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

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### **Part III - Anticipatory Action in Self-Defence and International Customary Law**

The present research examined the conditions under which anticipatory action in self-defence was legal under public international law. As it was explained in Chapter 1, the questions pertaining to anticipatory action have always been intrinsically connected to the content and temporal dimension of the right of self-defence *per se*.<sup>1</sup> For that reason, the research conducted focused on the right of self-defence as a whole and analysed anticipatory action together with that right.

The controversies surrounding the wording of Article 51 have made reliance on the customary basis of self-defence necessary.<sup>2</sup> Accordingly, in order to assess the legality of anticipatory action under public international law, this research has relied primarily on the relevant customary rules.

With that view in mind, two main research questions have been identified in the Introduction. The first question inquired whether anticipatory action in self-defence was part of contemporary customary international law. The second research question was reliant on the first and focused on the limits of anticipatory action in self-defence under contemporary customary international law.

Part III will answer these two questions on the basis of the findings of Part I and Part II. Accordingly, the conclusions of Parts I and II will be examined in order to answer the first research question. On that basis, the findings of both Part I and Part II will be discussed to address the second research question.

#### **13.1 First research question - The legality of anticipatory action in self-defence**

The first research question explores whether anticipatory action in self-defence is part of contemporary customary international law. In other words, the first research question inquires whether anticipatory action is part of the contemporary customary right of self-defence.

As it was explained in the Introduction, for the current content of the customary right of self-defence, the adoption of the UN Charter has been seen as a key moment.<sup>3</sup> It was then that the right of self-defence was expressly acknowledged as the only legal exception to the unilateral use of force.<sup>4</sup> At the same time, the adoption of the Charter gave rise to several controversies affecting the customary right of self-defence.<sup>5</sup> Since the drafters of the Charter included the right of self-defence as an ‘inherent’ (i.e., customary) right, it was necessary to explore the content of this right and thus trace the evolution of the customary law on self-defence in two phases: pre-Charter and post-Charter customary law on self-defence.

The examination of the development of pre-Charter customary law on self-defence was conducted through the method of legal-historical research. The examination of the evolution of post-Charter customary rules on self-defence was conducted through the use

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<sup>1</sup> See *supra* 1.1.2.3.

<sup>2</sup> See *supra* 1.2. The importance of the customary basis of self-defence was confirmed by the ICJ as well. *Nicaragua*, ICJ Rep. (1986) para. 176. See also *supra* 11.4.4.

<sup>3</sup> See *supra* 1.2.1.1.

<sup>4</sup> Brownlie 1963, pp. 265; Simma, p. 663; Neff, pp. 316-317; Dixon, p. 297.

<sup>5</sup> See *supra* 1.1.2.

of comparative case studies relating to a number of themes which have played a significant and continuous role in the assessment of the content of the contemporary customary law on self-defence.

### 13.1.1 Findings of Part I

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 drew conclusions on whether anticipatory action was seen as part of self-defence at the time the Charter was adopted.

The concept of self-defence was traced through 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.

It was one of the conclusions of the legal-historical research that the pre-Charter concept of self-defence was viewed as a right given by nature to both individuals and states. As a result of this dual discussion, two forms of defensive wars became to be recognized and employed in practice, although only one of them could be correctly characterized as 'self-defence'. The natural right of self-defence acknowledged for individuals purported to the *narrow* understanding of this right. This understanding was also applied to the state in a slightly more permissive manner, when it came to 'imperfect wars' and 'measures short of war'.<sup>6</sup> Conversely, when waging a 'perfect', officially declared, full-scale war for various defensive purposes, a much *broader* understanding of defence was employed. On the basis of the natural law-based, narrow understanding, defence was allowed against an imminent or an ongoing attack as well as against an attack that had already occurred, but only with the purpose of warding off a future attack.<sup>7</sup> The broader understanding of defence allowed the waging of preventive wars.<sup>8</sup>

The legal-historical research traced the evolution of both strands, but it mainly focused on the natural-law, narrow understanding of self-defence. Accordingly, one of the findings of Part I was that the natural-law, pre-Charter concept of self-defence had always been seen as having an intrinsic anticipatory aspect. There was no strict differentiation made between 'self-defence' and 'anticipatory self-defence', because the right *as such* had an anticipatory meaning. Remedial action in self-defence was allowed only if a new attack had to be warded off.<sup>9</sup>

One of the main conclusions of Part I was that, as a result of the gradual restriction of the broader conception of defensive wars in the third normative framework (late 19<sup>th</sup> and early 20<sup>th</sup> centuries), the narrow, natural-law conception of self-defence was the one accepted as customary law in the period immediately preceding and at the time of the adoption of the United Nations Charter. This understanding of self-defence – pertaining

<sup>6</sup> See *supra* 2.3.3.2. Grotius, Bk. II, ch. 1 (xvi), p. 184. See also *supra* 3.3 and 4.7.

<sup>7</sup> See *supra* 2.4. Gratian, question I, in Reichberg et al., pp. 109-110; Aquinas, question 41, article 1, in Reichberg et al., pp. 182-183; Pisan, Part III, ch. 12, in Reichberg et al., p. 219.

<sup>8</sup> Gentili, Bk. I, ch. 14, p. 66.

<sup>9</sup> See *supra* 6.4-6.6.

to the time before, during and after an attack – was taken in consideration when the compromise of Article 51 was reached.<sup>10</sup>

The intrinsic anticipatory aspect of the pre-Charter concept of self-defence was also highlighted by Bowett, who contended that ‘the right has, under traditional international law, always been “anticipatory”, that is to say its exercise was valid against imminent as well as actual attacks or dangers.’<sup>11</sup> The same conclusion was reached by Waldock, who asserted that ‘self-defence belongs to preventive justice’ in the sense that self-defence was strictly confined ‘to the object of stopping or preventing the infringement and reasonably proportionate to what is required for achieving this object.’<sup>12</sup>

In view of the conclusions of Part I, this research has referred to ‘anticipatory action in self-defence’ rather than ‘anticipatory self-defence’. The choice of the phrase was made in order to highlight the intrinsic aspect of anticipatory action within the concept of self-defence as a whole. Furthermore, the phrase has been used to suggest that there is no separate ‘anticipatory self-defence’ along a standard right of self-defence.<sup>13</sup> Naturally, the notion of ‘anticipatory self-defence’ was also used when direct quotes or specific references to legal doctrine as well as state- or UN practice rendered it necessary.

### 13.1.2 Findings of Part II

The aim of Part II was to analyse the development of post-Charter customary law on self-defence. In view of the conclusion of Part I, that the pre-Charter, natural-law concept of self-defence always had an anticipatory aspect,<sup>14</sup> Part II had to assess whether post-Charter developments have brought about the emergence of a new customary rule on self-defence affecting the anticipatory aspect of that right.

It is essential to emphasize that the aim of Part II was *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 needed to assess was whether a *new* customary rule *prohibiting* anticipatory action had emerged since the adoption of the Charter. For that reason, Part II embarked on a comparative analysis of several instances of state practice, organized under various themes, and examined the temporal dimension of self-defence as a whole to ascertain potential alterations in the concept of self-defence. Both anticipatory and remedial actions in self-defence were given attention.

On the basis of the comparative analysis, Part II found that the anticipatory dimension of self-defence could be discerned in all major groups of state practice discussed. All themes – state-to-state conflicts, conflicts involving WMD and conflicts involving non-state actors – included cases in which self-defence had an anticipatory dimension. Although remedial action was more prominent in state-to-state conflicts, self-defence pertained to all three moments: before, during and after an armed attack. Furthermore, in conflicts involving WMD the anticipatory dimension was very strong; though two of the

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<sup>10</sup> See *supra* 5.5 and 6.7.

<sup>11</sup> Bowett 1958, pp. 188-189.

<sup>12</sup> Waldock 1952, p. 464.

<sup>13</sup> Remarks also made in 2.4, 3.2.2.1, and 6.7.

<sup>14</sup> See *supra* 6.7.

cases discussed pushed that dimension beyond its pre-Charter limits towards prevention. The temporal dimension of self-defence against non-state actors was found to be both anticipatory and remedial. In other words, it reflected the pre-Charter understanding of the right in its full form: defence being allowed before, during and after an armed attack. The findings regarding state practice were coupled with the influence exercised by the practice of the Security Council, the International Court of Justice and other UN organs as well as with the current state of the academic debate. The resulting picture showed that there was no conclusive evidence of a new customary rule eliminating the pre-Charter anticipatory dimension of self-defence.

### 13.1.3 The legality of anticipatory action in self-defence in international law

On the basis of the corroborated findings of Part I and Part II, the present research concludes that anticipatory action is still part of the contemporary customary understanding of self-defence. Undoubtedly, the various post-Charter developments on the subject have shaped the conditions under which anticipatory action in self-defence is legal under international law. Their influence is addressed in relation to the second research question. Nonetheless, the temporal dimension of the contemporary customary right to self-defence has retained an anticipatory aspect, which – under certain conditions – may be deemed lawful under international law.

In order to place the present argument in the context of the current debate on the legality of anticipatory action in self-defence, a short examination of the relevant literature is necessary. Only the main contentions in the debate will be depicted, in order to place the present opinion in their context.

Those who reject the legality of ‘anticipatory self-defence’ (restrictive approach) employ a combination of treaty interpretation and contextualization. Accordingly, relying on a literal analysis of Article 51, certain authors maintain that self-defence before an armed attack was outlawed by the negotiators of Article 51.<sup>15</sup> Furthermore, these publicists contend that the adoption of the Charter was a big leap forward for the regulation of the use of force and that many traditional norms were left behind.<sup>16</sup> Likewise, the outlawry of anticipatory action in self-defence is also deduced from the assessment of post-Charter state practice.<sup>17</sup> Accordingly, it has been asserted that because the actual invocation of the right to ‘anticipatory self-defence’ is rare in practice, such a justification for the use of force can hardly be maintained under contemporary customary international law.<sup>18</sup> On that basis, it is contended that even if the drafters of the Charter did not intend to outlaw anticipatory action, subsequent state practice, under the influence of the Charter, has done so.<sup>19</sup>

Conversely, those advocating the legality of ‘anticipatory self-defence’ (permissive approach) maintain that the purpose of Article 51 was to preserve the customary

<sup>15</sup> Brownlie 1963, p. 275; Gray 2004, p. 98; Kunz, pp. 877-878. This view was also maintained by Franck, although he belongs to the legal doctrine that accepts the legality of anticipatory action in self-defence under certain circumstances. Franck 2002, p. 50.

<sup>16</sup> See *supra* 11.3.2.1. Summary Record of the 1627<sup>th</sup> ILC mtg., UN Doc. A/CN.4/SR.1627 (1980) para. 3 (comment by Tsuruoka).

<sup>17</sup> Gray 2004, pp. 98-99, 130.

<sup>18</sup> Brownlie 1963, p. 260; Gray 2004, p. 130; Henkin 1995, pp.121-122.

<sup>19</sup> Brownlie 1963, p. 260; Gray 2004, pp. 98, 130; Zoller, pp. 333-337.

understanding of the right, as prescribed by the *Caroline* criteria.<sup>20</sup> These authors also maintain that the *travaux préparatoires* do not show any intention in defining or restricting self-defence to instances where an armed attack has already occurred.<sup>21</sup> Some writers also point out that the French version of the phrase ‘if an armed attack occurs’ (*dans un cas où un Membre des Nations Unies est l’objet d’une agression armée*) is considerably less restrictive.<sup>22</sup> This part of the legal doctrine often makes reference to specific instances of state practice that involved anticipatory action in self-defence and maintains, on their basis, that ‘anticipatory self-defence’ may still be lawful under strict conditions.<sup>23</sup>

Some observations are needed in order to better illustrate the place of the present argument in the relevant debate. First of all, those advocating for a restrictive approach claim that by the time the Charter was adopted, customary law allowed only a narrow right of self-defence.<sup>24</sup> This is undoubtedly true. The analysis of the pre-Charter legal history has shown two strands – a narrow and a wider understanding – of self-defence.<sup>25</sup> The broader understanding of self-defence allowed for preventive action against possible and probable dangers, in the sense put forward by Gentili and Vattel.<sup>26</sup> This understanding was indeed considerably restricted by the beginning of the twentieth century and was generally viewed as unlawful at the time of the adoption of the Charter.<sup>27</sup> Conversely, the narrow understanding of self-defence continued to be accepted as customary law at the time of the Charter. On its basis, self-defence could be exercised against imminent threats or ongoing attacks as well as after an attack had already occurred if a new attack had to be warded off.<sup>28</sup>

Furthermore, there is documentary evidence suggesting that some delegates of the United States at the San Francisco conference wanted to restrict self-defence to the time after an armed attack.<sup>29</sup> Their proposal, however, was met with scepticism by other US delegates who believed that the right would be unduly restricted.<sup>30</sup> Moreover, these proposals were not put forward before the relevant committee, so no intergovernmental discussion ensued on the topic.<sup>31</sup> Therefore, no clear conclusion can be drawn solely from the records as to the temporal dimension attributed to self-defence by the various

<sup>20</sup> Bowett 1958, pp. 188-189; Higgins, p. 199; McDougal and Feliciano, pp. 231-236; Schachter 1991, pp. 150-152; Schwebel, p. 481; Waldock 1952, pp. 497-499.

<sup>21</sup> Bowett 1958, p. 188; Dixon, p. 301; McDougal and Feliciano, pp. 234-235; Waldock 1952, p. 497.

<sup>22</sup> Higgins, p. 199; Waldock 1952, p. 497.

<sup>23</sup> Dinstein 2005, pp. 191-192. Franck 2002, pp. 107-108; Higgins, pp. 199-203.

<sup>24</sup> Brownlie 1963, pp. 257-261; Gray 2004, p. 98.

<sup>25</sup> See *supra* 6.2-6.5.

<sup>26</sup> See *supra* 2.3.3.2 and 3.1.3. Gentili, Bk. I, ch. 14, p. 61; Vattel, Bk. III, ch. 3, § 42, p. 248.

<sup>27</sup> See *supra* 4.7 and 5.5.

<sup>28</sup> See *supra* 6.4 and 6.6.1.

<sup>29</sup> For the expressed intention of some of the US delegates at the San Francisco conference to limit self-defence to the time after an armed attack occurred, see *supra* 5.4 and Franck 2002, p. 50.

<sup>30</sup> See *supra* 5.4. Minutes of the Forty-Eighth Meeting (Executive Session) of the United States Delegation, Held at San Francisco, 20 May 1945, in *Foreign Relations of the US 1945*, p. 818; Minutes of the Thirty-Eighth Meeting of the United States Delegation, Held at San Francisco, 14 May 1945, in *ibid.*, pp. 707-709.

<sup>31</sup> See *supra* 5.4.

negotiators. Likewise, there is no conclusive evidence of a common or at least generally shared intention of restricting the right of self-defence to exclude anticipatory action.<sup>32</sup>

Finally, the status of anticipatory action in post-Charter developments cannot be ascertained only by looking at specific instances of state practice invoking ‘anticipatory self-defence’. The status of post-Charter anticipatory action can only be understood if the temporal dimension of the right of self-defence as a whole is analysed. Concentrating only on the Six-Day War and/or the 1981 Israeli bombing of the Osirak reactor cannot shed light on the way the temporal dimensions – both anticipatory and remedial – have been shaped since the adoption of the Charter. The comparative analysis of Part II has shown that sometimes the two dimensions combine as well as that neither of them is void of controversy. Moreover, instances of state practice cannot be analysed in isolation from each other and from the general reaction of states or legal doctrine. The picture that emerges as a result of the corroborated analysis of all these aspects shows the anticipatory dimension of self-defence resurfacing in all main themes of post-Charter state practice: state-to-state conflicts, conflicts involving WMD as well as conflicts involving non-state actors. At worst, anticipatory action in self-defence is a legal basis for the use of force that can easily be abused as a result of a general lack of regulation of its content in UN practice. At best, anticipatory action in self-defence is a legal basis for the use of force that is acquiring increased relevance in twenty-first century conflicts and, for that reason, needs to be better defined.

### **13.2 Second research question – The limits of anticipatory action in self-defence**

The second research question explores the limits of anticipatory action in self-defence under contemporary customary international law. It was the secondary objective of both the legal-historical research (Part I) and the comparative analysis (Part II) to identify a pattern of limitations applicable to anticipatory action in self-defence.

#### **13.2.1 Findings of Part I**

Since anticipatory action was an intrinsic part of the natural law of self-defence, one of the findings of the legal-historical research was that the elements limiting the exercise of the narrow understanding of self-defence were applicable to anticipatory action.<sup>33</sup>

In all three normative frameworks identified in Part I the same recognizable pattern of elements of self-defence could be contoured. First, self-defence always entailed the conditionality (occurrence or expectation) of an *attack*. Secondly, this attack (its occurrence or its imminence) had to give rise to an *immediate (present and inevitable) need to take action*. Thirdly, the exercise of self-defence had to be *moderate*. The first two elements have been found to be intrinsically linked to each other and were therefore treated under the general heading of ‘necessity’. The third condition pertained to the modality of the exercise of self-defence and was treated under the heading of ‘moderation’ or ‘proportionality’.

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<sup>32</sup> Ibid.

<sup>33</sup> See *supra* 6.7.

### 13.2.2 Findings of Part II

The three elements identified in Part I were employed as ‘juridical variables’ in the comparative analysis of Part II and were used to assess the various claims of self-defence voiced in state practice. The variables were also employed as basis for examining the influence of United Nations organs on the content of self-defence. It was the conclusion of each chapter of the comparative analysis that the three elements – under the headings of necessity and proportionality – continued to contour the content of self-defence and, implicitly, the limits of anticipatory action.

### 13.2.3 The limits of anticipatory action in self-defence under international law

On the basis of the combined findings of Part I and Part II, Part III will set out the content, applicability and controversies regarding each element of self-defence and will thus demarcate the parameters under which anticipatory action may be lawful. It is essential to note at this point, that in order to demarcate the parameters of anticipatory action, attention will be given to the immediacy element, because it is the one directly pertaining to the temporal dimension of self-defence. Although the other two elements (conditionality of an armed attack and proportionality) are closely connected to immediacy and cannot be examined in an isolated manner, they will receive less attention, because they do not directly pertain to the temporal dimension of self-defence. In order to analyse the content of each element, distinction has been made between standard-type armed attacks (invasions, occupation, large-scale bombardment or airstrikes) and so-called hit-and-run tactics (reoccurring attacks against citizens or smaller-scale shelling and other incidents). As explained in the concluding remarks of Part II, hit-and-run tactics (whether performed by non-state actors or regular forces) have a circular temporal dimension that needs specific attention.<sup>34</sup> Furthermore, self-defence against such tactics is significantly more controversial than against standard armed attacks, because it involves the application of the ‘accumulation of events’ theory.<sup>35</sup> Therefore, the elements of self-defence will first be discussed for armed attack in the standard sense and subsequently, for hit-and-run tactics.

#### 13.2.3.1 Standard-type armed attacks

As explained above, those claims of self-defence will firstly receive attention, which have been invoked against standard-type armed attacks. Although this category mainly involves acts that have been traditionally understood as armed attack (invasion, occupation or large-scale bombardments), the instances of state practice involving WMD will also be treated within this category. Although they cannot be characterized as (threat of) armed attack in the classic sense, their temporal dimension can be examined in the same manner as that of classic state-to-state conflicts. Accordingly, the following conflicts will pertain to this part of the analysis: the Jewish War of Independence (1948), the Korean War (1950-1952), the Sinai Campaign (1956), the Cuban missile crisis (1962), the Six-Day War (1967), the Yom Kippur War (1973), the Iran-Iraq War (1980-

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<sup>34</sup> See *supra* 12.1.3 and 12.3.

<sup>35</sup> See *supra* 10.6 and 12.3.



1988), the Israeli bombing of the Osirak reactor (1981), the Falklands War (1982), the Persian Gulf War (1990-1991), the US war against Iraq (2003) and the South Ossetian War (2008). Additionally, some instances of pre-Charter state practice will also be mentioned for comparative reasons.

Accordingly, in the present section the notion of ‘armed attack’ will be used to describe the standard-type understanding of the term, as outlined above.

### 13.2.3.1.1 Necessity

On the basis of the findings of Part I and Part II, two intertwined elements of the necessity requirement could be discerned: the conditionality of an armed attack and immediacy.<sup>36</sup>

The *conditionality of an attack* denotes both the occurrence and expectation (imminence) of an armed attack. As regards the notion of ‘armed attack’, pre-Charter customary law offered no precise definition. In case of individuals it was accepted that both the life and the property of private persons could be defended.<sup>37</sup> In case of sovereigns, reference was usually made to an ‘attack’,<sup>38</sup> ‘danger’,<sup>39</sup> or ‘invasion’<sup>40</sup> without laying down the specific conditions. Nonetheless, it was generally understood that for the narrow understanding of self-defence such an attack had to involve the use or threat of armed force.<sup>41</sup> Neither was there a 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.<sup>42</sup> 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.<sup>43</sup> Post-Charter practice has not completely remedied the definitional problems of armed attack. Although it is commonly accepted that it involves the most serious forms of threat or use of force, there is no commonly agreed definition of what constitutes armed attack and what does not.<sup>44</sup> Moreover, conflicts involving non-state actors have further complicated the definition of armed attack (as will be shown in section 13.2.3.2).

It is beyond the purpose of this research to elaborate on all the questions pertaining to the definition of armed attack. On the basis of the examined instances of state practice, it can nevertheless be maintained that an armed attack usually denotes the most serious

<sup>36</sup> See *supra* 6.6.1 and introductory remarks of Part II.

<sup>37</sup> Vitoria, *De jure belli*, p. 299; Grotius, Bk. II, ch. 1 (ii), p. 172.

<sup>38</sup> For instance: 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.

<sup>39</sup> Gentili, Bk. I, ch. 14, p. 62.

<sup>40</sup> June 23 Note, in Miller, p. 214.

<sup>41</sup> For instance: Suárez, Disputation XIII, § 1 (6), p. 804; Grotius, Bk. II, ch. 1 (v), p. 173; Webster, *BFSP*, p. 1138.

<sup>42</sup> 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). See also Bowett 1958, p. 5.

<sup>43</sup> See *supra* 5.4.

<sup>44</sup> See *supra* 1.1.2.1.

forms of the use of force endangering political independence, territorial integrity as well as the security and life of citizens.<sup>45</sup>

Although self-defence was sometimes invoked against injuries not involving the use of force, such claims found no support in state practice. In 1948, Transjordan, Egypt, Syria and Iraq maintained a claim of self-defence against the Jewish declaration of independence.<sup>46</sup> Likewise, in 1956, Israel justified its Sinai campaign as self-defence against the blocking of the Suez Canal and raids of the *fedayeen* supported by Egypt.<sup>47</sup> Neither of the arguments found support as grounds for invoking self-defence. In 1948, the Security Council characterized the actions of the Arab states as a threat to peace under Article 39 of the Charter and demanded the parties concerned to desist from further military action and issue cease-fire orders.<sup>48</sup> Although no condemnatory resolution was adopted on the occasion of the 1956 Sinai campaign, the general reaction in the Security Council to the endeavours of Israel, Britain and France was highly negative.<sup>49</sup>

Despite the fact that it is widely maintained that ‘armed attack’ denotes the most serious forms of the use force, there is little agreement on what exactly such forms entail. Pre-Charter customary law did not limit self-defence to the gravest uses of force. Since the narrow understanding of self-defence was relevant for ‘imperfect wars’ and measures short of war, it was also admitted that small scale uses of force could trigger self-defence as well.<sup>50</sup> The *Caroline* incident, for instance, involved self-defence against a small-scale danger posed by rebels and sympathizers of the Canadian insurrection.<sup>51</sup>

In post-Charter state practice, emphasis has been put on the scale of force in trying to point at the threshold of an armed attack.<sup>52</sup> Invasion and large-scale bombardments are generally agreed to constitute armed attacks, whereas smaller-scale uses of force are assessed on a case-by-case basis.<sup>53</sup>

In the opinion of the present author, the modality of the use of force (its geographical and temporal scope as well as the employed weapons) coupled with the effect of the force (the impact on the state or society) has to trigger serious consequences in order to denote an armed attack. For instance, the invasion of South Korea by the North not only affected the territorial integrity and the political independence of the state, but also disrupted society and caused great losses of life. Likewise, in case of a threat of an armed attack, the perceived modality of the force to be used (for instance, the scale of the expected airstrikes) and the envisaged effect (great loss of life and property) has to amount to a considerable danger. For example, in June 1967, Israel expected that the combined attack of Arab states against its territory would not only cause great casualties, but would also

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<sup>45</sup> Higgins, pp. 204-205; Gray 2008, pp. 147-148; Schachter 1991, p. 164.

<sup>46</sup> See *supra* 8.2; *Repertoire*, Supp. 1946-1951, ch. 12, pp. 493-494.

<sup>47</sup> See *supra* 8.4. GAOR, 1<sup>st</sup> Emergency Special Sess., UN Doc. A/PV.562 (1956) paras. 105-145.

<sup>48</sup> See *supra* 8.2. SC Res. 54 (1948).

<sup>49</sup> See *supra* 8.4.

<sup>50</sup> Bowett 1958, p. 5.

<sup>51</sup> See *supra* 3.2.2.1.

<sup>52</sup> Gray 2008, pp. 147-148; McDougal and Feliciano, pp. 238-240. See also *supra* 11.4.1. For an appraisal of the ICJ’s position on the required gravity of an armed attack, see Green, pp. 31-42.

<sup>53</sup> On the discussion of the scale and gravity of an armed attack, see, for instance, Gray 2008, pp. 128-133, 147-148; Lubell, pp. 50-51; Schachter 1991, p. 164.

aim at occupying significant parts of the country. Moreover, it was the expressed intention of several Arab officials to bring an end to Israel as an independent state.<sup>54</sup>

Usually, both the modality of the force and its effect are relevant to ascertain the gravity of an armed attack. Nonetheless, conflicts involving non-state actors have shown that sometimes the modality of the force is inconsequential in comparison with the effect of the attack. A string of small-scale attacks carried out against a state or the citizens of a state can have a considerable effect over time. Likewise, terrorist attacks are often carried out without the use of sophisticated weapons or the engagement of significant forces. The importance of these acts for the notion of armed attack will be further discussed when dealing with hit-and-run tactics.<sup>55</sup>

Suffice it to say at this point, that if the combination of the modality of force (to be used) and of the (envisaged) effect leads to grave consequences, the first element of necessity should be seen as met in order to call for a general engagement of the armed forces of a state.

As stated in the Introduction, it is not the purpose of this research to discuss unit self-defence. Nonetheless, the present author believes that armed forces of a country are permitted, under strict conditions, to defend themselves on a unit-to-unit level. For instance, the crew of the *USS Cole* could have issued a warning against the approaching dinghy boat and hit it in case it refused to stop. Likewise, the on-the-spot reaction of the Georgian forces to the shelling on 7 August 2008 was a legitimate act of unit self-defence. Such an act could have been carried out on the exclusive basis of unit self-defence, without any need to trigger *jus ad bellum* questions pertaining to ‘national self-defence’.<sup>56</sup> The conditions under which unit self-defence is allowed pertain to the law of military operations and are outside the scope of this research.<sup>57</sup>

The second element of necessity can be described as *immediacy* and flows from the dangers posed by the conditionality of the armed attack. Simply put, because of the modality of the force (to be) used and the (envisaged) effect, an immediate need for action is created.

Webster’s famous formula suggests the same conclusion. He referred to a ‘necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.’<sup>58</sup> Although his formula very colourfully describes the immediate need for action that (the threat of) an armed attack might create, another, simpler phrase used by him describes immediacy in the best terms. Accordingly, Webster contended that the actions of the British government had to stem from a necessity, ‘present and inevitable’.<sup>59</sup>

These two adjectives, present and inevitable, describe very well what the immediacy factor is about. First, the need for action must be ‘present’ in the sense that a state of emergency is created in which measures must be taken. In the standard Webster-formula, the phrase of ‘no moment for deliberation’ is the equivalent. As evidenced by the

<sup>54</sup> See *supra* 8.7. Statement of Mr. Eban (Israel), SCOR, 22<sup>nd</sup> Sess., 1348<sup>th</sup> mtg., UN Doc. S/PV.1348(OR) (6 June 1967) para. 150; Wright 1968, p. 9.

<sup>55</sup> See *infra* 13.2.3.2.1.

<sup>56</sup> For examples of on-the-spot-reaction, see Dinstein 2005, pp. 220-221.

<sup>57</sup> See, for instance, J.F.R. Boddens Hosang, ‘Force Protection, Unit Self-Defence, and Extended Self-Defence’, in T.D. Gill and D. Fleck, eds., *Handbook of the International Law of Military Operations* (Oxford, Oxford University Press 2010), pp. 415-427.

<sup>58</sup> Webster, *BFSP*, p. 1138.

<sup>59</sup> *Ibid.*

examination of state practice in various chapters of Part II, the present author has given preference to the term ‘present’, because it more reasonably describes the state of emergency created. While ‘no moment for deliberation’ poses the danger of being literally interpreted, the term ‘present’ describes an actual, real emergency, which nevertheless gives room for last-minute military preparations or talks with allies.<sup>60</sup>

Secondly, the emergency situation has to be ‘inevitable’. In the standard Webster-formula, the phrase ‘leaving no choice of means’ is the corresponding description. As evidenced by the presentation of state practice in Part II, the present author has given preference to the term ‘inevitable’, because it is a more realistic description of the unavoidability of the danger faced.

The two features – present and inevitable – form the immediacy factor. Both of them are needed to have an immediate need for action. If the need to act is not present, then there will probably be no way of knowing whether the danger is inevitable. For example, in 1981, Israel carried out airstrikes against an Iraqi nuclear reactor believing that if that reactor produced a nuclear bomb, Saddam Hussein would not shy away from using it. Even if one accepts that that was a legitimate fear based on adequate information, the reactor was four years away from producing a nuclear bomb. The need to act was not present and, for that reason, there was no way of knowing that within those four years other choice of means would have not presented themselves. With hindsight, it becomes clear that it was highly unlikely that alternative means would have precluded Iraq from obtaining nuclear weapons had the 1990-1991 Gulf War not occurred. Likewise, the question of whether Iraq would have used such weapons against Israel once it had them is unanswerable. Nonetheless, these observations are immaterial to the assessment of the immediate need at the time of the action.<sup>61</sup> Conversely, if the need to act is present, but the danger can be avoided by alternative means (such as negotiations), claims of self-defence cannot be justified.

After this succinct general presentation of the immediacy factor, its application to the remedial and anticipatory dimension of self-defence will be examined. Accordingly, distinction will be made between claims of self-defence against imminent, ongoing and already occurred armed attacks.

### 1) **Precluding an armed attack from occurring**

As Ago asserted, the objective of self-defence was to preclude ‘another’s wrongful action from proceeding, succeeding and achieving its purpose.’<sup>62</sup>

Precluding an armed attack from proceeding or occurring entails the existence of an imminent threat of armed attack. In other words, the threat has to be inevitable and present. Thus when it comes to self-defence against an imminent threat, the immediacy factor takes the form of imminence, but its two underlying features (presence and inevitability) remain unchanged. Accordingly, in order to render a threat imminent, it must be shown that it would have been unavoidable by other means. More specifically, the defending state must demonstrate that the attack could not have been precluded by non-forceful means, such as negotiations, mediation or fulfilment of certain legitimate

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<sup>60</sup> Gill 2007, p. 153; Lubell, p. 44.

<sup>61</sup> See *supra* 9.3. Gill 2007, p. 141.

<sup>62</sup> Ago Report, p. 54.

and reasonable requests. For instance, if the Johnson administration had succeeded in securing the reopening of the Straits of Tiran and further diplomatic talks had ensued, the inevitability of the Arab attack would have probably not seemed as obvious as it did before the Six-Day War.<sup>63</sup> The inevitability of the attack can also be deduced from an escalation of events that renders any non-forcible solution inadequate, as it happened in the Six-Day War.<sup>64</sup>

Furthermore, the defending state has to show that the elapse of time would have not ameliorated the situation and that there was an urgent need to act. The difficulty in proving the emergency of the situation was one of the reasons why Israel chose not to act pre-emptively in the face of the Yom Kippur War.<sup>65</sup>

The question arises whether the state defending itself against an imminent threat must prove *prior* to the defensive action the justifiability of its claim. It has been maintained that the state resorting to self-defence should offer justifying arguments before the defensive action. Accordingly, 'while conclusory official statements might be acceptable when the victim state has no time or opportunity to present the requisite evidence, the facts justifying its actions should otherwise be revealed prior to taking necessary defensive steps. When such disclosure is not feasible, it should be made at the earliest time thereafter.'<sup>66</sup>

Although Franck agreed with the importance of providing conclusive evidence supporting the resort to force of the injured state, he emphasized that the right of the injured state to defend itself could not depend on its ability to convince the fifteen members of the Security Council that it had indeed correctly identified the attackers and the host state.<sup>67</sup>

Indeed, there is nothing in the legal history of the requirement of necessity that would require states to unquestionably prove the justifiability of their claims prior to the defensive action. That would go against the immediacy factor embedded in the requirement of necessity. If a target state found itself facing a present and inevitable need to take action to ward off an imminent attack, its right to defend itself should not be made dependent upon convincing the members of the Security Council or any other official body as to the accuracy of the evidence in its possession. That being said, the target state would be obliged to offer an explanation during or after its defensive action. Article 51 requires reporting the use of force in self-defence to the Security Council. The defending state would thus have ample opportunity to present evidence and justification of its action before the members of the Security Council. States have used such an opportunity in the majority of cases where claims of self-defence were invoked to sustain specific armed actions.<sup>68</sup>

What such a report would have to show is that *on the basis of the available information* (objective criterion) interpreted in *good faith* (subjective criterion), the relevant officials of the state reached the conclusion that a threat of an armed attack was imminent. Both objective and subjective criteria have to be met. The subjective criterion

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<sup>63</sup> See *supra* 8.7.

<sup>64</sup> *Ibid.*

<sup>65</sup> See *supra* 8.8. Mueller et al., p. 207.

<sup>66</sup> Charney 2001, p. 836.

<sup>67</sup> Franck 2001, p. 843.

<sup>68</sup> For instance, *supra* 8.5, 8.6 and 8.11 as well as 10.2 and 10.3. See also Higgins, pp. 205-207.

is of utmost importance. Its absence will always render a claim of self-defence untenable. For instance, before the Nuremberg Tribunal, the defence argued 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.<sup>69</sup> Even though the availability of evidence of a potential British occupation of Scandinavia was (questionably) demonstrated, the facts of the case showed that the Nazi attack had been planned long before any question of British occupation of Norway had been raised.<sup>70</sup> Accordingly, the available information as to the British plans was used to justify a long-planned move of Nazi Germany aimed at improving its strategic and operational position in the war-theatre.<sup>71</sup> Conversely, the British operation against the concentration of French ships at Mers-el-Kebir was carried out on the basis of the strong conviction that had the Nazis seized the vessels, the waters around Britain would have become an open avenue for a German invasion force.<sup>72</sup> Although there was no irrefutable 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.<sup>73</sup> On the basis of the available information interpreted in good faith, Churchill's War Cabinet concluded that there was a present and inevitable need to act in the face of such a threat.

## 2) Precluding an armed attack from achieving its purpose

Full-scale invasions lead to situations in which defence is exercised against an ongoing armed attack that has not yet reached its purpose. Such instances are the Korean War and the Iran-Iraq War.<sup>74</sup> In both cases, the armed attack materialised in the form of a full-scale invasion in the sense of classic, state-to-state warfare, which allowed armed forces of the belligerent states to clash over a protracted amount of time. They form the quintessential examples of Article 51 measures of self-defence.<sup>75</sup>

As with claims of self-defence against imminent threats, the immediacy factor has to be shown through the existence of a present and inevitable need to act. In cases of ongoing invasions, the immediacy factor is met in a very apparent way.<sup>76</sup> If the armed forces of an attacking state are engaged in large-scale operations against those of the defending state, the fact that an armed attack is underway and that immediate action is needed is more than obvious. Therefore, the requirement of objectively demonstrating a present and inevitable need to act is more easily met than in cases of imminent threats.<sup>77</sup>

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<sup>69</sup> See *supra* 7.2.1.3.

<sup>70</sup> *Ibid.*

<sup>71</sup> See *supra* 7.2.1.3. *Nazi Conspiracy and Aggression*, p. 35.

<sup>72</sup> Brown 1997.

<sup>73</sup> Gill 2007, p. 134.

<sup>74</sup> See *supra* 8.3 and 8.9.

<sup>75</sup> *Ibid.* SC Res. 83 (1950); *Further Report of the Secretary-General on the Implementation of Security Council Resolution 598 (1987)*, UN Doc. S/23273 (1991) para. 6.

<sup>76</sup> Schmitt 2003, p. 530.

<sup>77</sup> Schachter 1991, p. 152.

### 3) Precluding an armed attack from maintaining its purpose

In some cases, an armed attack reaches its purpose before the defending state has a chance to riposte. The Falklands War and the Persian Gulf War are such instances.<sup>78</sup> It has been maintained that in such cases, claims of self-defence could not be upheld, because the attack that would have given rise to a defensive action was already finished.<sup>79</sup> Such a view stems from a literal transposition of the self-defence permitted under criminal law to the domain of public international law. Indeed, the natural-law concept of private self-defence (pertaining to individuals) allowed a strike after the first attack only if a second assault was expected.<sup>80</sup> Simply put, if a person is punched by someone and the attacker leaves the scene immediately, the victim is not entitled to run after him or her to punch them back. Instead, the victim would have to rely on law enforcement and file a complaint against the aggressor. Conversely, if after receiving the first blow it becomes evident that the attacker wants to continue the assault, the victim would be allowed to fight back to ward off the danger upon him. These scenarios cannot be literally transposed to inter-state relations. There is no police force in the legal domestic sense on which a state could rely when it becomes the victim of an armed attack. As Gill explained, the international legal order is characterized by a degree of decentralization and horizontalism which radically differs from a stable domestic legal order.<sup>81</sup>

Consequently, it would be unreasonable to maintain that a state was not allowed to defend itself in cases where the armed attack has already achieved its purpose. Undoubtedly, such a liberty could not extend endlessly after the armed attack. As Schachter warned, without a limitation 'self-defence would sanction armed attacks for countless prior acts of aggression and conquest.'<sup>82</sup> To avoid such abuses, Schachter suggested that a response had to be made close in time to the attack.<sup>83</sup> While it is unquestionably true that the immediacy factor has a temporal sense, the better view would be to rely on the emergency and inevitability of the danger rather than on physical temporal limits.

In other words, even though the armed attack has already achieved its purpose, it has to be apparent that preparations to repel the armed attack had been started as soon as information about the attack became available. That would show that the target state found itself in a present and inevitable need to act, but preparations for the defensive action took more time than the attack itself. Both the Falklands War and the Persian Gulf War are illustrative examples in this respect.

The naval forces of the UK engaged in battle with the Argentinean forces four weeks after the Junta regime accomplished the occupation of the Falklands Islands and South Georgia in the South Atlantic.<sup>84</sup> Nonetheless, even before the Argentinean invasion took place, the British ordered the deployment of several warships to the South Atlantic from either Gibraltar or from home ports. Furthermore, on the very day of the attack, the British cabinet met up in an emergency session and decided to send a task force to

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<sup>78</sup> See *supra* 8.10 and 8.12.

<sup>79</sup> Badr, p. 25.

<sup>80</sup> See *supra* 6.4.

<sup>81</sup> Gill 2007, p. 152.

<sup>82</sup> Schachter 1985, p. 292.

<sup>83</sup> Schachter 1985, p. 292.

<sup>84</sup> See *supra* 8.10.

liberate the Islands.<sup>85</sup> Accordingly, after three days of hasty preparations, further ships of the task force pulled out of ports around Britain and from Gibraltar.<sup>86</sup> The geographical disparity between the departure points (home ports or Gibraltar) and the target (South Atlantic) as well as the minimal time needed for assembling a considerable amphibious task force are factors that cannot be ignored when considering the justifiability and timeliness of the British defensive action.

Likewise, *Operation Desert Storm* started after Iraqi troops had completed the invasion and occupation of Kuwait.<sup>87</sup> Apart from the fact that it only took a few days for the Iraqi forces to occupy Kuwait, the fact that the Security Council and coalition states were attempting to find a non-forceful solution to the conflict is also important.<sup>88</sup>

In both cases the immediacy factor was present. The armed attacks created an emergency situation which could only be avoided by the use of force. Neither the UK nor Kuwait (and its allies) were, however, in position to respond immediately. Nonetheless, last-minute attempts of negotiations and rapid military preparations had been started as soon as the conflict erupted. Accordingly, as long as the immediacy factor – in the form of a present and inevitable need to act – is present, states are allowed to exercise self-defence even though the armed attack has already achieved its purpose. A contrary position would lead to the very undesirable consequence of not being allowed to oust invading forces from a country.

Moreover, as Gill warned, such a restrictive view would favour the more powerful states, always in a position to respond immediately, whereas the less powerful ones would be barred from defending themselves.<sup>89</sup>

Certainly, demonstrating the present and inevitable need to act would have the same importance in these cases as in the instances involving imminent threats. Accordingly, a state would have to prove that it resorted to remedial action in self-defence, because it found that no other solution was available. On the basis of the combined objective and subjective criteria, the state would have to show that the information available interpreted in good faith led to no other conclusion than that armed action was necessary to overturn the purpose of the armed attack.

#### 4) Immediacy and time

As it was shown above, the immediacy factor pertains to a present and inevitable need to act in both anticipatory and remedial actions in self-defence. A present and inevitable need to act will always have to be identified on the basis of the factual circumstances of each case. They can relate to several aspects: the military strength of the attacking and defending states, the magnitude of the armed attack or the envisaged effect of a threat thereof, the availability of non-forceful solutions, the openness of allies to come to the assistance of the victim state, the approach of the Security Council to the issue, the underlying historical and political conditions and the like. The discussed instances of state practice offer sufficient examples – precedents – of factors that can render the

<sup>85</sup> Freedman and Gamba-Stonehouse, p. 122.

<sup>86</sup> *Ibid.*, p. 128.

<sup>87</sup> See *supra* 8.12.

<sup>88</sup> See *supra* 8.12 and 11.2.

<sup>89</sup> Gill 2007, pp. 153-154.



immediacy element present or absent. On the basis of this multitude of factors, in most cases it will be possible to discern whether there was a present and inevitable need to act. There is no need to link immediacy to a given time span measurable in days or weeks. Obviously, in some cases the time span would play an important role. For instance, the Osirak reactor was four years away from producing a crude nuclear device when it was destroyed by Israel. In that case, the four-year time span did play a role in rendering the Israeli claim of self-defence untenable. Nonetheless, in general terms, immediacy should not denote an obligation on the part of a state to take action within a given, physically defined time limit. Measuring immediacy in days or weeks would shift the emphasis away from the most essential question: whether the need to act was in truth present and inevitable. That conclusion can be more efficiently drawn from quality-based factors (as those listed above), rather than quantity-oriented considerations (how many days did it take the British task force to reach the South Atlantic).

This preference for given time limits also stems from the literal transposition of the rationale and content of private self-defence (for individuals) to the realities of inter-state warfare. As explained above, that transposition is untenable because of the radically different nature of the international legal order.

### 13.2.3.1.2 Proportionality

The analysis of both pre-Charter and post-Charter customary law showed the continuity of the proportionality requirement for self-defence. Pre-Charter customary law acknowledged the principle of moderation, on the basis of which one could not exceed the force needed to ward off an attack.<sup>90</sup> That requirement was also reiterated by Webster, when he called upon the British government to show that its forces ‘did nothing unreasonable and excessive’<sup>91</sup> in their operation against the *Caroline*. Although Article 51 does not mention proportionality, the analysis of subsequent state practice shows the continued applicability of the principle.<sup>92</sup>

It is beyond the purpose of this research to address all the questions pertaining to the proportionality principle. Nonetheless, some comments will be made providing that they are necessary for depicting the anticipatory and remedial dimensions of self-defence. For that purpose, it can be maintained that proportionality is generally understood to limit the use of force in self-defence – both quantitatively and qualitatively – to what is required to ward off an attack.<sup>93</sup>

The quantitative element of proportionality refers to the relationship between the scale of the armed attack suffered and that of the defensive action. The qualitative element concerns the use of force needed to ward off the armed attack. The two elements work together. The quantitative element focuses on the scale of the armed attack (or the threat thereof) and thus indicates the danger created by it. By understanding the existing danger, the qualitative element helps to assess the use of force needed to ward it off.

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<sup>90</sup> See *supra* 6.6.2.

<sup>91</sup> Webster, *BFSP*, p. 1138.

<sup>92</sup> See *supra* 8.15, 9.6 and 10.6.

<sup>93</sup> *Ibid.* See also *supra* 6.6.2.

At times the quantitative element was given more emphasis by suggesting that proportionality had to be measured primarily against the expected or suffered attack.<sup>94</sup> The approach adopted by the ICJ in the *Oil Platforms* case seemed to suggest the same interpretation.<sup>95</sup> Many commentators have, however, asserted that proportionality needed to be weighed against the use of force required to preclude an attack from occurring, achieving or maintaining its purpose.<sup>96</sup>

Both the quantitative and qualitative elements are important when it comes to proportionality, although the qualitative one is the more relevant in deciding the extent of the force needed in the exercise of self-defence. The rationale of proportionality is best understood in case of an anticipatory action in self-defence. For example, if a state was facing an imminent threat of an amphibious invasion, the proportionate pre-emptive action would not necessarily mean carrying out an amphibious counter-attack against the threatening state. Such an action would be ‘proportionate’ in a purely quantitative sense of the word. Nonetheless, the imminent threat might be better avoided if the pre-empting state carried out surgical airstrikes against the crucial home-ports or already advancing fleet of the threatening state, rendering it incapable to land its troops. That pre-emptive action would be proportionate to the use of force needed to preclude the attack from taking place.

Likewise, in the instances where self-defence is exercised against an ongoing armed attack or one that has already occurred, proportionality should pertain to the use of force needed to stop the armed attack or overturn its achieved purpose.

The following section will examine the content of all three elements in cases where self-defence is invoked against hit-and-run tactics. Many conclusions relevant to standard-type armed attacks will be relied upon in the subsequent paragraphs.

### 13.2.3.2 Hit-and-run tactics and the limits of self-defence

When it comes to hit-and-run tactics, the temporal dimension 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.

Hit-and-run tactics are most often employed by non-state actors, thus all the instances described in Chapter 10 are relevant for the present analysis. At times, regular forces also resort to such acts, as evidenced by some of the cases examined in Chapter 8: the UK bombing of a Yemeni fort (1964); the Gulf of Tonkin incident (1964); the US bombing of Libya (1986); and the US airstrikes against the headquarters of the Iraqi intelligence service (1993). In these four cases, the governments claiming self-defence resorted to the use of force as a result of a string of past attacks directed against the territory under their control as well as against their armed forces and citizens.<sup>97</sup> In referring to such acts, apart

<sup>94</sup> Higgins, p. 201; Schachter 1991, p. 153.

<sup>95</sup> *Oil Platform*, ICJ Rep. (2003) para. 77. See *supra* 11.4.3.

<sup>96</sup> Ago Report, pp. 69, para. 121; Dinstein 1992, p. 57; Gardam 1993, p. 404; Gardam 2004, pp. 156-159; Gray 2004, p. 121; McDougal and Feliciano, pp. 242-243; Schmitt 2003, p. 532; Waldock 1952, p. 464. See also *supra* 8.14.

<sup>97</sup> See *supra* 8.5, 8.6, 8.11 and 8.13.

from the ‘hit-and-run tactics’ denomination, ‘terrorist acts’ will be used as well, in the sense explained in section 10.4.

Claims of self-defence against hit-and-run acts have been made in a particular fashion. The approach became to be known as the ‘accumulation of events’ theory or the ‘needle-prick’, or ‘pinprick’ approach.<sup>98</sup> The theory had several elements. First, there had to be a number of prior attacks, which, in their totality, amounted to an armed attack.<sup>99</sup> These acts, taken individually, need not be of increased gravity; it was enough if their totality resulted in great harm.<sup>100</sup> Secondly, these attacks had to emanate from an identifiable source, usually an armed group sent, supported or tolerated by another state.<sup>101</sup> It was implicitly understood that the link between the armed group and the sending, sponsoring or harbouring state had to be established and evidence had to be brought that that state was either incapable or unwilling to tackle the problem.<sup>102</sup> Thirdly, the repeated nature of attacks had to create the conviction that more would follow in order to achieve the objective of the armed group.<sup>103</sup> On this basis, the targeted state was allowed to invoke self-defence to repel future attacks that were expected because of the very reoccurrence of past attacks.<sup>104</sup> Lastly, the proportionality of the use of armed force by the targeted state was to be weighed against the totality of past and future attacks and not against isolated incidents.<sup>105</sup>

As with the analysis of standard-type armed attacks (section 13.2.3.1 of this chapter), the immediacy element of self-defence will be given the most attention. For that reason, questions pertaining to the third element of the ‘accumulation of events’ theory will be examined most thoroughly. For the sake of a comprehensive representation, however, some attention will be given to the other elements as well.

### 13.2.3.2.1 Necessity

As many times reiterated above, the principle of necessity entails two intertwined elements: the conditionality of an armed attack and immediacy.<sup>106</sup>

Because of the complex nature of the ‘accumulation of events’ theory, the conditionality of the attack and immediacy are even more entangled in claims of self-defence against hit-and-run tactics than in those against standard-type of armed attacks.

Regarding the *conditionality of an armed attack*, several difficulties can be discerned. One of them concerns the authorship of the attack. For long, the Security Council and a part of the legal doctrine condemned or criticized claims of self-defence against non-state actors and thus rejected the ‘needle-prick’ approach as well.<sup>107</sup> This was in spite of the

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<sup>98</sup> Bowett 1972, p. 12; Blum, pp. 233; Gross, p. 478; Schachter 1985, p. 293; Baker 1987, p. 42; Jacobson, pp. 13, 16.

<sup>99</sup> Brownlie 1963, p. 279; Gross, p. 478; Greenwood 1987, p. 954; Schachter 1985, p. 293.

<sup>100</sup> Blum, p. 233; Gross, p. 478; Greenwood 1987, p. 954; Schachter 1985, p. 293.

<sup>101</sup> Blum, p. 233; Greenwood 1987, p. 954; Gross, p. 478; Schachter 1985, p. 293.

<sup>102</sup> Blum, p. 233.

<sup>103</sup> Greenwood 1987, p. 954. Schachter 1985, p. 293.

<sup>104</sup> Blum, p. 233; Greenwood 1987, p. 954; Gross, p. 478; Higgins, p. 201; Schachter 1985, p. 293.

<sup>105</sup> Blum, p. 235; Gross, pp. 486-487; Schachter 1985, p. 293.

<sup>106</sup> See *supra* 6.6.1 and introductory remarks of Part II.

<sup>107</sup> See *supra* 10.2 and 10.3. For a critical opinion on the ‘accumulation of events’ theory, see Lubell, pp. 51-54.

fact that pre-Charter customary law offered several examples of self-defence being invoked against non-state actors. Such a case was none else but the *Caroline* incident itself.<sup>108</sup> In the immediate aftermath of the 9/11 attacks, the Security Council expressly acknowledged the right to resort to self-defence against terrorist acts.<sup>109</sup> With that acknowledgement, the members of the Security Council also implicitly admitted that armed attacks could be carried out by non-state actors as well.<sup>110</sup> The notion of armed attack thus partly ‘returned’ to its pre-Charter meaning, in the sense that non-state actors were again accepted as potential authors of an armed attack.

The question of the authorship of armed attack also involves the issue of sponsoring and harbouring states. It is beyond the purpose of this research to dwell into the questions concerning the responsibility of states for the acts of irregular groups that they support or harbour. For the purpose of the present analysis, it is asserted that the sending of armed groups by or on the behalf of a state to carry out attacks against another state will be considered as amounting to an armed attack, in line with the view expressed in the *Nicaragua* case.<sup>111</sup> Furthermore, exercising overall control or providing substantial assistance to such groups is also considered as potentially amounting to an armed attack.<sup>112</sup> Lastly, unwillingness or inability to prevent the use of its territory by irregular groups are seen as essential factors in rendering the harbouring or sponsoring state responsible for the activities of such groups.<sup>113</sup>

All other questions pertaining to the necessity requirement of self-defence against hit-and-run tactics directly or indirectly involve the *immediacy* element. For that reason, the specificities of the relationship between necessity and the ‘accumulation of events’ theory will be treated without a strict differentiation between the conditionality of armed attack and immediacy.

While it is accepted by the Security Council and a significant part of the legal literature that a single terrorist act, because of its scale and effect, can amount to an armed attack, it is widely debated under what conditions can a string of less serious attacks reach the same threshold.<sup>114</sup>

<sup>108</sup> See *supra* 3.2.2.1 and 6.6.1. See also Kelly, p. 225.

<sup>109</sup> SC Res. 1368 (2001) preamble.

<sup>110</sup> Franck 2002, pp. 54, 66-67.

<sup>111</sup> *Nicaragua*, ICJ Rep. (1986) para. 195.

<sup>112</sup> The ICJ stopped short of qualifying support of irregulars as basis for enquiring responsibility for the armed attack. *Nicaragua*, ICJ Rep. (1986) p. 103, para. 195. This view was criticized by Judge Jennings in her dissenting opinion. *Ibid.*, p. 543. For an elaboration of the Court’s contentions and Judge Jennings’s opinion, see *supra* 11.4.1. See also *Prosecutor v. Dusko Tadić*, ICTY Case No. IT-94-1-A, Judgment, Appeals Chamber, 15 July 1999, paras. 131, 137. The Appeal Chamber found that overall control by the state over organized and hierarchically structured groups was sufficient to deduce state responsibility. Such ‘overall control’ resided not only in equipping, financing or training and providing operational support to the group, but also in coordinating or helping in the general planning of its military or paramilitary activity. See also: P. Ducheine, *Krijgsmacht, geweldgebruik & terreurbestrijding: Een onderzoek naar juridische aspecten van de rol van strijdkrachten bij de bestrijding van terrorisme* (Nijmegen, Wolf Legal Publishers 2008) pp. 184-188. For the difficulties of transposing norms of attribution from one international law field to another, see: A. Nollkaemper, ‘Attribution of Forcible Acts: connections between the Law on the Use of Force and the Law of State Responsibility’, in N.M. Blokker and N.J. Schrijver, eds., *The Security Council and the Use of Force: theory and reality, a need for change?* (Leiden, Nijhoff 2005) pp. 140-141.

<sup>113</sup> Similar opinions: Feinstein, p. 279; Greenwood 2003, p. 25; Schachter 1991, p. 165.

<sup>114</sup> The fact that a single terrorist attack can amount to an armed attack was implicitly admitted by the Security Council in the preamble of Res. 1368 (2001) when it acknowledged the right of self-defence

When a series of past attacks, taken individually, do not amount to an armed attack, the claim of self-defence becomes more complicated. Relevant state practice shows that repeated attacks are carried out on the territory of another state or against its citizens on the basis of a specific political agenda.<sup>115</sup> In recent times, that political agenda is being clearly expressed through video recordings or internet sites.<sup>116</sup> Notwithstanding this, a significant amount of information regarding the activities of the armed groups is not readily available. Although their political agenda, target group and/or operation zone is often known, the approximate time and place of their next attack(s) is extremely difficult to ascertain. For that reason, the burden of proof pertaining to the immediacy of the danger has to be interpreted differently. In case of an imminent threat of a standard-type of armed attack, the defending state needs to demonstrate that on the basis of the available information interpreted in good faith the attack cannot be avoided by non-forceful means and the emergency of the threat requires swift action. That burden of proof entails an approximate knowledge of the specific parameters of the attack. In June 1967, Israel believed that it was days away from a combined invasion of its territory. That information became available due to a considerably visible escalation of events.<sup>117</sup>

The same logic cannot be applied to terrorist acts, because of the clandestinity surrounding their activities.<sup>118</sup> For that reason, certain additional considerations have to play a role in deciding whether a claim of self-defence could be justified. According to the ‘accumulation of events’ theory, a string of past attacks has to occur in order to expect new attacks from the same source.<sup>119</sup> Accordingly, a series of auxiliary factors can be discerned.

First, as mentioned above, there has to be evidence of a fairly clear political agenda. For instance, the political agenda of al-Qaeda includes the ending of Western (US) influence in the Middle East as well as the ousting of US forces from Afghanistan and Iraq.<sup>120</sup> Secondly, the political agenda has to be ‘active’, in the sense that there has to be a string of past attacks carried out on its basis. In the case of al-Qaeda, the 1993 WTC bombing, the East Africa bombings, the attack on the *USS Cole* and 9/11 were all part of a series of attacks on Western targets. If the political agenda has thus been ‘put in practice’, it is reasonable to conclude that, without a drastic change in circumstances, future attacks will occur as well.<sup>121</sup>

More specifically, if the hit-and-run tactics form a certain pattern (specific region and/or specific targets), it can again be reasonably concluded that the pattern will continue. If armed groups are particularly active in a certain part of a country, where they sporadically carry out attacks against civilians, soldiers or specific facilities, it can be

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against terrorist attacks. Several authors agree with this view: Beard, pp. 574-575; Brown 2003, pp. 24-25; Feinstein, p. 279; Franck 2001, p. 840; Franck 2002, p. 54; Gill 2003, p. 30; Greenwood 2003, p. 16.

<sup>115</sup> Gunaratna 2004, ‘Change or Continuity’, pp. 10-13. See also Schachter 1991, pp. 167-168.

<sup>116</sup> R. Gunaratna, ‘Military and Non-Military Strategies for Combating Terrorism’, in R. Gunaratna, ed., *Combating Terrorism* (Singapore, Marshall Cavendish 2005) pp. 14-16.

<sup>117</sup> See *supra* 8.7.

<sup>118</sup> On the interplay between secrecy and intelligence, see Gunaratna 2005, pp. 22-24.

<sup>119</sup> Blum, p. 233; Greenwood 1987, p. 954; Gross, p. 478; Higgins, p. 201; Schachter 1985, p. 293.

<sup>120</sup> A.B. Atwan, *The Secret History of al-Qaida* (London, Saqi Books 2006) pp. 225-226.

<sup>121</sup> Schachter refers to a ‘pattern of terrorist attacks’ that entail a ‘series of attacks accompanied by bellicose statements’ and that are convincing indications that future attacks will occur. Schachter 1991, p. 167. Schmitt refers to an ‘ongoing campaign of terror.’ Schmitt 2003, p. 547.

expected that that pattern will continue. For instance, relevant state practice has shown that various Palestinian armed groups several times shelled settlements in the northern part of Israel.<sup>122</sup> Furthermore, if an armed group repeatedly carries out attacks against the citizens of a certain country, regardless of their whereabouts, it can be reasonably concluded that such attacks will continue. This was the case with Libya in the 1980s, when Qaddafi had an expressed political agenda of fighting the US ‘on a hundred fronts.’<sup>123</sup> Likewise, the 1993 assassination attempt against former President George Bush was believed to be only one instance of a string of future attempts by Iraqi authorities to murder US officials.<sup>124</sup> Similarly, the political agenda of al-Qaeda undoubtedly includes past and future attacks against US and other Western citizens.<sup>125</sup> In most of these cases, the expressed political agenda of the armed group will shed light on their motivation and general objectives.

An ‘active’ political agenda thus identified will highlight the dangers posed by all past attacks (taken collectively) and also by the reoccurrence of such attacks. This greater picture will then have to be used to assess whether the danger posed by the armed group (or, as with Libya in the 1980s, by a state) creates a *present* and *inevitable* need to resort to armed force in self-defence. Needless to say, such an assessment will have to be made in good faith on the basis of all available information.<sup>126</sup>

As explained above, both the modality of the force (to be) used and the (envisaged) effect have to be taken in consideration when assessing an armed attack.<sup>127</sup> In the case of hit-and-run tactics the *modality* of the use of force is seldom substantial. The 19 hijackers of 9/11 carried only knives upon them and still managed to crash four planes. Therefore, the (envisaged) *effect* of hit-and-run acts will usually be more important than the modality of the force they used. The effect of the 9/11 was comparable with a large-scale bombardment: thousands of dead and financial losses measured in billions.<sup>128</sup>

Consequently, in assessing the significance of terrorist attacks, the overall effect that such attacks are creating must be given specific attention. If a string of (small-scale) attacks carried out over a period of time leads to the disruption of public order, public security or the normal functioning of a society, those attacks have to be viewed as partially justifying the exercise of self-defence. Undoubtedly, the effect of such attacks is not the only factor that needs to be taken in consideration. The inevitability element of immediacy is particularly important in this case. After establishing that the series of hit-and-run acts have a significantly disrupting effect, the concerned government will have to assess whether there is any non-forceful solution to the problem. Most importantly, it will have to assess whether measures of law enforcement are available and whether

<sup>122</sup> See *supra* 10.2, 10.3 and 10.5.4.

<sup>123</sup> See *supra* 8.11. Greenwood 1987, p. 934; Intoccia, pp. 181-182.

<sup>124</sup> See *supra* 8.13. 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.

<sup>125</sup> Atwan, pp. 225-226.

<sup>126</sup> On the challenges faced by intelligence work and investigation for identifying terrorist threats, see R. Borum, ‘Counter-Terrorism Training Post-9/11’, in G. Gunaratna, ed., *Combating Terrorism* (Singapore, Marshall Cavendish 2005) pp. 65-67.

<sup>127</sup> See *supra* 13.2.3.1.2.

<sup>128</sup> ‘9/11 by numbers’, in *New York Magazine*, available at <<http://nymag.com/news/articles/wtc/1year/numbers.htm>> (accessed 5 June 2010).

negotiations or mediation with the host state(s) would lead to any acceptable result. Likewise, if the fulfillment of reasonable and legitimate requests can open the door to a non-forceful solution, such an alternative will have to be taken in consideration.

Consequently, the obligations of the state on the basis of both the ‘accumulation of events’ theory and the requirement of necessity pertain to three points. First, it has to make clear that the political agenda of the armed group (or state, in some cases) is directed against its territory or its citizens and it has been ‘activated’ by a string of past attacks. Secondly, it has to show that the cumulative effect of the attacks caused serious disruptions to public security or the normal functioning of society. Thirdly, it has to show that, on the basis of the available information interpreted in good faith, there was no peaceful solution to the conflict and that there was a present and inevitable need to resort to armed force.

Perhaps even more prominently than in case of standard-type armed attacks, the futility of applying a physical time limit to immediacy is obvious when it comes to hit-and-run tactics. In this case, the temporal dimension of self-defence is all-encompassing and circular. Self-defence against hit-and-run tactics is both remedial and anticipatory. Moreover, the relevant conflict may encompass a string of attacks protracted over a significant period of time. For instance, the 1993 WTC bombing, the 1998 East Africa bombings, the 2000 attack on *USS Cole* and the 9/11 attacks were all said to be part of the same string of acts pertaining to al-Qaeda’s political agenda.<sup>129</sup> Measuring immediacy in days or weeks is therefore counterproductive in such cases. Instead, attention has to be given to the factual circumstances of each conflict: how powerful the armed group is; what is the effect of its attacks on security and society; what are the objectives they are trying to reach; what are the possible non-forceful solutions; can international law enforcement cooperation offer an efficient alternative, etc. Focusing on such considerations would shed light on whether armed action in self-defence in truth stems from a present and inevitable need to act.

### 13.2.3.2.2 Proportionality

As reiterated above, proportionality is generally understood to limit the use of force in self-defence to what is required to ward off an attack.<sup>130</sup> According to the ‘accumulation of events’ theory, proportionality has to be measured against the need to neutralize the source of all past and future attacks.<sup>131</sup>

The proportionality issue has given rise to countless controversies in relation to claims of self-defence against non-state actors (and hit-and-run tactics in general).<sup>132</sup> For long, most members of the Security Council were reluctant to accept that the proportionality of the defensive steps had to be measures against the general context of

<sup>129</sup> Greenwood 2003, p. 23; Schmitt 2003, pp. 535-536.

<sup>130</sup> See *supra* 6.6.2, 8.15, 9.6 and 10.6.

<sup>131</sup> Blum, p. 235; Gross, pp. 486-487; Schachter 1985, p. 293.

<sup>132</sup> SCOR, 24<sup>th</sup> Sess., 1468<sup>th</sup> mtg., UN Doc. S/PV.1468 (28 March 1969) paras. 18-19 (Finland expressing concern about the loss of civilian life), 34 (France expressing doubt as to the proportionality of the Israeli action); SCOR, 27<sup>th</sup> Sess., 1650<sup>th</sup> mtg., UN Doc. S/PV.1560 (26 June 1972) para. 93 (Belgium claiming that Art. 51 allows self-defence only against a single case of armed aggression); SCOR, 30<sup>th</sup> Sess., 1860<sup>th</sup> mtg., UN Doc. S/PV.1860 (5 December 1975) para. 3 (the US calling for an analysis of the Israeli airstrikes in the context of the repeated acts of violence committed by irregulars).

reoccurring violence.<sup>133</sup> At times, the need to look beyond the individual attacks and see the reoccurring pattern was pointed out by some members of the Council.<sup>134</sup> Such a need was also pointed out by Ago in his report to the International Law Commission. Although he was discussing acts of states, Ago asserted that self-defence could be justified against an armed attack consisting ‘of a number of successive acts.’ In such a case, the requirements of proportionality and immediacy had to be looked at ‘in the light of those acts as a whole.’<sup>135</sup> He pointed out that if a state suffered a series of successive and different acts of armed attack, the requirement of proportionality would not mean that the victim state was prohibited from undertaking a single armed action on a much larger scale in order to put an end to the escalation of attacks.<sup>136</sup> A part of the legal doctrine also advocates such a perspective.<sup>137</sup>

The present author agrees with the argument put forward by Ago, with the proviso that it should be considered applicable to non-state actors as well. If it has been established that the ‘active’ political agenda leads to a present and inevitable need to resort to force, the exercise of self-defence will have to aim at neutralizing the danger. Inflicting an equivalent damage on the attacker would only lead to a tit-for-tat method that would only prolong the conflict. For that reason, the magnitude of the defensive action can exceed that of the repeated attacks, as long as it is aimed at neutralizing the source of the attacks. In other words, the defensive action will have to aim at destroying military bases, training camps, stockpiles of weapons and other essential, infrastructure-related facilities used for preparing and launching attacks. The defensive action may therefore be of larger scale than the individual attacks launched by the armed groups. Nonetheless, the defensive force cannot go beyond what is necessary to neutralize the source of attacks. There are many questions regarding the lawfulness of targeting certain facilities that are equally used by civilians and (para)militaries. Moreover, the question of participation in hostilities, especially in irregular warfare, is also controversial. However, these questions pertain to the law of armed conflict and will not be addressed in this research.<sup>138</sup> Nonetheless, it is necessary to emphasize that defensive action going beyond what is required to stop the reoccurring of attacks should be deemed disproportionate. For instance, although the necessity requirement was met by Israel in 2006, some of its ensuing actions were rightfully criticized as disproportionate, because they destroyed targets that had no identifiable connection to the paramilitary activities of Hezbollah.<sup>139</sup>

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<sup>133</sup> See *supra* 10.2 and 10.3.

<sup>134</sup> SCOR, 24<sup>th</sup> Sess., 1467<sup>th</sup> mtg., UN Doc.S/PV.1467 (27 March 1969) paras. 48-49; SCOR, 30<sup>th</sup> Sess., 1860<sup>th</sup> mtg., UN Doc. S/PV.1860 (5 December 1975) paras. 3-5.

<sup>135</sup> Ago Report, pp. 69-70, para. 121.

<sup>136</sup> *Ibid.*

<sup>137</sup> Blum, p. 235; Gross, pp. 486-487; Schachter 1985, p. 293; Schmitt 2003, pp. 532-533.

<sup>138</sup> See, for instance, M.N. Schmitt, ‘Targeting in Operational Law’, in T.D. Gill and D. Fleck, eds., *Handbook of the International Law of Military Operations* (Oxford, Oxford University Press, 2010) pp. 245-275.

<sup>139</sup> SCOR, 61<sup>st</sup> Sess., 5497<sup>th</sup> mtg., UN Doc. S/PV.5497 (27 July 2006); Statement by the President of the Security Council, UN Doc. S/PRST/2006/34 (2006); SCOR, 61<sup>st</sup> Sess., 5498<sup>th</sup> mtg., UN Doc. S/PV.5498 (30 July 2006) pp. 2-3; 5499<sup>th</sup> mtg., 30 July 2006, S/PV.5499; Statement by the President of the Security Council, UN Doc. S/PRST/2006/35 (2006). See also Ducheine and Pouw, pp. 71-72; Wrachford, pp. 88-89.



On the basis of the analysis put forward above, it is the opinion of the present author that the ‘accumulation of events’ theory does not render the traditional, pre-Charter limitations of self-defence obsolete. The elements of the theory can be successfully corroborated with the necessity and proportionality requirements. Further attention to the combination of these elements is needed, but it is important to note that the centuries-old limitations of necessity (conditionality of an attack and immediacy) and proportionality (moderation) are flexible enough to meet new challenges and robust enough to nevertheless maintain their rationale.

### **13.2.4 Conclusions as to the limits of anticipatory action in self-defence**

In order to answer the second research question, Part III analysed the content, applicability and controversies of the three elements limiting self-defence: the conditionality of an armed attack and immediacy (under the requirement of necessity) and proportionality. These three elements were analysed from the point of view of standard-type armed attacks and hit-and-run tactics.

The answer to the second research question – under what conditions anticipatory action in self-defence is lawful in international law – can be summarized in three points. First, the conditions under which anticipatory action is lawful pertain to the right of self-defence as a whole. They limit the exercise of self-defence regardless of its temporal dimension. In other words, anticipatory action is limited by the same requirements as remedial action in self-defence.

Secondly, these conditions pertain to the necessity and proportionality of self-defence. Necessity entails the conditionality of an armed attack and the factor of immediacy (urgency and inevitability), whereas proportionality relates to the required amount of force to ward off an attack. As regards anticipatory action, the combination of these elements has to show that: the perceived threat of an armed attack created a present and inevitable need to use proportionate force to stop the attack from taking place.

Thirdly, the defending state must demonstrate that it perceived the applicability of all three elements on the basis of the available information (objective criterion) interpreted in good faith (subjective criterion).

If all these conditions are met, anticipatory action in self-defence – just as remedial action – may be deemed lawful.

## **13.3 Self-Defence: What It Is and What It Is Not**

The essence of the centuries-old content of self-defence allows states to undertake proportionate armed action as long as the armed attack or threat thereof creates a present and inevitable need to use force. The temporal dimension of self-defence pertains thus to the time before, during and after an armed attack. In other words, self-defence has both an anticipatory and a remedial dimension.

The anticipatory dimension of self-defence has been criticized as opening the door to abuse.<sup>140</sup> State practice offers a plenitude of examples for abuse of the right of self-defence no matter its temporal dimension. The solution is not to unduly restrict the temporal dimension of self-defence as a whole, but to better delineate the conditions that

<sup>140</sup> Cassese 2005, pp. 361-362; Gray 2008, pp. 164-165; Mégret, p. 376.

need to be met in its exercise. The present work attempted to address this task. It demarcated three elements of self-defence: the conditionality of an armed attack and immediacy (as elements of necessity) and proportionality.

These elements also assist in distinguishing self-defence from other forms of use of force. Understanding what does *not* constitute self-defence is as important as comprehending what constitutes that right.

Self-defence is not a form of collective security. The seventeenth- to nineteenth-century right to wage ‘perfect’ wars does not belong to individual states anymore. The greater part of that right was transferred to the Security Council at the time of the adoption of the Charter.<sup>141</sup> The Security Council may take collective enforcement measures to address a threat to international peace and security, a breach of peace or aggression. It may take action to achieve various objectives: restore constitutional order, put an end to an armed conflict, stop atrocities against the civilian population, prevent the outbreak of war and so on. These prerogatives are part and parcel of the collective security system of the United Nations and presuppose the existence of a Security Council resolution calling for or acquiescing to multilateral action. Self-defence cannot be exercised in pursuance of such objectives. Self-defence requires the existence of an armed attack or a threat thereof that creates a present and inevitable need to use force. No security threat, crisis or violation of international law justifies the exercise of self-defence if the above-mentioned conditions are not met. The conditionality of an armed attack and immediacy – as elements of necessity – are thus instrumental in distinguishing self-defence from any use of force belonging to the realms of collective security.

Self-defence must be distinguished from reprisals. According to the classic temporal differentiation between self-defence and reprisals, the former pertained to the time before and during the attack, whereas the latter became applicable after the attack had already occurred.<sup>142</sup> That differentiation ascertained the intrinsically anticipatory character of self-defence. Today, when self-defence also has a remedial aspect, a more purpose-based differentiation between the two forms of use of force is pertinent. A reprisal always had a punitive character. Its objective was to punish the author of the attack by inflicting damage proportionate to the one suffered. That is not the objective of self-defence. Even in its remedial dimension, self-defence is meant to put an end to an armed attack or precluding that attack from achieving its purpose. In that respect, self-defence stems from a necessity, present and inevitable, to address the precarious situation by the use of force. There is no such necessity when it comes to reprisals. Nonetheless, there are many contemporary instances of state practice where defensive actions turn into reprisals. When the use of force exceeds what is necessary to put an end to an armed attack, the armed action transforms and becomes a reprisal. Even though the existence of an armed attack is established, both the immediacy and the proportionality elements are overlooked. Disproportionate use of force often renders an originally legal claim of self-defence unjustifiable. Remedial action in self-defence is thus considerably susceptible to abuse. The only way self-defence can be distinguished from a reprisal is to observe the relevance and applicability of the elements of immediacy and proportionality.

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<sup>141</sup> See *supra* 5.4 and 5.5.

<sup>142</sup> For instance: Suárez, Disputation XIII, § 1 (6), p. 804; Grotius, Bk. II, ch. 1 (ii), p. 172; Vattel, Bk. II, ch. 5, §§ 67-68, p. 135, and Bk. III, ch. 1, § 5, p. 236.

Self-defence is not preventive use of force. Customary law does not require the existence of an armed attack to justify self-defence. The existence of a threat is also accepted as a legal ground for defensive action. Such a threat – much the same way as an existing armed attack – has to create a present and inevitable need to use force. Only an imminent threat can create such a necessity. A remote danger of being attacked at some point in the future does not meet the requirements of immediacy. In the case of hit-and-run tactics, where the place and time of the future attack is seldom known, the existence of a series of past attacks coupled with the dangers posed by future attacks can amount to a present and inevitable need to act. In such cases, the danger is not remote, it is very much real and confirmed by the series of attacks that had already occurred. The immediacy element is not met when force is used to tackle a potentially dangerous situation, even if the circumstances show a probable escalation of security concerns. In many cases, the security concerns are grave and raise considerable fears of conflict. Nonetheless, as long as this does not translate into a present and inevitable need to act in response to an (imminent threat of) attack, the right of self-defence is not available. Even if the current collective security systems creates loopholes in which states are left undefended against potentially grave dangers, the immediacy element must be used to distinguish self-defence from preventive use of force. Simply put, there is no ‘preventive self-defence’. The term is a paradoxical construction, as it denies one of the main elements of self-defence: immediacy. One can refer to preventive use of force, preventive war or preventive measures, but not to preventive self-defence.

The three elements (conditionality of an armed attack, immediacy and proportionality) are instrumental in distinguishing self-defence from other uses of force. They have remained unchanged no matter the age and the nature of the conflict. They could be discerned in all three normative frameworks of pre-Charter customary law. They were identified in post-Charter state practice. No matter the protagonists of the conflict or the weapon technology used, the essential elements of self-defence retained their significance and function. Even if they are categorized and classified in different manners, their core understanding remains the same: moderate action in self-defence is allowed as long as the armed attack or the threat thereof creates a present and inevitable need to use force.

The core understanding of self-defence is the sole basis for differentiating this centuries-old right from other forms of use of force. Strict observance of the three essential elements of self-defence is the only way an abuse of the right can be identified and, in the future, avoided. For that purpose, more attention should be given by judicial and other law-related bodies as well as by legal doctrine to the analysis of the manner in which these three elements work in practice.