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

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6 The temporal dimension of self-defence at the time of the Charter

The objective of Part I was 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 was necessary to understand how the content and temporal dimension of self-defence was viewed in 1945. On that basis, Part I had to assess whether anticipatory action was part of self-defence at that time and, if yes, under what conditions.

The concept of self-defence was traced through different historical phases and three succeeding frameworks that regulated war: the Christian natural law, the positivist and the emerging international law frameworks. In each of these frameworks, the concept of self-defence was identified and explained on the basis of available works and relevant state practice. In this process, the source, the forms, the temporal dimension and the limits of self-defence were addressed. Moreover, the analysis aimed at identifying those traits of the concept, which had been transferred from one framework to another.

The findings of Part I will be employed as basis for the analysis of post-Charter state practice regarding self-defence. In order to do that, the most important conclusions will be herewith summarized.

6.1 A right based on natural law

From the ancient Greek conception of natural law onwards, self-defence was viewed as a right given by nature. Accordingly, each human being had the right to preserve his or her own life and had the moral duty to defend others from wrong.¹ Even though the early Christians (such as Augustine) believed that an individual was not allowed to defend himself (because that showed dependence on earthly things), starting with Thomas Aquinas, theologians and philosophers asserted that self-defence was every human being's natural right.² On this basis, not only individuals had the right to self-defence, but also sovereigns were entitled (if not obliged) to defend the homeland.³ For centuries, self-defence was thus viewed as an inherent right, originating from the law of nature.

6.2 The content of the natural right of self-defence

As a right given by nature, self-defence was viewed as the prerogative of every individual and every sovereign.⁴ On the basis of this right, individuals were allowed to wage 'particular wars' or 'private wars' in self-defence. This view was upheld by thinkers such as Thomas Aquinas, Gratian, Christine de Pisan, Francisco de Vitoria, Francisco Suárez,

¹ See *supra* 2.1. Cicero, *De Officiis*, Bk. I, ch. 11, section 35, p. 37.

² Augustine, *The Problem of Free Choice*, Bk. I, 5.12, pp. 44-45; Peñafort, § 18, in Reichberg et al., pp. 138-139; Aquinas, question 40, article 1, in Reichberg et al., pp. 179-180; Vitoria, *De jure belli*, p. 299; Gentili, Bk. I, ch. 13, p. 59; Grotius, Bk. II, ch. 1 (iii), p. 172.

³ Aquinas, question 40, article 1, in Reichberg et al., p. 177; Vitoria, *De jure belli*, p. 300; Suárez, Disputation XIII, § 1 (4), pp. 802-803; Grotius, Bk. II, ch. 2 (xvi), p. 184.

⁴ Augustine, *The Problem of Free Choice*, Bk. I, 5.12, pp. 44-45; Peñafort, § 18, in Reichberg et al., pp. 138-139; Aquinas, question 40, article 1, in Reichberg et al., pp. 179-180; Vitoria, *De jure belli*, p. 299; Gentili, Bk. I, ch. 13, p. 59; Grotius, Bk. II, ch. 1 (iii), p. 172.

Alberico Gentili and Hugo Grotius.⁵ They all agreed that it was the natural right of the individual to defend himself and his property against an attack and to wage ‘war’ for that purpose. Such defence did not necessitate the permission of a public authority, because the right itself was viewed as natural.

The natural right of self-defence took up different roles in the normative frameworks examined, though its essential elements remained the same. In the Christian natural-law framework, the right of self-defence was one of the causes permitting private war. Certainly, the right of self-defence also pertained to public wars, but it was only one ‘just cause’ of many that permitted armed action. In the positivist normative framework, the natural right of self-defence was still recognized as a legal basis for private wars, although their justifiability was decreasing. Self-defence also took the form of ‘imperfect war’ or ‘measure short of war’ as legal justification for using force outside a ‘perfect’, officially declared war. In the international law framework, the natural right of self-defence was increasingly viewed as the only legal exception to the emerging prohibition of war.

Although its status changed throughout these frameworks, the concept of self-defence that was regarded legal at the time of the adoption of the Charter was that natural right which permitted private wars, ‘imperfect wars’ or measures short of war in self-defence.

6.3 Preventive wars

Besides the natural right to defend the homeland against invasion or attack, the sovereign also enjoyed a broader privilege: he could resort to war to defend the official religion or the more important interests of the state. The justifiability of such wars was based on the constructed interests and priorities of the king, emperor or leader. For that reason, this prerogative is more accurately described as preventive war and not as ‘self-defence’. According to such understanding of defence, war could be waged against expansionist neighbours (Peloponnesian War), against enemies of the religion (crusades, holy wars) and against any country that jeopardised the vital interests of the state (Gentili, Vattel and Clausewitz).⁶ By the time the Charter was adopted, the right to wage unilateral preventive wars was superseded by the prohibition of war.

6.4 The temporal dimension of the natural right to self-defence

In the temporal sense, the natural right of ‘blameless defence’ pertained to three moments: before, during and after the attack. Individuals could exercise self-defence against an ongoing or an imminent attack. They could also defend themselves after an attack took place, but only if the purpose of such action was to fend off a future attack.⁷

⁵ Aquinas, question 40, article 1, and question 41, article 1, in Reichberg et al., p. 177 and pp. 182-183, respectively.

⁶ Thucydides, *The Peloponnesian War*, Bk. I, ch. 71, in R.T. Strassler, ed., *The Landmark Thucydides* (New York, Touchstone 1998) pp. 40-41; Gratian, question V, canon 46, in Reichberg et al., p. 119; Gentili, Bk. I, ch. 14, p. 62; Pufendorf 1934, Bk. VIII, ch. 6 (7), p. 1298; Vattel, Bk. III, ch. 3, § 42, p. 248; Twiss, Vol. 1, pp. 11-12.

⁷ Gratian, question I, in Reichberg et al., p. 110; Pisan, Part III, ch. 12, in Reichberg et al., p. 219.

The temporal dimension of self-defence was thus often used to differentiate it from reprisals.⁸ Reprisals had as their objective redress of injuries, the punishment of the enemy and the requisition of lost property. They were used only after the specific injury had been inflicted, so they had an inherently reactive nature. Self-defence, on the other hand, always had an intrinsic anticipatory aspect.

When this narrow understanding of self-defence was transferred to ‘imperfect wars’ and ‘measures short of war’, the temporal limits were interpreted slightly more permissibly to correspond to the realities of public warfare. Accordingly, whereas self-defence of individuals was always an on-the-spot action, self-defence of states also allowed the preparation needed for organizing the armed forces.⁹ Nonetheless, even with the more permissive interpretation, the self-defence states could exercise as measures short of war only allowed action against ongoing attacks or attacks that were imminent or in preparation.¹⁰

6.5 The temporal dimension of preventive wars

‘Perfect’ – officially declared – wars waged by sovereigns for defensive purposes had a much broader scope than the defensive action allowed for ‘imperfect wars’ or ‘measures short of war’. A ‘just cause’ that allowed full-fledged military action could be punitive or defensive. Punitive war was waged for the punishment of the enemy, the redress of injury or for other reasons. Defensive war could also be waged for many reasons, including the prevention of ‘probable and possible dangers.’¹¹ The threat that justified preventive war only had to be possible, but not necessarily meditated or prepared (Gentili).¹² This view was specifically upheld in the period when sovereigns enjoyed an absolute right to wage war. The suspicious aggrandizement of a state or the arguably non-peaceful intentions of a neighbour could be interpreted as possible dangers that justified preventive war.

The broader understanding of defensive wars was gradually deemed unlawful in the emerging international law framework of the late nineteenth and early twentieth centuries. In contrast, the narrow understanding of self-defence survived as a customary rule and was increasingly viewed as the only lawful exception to the prohibition of war in that period.

6.6 Limits of the natural right of self-defence

In all three normative frameworks the same recognizable pattern of elements of self-defence could be contoured. First, self-defence always entailed the existence (occurrence or expectation) of an *attack*. Secondly, this attack (its occurrence or its imminence) had to give rise to an *immediate need to take action*. Thirdly, the exercise of self-defence had to be *moderate*. The first two elements are intrinsically linked to each other and can be

⁸ Peñafort, § 18, in Reichberg et al., p. 133; Vitoria, pp. 297, 303; Suárez, Disputation XIII, § 1 (6), p. 804; Grotius, Bk. II, ch. 1 (ii), p. 172.

⁹ See the differentiation made by Grotius regarding private and public defensive wars. Grotius, Bk. II, ch. 2 (xvi), p. 184.

¹⁰ Grotius, Bk. II, ch. 2 (xvi), p. 184. Hall, pp. 229, 232. See also *supra* 3.3.

¹¹ Gentili, Bk. I, ch. 14, p. 66; Vattel, Bk. III, ch. 3, § 42, p. 248; Pufendorf 1934, Bk. VIII, ch. 6 (7), p. 1298.

¹² Gentili, Bk. I, ch. 14, p. 62.

treated under the general heading of ‘necessity’. The third condition pertains to the modality of the exercise of self-defence and can be treated under the heading of ‘moderation’ or ‘proportionality’.

6.6.1 Necessity

None of the three normative frameworks identified entailed a precise definition of what sort of attack could justify self-defence. In case of individuals it was accepted that both the life and the property of private persons could be defended.¹³ In case of sovereigns, reference was usually made to an ‘attack’,¹⁴ ‘danger’,¹⁵ or ‘invasion’,¹⁶ without laying down the specific conditions. Nonetheless, it was generally understood that for the narrow understanding of self-defence such attack had to involve the use of armed force.¹⁷ Since the narrow understanding of self-defence was relevant for ‘imperfect wars’ and measures short of war, it was generally accepted that also small scale uses of force could trigger self-defence. Neither the *Caroline* incident nor the *Virginus* affair entailed large-scale uses of force.¹⁸ The very rationale of measures short of war was to tackle conflicts that did not necessitate the launching of a full-scale war.¹⁹ Consequently, there was no common understanding of what such attack had to endanger; the territory, the independence, the government of the state as well as its nationals could all be the object of such an attack.²⁰ Moreover, self-defence could be invoked against forces other than official; such as private armed groups or rebels. In both the Christian natural-law and the positivist normative frameworks, individuals were allowed to defend themselves against any attacker and that liberty was also given to the state. The *Caroline* incident is an illustrative example in this respect.²¹ Article 51 of the Charter employed the term ‘armed attack’ to describe this condition. Nonetheless, no definition of the term was provided by the drafters.

It was nevertheless clear that the occurrence or imminence of such an attack had to create an immediate need for action. In Webster’s words, this necessity had to be present and inevitable.²² The immediacy element of necessity was reiterated by public officials and publicists of the late nineteenth and early twentieth centuries and was mentioned – in various forms – by the delegates at the San Francisco conference.²³

¹³ Vitoria, *De jure belli*; Grotius, Bk. II, ch. 1 (xi), p. 179.

¹⁴ Gratian, question II, canon 1, in Reichberg et al., p. 113; Grotius, Bk. II, ch. 1 (iii), p. 172 (attack by violence) and ch. 2 (xvi), p. 184 (act of violence); June 23 Note, in Miller, pp. 213-214.

¹⁵ Gentili, Bk. I, ch. 14, p. 62.

¹⁶ June 23 Note, in Miller, pp. 213-214.

¹⁷ Gentili, Bk. I, ch. 13, p.58; Grotius, Bk. II, ch. 1 (iii), p. 172; Webster, *BFSP*, p. 1138; June 23 Note, in Miller, pp. 213-214.

¹⁸ See *supra* 3.2.2.1 and 3.2.2.2.

¹⁹ For instance, see Hall’s treatment of such measures: Hall, pp. 306-314.

²⁰ The *Caroline* incident and the *Virginus* affair involved private citizens and property (see *supra* 3.2.2.1 and 3.2.2.2). The Japanese invasion of Manchuria and the Italian invasion of Ethiopia endangered the territorial integrity and political independence of the occupied states (see *supra* 4.5.1 and 4.5.2).

²¹ See *supra* 3.2.2.1.

²² Webster, *BFSP*, p. 1138.

²³ June 23 Note, in Miller, pp. 213-214; Art. 2 Locarno Pact 1925; Oppenheim, Vol. 1, pp. 178-179. See also *supra* 5.4.

6.6.2 Proportionality

Medieval Christian doctrine recognized the principle of '*moderatio*', according to which one was supposed to act only for fending off the attack and was not allowed to exceed the limits of 'blameless defence' (Decretists, Aquinas).²⁴ The principle of moderation was acknowledged by Grotius as well.²⁵ With the dawn of the absolute right of war of sovereigns, the focus shifted from the causes to wage war to the modality of warfare. Hence, the principle of moderation (proportionality) received more attention and was connected not only to the right of self-defence, but also to other forms of military action.²⁶ Nonetheless, its importance for the right of self-defence could be discerned in all three normative frameworks. Stemming from its meaning relevant for private self-defence, proportionality in public defensive actions limited the use of force to what was required to ward off an attack.²⁷

6.7 The status and limits of anticipatory action in self-defence

Three layers of focus have been employed in Part I. First, the temporal dimension of self-defence was examined. Secondly, the status of anticipatory action within that spectrum was given attention. Thirdly, a recognizable pattern of limits of anticipatory action was demarcated.

Regarding the temporal dimension of self-defence, it was shown that it always pertained to the time before and during the attack and, under certain conditions, to the time after the attack. There was no separate right of 'anticipatory self-defence'. Self-defence always had an intrinsic anticipatory aspect. Consequently, the elements of self-defence *per se* were automatically limiting the exercise of anticipatory action. These limits have been identified as: the existence of an attack, the immediate need for action and moderation. This pattern of limitation could be recognized through all three normative frameworks discussed. As all three frameworks had a certain international characteristic, with the emergence of modern international law in the late nineteenth century, these limits were accepted as customary rules among states.²⁸

With the broader understanding of 'defensive' wars gradually restricted, the only understanding of self-defence that could play a role in the minds of the Charter negotiators was the customary rule of the natural-law self-defence described above. This natural-law understanding of the right always had an anticipatory aspect and it was limited by the requirements of necessity (attack and immediate need for action) and proportionality (moderation).

Part II will examine whether post-Charter state practice has altered the centuries old understanding given to the natural right of self-defence. In order to do that, the analysis in

²⁴ Peñafort, § 18, in Reichberg et al., pp. 138-139; Aquinas, question 41, article 1, in Reichberg et al., pp. 182-183.

²⁵ See *supra* 2.3.3.1.

²⁶ See the different sections on moderation in Grotius, Bk. III, ch. 11, p. 722-744, ch. 12, p. 745-756, ch. 13, p. 757-760, ch. 14, p. 761-769, ch. 15, p. 770-777. See also *supra* 2.3.3.1; Vattel, Bk. III, chs. 8-13, pp. 279-312; Twiss, Vol. 2, pp. 17-18. See also Roberts, pp. 938-939.

²⁷ See also Gardam 1993, pp. 394-397.

²⁸ For an elaboration on the 'international' characteristics of the normative frameworks, see 2.4, 3.3 and 4.7.

Part II will have to assess whether post-Charter developments have brought about the emergence of a new customary rule on self-defence that has affected the pre-Charter understanding of that right. On that basis, it will be examined whether the status and limits of anticipatory action have been altered by the new developments.