HAGUE COLLOQUIUM ON FUNDAMENTAL PRINCIPLES OF LAW

SELF-DEFENCE AS A FUNDAMENTAL PRINCIPLE

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Hague Academic Press
An Imprint of T·M·C·ASSER PRESS

Published by Hague Academic Press, an imprint of T·M·C·Asser press
P.O.Box 16163, 2500 BD The Hague, The Netherlands

<www.asserpress.nl>

Hague Academic Press' English language books are distributed exclusively by:

Cambridge University Press, The Edinburgh Building, Shaftesbury Road,
Cambridge CB2 2RU, UK,
or
for customers in the USA, Canada and Mexico:
Cambridge University Press, 100 Brook Hill Drive, West Nyack, NY 10994-2133, USA

<www.cambridge.org>

The *Hague Colloquium on Fundamental Principles of Law* Series is based on the results of the bi-annual HCFPL Colloquium, which is an integral part of the Hague Prize for International Law. Held in honour of the Laureate its topic is selected by the Laureate and covers a fundamental principle of law. The Hague Colloquia are designed as high level expert workshops guided by multi-disciplinarity, where practice and academia meet.

ISBN 978-90-6704-287-1
ISSN 1877-279X

PRINTED IN THE NETHERLANDS

INTRODUCTION

The book which you have in your hands has been a long time in the making, for which the Editors make no apology! The topic of self-defence in both national and international law is notoriously difficult to define and to circumscribe. Historians, philosophers, military officers, diplomats, lawyers and theologians, as well as legislators, judges and the executive arm of government, are among the many who have wrestled with the concept from the earliest days of recorded history until today. A subject-matter which includes the right of a householder to repel or discourage intruders, the right of a woman to resist an abusive partner, the right of a State to deal with actual or planned attacks by other States, by armed groups or even by individuals, cannot fail to be a subject-matter worthy of deep study and analysis. Add to this the fact that the contemporary debate on self-defence is interwoven with debates on environmental damage, energy (in)dependence, water-resources, terrorism, self-determination and human rights, and it becomes crystal clear that self-defence is a topic that cries out for discussion and research-based writing.

The Editors decided to respond to this challenge soon after the first Hague Prize for International Law was awarded to Professor Shabtai Rosenne in the year 2004. We had three objectives in view: to honour the Hague Prize Laureate; to inaugurate a new periodic forum for scholarly discussion in The Hague, and to organise a symposium on self-defence. We are delighted to say that all three objectives have been fulfilled.

The Hague Prize Foundation willingly and cooperatively adopted our suggestion that its Laureates should be associated with the new periodic forum, which we have called the Hague Colloquium on Fundamental Principles of Law, and which is already a fixture in the Hague calendar. The structural link which has been established is that the Laureate is a full participant in choosing the topic and speakers for each Colloquium, so that Professor Rosenne was our partner on self-defence, while the second

Hague Laureate, Professor Cherif M. Bassiouni, worked with the T.M.C. Asser Instituut and the Hague Institute for the Internationalisation of Law (HiiL), the current organisers of the Hague Colloquium, to accomplish the 2008 session on 'Jihad and the challenges of international and domestic law.'

Our hope is that this volume will contribute constructively to stimulating scholarship and research in the field of self-defence, that it will provide food for thought, and that it will inspire more colloquia and publications on the topic. The volume does not contain the proceedings of the Colloquium, though all the presentations were indeed recorded and transcribed by HiiL. Rather, we have chosen to publish four* brilliant essays on self-defence written by participants in the Colloquium subsequent to its having taken place. The essays are accompanied by a remarkably full and useful bibliography and by documentary materials, many of which are difficult to obtain elsewhere. We have throughout seen this project as 'work in progress,' and look forward eagerly to further developments.

We would like to thank Doron Kerbel, Galia Haver, H.E.Ambassador Eitan Margalit, Jos Kapteyn, Marjolijn Bastiaans, Frans Nelissen, Peter Kooijmans, Bob Lagerwaard, and the City of The Hague.

Ueberlingen, The Hague, Zichron Yaacov
November 2008 THE EDITORS

* *Modesty compels Arthur Eyffinger to disassociate himself from the number 'four.'*

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Part I

SELF-DEFENCE AS A GENERAL PRINCIPLE OF LAW AND ITS RELATION TO WAR

Peter Haggenmacher*

This Chapter aims to provide some introductory observations on the concept of self-defence, 'tracking its evolutionary path and the various meanings attributed to it throughout history, in different legal and belief systems,'[1] and also attempts to give some observations on self-defence as a general principle of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice.[2]

As is well known, this provision – and its progenitors in the Committee of Jurists called upon to devise the Statute in 1920 – initially had in mind a number of basic principles 'recognised by civilised nations' owing to an intrinsic or systemic necessity; that is, a set of substantive or procedural concepts and norms that were thought to be indispensable in any developed legal order. Inasmuch as these principles were not just speculative but positively enacted in municipal law, they were also considered to be valid in international law, and hence applicable by the Permanent Court of International Justice that was being set up in The Hague. This could either be seen as a natural law concept (which was doubtless in the mind of Baron Descamps, the president of the Committee and the originator of this clause, although he might rather have called it 'objective law', in line with the sociological theories that were fashionable in his day) or (in the wake of the dominant positiv-

* Graduate Institute of International Studies, Geneva, Switzerland.

[1] The phrase is freely arranged from the title and subtitle of the Colloquium.

[2] Cour permanente de Justice internationale, Comité consultatif de Juristes, *Procès-verbaux des séances du Comité*, 16 juin-24 juillet 1920, pp. 293-297, 307-321, 331-336.

A.C.G.M. Eyffinger, A. Stephens and A.S. Muller (eds.), Self-Defence as a Fundamental Principle

ist concepts of his opponents in the Committee) as an analogical transposition of municipal law principles to international law.

Be that as it may, what all the members of the Committee were thinking of when speaking of 'general principles of law recognised by civilised nations' were essentially those found in the European legal orders and their various overseas extensions. In practice, this mainly consisted of two legal families: Continental civil law and English common law. In fact, modern international law has been decisively shaped by this twin source of inspiration, and this would seem to hold good, among many other concepts and institutions, for self-defence.[3] The following summary observations, which do not pretend to be more than a very tentative sketch, will therefore stay within this 'Western' horizon.

1. Self-Defence as 'the Primary Law of Nature'

There is a venerable chain of authorities and testimonies regarding self-defence as a basic principle, so intimately linked with human nature itself that it is supposed to precede instituted legal orders. Dryden calls it 'Nature's eldest law';[4] and Blackstone holds that, 'as it is justly called the primary law of nature, so it is not, neither can it be in fact taken away by the law of society'.[5] Isidore of Seville, more than a millennium earlier, considered *violentiae per vim repulsio* as part of natural law which is 'everywhere observed by natural instinct rather than by some legal enactment'.[6] Writing his

[3] Self-defence did not figure among the examples of general principles mentioned by the members of the Committee. Hersch Lauterpacht, the author of the first important monograph on general principles drawn from private law, mentions self-help and necessity, but not self-defence; *Private Law Sources and Analogies of International Law*, London 1927, p. 152. Symptomatically, Lauterpacht was writing just before the time when self-defence started to be discussed as a technical concept in international law with the signature of the Pact of Paris in 1928. Bin Cheng's classic study of 1953 on the general principles of law deals with self-defence under 'the principle of self-preservation', together with necessity and self-help; *General Principles of Law as applied by International Courts and Tribunals*, London 1953, pp. 77-97.

[4] John Dryden, *Absalon and Achitophel*, i, 458, following *The Compact Edition of the Oxford Dictionary*, Oxford 1971, v° Self-defence, p. 2717.

[5] William Blackstone, *Commentaries on the Laws of England*, Oxford 1765-1769, bk. III, ch. 1, 1, p. 4.

[6] 'Ius naturale [est] commune omnium nationum, et quod ubique instinctu naturae, non constitutione aliqua habetur; ut...violentiae per vim repulsio. Nam hoc, aut si quid huic simile

influential *Etymologies* in the first third of the VIIth century, Isidore was tributary to the Roman jurisconsults, who saw self-defence very much in the same light. Phrases such as 'vim enim vi defendere omnes leges, omniaque iura permittunt' were common among them, as we shall see.

By the same token one is reminded of the language of Article 51 of the United Nations Charter mentioning 'the inherent right of self-defense'. This is rendered in the French text of the Charter by 'droit naturel de légitime défense', and the two formulas are indeed equivalent, in spite of an apparent discrepancy. Both are in fact used interchangeably in a well-known American note of 1928 relating to Kellogg's draft of the future Pact of Paris. The proposed text, it says, purposely avoids mentioning self-defence, because this right is supposed to be '*inherent* in every sovereign state and is implicit in every treaty'; inasmuch, therefore, 'as no treaty provision can add to the *natural* right of self-defence, it is not in the interest of peace that a treaty should stipulate a juristic conception of self-defence'.[7] In 1945 States thought differently on this matter, when they deemed it appropriate to add an express provision on self-defence to the initial draft of the Charter. Both the English and French formulations of Article 51 find some basis in the American note of 1928. They are substantially equivalent inasmuch as they refer to an original right that precedes the written law of the Charter (and especially its article 2, paragraph 4, which by contrast in 1945 was, at least partly, new law).

Such an original, unwritten right of self-defence was precisely what Isidore of Seville had in mind when he derived it from natural law. In this respect his 'etymological' argument concerning *ius naturale* deserves attention: it is so named, he explains, because it is *commune omnium nationum,* and this in turn is so because it is valid everywhere *instinctu naturae*. For once Isidore's explanation makes sense: the words *natura* and *natio* stem indeed both from the verb *nasci*; natural law is 'inborn', and therefore common to all 'nations', considered not as States but as so many human families. By the same token self-defence appears as a 'natural' right 'born' with us, and hence 'inherent', not derived from any human legislation.

The fountainhead of this whole tradition of self-defence as a natural right is the passage from Cicero's *Pro Milone* that serves as a motto for the present

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est, numquam iniustum [est], sed naturale aequumque habetur.' Isidorus Hispalensis Episcopus, *Etymologiarum sive originum libri viginti*, ed. Lindsay, Oxford 1911, bk. V, IV.

[7] Note of the Government of the United States to the Governments of Australia, Belgium, Canada, France, Germany, Great-Britain, etc., of June 23rd, 1928. A. Lysen (ed.), *Le Pacte Kellogg.* Documents concernant le traité multilatéral contre la guerre signé à Paris le 27 août 1928, Leiden 1928, p. 54.

Colloquium. It may be worthwhile to recall the circumstances that gave rise to this speech. Titus Annius Milo was accused of having deliberately caused the death of his enemy Publius Clodius Pulcher during an affray in 52 B.C. at Bovilla on the Via Appia where the two had come across each other with their armed escorts. The incident caused an enormous upheaval in Rome, where Clodius had been very popular with certain circles. This is why Cicero (a deadly enemy of Clodius) had to plead the case in a hostile atmosphere, which strained his rhetorical powers and caused him to lose his client's (and friend's) case.[8] The speech for Milo as it has come down to us was written after the event; had it really been proclaimed as written, it might have won the case. Although it is therefore surrounded by a degree of unreality, it is still, at least on paper, one of Cicero's most accomplished speeches, and certainly a classic text on self-defence. Cicero indeed tries to show that Milo had been the victim of an ambush laid by Clodius and that he therefore had to 'repel force by force'. This is the context of the well-known episode that figures in the introductory part of the speech where the legal problem is set out. If a man has been killed, Cicero explains, the accused usually either denies having done it at all or tries to defend his act as legal: 'aut negari solere omnino esse factum, aut recte ac iure factum esse defendi'. He continues: 'And if there is any occasion (and there are many such) when homicide is justifiable, it is surely not merely justifiable but even inevitable when the offer of violence is repelled by violence. ... against an assassin and a brigand what murderous onslaught can want justification? What is the meaning of the bodyguards that attend us, and the swords that we carry? We should certainly not be permitted to have them, were we never to be permitted to use them. There does exist therefore, gentlemen, a law which is a law not of the statute book, but of nature; a law which we possess not by instruction, tradition, or reading, but which we have caught, imbibed, and sucked in at nature's own breast; a law which comes to us not by education but by constitution, not by training but by intuition – the law, I mean, that, should our life have fallen into any snare, into the violence and the weapons of robbers or foes, every method of winning a way to safety would be morally justifiable. When arms speak, the laws are silent; they bid none await their word, since he who

[8] For these facts see e.g. Cicéron, *Discours*, t. XVII, Paris: Société d'édition 'Les Belles Lettres', 1967, pp. 47-60; Cicero, *Pro Milone*, ed. by A.B. Poynton, 2nd ed., Oxford 1902, pp. xi-xxiii; William Forsyth, *Life of Marcus Tullius Cicero*, 2nd ed., London 1867, ch. XVI, pp. 287-307; R. G. M. Nisbet, 'The Speeches', in T. A. Dorey (ed.), *Cicero*, London 1965, pp. 69-72.

chooses to await it must pay an undeserved penalty ere he can exact a deserved one'.[9]

Cicero's conception of self-defence as an elementary primeval right had a lasting influence over the centuries. Let it suffice to mention one author who had a long-standing familiarity with his works, Hugo Grotius, who quotes that very passage from *Pro Milone* to establish the legitimacy of recourse to force according to natural law; following a Stoic tenet reported by Cicero, he relates it with the *prima naturae*, the 'first things according to nature', which impel any animal, as soon as born, to provide for its own conservation and the maintenance of its proper condition, as well as to avoid its destruction and to repel whatever may cause it.[10] Self-defence is therefore paramount among those *prima naturae*, as Grotius confirms at the outset of his discussion of just causes of war. The first of these causes is indeed *defensio sui et rerum*. If an attack is directed against one's body and threatens one's life, he explains, it may be repelled even by killing the aggressor if there is no other escape. He adds: 'Note that this right of defence as such primarily arises from the fact that nature entrusts every one to himself, not from the injustice or sin of the one who is the source of the danger'.[11] This allows him to justify defence even against someone posing a threat without any bad intent. While he refers to medieval jurists and Spanish scholastics, this is in line with the Ciceronian *prima naturae*.

2. Self-Defence as an Institution of Positive Law

There is, however, another way of looking at self-defence, whereby it actually becomes a technical notion. Instead of being a pre-social right of nature, it can be seen as existing only within an instituted legal order, and by virtue of that order. Conduct beyond this social horizon should bear other names such as self-preservation or self-help. Self-defence itself is conceptually linked to a legal order that forbids recourse to force by its members, as an authorised exception to this prohibition. Such a prohibition in turn becomes practically

[9] Marcus T. Cicero, *Pro T. Annio Milone*, 8 (III) - 11 (IV), in Cicero, *The Speeches*. With an English translation by N.H. Watts, Cambridge, Mass., and London 1964, pp. 14-17.

[10] Hugo Grotius, *De iure belli ac pacis libri tres* (1625), Aalen 1993, bk. I, ch. II, §§ I (1) and III (1), pp. 48 and 53.

[11] *Op. cit.*, bk. II, ch. I, § III, p. 171.