

K. TIBORI SZABÓ, *Anticipatory Action in Self-Defence: Essence and Limits under International Law*, T.M.C Asser Press (Springer), The Hague 2011, xvi +348 pp.
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The issue of whether, in the UN era, the right of self-defence can be exercised not only against an armed attack that has in fact occurred but also against the *threat* of such an attack has long been a notable point of disagreement amongst both scholars and states. Deep divisions in the literature concerning the possible lawfulness of any form of ‘anticipatory’¹ defensive force emerged almost immediately following inception of the UN system,² and – as Kinga Tibori Szabó rightly states in the introduction to her excellent book on the subject – the lawfulness of anticipatory action remains ‘one of the most controversial questions in contemporary international law’ (p. 2).

There are two related research questions at the heart of *Anticipatory Action in Self-Defence*, which the author clearly identifies from the outset (p. 9). The first of these essentially asks whether anticipatory action in self-defence is lawful today. The second question is conditional upon an affirmative answer to the first: what are the legal limits of pre-emptive defensive uses of force? At the risk of significantly downplaying the quality and depth of this book, it is possible to boil its answers to these questions down to a relatively simple form. First, Tibori Szabó argues that anticipatory action in self-defence is – or, rather, *can be* – lawful. However, she then concludes that pre-emptive self-defence is *only* lawful if it complies with the well-established customary criteria of necessity (meaning, in this context, that any response is conditional on the imminent occurrence of an ‘armed attack’) and proportionality (meaning, here, that only what the author calls ‘moderate’ force is used to stop that attack from taking place).

It must be said that, in themselves, neither of these principal questions nor the ultimate answers given to them appear especially novel. While any measure in self-defence taken against a threat of force remains controversial, it is evident that an increasing number of writers now accept that anticipatory self-defence can be lawful, with its lawfulness usually being seen as dependent on the action meeting restrictive customary requirements: particularly a crucial criterion of *imminence*.³ There are plenty of scholars who have already made the same core claim as that advanced in *Anticipatory Action in Self-Defence*. At first glance, then, one might reasonably question what new contribution this book makes to the existing scholarship.

In fact, there are many reasons why Tibori Szabó's work represents an extremely valuable addition to the debate. The first of these is simply the scope of the book under review. While many writers have engaged with the issue of anticipatory action in self-defence in an article format,⁴ or as one aspect of a wider monograph,⁵ few have tackled the issue on this kind of scale. In particular, the quality and sheer *depth* of the research throughout is a key strength here. The author's analysis is continually strong, but it is the foundational research underpinning it that is perhaps more notable.

One result of this sort of larger, monograph-length assessment of the issues related to anticipatory action in self-defence is that the author is able to interrogate her subject-matter from a number of perspectives. For example, the first part of the book takes its time in providing a legal-historical analysis of the temporal dimension of self-defence, with the author exploring pre-Charter theory and practice in some depth to identify the roots of the right (pp. 29-124). Most treatments of pre-emptive self-defence simply do not have the space for such meticulous historical contextualisation. This opening section of the book admittedly covers some well-trodden ground, such as an analysis of the implications of the 1837 *Caroline* incident (although it should be noted that Tibori Szabó dissects this incident rather better than most, at pp. 72-75). However, it also engages with state practice and other historical material that is commonly overlooked in the context of the right of self-defence, such as the implications of *Operation Catapult* in 1940 (pp. 96-98) – especially regarding the necessity criterion – or the important eighteenth century distinction between 'perfect' and 'imperfect' wars in academic theory (pp. 59-68). Overall, this legal-historical aspect of the book significantly enriches the subsequent analysis.

Interpretative scrutiny of Article 51, and particularly the exact meaning of the phrase 'if an armed attack occurs', forms a key part of the longstanding anticipatory self-defence debate.⁶ Tibori Szabó takes a purposive approach to interpreting Article 51, and her analysis of the provision provides a solid basis for the claim that it does not preclude anticipatory action *per se*. This is a view to which this reviewer does not necessarily subscribe, but it is regardless very credibly argued. There is, admittedly, a logical flaw in the author's specific reasoning concerning Judge Schwebel's famous claim in the *Nicaragua* case⁷ that the term 'if an armed attack occurs' is not the same as saying 'if, and only if, an armed attack occurs' (p. 109, at footnote 35). However, in general the assessment of Article 51 – based on the object and purpose of the UN Charter as a whole and its *travaux préparatoires* – is excellent (pp.109-114).

Beyond the minutiae of treaty analysis, a more prevalent feature of *Anticipatory Action in Self-Defence* is its reference to customary international law. Tibori Szabó's use of state practice as a means of examining the content of international law – both pre- and post-Charter – is a key strength throughout. This is particularly evident in three chapters that appear in the middle of the book: Chapter 7 focuses on instances of 'traditional' state-on-state uses of force, Chapter 8 on self-defence in relation to WMDs, and Chapter 9 on self-defence against non-state actors. These three chapters engage in detail with the UN era state practice relating to anticipatory action in self-defence, and collectively constitute the 'spine' of the work. Together they provide the basis for the crucial claims reached in Part II, regarding the modern status of pre-emptive self-defence and its limits. The instances of practice covered in these chapters are generally considered in a nuanced and critical manner, and with the depth of research already noted as being a predominant feature of this book. Take, for example, the convincing assessment of the legal claims made in the context of the much discussed 6 Day War (pp. 144-149), or the important focus on the temporal dimension of the Turkish intervention in Northern Iraq in 2008 in response to PKK attacks (pp. 237-239).

For all of the quality and depth of the incident-based research on show, however, perhaps the most significant contribution of this book is of a rather more conceptual sort. This is Tibori Szabó's representation of self-defence as occurring on a temporal *spectrum*, which holistically covers the various stages of possible defensive action (the time prior to the attack being responded to, during it, and after it). The author argues that self-defence has always had an intrinsic anticipatory element and that this remains true today. On this basis, she distinguishes the anticipatory *dimension* to self-defence (something which is extremely common, with entirely uncontroversial 'traditional' self-defence actions frequently having at least an element of pre-empting future attacks about them) from full-blown anticipatory *action* in self-defence (pp. 275-277). This perspective shifts us away from the division usually drawn between regular self-defence (what Tibori Szabó calls 'remedial' action) and a separate anticipatory version.⁸ She argues that, in many cases, self-defence actions will involve both anticipatory and remedial elements. There is thus a single right of self-defence, which is commonly possessed of an anticipatory aspect; wherever a response occurs along the temporal spectrum, though, this must be strictly regulated by necessity and proportionality. Indeed, it is for this reason that the author ultimately prefers the terminology of 'anticipatory *action* in self-defence' rather than the more usual 'anticipatory self-defence': the latter suggests a separate concept, whereas the former indicates a temporal dimension of a single concept (p. 283).

This argument regarding the intrinsic anticipatory nature of the right of self-defence is perhaps best illustrated in relation to the notion that a defensive response can no longer be either necessary or proportional once the armed attack being responded to has ended. This is a relatively common feature of state practice/*opinio juris*,⁹ and has also been implicitly endorsed by the International Court of Justice.¹⁰ However, *Anticipatory Action in Self-Defence* well demonstrates that this notion seems at odds with self-defence claims that are put forward by states as a mixture of remedial and anticipatory action. In other words, states commonly claim to be responding to an armed attack that has occurred but is now over, *in combination* with the threat of related subsequent attack. The most high profile example of this sort of mixed claim is, of course, the United States led intervention in Afghanistan in 2001,¹¹ but Tibori Szabó also engages with a number of others (especially in Chapter 8). These examples highlight the intrinsic element of pre-emption even in instances where a clear and agreed armed attack has occurred, because without at least some degree of acceptability for an anticipatory dimension to the right, these examples would fall foul of the requirement that an attack that is over cannot be responded to.

There are of course elements of *Anticipatory Action in Self-Defence* that this reviewer found problematic: no book is perfect. One notable point of concern was the fact that Tibori Szabó repeatedly conflates the ‘armed attack’ criterion (which is to be found in Article 51 of the Charter) and the ‘necessity’ criterion in customary international law (see, e.g., p. 121-122). In her view, the former is simply the treaty-based expression of the latter, and thus the criterion of necessity *includes* what she refers to ‘the conditionality of an armed attack’. The idea here is that the necessity criterion requires that an armed attack – a grave use of force – has or will imminently occur. This reviewer entirely disagrees with this conclusion. As he has examined at length elsewhere, the criteria of ‘necessity’ and ‘armed attack’ are two separate – albeit often overlapping – requirements for lawful self-defence.¹²

Another critique that could be made of this book is a rather more stylistic matter. It is very evident when reading *Anticipatory Action in Self-Defence* that it was adapted from a PhD thesis: later investigation confirmed that it was originally submitted as a doctoral thesis at the University of Amsterdam. To be clear, this fact does not in any way diminish the *substance* of the book. Presuming that broadly similar research and analysis formed the basis of the version of this work submitted for the doctorate, it must have been an exceptional PhD thesis. However, it is something of a shame that, given the extremely high quality of the substance here, the book was not stylistically adapted to ‘feel’ rather less like a doctoral thesis and rather more like a monograph. This is particularly evident in Part III, which is

essentially an overlong conclusion, meticulously reiterating all of the previous arguments: a section that would be fully at home in a doctoral thesis, but feels rather bloated and inappropriate here. There are other points throughout this book where one gets the distinct sense that the editorial voice is directed at ‘examiners’ rather than ‘readers’. As stated, this is a minor criticism, given that it does not affect the ultimate quality of the work, or its substantive value. Nonetheless, it can become rather distracting on occasion.

The present reviewer is not entirely convinced by the final conclusions reached in *Anticipatory Action in Self-Defence*, at least not in the absolute form in which they are expressed. Anticipatory self-defence against an imminent, discrete and objectively verifiable threat may well be lawful; there is certainly a degree of state practice that can be seen as supporting the acceptability of such action in custom, as this book ably demonstrates. However, some scholars (and – crucially – states) remain opposed to all forms of anticipatory action, imminent or otherwise. Such action therefore remains highly controversial as a matter of hard law, something that is of course acknowledged by Tibori Szabó (both at p. 2 and p. 276). In the view of the present reviewer, neither a reading of Article 51 (including taking it in its wider context, as is done here), nor a detailed analysis of the state practice can provide a *conclusive* case for the lawfulness of pre-emption. On the question of anticipatory action in self-defence, then, he finds himself sharing a seat atop the fence with the judges of the world court.¹³ Yet despite the fact that this reviewer does not ultimately find himself fully swayed, *Anticipatory Action in Self-Defence* undoubtedly presents an exceptional case for the lawfulness of anticipatory action. The depth, commendable focus on state practice and the impressive quality of the research underpinning this book, all mean that it is an excellent addition to the literature. It is of no surprise at all that it won the 2012 Francis Lieber Prize from the ASIL Lieber Society on the Law of Armed Conflict.

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¹ It is worth noting that the terminology with regard to self-defence taken against the threat of force is not uniform in the literature. Various terms are used inconsistently by different scholars to mean different things in this context, which can lead to confusion (as has been pointed out by C. Gray, *International Law and the Use of*

Force (Oxford, Oxford University Press 3rd edn. 2008), pp. 211-212). The same terminology will be employed here as that used in the book under review: ‘anticipatory self-defence’ (or ‘anticipatory *action* in self-defence’) and ‘pre-emptive self-defence’ are employed interchangeably to refer to action taken in response to an *imminent* attack, while ‘preventative self-defence’ is used to refer to action taken in response to a perceived threat that is more temporally remote. However, it is worth noting that this reviewer has commonly used different terminology elsewhere: see, for example J.A. Green, ‘Docking the *Caroline*: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defence’, 14 *Cardozo Journal of International and Comparative Law* (2006) p. 429, at p. 465 footnote 151.

² See, for example, the famous debate between Bowett and Brownlie: D.W. Bowett, *Self-Defence in International Law* (Manchester, Manchester University Press 1958), particularly at pp. 188-192; and I. Brownlie, *International Law and the Use of Force by States* (Oxford, Oxford University Press 1963), particularly at pp. 257-261.

³ See, for recent examples of scholars who have taken this view: C. Henderson, *The Persistent Advocate and the Use of Force: The Impact of the United States upon the Jus ad Bellum in the Post-Cold War Era* (Farnham, Ashgate 2010), pp. 171-193; N. Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford, Oxford University Press 2010), pp. 55-63; and G.A. Raymond and C.W. Kegley, Jr., ‘Preemption and Preventative War’, in H.M. Hensel (ed.), *The Legitimate Use of Force: The Just War Tradition and the Customary Law of Armed Conflict* (Farnham, Ashgate 2008), p. 99, particularly at pp. 101-109.

⁴ See, for example, A. Garwood-Gowers, ‘Israel’s airstrike on Syria’s Al-Kibar Facility: A Test Case for the Doctrine of Preemptive Self-Defence?’, 16 *Journal of Conflict and Security Law* (2011) p. 263; C. Greenwood, ‘International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq’, 4 *San Diego International Law Journal* (2003) p. 7; M. Sapiro, ‘Iraq: The Shifting Sands of Pre-Emptive Self-Defense’, 97 *American Journal of International Law* (2003) p. 599; N. Shah, ‘Self-Defence, Anticipatory Self-Defence and Pre-Emption: International Law’s Response to Terrorism’, 12 *Journal of Conflict and Security Law* (2007) p. 95; and A.D. Sofaer, ‘On the Necessity of Pre-Emption’, 14 *European Journal of International Law* (2003) p. 209.

⁵ See, for example, Y. Dinstein, *War, Aggression and Self-Defence* (Cambridge, Cambridge University Press 5th edn. 2011) pp. 194-210; Gray (*supra* n. 1) at pp. 160-165 and pp. 208-227; J.N. Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* (Aldershot, Ashgate 2005), pp. 11-149; and T. Ruys, ‘Armed Attack’ and Article 51 of the UN Charter (Cambridge, Cambridge University Press 2010) pp. 250-367.

⁶ For a detailed appraisal of this aspect of the debate, see O. Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford, Hart Publishing 2010) pp. 407-416.

⁷ *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States of America*) merits (1986) ICJ Rep. p. 14, dissenting opinion of Judge Schwebel at para. 173.

⁸ For example, in his assessment of pre-emptive action in relation to Operation Iraqi Freedom, Pierson continually refers to the ‘the right of anticipatory self-defence’, indicating its distinct conception: C. Pierson, ‘Preemptive Self-Defense in an Age of Weapons of Mass Destruction: Operation Iraqi Freedom’, 33 *Denver Journal of International Law and Policy* (2004-2005) p. 150.

⁹ See, for example, the positions taken by states with regard to the *Mayaguez* incident in 1975 (*New York Times*, 16 May 1975, p. 15); the reaction of the United States to Israel's extraction of its nationals from Entebbe airport in 1976 (UN Doc. S/PV.1941, 8); the criticism by Zimbabwe of the United States invasion of Grenada in 1983 (UN Doc. S/PV.2491, p. 5); and the steps taken by South Korea following its naval clash with the North in 2002 ('The Naval Clash on the Yellow Sea on 29 June between South and North Korea: The Situation and ROK's Position' 1 July 2002, press release of the Ministry of National Defence of the Republic of Korea, available at <http://www.globalsecurity.org/wmd/library/news/rok/2002/0020704-naval.htm>).

¹⁰ *Nicaragua*, merits (*supra* n. 7) at para. 237.

¹¹ Where the United States put forward the dual claim that action was taken '[i]n response to these attacks [of 11 September 2001]' and also was 'designed to prevent and deter further attacks on the United States.' See UN Doc. S/2001/946.

¹² J.A. Green, *The International Court of Justice and Self-Defence in International Law* (Oxford, Hart Publishing 2009) pp. 129-146.

¹³ The International Court of Justice has explicitly refused to pronounce on the question on the basis that it has not been at issue before it, see *Nicaragua*, merits (*supra* n. 7) at paras. 35 and 194; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* merits (2005) ICJ Rep. p. 168 at para. 143.