

9.2 The Cuban Missile Crisis (1962)

9.3 The Israeli bombing of the Iraqi reactor (1981)

9.4 The *Nuclear Weapons* Advisory Opinion (1996)

9.5 The War against Iraq (2003)

9.5.1 The 2003 Iraq War – Setting the context

9.5.2 The 2003 Iraq War – Disarmament and Security Council resolutions

9.5.3 The 2003 Iraq War – ‘Self-defence’ against WMD

9.5.3.1 Necessity

9.5.3.1.1 Possession of WMD

9.5.3.1.2 The immediacy factor
10 Self-defence against non-state actors ................................................................. 195

10.1 Introduction ........................................................................................................ 195
10.2 Israel and Arab militants ................................................................................... 195
10.3 State practice in the 1960s-1980s .................................................................... 198
10.4 Terrorist attacks in the 1990s .......................................................................... 206
   - The Kenya and Tanzania bombings ................................................................ 208
10.5 Terrorist attacks of the new millennium ......................................................... 211
10.5.1 The attack on the USS Cole (2000) ................................................................. 211
10.5.2 The attacks of 9/11 (2001) ........................................................................... 213
   10.5.2.1 Factual background ............................................................................... 213
   10.5.2.2 The role of the Security Council ............................................................ 215
   10.5.2.3 The 9/11 attacks and the definition of ‘armed attack’ ......................... 216
   10.5.2.4 The responsibility of the Taliban regime for the 9/11 attacks .......... 217
   10.5.2.5 The legality of the US war in Afghanistan ......................................... 218
10.5.3 The war against Iraq (2003) ...................................................................... 220
10.5.4 Israeli invasion of Lebanon (2006) .............................................................. 222
10.5.5 Turkish incursion into Northern Iraq (2007-2008) .................................... 226
10.5.6 The Gaza crisis (2008-2009) ..................................................................... 228
10.6 Concluding remarks ......................................................................................... 231

11 The interpretation of self-defence and the United Nations ........................................ 233

11.1 Introduction ....................................................................................................... 233
11.2 Collective self-defence and collective enforcement measures ......................... 233
11.3 The work of other United Nations bodies ......................................................... 236
   11.3.1 The General Assembly of the United Nations ...................................... 236
   11.3.2 The work of the International Law Commission ................................... 238
      11.3.2.1 Self-defence and ‘general international law’ ................................... 239
      11.3.2.2 Armed action against private groups as ‘state of necessity’ .......... 241
      11.3.2.3 ‘Preventive’ self-defence ............................................................... 242
      11.3.2.4 Necessity and proportionality ....................................................... 242
11.4 The work of the International Court of Justice ............................................... 244
   11.4.1 The conditionality of an armed attack .................................................... 244
   11.4.2 Immediacy ............................................................................................... 248
   11.4.3 Proportionality ....................................................................................... 248
   11.4.4 The customary basis of self-defence ..................................................... 249
11.5 Concluding remarks ......................................................................................... 250

12 The temporal dimension of post-Charter self-defence ........................................... 253

12.1 Temporal dimension of self-defence in state-to-state conflicts ......................... 253
   12.1.1 Anticipatory dimension of self-defence in state-to-state conflicts ......... 253
   12.1.2 Remedial dimension of self-defence in state-to-state conflicts .......... 254
   12.1.3 Circular dimension of self-defence in state-to-state conflicts ............. 255
12.2 Temporal dimension of self-defence in conflicts involving WMD ............... 256
12.3 Temporal dimension of self-defence in conflicts involving non-state actors .... 257
12.4 Concluding remarks ......................................................................................... 258

Part III - Anticipatory Action in Self-Defence and International Customary Law ........... 261

13.1 First research question - The legality of anticipatory action in self-defence ........... 261
   13.1.1 Findings of Part I ..................................................................................... 262
   13.1.2 Findings of Part II .................................................................................. 263
   13.1.3 The legality of anticipatory action in self-defence in international law .... 264
13.2 Second research question – The limits of anticipatory action in self-defence ......... 266
13.2.1 Findings of Part I ................................................................. 266
13.2.2 Findings of Part II ................................................................. 267
13.2.3 The limits of anticipatory action in self-defence under international law .......... 267
  13.2.3.1 Standard-type armed attacks ........................................... 267
    13.2.3.1.1 Necessity ................................................................. 268
      1) Precluding an armed attack from occurring ..................... 271
      2) Precluding an armed attack from achieving its purpose ...... 273
      3) Precluding an armed attack from maintaining its purpose .. 274
      4) Immediacy and time ....................................................... 275
    13.2.3.1.2 Proportionality ....................................................... 276
  13.2.3.2 Hit-and-run tactics and the limits of self-defence ............... 277
    13.2.3.2.1 Necessity ................................................................. 278
    13.2.3.2.2 Proportionality ....................................................... 282
  13.2.4 Conclusions as to the limits of anticipatory action in self-defence .......... 284
13.3 Self-Defence: What It Is and What It Is Not ................................... 284

SUMMARY ......................................................................................... 287
NEDERLANDSE SAMENVATTING .................................................... 289
BIBLIOGRAPHY ............................................................................. 293
TABLE OF DOCUMENTS ............................................................... 305
TABLE OF CASES ........................................................................... 311
INDEX OF TOPICS ........................................................................... 313