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

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

7.1 Introduction

The Charter of the United Nations set up a new world organization with several organs that were given executive, legislative, judicial and other functions. The declared objectives of the new organization were the maintenance of international peace and security, the development of friendly relations and international co-operation in solving international problems, as well as the promotion of human rights and fundamental freedoms.¹ These goals were to be achieved through the work of the various organs of the UN, most importantly the Security Council, the General Assembly and the International Court of Justice.

The maintenance of international peace and security was to be the primary responsibility of the Security Council, as expressed in Article 24 of the Charter. For that purpose, the Security Council was granted wide powers of preventive diplomacy and peaceful settlement under Chapter VI of the Charter, as well as preventive and enforcement powers under Chapter VII of the Charter.² These powers were the reminiscence of the broad rights sovereigns enjoyed in the seventeenth to nineteenth centuries to wage war as an instrument of national policy.³ The Charter also gave the General Assembly and the International Court of Justice an important role in strengthening the rules pertaining to the maintenance of international peace and security. This chapter will shed light on how the new prohibition to use force and the right of self-defence were perceived by certain judicial bodies in the immediate aftermath of the adoption of the Charter. The judgments delivered by the Nuremberg and Tokyo tribunals as well as the approach taken by the International Court of Justice in the *Corfu Channel* case show how relevant law was interpreted and applied at that time. On that basis, it will be concluded how the principle of the prohibition to use force operated immediately after the adoption of the Charter. This chapter will also shed light on how the content of self-defence was viewed by international judicial bodies in the immediate aftermath of the adoption of Article 51 of the UN Charter.

7.2 The Nuremberg and Tokyo trials

Although they were created outside the United Nations system, the international military tribunals of Nuremberg and Tokyo were the first fora in which self-defence was discussed after the adoption of the Charter. The Nuremberg trials were conducted under the auspices of two courts: the International Military Tribunal (1945-1946) and the US Nuremberg Tribunals (conducted under Control Council Law No. 10). The International Military Tribunal of Nuremberg conducted the famous 'Major War Criminals Trial', while the US Military Tribunals tried other prominent figures of Nazi Germany. Much like the International Tribunal at Nuremberg, the International Military Tribunal for the Far East (Tokyo Tribunal) was set up with the purpose to bring Japanese political and

¹ Art. 1 UN Charter.

² Gill 1989, pp. 57-58.

³ See *supra* 5.4 and 5.5.

military authorities to justice. The Charter of the Tribunal was approved on 19 January 1945 and the Tribunal was first convened on 3 May 1946.

The Nuremberg Tribunal discussed self-defence in relation to the German invasion of Norway, whereas the Tokyo Tribunal addressed the same concept in connection with the Japanese invasion of the Dutch East Indies.

7.2.1 The Nuremberg trials

7.2.1.1 The creation of the Nuremberg International Military Tribunal

The need to punish the crimes committed by the Nazis was recognized as early as January 1942 at an allied meeting in London and reiterated in 1943 in the Moscow Declaration.⁴

By the beginning of 1945, a trial plan was put together by the Roosevelt administration. After the death of Roosevelt on 12 April 1945, President Harry Truman continued the policy accepted by his predecessor.⁵

The establishment of the new tribunal also implied the drafting and adoption of a charter that would serve as basis for the jurisdiction and competence of the judicial institution. A series of negotiations between the representatives of the US, the Provisional Government of the French Republic, the UK and the USSR started in 1945 and culminated in the London Conference on Military Trials of July 1945.⁶

During the negotiations, the question of holding Nazi officials responsible for attacking and invading other countries came up.⁷ Accordingly, the final version of Article 6 of the new (Nuremberg) Charter provided that, *inter alia*, '(a) Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing' ought to be punished by the tribunal.

The concept of self-defence was explicitly mentioned in one of the earlier drafts of Article 6. In suggesting a definition for aggression and aggressive war, the American delegation submitted a draft proposal that included the following statement:

⁴ M.R. Marrus, *The Nuremberg War Crimes Trial 1945-46: A Documentary History* (Boston, Bedford Books 1997) pp. 18-19. The 1943 Moscow Declaration stipulated that: 'Germans who take part in wholesale shooting of Polish officers or in the execution of French, Dutch, Belgian or Norwegian hostages or of Cretan peasants, or who have shared in slaughters inflicted on the people of Poland or in territories of the Soviet Union which are now being swept clear of the enemy, will know they will be brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged. [...] The above declaration is without prejudice to the case of German criminals whose offenses have no particular geographical localization and who will be punished by joint decision of the government of the Allies.'

⁵ Marrus, pp. 26-27, 32-33.

⁶ For the records of the negotiations, see the report of US representative Robert H. Jackson, *International Conference on Military Trials: London, 1945* (Washington, D.C., US Government Printing Office 1949), available at <http://avalon.law.yale.edu/imt/jack_title.asp> (accessed 1 March 2010).

⁷ For discussions involving the concept of aggressive war, see Minutes of Conference Session of 19 July 1945, in report of R.H. Jackson, *International Conference on Military Trials: London 1945* (Washington, D.C., Government Printing Office 1949), available at <<http://avalon.law.yale.edu/imt/jack37.asp>> (accessed 1 March 2010).

‘No political, military, economic or other considerations shall serve as an excuse or justification for such actions [i.e., aggressive war]; but the exercise of the right to legitimate self-defence, that is to say, resistance to an act of aggression, or action to assist a state which has been subjected to aggression, shall not constitute a war of aggression.’⁸

Although this draft proposal was subsequently changed and the explicit reference to self-defence was dropped, it shows that the right of self-defence was viewed as the only exception to the prohibition to wage war. It is also evident that the content of this draft article was very similar in its meaning to the understanding given to Article 51 of the UN Charter at the San Francisco Conference, which had been adopted few weeks before the London negotiations. The lack of explicit mentioning the right of self-defence in the Nuremberg Charter was not a hindrance for the Tribunal to apply it in the Major War Criminals Trial.

The Charter of the Nuremberg International Military Tribunal was adopted at the London Conference of July 1945 and it was incorporated in the London Agreement of 8 August 1945.

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

Twenty-one of the highest Nazi officials (‘the major war criminals’) were indicted on 6 October 1945 and the Nuremberg trial began on 20 November 1945. Count I and II dealt with the issue of aggressive war. Count I was described as ‘the formulation or execution of a common plan or conspiracy to commit, or which involved the commission of, Crimes against Peace, War Crimes, and Crimes against Humanity.’ Count II referred to the participation ‘in the planning, preparation, initiation, and waging of wars of aggression, which were also wars in violation of international treaties, agreements, and assurances.’ Count III dealt with war crimes and count IV with crimes against humanity. The defendants were indicted under all or some of these four counts. The judgment was delivered on 30 September and 1 October 1946 and sentenced 12 of the defendants to death by hanging. Three defendants were sentenced to imprisonment for life and the remaining accused received milder prison sentences.⁹ Twelve accused, including Hermann Göring, Rudolf Hess, Alfred Jodl and Joachim von Ribbentrop, were all found guilty under Count II (crimes against peace) for the planning, preparation, initiation, and waging of wars of aggression.¹⁰ Moreover, the judgment held the entire Nazi government and thus, the German Nazi state, responsible for the planning and waging of aggressive wars: ‘the evidence has made it plain that this war of aggression [...] was pre-meditated and carefully prepared, and was not undertaken until the moment was thought opportune for it to be carried through as a definite part of the pre-ordained scheme and plan.’¹¹ For that purpose, ‘war was seen to be inevitable, or at the very least, highly probable, if these

⁸ Ibid., definition of ‘aggression’, suggested by the American delegation as basis of discussion.

⁹ *Nazi Conspiracy and Aggression*, pp. 189-190.

¹⁰ The other accused found guilty under Count II were: Wilhelm Keitel, Konstantin von Neurath, Erich Räder, Alfred Rosenberg, Karl Dönitz, Wilhelm Frick, Walter Funk and Arthur Seyss-Inquart. *Nazi Conspiracy and Aggression*, pp. 189-190.

¹¹ Ibid., p. 17.

purposes were to be accomplished.’¹² The judgment dealt separately with the invasion of each Allied country and found them all to be aggressive wars.

7.2.1.3 Self-defence and the Major War Criminals’ Trial

The issue of self-defence came up in connection with the April 1940 invasion of Norway by Germany. After invading Poland in September 1939, the German government assured Norway that it would not launch an invasion against it as long as an unimpeachable neutrality towards the Reich was observed.¹³ Notwithstanding such an assurance, in seven months’ time, Norway was invaded by Germany. As UK Chief Prosecutor Sir Hartley Shawcross described the events before the judges, ‘in the early hours of the 9th April [1940], seven cruisers and fourteen destroyers and a number of torpedo boats and other small craft carried advance elements of six divisions, totalling about 10,000 men, forced an entry and landed troops in the outer Oslo Fjord, Kristiansand, Stavanger, Bergen, Trondheim and Narvik.’¹⁴ Apart from some smaller units that landed on the southern Norwegian coast, airborne troops and aircraft were landed near Oslo and Stavanger.¹⁵

The prosecution saw the specific details of the German invasion of Norway as an unquestionable proof that the attack was a premeditated, thoroughly planned military action.¹⁶ On the contrary, the defence contended that the invasion of Norway was a measure of prevention, as Britain and France were contemplating to occupy the country and use it as a basis for further military operations.¹⁷

The prosecution asserted that the Nazi attack ‘had been planned long before any question of breach of neutrality or occupation of Norway by England could ever have occurred.’¹⁸ Further, the prosecution claimed that the German assurances were made for no other purposes than to lull suspicion and to prevent Norway from preparing to resist the attack.¹⁹ In order to sustain that argument, the prosecution exposed all the strategic and military preparations made by the German officials to invade Norway, such as the disguise of the German warships as British craft, the deceptive names, codes and messages that the crew had to use or send if intercepted by enemy vessels. All the preparations were made in order to secure a surprise-landing of troops in Norway.²⁰

¹² Ibid.

¹³ Ibid., p. 34.

¹⁴ Exposé of UK Chief Prosecutor Sir Hartley Shawcross, 4 December 1945, in *Trial of the Major War Criminals before the International Military Tribunal: Proceedings*, Vol. 3, available at <<http://avalon.law.yale.edu/imt/12-04-45.asp>> (accessed 1 March 2010) (hereafter, Exposé of UK Chief Prosecutor).

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Direct Examination of Defence Witness Admiral Schulte-Mönting by Defence Counsel for Erich Räder, Dr. Walter Siemers, 22 May 1946, in *Trial of the Major War Criminals before the International Military Tribunal: Proceedings*, Vol. 14, available at <<http://avalon.law.yale.edu/imt/05-22-46.asp>> (accessed on 1 March 2010) (hereafter, Examination of Defence Witness Admiral Schulte-Mönting).

¹⁸ Exposé of UK Chief Prosecutor.

¹⁹ Ibid.

²⁰ Exposé of UK Junior Prosecution Counsel Major Elwyn Jones, 7 December 1945, in *Trial of the Major War Criminals before the International Military Tribunal: Proceedings*, Vol. 3, available at <<http://avalon.law.yale.edu/imt/12-07-45.asp>> (accessed 1 March 2010).

In contrast, the defence asserted that the invasion of Norway was a preventive measure of self-defence. In the direct examination of defence witness Admiral Schulte-Mönting by defence counsel for Erich Räder, the assertion was made that there were numerous reports about the Allies' intentions to occupy Norway.²¹

Accordingly, Admiral Schulte-Mönting claimed that 'the rumours were increasing that the Allies intended to drag Scandinavia into the war in order to prevent, if possible, the iron ore imports from Sweden to Germany.' Schulte-Mönting defended the credibility of such rumours by referring to the 'documentary evidence from the last World War' according to which Winston Churchill had seriously considered the occupation of Norway.²² Moreover, according to the same defence witness, there were reports concerning the presence of British air crews allegedly posing as civilians in Oslo and of Allied officers making surveys of Norwegian bridges, viaducts and tunnels. These reports were taken as indication that 'the transportation of heavy material and equipment was planned.'²³ In his direct examination of the witness, the defence counsel for Erich Räder put the emphasis on the dangers that arose for Germany on account of such reports. The witness stated that, in the opinion of the German government, with Norway occupied, operations in the North Sea would have become almost impossible. Furthermore, the ore imports would have been stopped and the danger of airborne attacks would have become grave for the north of Germany and the Eastern territories. In Schulte-Mönting's opinion, 'in the long run, the North Sea and the Baltic would have been blocked completely, and this would eventually have led to the total loss of the war.'²⁴

The defence also tried to show that such reports had become available as early as the autumn of 1939 and that Germany did not rush into invading Norway, but rather took cautious steps in monitoring the situation. According to Schulte-Mönting, the actual drafting of the military operation took place in February 1940 and by that time, the invasion of Norway became a 'compelling necessity'.²⁵

The judges were not convinced by this argument. In their view, the invasion of Norway was a strategic move to secure a significant military advantage. The judgment recalled the fact that the memorandum for 'gaining bases in Norway' was drafted in October 1939 and there was no mention of any danger arising from a potential Allied invasion. On the contrary, the plan aimed at improving the German strategic and operational position and addressed the question whether bases could be gained by military force against Norway's will and whether such bases could be acquired without fighting.²⁶ While the plan was being forwarded to the Fuehrer, Norway was receiving repeated assurances of neutrality on the part of Germany.²⁷ According to the judges, although the disadvantages of a British occupation of Norway were eventually reported to Hitler, the issue was discussed from a military and strategic point of view, rather than as a defensive measure.²⁸ The judgment also quoted the directive issued by Hitler on 1 March 1940:

²¹ Examination of Defence Witness Admiral Schulte-Mönting.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ *Nazi Conspiracy and Aggression*, p. 35.

²⁷ Ibid.

²⁸ Ibid., pp. 35-36.

‘The development of the situation in Scandinavia requires the making of all preparations for the occupation of Denmark and Norway by a part of the German Armed Forces. This operation should prevent British encroachment on Scandinavia and the Baltic; further, it should guarantee our ore base in Sweden and give our Navy and Air Force a wider start line against Britain [...]. It is most important that the Scandinavian States as well as the Western opponents should be taken by surprise by our measures.’²⁹

In the opinion of the judges, the directive and the entire narrative of the preparations for invasion showed no compelling circumstances that would have justified a pre-emptive attack. The judgment referred to the *Caroline* incident and affirmed that ‘preventive action in foreign territory’ was only justified in case of ‘an instant and overwhelming necessity for self-defence, leaving no choice of means and no moment of deliberation.’³⁰ On the basis of the available evidence, the judges found that when the plans for an attack on Norway were being made, they were not made for the purpose of forestalling an imminent Allied landing, but, ‘at the most’, that they were aimed at preventing an Allied occupation at some future date.³¹ The use of the term ‘preventive’ in the judgment gives rise to some confusion. On the one hand, the judges analyse ‘preventive action’ on the basis of the Webster formula and allow it only in the face of an imminent threat. On the other hand, they refer to prevention in the face of a possible, future attack. It is nevertheless clear that the ‘preventive action’ the judges found *admissible* was only the one against an imminent threat, on the basis of the Webster formula.

The judgment admitted that there were indeed Allied plans to occupy Norway, but that they were not as old as the German military plans and at the time of the invasion, the Nazi officials did not know about the existence of such plans; revealing documents were captured much later.³² Moreover, the judges referred to several German internal documents that showed that no imminent threat was perceived regarding the British invasion of Norway. For instance, according to a 13 March 1940 note made by defendant Alfred Jodl ‘the Fuehrer does not give order yet for “W” [Weser Exercise, invasion of Norway], he is still looking for an excuse.’³³ One day later, the same defendant noted: ‘Fuehrer has not yet decided what reason to give for “Weser Exercise”.’³⁴ The notes made by Alfred Jodl in his diary also shed light on Hitler’s approach regarding any non-military last resort measures. Accordingly, on 21 March 1940, Jodl noted: ‘Fuehrer rejects any earlier negotiations, as otherwise calls for help go out to England and America. If resistance is put up, it must be ruthlessly broken.’³⁵

In upholding its judgment, the Tribunal also noted that the invasion of Norway and Denmark was envisaged as a long term solution. A German naval memorandum issued on 3 June 1940, discussed the use to be made of the two Scandinavian countries and proposed that the territories acquired should continue to be occupied and organized so that they could in the future be considered as German possessions.³⁶ This was another

²⁹ Ibid., p. 36 (Directive regarding the Weser Exercise, 1 March 1940).

³⁰ Ibid., p. 36.

³¹ Ibid., p. 37.

³² Ibid., pp. 37-38.

³³ Ibid., p. 37.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid., p. 38.

proof that the German military action went well beyond the purposes of a defensive measure, since its objective was to last much longer than any perceived threat of an Allied occupation.

7.2.1.4 Interpretation of self-defence by the Nuremberg Tribunal

As shown above, the judgment of the Nuremberg Tribunal discussed the issue of self-defence in connection with the Nazi invasion of Norway. The judges referred to the *Caroline* incident in order to uphold the view that self-defence was justified if exercised in face of an imminent threat.³⁷ Even though the judges did not expressly discuss the legality of preventive measures against a potential threat, by their reference to the Webster formula they confirmed that self-defence could only be invoked against an imminent danger.

The judges found the German invasion illegal, even though, with hindsight, it became clear that the UK had planned to land in Norway at some point. The rejection of the self-defence claim was due to the fact that the German invasion plans were older than the British and there was no actual knowledge of the British plans at the time Norway was invaded. The judges thus based their assessment on what German officials knew at the time of the invasion.

From this point of view, the German invasion of Norway is in stark contrast with the British operation of sinking a part of the French fleet in 1940.³⁸ Accordingly, in case of 'Operation Catapult', the British government believed, in good faith, that, once returned to their ports, the French vessels could have been boarded and seized by German forces at any time and there would have been no obstacle in the Germans' way.³⁹ That threat was perceived by Churchill's War Cabinet at that time as giving rise to a present and inevitable necessity to act. Concerning the German invasion of Norway, no such perception, acquired in good faith, existed on behalf of the Nazi government at the time of the Weser Exercise.

The interpretation given to the concept of self-defence shows a confirmation of the pre-Charter, natural-law concept of the right and a strengthening of the restrictions brought to preventive action (against a potential threat). The Charter of the United Nations was not taken in consideration when discussing the right of self-defence. By referring to the *Caroline* incident, the Tribunal confirmed that one of the limits of pre-Charter self-defence: the present and inevitable necessity to act (immediacy).

³⁷ Ibid., p. 36.

³⁸ See *supra* 4.6.

³⁹ Gill 2007, p. 134.

7.2.2 The Tokyo Tribunal

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

The idea of an international tribunal to try the Japanese officials was first referred to in the Potsdam Declaration of July 1945.⁴⁰ Subsequently, on 19 January 1946, General Douglas MacArthur, the Supreme Commander for the Allied Powers in Japan issued an executive order by which he approved the Charter of the Tokyo Tribunal. The Tokyo Charter defined three types of crimes: crimes against peace, crimes against humanity and war crimes (Article 5(a-c)). The indictment of the Tokyo Tribunal classified crimes against peace as ‘Group One’ crimes, murder as ‘Group Two’ (it could amount to all three types of crimes) and conventional war crimes and crimes against humanity as ‘Group Three’ crimes. The Tribunal in Tokyo prosecuted 28 individuals with crimes from all three groups (Class A defendants). Seven of the 28 defendants (including Tojo Hideki, prime minister during the attack on Pearl Harbour, and Hirota Koki, prime minister in 1936-1937), were sentenced to death by hanging. The others were given prison sentences ranging from life to seven years imprisonment.⁴¹

7.2.2.2 Self-defence as interpreted by the Tokyo Tribunal

The issue of self-defence came up in relation to the so-called Pacific War, more specifically the Japanese invasion of the Dutch East Indies. Count 1 for crimes against peace referred to the common plan or conspiracy of Japan to secure its military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans. Count 32 charged the accused with waging a war of aggression and a war in violation of international law against the Kingdom of the Netherlands.

According to the prosecution, the Netherlands East Indies, together with the Portuguese portion of the Island of Timor, were within Japan’s area of interest and were designated as part of the ‘Greater East Asia Co-Prosperity Sphere.’⁴² This area – encompassing Burma, Malaya, the East Indies, Indo-China and the Philippines – was rich in supplies of rice as well as iron, gold, oil and many other raw materials that Japan sorely needed. The region, however, belonged to several Western nations: Britain, the Netherlands, France and the US.⁴³ The preparations of Japan to invade the Dutch East

⁴⁰ The Potsdam Declaration (Proclamation Defining Terms for Japanese Surrender) was a statement jointly issued by the United States, United Kingdom and China on 26 July 1945 in which an ultimatum was given to Japan. The Declaration outlined the terms of surrender for Japan and, *inter alia*, called for justice to ‘be meted out to all war criminals, including those who have visited cruelties upon our prisoners.’ Art. 10 Potsdam Declaration, available at <<http://www.ndl.go.jp/constitution/e/etc/c06.html>> (accessed on 2 June 2009).

⁴¹ B.V.A. Röling, *The Tokyo Trial and Beyond: Reflections of a Peacemonger*, ed. by A. Cassese (Cambridge, Polity Press 1993) pp. 3-4.

⁴² Appendix A, section 10, International Tribunal for the Far East, in *Trial of Japanese War Criminals* (Washington, D.C., US Government Printing Office 1946) p. 75 (hereafter, Indictment Tokyo Tribunal).

⁴³ Burma, Malaya and part of Borneo belonged to Britain; the remaining islands of the East Indies belonged to the Netherlands, whereas Indo-China was a French possession and the Philippines was under US protectorate. T.N. Dupuy, ‘Asiatic Land Battles: Japanese Ambitions in the Pacific’, in T.N. Dupuy, *The Illustrated History of World War II*, Vol. 9 (London, Edmund Ward 1963) p. 3.

Indies were thus part of a greater campaign to assert its military dominance in the Far East.⁴⁴

After Japan denounced its treaty with the Netherlands regarding the East Indies in 1940, it proposed a new one, which the Dutch government – at that time in exile –, rejected.⁴⁵ According to the same indictment, the occupation by Japan of French Indo-China (commenced in September 1940 and completed in July 1941) as well as the attacks upon territories of the US and the British Commonwealth in December 1941 (notably the attack on Pearl Harbour on 7 December 1941), were all part of the plan which included an invasion of the Netherlands East Indies. On 8 December 1941, immediately after the bombing of Pearl Harbour took place, the Netherlands declared war on Japan in self-defence. In the weeks of January - March 1942, Japan successfully occupied the Dutch East Indies as part of its greater invasion plan.⁴⁶

The contention of the defence that the invasion of the ‘Co-Prosperity Sphere’ was taken as a measure of self-defence against the United States, the United Kingdom, France and the Netherlands was rejected by the Tribunal. The judges did not seem convinced by the assertion that in the face of economic aggression from the US, Britain, France and the Netherlands, Japan had no other way of preserving the welfare and prosperity of her nationals but to go to war.⁴⁷ The Tribunal held that the restrictive measures taken were entirely justifiable attempts to thwart Japan from its long-prepared aggressive military plans.⁴⁸ As a result, the Japanese invasion campaign was characterized as a suite of aggressive wars against the Allied powers.⁴⁹

The judgment of 1 November 1948 reviewed the plans and policies adopted by Japan between July 1940 and December 1941 and concluded that the Pacific War was a long premeditated campaign, aiming at expanding the ‘Greater East-Asia Co-Prosperity Sphere.’⁵⁰ At first, in July 1940, Japan announced to the Netherlands that it was sending an economic mission to the East Indies.⁵¹ Later that year, Japan sent out several espionage missions in contemplation of occupying the islands of Java, Sumatra and Bali.⁵² In January 1941, the Japanese Diet discussed plans of military actions against the East Indies. The Dutch government was aware of that and became suspicious in relation to further negotiations.⁵³ In October 1941 the Japanese leaders decided that it was time to start military action against several targets in the Pacific arena.⁵⁴ On 7 December 1941 the attack on Pearl Harbour took place. As a consequence, the United States and the United Kingdom declared war on Japan. At the same time, the Netherlands, the Dutch East Indies, Australia, New Zealand, South Africa, Free France, Canada and China also

⁴⁴ Appendix A, section 10, Indictment Tokyo Tribunal, pp. 75-76.

⁴⁵ Ibid.

⁴⁶ Ibid., pp. 75-76.

⁴⁷ Chapter 7: ‘The Pacific War’, in B.V.A. Röling and C.F. Rüter, eds., *The Tokyo Judgment: The International Military Tribunal for the Far East, 29 April 1946-12 November 1948* (Amsterdam, APA-University Press Amsterdam 1977) pp. 380-381.

⁴⁸ Ibid., p. 381.

⁴⁹ Ibid.

⁵⁰ Ibid., pp. 328-329.

⁵¹ Ibid., p. 328.

⁵² Ibid., p. 339.

⁵³ Ibid., pp. 346-347.

⁵⁴ Ibid., pp. 364-366.

declared war on Japan.⁵⁵ As expected by that time, Japan started its invasion of the Dutch East Indies in early January 1942.

On the basis of these findings, the arguments of self-defence on behalf of Japan were not upheld by the judgment. The underlying reasons for Japan's acts were identified as 'prompted by the desire to deprive China of any aid in the struggle she was waging against Japan's aggression and to secure for Japan the possessions of her neighbours in the South.'⁵⁶ The judges characterized the wars waged against the US, UK, France and the Netherlands as wars of aggression.⁵⁷

The Tribunal also rejected the argument that in as much as the Netherlands took the initiative in declaring war on Japan, the ensuing war could not be described as a war of aggression by Japan.⁵⁸ The judgment emphasized that Japan had long planned the invasion of Netherlands East Indies in order to secure its economic benefits. Accordingly, the judges noted that by the middle of 1941, it was apparent that Japan was in full preparations for invading and seizing the Netherlands East Indies.⁵⁹

In contrast, the Tribunal regarded the declaration of war by the Netherlands as made in legitimate self-defence: 'The fact that the Netherlands, being fully apprised of the imminence of the attack, in self-defence declared war against Japan on 8 December and thus officially recognized the existence of a state of war which had been begun by Japan, cannot change that war from a war of aggression on the part of Japan into something other than that.'⁶⁰

Although the judgment of the Tokyo Tribunal did not elaborate on the concept of self-defence the way the Nuremberg judges did, it expressly acknowledged the legality of self-defence against an imminent threat of invasion.

7.2.3 Importance of the Nuremberg and Tokyo tribunals

The Nuremberg and Tokyo tribunals were conducted outside the United Nations system and were judicial organs of the victors of the Second World War. Their importance is, nonetheless, obvious, because they offer a view on how the rules concerning aggression and self-defence were viewed shortly after the adoption of the Charter. Both judgments confirm the understanding given to self-defence by pre-Charter customary law. Anticipatory action against imminent threats was seen as a natural part of the right of self-defence. Both the Nuremberg and the Tokyo tribunals accepted that states had a right to resort to self-defence in the face of an imminent threat. The Nuremberg trial even made reference to the *Caroline* incident and quoted the standard set up by Daniel Webster.⁶¹ The Tokyo trial expressly acknowledged the legality of the Dutch declaration of war in face of 'imminence of the attack' coming from Japan.⁶² The fact that no mention of Article 51 or any other provision of the UN Charter was made in neither of the judgments showed that the understanding given to self-defence by the Tribunals was

⁵⁵ Ibid., pp. 379-380.

⁵⁶ Ibid., p. 381.

⁵⁷ Ibid., pp. 381-384.

⁵⁸ Ibid., p. 382.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ *Nazi Conspiracy and Aggression*, p. 36.

⁶² Röling and Rüter, p. 382.

the one valid under customary law at the time. It also showed that, unlike some commentators have argued,⁶³ the adoption of the Charter did not drastically change the interpretation given to the rules governing the use of force. Both judgments were thus relying on pre-Charter customary law still deemed applicable in the immediate aftermath of the adoption of the Charter.

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

No reference to the right of self-defence was made by the International Court of Justice in the *Corfu Channel* judgment. Moreover, no Charter provisions were mentioned in the decision either. Nonetheless, the judgment is important because it relied on customary rules governing the use of force in the immediate aftermath of the adoption of the Charter. The case offered thus a good indication of what kind of use of force was perceived as lawful at the time.

The *Corfu Channel* case was a dispute between the United Kingdom and Albania.⁶⁴ The incident that led to the dispute took place on 22 October 1946 in the Corfu Channel. On that day, a squadron of British warships, the cruisers *Mauritius* and *Leander* and the destroyers *Saumarez* and *Volage*, left the port of Corfu and proceeded northward in the North Corfu Strait. Outside the Bay of Saranda, in Albanian territorial waters, the destroyer *Saumarez* struck a mine and was heavily damaged. *Volage* was ordered to give her assistance and to take her in tow. Whilst towing the damaged ship, *Volage* also struck a mine and was damaged. Nevertheless, she succeeded in towing *Saumarez* back to Corfu. Five months earlier, the Albanian coastguard opened fire without warning on two other British warships which were sailing in Albanian territorial waters while making passage through the Channel. That incident was followed by an increasingly tense diplomatic exchange in which the Albanian government denied that foreign warships had a right of innocent passage and that, in any case, such a passage was conditional of its prior authorization. After the two explosions of 22 October, the Albanian government claimed that it had no knowledge of the minefield lying in the Channel. Three weeks later, on 13 November 1946, the North Corfu Channel was swept by British minesweepers against the will of the Albanian government. As a result of the minesweeping, twenty-two moored mines were cut.⁶⁵

After diplomatic attempts to resolve the conflict failed, the UK instituted proceedings against Albania and requested the Court to declare Albania responsible for the explosions and in breach of international law. The Albanian reply requested the Court to declare the United Kingdom responsible for violating the territorial sovereignty of Albania by using the Corfu Channel without prior authorization and by conducting the minesweeping operation without the consent of the government in Tirana.⁶⁶

In its judgment, the Court first established that Albania bore responsibility for the two explosions occurred on 22 October 1946, because it must have had knowledge of the

⁶³ See, for instance, Summary Record of the 1627th ILC mtg., UN Doc. A/CN.4/SR.1627 (1980) para. 3 (comment by Tsuruoka). See *infra* 11.3.2.1.

⁶⁴ *Corfu Channel* (United Kingdom v. Albania), Judgment of 9 April 1949, ICJ Rep. (1949) p. 4 (hereafter, *Corfu Channel*).

⁶⁵ *Ibid.*, pp. 12-13; Waldock 1952, p. 499.

⁶⁶ *Corfu Channel*, ICJ Rep. (1949) pp. 9-12.

mine-laying operations and, although it had enough time to warn the British ships, it failed to do so.⁶⁷ Further, the Court upheld the existence of a right of innocent passage through the Corfu Strait and asserted that the passage of the British warships did not breach Albanian sovereignty, because it was done according to internationally recognized principles.⁶⁸

On the basis of these two preliminary findings, the Court embarked on analysing the legality of the passage of the British vessels. It noted that the ships, while in passage, were not proceeding in combat formation and they were not manoeuvring until after the first explosion. Their guns were in fore and aft position and they had no authority to use force unless attacked.⁶⁹ Accordingly, there was no actual threat or use of force in breach of international law. Thus the passage of the squadron of warships was indeed designed to affirm a right unjustly denied.⁷⁰ Moreover, the Court held that, although the British intention was also 'to demonstrate such force that she [Albania] would abstain from firing again on passing ships,' the passage could not be characterized as a breach of international law.⁷¹ These observations were not, however, unanimously accepted. In his dissenting opinion, Judge Azevedo maintained that a country could not 'become judge in its own case.' Even if Albania's conduct was partly or wholly unjustifiable, any intervention on part of the UK to end that conduct had to be disapproved as long as the actual right affirmed was under dispute. The only situation in which forceful affirmation of a right could be allowed was in self-defence, or, in Judge Azevedo's words, 'in the heat of the action.'⁷² Brownlie took the same position and opined that a state could not forcefully affirm a right that was still under dispute. The fact that the judgment stopped short of condemning the British demonstration of force, let Brownlie conclude that the Court exhibited a tolerant attitude towards the concept of self-help.⁷³ This opinion was partially upheld by Waldock, who asserted that allowing a state to test the attitude of another and 'to coerce it into future good-behaviour' was close to allowing forcible self-help.⁷⁴ Nonetheless, Waldock also emphasized that preparations to use force and, potentially, threat or the actual use of force, when it was in the affirmation of rights which had been illegally denied, was lawful.⁷⁵

In relation to the subsequent minesweeping operation, however, the Court emphatically rejected the arguments brought up by the UK in justification. Accordingly, the UK maintained that the minesweeping operation that took place on 13 November 1946 was necessary and justifiable as a special intervention to secure evidence, and as a measure of self-help and self-protection. In justifying its rejection, the Court regarded the alleged right of intervention 'as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law.'⁷⁶ Moreover, the

⁶⁷ *Ibid.*, pp. 22-23.

⁶⁸ *Ibid.*, pp. 28-29.

⁶⁹ *Ibid.*, pp. 30-31.

⁷⁰ *Ibid.*, p. 30.

⁷¹ *Ibid.*, p. 31.

⁷² *Ibid.*, p. 108 (dissenting opinion of Judge M. Azevedo).

⁷³ Brownlie 1963, p. 284.

⁷⁴ Waldock 1952, p. 501.

⁷⁵ *Ibid.*, p. 500.

⁷⁶ *Corfu Channel*, ICJ Rep. (1949) p. 35.

Court emphasized that such intervention ‘from the nature of things, would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.’⁷⁷ The Court was no more pardoning in relation to the self-help argument. It completely rejected it and asserted that, between independent states, ‘respect for territorial sovereignty is an essential foundation of international relations.’⁷⁸

Although criticized for its wording, the *Corfu Channel* judgment clearly rejected forcible interventions on behalf of states for the affirmation of rights. Despite the fact that it did not condemn coercive tactics, the judgement clearly rejected arguments of emergency interventions and self-help. It did not expressly refer to the right of self-defence, but by outlawing forcible self-help measures, it implicitly confirmed that the right of self-defence remained the only justifiable way in which a state could threaten to use or use force without the prior approval of the Security Council.

Although the Court did not altogether reject the exercise or affirmation of a right unjustly denied or under dispute, it did expressly reject the violation of a state’s territorial sovereignty as an unlawful measure of self-help.⁷⁹ It did so without relying on any provisions of the Charter. It can thus be concluded, that at the time of the *Corfu Channel* judgment, customary rules governing the use of force no longer justified armed intervention or forcible self-help.⁸⁰ The state of customary law was thus echoing the rationale of the Charter and its restrictive approach to the use of force.

7.4 Concluding remarks

Both the post-war military tribunals and the International Court of Justice mirrored the changes that were unfolding in international-law normative framework at that time. While forcible measures of self-help were deemed an institution of the past by the Court, anticipatory action in self-defence was confirmed by both the Nuremberg and the Tokyo tribunals. The influence of the Charter was still limited in the first years after its adoption. Nonetheless, the trend to restrict the unilateral use of force to instances of self-defence was independently unfolding.

In a few years’ time, the influence of the Charter principles relating to the use of force increased significantly. The following chapters will explore the extent of this influence on the customary right of self-defence.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ For an elaborate analysis of the forcible affirmation of rights and the *Corfu Channel* case, see T.D. Gill, ‘The Forcible Protection, Affirmation and Exercise of Rights by States under Contemporary International Law’, 23 *Netherlands Yearbook of International Law* (1992) pp. 105-173.

⁸⁰ Ibid., pp. 149-150.