Chapter 5

The Temporal Dimension of Self-Defense: Anticipation, Pre-emption, Prevention and Immediacy

Terry D. Gill

I Introduction

The adoption by the United States of a doctrine of pre-emptive, or even preventive, self-defense as part of its national security strategy, and its partial reliance upon that doctrine to justify the recent war against Iraq, has caused a great deal of controversy at both the diplomatic level and among international legal scholars relating to the permissibility of anticipatory or preventive self-defense in advance of an armed attack.1 While much legal opinion seems to be in broad agreement that self-defense would be permissible in response to an immediate and manifest threat of an attack,2 opinion diverges sharply on whether self-defense would be permissible in response to potential threats of an attack and, more especially, whether the notion of an immediate threat needs to be reexamined in the light of changed circumstances, such as terrorist threats and the possible use of weap-

1 National Security Strategy of the United States at www.whitehouse.gov/nsc/nss. html. A number of justifications were advanced by the US Government for the use of force against Iraq. Among these were references to the necessity of preventing Iraq from engaging in an attack with weapons of mass destruction upon the United States, US interests in the Middle East, or neighboring States, as well as the proliferation by Iraq of such weapons to terrorist movements. See “Pre-emption, Iraq and International Law” Comments by W.H. Taft IV and T.F. Buchwald in the Agora section of 97 AJIL (2003) 367.

ons of mass destruction by terrorist organizations and so-called rogue regimes.\(^3\) Other points of controversy include such questions as what constitutes an immediate threat of an armed attack, what is the proper interpretation of the relationship between Charter law and customary law relating to self-defense, and what is the proper and desirable relationship between the right of self-defense and the rest of the law governing the use of force?

This article will address these questions, hopefully contributing to this topical debate through a combination of legal reasoning and an examination of State practice. The starting point is that self-defense is a right, grounded in both Charter and in customary law, which allows some degree of anticipatory action to counter a clear and manifest threat of attack in the immediate, or at least proximate, future, within the confines of the well-known and widely accepted 1837 *Caroline* incident criteria, relating to necessity, immediacy and proportionality.\(^4\)

In this context, it is submitted that these criteria still provide a workable and acceptable framework for analysis, but are not a substitute for analysis itself. Those criteria must be applied in context, taking into account the credibility and urgency of a specific threat, the consequences of suffering the incipient or probable attack and the availability, or lack thereof, of feasible alternatives to the taking of action in self-defense. In short, the *Caroline* criteria must be applied in the light of other factual and legal considerations and were never meant to be, nor can they be seen in isolation, as mere abstractions, without due regard for the relevant circumstances of each particular situation. To demonstrate this, it will be necessary to examine a number of examples from State practice in which varying degrees of anticipatory action in self-defense were applied. Consequently, much of this article will be devoted to an examination of the permissible limits to the exercise of anticipatory self-defense, taking into account the analytical framework provided by the *Caroline* criteria and the relevant circumstances of each particular case or scenario which is used.

Following this examination of State practice in relation to the limits of anticipatory self-defense and the question of the relevance and functions of the *Caroline* criteria, an analysis will be conducted of the shortcomings in the National Security Strategy of the United States, particularly, of the challenge it poses to the contemporary *jus ad bellum* in attempting to redefine the notion

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\(^3\) Since the events of “9-11”, a third body of opinion has emerged within the debate over the parameters of self-defense. It suggests that pre-emptive action is justified not only within the traditional limits of the *Caroline* doctrine against immediate and manifest threats, but also to counter threats which are more remote in the future. See e.g. Sofaer, “On the Necessity of Pre-emption” in *14 EJIL* (2003) no. 2, 209; and the comments by Taft and Buchwald referred to in n. 1, supra.

\(^4\) The *Caroline* incident was referred to by the International Military Tribunals in Nuremburg and Tokyo, in debates in the UN Security Council and in academic literature relating to self-defense. See nn. 28, 37, 42 and 44 and accompanying text infra.