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

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12 The temporal dimension of post-Charter self-defence

The aim of Part II was 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 assessed 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.

Although, at the time of the adoption of the Charter, Article 51 was seen as a good compromise between the drafters, the wording of that article has since given rise to inexhaustible debate. As the comparative study of Part II has shown, controversies have emerged in relation to the temporal dimension of self-defence and all of its three elements: the conditionality of an attack and immediacy (necessity) as well as proportionality.

The purpose of this chapter is to draw conclusions as to the temporal dimension of post-Charter self-defence on the basis of the comparative analysis of Part II. The concluding remarks of this chapter will assess the place of anticipatory action within that temporal dimension. The significance of the findings and the discussion of the necessity and proportionality requirements will be elaborated in Part III.

Depending on the nature of the conflict, the temporal dimension of self-defence has been shifting from anticipatory action to remedial response and vice versa.

12.1 Temporal dimension of self-defence in state-to-state conflicts

In the case of state-to-state conflicts (Chapter 8), it was shown that the temporal dimension of the post-Charter concept of self-defence pertained to all three moments: before, during and after an armed attack. Unlike in pre-Charter state practice, the remedial aspect of self-defence in state-to-state conflicts (during and after an attack) was more prominent than the anticipatory one. Nonetheless, anticipatory action in self-defence was also acknowledged as lawful if the requirements of necessity and proportionality were met.

12.1.1 Anticipatory dimension of self-defence in state-to-state conflicts

The Six-Day War was an instance in which anticipatory action in self-defence was found to be legitimate by most commentators.[2] In June 1967, Israel launched an anticipatory action against an imminent threat of invasion from its Arab neighbours.[3] The Israeli

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[1] See *supra* 6.6.

[2] L.R. Beres, 'After the Gulf War: Israel, Preemption and Anticipatory Self-Defence Perspective', 13 *Houston Journal of International Law* (1991) p. 267; Dinstein 2005, pp. 191-192 (Dinstein characterized the Six-Day War as an instance of 'interceptive self-defence'); Franck 2002, p. 105; Gardner 1991, p. 51; Gill 2007, pp. 138-139. Shapira, pp. 75-76. The 'escalation of events' theory should not be confused with the 'accumulation of events' theory. For the description of the former, see *supra* 8.7. The latter pertains to hit-and-run tactics and was thoroughly examined throughout Chapter 10. Some authors rejected the legality of the Six-Day War: Alexandrov, pp. 153-154.

[3] See *supra* 8.7.

cabinet took in consideration the escalation of events beforehand and was able to predict both the manner and the purpose of the invasion.[4] The Israeli attitude before the outbreak of the Yom Kippur War was an instance of state practice where anticipatory action was not resorted to, although contemplated, because there was no perception of an imminent threat.[5]

Regarding the legality of anticipatory action in general, a significant number of authors agrees that an imminent threat of an armed attack can justify the exercise of self-defence.[6] Most of these authors consider the *Caroline* criteria as the standard for 'anticipatory self-defence'.[7]

Although legal doctrine has devoted thorough attention to the question of anticipatory action in self-defence, the International Court of Justice has always avoided addressing the issue of anticipatory action against an imminent threat. The only judicial bodies that expressly acknowledged the lawfulness of anticipatory action in self-defence against an imminent threat were the Nuremberg and Tokyo tribunals.[8] Moreover, as shown in Chapter 11, the International Law Commission has also avoided adopting a conclusive approach to anticipatory action in self-defence.

12.1.2 Remedial dimension of self-defence in state-to-state conflicts

The Korean War and the Iran-Iraq War were instances in which self-defence was exercised against an *ongoing* armed attack the purpose of which was not yet accomplished.[9] In both cases, the armed attack materialised in the form of a full-scale invasion in the sense of classic, state-to-state warfare, where armed forces of the belligerent states clash over a protracted amount of time. These cases also formed the quintessential examples of Article 51 measures of self-defence, although, in the case of the Iran-Iraq war, it took the UN a few years to affirm the right of Iran to defend itself against the Iraqi invasion.[10]

These instances of state practice also mirror the opinion of those authors who maintain that self-defence should be understood on the basis of a strict reading of Article 51 that limits the use of force to instances where an armed attack has already occurred.[11] The Falklands War and the Persian Gulf War involved the exercise of self-defence *after* an armed attack had already occurred. The naval forces of the UK engaged in battle with the Argentinean forces four weeks after the Junta regime accomplished the occupation of

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[4] See ibid.
[5] See *supra* 8.8.
[6] Bowett 1958, pp. 188-189; Gardner 1991, p. 51; Gill 2007, pp. 145-147; Greenwood 2003, pp. 12-16; Higgins, p. 199; McDougal and Feliciano, pp. 231-236; Schachter 1991, p. 151; Schwebel, p. 481; Waldock 1952, pp. 497-499. *Per a contrario*: Badr, p. 25; Brownlie 1963, pp. 275-278; Gray 2004, pp. 98-99, 130.
[7] Bowett 1958, pp. 188-189; Greenwood 2003, pp. 12-16; McDougal and Feliciano, pp. 231-236; Schachter 1991, p. 151; Waldock 1952, pp. 497-499.
[8] See *supra* 7.2.1.4 and 7.2.2.2. *Nazi Conspiracy and Aggression*, p. 36; Röling and Rüter, p. 382.
[9] See *supra* 8.3 and 8.9.
[10] See ibid.
[11] Badr, p. 25; Brownlie 1963, pp. 275-278; Cassese 2005, pp. 361-362 (Cassese offers *de lege ferenda* proposal for a possible future regulation of 'anticipatory self-defence', ibid., pp. 362-363); Gray 2008, pp. 160-165; Henkin 1991, pp. 44-46.

the Falklands Islands and South Georgia in the South Atlantic.[12] Likewise, *Operation Desert Storm* started after Iraqi troops had completed the invasion of Kuwait.[13] In both cases, however, preparations for the use of force in self-defence were made as soon as the armed attacks had started. In the case of the Falklands War, the geographical disparity between the home ports of the British naval forces and the zone of operations delayed the exercise of self-defence.[14] In the case of the Gulf War, the Security Council and coalition states attempted to solve the situation non-forcefully before opting for armed action.[15]

Although the Security Council acknowledged the legality of both actions (on the occasion of the Gulf War it also ordered collective enforcement measures), there has been some debate as to the timeliness of defensive action when the armed attack has already achieved its purpose.[16] Accordingly, the Falklands War was coined the reversal of a *fait accompli* rather than self-defence, because the takeover had already occurred.[17] Likewise, the contention was made that allowing self-defence in cases where the armed attack had already achieved its purpose would open the possibility of advancing defensive claims long after the injurious action had occurred.[18]

12.1.3 Circular dimension of self-defence in state-to-state conflicts

Some instances of state practice on self-defence have also involved hit-and-run tactics, where official elements of one state have carried out a series of small-scale, sporadic attacks on the territory or against the citizens of another state. Such instances were the hit-and-run tactics that led to the UK bombing of a Yemeni fort, the Gulf of Tonkin incident, the US bombing of Libya and the US airstrikes against Iraq. They purported a more complicated temporal dimension of self-defence that will be analysed within the temporal dimension of self-defence against non-state actors.[19] In the ensuing claims of self-defence, the defending states claimed that both remedial and anticipatory action was necessary to neutralize the source of threat. Accordingly, in 1964, the UK maintained that a series of incidents had convinced the government of the South Arabian Federation and the government of the United Kingdom that 'a deliberate and increasing attack by Yemen against the Federation was under way.'[20] Similarly, the US complained of 'deliberate and repeated armed attacks' against its naval vessels from North Vietnamese torpedo boats.[21] In 1986, the US justified the bombing of Libya by claiming that there was 'an ongoing pattern of attacks by Libya' as well as 'clear evidence that Libya was planning a multitude of future attacks.'[22] Likewise, in 1993, the US ambassador to the UN claimed that the airstrike against the Iraqi Intelligence Headquarters in Baghdad was carried out only after having concluded that there was no reasonable prospect that diplomatic

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[12] See *supra* 8.10.
[13] See *supra* 8.12.
[14] See *supra* 8.10.
[15] See *supra* 8.12 and 11.2.
[16] See *supra* 8.10.
[17] Neff, p. 330. See *supra* 8.10.
[18] Badr, p. 25; Schachter 1985, p. 292.
[19] See *infra* 12.3.
[20] *Repertoire*, Supp. 1964-1965, ch. 8, p. 128.
[21] SCOR, 19th Sess., 1140th mtg., UN Doc. S/PV.1140 (5 August 1964) para. 34.
[22] SCOR, 41st Sess., 2674th mtg., UN Doc. S/PV.2674 (15 April 1986) p. 17.

initiatives or economic pressure could influence the Iraqi government to cease the planning such attacks against US citizens.[23]

The US claims in the Gulf of Tonkin incident were criticized because of lack of clear information on the 'deliberate and repeated armed attacks' the government claimed it suffered. The mixed reaction to the other instances (condemnation for UK in 1964, criticism for US in 1986 and muted acceptance in 1993)[24] was due to the peculiarity of the argument for self-defence: defending oneself against past attack to preclude the occurrence of future ones.

Legal doctrine has been considerably divided on the issue. A number of authors have expressly or implicitly endorsed what became to be known as the 'accumulation of events' theory.[25] Others have rejected it as a dangerous extension of the understanding given to the right of self-defence.[26]

12.2 Temporal dimension of self-defence in conflicts involving WMD

In the case of conflicts involving weapons of mass destruction (Chapter 9), it was shown that there was a perceivable tendency to exceed the temporal dimension of self-defence. In the Cuban missile crisis, the US government decided not to resort to self-defence, because it believed that there was no legal basis for anticipatory action in the absence of the threat of an imminent attack.[27] That instance of state practice followed the pre-Charter understanding of the temporal dimension of self-defence.

The 1981 Israeli bombing of the Iraqi nuclear reactor went one step further. The Israeli Cabinet justified the airstrikes as self-defence against the possibility of Iraqi government developing a nuclear weapon in the foreseeable future.[28] The Israeli airstrikes were criticized by states before the Security Council as exceeding the limits of anticipatory action.[29]

The 2003 US invasion of Iraq exceeded even the limits of the 1981 Israeli action. The 2002 US National Security Strategy (also known as the 'Bush doctrine')[30] served as basis for the invasion and occupation of Iraq as well as the toppling of its regime without any evidence as to the existence – let alone imminent threat to use – weapons of mass destruction. The 1981 Israeli and the 2003 US actions show a tendency to exceed the temporal dimension of self-defence by advocating preventive use of force against the development or possession of WMD. While state-to-state conflicts involving claims of self-defence (Chapter 8) have consolidated the remedial dimension of self-defence, conflicts involving WMD push that dimension beyond anticipation and towards prevention.

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[23] Letter dated 26 June 1993 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/26003 (1993); Franck 2002, p. 94.
[24] See *supra* 8.5, 8.11 and 8.13.
[25] Baker 1987, p. 42; Blum, pp. 233; Bowett 1972, p. 12; Brownlie 1963, p. 279; Gross, p. 478; Higgins, p. 201; Jacobson, pp. 13, 16; Schachter 1985, p. 293.
[26] Henkin 1995, pp. 126-127.
[27] See *supra* 9.2.
[28] See *supra* 9.3.
[29] Ibid.
[30] Gardner 2003, pp. 585-586; Henderson, p. 6.

The preventive trend is not conclusively supported by UN organs or legal doctrine.[31] The approach of the Security Council has been negative; it unanimously condemned the Israeli reaction and it failed to endorse the US-led invasion of Iraq.[32] The International Court of Justice stopped short of characterizing possession of nuclear weapons unlawful *per se*, thus implicitly restricted the exercise of self-defence in such situations.[33]

The majority of the legal doctrine is also considerably sceptical as to the lawfulness of the use of force against development and possession of nuclear weapons.[34] Comments characterizing that trend as signalling a lawful alteration of the temporal dimension of self-defence have been voiced in legal literature, but the opinion is still in minority.[35]

12.3 Temporal dimension of self-defence in conflicts involving non-state actors

When it comes to conflicts involving non-state actors (Chapter 10), the temporal dimension of the post-Charter concept of self-defence is circular: the same defensive action is both remedial (against a string of past attacks) and anticipatory (against future attacks). The circularity stems from the 'accumulation of events' theory: the incidence of future attacks is expected because of the occurrence of past attacks.

This circularity of the temporal dimension was already perceived when analysing certain instances of state-to-state conflicts. The hit-and-run tactics employed by official elements of a state on the territory or against the citizens of another state, have led to similar arguments in self-defence than those used against non-state actors.[36]

The 'accumulation of events' theory has given rise to many controversies since the adoption of the UN Charter. For long, the Security Council and a part of the legal doctrine did not accept the possibility of attributing armed attacks to non-state actors and thus rejected the 'needle-prick' approach as well.[37] Nonetheless, there have also been lawyers who endorsed the theory and pointed out its usefulness for facing the threats posed by non-state actors.[38]

In the immediate aftermath of the 9/11 attacks, the Security Council expressly acknowledged the right to resort to self-defence against terrorist acts.[39] With that acknowledgement, the members of the Security Council also implicitly admitted that

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[31] SCOR, 36th Sess., 2282nd mtg., UN Doc. S/PV.2282 (15 June 1981) paras. 14-19; 2283rd mtg., S/PV.2283 (15 June 1981) paras. 23-27, 46, 117, 146; 2284th mtg., S/PV.2284 (16 June 1981) para. 11; 2288th mtg., S/PV.2288 (19 June 1981) para. 115. In one instance, the concepts of 'anticipation' and 'preventive aggression' were equated and deemed unlawful: 2283rd mtg., S/PV.2283 (15 June 1981) para. 146 (Sierra Leone). See also Alexandrov, p. 162; Franck 2002, pp. 105-107; Gardner 2003, p. 587; Gill 2007, pp. 141-142; Greenwood 2003, p. 14; Sapiro 2005, p. 367.

[32] See *supra* 9.3 and 9.5.2.

[33] See *supra* 9.4.

[34] Gardner 2003, pp. 587-588; Henderson, p. 14; Lowe, p. 865; Sapiro 2005, p. 367.

[35] Hill, pp. 329-331; Pierson, pp. 154-155; Taft and Buchwald, pp. 557-563, Taft, Remarks 2003; Wedgwood 2003, pp. 584; Yoo 2003, pp. 571-574.

[36] See *supra* 8.5, 8.6, 8.11 and 8.13.

[37] See *supra* 10.2 and 10.3. For a critical opinion on the 'accumulation of events' theory, see Lubell, pp. 51-54.

[38] Baker 1987, p. 42; Blum, pp. 233; Bowett 1972, p. 12; Brownlie 1963, p. 279; Gross, p. 478; Higgins, p. 201; Jacobson, pp. 13, 16; Schachter 1985, p. 293.

[39] SC Res. 1368 (2001) preamble.

armed attacks could be carried out by non-state actors as well.[40] That acknowledgement was in line with the pre-Charter understanding of self-defence, in which non-state actors were viewed as potential authors of an armed attack. Moreover, the attitude of the SC members to the 2006 Israeli invasion of Lebanon was the first signal of an implicit acceptance of the 'accumulation of events' theory.[41]

The growing concerns as to the nature of the twenty-first century terrorism have also fuelled arguments for 'preventive' self-defence, much the same way as the anxiety over possession of WMD by unfriendly states did. These opinions form a minority part of the relevant legal doctrine.[42]

Generally speaking, the circularity of the temporal dimension of self-defence against non-state actors is very similar to the pre-Charter understanding of that right. Accordingly, pre-Charter self-defence (in its narrow sense, of course), pertained to three moments: before, during and after an armed attack. That understanding is best mirrored in the post-Charter understanding of self-defence against non-state actors: defensive action against past attacks to preclude the occurrence of new ones.

12.4 Concluding remarks

The aim of this chapter was to draw conclusions as to the temporal dimension of post-Charter self-defence on the basis of the comparative analysis of Part II. This brief appraisal was needed in order to assess the place of anticipatory action within that temporal dimension.

It is the conclusion of this chapter – and of Part II as well – that the anticipatory dimension of self-defence could be discerned in all major groups of state practice discussed in the comparative analysis. All themes – state-to-state conflicts, conflicts involving WMD and conflicts involving non-state actors – confirmed the pre-Charter dimensions of self-defence: anticipatory and remedial. Moreover, all themes included cases in which self-defence had an anticipatory dimension. The basis on which the various claims of anticipatory action have been criticized or accepted pertained to the same elements that limited the pre-Charter concept of self-defence. For this reason, the present author does not agree with the contention of some publicists that post-Charter state practice has outlawed anticipatory action in self-defence as a result of its questionable legal basis or its rare use.[43] Looking at a few instances of state practice to reject (or justify) 'anticipatory self-defence' is insufficient. The anticipatory dimension of self-defence is present in many instances of state practice that are not necessarily treated as preemptive strikes.

Against this background, the practice of the Security Council cannot be interpreted as rejecting defensive anticipatory action *per se*. In fact, the legality of 'anticipatory self-defence' in general was many times endorsed by members of the Security Council, even when specific instances of state practice involving self-defence were harshly criticized.[44]

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[40] Franck 2002, pp. 54, 66-67.
[41] See *supra* 10.5.4.
[42] Hill, pp. 329-331; Pierson, pp. 154-155; Taft and Buchwald, pp. 557-563, Taft, Remarks 2003; Wedgwood 2003, pp. 584; Yoo 2003, pp. 571-574.
[43] Brownlie 1963, p. 260; Gray 2004, p. 130; Henkin 1995, pp.121-122.
[44] See, for instance, the discussions regarding the 1981 Israeli airstrike against the Osirak reactor, SCOR, 36th Sess., 2282nd mtg., UN Doc. S/PV.2282 (15 June 1981) paras. 14-19; 2283rd mtg., S/PV.2283 (15 June

The International Court of Justice, the International Law Commission as well as the General Assembly have refrained from making qualifications on the temporal dimension or anticipatory aspect of self-defence.[45]

Moreover, legal doctrine is still divided on the legality of anticipatory action in self-defence, although a significant number of authors justify it on the basis of the *Caroline* criteria.[46]

If the findings regarding state practice are corroborated with the influence exercised by the Security Council, the International Court of Justice and other UN organs as well as with the current state of the academic debate, it can be concluded that no new customary rule has emerged since the adoption of the Charter that eliminated the anticipatory dimension of self-defence. Undoubtedly, the various post-Charter developments on the subject have influenced the particularities of the limits of self-defence, but they cannot be interpreted as outlawing the pre-Charter anticipatory dimension of that right. On that basis, it remains to be seen what the coordinates of the current customary law on anticipatory action in self-defence are.

1981) paras. 23-27; 2284th mtg., S/PV.2284 (15 June 1981) para. 11. On the inconclusiveness of Security Council practice on 'anticipatory self-defence', see Gray 2004, p. 96.

[45] See *supra* 11.3 and 11.4. On the silence of the General Assembly on the issue, see Gray 2004, p. 95.

[46] Those for 'anticipatory self-defence': Bowett 1958, pp. 188-189; Higgins, p. 199; Gardner 1991, p. 51; Gill 2007, pp. 145-147; Greenwood 2003, pp. 12-16; McDougal and Feliciano, pp. 231-236; Schachter 1991, p. 151; Schwebel, p. 481; Waldock 1952, pp. 497-499. Those against: Badr, p. 25; Brownlie 1963, pp. 275-278; Cassese 2005, pp. 361-362 (nonetheless, Cassese offers *de lege ferenda* proposal for a possible future regulation of 'anticipatory self-defence', ibid., pp. 362-363); Gray 2004, pp. 98-99; Gray 2008, pp. 160-165; Henkin 1991, pp. 44-46.