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Anticipatory Action in Self-Defence

Essence and Limits under International Law

Kinga Tibori Szabó

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Dr. Kinga Tibori Szabó
Researcher
Forum for the Law of Armed Conflict and Peace Operations
University of Amsterdam
Amsterdam
The Netherlands

ISBN 978-90-6704-795-1 e-ISBN 978-90-6704-796-8
DOI 10.1007/978-90-6704-796-8

Published by T.M.C. Asser press, The Hague, The Netherlands www.asserpress.nl
Produced and distributed for T.M.C. Asser press by Springer-Verlag, Berlin Heidelberg

Cover design: eStudio Calamar, Berlin/Figueres

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

Foreword

The concept of self-defence is beyond any doubt one of the most controversial issues in international law. In particular, the question whether the use of force in anticipation of armed action by the other party is permissible as falling within the concept of self-defence is hotly disputed. Some courage therefore is needed to entertain a new analysis of this problem and to offer new solutions to the seemingly elusive issue of the temporal dimension of self-defence. The author of the present book has shown this courage and in my view she has succeeded in offering new vistas.

She presents a thorough analysis of the concept of self-defence as it developed in the Western approach of law throughout the ages, right from the days of Greek and Roman civilisation until the adoption of the Charter of the United Nations which formally recognises the inherent right of self-defence. By focussing on two main research questions (1. is anticipatory action in self-defence part of customary international law? and 2. if so, what are its limits?), she succeeds in an admirable way to keep this analysis of virtually inexhaustible material both succinct and pertinent.

The method of research chosen by the author is lucid and transparent. The codification of the right of self-defence in Article 51 of the United Nations Charter is seen as a key moment. In order to ascertain what the drafters of Article 51 had in mind, it was necessary to examine what the content of the pre-Charter customary right of self-defence was and this is done according to the method of legal-historical research. The material on which this part of the study is based is rich and varied, consisting both of elements of legal doctrine as it developed in the relevant intellectual, political and religious context in its subsequent manifestations, and on various examples of state practice.

This enquiry leads to the conclusion that the customary rule of self-defence always had an intrinsic anticipatory aspect, which was limited by the requirements of necessity and proportionality, and must be sharply distinguished from so-called preventive self-defence.

At the time of the adoption of the Charter, the customary rule of self-defence thus had a clear and intrinsic anticipatory dimension and the second part of the

research is therefore focussed on the question whether any new rule affecting the status of anticipatory action has emerged since 1945. This part of the study is based on comparative case studies. In this respect, the author deals with anticipatory action in 'conventional' state-to-state conflicts, in situations where weapons of mass destruction are involved, and in cases of armed action against non-state actors where the 'accumulation of events' theory plays a preponderant role. And again her conclusion is that if a perceived threat of an armed attack creates a present and inevitable need to use force in order to stop the attack from taking place (the requirement of necessity) and if the force used is proportionate, anticipatory action in self-defence may be deemed lawful.

It is not to be expected that all controversies about the anticipatory element of self-defence will be solved on the basis of the findings in this book. But the author's final recommendation, viz. that 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 the three key elements she has identified in her study (conditionality of an armed attack, immediacy and proportionality) and which can be discerned both in pre- and post-Charter customary law, seems strikingly apposite in a world where the risks which endanger society have become ever more disparate and ominous.

April 2011

Pieter H. Kooijmans
Former Judge in the International Court of Justice

Acknowledgments

The present book could have not been written were it not for the generous financial support provided by the Netherlands Organization for International Cooperation in Higher Education—Nuffic, the University of Amsterdam and the T.M.C. Asser Instituut.

I am grateful to Prof. Dr. Terry D. Gill, who continuously encouraged the completion of this book and who offered invaluable advice throughout the writing process.

I owe my innermost gratitude to my family—János, Margit, Zoltán, Emese, Márti, Călin and David – for their relentless and continuously motivating support.

April 2011 Dr. Kinga Tibori Szabó

Abbreviations

Bk.	Book
BMEWS	United States Ballistic Missile Early Warning System
Ch.	Chapter
CIA	United States Central Intelligence Agency
FBI	United States Federal Bureau of Investigation
GA	General Assembly (United Nations)
GA Res.	General Assembly Resolution (United Nations)
GAOR	General Assembly Official Records (United Nations)
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
IRBM	Intermediate-Range Ballistic Missile
ISAF	International Security Assistance Force
MRBM	Medium-Range Ballistic Missile
mtg.	Meeting(s)
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
PLO	Palestine Liberation Organization
PKK	Kurdistan Workers' Party
Recueil de cours	Collected Courses of the Hague Academy of International Law
Repertoire	Repertoire of the Practice of the Security Council
Res.	Resolution
SAM	Surface-to-Air Missile
SC	Security Council (United Nations)
SC Res.	Security Council Resolution (United Nations)
SCOR	Security Council Official Records (United Nations)
Sess.	Session (s)
Supp.	Supplement
TLAM	Tomahawk Land Attack Missile

Vol.	Volume
UN	United Nations
UN Doc.	United Nations Document Series
UK	United Kingdom of Great Britain and Northern Ireland
UNMOVIC	United Nations Monitoring, Verification and Inspection Commission
US	United States of America
USSR	The Union of Soviet Socialist Republics
WMD	Weapons of Mass Destruction

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Chapter 1
Introduction

1.1 Anticipatory Action in Self-Defence: A Controversial Concept

On 1 June 2002, at the West Point Military Academy graduation ceremony, the then US President George W. Bush declared that the Cold War doctrines of deterrence and containment were largely obsolete and that it was necessary to "take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge."[1] Three months later, on 9 September 2002, the then French President Jacques Chirac expressed his concern regarding the new doctrine. In his view, as soon as one nation claimed the right to take preventive action, other countries would naturally do the same.[2] Partially relying on the new doctrine, in March 2003, the United States invaded Iraq.

In April 2004, at the 98th annual meeting of the American Society of International Law, the "pre-emption doctrine" of the Bush administration was discussed by several panellists.[3] Whilst the new doctrine attracted both critical and acquiescing opinions, one of the speakers asserted that contemporary customary law left no room for pre-emptive or anticipatory self-defence *per se* and that such a right had to be viewed as a relic of the past.[4]

A few months later, in December 2004, a high-level UN panel delivered a report on issues of international security and use of force.[5] The panel concluded that "a threatened State, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would

[1] Bush (1 June 2002) Graduation Speech at West Point.

[2] Interview With Jacques Chirac (9 September 2002).

[3] The Bush Administration Preemption Doctrine and the Future of World 2004, pp. 325–337.

[4] Zoller 2004, pp. 334–335.

[5] UN High-Level Panel 2004, para 188, p. 54.

K. Tibori Szabó, *Anticipatory Action in Self-Defence*, DOI: 10.1007/978-90-6704-796-8_1,

deflect it and the action is proportionate".[6] At the same time, the panel stopped short of endorsing unilateral preventive action against potential threats.[7]

In October 2005, a panel of authoritative British international lawyers adopted the *Principles of International Law on the Use of Force by States in Self-Defence*, according to which the view that States had a right to act in self-defence in order to avert the threat of an imminent attack was widely, though not universally, accepted. Hence, it was unrealistic in practice to suppose that self-defence always had to await an actual attack.[8]

In the same year, on 19 December 2005, the International Court of Justice delivered its judgment in the *Armed Activities in Congo* case. The Court declined to discuss the lawfulness of a response to the imminent threat of an armed attack, because the issue had not been raised by the parties, although the evidence adduced by Uganda showed the 'preventative nature' of many of its armed acts.[9]

These are just a few instances illustrating how anticipatory action in self-defence or, generally, the temporality of self-defence can produce considerably differing, if not outright conflicting views.

The legality of pre-emptive strikes is indeed one of the most controversial questions in contemporary international law. At the core of this controversy stands the temporal dimension of self-defence: When and for how long can a state defend itself against an armed attack? Can it resort to armed force before such an attack occurs? How does one define anticipatory action? Is anticipatory action covered by the rules of self-defence or should it be treated as a different concept?

Such questions have generated ample discussion among legal scholars and public officials alike. Claims of self-defence have often been criticised or condemned for transgressing the perceived limits of their temporal dimension. At the beginning of the second decade of the twenty-first century, the temporal boundaries of self-defence are still contentious and hard to pin down.

This book was written on account of the keenness of the author to contribute to the contemporary debate on these temporal limits, in general, and on the legality of anticipatory action, in particular.

The innovative mark of the present research is its comprehensive focus on the temporal dimension and, particularly, the anticipatory aspect of self-defence. By way of conclusion, the definition and limits of anticipatory action in self-defence are incorporated into an accessible formula.

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[6] Ibid., para 188.

[7] Ibid., paras 190–191. For criticism of the findings of the panel, see Corten 2007, 217–232.

[8] The Chatham House Principles 2006, p. 964.

[9] Armed Activities in Congo 2005, para 143. Some authors maintain, however, that the ICJ has implicitly rejected anticipatory action in self-defence. Détais 2007, pp. 164–166.

1.2 The Temporal Controversy of the Right of Self-Defence

The right of self-defence is widely acknowledged today as one of the two exceptions to the prohibition to use force enshrined in the United Nations Charter (hereafter, 'Charter' or 'UN Charter').[10]

Article 2(4) of the Charter states that all Member States have to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.[11] The customary nature of this prohibition was acknowledged by the International Court of Justice (hereafter, ICJ or 'Court') in 1986, in its *Nicaragua* judgment.[12]

Article 51 of the UN Charter consecrated the right of self-defence as an exception to the prohibition to use force. It reads:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The Charter-based content of the right of self-defence thus allows states to undertake military action in case of an armed attack, provided that the endeavour is reported to the Security Council (hereafter, SC or 'Council') and as long as that action does not affect the Council's authority to take measures.

Complementary to the treaty-based description of self-defence is the customary concept of the right that is often used to complement Article 51:

> Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter.[13]

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[10] See, for instance, Brownlie 1963, p. 265; Dixon 2000, p. 297; Neff 2005, pp. 316–317, Simma 1995, p. 663.

[11] According to Chapter VII of the UN Charter, the other main exception to the general prohibition to use force is the Security Council-controlled collective enforcement action. Also, there is a growing literature discussing humanitarian intervention as a possible third exception to the prohibition. See, for instance, Evans 2008; Lillich 1986; Tesón 2005.

[12] Nicaragua 1986, paras 185–186, 188, 292(4). See *infra* 11.4.4 for main discussion. The major part of the literature agrees with the interpretation of the Court: Dixon 2000, pp. 296–297; Dinstein 2005, p. 92; Gray 2008, p. 30; Schachter 1991, pp. 130–131.

[13] Nicaragua 1986, para 176.