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

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4 Self-defence as an exception to the prohibition of war

The purpose of this chapter is to follow the evolution of the right of self-defence within the emerging system of modern international law of the late nineteenth and early twentieth centuries. Starting with the late nineteenth century, the major change in the approach to war was an ever growing trend to restrict it. In this process, many forms of war and measures short of war began to be criticized and characterized as illegal. Moreover, this period saw the emergence of modern international law as we understand it today.¹

In the early twentieth century, several multilateral agreements were concluded, which, in general terms, aimed to restrict or to prohibit recourse to war. Apart from that, the state practice connected to the League of Nations arbitration system was also very important, because it showed how specific forms of force (especially the so-called measures short of war) came under sharp criticism by the members of the League. The chapter will focus on some of these cases, in order to show how reprisals and abusive references to self-defence were addressed by the League of Nations. Although not all of these cases ended in successful dispute resolution, they are illustrative of how the framework of war-related principles was changing at the time.

Chapter 4 will make reference to representative and authoritative writings of the period as well as important instances of state practice relevant for self-defence. In the following paragraphs, emphasis will be put on the way self-defence was understood during this period and whether its narrow, natural-law understanding was still accepted. Both in the Christian natural law and in the positivist conception, the temporal dimension of self-defence pertained to the time before, during and (increasingly in the nineteenth century) after an attack. In both frameworks, this understanding of self-defence was differentiated from the broader sense, which allowed preventive use of force. Moreover, both normative frameworks identified the same elements of self-defence (whether anticipatory or remedial): the existence of an attack, the immediate need to respond and moderation. Chapter 4 will assess whether the temporal dimension and elements of self-defence were altered during the examined period. On that basis, it will be deduced whether anticipatory action was still part of the contemporaneous understanding of self-defence, and if yes, under what conditions.

4.1 Pacifist trends of the nineteenth century

In the second part of the nineteenth century, the concept of war as a ‘last resort’ started to gain momentum. The view that war was a means of last resort was also strengthened by the increasing attention given to peaceful means of settling disputes. But apart from those who promoted peaceful means of dispute settlement, realist thinkers also had to admit that the creation of an organized system of peaceful dispute settlement was indeed needed.²

As a consequence of the growing tendency to favour peaceful dispute settlement, the principle of self-preservation started to lose its dominant position. At the beginning of the

¹ Hueck, p. 198; Nussbaum, pp. 191-199; Steiger, pp. 190-192.

² For the increasing importance of arbitration in the nineteenth century, see Nussbaum, pp. 212-218.

new century, international lawyers began to denounce it as a dangerous concept. Oppenheim, for instance, explicitly called for the restriction of the principle:

‘It is frequently maintained that every violation is excused as long as it was caused by the motive of self-preservation, but it becomes more and more recognized that violations of other states in the interest of self-preservation are excused in case of necessity only.’³

At the same time, the first signs of an ‘international civil society’ appeared with the regular organization of the Universal Peace Congresses, starting with 1889, which had the cessation of the arms race as one of their objectives.⁴ The foundation of the International Committee for Relief to the Wounded (later to be known as the International Committee of the Red Cross) in 1863, through the work of Henry Dunant, also contributed to the development of a transnational civil society focused on matters of war and peace.⁵

The end of the nineteenth century and the beginning of the twentieth century saw the conclusion of the first international conventions regulating recourse to war and the conduct of hostilities. Moreover, the first international organization was created, which, *inter alia*, had the objective of restricting military action among its members. The Hague Conventions and the League of Nations initiated a process in which the seventeenth- and eighteenth-century normative framework changed substantively and moved towards the restriction of war. These initial moves were taken further by a series of bilateral agreements (such as the Bryan treaties) restricting recourse to war and, in 1928, by the Kellogg-Briand Pact.⁶ The lessons learned in this transition period bore great importance on the drafting of the Charter of the United Nations.

The move towards regulating the resort to force had several sub-phases: (1) the modest steps taken by the Hague conventions; (2) the first restrictions of war brought by the League of Nations Covenant; (3) the strengthening of such restrictions by the Kellogg-Briand Pact and the challenges to it in the state practice of the 1920s; (4) the 1930s state practice that paved the way for the Second World War, and, finally, the adoption of the United Nations Charter, which will be discussed in Chapter 5.

4.2 The Hague Conventions (1899, 1907)

The two Hague Peace Conferences were seen as the first truly international, intergovernmental summits. Although both conferences tacitly accepted the right of states to wage war, they set out certain principles which states were obliged to follow before resorting to war.

³ Oppenheim, Vol. 1, p. 178.

⁴ These congresses are seen today as the primary fora for the pre-First World War peace movement. The first Universal Peace Congress was held in Paris in June 1889, and meetings followed almost every year until 1913. The outbreak of the First World War postponed further congresses until 1921, when they recommenced and were held during the inter-war years. The last inter-war congress met at Zurich in August 1939, concluding their meeting four days before Nazi Germany invaded Poland.

⁵ For a succinct presentation of the peace movement, see Nussbaum, pp. 221-222.

⁶ For an analysis of the Bryan treaties, see ‘The Bryan Peace Treaties’ (Editorial Comment), 7 *American Journal of International Law* (1913) pp. 823-829.

The initiation of the first Hague Peace Conference of 1899 was made by Russia in August 1898.⁷ At the invitation of the Dutch Queen Wilhelmina, the participating states decided to hold the conference in The Hague.⁸ Because most participants feared that the conference might result in the diminishing of their prerogatives to defend themselves and in revision or recognition of some political situation with which they were not satisfied, the Russian statesmen had to repeatedly ensure the incumbents that the conference would avoid any sensitive political question which would touch the susceptibility of any power, and that it would be more technical, than political.⁹

The main success of the first Hague conference was the creation of a procedure for arbitration of disputes between members. In the end, the Permanent Court of Arbitration was created, but resort to arbitration was declared voluntary.

A second Hague peace conference was convened in 1907 with the aim of including states not represented in 1899, developing the arbitration procedure and further developing the laws of war.

Self-defence was not addressed during the two Hague conferences, because there was no discussion regarding the restriction of the right to wage war.

That question was, nevertheless, taken up by the legal literature at the time. Along with the calls for restricting the principle of self-preservation, authors also moved towards designating self-defence as the only measure that can be excused as self-preservation. On this topic, Oppenheim asserted:

‘Such acts of violence in the interest of self-preservation are exclusively excused as are necessary in self-defence, because otherwise the acting state would have to suffer or have to continue to suffer a violation against itself. If *an imminent violation or the continuation of an already commenced violation* can be prevented and redressed otherwise than by a violation of another state on the part of the endangered state, this latter violation is not necessary, and therefore not excuse and justified.’¹⁰

Accordingly, if a state was informed that on a neighbouring territory a body of armed men was being organised for the purpose of a raid into its own territory and the danger could be removed through an appeal to the authorities of that country, there was no need to act in self-defence. Conversely, if such an appeal proved to be fruitless or impossible, or if there was even more danger in delaying defence, the threatened state was justified to resort to self-defence.¹¹

Oppenheim’s description of self-defence bears importance for several reasons. First of all, it demonstrates that the close link between the principle of self-preservation and the right of self-defence was still acknowledged in the early twentieth century. Secondly,

⁷ For a detailed account on genesis of the idea of a peace conference, see T.K. Ford, ‘The Genesis of the First Hague Peace Conference’, 51 *Political Science Quarterly* (1936) pp. 354-382. For a different view on the same matter, see D.M. Morrill, ‘Nicholas II and the Call for the First Hague Conference’, 46 *Journal of Modern History* (1974) pp. 296-313.

⁸ Participating countries: Germany, The United States of America, Austria-Hungary, Belgium, China, Denmark, Spain, France, Great Britain and Ireland, Greece, Italy, Japan, Luxembourg, Mexico, Montenegro, The Netherlands, Persia, Portugal, Romania, Russia, Serbia, Siam, Sweden and Norway, Switzerland, Turkey and Bulgaria.

⁹ Ford, p. 378.

¹⁰ Oppenheim, Vol. 1, p. 178 (emphasis added).

¹¹ *Ibid.*, pp. 178-179.

the example used by Oppenheim shows that the right of self-defence was seen as a measure short of war. Thirdly, there was need for a legal explanation pertaining to self-defence in order to justify a measure short of war. Fourthly, the above-quoted passage describes self-defence as a right against ‘an imminent violation or the continuation of an already commenced violation,’ thus acknowledging the urgency element of the narrow understanding of the right. Fourthly, the requirement of an irremovable danger echoes the inevitability element of the narrow understanding of self-defence.

Despite these moves towards the regulation of warfare, the dominant view in foreign policy was still influenced by the Clausewitzian interpretation of war. The result of this approach was the first global war that brought profound changes to society and morality, as well as to the legal interpretation of war.

The aftermath of the war led to the more powerful resurgence of pacifist voices demanding the imposition of legal restrictions on resort to war.¹² As put by Edward Benes in 1932:

‘Exasperated and horror-stricken at the fearful sacrifices entailed by the World War, at the blood spilt and at the moral as well as the material damage, mankind demanded the ending of that period in the world’s development in which war was considered a normal political instrument for the settlement of international disputes.’¹³

Many argued that the war had been the product of the balance of power system, so the main purpose was to construct a legal and institutional structure that would prevent wars in the future.

4.3 The Covenant of the League of Nations

After the First World War, the creation of the League of Nations in 1919 was seen as an attempt to generate a powerful institutional structure needed for restricting war. It was thus believed that the main purpose of the Covenant of the League of Nations was to make member states accept and maintain the obligation never wilfully to resort to war, thus ‘renouncing one of the most important and far-reaching rights of sovereignty.’ Moreover, on the basis of the Covenant, states were supposed to recognize the necessity to control the arms race and reduce national armaments to the level of meeting basic national safety requirements.¹⁴

The Covenant of the League of Nations was adopted by the Paris Peace Conference in April 1919. It entered into force on 10 January 1920. Although its President at the time greatly contributed to the idea of a League of Nations, the United States never became a member of the League.¹⁵ Another ‘great absent’ at the founding negotiations was Germany, which accepted membership only in 1926, but withdrew after seven years. Similarly, the USSR was a League member only between 1934 and 1939. Out of the 42

¹² E. Benes, ‘The League of Nations: Successes and Failures’, 11 *Foreign Affairs* (1932) p. 66. Neff, p. 285.

¹³ Benes, p. 66.

¹⁴ *Ibid.*, p. 67.

¹⁵ For a detailed account of Woodrow Wilson’s role and the main forces behind the rejection of the ratification, see F.P. Walters, *A History of The League of Nations* (London, Oxford University Press 1965) pp. 68-72.

founding members, only 24 remained members of the League until the end.¹⁶ Many other states (such as Italy, Japan, Denmark, Czechoslovakia and Romania) withdrew at the beginning of the Second World War. Spain withdrew in 1939 as a result of the Spanish Civil War.

4.3.1 War in the regulatory system of the Covenant

Perhaps the most revolutionary element of the Covenant was Article 10, according to which the members of the League undertook ‘to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League.’ It was seen as a revolutionary provision for mainly two reasons. First of all, it was the firm formulation of a collective security system on an international level, in which Member States had to show respect towards and preservation of each other’s territorial integrity and political independence in the face of an external aggression. Secondly, it was the first express prohibition of aggression in an international treaty. As Benes observed, this clause was seen as having the ability to change the traditional foreign policy of all countries from ‘egoistic and self-centred’ to acknowledging ‘certain moral and material interests common to all nations.’¹⁷

Although it did not go as far as to restrict or prohibit the use of force itself, Article 10 was often mentioned by members of the League as a general principle to which appeal could be made whenever a serious threat to the territorial integrity or the political independence of a state was alleged. China, for instance, submitted its dispute with Japan over Manchuria under Articles 10, 11 and 15, and consequently in 1932, members of the Council addressed an appeal to the Japanese government calling attention to Article 10.¹⁸

The Covenant also elaborated a dispute settlement procedure for the League members. Article 12 provided that if a dispute arose between the members that was likely to lead to a rupture, they would submit the matter ‘either to arbitration or judicial settlement or to enquiry by the Council’ and they agreed ‘in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council.’ Similarly, Article 13(4) stated that members of the League had to carry out ‘in full good faith any award or decision that may be rendered’ and they had to refrain from resorting to ‘war against a Member of the League which complies therewith.’

Article 15(1) stated that ‘if there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration or judicial settlement in accordance with Article 13, the Members of the League agreed that they will submit the matter to the Council.’ Nonetheless, if the Council could not reach a decision, paragraph 7 of the same Article allowed Member States to ‘reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.’ In support of this provision, Article 16 stated that if a member of the League resorted to war in disregard of Articles 12, 13 or 15, it was deemed to have committed an act of war against all other members of the League, which were required to subject the aggressor to various sanctions.

¹⁶ The 24 members included the Free French Government during the German occupation of France.

¹⁷ Benes, p. 68.

¹⁸ Brownlie 1963, p. 64.

4.3.2 Self-defence in the League system

The right of self-defence was not explicitly stated in the Covenant. Nonetheless, by requiring Member States to help each other when faced with an external aggression, the Covenant implicitly recognized the right to individual and collective defensive action. We can infer from the wording of Articles 10, 12 and 15 that Member States were allowed to exercise self-defence (individually or collectively) only when faced with an actual external aggression. The system of dispute settlement envisaged by the Covenant purported in itself the objective of avoiding, if possible, preventive or punitive wars. Thus it could be inferred that the self-defence the drafters had in mind was not necessarily the broad privilege of sovereigns to wage wars for the interest of the state.¹⁹

According to Bowett, the reason why no specific reservation of the right of self-defence appeared in the Covenant, was that such specification was regarded as superfluous.²⁰ The legality of self-defence as an exception to the prohibition stipulated in the Covenant was, nevertheless, confirmed by one of the preliminary reports on the Geneva Protocol on the Pacific Settlement of International Disputes:

‘The prohibition affects only aggressive war. It does not, of course, extend to defensive war. The right of legitimate self-defence continues, as it must, to be respected. The State attacked retains complete liberty to resist by all means in its power any acts of aggression of which it might be the victim.’²¹

Self-defence was explicitly recognized as an exception to the restriction of war in the Locarno Treaties, agreements negotiated between several European states in 1925.²² Although the agreements were concluded outside the League system, they were based on the principles laid down in the Covenant. Accordingly, in the Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy, the parties undertook not to invade or attack each other as well as not to resort to war against each other. Three exceptions were stipulated to this undertaking: the right to self-defence, action in pursuance of Article 16 of the Covenant and action resulting from a decision taken by the Assembly or by the Council of the League of Nations or in pursuance of Article 15(7) of the Covenant, provided that in this last event the action was directed against a State which was the first to attack.

The treaty defined self-defence as ‘resistance to a violation of the undertaking’ not to attack, invade or resort to war against each other or resistance to a ‘flagrant breach’ of the

¹⁹ H. Wehberg, *The Outlawry of War* (Washington, Carnegie Endowment for International Peace 1931) pp. 10, 100-103.

²⁰ Bowett 1958, p. 124.

²¹ E. Benes and N. Politis, Report on the Protocol, submitted to the Fifth Assembly (1924), *League of Nations Official Journal* (Special Supp. No. 23) p. 483 (hereafter, Benes-Politis Report). The protocol proposed sanctions against an aggressor state and provided a mechanism for the peaceful settlement of disputes. States had to agree to submit all disputes to the Permanent Court of International Justice, and any state refusing arbitration was to be deemed the aggressor. The protocol was rejected.

²² The Locarno Treaties were seven agreements negotiated at Locarno (Switzerland) in October 1925 and signed in London in December 1925 between Germany, France, Belgium, Britain, Italy, Poland and Czechoslovakia. The particular agreement referred to in this section is the Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy, 16 October 1925 (hereafter, Locarno Pact 1925).

demilitarization provisions of the Treaty of Versailles (Articles 42 and 43), ‘if such breach constitutes an unprovoked act of aggression and by reason of the assembly of armed forces in the demilitarised zone immediate action is necessary.’²³

This definition was not only reflecting the understanding given to self-defence at that time, but it was also mirroring the centuries-old narrow sense of self-defence according to which ‘immediate action was necessary’ in the face of an ongoing or imminent attack.

4.4 State practice in the 1920s and the League’s dispute settlement role

In the 1920s, the League proved to be successful in many dispute settlement cases, although it also registered a few failures, which, however, did not prove to be fatal. One of the successes of the League dispute settlement system was the resolution of the Åland Islands crisis.²⁴

A less successful dispute resolution of the League was the tackling of the 1923 Corfu incident involving the occupation of the Greek island of Corfu by Italian forces under Mussolini.²⁵ Greece referred the matter to the Council and asked for its resolution under Articles 12 and 15 of the Covenant. The solution of the matter was entrusted to the Conference of Ambassadors,²⁶ while the Council had to draft a proposal for settlement. The draft proposal referred the matter to the Permanent Court in The Hague. Meanwhile, Greece had to deposit 50 million lire to be drawn on later, in accordance with the decision of the Court. Greece submitted promptly to the demands, but Italy refused to cooperate declaring that occupation of foreign territory as a measure of peaceful coercion was permitted by international law and that the Council had no right to deal with the question, since Italy had no intention to go to war with Greece, thus peace was not endangered. This view was harshly criticized not only by the League Assembly, but also by other members of the Council.²⁷

²³ Art. 2 Locarno Pact 1925.

²⁴ After Finland’s declaration of independence from Imperial Russia in 1917, dispute arose between Sweden and Finland regarding the Åland Islands, inhabited by a Swedish-speaking population. Sweden considered that the Islands should be part of their country, whereas Finland felt that it was entitled to keep them as they were part of the Grand Duchy of Finland (established by Russia at the beginning of the nineteenth century). To tackle the problem, in 1920, the League set up a commission to analyse the details of the crisis. On the basis of the findings of the appointed commission, the League decided that the Åland Islands would remain part of Finland, because territorial separation was an extreme measure that could not be justified in that case. Nevertheless, the Council considered that the islands had to be governed autonomously, with the League ensuring that the rights and legitimate interests of the inhabitants were not threatened or damaged. Walters, pp. 103-105.

²⁵ The delimitation of the border between Albania and Greece was entrusted to a delimitation commission set up by the League. When one of the members of the commission, Italian General Tellini was assassinated on Greek territory, the Italian Prime-Minister, Benito Mussolini sent a powerful Italian squadron that occupied the Greek island of Corfu. The Italian dictator claimed that such action could not be seen as an act of war, because it was a mere temporary measure to assure the compliance of Greece with the terms stipulated. Walters, pp. 244-246.

²⁶ The Conference of the Ambassadors was a body that was never officially an organ of the League of Nations. The Conference was an executive body of the Allied Powers between 1920 and 1931, but which – because of its composition – was often acting as a *de facto* decision-making body outside the League. It consisted of the ambassadors of France, Great Britain, the United States, Italy, Japan, and, later, Belgium, but its composition varied on the basis of the matter reviewed by the Conference.

²⁷ Walters, pp. 250-251; F. Kalshoven, *Belligerent Reprisals* (Leiden, Martinus Nijhoff 2005) p. 5.

The main issue that surfaced with the Corfu incident was the concept of lawful reprisals. As a result of the criticism for failing to justly solve the Corfu incident, the League Council referred the question of lawful reprisals to a Committee of Jurists. Accordingly, the committee was asked whether measures of coercion which were not intended as acts of war were compatible with the Covenant²⁸ The answer of the committee was quite ambiguous:

‘Coercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant, and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of the measures adopted, whether it should recommend the maintenance or the withdrawal of such measures.’²⁹

The answer of the jurists shows that the outlawry of ‘coercive measures’ was still not generally acknowledged in the first decades of the twentieth century. Despite this, the outrage caused by Italy’s actions showed that many members of the League shared the view that forceful reprisals were incompatible with the Covenant. After the Corfu incident, these types of reprisals gradually disappeared from state practice in the period before the Second World War.³⁰

With armed reprisals increasingly perceived as illegal, state practice was slowly moving towards rendering self-defence the only valid exception to the prohibition to wage war.³¹

Although the 1920s were a tough test for the League’s viability as a negotiator, the signs of its collapse were not yet visible. Moreover, the adoption of the Kellogg-Briand Pact was seen as a strengthening of the restrictions on war.

4.4.1 The drafting of the Kellogg-Briand Pact and the right of self-defence

The Kellogg-Briand Pact was born out of France’s post-war system of alliances, negotiated to maintain the peace of Europe.³² France saw its security and implicitly, the security of Europe, greatly endangered by its former enemy, Germany. Consequently, it sought to obtain reassurances from the other Powers that they would stand together in case of another belligerent move by its neighbour. Between 1920 and 1927, the French government managed to secure alliances with all important states neighbouring Germany (Belgium, Poland and Czechoslovakia) as well as with the Balkans (Romania and Yugoslavia).³³ After securing the amiability of all major neighbours of Germany and of the progressively unfriendly Italy, France attempted to open negotiations with the US. The greatest role in this initiative was played by then foreign minister of France, Aristide

²⁸ Walters, pp. 252-253.

²⁹ League Council meeting of 13 March 1924, *5 League of Nations Official Journal* (No. 4, 1924) p. 524.

³⁰ Brownlie 1963, p. 222; Kalshoven, p. 4.

³¹ Wehberg, pp. 49, 92.

³² R.H. Ferrell, *Peace in Their Time: The Origins of the Kellogg-Briand Pact* (New Haven, Yale University Press 1952) p. 51.

³³ Ferrell, pp. 63-64.

Briand, who was a prominent politician and diplomat, an important French political figure of the interwar period.³⁴

On 6 April 1927, in a statement issued through the Associated Press, Briand proposed to the US government to enter into an agreement never to use war as an instrument of national policy against each other.³⁵ This suggestion was made official in June that year and it took the form of a draft agreement, the first Article of which was to serve as basis for the final version of the Pact.

The American reply came in December 1927, from Frank B. Kellogg, the American Secretary of State, who suggested obtaining ‘the adherence of all the principal powers of the world to a declaration renouncing war as an instrument of national policy.’³⁶ The French replied on 5 January the following year with changing the wording of the proposal. Briand’s formula – condemning war and renouncing it as an instrument of national policy – was altered to a more permissive phrase: ‘to renounce all wars of aggression.’ This suggestion, however, was abandoned as a result of subsequent negotiations and the original wording was kept.³⁷

Although the right of self-defence was not explicitly recognised in the Pact, it was discussed during the pre-Pact negotiations. In the official note of 30 March 1928 sent to the US, the French government made three reservations regarding the content of the would-be treaty. One of them referred to self-defence and stipulated that the renunciation of war would not deprive the signatories of the right to legitimate defence.³⁸

These reservations were answered by Kellogg in his final note of 23 June 1928, after several other powers (Germany, Japan, Italy and Great Britain) received proposals to adhere and copies of the French-American diplomatic correspondence. All powers reacted favourably to the proposal.³⁹ Kellogg’s final note was sent to all would-be signatories and took the form of an interpretative reply to all the comments, reservations and concerns expressed by the French and the other governments.⁴⁰ Kellogg discussed several issues in his note: self-defence, the relationship of the Pact with the Covenant of the League of Nations, with the treaties of Locarno and with treaties of neutrality, the attitude towards a treaty-breaking state as well as the universal applicability of the Pact. Regarding the relationship between the Pact and the Covenant, Kellogg asserted that there was no real inconsistency between the two. Critics suggested that Article I of the Pact only forbade war as an instrument of national policy and it failed to set out the common – Covenant- and Pact-based - limits on the legality of war as an instrument of international policy.⁴¹ In response, Kellogg emphasized that even if the Covenant could be construed as authorizing war in certain circumstances that was a mere authorization

³⁴ On various theories on how Briand got to the idea of proposing an agreement to the US for the renunciation of war, see N.M. Butler, *Across the Busy Years: Recollections and Reflections*, Vol. 2 (New York, Scribner 1939-1940) pp. 202-203.

³⁵ A.C. Watkins, *The Paris Pact: A Textbook for Schools and Colleges* (New York, Harcourt, Brace and Company 1932) p. 16.

³⁶ Watkins, p. 18.

³⁷ D.H. Miller, *The Peace Pact of Paris: A Study of the Briand-Kellogg Treaty* (New York, G.P. Putnam’s Sons 1928) pp.20-21, 45.

³⁸ Watkins, pp. 18-19.

³⁹ *Ibid.*, p. 19. As a result of Great Britain’s proviso, invitations were sent to Canada, The Irish Free State, Australia, New Zealand, South Africa and India.

⁴⁰ *Ibid.*, p. 20.

⁴¹ Dinstein 2005, pp. 84-85.

and not a positive requirement. Hence, in his opinion, there was no inconsistency between the Covenant and the idea of an unqualified renunciation of war.⁴²

According to Watkins, Kellogg's note explained the way the Pact was able to fill the gap in the Covenant: the latter did not undertake entirely to prescribe wars between nations, whereas all wars were renounced in the former.⁴³

Regarding the relationship with the Locarno treaties and with neutrality treaties, Kellogg highlighted that any state that would break those agreements by resorting to war against another party or, respectively, by attacking a neutral state, would simultaneously break the antiwar Pact as well. Thus the parties would be automatically released of any obligations towards that state regarding war.⁴⁴

It is worth to note that, although Kellogg advocated the universal applicability of the Pact, he believed that the entry into force of the agreement could not be conditioned by the adherence of all the nations of the world. In his opinion, the Pact's entry into force among the six main powers (France, Great Britain, Germany, Italy, Japan and the US) would have acted as 'a practical guaranty against a second world war.'⁴⁵

Regarding self-defence, Kellogg's final note served as a hidden article of the Pact. Although his response was meant to explain why there was no stipulation of such right in the draft, Kellogg managed to give a strong characterization of the right, which made the other states believe that it was obvious to consider self-defence as the unnamed, but natural exception to the Pact.

Kellogg started his interpretation by stating that there was nothing in the draft that restricted or impaired in any way the right of self-defence. He went on to say:

'That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defence. If it has a good case, the world will applaud and not condemn its action.'⁴⁶

The American Secretary of State further explained that it was not in the interest of peace that a treaty would stipulate a 'juristic conception' of 'the natural right of self-defence,' since it was 'far too easy for the unscrupulous to mould events to accord with an agreed definition' and because no specific reference to self-defence as an inalienable attribute of sovereignty was necessary or desirable.⁴⁷

What Kellogg coined as the inherent right of the state was the same concept that the drafters of the Covenant and the Locarno Treaties had in their mind: a right of self-defence that could be exercised when a state was faced with an invasion or an attack. This right did not allow defence against dangerously powerful neighbours, suspicious aggrandizement plans of sovereigns or other potential dangers.

⁴² Note of the Government of the United States to the Governments of Australia, Belgium, Canada, Czechoslovakia, France, Germany, Great Britain, India, Irish Free State, Italy, Japan, New Zealand, Poland and South Africa, 23 June 1928, in D.H. Miller, *The Peace Pact of Paris: A Study of the Briand-Kellogg Treaty* (New York, G.P. Putnam's Sons 1928) p. 214 (hereafter, June 23 Note).

⁴³ Watkins, p. 57.

⁴⁴ June 23 Note, in Miller, pp. 214-215.

⁴⁵ *Ibid.*, p. 216.

⁴⁶ *Ibid.*, pp. 213-214.

⁴⁷ *Ibid.*, pp. 214, 216.

The self-defence Kellogg referred to was based on the essence of the narrow, natural-law form of that right, advocated in case of private wars between the fourth and sixteenth centuries and as ‘imperfect wars’ or measures short of war in the seventeenth to nineteenth centuries. Although the status of this right has changed throughout the centuries (from ‘just cause’ for private wars to ‘imperfect wars’ and later measures short of war), its content remained the same and survived into early twentieth-century state practice to be acknowledged as the only legal exception to the prohibition of war.

Moreover, Kellogg’s phrase ‘to defend their territory from attack or invasion’ did not purport any temporal restriction as to the time before or after the attack. It rather evoked the understanding according to which self-defence was allowed when an immediate need for action was present. In Webster’s words, when there was ‘a necessity, present and inevitable.’⁴⁸

4.4.2 The importance of the Kellogg-Briand Pact

The Pact was signed by fifteen states on the 27 August 1928.⁴⁹ The Pact consisted of three articles: two substantive and one procedural. In Article I the contracting parties condemned recourse to war for the solution of international controversies, and renounced it, as an instrument of national policy in their relations with one another. Article II referred to the settlement of disputes and stipulated that the parties agreed that the solution of ‘all disputes or conflicts of whatever nature or of whatever origin,’ which might arise among them, would never be sought except by pacific means. Article III concerned the procedure of further signatures and ratification. There was no explicit mention of compatibility with the Covenant or other treaties, the violation of the treaty or self-defence. For that reason, the final note of Frank Kellogg served as an official basis for the interpretation of the Pact.

The immediate reaction to the Pact was enthusiastic. Contemporary analysts saw it as a strong pledge for the renunciation of war. According to Watkins, the Pact was a ‘direct blow at the institution of war’ also because it allowed only pacific means of settling disputes.⁵⁰ At the 1934 Budapest Conference of the International Law Association, chairman Manley O. Hudson, professor of international law at the Harvard University, named three instruments in the post-war period that were of outstanding significance to international law: the Covenant of The League of Nations, the Statute of the Permanent Court of International Justice and the Kellogg-Briand Pact.⁵¹

The Pact also had its weaknesses. Most significantly, perhaps, the Pact shared the weakness of the Covenant of being too narrowly targeted and only renouncing resort to *war* and not use of armed force in general.⁵² On the positive side, the Kellogg-Briand

⁴⁸ Webster, *BFSP*, p. 1138.

⁴⁹ The initial signatories were France, US, Germany, Great Britain, Canada, Australia, New Zealand, South Africa, Irish Free State, India, Belgium, Japan, Poland, Czechoslovakia and Italy. By August 1932 forty-seven other states signed the Pact, raising the number of parties to a total of sixty-two. At the outbreak of the Second World War, however, the number of the parties to the Pact dropped considerably.

⁵⁰ Watkins, pp. 32-33.

⁵¹ *Briand-Kellogg Pact of Paris (August 27, 1928): Articles of Interpretation as Adopted by the Budapest Conference, 1934, Together with the Report of the Relevant Proceedings* (London, Sweet & Maxwell 1934) p. 13.

⁵² Neff, p. 285.

Pact was the first clear sign of the break-away of legalism from the tenets of the realist balance-of-power system. The fact that the Pact pledged the renunciation of war as an instrument of national policy, a Clausewitzian phrase so much cherished by realism, was the sign that the first firm grounds for a new framework were being laid down. Likewise, the explanations provided by Kellogg in his 23 June Note as to the way the different multilateral treaties (including the Covenant and the Pact) worked together, showed the veritable network of legal instruments established by states to further confirm the objectives of the new framework.

Although the concept of self-defence was not expressly included in the Pact (as it was not addressed in the Hague conventions or the Covenant), the common understanding given to the right echoed the narrow, natural-law understanding of self-defence, applied to the realities of public warfare, according to which ‘immediate action was necessary’⁵³ ‘to defend [...] from attack or invasion.’⁵⁴

4.5 State practice in the 1930s and the collapse of the League of Nations

Although the Kellogg-Briand Pact was received with enthusiasm and was seen as an additional consolidation of the League of Nations, state practice in the 1930s demonstrated the fatal weaknesses of the League system.

Apart from the rise of fascism in Italy and Germany, the political and military weakness of the most active members of the League (France and Britain), rendered its functioning more than difficult. The fact that the US never became a member and that Germany and the USSR shifted to be enemies of the League, rendered the survival chances of the organization minimal. With such weak pillars for a collective security system, the cumbersome decision-making in the League Council turned into an invincible obstacle. The determination of whether a particular use of force constituted an act of aggression or the formulation of a resolution for a dispute had to be the result of a unanimous decision of the League Council. The membership in the League Council changed over time, but it was continuously based on the permanent/non-permanent divide, having the great European powers as its permanent members. With such a structure, unanimity in the difficult cases was impossible to achieve.

The collapse of the League was facilitated by the Council’s inability to tackle three major conflicts: the Japanese invasion of Manchuria (1931-1932), the conflict between Bolivia and Paraguay (1932-1933) and the Italian invasion of Abyssinia in 1935. All three conflicts have been explained and interpreted (by parties and commentators) in terms of aggression and response to aggression.

The conflict between Bolivia and Paraguay involved the Gran Chaco, a vast area separating the two countries. Both governments claimed the whole area and each was in effective control of a small part near its own territory.⁵⁵ Although early skirmishes in the

⁵³ Art. 2 Locarno Pact 1925. See *supra* 4.3.2.

⁵⁴ June 23 Note, in Miller, pp. 213-214.

⁵⁵ As a result of the 1879-1884 war between Bolivia, Peru and Chile, Bolivia lost its narrow strip of coast and became landlocked. The Gran Chaco remained the only route which permitted Bolivia to reach the Atlantic coast through the Río de La Plata estuary. Bolivia and Paraguay several times attempted to agree on a frontier without success. By the late 1920s, both countries maintained several military posts in the disputed region. B.W. Farcau, *The Chaco War: Bolivia and Paraguay, 1932-1935* (Westport, Conn., Praeger 1996) p. 8.

1920s were anesthetized by the League, in 1932 the two parties launched hostilities against each other.⁵⁶ In 1933, the League agreed to dispatch a commission of its own to solve the conflict. After several failures to secure agreement between the two parties, in 1934, the commission returned to Geneva.⁵⁷ Reaching a state of mutual stalemate, the two belligerents finally agreed on a truce in June 1935 and the war was declared over in November the same year. A peace treaty was finally signed in Buenos Aires in July 1938, but the League was no longer formally associated with the proceedings.

Although the concept of self-defence was not invoked by either of the parties, this crisis clearly showed that the members of the League still did not see self-defence as the sole exception to the prohibition of war.

The invasion of Manchuria and that of Ethiopia were specifically linked to the concept of self-defence by one or the other party. Nonetheless, in both cases, the self-defence invoked lacked the elements of the right understood in its narrow (natural-law) sense.

4.5.1 The invasion of Manchuria by Japan (1931-1932)

According to Walter, the Japanese occupation of Manchuria was a turning point in the history of the League and of the world.⁵⁸

On the night of 18 September 1931, the Japanese Quantung Army, which was policing the South Manchurian Railway, alleged that a small group of Chinese soldiers blew up a few meters of the railway track near Mukden (a city in the south of Manchuria, now Shenyang) and used the event as an excuse to seize the arsenal of the city and occupy it by morning the following day.⁵⁹

After the incident of 18 September, some attempts were made to reach an agreement between China and Japan regarding Manchuria. However, national sentiments ran high on both sides and the talks subsequently failed. China referred the matter to the League Council pursuant to Articles 10, 11 and 15 of the Covenant.⁶⁰ Japan continued its campaign and in the remainder of 1931 occupied the entire region of Manchuria. In 1932 Chinese regulars and guerrillas strengthened their resistance, causing the spread of the conflict beyond the region, to Shanghai (January-March 1932) and to Jehol (March 1933) as well as other areas of China. In May 1933 an armistice agreement was concluded.⁶¹ Before the League, Japan declared that there was no military occupation and that there were no warlike intentions. Indeed, neither China nor Japan declared the existence of a

⁵⁶ Walters, pp. 527, 531-532.

⁵⁷ Ibid., pp. 532-533.

⁵⁸ Ibid., p. 465.

⁵⁹ J.T. Shotwell and M. Salvin, *Lessons on Security and Disarmament: From the History of the League of Nations* (New York, King's Crown Press 1949) p. 81; Brownlie 1963, p. 385. Manchuria is a historical name given to a vast geographic region in northeast Asia. The part belonging to China is known as Inner Manchuria, while the sector belonging to Russian territory, Outer Manchuria. Nowadays, Manchuria denotes the region commonly referred to as Northeast China, while up to the beginning of the twentieth century it was also referred as Quantung. The region of Jehol (to the south-west) is by some considered as part of Manchuria. The region occupied by Japan in 1931-1933 was Inner Manchuria, with its three provinces of Heilongjiang, Jilin and Liaoning.

⁶⁰ Walters, pp. 468-469; Brownlie 1963, p. 386.

⁶¹ Brownlie 1963, pp. 385-386.

state of war between 1931 and 1933. Moreover, Japan justified its action as, *inter alia*, 'defence of rights and interests on which her very existence depends.'⁶²

Japan stipulated that it had no territorial desires and that most of the troops had already been withdrawn, while the rest would be evacuated as soon as Japanese citizens and property in Manchuria were no longer endangered. But as the situation in Manchuria grew worse, the Council started to doubt the assurances given by Japan. Faced with criticism for its actions, the Japanese government put forward another explanation, according to which China breached the Kellogg-Briand Pact by boycotting Japanese goods throughout its territory and thus Japan was entitled to take forcible counter-action.⁶³

Negotiations overseen by the Council and the United States started in October 1931, but failed to reach an agreement. The military situation grew worse with the Japanese army marching further into Chinese territory on the pretext of rescuing its own nationals in Tientsin, south to Manchuria.⁶⁴

The Council was wary in accepting such justifications and it repeatedly stated that the Covenant did not authorize states to seek redress by other than peaceful means. Eventually, the Council rejected the pretext of self-defence or rescuing nationals and deemed Japanese military action illegal. But such verdict came too late to prevent the invasion and occupation of a considerable part of China.⁶⁵

The now famous report of the Lytton Commission was published in September 1932 and it served as an authoritative record of facts. As a verdict, the Lytton Report was a substantial endorsement of the Chinese case. The report clearly stated that the actions of the Japanese army after the Mukden incident could not be viewed as legitimate self-defence and hinted that the Japanese military campaign was planned beforehand.⁶⁶ Moreover, the report concluded that the newly formed state was not the result of a genuine independence movement and therefore the re-establishment of Chinese sovereignty over Manchuria was recommended.⁶⁷

As a response, Japan reiterated its argument of self-defence against a disorganized and civil war-torn China and rejected the recommendations of the Lytton Report. Following a statement adopted by the Assembly of the League in February 1933, which endorsed the findings and recommendations of the Lytton Report, on 27 March, Japan announced its withdrawal from the League.⁶⁸ Despite the resounding appraisal of the Lytton Report, the prestige of the League suffered a great deal because of the Manchurian incident and its aftermath.

The claim of self-defence invoked by Japan was far from meeting the requirements of the narrow, natural-law concept. Japan failed to demonstrate the existence of an immediate need for action against an imminent or prepared attack, let alone an attack in progress. The disturbances caused by the Chinese soldiers in Manchuria could have never amounted to a danger that created an immediate need for action. Moreover, the full-scale invasion of Manchuria could not be seen as a moderate response to the turbulence.

⁶² League Council meeting, 25 January 1932, 13 *League of Nations Official Journal* (No. 3, 1932) p. 332.

⁶³ Walters, pp. 473-475.

⁶⁴ *Ibid.*, pp. 475, 479-480.

⁶⁵ Brownlie 1963, pp. 294-295.

⁶⁶ Walters, p. 491; Brownlie 1963, p. 294; Shotwell and Salvin, p. 88.

⁶⁷ Walters, p. 492; Shotwell and Salvin, p. 88.

⁶⁸ Walters, p. 495.

Although the Lytton Report eventually condemned the actions of Japan, the illegality of its actions had been visible from the beginning.

4.5.2 The Italian invasion of Ethiopia (1935-1936)

Admitted to the League in 1923 and under the rule of Hailie Selassie from 1928, Ethiopia was bordered on north and south by Italian colonies. The ancient kingdom had made considerable progress under the rule of Hailie Selassie, but still lacked full control over its territory, especially regarding tribes in frontier regions.⁶⁹

According to the memoirs of his General, Emilio de Bono, Italian dictator Mussolini began planning an attack on the country as early as 1933, but a pretext was needed to launch hostilities.⁷⁰ Such excuse finally presented itself on 5 December 1934, in the form of clashes in the disputed area between Italian Somaliland and the Ogaden province inhabited by Ethiopian tribes. The direct clash between the armed forces of the two states was of insignificant proportions, but Mussolini saw it as a unique chance to put his plan into action. The Italian government promptly reacted to the clashes, claiming that it was forced by Ethiopian hostility to exercise legitimate self-defence and, simultaneously, to spread civilization among the Ethiopians.⁷¹

Hailie Selassie duly referred the matter to the Council of the League, submitting it for arbitration and pledging to accept whatever outcome of it. Action on behalf of the Council was delayed because France and Britain hoped to solve the matter with Italy alone.⁷² Meanwhile, Italian preparations for the invasion of Ethiopia continued, although the official discourse was excluding any military intervention. This attitude changed in the spring of 1935 and Italy started to refer to it as a 'colonial war' in defence of its territories, a war that was manifestly distinguished from any form of aggression. The proposals of the League for peaceful solutions were quickly thrown away by no others than France and Britain, who wished to solve the conflict through secret negotiations with Italy.⁷³

By June 1935 it became clear that Italy was massively arming itself. The League Council met again in September 1935 and drafted a plan of international assistance to Ethiopia which was, however, rejected by Italy.⁷⁴ The Italian government claimed that Ethiopia failed to respect its obligations under various treaties, that it had committed a long series of outrages against Italian diplomats and that, in fact, it was incapable of being a true member of the League, because Ethiopia was not an organized state at all and because it did not succeed in abolishing slavery as promised at the entrance in the League. On this basis, Italy once again reiterated its right to defend its own colonies and claimed that it was defending the prestige and good name of the League of Nations.⁷⁵

With the Council not being able to stop the unfolding of the events, the Italian offensive began on 3 October 1935. Although the League imposed sanctions against

⁶⁹ Shotwell and Salvin, p. 92.

⁷⁰ E. de Bono, *Anno XIII: The Conquest of an Empire* (London, Cresset Press 1937) pp. 13-14.

⁷¹ Walters, p. 625.

⁷² The reason of French and British reluctance to refer the matter to the Council was their fear to upset Mussolini, who was believed to be willing to hold back rising Nazi aggressiveness. Walters, pp. 627-629.

⁷³ *Ibid.*, pp. 634-635, 638-639.

⁷⁴ Shotwell and Salvin, p. 95.

⁷⁵ Walters, pp. 642-644.

Italy, the French Prime Minister Pierre Laval and the British Chancellor Sir Samuel Hoare secretly decided not to employ such sanctions, allowing this way Mussolini to carry out his plans in Eastern Africa. This infamous accord was to be known as the Hoare-Laval Plan and although it never entered into force, the two dignitaries had to resign when information leaked to the media.⁷⁶

In January 1936 it became evident that Italian forces used chemical weapons (mustard gas) and flame throwers to disperse Ethiopian forces. Addis Ababa was captured in May 1936 and the Abyssinian emperor forced to flee. Although the League condemned the action of Italy as unlawful aggression and although it denied its right to attack Ethiopia on the basis of legitimate defence, the Council's paralysis – as a consequence of the attitude of France and Britain – permanently damaged the reputation and functioning of the organization.

As with the Japanese invasion of Manchuria, the Italian claim of self-defence against Ethiopia was far from meeting the requirements of the narrow, natural-law concept of self-defence. There was no evidence of an attack, imminent or in preparation. The clashes that occurred in the disputed area were far from qualifying as an attack that created an immediate need for action or, in Webster's words, 'a necessity, present and inevitable.'⁷⁷ Moreover, the full-scale invasion of Ethiopia and the use of chemical weapons could hardly be justified as a moderate use of self-defence.

It is important to conclude at this point that the narrow, natural-law concept of self-defence maintained its validity in the League system of prohibition of war. Both public official and legal publicists characterized self-defence as the only exception to the prohibition of war. State practice was slower in accepting this restriction. As the Corfu incident and the Chaco War showed, other forms of the use of force, remnants of the nineteenth century measures short of war, were still employed by states. Nonetheless, there were other instances of state practice which showed that the use of force was condemned for not meeting the requirement of self-defence. Accordingly, both the Japanese invasion of Manchuria and the Italian invasion of Ethiopia were condemned for not meeting the requirements of a moderate exercise of self-defence to ward off an attack in a situation of 'present and inevitable' necessity. These instances of state practice can be corroborated with statements of officials (such as the informative note of Kellogg), certain multilateral agreements (such as Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy) and legal literature that made explicit reference to self-defence and which are reflecting *opinio juris* of that time.⁷⁸

4.6 The Second World War

With Hitler remilitarizing the Rhineland and Mussolini rallying to the German dictator's side, the days of the League were numbered and the Second World War was looming over Europe. With the German invasion of Poland in 1939, the second global war of the twentieth century started and was to last for six years.

⁷⁶ Shotwell and Salvin, p. 100.

⁷⁷ Webster, *BFSP*, p. 1138.

⁷⁸ June 23 Note, in Miller, pp. 213-214; Art. 2 Locarno Pact 1925. See *supra* 4.3.2; Oppenheim, Vol. 1, pp. 178-179.

After invading Poland, the German government sent a solemn assurance to Norway in which it promised ‘under no circumstances to prejudice’ its inviolability and integrity, as well as to respect its territory, as long as Norway ‘will observe an unimpeachable neutrality towards the Reich’ and will not tolerate any breaches of its neutrality by any third party.⁷⁹ Despite its promise, in April 1940, Germany invaded Norway. The invasion was characterized by Germany as a measure of preventing Britain and France from occupying Norway and using it as a basis for further military operations. The justification on the basis of self-defence was brought before the Nuremberg Tribunal in 1946. The case will be discussed in detail in Part II of this book.

An instance of wartime state practice that deserves attention at this point is the British attack on the French naval fleet in July 1940. *Operation Catapult* – as it was named – was an attempt to ensure that the German forces would not make use of French war vessels.⁸⁰

– *Operation Catapult* (1940)

In June 1940, Great Britain found herself in a precarious strategic position. France was steps away from an armistice, while Italy had just announced its participation in the war alongside Germany. Britain had suddenly found herself standing alone against the Third Reich.⁸¹

The terms of the German-French Armistice Agreement caused serious concerns to the British. In particular, Article 8 of the Agreement stipulated that all French vessels outside territorial waters were to immediately return to France. Britain was worried that the French vessels stationed in the Mediterranean could this way very easily come within the grasp of the German forces.⁸²

British Prime Minister Winston Churchill ordered substantial reinforcements to the British fleet stationed in the Mediterranean, but this manoeuvre could not entirely solve the problem. At that time, the French fleet was acknowledged as the world’s fourth largest navy. If Germany and Italy were allowed to make use of the fleet in addition to their existing naval force, Britain would be faced with an overwhelming threat that was impossible to meet.⁸³ Not only would Britain be isolated from the vital Atlantic supply routes and from its empire, but also the waters around it would become an open avenue for a German invasion force.⁸⁴

Churchill resorted to diplomacy at first, but the French government refused to order its ships to sail to British ports. Negotiations failed and Churchill decided that a pre-

⁷⁹ Office of the United States Chief of Counsel for the Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression: Opinion and Judgment* (Washington, D.C., US Government Printing Office 1947) p. 34 (hereafter, *Nazi Conspiracy and Aggression*).

⁸⁰ For a review of Anglo-French relations between 1940-1942 and *Operation Catapult*, see W. Tute, *The Reluctant Enemies: The Story of the Last War between Britain and France, 1940-1942* (London, Collins 1989).

⁸¹ P. Lasterle, ‘Could Admiral Gensoul Have Averted the Tragedy of Mers el-Kébir?’, 67 *Journal of Military History* (2003) pp. 837-838.

⁸² R.J. Brown, ‘Operation Catapult: Naval Destruction at Mers-el-Kebir’, *World War II* (September 1997), available at <www.historynet.com/operation-catapult-naval-destruction-at-mers-el-kebir.htm> (accessed 2 February 2010); Lasterle, p. 837.

⁸³ Brown 1997.

⁸⁴ *Ibid.*

emptive use of force was needed to protect Britain from the danger that Axis possession of the French vessels threatened. This danger had to be overcome as soon as possible in order for the British warships now shadowing the French to be released for operations elsewhere. Churchill set 3 July as the day on which all French naval warships within Britain's grasp would either be seized or destroyed.⁸⁵

In choosing primary targets, the planners were not concerned with the French ships that had taken refuge in home ports, such as those stationed at Casablanca, Dakar or Alexandria. The real concern of the British War Cabinet was the concentration of French ships at Mers-el-Kebir, near Oran in Algeria, where the strongest concentration of French ships was anchored. The force included two older battleships (*Bretagne* and *Provence*), six destroyers, one seaplane carrier and two modern battle cruisers, (*Dunkerque* and *Strasbourg*). The War Cabinet was especially worried about the latter two; these battle cruisers were two of the most modern ships afloat at that time, they were both more powerful than the German battle cruisers and faster than the British (except the battle cruiser *Hood*).⁸⁶

On 3 July 1940, the British first seized the French naval vessels in the British ports. This operation also confirmed the necessity of the take-over, because the same seizure could have been accomplished by the Germans as well.⁸⁷ The same course of action was followed with the French vessels located in Alexandria and the West Indies. When it came to the French fleet at Mers-el-Kebir, the operation took another turn. The British offered an ultimatum to the French naval commander, Admiral Gensoul, that included four alternatives: have the French fleet join the British Royal Navy, take the fleet to British ports, take the fleet to a French West Indian or a US port, or sink the fleet in the harbour. If none of these options were accepted within three hours, the British admiral on the scene would be instructed to sink the French fleet by naval gunfire.⁸⁸ Tense negotiations followed throughout the day, with the British naval commander, Vice Admiral Somerville trying to secure a peaceful resolution of the situation. Admiral Gensoul, however, refused to accept the ultimatum.⁸⁹ At 5:30 in the afternoon, the British naval force opened fire on the French fleet. Most of the vessels were either destroyed or sank, while a small group managed to escape and harbour at Toulon. Some 1300 French sailors died and other 340 were wounded in the attack.⁹⁰

Although there was no conclusive evidence of a clear German intention to take control of the French fleet, once returned to their French ports, the vessels could have been boarded and seized by German forces at any time and the British could have done nothing about it.⁹¹ In Lasterle's words, if that scenario took place, Britain would have been 'doomed'.⁹² The present and inevitable necessity perceived by Churchill's War Cabinet was thus based on an inference, made in good faith, that the only way such a

⁸⁵ *Battle Summary No. 1: Operations against the French Fleet at Mers-el-Kebir, 3 - 6 July 1940*, HMS Hood Reference Materials, Doc. AIR 234/317, available at <www.hmshood.org.uk/reference/official/adm234/adm234-317.htm> (accessed 2 February 2010) (hereafter, *Battle Summary No. 1*).

⁸⁶ Brown 1997; *Battle Summary No. 1*.

⁸⁷ Gill 2007, p. 132.

⁸⁸ Brown 1997; *Battle Summary No. 1*; Lasterle, p. 836.

⁸⁹ Lasterle, pp. 840-843.

⁹⁰ Gill 2007, p. 132; Lasterle, p. 843.

⁹¹ Gill 2007, p. 134; Lasterle, p. 838.

⁹² Lasterle, p. 838.

disaster could be avoided was to either place the French fleet under British control or destroy it. Although sinking the French ships was the last-resort option of the operation, the unsuccessful negotiations between Somerville and Gensoul led to the destruction of the French fleet stationed at Mers-el-Kebir.⁹³

According to some authors, the Second World War was not a true war; it was rather an instance of aggression-and-self-defence, on the most spectacular scale.⁹⁴ As a consequence of the state of ‘total war’, all military, industrial and economic capacities were put at the service of the war objectives. That led to a total exhaustion of both military and civilian resources and after six years, the participants were left in a state of complete economic and social exhaustion.

4.7 Concluding remarks

The aim of this chapter was to assess whether the temporal dimension and elements of self-defence acknowledged in the Christian natural-law and the positivist normative frameworks were altered during the emerging system of modern international law of the late nineteenth and early twentieth centuries. Such an assessment was intended to deduce whether anticipatory action was still part of the contemporaneous understanding of self-defence, and if yes, under what conditions.

The end of the nineteenth and the beginning of the twentieth centuries saw the emergence of a new normative framework that moved towards the prohibition of aggressive war. Notwithstanding the ambiguities surrounding the specific object of this prohibition, there was a clear trend towards invalidating the absolute right of war that dominated the seventeenth- to nineteenth-century Western tradition. Within this framework, self-defence was given a privileged place: it was to be viewed as the only exception to war as an instrument of national policy. Most of the ground-breaking treaties, however, shied away from stipulating (let alone defining) self-defence as an explicit exception. In order to discern what the content and temporal dimension of this right was, the legal-historical analysis of this chapter corroborated information from diplomatic notes, regional treaties, reactions to instances of state practice and legal literature.⁹⁵

On the basis of this corroborating exercise, it is the conclusion of this chapter that the concept of self-defence, accepted as a customary rule in the emerging international law framework, retained its narrow, natural-law understanding (applied to the realities of interstate conflict) that was apparent in the previous two normative frameworks identified. Accordingly, self-defence was seen as giving rise to an immediate need for armed action to defend the state from an attack or invasion. Such armed action had to be undertaken with moderation and not go beyond the warding off of the attack. That interpretation did not restrict the temporal dimension of self-defence to a specific time; it

⁹³ Gill 2007, p. 132. *Per a contrario*, Lasterle asserts that ‘the die was already cast’ on the morning of 3 July 1940, when Churchill decided that the French fleet at Mers-el-Kebir had to be destroyed. Lasterle, p. 844.

⁹⁴ Neff, p. 313.

⁹⁵ June 23 Note, in Miller, pp. 213-214; Art. 2 Locarno Pact 1925. See *supra* 4.3.2; Benes-Politis Report, p. 483; Oppenheim, Vol. 1, pp. 178-179.

rather reiterated the present and inevitable necessity that the Webster-formula rendered as a primary condition for the exercise of self-defence. The negative reaction to the scale of the Japanese and Italian armed actions against Manchuria and Ethiopia, respectively, also showed that moderation was still viewed as a necessary condition of self-defence.

Consequently, the requirements of present and inevitable necessity and due moderation (proportionality) can be viewed as the elements that limited the exercise of self-defence at the beginning of the twentieth century, regardless of the anticipatory or remedial nature of the defensive action. Chapter 5 will examine whether this understanding was the one taken in consideration at the adoption of the UN Charter.