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SUMMARY

Anticipatory Action in Self-Defence
The Law of Self-Defence – Past, Present and Future

The purpose of this research was to examine the conditions under which anticipatory action in self-defence was legal under public international law. Two research questions were formulated in order to address that purpose. 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. In order to answer these questions, the research was conducted in three main parts. Part I analysed pre-Charter customary law on self-defence, whereas Part II looked at the post-Charter customary law on self-defence. Part III addressed the two research questions on the basis of the findings of Part I and Part II.

It was one of the main findings of Part I that the pre-Charter customary right of self-defence was intrinsically anticipatory and was limited by the requirements of necessity and proportionality. Part I thus partly answered the first research question: it found that anticipatory action in self-defence was part of pre-Charter customary law. That finding formed the main basis for further research. Since anticipatory action was found to be part of customary law before the adoption of the Charter, the second part of the research had to assess whether a new customary rule prohibiting anticipatory action has emerged since the adoption of the Charter. Part II found that no new customary rule emerged since the adoption of the Charter that eliminated the anticipatory dimension of self-defence. The various post-Charter developments on the subject had indeed influenced the limits of self-defence, but they could not be interpreted as outlawing the pre-Charter anticipatory dimension of that right.

Moreover, the combined findings of Part I and Part II showed that the temporal dimension of pre-Charter self-defence was still relevant for twenty-first century conflicts. Accordingly, all major types of conflicts analysed (state-to-state, weapons of mass destruction-related and those implicating non-state actors) involved self-defence before, during and after an armed attack. In other words, both the remedial and the anticipatory dimensions of self-defence – present in its pre-Charter understanding – resurfaced in post-Charter state practice.

In addressing the second research question, Part I embarked on identifying a pattern of limits pertaining to the pre-Charter notion of self-defence. Because it was established that the pre-Charter customary right of self-defence was intrinsically anticipatory, it was also apparent that the limits of self-defence would apply to anticipatory action as well. It was concluded that the understanding of self-defence – as accepted at the time of the adoption of the UN Charter – stemmed from a natural-law conception which allowed moderate action against imminent threats and ongoing attacks as long as there was a present and inevitable need to act. That understanding also allowed moderate action after an attack had occurred, but only if the need to ward off a future attack was present. On this basis, Part I identified the limits of pre-Charter self-defence: the existence or threat of an attack, the immediate need to act and the requirement of moderation. The first two elements (attack and immediate need) were grouped under the heading of necessity, whereas the third element (moderation) was treated as proportionality.

Part II took over these elements and employed them as juridical variables in analysing relevant post-Charter state practice. The purpose of this exercise was to assess whether these elements continued to limit self-defence (and, implicitly, anticipatory action) since the adoption

of the Charter. All three elements were found to resurface in all themes of post-Charter state practice. Moreover, their presence or absence was often used by states before the Security Council to support or criticize specific claims of self-defence. Furthermore, other organs of the UN – the International Court of Justice and the International Law Commission – discussed some attributes of these elements. Although some aspects of the three elements have been shaped by post-Charter developments, their significance as the current limitations of (anticipatory action in) self-defence was discernable through the findings of Part II.

Part III brought together all these findings and set out an elaborate analysis of the temporal dimensions of self-defence and of its limits. It was found that the first element, the conditionality of an attack, was given a more restrictive interpretation since the adoption of the Charter. Accordingly, in many cases and by a significant part of the legal doctrine, armed attack was interpreted as pertaining to the most serious forms of the use of force. Nonetheless, self-defence claims against non-state actors and the 'accumulation of events' theory have shown that such a view needed more elaboration. The second element, immediacy, has shown little alteration compared to its pre-Charter understanding. Owing to a regular reiteration of the *Caroline* criteria, the element of immediacy was always connected to a present and inevitable need to act, although that need was formulated in many different forms. There has been a discernible tendency – especially in legal doctrine – to assign immediacy a physical temporal limit, but the logic behind such reasoning was found to be hard to maintain. Finally, the third element, proportionality, was found to be very strongly reiterated in state practice, although it is far from being void of controversy. As with the notion of armed attack, its understanding is very much influenced by claims of self-defence against non-state actors and, frequently, the 'accumulation of events' theory.

The greatest challenge to the content and applicability of these elements comes from the 'accumulation of events' theory employed in claims of self-defence against hit-and-run tactics (and non-state actors). The present research gave specific attention to this theory, because it involved both the remedial and the anticipatory dimension of self-defence, while affecting the necessity and proportionality requirements as well. As it was put forward in Part III, 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.

As a consequence, this research found that anticipatory action in self-defence is still part and parcel of contemporary customary international law and that its limits are based on the centuries-old requirements of necessity and proportionality. The centuries-old content of self-defence (whether anticipatory or remedial) is adaptable enough to meet the new challenges of twenty-first century conflicts and robust enough to nevertheless maintain its underlying principle – that proportionate 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.