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

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Part II - Post-Charter Customary Law on Self-Defence

'[s]elf-defence is (...) action whereby "defensive" use of force is opposed to an "offensive" use of comparable force, with the object – and this is the core of the matter – of preventing another's wrongful action from proceeding, succeeding and achieving its purpose.'

(Roberto Ago)

The aim of Part II is to analyse the development of post-Charter customary law on self-defence. It was the conclusion of Part I that the pre-Charter, natural-law concept of self-defence always had an anticipatory aspect and it was limited by the requirements of necessity (attack and immediate need for action) and proportionality (moderation).¹ Against this background, Part II will have to assess whether post-Charter developments have effectuated the emergence of a new customary rule on self-defence that has affected the pre-Charter understanding of that right. It is essential to note at this point that the aim of Part II is *not* to ascertain the existence of a clear customary rule justifying anticipatory action in self-defence. That objective was reached by Part I by concluding that there existed such a customary rule before and at the time of the adoption of the UN Charter. Therefore, what Part II needs to assess whether a *new* customary rule *prohibiting* anticipatory action has emerged since the adoption of the Charter.

On that basis, it will be examined whether the right of self-defence has retained its intrinsically anticipatory aspect and whether its limits (as outlined above) are still automatically applicable to anticipatory action.

Post-Charter developments in the regulation of war and the use of force will be treated as the progression of the third normative framework identified in Part I (the emerging international law framework of the nineteenth and early twentieth centuries). To analyse the post-1945 evolution of this normative framework, several themes will be identified in order to depict the main challenges of the twentieth and twenty-first centuries. As outlined in section 1.2.1.3 of Chapter 1, the following themes will be given attention: classic state-to-state conflicts, conflicts involving weapons of mass destruction, conflicts involving non-state actors and the relevant work of UN organs. Within these themes, several instances of state practice will be analysed and compared.

To prepare the analysis of post-Charter customary law on self-defence, Chapter 7 will depict the understanding given to the new rules on the prohibition to use force (including self-defence) in the immediate aftermath of the adoption of the Charter. Chapter 8 will examine classic state-to-state conflicts in which claims of self-defence were contemplated or used. Chapter 9 will look at the impact of weapons of mass destruction on the development of post-Charter self-defence. Chapter 10 will analyse the role played by non-state actors in shaping the content and temporal dimension of self-defence. Chapter 11 will examine the work of various UN organs (the Security Council, the General Assembly, the International Law Commission and the International Court of Justice) that influenced in some way the post-Charter understanding of self-defence. Chapter 12 will compare the findings of the previous chapters and will draw conclusions on the state of the current debate regarding the temporal dimension of the post-Charter customary rule of self-defence.

¹ See *supra* 6.6.

Post-Charter customary law on self-defence will be analysed in a very different way from its pre-Charter equivalent. A comparative case study is best suited to trace the influence of the various themes of the twentieth and twenty-first centuries mentioned above on the development of self-defence. For that reason, Part II will rely on state practice considerably more than the legal-historical research of Part I.

In selecting the instances of state practice for the comparative study, the main consideration was to offer a representative illustration of the circumstances in which claims of self-defence were contemplated or used. The comparative analysis will follow the same layers of focus that Part I did. Accordingly, the temporal dimension of self-defence will be examined for each instance of state practice. It is essential to note here, that when referring to the pre-Charter temporal dimension of self-defence, the narrow, natural-law understanding that was considered at the adoption of the Charter will be understood. If applicable, the status and limits of anticipatory action within that spectrum will be given attention.

The common element in all cases examined is that a claim of self-defence (anticipatory, remedial or ‘preventive’) was at least contemplated by the government of the target state. It is important to note at this point, that Part II will give equal attention to anticipatory, remedial and ‘preventive’ claims of self-defence in order to clearly map out the way the temporal dimension of that right has developed after the adoption of the Charter. Additionally, the instances of state practice were chosen in such way as to greatly differ in their outcome: acceptance, criticism or condemnation.² This outcome will be dependent on the factual circumstances and the juridical variables of the case. The juridical variables applied to each case will be the three elements identified as the content of the pre-Charter customary rule of self-defence: conditionality of an attack, immediate need for action and moderation.³ Although no precise definition of these limits existed in pre-Charter customary law, their resurfacing in all three of the normative frameworks analysed shows that they were considered as forming part of the customary rule of self-defence.⁴ Starting with nineteenth century legal doctrine and especially as a result of the Webster formula these elements were grouped under the general headings of necessity and proportionality.⁵ Accordingly, these variables will be analysed in Part II as:

1. Necessity (‘conditionality of an armed attack’ and ‘immediacy’).
2. Proportionality (what was generally understood as moderation).

Each case will be analysed on the basis of these variables and each theme-chapter will draw conclusions on their role. Furthermore, each theme-chapter will draw conclusions on the temporal dimension of self-defence to assess whether it has retained its intrinsically anticipatory aspect and whether its limits (as outlined above) are still automatically applicable to anticipatory action.

² The outcome of the various instances of state practice will be assessed on the basis of a ‘general reaction’, which will be understood as the opinion of a majority of the members of the Security Council (and, where relevant, the General Assembly) as well as the views expressed by a significant part of the legal doctrine. See *supra* 1.4.

³ See *supra* 6.6.

⁴ See *supra* 2.4, 3.3 and 4.7.

⁵ For the rationale of this grouping, see *supra* 6.6.

Part III will return to the two main research questions stipulated in the Introduction and will address them on the basis of the findings of Part I and Part II.

In all chapters, reference will be made to instances of state practice, relevant Security Council or other UN-related work, judicial decisions (if applicable) and legal literature.