Anticipatory Self-Defence:
Legal Analysis versus Strategic Realities

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I. Introduction

Unlike other contributions to this volume, this essay does not deal with a conflict between basic values and fundamental principles of international law based on them. It addresses the contradiction between conclusions reached, on the one hand, on the basis of a strictly normative analysis and, on the other, an assessment of the relevant factual aspects of a legal issue. In their search for a solution lawyers should not simply appeal to common sense or, if the legal rule has a contractual foundation, refer to the treaty as a living instrument that must be adapted to a changing environment. They should also look for more specific legal arguments in order to bridge the gap between law and facts.

One variant of the solution eventually advocated might be a watered down version of the initial conclusion that was based on purely legal grounds. It may be due to the awareness that exceptions to a legal principle must be accepted in order to ensure the latter’s continued practical relevance. Such concessions to realpolitik could indeed be a price worth paying. Legal purism or perfectionism that insists on the technically correct interpretation could lead to an even less desirable result in practice. It may entail the risk that the very existence of the rule in question will be doubted and denied, so that it will be completely ignored by political and military decision makers and become obsolete.

The issue of the lawfulness of anticipatory self-defence lends itself particularly well to an illustration of the above-mentioned dilemma for more than one reason.

What is at stake is not a matter of secondary political relevance for a state, such as the treatment of a single individual or a small number of nationals whose human rights have been violated, the investment of

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a private company in a foreign country or the sovereignty over a small disputed border area, but possibly the independence and even the physical survival of an entire nation. Therefore, the consideration of military and strategic realities is particularly urgent. This task is made more difficult by the fact that international security has become increasingly complex. For a long time, its focus was on armed conflict between states using their regular armed forces. Recently, unprecedented threats are posed by non-state actors, in particular terrorists and organised criminals. Major security risks today include cyber threats, energy shortage and climate change, as well as pandemics, mass migration and refugee movements. The emergence of new security problems may in turn call for a reassessment of previous conclusions on the applicable law.

Furthermore, the search for an answer to the question of the legality of self-defence before the actual occurrence of an armed attack on the basis of the relevant provision of the UN Charter provides a model case for the intricacies of treaty interpretation. It offers international lawyers both a unique challenge and opportunity to test their skills in what could be called the art of their profession.

Moreover, Karl Zemanek is an authority on the law of treaties and has made important contributions to the debate on some of the key questions raised in the context of the prohibition of the threat or use of force, including the right of self-defence.¹

Finally, since this author dealt with anticipatory self-defence in some detail more than thirty years ago, this essay makes him take a fresh look at his earlier position on the issue and find out whether it is still tenable today.²

II. Interpreting Article 51 UN Charter: Arguments For and Against the Legality of Anticipatory Self-Defence

The legal rules governing self-defence in modern international law are laid down in Article 51 UN Charter. The interpretation of this provision
