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

Tibori Szabó, K.J.

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

'We have to consider whether the injustice is, practically speaking, simply about to take place, or whether it has already done so, and redress is sought through war. In this second case, the war is aggressive. In the former case, war has the character of self-defence, provided that it is waged with a moderation of defence which is blameless.'

(Francisco Suárez)

The objective of Part I is to trace the evolution of pre-Charter customary law on self-defence from its ancient Greek natural-law roots to the time of the adoption of the UN Charter. This legal-historical research is needed to understand how the content and temporal dimension of self-defence was viewed in the first decades of the twentieth century. On that basis, Part I will conclude whether anticipatory action was part of self-defence at that time and, if yes, under what conditions.

The need to return to the natural-law roots of self-defence was explained in section 1.2.1.2 of the present chapter. It is important to reiterate here that the terms 'inherent' and 'naturel' employed in Article 51 of the UN Charter to characterise self-defence evoke an understanding of that right that had existed for centuries before the adoption of the Charter. It remains to be seen whether that understanding had survived the test of time and if yes, in what form was it acknowledged at the end of the Second World War.

Part I seeks therefore to show the changes through which the natural law concept of self-defence went through over three main 'normative frameworks': the natural law-dominated (Christian), the positivist and the incipient international law frameworks. Accordingly, Chapter 2 will offer a brief review of self-defence as part of the ancient Greek as well as early and medieval Christian conceptions of natural law (ca. 500 BC up to the 17th century CE). Chapter 3 will look at self-defence as a measure short of war and will assess whether its natural-law content remained unaltered (17th-19th centuries). Chapter 4 will discuss self-defence as an exception to the prohibition of war and will analyse its evolution in the midst of the emerging modern international law of the late nineteenth century and the early twentieth century. Chapter 5 will analyse the way the natural-law concept of self-defence was enshrined in the United Nations Charter.

On the basis of this legal-historical research, a comprehensive representation of the pre-Charter concept of self-defence, its content and temporal dimension will be offered (Chapter 6). If it is established that anticipatory action was part of that concept of self-defence, a recognizable pattern of the limits of such action will be demarcated. The thus identified understanding of self-defence will be seen as the one taken in consideration by the drafters of the UN Charter in their negotiations on Article 51. The pre-Charter concept of self-defence will be further tested against the influence of post-Charter developments in Part II of this book.