Chris O'Meara. ***Necessity and Proportionality and the Right of Self-Defence in International Law*****. Oxford University Press.**

1.6.1 The Nature and Function of Necessity and Proportionality

Necessity and proportionality condition the exercise of the right of self-defence. Necessity determines *whether* defensive force may be used to respond to an actual or imminent armed attack and *where* it must be directed. Proportionality governs *how much* force is permissible. Once the availability of the right is triggered in response to an armed attack, these two requirements operate to restrain the scope of defensive action and ensure that it remains defensive. As Ago notes, 'the objective to be achieved by [self-defence], its *raison d'être*, is necessarily that of repelling an attack and preventing it from succeeding, and nothing else'. Therefore, compliance with necessity and proportionality indicates that the purposes of self-defence are achieved, and nothing beyond that. As guardians of the parameters of the right of self-defence, they are the 'touchstones' that ground such action in the principle of legality.

1.6.2 The Purposes of the Right of Self-Defence

1.6.2.1 Halting, Repelling or Preventing an Armed Attack

Compliance with necessity and proportionality guarantees that the purposes of self-defence are achieved, and nothing more. The result is a lawful use of force. Such compliance in turn depends on establishing the purposes of self-defence. These purposes provide the benchmark against which adherence to the requirements of necessity and proportionality is gauged. This benchmark defines their content and scope. It answers the two questions that govern the present analysis: 'necessary to do what?' and 'proportionate to what?' There can be no meaningful deliberation of necessity and proportionality without concomitant consideration of these purposes. Whether a narrow or expansive view is adopted on this issue delineates the conceptual boundaries of these requirements.

The legitimate purposes of the right of self-defence remain highly controversial, however. Disagreements regarding how far a state may go to defend itself risk making an assessment of necessity and proportionality an overly subjective exercise, beholden to the position of the reviewer, be it a state, international organization, court or scholar. Even if subject to a later, objective review by a court (which is rare), continuing controversies mean that it might be very difficult to identify when the defensive purpose is fulfilled and, as a result, the right to exercise self-defence ceases. […] One of the most notable is whether states possess a right of some form of anticipatory self-defence. The ability to counter potential future threats that have not yet materialized is widely rejected by scholars and states alike, although a right to respond to 'imminent' armed attacks occupies a much less clear position in international law. If one does accept the existence of a limited right of anticipatory self-defence against imminent armed attacks, then the purposes of the right of self-defence are to halt, repel or prevent an armed attack. However, such purposes, and the attendant analysis of both necessity and proportionality, change if one rejects this possibility. For commentators and states that deny any right of anticipatory self-defence, necessity and proportionality become much narrower concepts. This is because the purposes of self-defence are reduced to halting and repelling, and not preventing, an armed attack. As explored further below, the more limited the view of self-defence the more circumscribing these requirements become.

Although the outer parameters of self-defence may be debated along these lines, the core purpose is not. A use of force in self-defence must be defensive in nature. Force going beyond halting, repelling or preventing an armed attack will be either unnecessary or disproportionate and, *ipso facto*, unlawful. Yet, the reality beyond the pages of an academic text, or courtroom judgment, might not be so clear-cut. States do not confine themselves to the neat argot of 'halting, repelling or preventing' when discussing defence and their national security. They may employ other terms, including 'deterring' or 'discouraging' armed attacks. This language appears to take action beyond an immediate defensive purpose and into a more uncertain and distant future of possibilities. 'Deterrence', it can be argued, is an inherent part of punitive measures and cannot, therefore, be recognized as a legitimate motive for using force. Yet, an element of deterrence might in fact be considered by states to be an integral part of a defensive response. Instead of focusing on the label that might be employed to describe a particular act, the key factor that will determine the legality of a putatively defensive response is whether there is a continuing threat to a defending state and its actions are necessary and proportionate to counter that threat. This points to the existence of a legitimate defensive purpose.

1.6.2.2 An Overriding Defensive Purpose

The existence of additional and even decisive motives, over and above self-defence, does not deprive a state of the right to resort to self-defence, provided the conditions for an armed attack are met. Particular motives for taking military action, and the outcomes of such action do, however, relate to the issue of whether a purported defensive act is necessary and proportionate. For example, the appropriation of resources, changing a border, destroying state infrastructure, occupation and regime change are all possible results of purported defensive action. Whether these outcomes are a result of coincidence or design, the question is whether they are necessary and proportionate to achieving a defensive purpose (*viz* halting, repelling or preventing an armed attack), not whether they are additional legitimate purposes of the right of self-defence itself.

Simma maintains that as long as defensive action 'visibly and credibly preserve[s] a primary repelling character it is immaterial if [a defending state] simultaneously harbours additional, but subordinate deterrent, retributive or even punitive motives when conducting them'. Reference here to retribution and punishment is potentially troubling. Such terms are at odds with the notion of defence. Yet, as Dinstein notes, 'the motives driving States to action are usually multifaceted, and a tinge of retribution can probably be traced in every instance of response to force'. This issue goes to the question of how far a state may go to protect itself. Ultimately, any motive or purpose beyond defence risks rendering ostensibly defensive action an unlawful armed reprisal.

Corten argues that it is better to think of the 'main' or 'ultimate aim' of defensive action. Subordinate aims, such as overthrowing a government, are permitted, provided they are necessary to put an end to an armed attack. Such approach, Corten argues, best accords with Ago's reference to the *raison d'être* of self-defence. This account is logical. It recognizes that a state might pursue other subsidiary aims in exercising its right of self-defence but requires such aims to be necessary and proportionate to halting, repelling or preventing an armed attack. It might not be easy to establish clear lines of distinction on this point, but adding a potentially open-ended list of extra possible defensive aims risks rendering self-defence meaningless. The analytical framework set out in this book aims to assist with assessing adherence to an overriding defensive purpose.

1.6.2.3 Fulfilling the Defensive Purpose

It is also important to consider what sort of action a defending state might be permitted to take to fulfil a defensive purpose that complies with the requirements of necessity and proportionality. As an example, it is logical to conclude that an armed attack that has succeeded in capturing territory can only be successfully defended against by repulsing the attacker and restoring that territory. A return to the territorial *status quo ante bellum* is the minimum legitimate defensive goal in such circumstances. However, it is clear that states can do more than this, whilst remaining within the bounds of necessity and proportionality. As Green notes, it might not be enough simply to expel the attacker from captured territory. A defending state's troops are not required to stop at the border and idly watch the attacker regroup and prepare a fresh attack. Steps may be taken to ensure there is no repeat occurrence. An example is Operation Desert Storm, being the coalition response in 1991 to Iraq's invasion of Kuwait. Forcing Iraq's withdrawal from Kuwait meant that the response was not restricted to the latter's territory.

In terms of how much further a state may go beyond re-establishing the *status quo ante bellum*, it seems sensible to suggest that action taken that 'reasonably secures the state following an armed attack will be acceptable'. An example is the maritime exclusion zone maintained by the British for five years around the Falkland Islands following the end of active hostilities arising out of Argentina's 1982 invasion. Given that Argentina had refused to proclaim a formal end to hostilities, excluding Argentine military aircraft and vessels from this area was probably a lawful defensive measure. This ability to re- establish and guarantee the security of the defending state can be sensibly interpreted as part of, or attendant to, halting, repelling or preventing an armed attack. Without this ability, these purposes might not be achieved effectively and the threat to the defending state might subsist.

States are not permitted to protect 'perceived security interests', however. Any defensive action taken by a defending state must relate to a distinct and identifiable threat. Furthermore, temporal considerations limit the extent to which states may claim a defensive necessity. This reflects the fact that self-defence is a temporary emergency right. To be considered necessary, such acts must be aimed at provisionally guaranteeing the legitimate and immediate security of defending states. Once the threat has been successfully countered, the necessity of self-defence falls away. Beyond the immediate security needs of the defending state, 'the creation of permanent conditions of security seem to have been reserved by the international community as tasks to be performed collectively'. An enduring solution to the situation is to be provided by the collective security mechanisms of the UN Charter, with the UNSC at its head. These considerations are explored further in the following chapters.

Otázky k textu:

1. Co lze považovat za legitimní účel sebeobrany a co naopak takovým účelem není? Pokuste se z tohoto hlediska analyzovat alespoň tři potenciální účely, na které autor poukazuje.

2. Uvažte, zda a event. v jakém případě by bylo možné považovat za legitimní cíl sebeobrany změnu vlády ve státě, který provedl ozbrojený útok (např. změnu Putinova režimu v Rusku). Jaké argumenty by hovořily ve prospěch a jaké v neprospěch kladné odpovědi na tuto otázku?