Does anticipatory self-defence coexist with the *Charter of the United Nations 1945*?

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This thesis is presented for the degree of Doctor of Philosophy
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I declare that this thesis is my own account of my own research and contains as its main content work which has not previously been submitted for a degree at any tertiary education institution

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ABSTRACT

An important question of public international law unresolved by the existing scholarly debate is whether anticipatory self-defence coexists with the Charter of the United Nations 1945. The debated issue can be simply stated.

In 1945, Article 51 of the Charter recognised a state’s inherent right of self-defence and protected this right against impairment by the treaty’s operation. However, the article simultaneously preconditioned the exercise of this right on the occurrence of an ‘armed attack’. Scholars remain divided as to whether a state may exercise this right after it has suffered such an attack, or whether a state may exercise this right at some time before such an attack. The debate has almost exclusively focussed on an interpretation of Article 51.

My thesis shifts the focus from Article 51. I have adopted an historical methodology to focus on the legal nature of the inherent right of self-defence and of the international customary law principles of immediacy and necessity (principles which historically have restricted the exercise of this right). My focus demonstrates how these elements of international law enabled Article 51 in 1945 to authorise a state to exercise its inherent right of self-defence against an imminent threat of armed force.

Absent from the existing scholarly debate (and from international law) is a definition of the legal commencement of an armed attack for the purpose of Article 51. Without this definition, the beginning of the very conduct to which the precondition in Article 51 relates remains illusory. This, in turn, continues the
uncertainty over the earliest point in time at which the inherent right of self-
defence may be exercised under that article. Identifying this point in time is, in my
opinion, the underlying legal question debated by scholars. The resolution of this
question will consequently answer the question posed by my thesis.
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Chapter 1

1.1 Introduction

A contentious question in international law is whether anticipatory self-defence coexists with the *Charter of the United Nations 1945*. The existing scholarly debate over this question of law is primarily divided into two apparently competing philosophies. Generally, one philosophy asserts that anticipatory self-defence was impliedly extinguished in 1945 because Article 51 of the *Charter* preconditioned an exercise of the inherent right of self-defence on the occurrence of an armed attack. The other philosophy rejects this literal interpretation of Article 51 because it erodes the concept of self-defence by condemning a state to suffer the physical consequences of an armed attack before exercising its inherent right of self-defence. Article 51 states:

> 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.\(^2\)

The question posed by my thesis is deliberately couched in the same terms as that hitherto debated. However, I suspect this question has not been authoritatively answered because the true question of law which underlies it has not been recognised. This true question is to define the legal scope of the inherent right of self-defence under the *Charter* in 1945. By ‘legal scope’ I mean when and against

\(^{1}\) The term ‘anticipatory self-defence’ when used in my thesis describes the legal basis in international law which authorises a state to use armed force against a threat of such force.

which conduct the inherent right of self-defence could lawfully be exercised at that time. Answering this underlying question of law will answer the question posed by my thesis. The debate shows the reverse not to be the case. I have formed my suspicion because neither philosophy expressly asserts that Article 51 required a state in 1945 to suffer the physical commencement of an armed attack before exercising its inherent right of self-defence. This being so, the debate actually concerns itself with ascertaining the earliest point in time at which international law in 1945 authorised a state to exercise its inherent right of self-defence before being physically attacked.

Three things are necessary to answer this underlying question of law. The first is an understanding of the rationale in international law for the inherent right of self-defence and for anticipatory self-defence. The second is a deeper understanding and application of the functions fulfilled by the international customary law principles of immediacy and necessity. The third is a definition of the legal commencement of an armed attack for the purpose of Article 51 of the Charter. The existing scholarly debate can be considered deficient in respect of these matters because it almost exclusively focuses on the legal effect of the precondition of the occurrence of an armed attack in Article 51. It is helpful to expand on the history of the existing debate.

Before the Charter, the existence and understanding of anticipatory self-defence in international law was not a contentious issue. Early legal scholars and states from

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3 Including how this right relates to formal sources of international law as prescribed by Article 38(1) of the Statute of the International Court of Justice, opened for signature 26 June 1945, 59 Stat 1031 (entered into force 24 October 1945). The term 'inherent right of self-defence’ when used in my thesis describes the right of self-defence as a manifestation of a state’s sovereignty in international law.
about the 15th Century considered what is today generally regarded as ‘anticipatory self-defence’ as being a manifestation of a state’s inherent right of self-defence\(^4\) when exercised against an imminent threat of armed force. If a state, or an ally, was faced with an imminent threat of armed force and it became necessary to repel this threat with defensive force, it was this right that was exercised. The functions fulfilled by the international customary law principles of immediacy and necessity in international law in this regard were also uncontroversial in the work of early legal scholars.\(^5\) Their operation restricted when and against which conduct the inherent right of self-defence could be exercised, thus forming its legal scope. The ability of a state to lawfully defend itself before it was physically attacked underpinned the concept of self-defence.

In contrast, the scholarly debate after the \textit{Charter} over the continuing existence of anticipatory self-defence in international law focuses almost exclusively on Article 51 of that treaty. This article from 1945 provided express protection to the inherent right of self-defence against impairment by the operation of the treaty. ‘Impairment’ in this regard could have referred to the pre-existing recognition by international law of this right \textit{per se}, or the legal scope of this right in international law at that time. Most relevantly, this express protection has been interpreted by some scholars\(^6\) to mean that the inherent right of self-defence should still be

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\(^4\) As recognised by international customary law at that time.

\(^5\) The third customary law principle of proportionality, which restricts the extent to which the inherent right is exercised, is not directly relevant to the subject-matter of my thesis. However, this principle will be further described later in my thesis where required.

exercised against an imminent threat, or use, of armed force directed against the state, despite the article’s precondition for the occurrence of an armed attack. These scholars say to suggest otherwise erodes the concept of self-defence by condemning a state to first suffer the physical consequences of an armed attack before defending itself. However, this precondition has been strictly interpreted by other scholars\(^7\) to mean that anticipatory self-defence was thereby impliedly extinguished by it. A third school of scholars\(^8\) has acknowledged the logic of both views, but adopts neither unconditionally.

Thus, the point in time to which the existing scholarly debate applies is narrow and can be clearly defined. It is the second of three points in time which may be used to measure a shift from peace to armed conflict in international law. The first point is

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when a threat of armed force manifests. The second point is when this threat becomes imminent to the threatened state. The third point is the use of armed force. The restriction of this debate to an interpretation and application of Article 51 has not resolved the scholarly division.\(^9\) I suspect that the true question of law which underlies the question consciously debated by scholars has remained unrecognised because of their focus on Article 51 of the *Charter*. This focus may have resulted in a neglect of the historic effect of the international customary law principles of immediacy and necessity. Such neglect may have diminished an understanding of the legal scope of the inherent right of self-defence as it was immediately before 1945. This diminishing, in turn, may have obscured an understanding of how Article 51 may be interpreted as not having altered that scope.

My position, therefore, does not advocate one principle scholarly philosophy over another. Rather, it incorporates the core of each philosophy, being in respect of one, the literal interpretation and application of Article 51, and in respect of the other, the maintenance of the legal authority of a state to exercise its inherent right of self-defence against an imminent threat of armed force. This incorporation is achieved by identifying the legal point at which these philosophies intersect, by identifying the true legal question which underlies their debate and by identifying (and correcting) the deficiency in the debate, which is the absence of a definition of the legal commencement of an armed attack for the purpose of Article 51. Through this approach, it is possible to reconcile the legal differences which divide these two principle scholarly philosophies.

The uncertainty in some instances of state practice since 1945 over the legal scope of the inherent right of self-defence has been dramatically demonstrated. For instance, in 1981, Israel destroyed Iraqi nuclear power infrastructure because it feared the infrastructure might be used to develop a nuclear weapon. The justification used by Israel for the use of force was its inherent right of self-defence and Article 51 of the *Charter*. In 2003, Iraq was invaded and its government removed by a coalition of western states for similar reasons under circumstances in which the precondition of an armed attack in Article 51 was unfulfilled. The justification offered for the use of force included the inherent right of self-defence and Article 51. In both instances of state practice, much of the debate between states over the lawfulness of the use of armed force focussed on the interpretation and application of Article 51. This article has become the primary source of justification and opposition for the use of force in alleged self-defence since 1945.\(^\text{10}\)

However, in the 18 controversial instances of state practice in purported self-defence since 1945 studied in Chapter 7, no state has expressed the belief that a state should first suffer the physical consequences of an armed attack before exercising its inherent right of self-defence. This fact is also a characteristic of the existing scholarly debate. It infers that differences between states centre on the earliest point of time at, and the conduct against, which the inherent right of self-defence can be exercised under the *Charter*, rather than the more specific question of whether anticipatory self-defence coexists with the *Charter*. It consequently appears that a common factor between the existing scholarly debate and the

controversial instances of state practice since 1945 is that divisions in each can more appropriately described as relating to the legal scope of the inherent right of self-defence.

1.2 Purpose

The purpose of my thesis is to offer a new, original and substantial contribution to the existing scholarly debate concerning the question: Does anticipatory self-defence coexist with the *Charter of the United Nations 1945*? My contribution offers a new legal prism through which to view the inherent right of self-defence, the international customary law principles of immediacy and necessity and the legal commencement of an armed attack for the purposes of Article 51 of the *Charter*. This legal prism, in turn, offers a new legal basis for explaining how anticipatory self-defence may be seen as coexisting with the *Charter* in 1945. My contribution provides an alternative view by which the principle scholarly philosophies may be reconciled.

1.3 Central question of law and supporting questions of law

My examination of the existing scholarly debate in Chapter 6 demonstrates a wide variance in views since 1945 of the legal scope of the inherent right of self-defence. At one end of the continuum are some scholars who suggest that the earliest point at which this right may be exercised is immediately before the physical commencement of an armed attack. At the other end of the continuum are some scholars who suggest that the earliest point in time at which this right may be exercised is when a suspicion is formed that a state, or group, *may* possess the
technology to produce a weapon of mass destruction.\textsuperscript{11} The distance between these two positions is wide and is contrasted from the consistency in views given of the legal scope of the inherent right of self-defence by early legal scholars before 1945, as will be seen in Chapter 2.

I believe that the divergence in views within the existing scholarly debate is partly attributable to important questions of law having been inadequately explored. These questions may reveal latent insights into the importance of the inherent right of self-defence, the international customary law principles of immediacy and necessity and the functions they respectively fulfil in international law. These insights may, in turn, assist to reconcile the divisions in the existing debate and in state practice in respect of the coexistence of anticipatory self-defence and the \textit{Charter}. The questions which I suspect have been neglected will form my central question of law (the answer to which will assist in answering the question posed by my thesis) and my four supporting questions of law (the answers to which will assist in answering my central question of law).

My central question of law to be explored is: \textit{was anticipatory self-defence in international law in 1945 constituted by an exercise of the inherent right of self-defence against an imminent threat of armed force?} To progress the existing scholarly debate beyond the basic philosophical conflict described above, my central question of law must temporarily be put aside in favour of the consideration of my four supporting questions of law.

My first supporting question of law is one which returns to the most fundamental element of the international law of self-defence: *what was the inherent right of self-defence in international law at the time of the Charter?* As my central question of law relates to the legal scope of this right in 1945, it is necessary to first gain a full understanding of the legal right which constitutes the ‘inherent right of self-defence’. It is for this reason that I will commence my substantive study in Chapter 2 from the inception of international law around the 15th century.

Answering my first supporting question of law naturally leads to my second supporting question of law: *what was anticipatory self-defence in international law at the time of the Charter?* To answer this question, an understanding of how anticipatory self-defence first manifested in international law is necessary. By commencing my study around the 15th century, I am able to demonstrate the legal basis for this manifestation to 1945 and then compare and contrast how the existing scholarly debate perceives anticipatory self-defence under the *Charter*.

Answering my first two supporting questions of law leads to my third supporting question of law: *what were the principles of law developed by international customary law which restricted the exercise of the inherent right of self-defence?* An understanding of the functions fulfilled by the international customary law principles of immediacy, necessity and proportionality is an aspect of the existing scholarly debate which, in my opinion, has been neglected by the debate’s focus on Article 51 of the *Charter*. These principles, which functioned to restrict when, why and to what extent the inherent right of self-defence was exercised in international

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12 These rules were recognised as international customary law principles in *Caroline* [1837] 30 B.F.S.P. 195, but the early scholars establish that they operated in international law to restrict the exercise of the inherent right of self-defence well before this case.
law for around four centuries before the Charter (and which have continued to exist in international law since) hold latent insights into how they functioned cooperatively with Article 51 to retain the pre-1945 legal scope of this right.

The answers to my first three supporting questions of law gives rise to my fourth and final supporting question of law: *when did an armed attack legally commence in 1945 for the purpose of Article 51 of the Charter?* This question addresses a lacuna in Article 51 and in the scholarly debate, for this article does not define an armed attack *per se*, or the legal commencement of such an attack. Such a definition is of vital importance because the precondition in this article of the occurrence of an armed attack was the only new substantive rule of international law introduced by the Charter which bears upon the earliest point of time at which the inherent right of self-defence can be exercised. Unless a legal definition of this point in time is introduced to the existing debate, the commencement of the very conduct which creates the precondition in Article 51 will remain illusory.

1.4 Methodology

The historical approach adopted to explore my central question and four supporting questions of law is qualitative in nature.13 My approach has been guided by two considerations. The first consideration is that the purpose of my thesis could most effectively be fulfilled by taking an alternative approach to that taken by the existing scholarly debate. I thought this to be logical, as the existing debate has not reconciled its own divisions. The second consideration is that I thought it necessary to return to the formation of the originating substantive elements of self-

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defence in international law – the sovereign right to use war defensively and the considerations of immediacy, necessity and proportionality – because the divisions within the existing debate may be attributable to a departure from how these elements historically functioned.

In observing and interpreting the conduct of states when acting in self-defence, it will be seen that early legal scholars formed their thoughts into basic principles which would remain part of international law. These scholars drew upon the principles of Natural Law and the municipal laws of sovereign states which governed self-defence on an individual level and applied them to the international plane. In doing so, they wrote about defensive instincts which determined the behaviour of human beings when faced with an imminent threat of personal harm and how municipal laws of self-defence reflected these instincts. These scholars applied the same basic reasoning to sovereign states, for states were formed and governed by human beings. In Chapter 6, it will be seen that some latter scholars also acknowledge the importance of reflecting these instincts in international law because it enhances the likelihood of states acting in accordance with international rules. Their reasoning is the same as that of early legal scholars: states, like human beings, are likely to respond similarly when faced with an imminent threat of armed force because the human mind ultimately directs a state’s response.

As the historical aspect of my methodology analyses the work of early legal scholars, my study will sequentially span the evolution of the international law of self-defence from about the 15th century to the present day. The developments in this aspect of international law, however, did not occur in isolation. They occurred as part of the overall evolution of the law in restricting and then prohibiting the
threat and use of armed force generally. Therefore, to give context, my study will encompass both dimensions of the law. The time period of my thesis is wide, but necessary. This requires a degree of limitation. This limitation will be in that dimension of the evolution of international law which relates to the use of offensive force. This limitation will enable an emphasis to be placed on the dimension which relates to self-defence. The first period begins in Chapter 2 where the work of early legal scholars in the 15-18th centuries is studied. The second period of 1815 to 1939 appears in Chapters 3-4 and the third period of 1945 to the present appears in Chapters 5-7.

After analysing the information in each chapter, I will make observations and draw conclusions about how that information might be interpreted to answer my four supporting questions of law. These answers will assist me to answer my central question of law in 1945 and ultimately the question posed by my thesis. My approach will help the reader to clearly identify the substantive rules of international law in respect of self-defence at any particular point of time during the periods studied. The temporal nature of the question posed by my thesis requires it to be answered at two points in time. The first is in 1945 when the Charter was created. The second is at the time of writing.

1.5 Literature review

Scholars since 1945 recognise the division in their debate over the coexistence of anticipatory self-defence and the Charter.14 As will be seen in Chapter 2, early

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14 For example, Cassese, above n 8, 359-360; Gray, above n 8, 95; Dixon, above n 8, 297 and Doyle, above n 6.
legal scholars\textsuperscript{15} did not refer to an exercise of the sovereign right to use war defensively against an imminent threat of armed force as ‘anticipatory self-defence’. An absence of reference to anticipatory self-defence in the work of scholars in the early 20\textsuperscript{th} century is also evident.\textsuperscript{16} This infers that those scholars did not think there was a distinct legal ‘right’ of anticipatory self-defence in international law separate to the sovereign right to use war defensively. What would now be considered ‘anticipatory self-defence’ by many contemporary scholars was to earlier scholars simply an exercise of the inherent right of self-defence against an imminent threat of armed force. After 1945, the question posed by my thesis has divided scholarly opinion into three distinct philosophies as described in sub-chapter 1.2, rather than the two that have previously been described by some scholars.\textsuperscript{17}

As will be seen in sub-chapter 6.2.3.1, the positivist philosophy suggests that anticipatory self-defence was impliedly extinguished in 1945 by the precondition of the occurrence of an armed attack in Article 51 of the \textit{Charter}. A consequence of this philosophy is that it condemns a state to first suffering the physical consequences of an armed attack before defending itself with defensive force. Other consequences of the philosophy are that it puts an innocent state at a practical disadvantage to an aggressor and that an attack might cripple a state’s

\textsuperscript{15} For example, Balthazar Ayala, \textit{De Jure et Officiis Bellicis et Disciplina Militari Libri III} (1582); Hugo Grotius, \textit{De Jure Belli ac Pacis Libri Tres} (1625); Alberico Gentili, \textit{Hispanicae Advocatiois Libri Duo} (1661); Francesco de Vitoria, \textit{De Indis et de Iure Belli Rerfectiones} (1696); Samuel Pufendorf, \textit{De Jure Naturae et Gentium Libri Octo} (1688); Emer de Vattel, \textit{The Law of Nations or the Principles of Natural Law} (1758) and Christian Wolff, \textit{Jus Gentium Methodo Scientifica Pertractatum} (1764).

\textsuperscript{16} For example, William E. Hall, \textit{International Law} (8\textsuperscript{th} ed, 1907) and John Westlake, \textit{The collected papers of John Westlake on Public International Law} (1914).

\textsuperscript{17} Gray, above n 8, 133; Ian Brownlie, above n 8, (2003) 701 and Blay, Piotrowicz and Tsamenyi (eds), above n 8, 230.
ability to effectively defend itself. In the worst case, the attack might destroy that state.

However, positivists are not united in an absolute application of their philosophy. Some positivists assert that in certain circumstances a state may lawfully use defensive force against an imminent threat of armed force.\textsuperscript{18} Three specific legal issues emerge as a consequence of the existence of these exceptions. The first issue is that their proponents do not identify the legal authority in international law which permits the use of armed force against an imminent threat of armed force. The second issue is that a ‘gap’ appears between the point in time at which a state awaits the moments before the physical commencement of an armed attack before defending itself (a strict application of the positivist philosophy) and the point in time at which a state defends itself before the physical commencement of such an attack (an application of this philosophy in circumstances encompassing exceptions). The third issue is that the proponents must consider that the circumstances in any of these exceptions fulfil the precondition of the occurrence of an armed attack in Article 51, as it is only with this fulfilment that the inherent right of self-defence can lawfully be exercised under this article.

This third issue suggests its proponents believe that an armed attack in the quoted circumstances commences for the purpose of Article 51 \textit{prior} to the physical attack, but the proponents do not express this conclusion. This conclusion, however, is consistent with the fact that the positivist philosophy does not expressly assert that a state in any circumstances should first suffer the

\textsuperscript{18} For example, Randelzhofer ‘Article 51’ in Simma (ed), above n 7, 803 [39].
consequences of the physical commencement of an armed attack before defending itself.

In contrast, the realist philosophy is that anticipatory self-defence was not extinguished by the precondition of an armed attack in Article 51 of the *Charter*. This philosophy suggests that the principle which underpins self-defence is the legal capacity of states in international law to respond to an imminent threat of armed force before the state suffers the physical consequences of an armed attack. Realists argue that there is no evidence in the negotiation of Article 51 of the *Charter* that states had any intention of impairing the inherent right of self-defence. They suggest the opposite is the case, as finally demonstrated by the express protection against impairment granted to this right by Article 51. Realists, however, do not provide a clearly articulated legal basis for reconciling their view with the precondition of the occurrence of an armed attack created by Article 51. Nor have realists defined the legal commencement of an armed attack for the purpose of Article 51.

The neutralist philosophy is constituted by those scholars who acknowledge both views, but accept neither unconditionally.

The *United Nations Secretary-General’s High-Level Panel on Threats, Challenges and Change*,¹⁹ established after the hijacking of commercial aircraft in the United States in 2001, concluded that a state facing an imminent armed attack may

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¹⁹ A Panyarachun, *UN Secretary-General’s High-Level Panel on Threats, Challenges and Change*, UN GAOR, 59th sess, 56th plen mtg, UN Doc A/59/565 [188] (2004). At [192] the panel did not “favour the rewriting or reinterpretation of Article 51” in order to justify a state striking first in lawful self-defence in the face of an imminent armed attack.
exercise its inherent right of self-defence without violating Article 51 of the *Charter*. This conclusion supports the positivist philosophy. However, the panel did not identify the specific legal basis in international law which permits the inherent right of self-defence to be exercised in circumstances earlier than those envisaged by the precondition in Article 51.\(^\text{20}\) Thus, the uncertainty in the scholarly debate over the coexistence of anticipatory self-defence and the *Charter* is significant, unresolved and is likely to remain so without an adoption of a different approach to that taken by it.

A new aspect of my methodology is to explore how early legal scholars described the incorporation of the sovereign right to use war defensively into international law and to compare and contrast this description with those provided in the existing scholarly debate. This aspect of my methodology is grounded in my first supporting question of law. Early legal scholars describe this right as pre-existing international law. They assert that, upon the formation of international customary law, it recognised this right by making substantive rules to restrict its exercise, thereby incorporating the right into international law. These rules were the principles of immediacy, necessity and proportionality, as developed through the practice and *opinio juris* of states in self-defence.

However, the early scholars did not suggest that this process of recognition and incorporation ‘replicated’ the sovereign right to use war defensively in international customary law, so as to create a ‘customary law right of self-defence’.

Rather, they concluded the sovereign right remained vested in and peculiar to the state and that international law restricted its exercise through the operation of the three customary law principles identified above. This view suggests that the substantive content of the customary law in respect of self-defence was the principles of immediacy, necessity and proportionality only.

This content of international customary law is consistent with how the sovereign right and the customary law principles were described in *Caroline*, as will be demonstrated in sub-chapter 3.2.3. It is also consistent with the negotiations for the *General Treaty for the Renunciation of War 1928*, as will be demonstrated in sub-chapter 4.2.1.4, in which the negotiating states said that the inherent right of self-defence was a right innate to the state that could not be replicated in international law by any treaty.

In contrast to this view, a small number of scholars in the existing debate conclude that this process of recognition and incorporation replicated the sovereign right to use war defensively in international customary law. They say this resulted in the creation of a distinct ‘customary law right of self-defence’ in international law separate to the general sovereign right. This interpretation of the process of recognition and incorporation broadens the substantive content of customary law described by early legal scholars. The effect of this interpretation tends to confuse how many legal rights of self-defence exist in international law and is a material point in my thesis for the reason explained immediately below.

Early legal scholars concluded that it was the sovereign right to use war defensively which was exercised in international law against an imminent threat of
armed force. The legal scope of this right, being the imminent threat, or use, of armed force directed against the state, remained evident in *Caroline* in 1837, as demonstrated in sub-chapter 3.2.3 and to 1945, as demonstrated in Chapter 4. In contrast, some in the existing debate have referred to anticipatory self-defence as a distinct legal right which is vested in the state, or have inferred its distinct existence separate to the inherent right of self-defence by having been formed by international customary law, or have made generalised references to ‘anticipatory self-defence’, ‘anticipatory action’, or ‘preventative self-defence’ without clearly identifying a rationale in international law for it. Therefore, a possible position can be taken that it was this distinct right of anticipatory self-defence that was impliedly extinguished by the precondition of an armed attack in Article 51 of the *Charter* in 1945. From this position, a belief can be asserted that the inherent right of self-defence was not impaired by this implied extinguishment (something forbidden by Article 51 itself) because it was not the inherent right itself that was affected by it.

The practice and *opinio juris* of states in self-defence before and after the *Charter* may be interpreted as being more consistent with the view expressed by early legal scholars than the view expressed by some scholars since 1945. The former only

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refer the sovereign right to use war defensively when armed force was used in self-
defence against a threat, or use, of armed force. Similarly, as will be seen in
Chapter 7, state practice in self-defence after 1945 simply refers to the inherent
right of self-defence as being invoked in those circumstances, rather than any other
legal right in international law.

Another new aspect of my methodology is to explore the work of early legal
scholars to gain an understanding of the full legal effect of the operation of the
international customary law principles of immediacy and necessity. Before 1945,
there was no multilateral treaty in international law equivalent to Article 51 of the
Charter which imposed a precondition of the occurrence of an armed attack before
the sovereign right to use war defensively could be exercised. The only other
substantive rules of international law which existed to restrict the exercise of the
sovereign right were the customary law principles of immediacy, necessity and
proportionality. My exploration of the work of early legal scholars will identify
how the operation of the first two of these principles naturally created the legal
scope of the sovereign right to use war defensively before 1945, which was the
imminent threat, or use, of armed force directed against the state.

I will also propose a definition of the legal commencement of an armed attack for
the purpose of Article 51 of the Charter, which is derived from the natural
operation of the customary law principles of immediacy and necessity. Defining
this point in time will define the earliest point at which the inherent right of self-
defence could lawfully be exercised in 1945 in accordance with Article 51 of the
Charter, due to the article’s precondition for such an attack. The existing scholarly
debate has not produced such a definition, yet one is essential because it will
identify the legal commencement of the very conduct to which the precondition in Article 51 relates. In this respect also, the work of early legal scholars provide some important insights into how they may have defined such a point in time (had it been necessary for them to do so).

The question posed by my thesis has not been addressed by the International Court of Justice. Nevertheless, Corfu Channel, Nicaragua, Oil Platforms, Legality of the Threat or Use of Nuclear Weapons, Legal Consequences of the Wall and the Armed Activities in the Congo\(^{23}\) represent the most relevant judgments of the Court in respect of my four supporting questions of law and will be examined for that purpose.

1.5 Structure

My thesis has eight chapters. Apart from this chapter and Chapter 8, which is my conclusion, there are six substantive chapters. These chapters are structured to sequentially explore the evolution of international law in respect of the use of force between states from the work of early legal scholars around the 15\(^{th}\) century to the present day.

Chapter 2 is divided into five sub-chapters and explores the Law of Nations (that is, the emerging system of international law as described by early legal scholars) in respect of the use of force between sovereign states to and during the 15\(^{th}\) to 18\(^{th}\) Centuries. Sub-chapter 2.2 examines the early scholars’ rationale for the sovereign

right to use war, while sub-chapter 2.3 identifies the legal basis for their division of war into its two historical dimensions of offensive and defensive war. Sub-chapter 2.4 considers the theory of ‘just war’ to identify the foundations of the restrictions imposed on the sovereign right to use war by the Law of Nations, how the operation of the considerations of immediacy and necessity might be used to determine the legal scope of defensive war and the early basis for defining the legal commencement of an armed attack within the rules of international law.

Chapter 3 is divided into five sub-chapters and explores the use of force between states in the period 1815 to 1914. Sub-chapter 3.2 examines how international customary law continued to restrict the sovereign right to use war offensively in this period, the basis in law for the peaceful settlement of disputes and the important articulation of the customary law principles of immediacy, necessity and proportionality in *Caroline* in 1837. Sub-chapter 3.3 explores how the foundations for identifying the legal scope of defensive war formed in Chapter 2 may have continued to apply in the period 1815 to 1914. Sub-chapter 3.4 also applies the foundations identified in Chapter 2 for defining the legal commencement of an armed attack to the period studied to assess whether these foundations could be sustained in light of the correspondence in *Caroline* and in light of the practice and *opinio juris* of states in self-defence.

Chapter 4 is divided into five sub-chapters and explores the use of force between states in the period 1919 to 1939. Sub-chapter 4.2 examines the significant increase in momentum during this period of the use of peaceful means to settle international disputes and the use of treaties to further restrict the use of war, including the significance of the prohibition of war in 1928 by the *General Treaty for the
Renunciation of War\textsuperscript{24}. Sub-chapter 4.3 introduces a new observation to the scholarly debate of a latent consequence of anticipatory self-defence of protecting and preserving the right of states to remain free from the use of war in their international relations, a right derived as a corollary to that treaty’s prohibition of war.

Sub-chapter 4.4 will explore the international legal rights and principles of self-defence during the period studied. In it I will answer my supporting questions of law as far as international law permitted in 1939 in order to answer my central question of law at that time in history. This is in preparation for the application of these answers to international law under the Charter in 1945. This application will commence in Chapter 5.

Chapter 5 is divided into four sub-chapters. The first part of sub-chapter 5.2 examines the relevant articles of the Charter which relate to the use of force, except self-defence. I will introduce to the existing scholarly debate a new observation of the prohibition of the threat, or use, of force by Article 2(4) along the same reasoning as that of my new observation in respect of the prohibition of war in the General Treaty in sub-chapter 4.3. The second part of sub-chapter 5.2 examines Article 51 and its travaux preparatoires. This sub-chapter also uses the answer to my fourth supporting question of law in Chapter 4 to interpret the precondition of an armed attack in Article 51 in a way different to that which the existing scholarly debate interprets them. In sub-chapter 5.3, I will apply the answers provided by my central and supporting questions of law to Article 51, free

\textsuperscript{24} 1928 General Treaty for Renunciation of War as an Instrument of National Policy, opened for signature 28 August 1928, 94 LNTS (1929) 57 (entered into force 24 July 1929). 63 states or virtually the entire international community in 1928 were party to the treaty.
of the divisions which subsequently arose within the scholarly debate, to offer a new legal basis for the coexistence of anticipatory self-defence and the Charter in 1945.

Chapter 6 is divided into five sub-chapters and examines the scholarly and judicial developments in respect of self-defence since the inception of the Charter. Sub-chapter 6.2 explores the existing scholarly rationale in international law for the inherent right of self-defence and for anticipatory self-defence, the nature of the division in the existing debate and how the answers to my central and supporting questions of law may provide a new legal basis for reconciling this conflict, or at least to lessen the distance between the positivist and realist philosophies. Sub-chapter 6.3 identifies what may be deficiencies in the existing debate in its attempt to define the occurrence of an armed attack for the purpose of Article 51 of the Charter and how these deficiencies have inhibited the broader debate. Sub-chapter 6.4 examines the relevant judgments of the International Court of Justice which relate to self-defence.

Chapter 7 is divided into five sub-chapters. Sub-chapter 7.2 examines the post-Charter period to 1962 during which state practice in self-defence reflected the pre-Charter understanding of the legal scope of the inherent right of self-defence. Sub-chapter 7.3 examines controversial instances of state practice involving the use of force after 1962 sought to be justified by Article 51 and the inherent right of self-defence. It will scrutinise the legal basis offered for and against the use of force in each instance. Sub-chapter 7.4 will apply the answers to my central question and supporting questions of law to these controversial instances of state
practice to provide a new legal prism through which their lawfulness may be measured under the international legal framework created in 1945.

Chapter 8 is my formal conclusion. In it I will summarise my research, observations and conclusions and articulate a new legal basis for demonstrating how, with the creation of the *Charter* in 1945, anticipatory self-defence coexisted with this treaty.
Chapter 2

The use of force between states before 1815 – the sovereign right to use war

2.1 Introduction

The point of commencement for the exploration of my central question and supporting questions of law is the work of early legal scholars between the 16th and 18th centuries. This work provides a valuable understanding of the legal ramifications of rise of sovereign states and their development of a system of law to regulate relations between them (described by these scholars as the ‘Law of Nations’ and which became known generally as ‘public international law’).

Of most relevance is the gaining from early scholars of an understanding of the sovereign right to use war (this right being a manifestation of a state’s sovereignty), the process of recognition and incorporation of this right into the Law of Nations, how the law divided war into its ‘offensive’ and ‘defensive’ dimensions and how and why the law developed substantive rules to restrain the defensive exercise of this right. This chapter explores how early legal scholars attributed the rationale for the right to use war to state sovereignty. The primary reason for exploring this rationale is to see if the scholars considered this right as encapsulating the entirety of a state’s legal authority within the Law of Nations to defend itself from the threat, or use, of armed force directed against the state.

My exploration of the substantive rules created by the Law of Nations to restrain the exercise of the sovereign right to use war defensively concerns the development of the international customary law principles of immediacy, necessity
and proportionality. I will investigate whether the first two of these principles provide latent insights, as yet unexplored by the existing scholarly debate, which may provide a basis for resolving two uncertainties in the existing scholarly debate. The first is how these two principles defined the "legal scope" of this right. The second is how these two principles provided a basis for defining the legal commencement of an armed attack in the Law of Nations and which may remain applicable today.

It will be seen in this chapter that the Law of Nations at its inception and in the centuries after did not develop an express substantive rule requiring the occurrence of an armed attack before the sovereign right to use war defensively could be lawfully exercised (a substantive rule which first appeared in international law in Article 51 of the Charter in 1945). However, the earliest point in time at which this right was authorised by the law to be exercised from at least the 16th century to 1945 was the fulfilment of the international customary law principles of immediacy and necessity. Could this fulfilment be adequately described as the legal commencement of an armed attack between sovereign states?

This chapter is divided into five sub-chapters. The exploration of early legal scholars’ rationale for the sovereign right to use war is examined in sub-chapter 2.2. This examination will promote a clear understanding of the origin and legal scope of this right. Sub-chapter 2.3 identifies the legal basis used by the scholars for their division of war into its offensive and defensive dimensions. This will facilitate my study of the theory of ‘just war’ in sub-chapter 2.4, where the

25 The term ‘legal scope’ will be used throughout my thesis to describe the range of conduct against which the sovereign right to use defensive war was lawfully exercised at any particular time period, as determined by the substantive rules of international law.
underlying legal principles developed by international customary law to govern just defensive war will be explored. This exploration will identify latent insights relating to the formation of the legal scope of defensive war and a new basis for defining the legal commencement of an armed attack. The foundations for the answers to my four supporting questions of law will be summarised in my conclusion in sub-chapter 2.5.

2.2 The rationale for the sovereign right to use war

What was the rationale offered by early legal scholars for the right of a sovereign state to use war in its relations with other states? The scholars – for example, Francisco de Vitoria (1486-1546), Balthazar Ayala (1548-1584), Hugo Grotius (1583-1645), Alberico Gentili (1552-1608), Samuel Pufendorf (1632-1694), Christian Wolff (1679-1754) and Emer de Vattel (1714-1767) – created their work during a period in which the sovereign was literally vested in a specific human being. This person, often a Prince, manifested the state until sovereign power gradually shifted to the state itself to create the nation-state. The scholars make it clear that an aspect of sovereign power, whether under a Prince, or the state, was the right to use war in its relations with other sovereign states. They describe two primary functions fulfilled by this sovereign right. These were the settlement of disputes with other states and self-defence.

The early scholars described this sovereign right by drawing on the laws and practices of powerful city states such as Athens and Rome, of contemporary European states and on religious and natural law. So what was considered to be ‘war’ in the times of these scholars? Hugo Grotius described ‘war’ as ‘the
condition of those contending by force’. 26 He said a ‘public war’ was waged by the sovereign. A ‘private war’ was waged by private persons other than with the authority of the sovereign. A mixed war was a private war on one side and a public war on the other. Grotius further divided public war into ‘formal’ and ‘less formal’ war, based on the existence, or not, of certain formalities. 27

Samuel Pufendorf described ‘war’ as ‘the state of men who are naturally inflicting or repelling injuries or are striving to extort by force what is due to them.’ 28 Christian Wolff described ‘war’ as the preparation for, or the use of, force by way of arms against an enemy. 29 He used the terms ‘war’ and ‘force’ to describe armed force, whether between individuals, or sovereign states. 30 Emer de Vattel described ‘war’ as ‘that state in which we prosecute our rights by force’. 31 The essence of the meaning of war did not alter in the centuries immediately after the early scholars. 32

The early scholars’ descriptions of war were derived from, and in turn reflected, certain fundamental human instincts and behaviours. This influence is perhaps explained by the fact that sovereign power had originally been vested in and exercised by a Prince, thereby favouring a greater connection between sovereign

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26 Grotius, above n 15, 91-137. His definition purposefully excluded ‘justice’ because the investigation of what can be considered a ‘just’ war was the object of his work; 34. Lassa Oppenheim, *Oppenheim’s International Law* (9th ed, 1992) vol 1, 1 accepted Grotius’ definition of ‘war’. He wrote, in respect of the importance of recognising that it is governments that go to war for the purpose of the laws of war, that ‘the laws of war belong equally to insurgents not yet recognised as a state but recognised as having belligerent rights, which they would not be if they did not possess a government.’

27 Grotius, above n 15, 97. The limits of legal authority of private individuals during war are examined in Grotius’ Book I, 92, Book II, 172-173 and Book III, 788-791.

28 Pufendorf, above n 15, 9 [8].

29 Wolff, above n 15, 405 [784]-[785].

30 Ibid, for example, 323 [632]. His division of war into public war, private war and mixed war was the same distinction made by Grotius; 311-312 [607]-[609].

31 Vattel, above n 15, 235 [1]. He made the distinction between ‘public war’ ‘which takes place between Nations or sovereigns, which is carried on in the name of the public authority and by its order’ and ‘private war’ which takes place between individuals’, 235 [2]-[3].

32 For instance, John Westlake, *International Law* (1913) Part II, War, 1 who described war as ‘the state or condition of government contending by force’.
power and human conduct. Thus, to explain their rationale that the right of a state to use war was derived from its sovereignty, the early scholars described this right as an extension of man’s natural right to use war (or force) to revenge wrongs committed against him personally, to settle his disputes and to defend himself.33

Grotius wrote:

‘Meanwhile we shall hold to this principle, that by nature every one is the defender of his own rights; that is the reason why hands were given to us’.34

Pufendorf described ‘particular’ war as between men either within a state (a ‘civil’ war) or externally with another state. He rejected the notion of a common or universal war amongst all men, as such conduct would be one of ‘beasts’.35 Vattel also held this view, but if the sovereign was unable to protect its citizens from another’s war, the right could properly be exercised by the individual against the invader.36 Wolff considered a state’s natural right to remain uninjured by another as identical as that possessed by man and the right of both state and man to defend itself from such injury was identical.37

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34 Grotius, above n 15, 92, 102-137 and 164. ‘Natural Law’ theory is concerned with man’s obligations as a citizen, ethics and the bounds of lawful government action and evaluates the content of laws against moral principles. For contemporary views of the early scholars work in respect of this theory, see for example Ralph McInerny, ‘Thomistic Natural Law and Aristotelian Philosophy’ in John Goyette, Mark Latkovic and Richard Myers (eds) St Thomas Aquinas and the Natural Law Tradition: Contemporary Perspectives (2004) 25; Maret Leiboff and Mark Thomas, Legal Theories in Principle (2004) 54; Brian Bix, ‘Natural Law: The Modern Tradition’ in Jules Coleman and Schott Shapiro (eds), The Oxford Handbook of Jurisprudence and Philosophy of Law (2002) 61-66; David Lyons, ‘Moral Aspects of Legal Theory’ in Kenneth Himma and Brian Bix (eds) Law and Morality (2005) 109-114 and Vilho Harle, Ideas of Social Order in the Ancient World (1998) 99. Natural law theory is not identical to international customary law, the constitutive elements of which are identified in footnote 53 and are further discussed in Chapter 3, but it will be shown in this thesis that the inherent right of self-defence and the principles which have historically restricted its exercise are common to both theories.
35 Pufendorf, above n 15, 9 [8]. Man’s natural right to use war is discussed in Book VIII, 1292-1294 [880]-[881] and 1300 [885] and his restriction to do so with the establishment of the sovereign is examined at 1299 [885]. See Vitoria, above n 15, 167-168
37 Wolff, above n 15, 9 [3], 20 [28], 28-29 [43], 129-130 [252]-[254], 139 [273], 313 [613] and 314 [615]. This is because he regarded a sovereign state, as regards to another, as a free person living in a state of nature; 9 [2].
The early scholars distinguished certain fundamental legal rights derived by the sovereign state from the law of nature from those legal rights derived from the positive Law of Nations. Wolff best described the positive Law of Nations as being constituted by the voluntary law, which was the presumed will of states. This law was drawn from the law of nature and ‘stipulative law’, the latter being formed through the express agreements between two or more states, such as treaties, and international customary law formed by tacit agreements between two or more states evidenced by ‘long usage and observed as law’. 

The early scholars viewed the sovereign right to use war as a necessary aspect of a state’s collective organisation. The right served the purpose of protecting the state and its citizens from armed force at a time when the state was establishing itself in the developing community of nations. Pufendorf considered man’s natural law was ‘deducible from the requirements of human nature’ and therefore the ‘law of nature and the law of nations are one and the same thing’. Wolff expressed the same view, however, he made a distinction between the fundamental principles of natural law, which apply equally to men and states, and their application to each object. This was especially evident in self-defence. For instance, Wolff considered the ability of a sovereign state to defend itself from armed force ultimately measured its power and ability to survive within the developing system of the Law of Nations.

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40 Wolff, above n 15, 9-10 [3]-[4], 20 [28], 26 [38], 41-42 [69], 129 [252] and 313 [613]. See also Westlake, above n 32, 55-64.
Some scholars saw the rise of the sovereign state and the formation of an international society as a natural continuum of man’s development of municipal law. Common to their work and to that of some who followed considered that a new sovereign state, upon its inception, innately possessed the right to use war for certain offensive and defensive purposes (the scope of these purposes, which was restricted mainly by the principles developed by international customary law, will be described in sub-chapter 2.4).

In expressing this rationale, the scholars did not simply analogise the sovereign right with man’s natural right to use war to settle his disputes and for self-defence. Rather, they suggested that the sovereign right was a manifestation of man’s natural right. Wolff did so succinctly:

‘But the right of a nation [to use war] is only the right of private individuals taken collectively, when we are talking of a right existing by nature. Of course such a right belongs to a nation only because nature has given such a right to the individuals who constitute the nation.’

The world before the early scholars provides a fuller context for their observations. Powerful city-states such as Athens and Rome conquered other city-states and regions by war in order to expand their empires, raise taxes, subdue insurrections

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42 Grotius, above n 15, 14-15, 44, 102-103. Pufendorf, above n 15, 984 described a sovereign state as a ‘compound moral person, whose will, intertwined and united by the pacts of a number of men, is considered the will of all, so that it is able to make use of the strength and faculties of the individual members for the common peace and security.’ Wolff, above n 15, 5, 9[2] believed that a nation arose as a matter of the law of nature and regarded it as an individual free person living in a state of nature and was constituted by its individual citizens who united to form it. He described a nation succinctly at 91 [174] as ‘a number of men associated in a state.’ Sovereignty was exercised by the ruler of the state over all its land, but the principle of sovereignty was different to the principle of public or private ownership of parts of the land; 60 [102].
43 For example, Pufendorf, above n 15, Book VII, 1013 [5], 1055-1063 [722]-[727] and Book VIII, 1148 [784]; Wolff, above n 15, 11-13 [7]-[9] and 20-24 [28]-[34] and Vattel, above n 15, 235 [4]. For the views of subsequent scholars who shortly followed, see, for instance, Westlake, above n 32, 111-121; Hall, above n 16, 82 and Oppenheim, above n 26, vol 1 [119].
44 Wolff, above note 15, 315 [617].
to their rule and to quell potential threats to their empires. Such acts of war were usually resisted with responding acts of war by those sought to be conquered. This basic dynamic created the fundamental and enduring distinction between ‘offensive’ and ‘defensive’ war (discussed further below). Thus, a conflict in its totality was termed ‘war’ and each side provided its justification for its participation in it. This dynamic was reflected in the Law of Nations.

The early scholars described the effect of state sovereignty within the territories of a state, but the sovereign right to use war was not the only aspect of the Law of Nations which functioned to protect and preserve sovereign power, or to perfect

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45 In respect of the bases for the Peloponnesian condemnation of Athenian aggression and expansion, see Thucydides, The Peloponnesian War (1998) 15-31. The Peloponnesians, led by Sparta and Corinth, grew after the Athenian victory over King Xerxes of Persia at the battle of Salamis (56-60). It is clear the Lacedaemonian’s decision to invade Attica in 431 B.C. was in preparation for what it claimed would be a defensive war against Athens (60-61). However, Athens also believed that it was fighting a defensive war against the Peloponnesian armies when it responded to this invasion; see Pericles’ speech to Athenians at the end of the first year of the war in which he described the ‘aggression’ of the Lacedaemonians (91-97). As to the use of war by Rome to expand its empire, see Adrian Keith Goldsworthy, The Roman Army at War 100 B.C.-A.D. 200 (1996) in which he describes the punitive wars launched by Rome between 53 B.C. by Julius Caesar, in 51 B.C. by Cicero and in A.D. 15 by Arminius against Germany and other European territories and peoples who might become allies of the Germans in the future (95-100). For the unique difficulties for Rome posed by using war against peoples not united by a central government, see 102-103. Rome’s wars of conquest were principally used for suppression of insurrection (79-95) and for economic expansion (100-105). For the latter motivation for launching wars of conquest against Britain, see Theodor Mommsen, A History of Rome under the Emperors (1996) in which he traces the campaigns of Julius Caesar, Claudius, Nero, Vespasian and Severius against the ‘semi-civilised tribes’ of Britain by Rome’s ‘occupation force’ (258-266). Mommsen explains that Rome’s military expansion of its economic power in Britain was motivated by the latter’s well developed system of commerce which provided for a sound taxation base for Rome, its rich agricultural land and mines and the fact that owners of landed estates pledged allegiance to Rome out of necessity of threat of force. For similar views of Rome’s use of war for conquest, see generally Thomas Burns, Rome and the Barbarians, 100 B.C.–400 A.D. (2003); Warwick Ball, Rome in the East: the transformation of an Empire (2000); Hedley Bull, Benedict Kingsbury and Adam Roberts, Hugo Grotius and international relations (2002) 177-179. While Rome imposed a system of law throughout its empire (jus gentium) it was not a consensual system of international law developed among independent sovereign states. Jus gentium is to be distinguished from the system of law (jus civile) within Rome proper which governed its citizens; Westlake, above n 32, 1-3 and Ahmed Sheikh, International Law and National Behaviour: a behavioral interpretation of contemporary international law and politics (1974) 53.

46 The legal characteristics of offensive and defensive just war are discussed below in sub-chapter 2.3.

47 Grotius, above n 15, 103-104 and 1137-138; Wolff, above n 15, 130-131 [255]-[256]; Oppenheim, above n 26, 119-123 and Westlake, above n 32, 20-21.
the state, or to preserve a state’s independence.\textsuperscript{48} Principles of the equality of states\textsuperscript{49} and the non-intervention by one state in the internal affairs of another\textsuperscript{50} also contributed. While these two principles functioned to uphold the legal sanctity of the state in the developing system of law, it appears clear from the work of the scholars that the sovereign right to use war was a state’s final means by which the settlement of its disputes,\textsuperscript{51} or its physical safety, was protected in the event of the failure of peaceful attempts to avoid conflict.

A fundamentally important distinction made by the scholars is that between the rationale for the sovereign right to use war and the considerations which restricted its lawful exercise (which would later be recognised as principles of international customary law).\textsuperscript{52} In respect of defensive war, this distinction meant that the sovereign right was intrinsically possessed by each state, but that the considerations of immediacy, necessity and proportionality were recognised and practised among states as means of restricting the exercise of that right.\textsuperscript{53}

\textsuperscript{48} Wolff, above n 15, 91 [174]. For the numerous other duties owed by nations to each other, see Chapter II, 84-139. For those duties owed by nations to themselves, see Chapter I, 20-83.

\textsuperscript{49} Ibid 15 [16] where he expressed the view that the equality of sovereign states is derived from the equality of individuals as determined by natural law. See also Oppenheim, above n 26, 339-379.

\textsuperscript{50} Wolff, above n 15, 130-131 [254]-[257].

\textsuperscript{51} Neff, above n 33, 49.

\textsuperscript{52} The references made by scholars to the early considerations of immediacy, necessity and proportionality in respect to the exercise of the sovereign right to use defensive war are examined in sub-chapter 2.4.3.

\textsuperscript{53} This distinction is examined in sub-chapter 2.4.3. For discussions of the formal sources of law during the period of the early scholars and afterwards, see, for example, Westlake, above n 32, 14-17; Oppenheimer, above n 26, 23 and Article 38 of the \textit{Statute of the Permanent Court of International Justice}, opened for signature 28 June 1919, (1919) UKTS 1919/4 (entered into force 10 January 1920)) as enumerated later in Article 38(1) of the \textit{Statute of the International Court of Justice}, opened for signature 26 June 1945, 59 Stat 1031 (entered into force 24 October 1945). International customary law is constituted by a general practice of states conducted with the relevant consideration of a legal obligation, or permission, to do so (the \textit{opinio juris}).
2.3 The division of war into offensive and defensive war

The scholars describe ‘war’ as being divided into the categories of ‘offensive’ and ‘defensive’ war by the Law of Nations. An observation made is that this categorisation, to some degree, appears linked to the theory of ‘just war’ in which an act of war was categorised by the law as either justly offensive, or justly defensive, depending on the circumstances.

Vitoria described this division as forming the two dimensions of the Law of Nations within which the sovereign right to use war was exercised. He believed war to be lawful under natural law and written law and that the authority of these two sources of law meant war was also lawful under ‘Gospel law’.\(^54\) In his view, the right to use war offensively, or defensively, was equal. Offensive war included the avenging of a wrong done to the state by another and the taking of punitive action so that future wrongs would be discouraged.\(^55\) Defensive war was equally justified for an individual as it was for a sovereign state and both were motivated by the same considerations of protecting self from harm.\(^56\) In Vitoria’s view, the only distinction in the scope of authority between an individual and a state in defensive war came immediately after an attack; it was only a state which could avenge force, or a wrong committed against it, if the immediacy of the situation passed.\(^57\) His concept of defensive war was broad and not limited to reacting to the

\(^{54}\) Vitoria, above n 15, 164, point 31 and 166-167.
\(^{55}\) Ibid 167.
\(^{56}\) Ibid 167-168. The defence of property, Vitoria believed, required a person being attacked to flee if circumstances permitted. If circumstances did not so permit, force in defence of property was permitted. However, if defence was made for self in fear of physical harm, no obligation rested on the person attacked to flee. He may use force without considering alternative action.
\(^{57}\) Ibid 168.
threat, or use, of external armed force, but of also retrieving dispossessed property of the sovereign state.\textsuperscript{58}

Ayala similarly divided war into these two categories. He wrote that offensive war could only be declared by the sovereign power of the state (except in limited circumstances such as pressing necessity, or in the absence of the Prince), but defensive war was ‘open to any one by the law of nature’.\textsuperscript{59} He saw the sovereign right of a state to use war defensively as having been derived from the right of self-defence provided to man by nature and that both rights could be exercised to ward off an attack to the extent the threat no longer existed.\textsuperscript{60} Grotius included public, private and mixed wars in his general definition of war as ‘the condition of those contending by force’.\textsuperscript{61} He examined the permissibility of sovereign states to go to war primarily from the viewpoint of the law of nature and moral grounds.\textsuperscript{62} Grotius considered whether war, especially when used defensively, was a natural act and one not in conflict with the Law of Nations, or the ‘Gospel’.\textsuperscript{63}

Pufendorf also considered the just causes of war to be naturally divided into offensive and defensive categories. He described offensive war to be ‘those by which we extort debts which are denied us, or undertake guarantees for the future’

\textsuperscript{58} Ibid 169-170.
\textsuperscript{59} Ayala, above n 15, vol II, 8-9, 11.
\textsuperscript{60} Ibid 9-10, 18.
\textsuperscript{61} Grotius, above n 15, Book I, 33, 91-137.
\textsuperscript{62} Ibid 51, where he examined the writings of Marcus Tullius Cicero. His study of the causes of war considered justifiable was made in Book II which is examined below.
\textsuperscript{63} Ibid 52-90. Grotius uses ‘war’ to describe military force at the hands of either individuals, or the sovereign state, regardless of its scope. At 91, he defined ‘use of force’ as ‘when an individual tries to enforce his claim to what he thinks is due him without having recourse to a judge.’
and defensive war as ‘those in which we defend and strive to retain what is ours’.\(^{64}\)

Wolff made the same distinction in the following way:

\[
\text{‘A defensive war is defined as one in which any one defends himself against another who brings war against him. But that is called an offensive war which is brought against another who was not thinking of bringing a war, or when any one assails another with arms.’}^{65}\]

Vattel attributed offensive war to that state which first took up arms and described the legitimate purpose of offensive war generally as for the enforcement or protection of certain rights. He described defensive war as an exercise of the ‘right of self-defence against an offensive war, whether the latter was justified, or not.’\(^{66}\)

The legal bases used by the scholars to categorise war as either offensive, or defensive, were intrinsic to the theory of ‘just war’ (this theory will be examined in sub-chapter 2.4). This categorisation is important because the scholars appear to have used the various manifestations of ‘law’ as they applied to individuals at that time – that is, ‘natural’, ‘moral’, ‘written’ and ‘Gospel’ law – to form the basis for the same categorisation of war in the Law of Nations. In this way, ‘law’ defined the legal characteristics of offensive and defensive war in the Law of Nations. War, in order to be justified by this law, was in turn required to be motivated by the enforcement, or protection, of legal rights possessed by the sovereign state.

The historical context in which these scholars completed their work must always be borne in mind when interpreting them. European and other Great Powers were evolving from municipal forms of government in which sovereignty was generally vested in Princes and Monarchies. With the Law of Nations continuing to develop

\(^{64}\) Pufendorf, above n 15, Book VIII 1294 [881] and 1298 [884].

\(^{65}\) Wolff, above n 15, 314 [615].

\(^{66}\) Vattel, above n 15, 235 [3]-[5].
within this evolution, the legal means at the disposal of the early scholars were those laws which related to the individual (and Roman Law which also recognized some form of law on the international plane). In this respect, it can be seen from their work that Natural Law played a central part in providing legal principle to the evolving Law of Nations.

2.4 The theory of ‘just war’

The work of early legal scholars illustrates that the theory of ‘just war’ was primarily constituted by justifications for the exercise of the sovereign right to use war. The theory consisted of a well-developed framework of legal principle which assisted in categorising what was regarded by the Law of Nations as legally permissible and impermissible causes for war. The theory of just war was predominantly derived from what was considered ‘right’ and ‘just’ behaviour by the standards of European powers and was drawn from the practice of states, moral law, natural law and characteristics of human behaviour. In the most general terms, exercising the sovereign right to use war was ‘just’ if it was in response to ‘unjust’ aggression, or if it was to recoup property, debts, or to punish a wrong-doer who had offended against the state. Just war functioned within the framework of the Law of Nations. An external assessment of the merits of any particular case before the sovereign right was exercised was not part of this framework.

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67 Brownlie, above n 8 (1963), 3-18 provides a more contemporary scholarly view of this theory.
68 Vattel, above n 15, Chapter III 243-253. For other contemporary scholarly views on the theory of Just War, see Hall, above n 7, 263-294; Lauterpacht, above n 7, 178; Malanczuk, above n 8, 306-307; McCormack, above n 6 (2005), 224-225; Clarke, above n 6, 149; Wallace, above n 8, 277 and Michael N Schmitt, ‘International Law and the Use of Force: The Jus ad bellum’ (2003) II The Quarterly Journal 89-97, 89.
69 For instance, Vitoria, above n 15, 166. The practice of European states is only once referred to by Vitoria as ‘Custom’ at 169. He also draws on ‘human law’ which is interpreted as a reference to natural law and/or the natural behaviours of man. See Neff, above n 33, 49.
70 Lauterpacht, above n 7, 177-179.
The nature of the theory of just war required the invoking state to impugn the actions of the party against whom the sovereign right was exercised.\(^72\) This had the effect of one side to the war considering itself ‘just’ in its cause and the other side ‘unjust’ by reference to the legal principles underlying the theory.\(^73\) Thus, the theory could, in practice, see each side in war claim a just cause for it. Some early scholars ignored this apparent contradiction within the theory. However, Vitoria wrote that although the cause for war must not only be ‘just’, it must also ‘come up to the standard of a wise man’s judgment’, in observing the impracticality of both sides of a war correctly claiming justification for it:

‘Also the result would otherwise be that very many wars would be just on both sides, for although it is not a common occurrence for princes to wage war in bad faith, they nearly always think theirs is a just cause. In this way all belligerents would be innocent and it would not be lawful to kill them.’\(^74\)

The objective of just war was uniformly considered by early scholars to be the peace and security of the sovereign state.\(^75\) In Ayala’s opinion, war in order to protect a state’s sovereignty was the principal cause for just war, however, vengeance for a wrong unjustifiably inflicted on a sovereign state and a refusal for innocent passage across sovereign territory also justified offensive war.\(^76\) Grotius used the word ‘justifiable’ to distinguish those issues over which resort to war was considered legally ‘right’ from all other issues which ‘influence men through regard for what is expedient’ for going to war.\(^77\) This appears to have placed

\(^72\) Ayala, above n 15, 10.
\(^73\) Wolff, above n 15, 309 [603], 315 [618], 320-321 [629] and 324 [633].
\(^74\) Vitoria, above n 15, 173, 177 and 187. However, the early scholars were not united on this point. See, for example, Ayala, above n 15, 23.
\(^75\) Vitoria, above n 15, 172-173. Only the sovereign power, including a Prince, could declare offensive war against another state; 169.
\(^76\) Ayala, above n 15, 11-12.
\(^77\) Grotius, above n 15, 169.
actual, or threatened, ‘wrong-doing’ against a state which harmed its peace, or security, at the centre of the theory.\(^78\)

Vitoria believed that if the wrong was sufficiently serious, the conquering of the wrong-doer, despite its sovereignty, was permitted.\(^79\) He also attributed the right to invoke just war to ‘more developed and cultured sovereign states’, but denied it to ‘lesser’ states.\(^80\) Vitoria distinguished ‘good and innocent’ states from those less virtuous and considered it important to use the threat of, or actual, war to ward off the conduct of the latter.\(^81\) These positive attributes of a sovereign state, in his opinion, were possessed by those which followed the Christian faith and who were ‘moral’.

The categorisation of war into ‘offensive’ and ‘defensive’ war played an important role in the theory of just war because it facilitated the subjective justification of one side in a war being considered morally right in its cause and the other side being considered morally wrong.\(^82\) Being morally right was equated to being legally right within the Law of Nations. In this respect, Grotius believed that being legally ‘right’ was a moral-based assessment of the motivation for war. With a sound moral motivation, ultimately determined by its ‘cause’, war between states was considered to be as legally based as actions in municipal law. He continuously

\(^78\) Vitoria, above n 15, 170-171.
\(^79\) Ibid 186 where Vitoria thought conquest was justifiable in two instances. First, ‘because of the number and aggravated quality of the damages and wrongs which have been wrought’ by an enemy state. Second, ‘when security and peace can not otherwise be had of the enemy and grave danger from them would threaten the State if this were not done.’
\(^80\) Ibid 167. Vitoria did not provide a definition or criteria for distinguishing ‘good and innocent’ states from those he considered did not possess these attributes. He afforded no legal rights to rebels who stand against the sovereignty of a state. Thus, they could not possess the right to wage war nor possess a just cause for war.
\(^81\) Ibid.
\(^82\) Ayala, above n 15, 10-12; Grotius, above n 15, Book II, 169-171.
made this comparison throughout his books. In his view, this connection between the ‘cause’ of war, moral correctness and thus the legality of war applied equally to public and private war and formed the basis of the theory of just war.

Grotius considered the three broad ‘causes’ of justifiable war to be defence, recovery of property and punishment. Pufendorf considered the heads of just war to be defence of self and property, resistance to invasion, enforcement of legal rights, reparations and to prevent future wrongs. Wolff considered the broad just cause for offensive war to be when a state had a right to benefit from an act which ought to be performed by another and could not obtain it otherwise than by force of arms. In his view, this cause arose before a wrong was actually committed. He thought if one state was unwilling to accept arbitration of a dispute, then the requesting state had the immediate right to use war to force a settlement. He considered it just to use war against a growing power which manifested an intention to subject other states to itself, but only when it had put that intention into some form.

Vattel thought that war made for reasons other than necessity was ‘unjust’ and attached the ramifications for it to God. Although he thought that war signified

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83 Grotius, above n 15, 170-171, 184. Grotius considered the suffering of ‘injury’ to be the greatest cause.
84 Ibid 169-185. ‘Defence’ equated to the personal and sovereign right to use defensive war.
85 Pufendorf, above n 15, Book VIII 1294 [881].
86 Wolff, above n 15, 321-322 [630]; 138-139 [271] and 315-316 [619]. At 315 [618] he wrote that just cause for war was ‘a wrong done or likely to be done, the war that is brought without precedent or threatened wrong is not a just war, consequently it is unjust, nor has any one a right of war except the one to whom either a wrong has been done or is offered or threatened.’
87 Ibid 314 [617] where he wrote, ‘A just cause of war between nations arises only when a wrong has been done or is likely to be done’. This included the defence of all rights possessed by a state (139 [273] and 313 [613]), included a state’s right to fish the open seas; 70 [124].
88 Ibid 292 [572].
89 Ibid 334-335 [650].
90 Vattel, above n 15, 244 [27] and 245 [33]-[34].
the failure of reason and law between disputing men, it was a legitimate sovereign right to be exercised by a state within the Law of Nations against those who ‘despise justice and refuse to listen to reason’.\(^91\) He thought war must be adopted when all other methods fail. Vattel’s philosophy to justify war was widely-based and rested with the satisfaction of either one of two requirements. The first was objective grounds for war (‘justifying grounds’) and the second was the subjective expediency and appropriateness of going to war (‘motives’). It appears from the totality of Vattel’s work that the first ground relates to objectively-ascertainable reasons for going to war, such as self-defence, or for the enforcement of a separate right which was clearly violated. The second ground was purely subjective and does not appear to be limited by the existence of external evidence that justified war. In either case, however, war was dependant upon the defence, or maintenance, of rights possessed by the sovereign state.\(^92\) Vattel, therefore, identified a ‘three-fold object of lawful war’:

\begin{quote}
‘(1) to obtain what belongs to us, or what is due to us; (2) to provide for our future security by punishing the aggressor or the offender; (3) to defend ourselves, or to protect ourselves from injury, by repelling unjust attacks. The first two points are the object of offensive war, the third is the object of defensive war.’\(^93\)
\end{quote}

Thus, the scholars identified a wide variety of ‘causes’ for just war and these causes were divided into the pre-existing categorisation of ‘offensive’ and ‘defensive’ war. The framework of legal principle which constituted this theory appears to have exhibited interconnectedness between the cause of war, the moral correctness in responding to that cause and the assumed lawfulness of war within the Law of Nations. While some causes for offensive war varied between the 16\(^{th}\)

\(^{91}\) Ibid 243 [25].  
\(^{92}\) Ibid 243 [26] and 246 [37].  
\(^{93}\) Ibid 244 [28].
and 18th centuries, war by a sovereign state against the threat of armed force was a consistently-held cause for defensive just war.

By the 19th century, however, the theory of just war was eroding due to the dominance of the modern nation state which was marked by the Treaty of Westphalia 164894 and the end of the religious wars in Europe. The exercise of the sovereign right to use war offensively began being justified as a discretionary means of fulfilling objects of ‘national policy’ rather than as a ‘just’ act of war. As will be seen in Chapter 3, this erosion made way for different legal principles within the Law of Nations which would govern the exercise of the sovereign right to use war (and for the use of force short of war).95

2.4.1 The limitations of ‘just war’

It is observed that the nature of the theory of ‘just war’ can be seen as having functioned to restrict the exercise of the sovereign right to use war. What at least seems certain is the exercise of the sovereign right under this theory, whether for offensive or defensive purposes, was not unrestricted by the operation of the Law of Nations. Thus, Vitoria considered a ‘wrong received’ as the fundamental cause for commencing just war, but believed some motivations did not provide justification for war, such as religious difference, an expansion of empire and the

94 Treaty of Westphalia 1648, opened for signature 24 October 1648, 2 BFSP 1856 (entered into force 24 October 1856).
95 This right continued to be considered by states in 1815 as a fundamental cornerstone of nationhood and its exercise represented a fundamental aspect of their international relations. Purposes for its exercise in 1815 and afterwards, as will be seen in Chapter 3, included the settlement of legal disputes, reprisal and intervention. See Brownlie, above n 5 (1963), 19 and 45 at which he describes the right of war as ‘unrestricted’. See also McCormack, above n 6 (2005), 224-225; Nigel Meeson, ‘Sovereignty’ (1978) 2 Encyclopedia of Public International Law 1193-1201; Peter Steinberger, ‘Sovereignty’ (1987) 10 Encyclopedia of Public International Law 397-418; Rodriguez Fowler, Julie Bunck, Law, Power and the Sovereign State: The Evolution and the Application of the Concept of Sovereignty (1995) 47-68 and Schmitt, above n 68, 89-90.
personal glory of Princes. He stressed that it was not ‘just’ to attack ‘infidels’ for simply being so. He believed the reasoning of ‘just’ did not signify, in all cases, ‘justice and equity’, but instead provided a ‘legal completeness’ to the act of war. He wrote that in order for the sovereign right to use war offensively to be just, it required a necessary cause and should not be characterised by ‘vengeful savagery’, or be motivated for the object of conquest.

Grotius wrote that if war could be avoided by pacific means, even if the cause was clear and just and even if it meant abandoning the right for just war, it should be so avoided. Gentili linked just offensive war on the seas to sovereignty and that such war beyond the limitations imposed by sovereignty was only just if it did not amount to piracy. The intrinsic constraints within the theory of just war would, towards the 17th century, become more apparent.

Once in the 17th century, the scholars and the developing Law of Nations illustrate a greater regard for considerations of humanity in war and in the limitations of the theory of just war. For example, as seen, Pufendorf believed that the Law of Nations arose from natural law, which in turn arose from the ‘requirements of human nature’ and as such, considerations for humanity gave reason for restraining war. While nature permitted just war, peace must have been its

96 Vitoria, above n 15, 170-171. However, at 186, Vitoria believes conquest is justifiable in two instances. First, ‘because of the number and aggravated quality of the damages and wrongs which have been wrought’ by an enemy state. Second, ‘when security and peace can not otherwise be had of the enemy and grave danger from them would threaten the State if this were not done.’
97 Ayala, above n 15, 20.
98 Ibid 22.
99 Ibid 10.
100 Ibid 560-562, 567.
101 Gentili, above n 15, Book I, 35-38.
102 Pufendorf, above n 15, Book II, 226 [156].
103 Ibid 227 [156] and Book VIII 1292 [2].
object.\textsuperscript{104} To this end, Pufendorf advocated arbitration of any dispute should the cause for just war be unclear.\textsuperscript{105}

Wolff also attributed to just war the principle of natural law that harm, or damage, to another should not be done unjustly and that a clear cause is required for war.\textsuperscript{106} He distinguished a just cause for war from a ‘licence for war’ which was simply a belief that a sovereign state had a general, or unlimited, right to use war at will.\textsuperscript{107} But when just war was exercised for offensive reasons, such as to punish a wrong threatened, or committed, there were limitations placed by the theory on the extent to which war was used. Thus, ‘a more serious punishment is not permissible when a lighter one is adequate.’\textsuperscript{108} Wolff considered the limitations placed on war within the theory of just war with greater sophistication. He drew a distinction between ‘justifying’ and ‘persuasive’ causes for war.\textsuperscript{109} A justifying cause for war belonged to the law of nature and the Law of Nations, thus considered ‘lawful’. A persuasive cause for war, in contrast, was a consideration of policy and politics and was considered by him to be unjust.\textsuperscript{110} A mere assertion of justness was insufficient to fulfil the theory of just war and he considered wars pursuant to persuasive assertions only as unlawful.\textsuperscript{111} Wars that were neither justifying nor persuasive were considered ‘transgresses of the law of humanity’.\textsuperscript{112}

\textsuperscript{104} Ibid Book VIII, 1293-1294 [881]. Pufendorf adopted Grotius’ causes for just war; 1296-1297 [881].
\textsuperscript{105} Ibid 1295 [881].
\textsuperscript{106} Wolff, above n 15, 90-91 [173]. He considered the law of nature to be so dominant in the theory of just war that if something was not provided for by such law then it is considered illegal and therefore, unjust; 295 [577].
\textsuperscript{107} Ibid 315 [618].
\textsuperscript{108} Ibid 296-297 [580].
\textsuperscript{109} Ibid 316 [621].
\textsuperscript{110} Ibid 316 [622] and 331 [645].
\textsuperscript{111} Ibid 317 [624].
\textsuperscript{112} Ibid 318 [625]. Wolff excluded the increasing power of a neighbouring state (328-329 [640]) and fortifications, or the mere making plans for war (329-330 [641]), as causes for just war.
It can be seen that Wolff, as did Grotius before him, assessed the lawfulness of war within the theory of just war by reference to the law of nature and moral considerations and excluded, as a just cause for war, political motivations by a sovereign state. It seems that such political motivations for war were distinguished from political decisions to use war. The former appears to have related to using war to achieve objectives which were outside the law of nature, whereas the latter was the mechanism of the sovereign state to embark upon just war.

Similarly, Vattel warned against ‘unjust pretexts’ for offensive war, for example, conquest and the ‘usurp of property’ as they were not proper objects of war.\(^\text{113}\) He believed that while the sovereign right to use war for just causes could not be repressed, its exercise, whether for offensive or defensive reasons, was restrained by necessity and considerations of ‘justice, equity and humanity’.\(^\text{114}\) While this was also the view of Grotius and Vattel, the effect of their works appears to be that if the conquest of another state, or the usurpation of its property, was a natural outcome of a war justified by proper cause, then either outcome was considered lawful.

### 2.4.2 The legal scope of the sovereign right to use war defensively

While the work of early legal scholars refer to other just causes for defensive war,\(^\text{115}\) this sub-chapter will only explore that cause constituted by a threat, or use,

\(^{113}\) Ibid 235 [4]. He uses ‘war’ and ‘force’ throughout his work as interchangeable terms to describe the same act, that is, military force in any form of any scale. See also the Report of Dr John Marriott, Advocate General to the Right Hon. The Earl of Halifax, 30 November 1764, Law Officers (Letter Books), H.O. 49, vol 2 in Geoffrey Cumberlege (ed), (1949) The British Year Book of International Law 1949 XXVI 6-15 in which the Advocate General rejected conquest as a national right in the Law of Nations.

\(^{114}\) Wolff, above n 15, 235 [3].

\(^{115}\) For example, Vitoria, above n 15, 170-171, Pufendorf, above n 15, Book VIII 1305 [889]) and Wolff, above n 15, 314-315 [617]-[618] who considered that a cause for just defensive war arose
of armed force directed against the state. This is because exercising the sovereign right to use war defensively against this cause would, in time, be considered by the Law of Nations (and later by international law) as the purest form of self-defence (and the most relevant to my thesis).

An identification of the range of conduct considered by the scholars to have constituted a just cause for defensive war could also be considered as also having formed the legal scope of this manifestation of the sovereign right. The term ‘legal scope’ is, therefore, a convenient way of representing the range of conduct against which this right was lawfully exercised within the Law of Nations. Grotius examined the justness of using defensive war against the threat of injury to a state. He drew his legal principles from natural law which provided the right of self-defence to individuals. His underlying principle was that the requirement for self-defence arose before actual armed force was used by an aggressor:

‘The danger, again, must be immediate and imminent in point of time. I admit, to be sure, that if the assailant seizes weapons in such a way that his intent to kill is manifest the crime can be forestalled; for in morals as in material things a point is not to be found which does not have a certain breadth. But those who accept fear of any sort as justifying anticipatory slaying are themselves greatly deceived, and deceive others.’

He emphasised the need for the threat of armed force to have been imminent to trigger the right to use defensive war:

‘Further, if a man is not planning an immediate attack, but it has been ascertained that he has formed a plot, or is preparing an ambuscade, or that he is putting poison in our way, or that he is making ready a false accusation and false evidence, and is corrupting the judicial procedure, I maintain that he cannot lawfully be killed, either if the danger can in any way be avoided, or if it is not altogether certain that the danger cannot otherwise be avoided.’

when the threat of wrong-doing manifested itself (in addition to the commission of a wrong-doing). Pufendorf saw reprisal for wrong-doing as an example of defensive war, in that the war defended the right to enforce redress for the wrong-doing.

116 Grotius, above n 15, Book II, 173-175 and 549.
117 Ibid Book I, 49, Book II 174-175 and 575.
Grotius employed the consideration of the immediacy of the threat to define the earliest point in time at which the sovereign right to use war defensively could justly be exercised:

‘Quite untenable is the position, which has been maintained by some, that according to the law of nations it is right to take up arms in order to weaken a growing power which, if it become too great, may be a source of danger… But that the possibility of being attacked confers the right to attack is abhorrent to every principle of equity.’ 118

When Grotius’ definition of war is recalled, it seems evident that if an individual, or state, was taken by surprise by the actual use of armed force, then the ensuing hostilities were better described as ‘war’. Thus, it might be concluded, in Grotius’ mind, that self-defence was effected when the sovereign right to use war defensively was exercised against an imminent threat of armed force. Support for this conclusion can be found in the work of others. Pufendorf119 saw the occasion for exercising this right within the theory of just war as arising before an actual injury was sustained by a self-defending state.120 To him, the very purpose of defensive war was to avoid injury, as it was for individuals under the law of nature.121 He thought that defending one’s self before suffering injury was a matter of reason122 and that the natural instinct of a sovereign state to act in defence against an imminent threat of armed force was because it was the natural instinct of man to do so.123 If it was otherwise, it would mark the end of mankind:124

119 Pufendorf, above n 15, Book II 264-294 [182]-[202].
120 Ibid 275 [184] where he wrote, ‘For self-defence does not require one to receive the first blow or only to elude or ward off the blows which are aimed.’ However, he did believe that avoidance of impending force was preferable if it could be achieved, or even to endure a slight injury if doing so did not cause much detriment to the state; 267-269 [184]-[185]. The overriding motivation for exercising the right was to achieve effective defence, not revenge; 270 [186].
121 Ibid 264 [182] where he wrote that the law of nature permits violence in self-defence in order to preserve safety.
122 Ibid 283 [195] and Book VIII 1292 [880]. Pufendorf, above n 15, Book II 585 and Book III 1314 [895] agreed with Grotius on the bases for defensive war enabling sovereignty to be gained over an aggressor’s territory.
123 Ibid Book VIII 1292-1294 [880]-[881] even though the municipal laws of a state that controlled the individual’s right of self-defence when a person’s life was not threatened and the international
‘And so when a man, contrary to the laws of peace, undertakes against me such things as
tend to my destruction, it would be a most impudent thing for him to demand of me that I
should thereupon hold his person inviolate, that is, that I should sacrifice my own safety so
that his villainy may have free play.’

Pufendorf thought the earliest point at which the sovereign right to use war
defensively arose was when the threat had evolved to a point where injury could
immediately be occasioned by the self-defending state if the aggressor decided to act:

‘The beginning of the time at which a man may, without fear of punishment, kill another
in self-defence, is when the aggressor, showing clearly his desire to take my life, and
equipped with the capacity and the weapons for his purpose, has gotten into the position
where he can in fact hurt me, the space being also reckoned as that which is necessary, if I
wish to attack him rather than to be attacked by him.’

Pufendorf’s reasoning suggests the nature of weapons possessed by the aggressor
was a factor in determining when this point arose. This is because the range and
power of the weapon were pivotal to a self-defending state’s determination of
when it was likely to suffer injury if those weapons were used. Pufendorf
considered the right to use war defensively against a threat of armed force to be
absolute and the exercise of it was not determined by the nature of the threat
having gained a certain degree of seriousness (in contrast to the imminence of the
threat and the necessity to respond to it):

‘And this holds good not merely if an enemy has undertaken to use every extremity against
me, but also if he simply wishes to injure me within certain limits, for he has no greater
right to do me a slight injury than a severe one’.

customary principles which governed the exercise of the right to use defensive war were not
identical in nature. The distinction between the legal right of self-defence in both jurisdictions and
the substantive rules which regulated in each jurisdiction are consistently maintained by all the
eyear scholars.

124 Ibid Book II 265 [183].
125 Ibid 265 [182]. See also 272-274 [188]-[189].
126 Ibid.
127 Ibid 276-277 [190]-[191].
128 Ibid Book II 269 [185], Book III 1298 [884] and 1302 [885]. His view is more consistent with
my legal definition of the commencement of an armed attack, rather than with the ‘scope and
effect’ test employed by scholars after 1945, as the seriousness of the harm to a state that might be
Thus, in Pufendorf’s opinion, the sovereign right to use war defensively against a threat of armed force permitted the self-defending state to cross the border with the threatening state and repel, or destroy, the threat as far as it manifested.129 This right applied equally to the defence of allies, but only when they requested it, so that ‘the defensive war is in their name, not ours.’130 Of such paramount importance was the sovereign right that it was considered just even if exercised genuinely, but mistakenly, against another.131 Wolff also considered that the sovereign right functioned against a threat of armed force.132 In his view, the likelihood of such a threat evolving into actual force was sufficient to trigger its exercise.133 Vattel defined the legal scope of the sovereign right in the following manner:

“We may say, therefore, in general, that the foundation or the cause of every just war is an injury, either already received or threatened. The justifying grounds of war show that a State has received an injury, or that it sees itself seriously enough threatened to authorize it to ward off the injury by force.”134

He illustrated the fundamental importance to the concept of self-defence of acting against an imminent attack:135

“But suppose the safety of the State is endangered; our foresight can not extend too far. Are we to delay averting our destruction until it has become inevitable?... If an unknown man takes aim at me in the middle of a forest I am not yet certain that he wishes to kill me; must I allow him time to fire in order to be sure of his intent? Is there any reasonable

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129 Ibid Book II 270-271 [186], 356 [242], Book III 1294 [881] and 1296 [881].
130 Ibid Book III 1305-1306 [889].
131 Ibid Book II 272 [187].
132 Wolff, above n 15, for example 315 [618]) where he wrote that ‘a wrong done or likely to be done, the war that is brought without precedent or threatened wrong is not a just war, consequently it is unjust, nor has any one a right of war except the one to whom either a wrong has been done or is offered or threatened.’ At 319 [627] he considered it a just defensive war if a sovereign state was threatened by a war that was neither justifying or persuasive and that all states have a right to use defensive war for all their security against a state that threatens such a war. See also 320 [629].
133 Ibid 314 [617].
134 Vattel, above n 15, 248 [42].
135 Even when exercised justifiably, but mistakenly; ibid 172-173.
Vattel also identified two factors which constituted such a threat: the ability to carry the threat into actual war and the ‘will to injure’. He described the exercise of this right as a ‘duty’, but this right did not exist against offensive war which itself was just. In such circumstances, the state threatened with attack should ‘offer due satisfaction’ and, only if refused, did the right to use defensive war become just.

Two basic observations can therefore be made of the work of the scholars in their descriptions of the two forms of conduct – the threat, or use, of armed force – against which the exercise of the sovereign right to use war of defensively was considered lawful by the Law of Nations. The first observation is that this range of conduct can be considered as having formed the legal scope of this right (conversely, conduct which fell outside these parameters did not fall within this legal scope). The second observation is that the underlying principle of self-defence related to a threat of armed force so as to protect a state from the unjustness of being attacked.

The early scholars referred to the human instinct reflected in the sovereign right to use war defensively (and accommodated by the international customary law principles of immediacy and necessity) of either striking first against a threat of

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136 Ibid 248-249 [44]. In a material deviation from Wolff, Vattel believed that the growing strength of a neighbouring state, if it in itself became disproportionately greater than another, justified defensive war. See also Westlake, above n 32, 120.
137 Vattel, above n 15, 248-249 [44].
138 Ibid 246 [35]-[36]. However, Vattel does not delineate between just and unjust in each conflict. He recognises the possibility both sides of a conflict can act with just cause in which the distinction between offensive and defensive war becomes unclear. In such uncertain circumstances, both are considered to have acted justly until the cause is decided. See also Brownlie, above n 8 (1963), 6-9.
violence, or fleeing from it (I shall describe this instinct as the ‘human defensive instinct’ for the purpose of my thesis). The scholars extended this instinct to the natural behaviour of a sovereign state when faced with an imminent threat of armed force. Other disciplines recognise this instinct.\textsuperscript{139} The human reality which underpins this instinct is that man knows that he has a greater chance of surviving personal violence if defensive force is used before, rather than after, the commencement of such violence.\textsuperscript{140}

As a sovereign state is formed by human beings, it is reasonable to expect the human decisions which dictate its response to an imminent threat of armed force will reflect this human defensive instinct. In this respect, the view of some scholars subsequent to their early counterparts is that if the international legal framework which governs self-defence at any particular time does not reflect this human defensive instinct, then states are more likely to disregard the framework’s substantive rules and will act defensively to avoid being attacked.\textsuperscript{141}

My exploration of the work of the early scholars in respect of the legal scope of the sovereign right to use war defensively shows references made to the three considerations which operated to restrict the exercise of this right within the Law of Nations. These considerations were the immediacy of the threat, the necessity to use force to repel it and the proportionality of the defensive force \emph{vis-à-vis} the

\begin{itemize}
\item \textsuperscript{139} See, for example, Daniel Goleman, \emph{Emotional Intelligence} (1995) 7, 60, 136, 205, 227; John E Warren, \emph{Emotional Power} (2004) 225-227; John Ratey, \emph{A User’s Guide to the Brain} (2001) 66, 88, 114, 161-162, 171, 228-229, 232; Robert Winston, \emph{Human Instinct – How Our Primevil Impulses Shape Our Modern Lives} (2002) 37-42, 49, 61-62. The logic provided by Grotius and Pufendorf at the beginning of this sub-chapter in respect of man’s instinct to defend himself \emph{from} harm rather than awaiting harm and how the Law of Nations supported this action between sovereign states pertains to this work in psychology.
\item \textsuperscript{140} Brownlie, above n 8 (1963), 261.
\item \textsuperscript{141} For example, Westlake, above n 32, 78-79. The scholarly work since Article 51 of the \emph{Charter} which refer to the need for the substantive rules of international law to be interpreted and applied to accommodate the human defensive instinct will be examined in Chapter 6.
\end{itemize}
threat. The purpose of the first two considerations was to determine when and why the right could be exercised. The purpose of the third operated after the right had been exercised and restricted the extent to which the right could be exercised (however, this third purpose is not relevant to the question posed by my thesis). These considerations will now be explored in more detail to identify their latent insights previously unexplored by early scholars, or the existing scholarly debate.

2.4.3 The early references to considerations of immediacy, necessity and proportionality

As seen, early legal scholars distinguished between the sovereign right to use war defensively and the considerations of immediacy, necessity and proportionality.142 These considerations were described in the context of the theory of just war and illustrate, in the minds of the scholars, why the exercise of this right was ‘just’ (and therefore ‘lawful’) when these considerations were fulfilled. The considerations were usually explained in the context of the self-defence of the individual143 before their principles were applied to the emergence of the sovereign state.

The first two considerations related to the decision of a self-defending state to exercise its sovereign right to use war defensively. The first consideration measured the immediacy of the threat of armed force facing the self-defending state. ‘Immediacy’ in this sense meant the physical proximity of the enemy’s forces, their degree of mobilisation, their weapons and their apparent intent to use

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142 These considerations were not described by the early scholars as international customary law principles as they would later be described in Caroline, as will be studied in Chapter 3. For this reason, I shall use the term ‘consideration’ in describing their legal content.

143 Vitoria, above n 15, 169-179. Vitoria barely distinguished between the exercise of the right of self-defence by an individual and the justness of defensive war on the part of a sovereign state. However, he distinguished between an individual’s right to use force to defend himself after the threat had passed and the sovereign right, in identical circumstances, to later avenge the wrong with defensive war; 168, 183.
actual force. The second consideration was the necessity to use defensive war against that threat. ‘Necessity’ in this sense meant that defensive war was the only means by which the self-defending state could prevent an actual attack, having regard to all the circumstances. Grotius distinguished between the considerations of immediacy and necessity having been fulfilled, or not, by the circumstances.\textsuperscript{144}

Further, he wrote:

‘Quite untenable is the position, which has been maintained by some, that according to the law of nations it is right to take up arms in order to weaken a growing power which, if it become too great, may be a source of danger… But that the possibility of being attacked confers the right to attack is abhorrent to every principle of equity.’\textsuperscript{145}

Pufendorf also required the threat of armed force to be imminent before a self-defending state, as a matter of necessity, could justify exercising its sovereign right to use war defensively.\textsuperscript{146} Vattel believed that a lawful exercise of this right was restrained by the necessity to use defensive war and by the considerations of ‘justice, equity and humanity’.\textsuperscript{147} The scholars suggest that the considerations of immediacy and necessity were to be simultaneously fulfilled before the sovereign right could lawfully be exercised. The third consideration of proportionality did not relate to the initial decision to use defensive war, but operated after that decision had been made and functioned to restrict such war to that which was necessary to repel and neutralise the threat.\textsuperscript{148}

An examination of the functions fulfilled by the considerations of immediacy and necessity reveal how they formed the legal scope of the sovereign right to use war

\textsuperscript{144}Grotius, above n 15, 174-175, 575.
\textsuperscript{145}Ibid 184 and footnote 117 above. See also Westlake, above n 32, 115-121.
\textsuperscript{146}Pufendorf, above n 15, Book II 265 [182], 277 [191], Book II 274 [188]-[189], Book VIII 1293-1294 [881] and 1298-1299 [884].
\textsuperscript{147}Vattel, above n 15, 235 [3]. He also extended these considerations to offensive war.
\textsuperscript{148}For example Grotius, above n 15, 173 and Wolff, above n 15, 296-297 [580]. The consideration of proportionality does not have direct relevance to the subject-matter of my thesis.
defensively. Their nature meant they fulfilled their respective legal functions before actual armed force was used against a state. However, scholars say that a threat of armed force per se was not sufficient within the Law of Nations to authorise the sovereign right to be exercised. Rather, such a threat needed to reach the threshold of being imminent and necessary to be repelled by force. Upon the fulfilment of this threshold, the sovereign right in the self-defending state was triggered and was authorised by the law to be exercised.

There is one other legal effect not explored by the early scholars that can be conceived from the way in which the two considerations of immediacy and necessity functioned. That effect is to define the legal commencement of an armed attack between sovereign states. In the era of early scholars, there was no substantive rule in the Law of Nations which expressly required the occurrence of an ‘armed attack’ before the sovereign right to use war defensively could lawfully be exercised. Rather, the only precondition was a joint fulfilment of the considerations of immediacy and necessity. In the absence of such a substantive rule (which did not appear in international law until Article 51 of the Charter in 1945) and in the absence of controversy over the earliest point in time when the sovereign right could lawfully be exercised, early scholars did not have a scholarly need to explore a definition for the legal commencement of an armed attack.

Had the scholars derived such a definition from the legal principles developed by the Law of Nations, what may they have said? Arguably, the answer may be have been as follows.
2.4.4 The legal commencement of an armed attack between sovereign states

For a definition of the legal commencement of an armed attack (meaning an offensive, or unjust, armed attack, not an attack in self-defence authorised by the Law of Nations) to be offered, it needs to be contrasted from the physical commencement of such an attack. Such a definition, in my opinion, must also be different to the ‘scope and effect’ test employed by the existing scholarly debate to recognise when an armed attack has occurred for the purpose of Article 51 of the *Charter* (this test and its shortcomings described by that debate are examined in sub-chapter 6.2.4).

The physical commencement or completion of an armed attack focuses on the actual use of armed force by an aggressor, such as the launch of an invasion or bombardment. In contrast, I believe that the legal commencement of an armed attack pinpoints a time which precedes the physical commencement of such an attack. Why so? My belief comes from two features demonstrated in the work of early legal scholars: that the underlying principle at play in self-defence was a state’s avoidance of injury from unjust armed force and that the sovereign right to use war defensively was exercised *before* actual armed force was used against a self-defending state. The second feature readily shows that an exercise of the sovereign right was authorised by the Law of Nations at an earlier time than the physical commencement of an armed attack. Therefore, there is clearly a temporal difference between the point in time at which the law authorised self-defence and the physical commencement of an armed attack. This temporal difference requires further enquiry.
It is of practical assistance in this regard to briefly return to the example seen earlier in Vattel’s work in which a stranger met him in the forest and took aim at him (let’s assume with a bow and arrow). If he knew he was outside the effective range of the stranger’s weapon, the considerations of immediacy and necessity would not be fulfilled (although preparations to decide to either defend himself, or flee, would sensibly have commenced).¹⁴⁹ Therefore, there was no legal interaction between Vattel’s individual right of self-defence and these considerations, with the result that the right was not triggered. However, if the stranger ran towards Vattel, then once he had reached the effective range of his weapon the considerations of immediacy and necessity would be fulfilled. At this point, his right of self-defence and these considerations interacted, triggering his right to defend himself (whether he chose to exercise it or to instead flee).

Viewed in this way, the legal commencement of the armed attack against Vattel can be regarded as occurring when the threat of being shot became so imminent that it became necessary, in order to preserve his life, to exercise his right of self-defence, even though his assailant had not shot his arrow. If this correctly reflects the principles identified by the scholars, the armed attack against Vattel, as a question of law, commenced when his right of self-defence was triggered by the fulfilment of the legal considerations of immediacy and necessity.

What are the alternative possibilities to this theory? There seem to be two. The first is that the armed attack against Vattel commenced at some point before the considerations of immediacy and necessity were fulfilled by the threat posed by his

¹⁴⁹ Not that absolute certainty of the range of the weapon on the part of Vattel would be required before his natural right of self-defence to be legitimately exercised.
assailant. The other is that the armed attack commenced at the time, or at any point afterwards, the arrow is (eventually) fired by Vattel’s assailant.

An implication of the first alternative is that the law would not have functioned to restrict Vattel’s right of self-defence as it otherwise would. Without these two considerations functioning to restrict his exercise of this right, Vattel’s decision to defend himself would be open-ended and uncontrolled by principles of law. An implication of the second alternative is that for Vattel to await the firing of the arrow before he defended himself would render the consideration of immediacy pointless. An obvious practical consideration of the second alternative reveals that Vattel may well have lost his life by awaiting the firing of the arrow, or might have been so wounded that self-defence thereafter was impossible.

Both alternatives, as we know from the early scholars, do not reflect the operation of and functions fulfilled by, the sovereign right to use war defensively and the considerations of immediacy and necessity within the Law of Nations. They are therefore considered to be less attractive possibilities for marking the legal commencement of an armed attack than at the point in time when the considerations of immediacy and necessity are fulfilled.

For these reasons, I conclude that the work of early scholars demonstrates a basis for defining the legal commencement of an armed attack within the Law of Nations. I therefore make the preliminary conclusion that the most likely point in time at which an armed attack legally commenced between sovereign states between the 16th and 18th centuries was when a threat of armed force directed against the state fulfilled the considerations of immediacy and necessity.
2.5 Conclusion

The early scholars’ description of the Law of Nations between the 16th and 18th Centuries answers my four supporting questions of law. In respect of my first supporting question, the scholars’ rationale for the right of a state to use war defensively in the Law of Nations was state sovereignty. The rationale holds that this right was intrinsic to the state itself – a manifestation of its sovereignty – and pre-existed the formation of the Law of Nations.

In respect of my second supporting question of law, the scholars’ rationale in the Law of Nations for the right of a sovereign state to repel an imminent threat of armed force was the sovereign right to use war defensively. The term ‘anticipatory self-defence’ was not used by scholars to define a distinct legal right separate from the sovereign right. Rather, acts of defence in their era which today might be regarded as anticipatory self-defence manifested when the sovereign right was exercised against an imminent threat of armed force which had fulfilled the international customary principles of immediacy and necessity. No mention was made of any other legal right in the Law of Nations which authorised a sovereign state to use defensive force to repel a threat, or use, of offensive force.

In respect of my third supporting question of law, early scholars identified the international customary law principles of immediacy, necessity and proportionality which functioned to restrict an exercise of the sovereign right to use war defensively. It is possible to regard the coincidental fulfilment of the first two principles as forming the legal scope of this right, that is, the conduct against and the time at which the right was lawfully exercised within the Law of Nations.
In respect of my fourth supporting question of law, the point of time at which the principles of immediacy and necessity were fulfilled is the preferred point in time which best defines the legal commencement of an armed attack within the Law of Nations. The two alternatives to this point – some time before, or some time after, the fulfilment of these two principles – to define this moment are less consistent with the work of early legal scholars and do not reflect the operation of and functions fulfilled by the sovereign right to use war defensively and the considerations of immediacy and necessity.

A silent issue arises in the work of the early scholars which does not expressly fall within my supporting questions of law, but requires identification at this point, as it will arise later in Chapter 6 in the existing scholarly debate. This issue relates to some scholars who provide their views on the rationale in international law of the inherent right of self-defence and of anticipatory self-defence. The work of early legal scholars suggests that the international customary law principles of immediacy, necessity and proportionality constituted the substantive content of international customary law in respect of defensive war. This suggestion infers that the process of recognition of the sovereign right to use war defensively by international customary law and its consequent incorporation into the Law of Nations was not considered to have created a ‘customary law right of self-defence’.

In all their work spanning three centuries, no mention is made by early legal scholars of a legal right in the Law of Nations other than the sovereign right to use war defensively which authorised states to use armed force in self-defence.

If this was the intended view of early legal scholars of the process of recognition of the sovereign right and its incorporation into the Law of Nations, it seems logical.
Those scholars may have considered that, as the right existed in the state before the Law of Nations was created by states themselves, the purpose of international customary law was to form the principles of immediacy, necessity and proportionality in order to restrict the right’s exercise. As will be seen in sub-chapters 3.2.3 and 4.2.1.4 respectively, this inference is consistent with the diplomatic correspondence in Caroline and the negotiations for the General Treaty for the Renunciation of War 1928.

In further support of this view, it will be seen in subsequent chapters that the nature of an international customary law rule formed through the requisite practice and opinio juris of states has historically been to grant a positive legal right for a state to act in a particular way, or to impose on a state an obligation to act, or to refrain from acting, in a particular way. In almost all international judicial cases in respect of the formation of a customary law legal right, there was no pre-existing legal right vested in states in relation to the subject-matter of the practice. This situation can be contrasted from the unique circumstances of the sovereign right to use war defensively, as related by early legal scholars, which not only pre-existed customary law, but the Law of Nations itself.

An opposite view is that this process of recognition and incorporation ‘replicated’ the sovereign right to use war defensively in international customary law, resulting in the formation of a ‘customary law right of self-defence’ in the Law of Nations which coexisted with the sovereign right. Although early legal scholars before 1945 did not describe such a replication, its occurrence has been suggested by a small number of scholars after 1945, as will be seen in Chapter 6. This suggestion of replication is extended by this small number of scholars to the existence of a
‘customary law right of anticipatory self-defence’ which existed in international law in and before 1945. This view raises the possibility of another view, namely, that it was this right that was impliedly extinguished by the precondition of an armed attack in Article 51 of the Charter in that year, thus avoiding an impairment of the inherent right of self-defence.

It is not necessary at this point in my thesis to explore this issue further, as there is no conflict to address in the views expressed by early legal scholars. What is observed is that their work seems more consistent with the proposition that the principles of immediacy, necessity and proportionality constituted the substantive content of international customary law and that the right to use war defensively in the Law of Nations remained vested in the state. This issue will be touched upon again in Chapters 3 and 4 in respect of the period 1815 to 1939 and will be addressed in Chapter 6 when it manifests in the existing scholarly debate.

It will now be seen, with the erosion of the ‘just war’ theory, that states used specific reasons to justify exercising the sovereign right to use war. Defensive war remained one of those reasons of justification in the Law of Nations (generally called ‘international law’ after 1815) as a greater emphasis was placed on the arbitration and conciliation of international disputes.
Chapter 3

The use of force between states – 1815 to 1914

3.1 Introduction

The purpose of this chapter is to explore the developments in international law in respect of the use of force in the period 1815 to 1914 to determine whether the answers to my four supporting questions of law in Chapter 2 remain applicable to this period. The diplomatic correspondence in *Caroline* in 1837, which will be analysed in 3.2.3, is of central importance to my exploration because it is the first generally-acknowledged articulation in the scholarly work of the considerations of immediacy, necessity and proportionality as international customary law principles. *Caroline* also illustrates how the United States and Great Britain perceived the functions fulfilled by these principles and by the sovereign right to use war in international law at that time.

The developments in international law in this period included the erosion of the theory of just war and its replacement by the use of specific reasons to justify exercising the sovereign right to use war, including intervention, naval blockade, reprisal and self-preservation. An important development was the greater emphasis placed by states on the peaceful settlement of international disputes. This emphasis did not prevent a state from ultimately using war, or force, to settle a dispute if arbitration, or conciliation, failed. However, this growing preference for the peaceful settlement of disputes was an important step in strengthening the momentum toward prohibiting war, other than defensive war, in international law.
This chapter is divided into five sub-chapters. I will first examine the developments in international law which relate to the non-defensive use of war, so that the constancy of the substantive rules which governed defensive war can be illustrated in its historical context. Thus, sub-chapter 3.2 examines how international customary law restricted the exercise of the sovereign right to use war offensively to the settlement of legal disputes, the legal bases for the peaceful settlement of such disputes and the important articulation of the customary law principles of immediacy, necessity and proportionality in *Caroline* in 1837 in respect of defensive war.

The applicability of the answers to my first and second supporting questions of law provided in Chapter 2 against the developments in international law in the period studied will be made in sub-chapter 3.2. The applicability of the answers to my third and fourth supporting questions of law provided in Chapter 2 will be made in sub-chapters 3.3 and 3.4. I will draw my conclusions in respect of the applicability of the answers to my four supporting questions of law in 1914 in sub-chapter 3.5.

### 3.2 International customary law

The primary formal source of international law in the period 1815 to 1914 in respect of the use of war was international customary law. Its formation of substantive rules was by a general practice of states conducted with the requisite *opinio juris* of legal entitlement, or obligation.\(^{150}\) The sovereign state consolidated

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\(^{150}\) For discussions of the formal sources of law during the period of the early scholars and afterwards, see Westlake, above n 32, 14-17 and Oppenheimer, above n 26, 23. It would not be until 1919 that the formal sources of international law would be expressed in a multilateral treaty in Article 38 of the *Statute of the Permanent Court of International Justice*, opened for signature 28 June 1919, (1919) UKTS 1919/4 (entered into force 10 January 1920).
itself during this period as the principal personality in the system of international law.

The formation of some states was often influenced, or determined, by war. There were no multilateral treaties in this period which prohibited the exercise of the sovereign right to use war, but there were treaties towards the end of the 19th century which imposed obligations on states to attempt to settle international disputes before resorting to war. Such treaties formed part of the practice of states and demonstrate the growing momentum towards prohibiting war to settle disputes. State practice and international customary law, therefore, must consequently be assessed within the overall context of the use of war.

3.2.1 Instances of the use of war, or force

In the period 1815 to 1914, the sovereign right to use war continued to be lawfully exercised by states in a number of circumstances. Although the principle of the Balance of Power was established by the Final Act of the Congress of Vienna 1815, under which the boundaries between European states were settled after the Napoleonic Wars, the exercise of the sovereign right was not limited by this treaty.

Even though war for the sole reason of conquest was not considered a lawful exercise of the sovereign right by international law, war often did result in the conquest of foreign land formerly the territory of one of the warring states. The

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152 Britain finally annexed Burma after three wars in the period 1823 to 1887; the Russo-Persian War from 1826 to 1828 in which Persia declared war on Russia to regain sovereignty over disputed land and which was determined by the Treaty of Turchmenchay, opened for signature 2 February 1828, Clive Parry, The Consolidated Treaty Series, Vol 78, 105 (entered into force 2 February
absence of a centralised international legal body to restrain states from using war as a tool for achieving national objectives, or to determine the legality of specific instances of war, continued to affect the development of international law. Lauterpacht observed in this regard:

‘by the exercise of a purely discretionary right of declaring war, a State could with one stroke release itself, as against the attacked member of the society of States, from all the obligations of International Law save those appertaining to the conduct of war.’

In the Crimean War from 1853 to 1856, European powers exercised the sovereign right to use war to alter the balance of power between them. After Russia defeated Turkey in the Russo-Turkish War from 1828 to 1829, it moved

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1828); the Argentina-Brazil War from 1825 to 1828 in which Brazil lost its sovereignty over Uruguay and which was determined by the Treaty of Montevideo 1828, opened for signature 28 February 1828, Clive Parry, The Consolidated Treaty Series, Vol 79, 1 (entered into force 28 February 1828); the French conquest of Algeria in 1830 known as the Algerian War and which was determined by the Evian Accords 1862, opened for signature 14 June 1862, Clive Parry, The Consolidated Treaty Series, Vol 126, 35 (entered into force 14 June 1862); the Chincha Islands War from 1864 to 1866 in which Spain tried to regain sovereignty over South American territories formerly held by it; the Austro-Prussian War of 1866 at the conclusion of which sovereignty over territories was assumed by Prussia and which was determined by the Peace of Prague 1866, opened for signature 23 August 1866, Clive Parry, The Consolidated Treaty Series, Vol 133, 81 (entered into force 23 August 1866); the Anglo-Zulu War of 1879 between the British Empire and the Zulu Empire; the War in the Pacific from 1879 to 1883 in which Bolivia and Peru fought Chile after the latter seized coastal territory rich in minerals and which was determined by the Treaty of Ancon 1883, opened for signature 20 October 1883, Clive Parry, The Consolidated Treaty Series, Vol 162, 458 (entered into force 20 October 1883); the Sino-French War from 1884 to 1885; the Russian-Circassian War which began around the time of the Russo-Persian War and ended in 1886 and was determined by the Loyalty Oaths by Circassian Leaders (entered into force 2 June 1886); the Mahdist War 1898 in which Britain assisted Egypt in seizing Sudan, and the First Italian-Ethiopian War from 1895 to 1896 in which Italy attempted by force to gain sovereignty over Ethiopia but was defeated and which was determined by the Treaty of Addis Ababa 1896, entered into force 26 October 1896, Clive Parry, The Consolidated Treaty Series, Vol 183, 423 (entered into force 26 October 1896). See Brownlie, above n 8 (1963), 20 described the right of states to go to war and to obtain territory by right of conquest in the 19th century as ‘unlimited’; George Sabine, A History of Political Theory: The Theory of the National State (4th ed, 1973) Part III and Harris, above n 151, 218. Lauterpacht, above n 7, 178-179. See also Brownlie, above n 8 (1963), 21 and Malanczuk, above n 8, 19-20. Ingo von Munch, ‘Vienna Congress (1815)’ (1984) Encyclopedia of Public International Law 7 522-525; Simon Royce, The Crimean War and its Place in European Economic History (2001) 12-44 and Meaney, above n 71, 315 where he described the Crimean War as the first war between the great powers since 1815 when the Vienna system was created. successive peace treaties in 1856 and 1878 failed to form any cohesive treaty-based system of collective security on the European continent; see Treaty of Paris, opened for signature 30 March 1856, 2 BFSP 1856 (entered into force 30 March 1856) which ended the Crimean War. On that treaty, see Ernst Schieder, ‘Paris Peace Treaty (1856)’ (1984) 7 Encyclopedia of Public International Law 376-378. The Treaty of Unkiar-Selessi 2 BFSP 1833 (entered into force 1 November 1833) marked the end of this war.
towards imposing control over the Ottoman Empire. Russia destroyed the Turkish fleet in November 1853, ostensibly because of an unsettled dispute over religious populations in Constantinople. Britain and France declared war on Russia, *inter alia*, to protect their interests in the Middle East by defending the straits separating the Black and Mediterranean Seas. As a consequence of the war, Russia lost Bessarabia and the mouth of the Danube to the Ottoman Empire. Walachia, Serbia and Moldavia were released from the Russian protectorate and placed under an international guarantee. Britain, France and Sardinia also denied Russia the right to maintain a fleet in the Black Sea.\(^{156}\)

The Second Opium War\(^ {157}\) in 1858 commenced after Britain, France, Russia and the United States demanded far-reaching commercial treaties with Emperor Xianfeng of the Qing Government of China. After China refused the terms demanded, the navies of these powers attacked China until treaties satisfactory to them were entered into by China.\(^ {158}\)

In 1861 and 1862, British, French and Spanish naval forces landed by force in Mexico with the stated intention of recovering the repayment of commercial loans made to the Mexican Government. However, it soon became clear to the British and Spanish that France had the broader intention of conquering Mexico and the

\(^{156}\) See Royce, above n 154, 126-137.

\(^{157}\) Lauterpacht, above n 7, 33-34 and Meaney, above n 71, 280-288.

\(^{158}\) Meaney, above n 71, 280-281 where he described how Britain, France, Russia and the United States took advantage of the internal strife in China to force the Imperialist Government to enter new economic treaties (known as the *Treaties of Tientsin 1858*, opened for signature 26 June 1858, Clive Parry, *The Consolidated Treaty Series*, Vol 1, 319 (entered in force 26 June 1858)) that would permit China to be opened up to western economic interests unencumbered by issues of Chinese sovereignty.
forces of these two states withdrew. In the Franco-Prussian War from 1870 to 1871, it is generally accepted that Prussia manipulated France into declaring war on her with the premeditated purpose of Prussia gaining sovereignty over Alsace-Lorraine and the southern German states of Baden, Bavaria and Wurttemberg.

After negotiations between Japan and Russia to determine their respective regions of influence in and around the Korean peninsula deteriorated in 1904, Japan declared war and simultaneously destroyed the Russian naval forces in Port Arthur. This war was designed to stop the spread of Russia’s influence in Korea, to deny it a warm-water port in the Pacific and to conquer land that Russia itself had conquered by war. The United States also used war late in the 19th century to annex Puerto Rico, Cuba and territory as far away as the Philippines for economic and militarily-strategic purposes.

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160 The Treaty of Frankfurt 1 BFSP 1871 (entered into force 10 May 1871) concluded this war. The treaty determined the border between the new German Empire and the Third French Republic, including the payment of five billion francs from France to Prussia as a war indemnity. See Gordon Craig, *Germany: 1886 – 1945* (1980) Chapter 1, 5-44 and Meaney, above n 71, 147 and 317. At 147, Meaney he describes how Alsace-Lorraine and other large areas of land not formerly under German sovereignty (under Prussian leadership) were gained after Bismarck ‘cleverly manoeuvred Franco-Prussian diplomacy over the succession of the Spanish throne in such a way as to force the French to declare war on Prussia’.
161 Meaney, above n 71, 148 and 318.
162 Known as the Russo-Japan War 1904-1905. See Richard Hough, *The Fleet That Had To Die* (1960) 1-14; Ispin Nish, *The Origins Of The Russo-Japanese War* (1986) Chapter 1 and Meaney, above n 71, 210 where he described the Russian defeat as a ‘national humiliation’. At 302, he described the diplomatic negotiations conducted between Russia and Japan over their respective interests in Manchuria and Korea, however when it became clear to Japan that Russia was not prepared to leave Korea to Japan, the Japanese fleet attacked Port Arthur and ‘annihilated the Russian fleet’ in order to ensure its sovereignty over the territory.
163 The Spanish-American War in 1898-1901, which ended with the *Treaty of Paris 1898*, opened for signature 10 December 1898, 5 Bevans 741, (entered into force 10 December 1898) which involved the annexure of land under the sovereignty of Spain and included the conquering of the Philippines Islands after suppressing the indigenous uprising for independence. The United States had frequent violent clashes with Cuba during the 18th and 19th Centuries; Kenneth Hendrickson Jnr, *The Spanish-American War* (2003) 3-37; Walter Zimmermann, *First Great Triumph* (2002) 22-31 and Meaney, above n 71, 129 who described the United States annexation of the Philippines as that state’s ‘first consciously acquired dependant colony.’
However, not all instances in which the sovereign right to use war was exercised in this period were intended to create a state of war.\textsuperscript{164} Militarily-powerful states exercised this right in what they considered a limited way to achieve limited national objectives. Thus, it was not the measurement of force that determined a state of war, but the considerations of the parties involved.\textsuperscript{165} As Brownlie observed:

\begin{quote}
‘As a rule only powerful states would assert their rights as neutrals in a case in which the parties to a conflict did not themselves admit a state of war. Limited forms of coercion and also large-scale hostilities could take place without the victim of an attack asserting that ‘war’ existed since the attacker was often a major Power and the victim a relatively weak state anxious not to aggravate the situation.’\textsuperscript{166}
\end{quote}

He also described the effect of this limited exercise of the sovereign right to use war in this way:

\begin{quote}
‘A Great Power could with impunity conduct military or naval operations against a lesser Power which it did not characterize as war but as a reprisal, pacific blockade, or intervention or which it did not characterize at all, except perhaps negatively or merely pointing to the absence of a state of war. The lesser Power had the right to elect to treat the hostilities as creating a ‘state of war’ but in practice the lesser Power involved preferred to accept the limited character of the conflict indicated by the absence of war.’\textsuperscript{167}
\end{quote}

Specific reasons, or ‘stereotyped pleas’,\textsuperscript{168} were used to justify the use of armed force during this period.\textsuperscript{169}

\begin{flushright}
\textsuperscript{164} Lauterpacht, above n 7, 223.
\textsuperscript{165} Arnold McNair and Arthur Watts, \textit{The Legal Effects of War} (4\textsuperscript{th} ed, 1966) 7-8 and observed that a state of war depended on at least one of the parties so asserting, with or without the other state so agreeing. They add that a state of war is so serious a matter that it cannot be implied.
\textsuperscript{166} Brownlie, above n 8 (1963), 28.
\textsuperscript{167} Ibid 39. At 31, he observed that it was in the interest of states using such force not to categorise their conduct as one of war: ‘A government which states that war existed adopts and approves what might have passed as an isolated incident, the subject merely of a demand for damages and an apology’.
\textsuperscript{168} Ibid 41 and Lauterpacht, above n 7, 178-179 and 202-203.
\textsuperscript{169} Brownlie, above n 8 (1963), 41 and 216. See also Lauterpacht, above n 7, 136-141 and Malanczuk, above n 8, 19-20. The beginning of the 20\textsuperscript{th} century gave rise to a series of bilateral arbitration treaties, such as the \textit{Root Treaties}, 2 NRG Series 3, 30 between the United States and France and other states between 1908 and 1914 and the \textit{Treaties for the Advancement of Peace 1913}, 61 Stat. 1245 (entered into force 1 September 1913) between the United States and others in 1913 and 1914 which required a delay of 12 months after a dispute during which time force could not be used between and against the parties to them.
\end{flushright}
Naval blockade was not considered an act of war by the state employing it when done so to force the settlement of a dispute (usually after peaceful means to settle the dispute had failed).\textsuperscript{170} If a militarily-inferior state asserted that the use of such force was an act of war, the superior state often ignored this declaration in order to avoid the implications of war which arose under international law.

For example, in April 1914, military forces of the United States landed and occupied Vera Cruz in Mexico in response to three crew members of the \textit{U.S.S. Dolphin} having been arrested and detained by Mexican authorities. Although Mexico released the crew members and apologised to the United States, the United States Congress on 22 April 1914 issued a joint resolution in response to the request made to it by President Wilson. This request was for the authorisation of the use of force to enforce the demand by the United States for ‘unequivocal amends for certain affronts and indignities committed against the United States.’ Congress stated that the United States ‘disclaims any hostility to the Mexican people or any purpose to make war on Mexico’. However, the Mexican Minister for Foreign Affairs claimed that under international law the conduct of the United States amounted to an act of war. The United States ignored the Mexican assertion. Part of President Wilson’s address to Congress proceeded:

‘If armed conflict should unhappily come as a result of his attitude of personal resentment toward this government, we should be fighting only General Huerta and those who adhere to him and give him their support, and our object would be only to restore to the people of the distracted republic the opportunity to set up again their own laws and their own government… There can in what we do be no thought of aggression or of selfish aggrandizement. We seek to maintain the dignity and authority of the United States only because we wish always to keep our great influence unimpaired for the uses of liberty, both in the United States and wherever else it may be employed for the benefit of mankind.’\textsuperscript{171}

\textsuperscript{170} Brownlie, above n 8 (1963), 20 and Lauterpacht, above n 7, 132.
At the port of Navarino in 1827, France, Russia and Great Britain used their superior naval forces to blockade the port in order to forcefully intercept Turkish shipping. The Turkish fleet was provoked and engaged which resulted in the destruction of 60 Turkish ships and the death of 4000 Turkish sailors. Despite this, the Governments of France, Russia and Great Britain stated that their conduct did not create a state of war with Turkey.\(^\text{172}\)

Other conspicuous instances of naval blockade include the French blockade of Formosa from 1882 to 1885\(^\text{173}\) and the blockade of Venezuela by Germany, Great Britain and Italy from 1902 to 1903.\(^\text{174}\) In all instances, significant force was used by states without any recognition of a state of war. The only exception was in the case of Formosa in 1825, but not until very late in the blockade and only after significant force had been used against China.\(^\text{175}\)

‘Intervention’ in this period was manifested by a ‘dictatorial interference’ by one state against another in order to settle a dispute in favour of the intervening state.\(^\text{176}\)

The use of armed force by the intervening state often characterised intervention in this period, but the threat of such force, political pressure or diplomatic protest to coerce a state to submit to the demands of the intervening state were also forms of conduct which constituted intervention.\(^\text{177}\) Brownlie restricted his examination to

\(^{172}\) Lauterpacht, above n 7, 144-145 in which he points out that naval blockades before the 19th century was only employed between belligerents: ‘It was not until the second quarter of the nineteenth century that a so-called pacific blockade – that is, a blockade during time of peace – was first resorted to as a compulsory means of settling an international difference.’ See also Christopher Woodhouse, *The Battle of Navarino* (1965) 112-140.

\(^{173}\) Lauterpacht, above n 7, 146; Brownlie, above n 8 (1963), 31-33 and Bruce A Elleman, *Modern Chinese Warfare 1795-1884* (2001) 84-87.

\(^{174}\) Brownlie, above n 8 (1963), 35-36.

\(^{175}\) Ibid 33

\(^{176}\) Ibid 44.

\(^{177}\) Ibid 44-45 and Lauterpacht, above n 7, 150-151.
intervention committed by the threat, or use, of force. He quoted Lawrence who wrote that ‘The essence of intervention is force, or the threat of force, in case the dictates of the intervening power are disregarded…’ The use of armed force to protect the lives and property of nationals in other states was considered a legitimate action for intervention, although the use of force to achieve this end was sometimes categorised as ‘necessity’, ‘self-preservation’ and even ‘self-defence’, on the basis that nationals in a foreign state constituted an extension of their own state.

‘Necessity’ was a reason given to justify military force short of war which operated as ‘an aspect of the right of self-preservation’. It was applied for the purpose of securing the protection of economic, or other, interests external to the territory of the state considered vital to it. The state invoking necessity was the sole judge of its use. According to Brownlie, necessity was identical in substance to the right of self-preservation. He believed that the simultaneous and liberal use of the concepts of necessity and self-defence in the 19th century to justify force arose because of confusion in terminology, rather than for the purpose of defining distinct state practices:

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179 Brownlie, above n 8 (1963), 44.
180 Ibid 289-291; Derek W Bowett, *Self-Defence in International Law* (1958) 14-15; Westlake, above n 32, 299 and Lauterpacht, above n 7, 151. The protection of the lives and property of nationals was a basis for the lawful exercise of the sovereign right to use war in the times of the early scholars, as seen in sub-chapters 2.3 and 2.4 above. The United States, in particular, has a long history of exercising the sovereign right for this purpose; see Brownlie, above n 8 (1963), 290-291.
181 Ibid 42.
182 Ibid. ‘Necessity’ in this respect is not the same concept as the consideration of necessity in respect of self-defence as described in Chapter 2.
183 McCormack, above n 6 (2005), 242-243.
184 Brownlie, above n 8 (1963), 43 where he wrote, ‘Self-defence was regarded either as synonymous with self-preservation or as a particular instance of it.’ His opinion on the same page is that ‘The statesmen of the period used self-preservation, self-defence, necessity, and necessity of self-defence as more or less interchangeable terms’. 
‘The right of self-preservation is in some cases asserted parallel to, or as a form of, a doctrine of necessity. There would seem analytically to be no distinction between the two and the discussions in works of international law certainly treat them as identical except in so far as necessity is a wider legal category and may, for example, appear in the context of the laws of war.’\(^{185}\)

‘Reprisal’ in this period was constituted by the use of military force by one state against another in response to the latter’s perceived international delinquency.\(^{186}\) Lauterpacht described the essential features of reprisal as:

> ‘injurious and otherwise internationally illegal acts of one State against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a dispute created by its delinquency.’\(^{187}\)

Reprisal, to be considered lawful in international law, must have been motivated to obtain justice. The justice sought through reprisal could have related to a breach of a commercial treaty, as was the case in 1840 when Great Britain laid an embargo on Sicilian ships after Sicily allegedly violated a treaty with Great Britain (which guaranteed her certain rights for the mining of sulphur) by granting a monopoly to a French company.\(^{188}\) In contrast, the Case of Don Pacifico, which involved the capture of Greek vessels by Great Britain in respect to a claim by a private British citizen which could have been settled in the Greek courts, was considered by Lauterpacht as being a case in which the reprisal was not genuinely motivated by considerations of justice.\(^{189}\)

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\(^{185}\) Ibid 42.

\(^{186}\) Bowett describes reprisal as essentially ‘punitive in nature; they seek to impose reparation for the harm done, or to compel a satisfactory settlement of the dispute created by the initial act, or to compel the delinquent state to abide by the law in the future…’; Derek Bowett, ‘Reprisals Involving Recourse to Armed Force’ (1972) 66 American Journal of International Law 1.

McCormack, above n 6 (2005), 238 distinguished acts of reprisals from lawful self-defence as being ‘motivated by a desire for revenge, and constitute punitive measures, whereas acts undertaken in self-defence are to protect the defending state against the acts of another state that are in violation of international law’.

\(^{187}\) Lauterpacht, above n 7, 136. His examination of reprisal is contained at 135-144. The self-help means of ‘retorsion’ is contrasted from reprisal in that retorsion does not involve the use of force by the aggrieved state and therefore has no purpose for consideration in this thesis.

\(^{188}\) Ibid 136-137.

\(^{189}\) Ibid 137-138.
Lauterpacht wrote that reprisal could be directed against ‘anything and everything’ which belonged to the delinquent state or its citizens, including the territory of that state, and described it as a ‘rough means for the settlement of disputes’ which often gave rise to occasions of abuse between powerful and weak states.\textsuperscript{190} However, he acknowledged that, in the absence of a strong central international authority, states had little alternative but to continue to use reprisal as a means of achieving redress.\textsuperscript{191} In describing reprisal as a use of force short of war, Brownlie found one positive aspect to the state practice:

‘At a time when legal controls of the use of force were not conspicuous it had perhaps one useful function. The absence of any admission that a state of war existed indicated that the action might be intended as a reprisal or justified intervention. And even if there were no obvious justification for reprisal or intervention, its absence nearly always signified the use of force for a limited purpose, either to settle a grievance or to punish wrongdoers or to provide warning or preventative action. In such a case there is no intention to conquer or annex.’\textsuperscript{192}

3.2.2 Peaceful settlement of disputes

The end of the 19\textsuperscript{th} century saw the increasing development of international legal institutions and treaties designed to settle disputes through peaceful negotiations. The \textit{Hague Conventions for the Pacific Settlement of International Disputes} in 1899 and 1907\textsuperscript{193} evidenced an intention of its parties to extend ‘the empire of law, and of strengthening the appreciation of international justice’.\textsuperscript{194} The parties recorded in the \textit{Convention} that ‘the principles of equity and right on which are based the security of States and the welfare of peoples’ are those by which they

\textsuperscript{190} Subject to certain limited restrictions; ibid 139 and Brownlie, above n 5 (1963), 219-220.
\textsuperscript{191} Lauterpacht, above n 7, 143.
\textsuperscript{192} Brownlie, above n 5 (1963), 40. See also Charles Fenwick, \textit{International Law} (2\textsuperscript{nd} ed, 1934) 146 stated that the rights of self-preservation and self-defence arise naturally from the right of existence.
\textsuperscript{193} \textit{Hague Convention for the Pacific Settlement of International Disputes} 1899, opened for signature 29 July 1899, 1 Bevans 230 (entered into force 4 September 1900) and the \textit{Hague Convention for the Pacific Settlement of International Disputes} 1907, opened for signature 18 October 1907, 1 Bevans 577 (entered into force 26 January 1910). See Schmitt, above n 68, 89-90 and Williams, above n 6, 72-73.
\textsuperscript{194} 49 states signed and ratified the \textit{Convention} between 1900 and 1907.
were agreed to be bound.\textsuperscript{195} The \textit{Convention} did not prohibit the exercise of the sovereign right to use war, but instead had the view of ‘obviating, as far as possible, recourse to force in the relations between States’ when endeavouring to peacefully settle ‘international differences.’\textsuperscript{196} The parties to a serious disagreement or conflict agreed to mediation through other parties ‘before an appeal to arms’ as far as circumstances would allow.\textsuperscript{197}

It was clear, however, that the existence of ‘hostilities’, despite efforts to mediate, was envisaged.\textsuperscript{198} Indeed, the mediation process could not have the effect of ‘interrupting, delaying, or hindering mobilization or other measures of preparation of war’ unless the parties to the dispute agreed.\textsuperscript{199} The \textit{Convention} created the Permanent Court of Arbitration and the International Bureau provided the records, communication and administrative mechanisms for the Court.\textsuperscript{200} The object of arbitration was the settlement of differences between states and was motivated by a ‘respect for law’.\textsuperscript{201}

The \textit{Convention} was only one example of states using the law to arbitrate their disputes.\textsuperscript{202} Central American states in 1907 created the \textit{Central American Court of Justice}.\textsuperscript{203} This Court lasted for 10 years and although it entertained only 10 cases,

\begin{itemize}
\item \textsuperscript{195} The preliminary statement of intentions prior to Title I of the \textit{Convention}.
\item \textsuperscript{196} Article 1 of the \textit{Convention}.
\item \textsuperscript{197} Article 2 of the \textit{Convention}.
\item \textsuperscript{198} Article 3 of the \textit{Convention}.
\item \textsuperscript{199} Article 7 of the \textit{Convention}. This proviso against interruption extended to hostilities if mediation occurred after their commencement. See Lauterpacht, above n 7, 178-179.
\item \textsuperscript{200} Chapter II of the \textit{Convention}.
\item \textsuperscript{201} Article 15 of the \textit{Convention}.
\item \textsuperscript{202} Other examples include the \textit{Root Treaties}, 2 NRG Series 3, 30 between the United States and France and other states between 1908 and 1914 and the \textit{Treaties for the Advancement of Peace}, 61 Stat. 1245 (entered into force 1 September 1913) between the United States and others in 1913 and 1914.
\item \textsuperscript{203} \textit{Treaty of the Central American Peace Conference 1907}, opened for signature 20 December 1907, 7 Bevans 101 (entered into force 20 December 1907) which arose from the Central American
its creation evidenced the intention of five Central American states to employ international arbitration as an alternative to war. As with the Hague Convention, the treaty which created the Court did not prohibit the exercise of the sovereign right to use war. Additionally, the Venezuelan Arbitrations formed the basis of the Porter-Drago Convention, which precluded its parties to use force to recover debt.\(^{204}\)

The practice of states of using bilateral and multilateral treaties to attempt to peacefully settle disputes delayed the timing of war, but did not prohibit it.\(^{205}\) Nevertheless, this practice represented a number of important developments relating to the sovereign right to use of war in this period.

First, the use of treaties to specify the rules for the peaceful settlement of disputes helped to formalise the concept of international arbitration and conciliation first referred to by early legal scholars. Secondly, the sovereign right to use war was recognised by states in these treaties and its immediate exercise to settle a dispute was becoming a less favourable option.\(^{206}\) Thus, it may be concluded that the Convention and other like treaties were further evidence of the practice and opinio juris of states for the purpose of international customary law.

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\(^{205}\) Brownlie, above n 8 (1963), 25 warned against overestimating the effects of the international movement towards arbitration and conciliation at this time, pointing out that ‘Major clashes of interest were rarely submitted to arbitration’.

\(^{206}\) Ibid 26, 28. Brownlie believed that some reasons for this include public opinion, economic considerations, media and negative national consequences occasioned by war.
The above examination illustrates the general developments in international law in the period 1815 to 1914 concerning the sovereign right to use war to settle international disputes and the momentum created to use peaceful means rather than war. It was in this historical environment in which the sovereign right to use war defensively continued to exist in international law.

Of particular relevance is the distinction which emerged in international law between the use of war and the use of force. This distinction is relevant because as international law continued to restrict the exercise of the sovereign right to use war, the object of this restriction would, in time, encompass not only ‘war’ but also the ‘threat, or use, of force’.

3.2.3 Caroline

In relation to the sovereign right to use war defensively in the period 1815 to 1914, there is not a significant amount of material available for analysis.207 Of most relevance to my thesis is Caroline.208 The considerations of immediacy, necessity and proportionality which were identified by early legal scholars prior to 1815 were authoritatively articulated in this diplomatic correspondence as international customary law principles. Caroline is of particular relevance to my four supporting questions of law because it considered the sovereign right to use war defensively, the customary law principles of immediacy, necessity and proportionality and the

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207 Brownlie, above n 8 (1963), 249.
respective functions fulfilled by these two elements of the international law of self-defence.

In *Caroline*, the British seized a United States ship being used to supply rebel leaders in the Canadian Rebellion of 1837 while it was docked in the United States port of Schlosser. The British fired the ship and sent it over Niagara Falls, killing two United States nationals. The legality of this act was debated in detail in correspondence between the two states. Secretary of State of the United States Government, Mr Daniel Webster, wrote to Her Britannic Minister Plenipotentiary on Special Mission to the Secretary of State of the British Government, Lord Ashburton, in protest:

"It will be for [Her Majesty’s] Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorised them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.

It must be shown that admonition or remonstrance to the persons on board the Caroline was impracticable, or would have been unavailing; it must be shown that day-light could not be waited for, that there could be no attempt to discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was necessity, present and inevitable, for attacking her in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some and wounding others… a necessity for all this, the Government of the United States cannot believe to have existed."

How many international customary law principles were recognised in this correspondence? Some scholars have suggested that there were two, namely, ‘necessity’ and ‘proportionality’. They suggest that the concept of immediacy as

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210 For example, Triggs, above n 8, 577 [10.16] and McCormack, above n 6 (2005), 262-263 who described the customary law principle of necessity in this two-dimensional way. He wrote that the first dimension involved a consideration of the nature of the threat to the self-defending state and the second involved a consideration of the physical proximity or imminence of that threat, and Green, above n 6, 64-111. See also Institut de Droit International, *Present Problems of the Use of*
described by early legal scholars was a factor to be fulfilled as part of the customary principle of necessity. Other scholars have recognised the three principles described by early legal scholars. Whichever interpretation of *Caroline* is adopted, the outcome is the same, for both views focus on factors common to the commencement of all conflicts which were measured by these principles to determine when the sovereign right to use war defensively could be exercised. These factors included the nature and location of the weaponry and troops mobilised by the state threatening force and the capacity of the self-defending state to defend itself against the threat should it evolve into a use of armed force.

The practice and *opinio juris* of states in the exercise of the sovereign right to use war defensively in the examined period, while considered at times to have been reactionary in nature, does not clearly establish which interpretation of *Caroline* was adopted and applied. For instance, in the Crimean War from 1853 to 1856, the Ottoman Empire declared war on Russia on 23 October 1853 after Russian troops on 2 July 1853 occupied by force (and without a declaration of war) provinces

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211 For example, Dinstein, above n 7, 209; Schmitt, above n 68, 92-93; Williamson, above n 6, 3, 115-117, 206, 213-216, 229 and 246 and Doyle, above n 6, 11-15.

212 Brownlie, above n 8 (1963), 250.

213 Ibid 42-44. Brownlie devotes three pages to the legal principles governing the right of self-defence during this period. At 249 he writes that there is a paucity of direct relevant evidence on self-defence generally before 1945. In addition, at 42-44, he writes that the right of self-defence as a distinct legal concept in this period was sometimes obscured by being intrinsically connected to, or considered part of, forcible self-help concepts such as ‘self-preservation’. See also McCormack, above n 6 (2005), 224-225. The Japanese representative on 18 September 1931 justified Japanese military action in Manchuria as ‘justifiable measures of self-protection on the standard principle laid down in the *Caroline*, that every act of self-defence must depend for its justification on the importance of the interests to be defended, on the imminence of the danger, and on the necessity of the act’; 27 (1933) *American Journal of International Law* 100.

214 For example, Bryde, above n 208, 212-215; Greig, above n 6, 366-402 and Mrazek, above n 208, 81-111.
proximate to the Empire.\textsuperscript{215} This occupation was seen by Turkey as posing an imminent threat of invasion. Turkish troops attacked the Russian army in those provinces and soon after the Russian fleet destroyed the Turkish fleet.\textsuperscript{216}

In the Franco-Prussian War from 1870 to 1871, Prussia exercised its sovereign right only after the French armies crossed its border. However, this defensive war by Prussia may be viewed as having exceeded the customary law principle of proportionality when Prussia not only repelled the advancing French army from Prussian territory, but also went on to invade and conquer France and to seize sovereignty over large areas of its territory.\textsuperscript{217} As suggested earlier in sub-chapter 3.2.1, this may have been the motive of Bismark from the outset, which perhaps undermined the entire question of self-defence. The Japanese-Russo War in 1904 commenced with a simultaneous declaration and use of war by the Japanese, so the customary law principles of immediacy and necessity from the perspective of the Russian Fleet were coincidentally fulfilled.\textsuperscript{218}

China refrained from exercising its sovereign right against the combined British, French, Russian and United States fleets in the face of the prolonged and serious threat posed by them before the commencement of the Second Opium War,\textsuperscript{219} but exercised its sovereign right when attacked. However, China’s delay was probably attributable as much to the overwhelming power of the fleet and of the internal turmoil inside China.


\textsuperscript{216} Royce, above n 154, 25-29 and Meaney, above n 71, 315.

\textsuperscript{217} Craig, above n 160, 5-44 and Meaney, above n 71, 147, 317-318.

\textsuperscript{218} Nish, above n 162, 40-43 and Meaney, above n 71, 210.

\textsuperscript{219} Meaney, above n 71, 280-288.
Hostilities at the commencement of the First World War, despite the enormous military build-up and political tensions in Europe from 1912, occurred only after formal declarations of war. However, the German declaration of war on Russia occurred in the face of what was perceived as an imminent threat of armed force from a general mobilisation of Russian troops and her navy, but before these forces had left the territory, or territorial waters, of Russia.

I will adopt in the period 1815 to 1914 the approach of the diplomats in *Caroline* of categorising immediacy, necessity and proportionality as separate international customary law principles. My adoption is intended to highlight the individual legal functions fulfilled by these principles. Maintaining a clear distinction of each will become increasingly important throughout my thesis. The individual legal functions of these principles, as described in *Caroline*, will now be examined.

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220 Ibid 335-354. See also The Austro-Hungarian Ultimatum to Serbia, 23 July 1914, *The Austro-Hungarian Minister for Foreign Affairs, Berchtold, to the Minister at Belgrade, Vienna, 22 July 1914*, cited at ibid 601-603, and Berchtold, *The Austro-Hungarian Minister for Foreign Affairs, Berchtold, to the Minister at Belgrade* (1914) <www.firstworldwar.com/source/austrianultimatum.htm> at 23 February 2009; The Serbian Response to the Austro-Hungarian Ultimatum, 25 July 1914, *The Royal Government of Serbia, The Serbian Response to the Austro-Hungarian Ultimatum*, 25 July 1914 cited at ibid 603-606, and The Royal Government of Serbia, *The Serbian Response to the Austro-Hungarian Ultimatum* (1914) <www.firstworldwar.com/source/austrianultimatum.htm> at 23 February 2009; The Kaiser’s Response to Serbia’s Reply, 28 July 1914, *The Emperor to the German Secretary of State of Foreign Affairs*, 28 July 1914 cited at ibid 606-607; Austro-Hungarian Declaration of War with Serbia, 28 July 1914, *Count Leopold von Berchtold, Austro-Hungarian Foreign Minister, to M. N. Pashitch, Prime Minister and Foreign Minister of Serbia*, (1914) <www.firstworldwar.com/source/austrohungariandeclarationofwar_serbia.htm> at 23 February 2009; Germany’s Declaration of War with Russia, 1 August 1914, *The German Emperor to His Majesty the Emperor of Russia, Germany’s Declaration of War with Russia* (1914) <www.firstworldwar.com/source/germandeclarationofwar_russia.htm> at 23 February 2009, which reads “The Imperial German Government has used every effort since the beginning of the crisis to bring about a peaceful settlement. In compliance with a wish expressed to him by His Majesty the Emperor of Russia, the German Emperor had undertaken, in concert with Great Britain, the part of mediator between the Cabinets of Vienna and St. Petersburg; but Russia, without waiting for any result, proceeded to a general mobilization of her forces both on land and sea. In consequence of this threatening step, which was not justified by any military proceedings on the part of Germany, the German Empire was faced by a grave and imminent danger. If the German Government had failed to guard against this peril, they would have compromised the safety and the very existence of Germany. See also Germany Declaration of War with France, 3 August 1914, *The German Ambassador to Paris, Germany’s Declaration of War with France* (1914) <www.firstworldwar.com/source/germandeclarationofwar_france.htm> at 23 February 2009.
3.2.3.1 Immediacy

The international customary law principle of immediacy articulated in *Caroline* imposed an obligation on a self-defending state to assess the temporal proximity of a threat of armed force against a sovereign state.\(^\text{221}\) This principle functioned, as it did in the era of early legal scholars, to restrict the exercise of the sovereign right to use war defensively until such a threat became imminent. ‘Imminent’ in the sense described by the diplomats meant that the threat was so proximate to becoming a use of armed force that the self-defending state was compelled to act to avoid being attacked first.\(^\text{222}\) Thus, it can be observed that the use of defensive war was for the purpose of protecting the self-defending state (or other states if it was an exercise of collective defence) from suffering the actual use of force.\(^\text{223}\)

International law permitted the immediate assessment of the imminence of a threat of armed force to be made by the self-defending state, as was the case in the era of early legal scholars.\(^\text{224}\) A threatened state was not required by international law to await an opinion from the international community about whether it could lawfully exercise its sovereign right.\(^\text{225}\) Thus, a build-up of the armies of state A along the border with state B, but within the territory of state A, may or may not have fulfilled the customary law principle of immediacy. The answer to this question

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\(^{221}\) Brownlie, above n 8 (1963), 333.

\(^{222}\) Waldock, above n 6, 498 and Brownlie, above n 8 (1963), 261.

\(^{223}\) Brownlie, above n 8 (1963), 434 point (b); Bowett, above n 180, 1; Dinstein, above n 7, 209; Gray, above n 8, 121; Alexandrov, above n 8, 167; Maogoto, above n 7, 95; Cassese, above n 7, 355; Judith Gardam, ‘Proportionality and the Use of Force in International Law’ (1993) 87 *American Journal of International Law* 391-413 and Schmitt, above n 28, 92 who writes ‘Necessity requires that forceful defensive reactions be of a last resort – that peaceful means of resolution be exhausted first’ and ‘U.S. State Department, Memorandum on U.S. Practice with Respect to Reprisals’ (1979) 73 *American Journal of International Law* 489.’

\(^{224}\) See sub-chapter 2.4 and Randelzhofer ‘Article 51’ in Simma (ed), above n 7, 804 [40], 805 [42]; Gray, above n 8, 121; Cassese, above n 8, 355 and Harris, above n 151, 896.

\(^{225}\) Dinstein, above n 7, 209 and O’Connell, above n 22, 316. Georg Schwarzenberger, *A Manual of International Law* (3rd ed, 1952) 83 held views consistent with those of O’Connell in describing the right of self-defence if ‘there was an instant and overwhelming necessity for such action’.
depended on a consideration of all the circumstances. For instance, an ultimatum may have been given by state A to state B that if demand X was not met in 14 days, there would be ‘dramatic consequences’. Therefore, the closer the expiration of that period, the closer the principle of immediacy came to being fulfilled. So, the acts which constituted the threat were not restricted to the mobilisation of troops and weapons.

What was the precise legal function(s) fulfilled by the international customary law principle of immediacy? Caroline illustrates that its primary function was to measure the temporal proximity of a threat of armed force directed against the state. Caroline confirmed the view expressed by the early scholars that this principle was fulfilled before armed force was used against a self-defending state, as evinced by the words ‘there was necessity, present and inevitable, for attacking her in the darkness of the night…’ ‘Inevitable’ in this sense appears to mean that the threat was of such a nature that its elevation to armed force appeared imminent and certain.

Another legal function of the international customary law principle of immediacy not generally identified by scholars was its ability to adapt and be applied to the evolution in weaponry. For example, this principle was fulfilled at an earlier point in time by a new weapon that was capable of delivering its payload faster than other weapons, such as the introduction into warfare of the aeroplane. Thus, the mobilisation of the air force of state A, which was situated some distance from its

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226 This was the case with Germany and Russia between 27 July 1914 and 1 August 1914, as seen above.
227 Brownlie, above n 8 (1963), 250, 257-258, 306. He cautions at 258-260 and 366-367 that anticipatory self-defence had obvious dangers, that its justification was infrequent and that the more distant the impending attack, the less cogent the exercise of the right. See also McCormack, above n 6 (1991), 131, 246-248.
border with state B, may have fulfilled this principle earlier than a mobilisation of closer troops. Therefore, regardless of the nature of the weapon which constituted an imminent threat of armed force, the nature of this principle allowed the sovereign right to be exercised against it before it was actually used against the self-defending state.

3.2.3.2 Necessity

The international customary law principle of necessity during the period 1815 to 1914 must firstly be distinguished from the doctrine of ‘necessity’ used to justify war for the purpose of self-help.\(^{228}\) The former related to the circumstantial compulsion on the part of a self-defending state to exercise its sovereign right to use war defensively against an imminent threat of armed force.\(^{229}\) The latter was the general justification for exercising the sovereign right to use war in order to protect its national interests abroad considered vital to the state.\(^{230}\)

*Caroline* illustrates that the function fulfilled by the customary law principle of necessity was to restrict an exercise of the sovereign right to use war defensively to circumstances in which it was necessary to repel an imminent threat of armed force so as to avoid the use of such force.\(^{231}\) Circumstances to be assessed by the state

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\(^{228}\) Brownlie, above n 8 (1963), 216.

\(^{229}\) Ibid 231 as opposed to the self-help doctrine of ‘legitimate defence’ which ‘involved action to prevent or redress violation of legal rights’.

\(^{230}\) For instance, Brownlie wrote that in the 19th century the doctrine of necessity, when defined, appeared to be ‘applicable when action is necessary for the security or safety of the state’; ibid 42, 48 and 231. Other pleas to achieve the same result included the right to self-preservation and the protection of vital interests; 41.

\(^{231}\) Ibid 42; Lauterpacht, above n 7, 177-179, 222; Hall, above n 7, 304 [9.23] and Schmitt, above n 28, 92 believe that the customary international law principle of necessity underlies the very concept of self-defence and became even more significant when the international community began controlling the right to go to war. Arend and Beck, *International Law & The Use of Force* (1993) 72 wrote ‘First, a state would need to demonstrate that such forceful action [the use of defensive force] was necessary to defend itself against an impending attack. It would, in other words, be
when determining whether this principle was fulfilled included the weapon deployed by the threatening state, the size and location of its troop mobilisation, the military capacity of the self-defending state to defend itself against those factors and the political situation between the states. *Caroline* demonstrates that the function fulfilled by this customary law principle was to determine whether any means other than defensive war were likely to prevent an imminent threat of armed force from evolving into a use of such force.

The fulfilment of this function must be viewed in conjunction with the fulfilment of the international customary law principle of immediacy, for it was the coincidental fulfilment of each principle which triggered the sovereign right to use war defensively. Thus, with the principle of immediacy fulfilled, the function of the principle of necessity was fulfilled if the circumstances, as perceived by the self-defending state, showed that there was no practical recourse to defend itself other than by exercising its sovereign right. In other words, peaceful negotiations, or any other means, were unlikely to prevent the state from avoiding an attack, thus necessitating defensive war.

### 3.2.3.3 Proportionality

The international customary law principle of ‘proportionality’ was reflected in the words in *Caroline* ‘since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it’. But this customary law principle was reflected in the work of early legal scholars. The legal effect of

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233 See sub-chapter 2.4.3 above.
these words were to impose upon a self-defending state an obligation to restrict the use of defensive war to repelling the threat, or use, of armed force.\textsuperscript{234} This obligation appears to have been intended to restrict the extent to which defensive war could be used after having lawfully been initiated.\textsuperscript{235}

The words ‘and kept clearly within it’ in \textit{Caroline} clearly articulate the function fulfilled by the customary principle of proportionality. Thus, it can be concluded that once the customary principle of necessity was no longer fulfilled (due to the imminent threat, or use, of armed force having been successfully repelled) there was no legal scope within which the customary principle of proportionality could have operated, as the right to use defensive war had ceased.\textsuperscript{236}

It can be seen in \textit{Caroline} that the customary law principle of proportionality contributed directly to controlling the use of war between states.\textsuperscript{237} Even when a sovereign state was lawfully justified to use defensive war, the customary principle of proportionality functioned to prevent such war from becoming illegitimate revengeful war.\textsuperscript{238}


\textsuperscript{236} Lauterpacht, above n 7, 223. The Franco-Prussian War of 1870-1871 can be seen as an example of this.

\textsuperscript{237} As long as these principles are applied in governance of the inherent right itself, as it was in \textit{Caroline}, rather than in some relation to an incorrectly perceived customary law right of anticipatory self-defence, which may lead them to be viewed as a ‘deeply flawed’ formula in contemporary international law; see, for example, Doyle, above n 6, 15.

\textsuperscript{238} Lauterpacht, above n 7, 158, 189-190; Fenwick, above n 192, 228-248; Brownlie, above n 8 (1963), 257 and Keith, above n 208, 150-151 views the right to self-defence as ‘one of the most
This is not to say that a subversion, or manipulation, of the functions fulfilled by the three customary law principles was not possible, even in circumstances in which the principles of immediacy and necessity appeared fulfilled. An example was the Franco-Prussian War of 1870 to 1871. Although Bismark’s apparent manipulation of circumstances led France to declare war on Prussia, the point at which the Prussian defensive war progressed beyond a repulsion of the French troops from Prussian territory was the point at which the customary principles of necessity and proportionality were no longer fulfilled. It was also the point at which Prussia arguably exceeded the customary principle of proportionality.

Despite the circumstances under which the Franco-Prussian War commenced, the international customary law principles of immediacy, necessity and proportionality remained constant substantive rules of the international law of self-defence throughout the period 1815 to 1914.

3.3 The legal scope of defensive war

It will be recalled from sub-chapter 2.4.2 that the legal scope of the sovereign right to use war defensively before 1815 was the imminent threat, or use, of armed force. This legal scope was determined by the restrictions imposed on the exercise of this right by the operation of the considerations of immediacy and necessity. *Caroline* recognised the same considerations as international customary law principles. While these principles remained a part of international law, the *prima facie* view is that they continued to form the legal scope of the sovereign right in the period 1815 to 1914, that is, the conduct against and the time at which the

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essential and important and that which lies at the foundation of all the rest’ but does not examine the *Caroline* or the principles of immediacy and necessity.

239 Craig, above n 160, 5-44 and Meaney, above n 71, 147, 317.
sovereign right could lawfully be exercised. This legal scope remained the same as in the era of early scholars, that is, the imminent threat, or use, of armed force.\textsuperscript{240} This \textit{prima facie} view is consistent with instances of state practice examined during this period.

3.4 The legal commencement of an armed attack between sovereign states

It will be recalled from sub-chapter 2.4.4 that the legal basis for a definition for the legal commencement of an armed attack in the Law of Nations could be inferred from the operation of the considerations of immediacy and necessity. The inference I drew was that this point in time was probably when these two customary principles were fulfilled by an imminent threat of armed force. It was at this point that the sovereign right to use war defensively was triggered in the threatened state.

The \textit{prima facie} view formed is that the same definition, derived from the same legal theorem and justified by the same preference for the point of time it pinpoints to a point either before, or after, it can be applied to international law in the period 1815 to 1914. The available materials from this period do not disclose a formal source of international law providing such a definition.

3.5 Conclusion

In relation to my first supporting question of law, the rationale for the right of a state in international law to use war offensively, or defensively, in the period 1815 to 1914 appears to have continued to be state sovereignty. Although international

customary law continued to restrict the exercise of the sovereign right to use war to finally settle disputes between states, the period saw a growing preference for first attempting to peacefully settle those disputes. The diplomatic correspondence in *Caroline* seems consistent with this rationale. It was this sovereign right to use war that was recognised in the diplomatic correspondence.

It then seems to follow in relation to my second supporting question of law that state sovereignty could still properly be regarded as the rationale for anticipatory self-defence in the period examined. In this respect, an exercise of the sovereign right to use war defensively against an imminent threat of armed force was not considered in *Caroline*, or in the practice and *opinio juris* of states in self-defence, to be pursuant to a legal right which existed separately to the sovereign right in international law.

In relation to my third supporting question of law, *Caroline* recognised the considerations of immediacy, necessity and proportionality described by early legal scholars in Chapter 2 as international customary law principles. These customary law principles continued to restrict when, why and to what extent the sovereign right could be exercised in self-defence in international law. The operation of the first two principles appear capable of continuing to determine the legal scope of the sovereign right to use war defensively, that is, the range of conduct against and the time when the right could be lawfully exercised.

The answers to my first three supporting questions of law in the period examined suggest that my definition of the legal commencement of an armed attack proposed in Chapter 2 could remain applicable to the period studied. The legal effect of the
fulfilment of the principles of immediacy and necessity by an imminent threat of armed force triggered the sovereign right to use war defensively in a threatened state. At this point of time, the legal relationship between the aggressor and threatened state can be seen as being altered in international law from being one of peace to being one of war (in the absence of an earlier declaration of war). It was at this point that international sanctioned the use of armed force by the threatened state to defend itself from suffering harm.

My definition of the legal commencement of an armed attack is regarded as remaining preferable to a definition which relates to an earlier, or later, point in time in a conflict. Both alternatives would appear to apply inconsistently with what is known of the function fulfilled by the sovereign right to use war defensively and the functions fulfilled by the international customary law principles of immediacy and necessity. In this respect, the validity of my reasons given in sub-chapter 2.4.4 as to why my definition was formed about the period before 1815 may be regarded as continuing in the period 1815 to 1914.

The last observation made in my conclusion to Chapter 2 was that the two possible effects of the process of recognition by international customary law of the sovereign right to use war defensively and its consequent incorporation into international law were that this process either resulted in the principles of immediacy, necessity and proportionality forming the substantive content of customary law, or that a distinct ‘customary law right of self-defence’ was also formed. The evidence in the period studied appears to remain consistent with the first view. It is clear from Caroline that the practice and opinio juris of states in self-defence that states believed that it was the sovereign right to use war
defensively whose exercise was restricted by the customary law principles of immediacy, necessity and proportionality.

The First World War during the years 1914 to 1918 will be seen in the following chapter as a catalyst for the international community to use international law to centralise the machinery for the peaceful settlement of disputes between states. The following period from 1919 to 1939 saw an increase in the momentum for peaceful settlement. Until 1928, however, this momentum did not prohibit the sovereign right to use war from being exercised to ultimately settle a dispute. This period, which will now be examined, is an important transitionary period for the developing system of international law in its move away from war.
Chapter 4

The use of force between states – 1919 to 1939

4.1 Introduction

The purpose of this chapter is to explore the developments in international law in the period 1919 to 1939 and to determine whether the answers to my four supporting questions of law, as produced in Chapters 2 and 3, may have remained applicable. This chapter has particular relevance to the purpose of my thesis, as it will establish the answers to my central and supporting questions immediately before the creation of the Charter.

These answers are important at this point in time because Article 51 of the Charter in 1945, as will be seen in Chapter 5, recognised and protected from impairment the inherent right of self-defence (formerly termed the ‘sovereign right to use war defensively’) as understood in international law at that time. Therefore, the nature of this right and its legal scope immediately before the Charter are considered crucial to answering the question posed by my thesis when it may first be asked, which is in 1945.

The period studied in this chapter saw a significant increase in the restriction placed by international law on the lawful exercise of the sovereign right to use war offensively and in the use of peaceful means to settle legal disputes. It will be seen that the Covenant of the League of Nations 1919\textsuperscript{241} required its signatory states to submit to a process of peaceably settling their legal disputes. The treaty restricted

the lawful use of war to those instances in which this process failed. However, the most significant development in this period was the prohibition of war introduced by the *General Treaty for the Renunciation of War 1928*, a treaty which prohibited all forms of war other than defensive war. In turn, this prohibition heightened the legal distinction previously made by states between war and the use of force short of war, because some states began considering a use of force which hitherto might have been considered ‘war’ not as war. The purpose of this was to avoid the ramifications in international law which would accompany a use of war.

While the general legal effect of the *General Treaty* is not a matter of scholarly controversy, I will explore a new consequence which may have arisen from this treaty which is unexamined by scholars. This consequence is that the prohibition of war created by this treaty created a corollary legal right in states to remain free from the use of war in their international relations. As a result, the importance of anticipatory self-defence in fulfilling its historic function of protecting and preserving the state from an imminent threat of armed force might be simultaneously considered as the final means by which the new legal right created by the *General Treaty* was defended.

The existence of this new legal right, if accepted, may be seen as an important development in international law, as it represented the first time in history in which states gained from international law the legal right not to suffer war. Thus, I will explore in this chapter the legal basis for a new proposition that, from 1928, anticipatory self-defence assumed a consequential purpose in international law to

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242 *1928 General Treaty for Renunciation of War as an Instrument of National Policy*, opened for signature 28 August 1928, 94 LNTS (1929) 57 (entered into force 24 July 1929). 63 states or virtually the entire international community in 1928 were party to the treaty.
protecting and preserving the state from harm, namely, the protection and preservation of the right of states not to suffer war in their international relations.

The examined period in respect of the inherent right of self-defence and the international customary law principles of immediacy and necessity is unremarkable. These two elements of the international law of self-defence remained constant. Clear evidence which appears consistent with the answers to my first three supporting questions of law will be observed in the negotiations for the General Treaty. During these negotiations, states considered the inherent right of self-defence to be an inviolable aspect of their sovereignty and one from which a treaty could not detract. These negotiations in this respect will be seen to have characterised the practice and opinio juris of states in self-defence during the period studied, that is, they exercised their inherent right of self-defence in accordance with the customary law principles of immediacy, necessity and proportionality against the imminent threat, or use, of armed force.

This chapter is divided into five sub-chapters. Sub-chapter 4.2 encompasses the developments in respect of the peaceful settlement of international disputes and the use of treaties to further restrict the use of war, including the significance of the General Treaty. In sub-chapter 4.3, I will introduce my observation of the new legal consequence which may be seen as having arisen between anticipatory self-defence and this treaty, as described above. Sub-chapter 4.4 will explore the inherent right of self-defence and the customary law principles of immediacy, necessity and proportionality and how the operation of these principles continued to naturally form the legal scope of this right.
Sub-chapter 4.5 concludes this chapter by testing the answers to my four supporting questions of law, as developed in Chapters 2 and 3, against the developments in international law in the period examined. These answers will then enable me to provide a new legal basis for answering my central question of law at the first instance at which it arises, being in 1945.

4.2 International customary law – an overview

During the years 1919 to 1928, international customary law, as recognised by Article 38(2) of the Statute of the Permanent Court of International Justice 1919, remained the principal formal source of international law which governed the use of war. The use by states of multilateral treaties after the First World War to express their growing intention to attempt to settle international disputes by peaceful means increased. These treaties continued to create and strengthen international institutions and machinery for such settlements, thereby illustrating the international community’s growing preference for avoiding the use of war to settle their disputes.

However, the sovereign right to use war to settle such disputes, as examined in Chapters 2 and 3, was prohibited by the General Treaty in 1928. Although this treaty has generally been acknowledged as inadequately addressing the issue of states continuing to use force not intended to amount to war, its prohibition of war

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243 Article 38 of the Statute of the Permanent Court of International Justice, opened for signature 28 June 1919, (1919) UKTS 1919/4 (entered into force 10 January 1920). The other formal sources recognized by Article 38 were "international conventions, whether general or particular, establishing rules expressly recognized by the contesting States, the general principles of law recognized by civilized nations, and judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."
was the culmination of a gradual move away from the use of war to settle international disputes.

4.2.1 Instances of the use of war, or force

It will be seen in sub-chapter 4.2.2.1 that the Treaty of Versailles 1919 did not prohibit the exercise of the sovereign right to use war. Rather, it restricted it to circumstances where attempts to peacefully settle international disputes failed. Instances of war after the creation of the Treaty must therefore be viewed in light of the provisions of that treaty. These instances must also be viewed in light of the significant geopolitical changes brought about by the First World War. For instance, a state of war existed between the U.S.S.R. and Poland from 1919 to 1921 over their borders, despite the Treaty of Versailles 1919 reinstating Poland’s sovereignty. There was no commitment of either state to peacefully settle their dispute prior to going to war.  

From 1919 to 1920, Britain used armed force against Afghanistan to assert control over its territory and foreign policy without declaring war. From 1919 to 1922, Greece also used armed force against territory formerly held by the Ottoman Empire in order to seize territory and exercise sovereignty over it.  

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244 The Polish-Soviet War had an estimated 247,000 people killed and was ended by the Treaty of Riga 1921 (entered into force 18 March 1921). See Norman Davies, White Eagle, Red Star: The Polish-Soviet War (1st ed., 2003) and Thomas Fiddick, Russia’s Retreat from Poland (1920). Poland also went to war with Lithuania in 1920 over a similar territorial dispute. The Silesian Uprisings at this time involved the Polish population in Silesia rebelling against Weimer rule.  

245 The Third Anglo-Afghan War was temporarily determined by the Treaty of Rawalpindi 1919, opened for signature 8 August 1919, (entered into force 8 August 1919), Clive Parry, The Consolidated Treaty Series, Vol 225, 446 which was amended on 22 November 1921. King Amunullah of Afghanistan remarked during the peace negotiations that the air bombardment of Kabul and his official residence by the British seemed a ‘habit which is prevalent among all civilised people of the West, yet is a method of warfare criticised by the British when exercised against them’; Willem Vogelsang, The Afghans (2002) 245-344.  

246 The Greco-Turkish War was ended by the Treaty of Lausanne 1923, opened for signature 24 July 1923, (entered into force 24 July 1923). The treaty also led to the international recognition of
France used armed force against Syria in 1920 after the proclamation of a Syrian Republic and nationalist government under King Faisal when the Ottoman Empire rule collapsed.\textsuperscript{247}

The *Sykes-Picot Agreement* was a secret agreement between Britain and France that determined between them their respective spheres of economic and trade influence throughout the Arab world. After King Faisal proclaimed the right of Syrians to govern themselves, Britain and France met at the San Remo Conference in March 1920. Before the French Mandate of Syria was formally approved by the Council of the *League of Nations* and before negotiations with Turkey (the former sovereign of the territory) were completed, France invaded Syria and removed King Faisal by armed force.\textsuperscript{248} France did not declare war on Syria. The U.S.S.R. in 1921 also used armed force against the Democratic Republic of Georgia in order to assume sovereignty over it.\textsuperscript{249}

Despite the prohibition of war created by the *General Treaty*, the use of war, or armed force, continued after 1928. In 1929, the U.S.S.R. and China went to war over a dispute concerning the Manchurian Chinese Eastern Railway.\textsuperscript{250} Japan from

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\textsuperscript{247} The *Sykes-Picot Agreement* 1916, opened for signature 16 May 1916, (entered into force 16 May 1916), Parry, above n 251, Vol 221, 323.

\textsuperscript{248} David Fromkin, *A Peace to End all Peace: The Fall of the Ottoman Empire and the Creation of the Modern Middle East* (1989) 286-288.

\textsuperscript{249} The Soviet-Georgian War in 1921 resulted in the creation of the Georgia Soviet Socialist Republic which was controlled politically, militarily and economically by the U.S.S.R. despite the *Treaty of Moscow* 1921 (entered into force 7 May 1920) which recognised Georgia’s independence; Robert Suny, *The Making of the Georgian Nation* (2nd ed, 1994) 207.

\textsuperscript{250} See *Text of the British Note of 2 December 1929 to China and the U.S.S.R* reprinted in John W Wheeler-Bennet (ed), *Documents on International Affairs* 1929 (1930) Royal Institute of International Affairs, 276 in which the British Government referred to the prohibition of war under the *General Treaty* and the responsibility of these nations to observe this prohibition; *Text of Identical Notes of 2 December 1929 from the United States to China and the U.S.S.R.* at 277 where the United States Government made similar observations; *Text of the Reply of the Chinese Government of 4 December 1928* at 278 in which China recognised the inherent right of self-defence for the
1931 to 1945 invaded and occupied Manchuria following an incident at Mukden. Full-scale war between Japan and China over this incident did not start until 1937 when surrounding towns were forcibly occupied by Japanese troops.\textsuperscript{251}

The Chaco War was fought between Bolivia and Paraguay from 1932 to 1935 over a territorial dispute which originated in 1906. Hostile exchanges occurred between the two states from 1928 before a state of war developed.\textsuperscript{252} Peru invaded two regions of southern Columbia on 1 September 1932 over dissatisfaction with economic agreements about sugar and the \textit{Salomon-Lozano Treaty 1922}.\textsuperscript{253} This treaty evinced an agreement between the two states over the administration of the regions invaded by Peru. These instances of war occurred within a relatively short time of the creation of the \textit{General Treaty}.

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\textsuperscript{251} The escalation of this conflict into war between the two states is commonly known as the Second Sino-Japanese War. See \textit{Appeal of the Chinese Government to the League Council 21 September 1931} reprinted in John W Wheeler-Bennet (ed), \textit{Documents on International Affairs 1932} (1932) Royal Institute of International Affairs, 240-396 at 241-242 in which the Chinese Government described the ‘unprovoked’ military actions of the Japanese armed forces; \textit{Telegram from the President of the League Council to the Chinese and Japanese Governments in Accordance with the Council’s Decision 22 September 1931} at 242-243 where the Council advocated a peaceful settlement of the dispute; \textit{Identical Notes from the U.S. Secretary of State to the Chinese and Japanese Governments} 23 September 1931 at 247 in which the United States advocated a settlement of the dispute without ‘resort to the use of force’; \textit{Japanese Memorandum to the League Council Objecting to the Participation of the United States} 17 October 1931 at 250-251 in which the Japanese Government, apart from objecting to the United States on the basis of its non-membership of the \textit{League of Nations}, stated that the dispute did not constitute ‘war’ so was not subject to the \textit{General Treaty} and the \textit{Truce-Agreement between the Chinese and Japanese Military Authorities}, signed at Tangku on 31 May 1933 reprinted in John W Wheeler-Bennet (ed), \textit{Documents on International Affairs 1933} (1933) Royal Institute of International Affairs, 493. See also Brownlie, above n 8 (1963), 76-77; Lauterpacht, above n 7, 185 and Richard Wilson, \textit{When Tigers Fight: The Story of the Sino-Japanese War 1937-1945} (1982).

\textsuperscript{252} The \textit{Chaco Declaration 1932} 55 LNTS 144 (entered into force 3 August 1932) arose from the Chaco Peace Conference attended by Chile, the United States, Peru, Brazil, Argentina and Uruguay. See Bruce Farcau, \textit{The Chaco War} (1996).

\textsuperscript{253} \textit{Salomon-Lozano Treaty 1922} (entered into force 1 July 1922). See Brownlie, above n 8 (1963), 76-77 and Lauterpacht, above n 7, 185.
Saudi Arabia in 1934 also used war against the Yemen to seize territory and exercise sovereignty over it, as did Italy when it invaded Ethiopia in 1935 and annexed the state without a declaration of war. In 1939, Hungary and Czechoslovakia used armed force against each other over a border dispute involving two regions. This resulted in a large-scale invasion by Hungarian troops and a consequent annexation of territory. The pre-conflict communications between the two states were by way of demands, counter-demands and threats, rather than negotiations under any treaty to bring about a peaceful settlement.

In 1939, Italy invaded Albania and made the state an Italian protectorate. Japan and the U.S.S.R. in the same year fought a large battle over a disputed border area between the two states. The U.S.S.R. invaded Finland just prior to the commencement of the Second World War. Criticism from other states, such as the United States and Britain, in respect to the possible violation of the General Treaty, was made about the Italian invasion of Abyssinia in 1935, the Japanese action against China in 1937 and the U.S.S.R.’s invasion of Finland in 1939. In respect these instances of state practice, Lauterpacht wrote that all violated the

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254 The Saudi-Yemini War ended with the Treaty of Taif 1934 (entered into force 20 May 1934) by which the Yemen yielded sovereignty over a number of territories in favour of Saudi Arabia.
255 Ethiopia did not capitulate, or surrender, to Italy. The invasion is generally considered to have constituted a violation of Article X of the Covenant of the League of Nations 1919 and the General Treaty. See Brownlie, above n 8 (1963), 77 and David Nicholl, The Italian Invasion of Abyssinia 1935-1936 (1997) 1-48.
256 The origins of this dispute were historical and were aggravated by the terms of the Treaty of Trianon 1920 (entered into force 4 June 1920) which granted Czechoslovakia large areas of territory over which the Austro-Hungarian Empire previously held sovereignty; Margaret Macmillain, Paris 1919: Six Months that Changed the World (2003) 47-59.
257 King Zog of Albania fled and took refuge in London after Italy forced the Albanian Parliament to accept its demands to become its protectorate; Bernd Fischer, Albania at War (1999) 15.
258 This battle is commonly referred to as the Battle of Khalkhin Gol and was part of the Soviet-Sino War of 1939 over their respective borders and economic influence; Alvin Coox, Japan against Russia 1939 (1978) 121.
prohibition of war under the *General Treaty*. However, he wrote in relation to reconciling conflicts soon after the treaty’s creation:

‘The fact that within a short period after the conclusion of the Pact its provisions were repeatedly violated cannot properly be regarded as detracting from its legal significance.’

Lauterpacht suggests that the minority of states in the international community which violated the prohibition of war created by the *General Treaty* did not thereby undermine the general practice and *opinio juris* of states in respect of avoiding war, as expressed in the treaty itself. Thus, he drew a conclusion that a customary law rule which prohibited war was formed after 1928 and before the Second World War, despite the number of armed conflicts which arose. His observation is consistent with that made later by Brownlie:

‘the practice of states between 1920 and 1945 and more particularly between 1928 and 1945, provides adequate evidence of a customary rule that the use of force as an instrument of national policy otherwise than under a necessity of self-defence was illegal… the ‘minority of states which violated this rule usually alleged that on the facts no violation had occurred. The various invasions were in some but not all cases accompanied by legal apologia. The right of war referred to so often in works on international law was not invoked. The condemnation of illegal resort to force either as a principle, a treaty obligation, or a reaction to an actual instance of resort to force was the general practice in these years.’

4.2.2 Treaties restricting the use of war

Important multi-lateral treaties were negotiated during the period 1919 to 1928 which illustrated the growing intention of the international community to restrict the exercise of the sovereign right to use war. It is generally accepted that the First World War contributed to the growing commitment of states to settle disputes peacefully and to refrain from using war for the purposes for which it had

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259 Lauterpacht, above n 7, 186. See also Brownlie, above n 8 (1963), 77-78.
260 Lauterpacht, above n 7, 197.
261 Brownlie, above n 8 (1963), 110.
previously been exercised.\textsuperscript{262} The \textit{Covenant of the League of Nations 1919},\textsuperscript{263} the \textit{Locarno Treaties}\textsuperscript{264} and the \textit{General Treaty for the Renunciation of War 1928}\textsuperscript{265} primarily demonstrated the international community’s developing intention to subjugate the exercise of this right to the law and international institutions.

4.2.2.1 \textit{Covenant of the League of Nations 1919}

The \textit{Covenant of the League of Nations 1919} represented the first treaty-based attempt to restrict the exercise of the sovereign right to use war.\textsuperscript{266} The drafting of the treaty, the absence of universal membership of it – especially the non-participation of the United States and the U.S.S.R. – and the ineffectiveness of the enforcement machinery were considered serious inhibitors to achieving its purposes.\textsuperscript{267} The primary purpose of the \textit{Covenant} was to create ‘the obligation to use peaceful means of settling disputes, resort to war being conditional on failure of the procedures of peaceful settlement for which provision was made.’\textsuperscript{268} It promoted international cooperation and the achievement of peace and security by the acceptance on the part of its parties of the principle of ‘not resorting to war’.\textsuperscript{269} Article 10 imposed a legal obligation upon members to respect and preserve the


\textsuperscript{263} \textit{Covenant of the League of Nations}, above n 234.

\textsuperscript{264} \textit{Locarno Treaties 1925}, opened for signature 1 December 1925, 54 LNTS 354, (entered into force 1 December 1925). See Brownlie, above n 8 (1963), 70-71 and Lauterpacht, above n 7, 89 and 180.

\textsuperscript{265} \textit{1928 General Treaty for Renunciation of War as an Instrument of National Policy}, above n 248. 63 states or virtually the entire international community in 1928 were party to the treaty. See Brownlie, above n 8 (1963), 75; Harris, above n 151, 861 at Note 1; Schmitt, above n 68, 90 and Niaz Shah, ‘Self-defence, Anticipatory Self-defence and Pre-emption: International Law’s Response to Terrorism’ (2007) 12 Journal of Conflict & Security Law 95-126, 95-96.

\textsuperscript{266} As opposed to bilateral efforts through treaties of arbitration to limit the right to go to war. See Brownlie, above n 8 (1963), 54; Shah, above n 265, 95-96 and Schmitt, above no 68, 90.

\textsuperscript{267} Brownlie, above n 8 (1963), 55-56 and McCormack, above n 6 (2005), 226.

\textsuperscript{268} Brownlie, above n 8 (1963), 56.

\textsuperscript{269} Lauterpacht, above n 7, 16-17, 97 and McCormack, above n 6 (2005), 226.
territorial integrity and existing political independence of each other, as against ‘external aggression’.\(^{270}\)

However, the *Covenant* did recognise the need for states to maintain sufficient armaments for the purpose of individual and collective self-defence while endeavouring to reduce armaments superfluous to this need.\(^{271}\) The concept of collective self-defence and collective action to ‘safeguard the peace of nations’ when there was a ‘war or threat of war’ and the ‘friendly right of each Member’ to bring to the attention of the Council ‘any circumstance whatever affecting international relations which threatens to disturb international peace’ appeared in Article 11 of the *Covenant*.

Article 16 complemented Article 11 by imposing a duty on the Council to recommend ‘what effective military, naval or air force the Members of the League shall severally contribute’ for the protection of the covenants of the League should any member of the League resort to war in disregard of Article 12, 13 or 15. States were required to avoid resorting to war. However, they were not prohibited from exercising the sovereign right except under the circumstances envisaged by the *Covenant*.\(^{272}\) In this regard, the *Covenant* limited the exercise of this right by providing, under Article 12(1), that states were to submit themselves to a three-month cooling-off period between involvement in a dispute and before going to war, should peaceful means fail to settle the dispute.\(^{273}\)

\(^{270}\) Lauterpacht, above n 7, 97-98 and McCormack, above n 6 (2005), 248-250.

\(^{271}\) Article 8 of the *Covenant*.


\(^{273}\) A characteristic of bilateral arbitration treaties in existence at this time.
The *Covenant*, therefore, required its members to avoid resorting to war, while explicitly recognising the sovereign right to use war, albeit exercisable only after the failure of peaceful efforts to settle the dispute. Thus, the distinction between lawful and unlawful war was formally created by the *Covenant*. It was determined by whether a member abided by its obligation to employ pacific settlement procedures before resorting to war.\(^{274}\) The sovereign right to use war, except in self-defence,\(^ {275}\) was restricted and subjugated to the operation of the *Covenant*.\(^ {276}\) However, it has been the general view that Article 15(7) undermined the extent of the restriction created by Articles 10, 12 and 16.\(^ {277}\) The article created the right in the members of the *Covenant* to ‘take such action as they shall consider necessary for the maintenance of right and justice’ should the Council fail to make a unanimous report concerning an infringement of the *Covenant*.\(^ {278}\)

Lauterpacht highlighted the conceptual difficulties created by the *Covenant* in choosing the term ‘war’ to describe the restricted behaviour. He thought that discriminating against the use of force generally would probably have been preferable.\(^ {279}\) Due to the distinction made by states between the two concepts during the 19\(^ {th}\) century, the use of the term ‘war’ rather than ‘force’ raised some doubt:

‘Secondly, such restrictions and prohibitions as the Covenant imposed in this sphere were limited to resort to war. They left open the question of recourse to force short of war.

\(^{274}\) Articles 12, 13 and 15 of the *Covenant*. See Brownlie, above n 8 (1963), 55-66.

\(^{275}\) The right of self-defence was impliedly reserved by the *Covenant*; see Report to the Assembly by the First Commission, 1931, LNOJ, Spec. Supp. No 94, A C.I. Annex 18.

\(^{276}\) Brownlie, above n 8 (1963), 58 and Harris, above n 151, 861-862.

\(^{277}\) For example Lauterpacht, above n 7, 161 and Brownlie, above n 8 (1963), 60-62.

\(^{278}\) Lauterpacht, above n 7, 98-99.

\(^{279}\) Ibid 98-99 at which he writes: ‘Under the Covenant that limitation of the jurisdiction of the League of Nations was grounded in the fact that members of the League had not definitely renounced the right to resort either to war or to acts short of war. Accordingly, under the Covenant there remained the possibility, based on a legal right, of disturbance of the peace’. See also McCormack, above n 6 (2005), 249-250.
Although subsequently organs of the League made pronouncements to the effect that the use of force not amounting to war was not necessarily compatible with the Covenant and that acts of force not accompanying a declaration of war could nevertheless constitute war in violation of the Covenant, the resulting position was far from clear.\textsuperscript{280}

Brownlie believed that the cumulative effect of the articles of the \textit{Covenant} did not repudiate the sovereign right to use war. Rather, it derogated from it by restricting it to prescribed circumstances.\textsuperscript{281} Lauterpacht took the same view.\textsuperscript{282} Brownlie also states that while the general purpose and the specific articles of the \textit{Covenant} ‘created a presumption against the legality of war as a means of self-help’,\textsuperscript{283} the fundamental attitude of states to the treaty was still determined from the viewpoint of retaining the sovereign right to use war:

\begin{quote}
‘The general presumption was that war was still a right of sovereign states although signatories to the Covenant were bound by that instrument to submit to certain procedures of peaceful settlement. Resort to war in violation of the Covenant was illegal but the content of the illegality was \textit{prima facie} the violation of a treaty obligation.’\textsuperscript{284}
\end{quote}

4.2.2.2 \textit{Geneva Protocol 1924}

Further evidence of the intention of the international community to restrict the sovereign right to use war can be observed after the \textit{Covenant}. Although its provisions never came into operation, the \textit{Draft Treaty of Mutual Assistance}\textsuperscript{285} in 1923 and the \textit{Geneva Protocol} in 1924\textsuperscript{286} utilised the undefined concept of ‘aggression’ to describe war considered to be unlawful under international law. In Article 1 of the \textit{Protocol}, aggressive war was declared to be an international crime.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{280} Lauterpacht, above n 7, 152.
\item \textsuperscript{281} Brownlie, above n 8 (1963), 56.
\item \textsuperscript{282} Lauterpacht, above n 7, 98-99.
\item \textsuperscript{283} Brownlie, above n 8 (1963), 57.
\item \textsuperscript{284} Ibid 66.
\item \textsuperscript{285} League Doc A/35 (1923) spec suppl no 16. See Lauterpacht, above n 7, 180 and Brownlie, above n 8 (1963), 68-69.
\item \textsuperscript{286} \textsl{League of Nations Official Journal} (1924) spec suppl no 24. See Lauterpacht, above n 7, 180 and Brownlie, above n 8 (1963), 69-70.
\end{itemize}
\end{footnotesize}
While implicitly acknowledging the sovereign right to use war, an aggressive war was described using exclusionary language.

A war was not to be considered aggressive if the state was a party to the dispute, had accepted the unanimous recommendation of the Council, a verdict of the Permanent Court of International Justice, or an arbitral award against a party and that the state resorting to war did not intend to violate the political independence, or the territorial integrity, of the other. Similarly, the Preamble of the Protocol described a war of aggression as an international crime. It essentially defined aggression as an act of war which breached the Covenant, or its own articles, i.e., resorting to war without first submitting the dispute to pacific settlement procedures.

4.2.2.3  Locarno Treaties 1925

In 1925, the Locarno Treaties negotiated between some European states included obligations in Article 1 not to go to war, attack, or invade, each other except in the instance of legitimate defence, or in other instances specific to the treaties. While focussing on articles of the Treaty of Versailles and the demilitarised zones, the instances specified in the treaties were consistent with the Protocol and the Covenant in respect to obligations for the peaceful settlement of disputes before resorting to war.

287 Lauterpacht, above n 7, 46-47 and Harris, above n 151, 985-987.
288 Lauterpacht, above n 7, 180 and Brownlie, above n 8 (1963), 70.
289 Locarno Treaties 1925, above n 270. See Brownlie, above n 8 (1963), 70-71 and Lauterpacht, above n 7, 89, 180.
290 Western European allies from the First World War negotiated with new central and eastern states to finalise the post-war peace settlements and normalise relations with Germany. The arbitration treaties were made between Germany and Belgium, France, Czechoslovakia and Poland.
291 Lauterpacht, above n 7, 90-91, 180 and Brownlie, above n 8 (1963), 71.
The Resolutions of the League Assembly in 1925 and 1927, which stated that a war of aggression was an international crime, still left some doubt as to whether wars of aggression _per se_ were prohibited, or only if such wars were launched without first exhausting every peaceful means to settle the dispute. Without this matter being clarified, the resolutions did not expand the effect of the _Covenant_. It must be observed that the language of the resolutions attracted some force when considered from the historical context of international law at that time evolving towards a general prohibition of the use of force.

The Resolution of the Sixth International Conference of American States 1928 similarly resolved to recognise that a war of aggression constituted an international crime and prohibited it. Brownlie was critical of the use of the term ‘aggression’ for its lack of specificity, along with the failure of the resolution to deal properly with the state practice of intervention. He added that the resolution mirrored the weaknesses of the League Resolutions of 1925 and 1927. Similarly, the _Chaco Declaration 1932_ contained a refusal by states that attended its subsequent peace conference to recognise any settlement of territory arising from the war that was not obtained by peaceful negotiations. It also refused to recognise sovereignty over territory acquired during the war by force, or by occupation.

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293 Lauterpacht, above n 7, 180-181 and Brownlie, above n (1963), 73.
294 The Resolution of the Sixth International Conference of American States (1928) 22 _American Journal of International Law_ 356-357. See Lauterpacht, above n 7, 181 and Brownlie, above n 8 (1963), 73-74.
295 Brownlie, above n 8 (1963), 74 writes, ‘Although some writers regard the resolution as of moral force only the better view probably is that the resolution, though not creating a rule of law, states that a rule of law exists.’
296 _The Chaco Declaration 1932_, above n 258, arose from the Chaco Peace Conference attended by Chile, the United States, Peru, Brazil, Argentina and Uruguay. See Farcau, above n 252, 183.
The *Locarno Treaties 1925* contained collective and several guarantees of its parties to maintain their territorial *status quo*. Mutual undertakings were made between Germany and Belgium and Germany and France not to ‘attack or invade each other or resort to war against each other’. These mutual undertakings, however, did not apply to the ‘exercise of the right of legitimate defence’. In contrast to the *Covenant*, the *Locarno Treaties* made the express distinction between war that would violate the treaties (that is, offensive war) and that which did not (that is, defensive war).

### 4.2.2.4 General Treaty for the Renunciation of War 1928

The general prohibition of war was achieved by the *General Treaty for the Renunciation of War 1928*. Desiring a clear prohibition of war, the United States and France initiated negotiations for its creation. Articles I and II state respectively:

> ‘The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

> ‘The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.’

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297 *Locarno Treaties 1925*, above n 270. See sub-chapter 2.3.2 above.  
298 Article 1 of the treaty.  
299 Article 2 of the treaty.  
300 Article 2(1) of the treaty. See Gustav Stresemann, *German aims at Locarno*, Diary entry of the German Foreign, 23 September 1925 reproduced in Eric Sutton, *Gustav Stresemann, His Diaries, Letters and Papers* (1937) vol II, 165-167 in which the Foreign Minister recorded his determination to alter the perceived limitations on the German sovereign right to defend itself from war, invasion, or any act inconsistent with its exercise of sovereignty over its land.  
The words ‘recourse to war’ in Article I did not expressly prohibit the use of armed force short of war. However, when Article I is considered with the obligation in Article II to use pacific means to settle ‘all disputes or conflicts of whatever nature or of whatever origin’, there is an implication that the use force short of war was also considered unlawful. This point rested on the definition of ‘war’, a definition of which was not provided by the treaty. Indeed, the United States, Great Britain and France thought that defining ‘aggression’ was not only undesirable, but impossible, as will be seen below in the treaty’s travaux preparatoires and other documents.

During the negotiations for the General Treaty, Secretary Kellogg and the British Government referred to a state’s right of self-defence as being ‘inherent’ to every state and that the right was also ‘implicit’ in all treaties. A statement during these negotiations by Mr Austen Chamberlain, the Secretary of State for Foreign Affairs of the Government of Great Britain, encapsulated the views of his state in this respect. He attributed a single right of self-defence in international

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302 The word ‘inherent’ was defined in 1928 in the Oxford English Dictionary, 1928 vol V, column 2, 293 as: ‘1. Sticking in; fixed, situated, or contained in something (in physical sense); 2. fig. Cleaving fast, remaining, or abiding in some thing or person; permanently indwelling; 3. Existing in something as a permanent attribute or quality; forming an element, esp. a characteristic or essential element of something; belonging to the intrinsic nature of that which is spoken of; indwelling, intrinsic, essential; 4. Vested in or attached to a person, office, etc., as a right or privilege.’ The Oxford English Dictionary was originally published in separate parts between 1884 and 1928 and the part containing the entry for the word ‘inherent’ first appeared in 1900.

303 William E Borah, Hearing before the Committee on Foreign Relations on the General Pact for the Renunciation of War, Signed at Paris 27 August 1928, United States Senate, Seventeenth Congress, Second Session, Part 1, 7 and 11 December 1928, 1-12, The United States Senate Committee at the completion of its hearings described the immutability of the inherent right in similar terms; see Report of the U.S. Senate Committee on Foreign Relations, Congressional Record, vol 70, No 29, (1928) 1783-1784 reprinted in Wheeler-Bennet (ed), above n 301, 6.

304 Austen Chamberlain, Further Correspondence with the Government of the United States Respecting the United States Proposal for the Renunciation of War, Cmd. 3153 [in continuation of Cmd. 3109], London, 23 June 1928, 1 [3] under the heading ‘Self-defence’. This document records the correspondence that was presented by the Secretary of State for Foreign Affairs of Great Britain to Parliament by command of His Majesty. It related the construction of the views of the proposed treaty held by the Government of Great Britain by the Secretary of State of the United States, Mr Frank B Kellogg to the American Society of International Law on 28 April 1928. Mr Chamberlain,
law to state sovereignty, that its nature prevented it from being defined in any treaty and that its inviolability did not permit any treaty provision to detract from it. The statement is repeated in its entirety to reflect its importance:

‘There is nothing the American Draft of an antiwar treaty which restricts or impairs in any way the right of self-defence. That right is inherent in every sovereign State and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions, to defend its territories from attack or invasion, and it alone is competent to decide whether circumstances require recourse to war in self-defence. If it has a good case, the world will applaud and not condemn its action. Express recognition by treaty of this inalienable right, however, gives rise to the same difficulty encountered in any effort to define aggression. It is the identical question approached from the other side. In this respect, no treaty provision can define the natural right of self-defence. It is not the interest of peace that a treaty should stipulate a juristic conception of self-defence, since it is far too easy for the unscrupulous to mould events to accord with an agreed definition.’

The use of the term ‘inherent’ can be considered evidence of Great Britain’s view that the right of self-defence rested in its sovereignty. In addition, he stated that all states were free to exercise this right to protect themselves from attack, or invasion. His use of the word ‘from’ can be interpreted as reflecting the pre-existing legal scope of this right, which encompassed an imminent threat of armed force. Secretary Kellogg views were the same in this respect, as will now be seen.

In the Senate of the United States, the Committee on Foreign Relations examined Secretary Kellogg about the legal effect of the General Treaty. He referred to

the Secretary of State for Foreign Affairs of the Government of Great Britain, referred to the six major considerations emphasised by the Government of France of the draft treaty. These considerations were self-defence, the League Covenant, the Treaties of Locarno, treaties of neutrality, relations with a treaty-breaking state and universality.

305 Chamberlain, above n 304, 1 [3] under the sub-heading ‘Self-defence’.
306 See Lauterpacht, above n 7, 184-190; Brownlie, above n 8 (1963), 236 (n 4-5) – 240 and McCormack, above n 6 (2005), 250-253.
307 Brownlie, above n 8 (1963), 241 concluded that self-defence at this time was a ‘necessary reaction against the use or threat of force.’
the question asked by some states during the negotiations of whether the treaty would diminish the inherent right of self-defence:

‘It seemed to me incomprehensible that anybody could say that any nation would sign a treaty which could be construed as taking away the right of self-defence if a country was attacked. This is an inherent right of every sovereign, as it is of every individual, and it is implicit in every treaty. Nobody would construe the treaty as prohibiting self-defence. Therefore, I said it was not necessary to make any definition of “aggressor” or “self-defence”. I do not think it can be done, anyway, accurately. They have been trying to do it in Europe for six or eight years, and they never have been able to accurately define “aggressor” or “self-defence.”

Secretary Kellogg stated that exercising the inherent right of self-defence was a unilateral decision to be taken by the affected state and thought that every other state would not accept anything less. He returned to this point throughout his appearance before the committee, stating later that it was within a state’s “sovereign rights” to determine if it was ‘unjustly attacked’. The United States Senate Committee considered that the inherent right of self-defence was to be exercised at the sole discretion of states within the rules of international law, that the right is a necessary corollary of independent sovereignty and that ‘it is the first law of nations, as of individuals.’

Senator Swanson asked whether the concept of self-defence was ‘not confined to defence of any territory, but that any nation may send troops into any territory where it may be necessary for its self-defence’, to which the Secretary replied:

‘Certainly; the right of self-defence is not limited to territory in the continental United States, for example. It means that this Government has a right to take such measures as it believes necessary to the defence of the country, or to prevent things that might endanger

\[309\] Ibid 2. See also 15 where the Secretary believed that the General Treaty would not have been negotiated between any states if ‘aggression’ or ‘self-defence’ had been defined.
\[310\] Ibid.
\[311\] Ibid 12.
the country; but the United States must be the judge of that, and it is answerable to the public opinion of the world if it is not an honest defence; that is all.’

Secretary Kellogg confirmed to the Senate Committee that the notes from other states of his interpretation of the legal scope of the inherent right of self-defence and of the treaty itself showed that they concurred with his. The Soviet reservation suggested that the treaty should go further than simply prohibiting ‘war’ and include:

‘other military actions such as, for instance, interference, blockade, military occupation of foreign territories, of foreign ports.’

The Secretary referred to the reservation of Great Britain that its defence by armed force against an attack directed at its interests around the world was ‘a measure of self-defence’. He pointed out that Great Britain was distinguishing war as renounced under the General Treaty from war in the name of self-defence. He added:

‘Self defence, as I said, is not limited to the mere defence, when attacked, of continental United States. It covers all our possessions, all our rights; the right to take such steps as will prevent danger to the United States.’

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313 Ibid 2-3. In response, Senator Reed confirmed that the application of the right of self-defence ‘applies to every other country’ to which Secretary Kellogg replied, ‘Certainly; nor do I think it is practicable to do anything else; although there are idealists who say that it is practicable. It is entirely impracticable, in my judgment.’

314 Secretary Kellogg insisted that the entirety of the negotiations for the treaty were conducted by way of notes between states and refused to meet face-to-face with state representatives; Ibid 2.

315 Note from Mr M Litvinoff to Mr M J Herbette, Ambassador Extraordinary and Plenipotentiary of the French Republic [in Moscow], 31 August 1928 reprinted in Wheeler-Bennet (ed), above n 250, 9. The reason the Soviet reservation suggested this was because it considered that such actions constituted an attack by one nation against another and that such actions often led to war. Despite this, the Soviet Union formed an agreement with Poland, Lithuania, Turkey and Persia to consider themselves immediately bound by the prohibition of war under the General Treaty; see The Litvinov Protocol 1928 and reprinted Wheeler-Bennet (ed), above n 301, 51-52.

316 Ibid 3 and 9.

317 Ibid 3-4. The balance of the document consisted of questions and answers of Secretary Kellogg concerning such issues as mutual release from the obligations under the treaty should a party to it violate it by an act or war; that there are considered to be two types of war (aggressive and defensive) and that the treaty renouncing the former should be required to expressly preserved the latter; the note of Great Britain in which Secretary of State for Foreign Affairs reserved the right to protect its interests around the world from attack as a matter of legitimate self-defence and whether the United States might be disadvantaged if it did not make similar reservations (a suggestion that
The negotiations for the *General Treaty* demonstrate an emphasis on the distinction between defensive war and offensive war. This emphasis arose because the treaty’s renunciation in Article I was not of the concept of war absolutely, but of offensive, or aggressive, war.\textsuperscript{318} Its prohibition of the former highlighted the importance of the latter, for the latter remained the only form of lawful war after 1928.\textsuperscript{319} The preservation of the inherent right of self-defence and its continued operation unhindered by the treaty were assurances demanded by states before agreeing to be bound by the treaty.\textsuperscript{320} The use of the word ‘inherent’, or ‘natural’, in the negotiations to describe a state’s right to defend itself in international law against a threat, or use, of armed force reflected the rationale expressed by early legal scholars. It demonstrated an understanding that the right was vested in the state itself, that is, its sovereignty.

However, the use of armed force short of ‘war’ was not expressly prohibited by the treaty, which left doubt about its parameters.\textsuperscript{321} As seen earlier, the instances of war and the use of force short of war between 1928 and 1939 were not infrequent. Indeed, their occurrence during that 11 year period was greater than the period after the First World War to 1928.

\textsuperscript{318} The U.S. Senate Committee in its final report considered the inherent right would be the only lawful use of force under the treaty and that this right would in no way be curtailed or impaired by it; see *Report of the U.S. Senate Committee on Foreign Relations*, Congressional Record, vol 70, No 29, 1783-1784 reprinted in Wheeler-Bennet (ed), above n 301, 6-8.

\textsuperscript{319} Other treaties in this period made the distinction between “aggression” on one hand and the right of defence on the other so that the latter would be excluded from being categorised as prohibited force, for instance, the *Saadabad Pact 1937* 190 LNTS 21 (entered into force 8 July 1937) in which Article 4 excluded ‘the exercise of the right of legitimate defence’.

\textsuperscript{320} The Senate Committee on Foreign Relations recommended that the *General Treaty* be ratified by the United States Government on its understanding that neither the right of self-defence *per se*, or its lawful exercise, would be curtailed or impaired by the operation of the treaty.

\textsuperscript{321} However, Brownlie, above n 8 (1963), 240 expressed the view that Article 1 prohibited the use of armed force short of war for the reasons previously justified as self-help in the period 1815 to 1928. Whether or not the *General Treaty* prohibited the exercise of the sovereign right to use force short of war remains a matter of debate between scholars.
The significance of the *General Treaty* not only lies in being the first treaty to have expressly prohibited war. The negotiations for the treaty in respect of the inherent right of self-defence, as will be seen shortly, tend to support three matters previously analysed in my thesis. The first was that state sovereignty was considered by the negotiating states to be the rationale for this right. The second was that this right was considered the only legal right of self-defence possessed by a state in international law. The third was the view that the legal scope of this right was the threat, or use, of armed force (conduct which was expressed variously as ‘aggression’, ‘invasion’ and ‘war’).

It was not the practice of states before the *General Treaty* to use the terms ‘inherent’, or ‘natural’, in defence and other multilateral treaties. Instead, treaties before 1928 evinced a commitment by their parties to ‘unity’, or promised to provide the services of their armed forces, or mutual support, or at least neutrality, in the case of such an attack. However, some states did attempt to define

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322 There were 15 original signatories to the *General Treaty*. By December 1928, 46 states had notified the United States Government of their adherence, or intention to adhere, to the treaty; see Wheeler-Bennet (ed), above n 301, 14.

323 For instance the *Treaty of Hanover* 1725, opened for signature 3 June 1725, Parry, above n 251, Vol 32, 201 (entered into force 7 June 1725) in which Great Britain, France and Prussia promised mutual military support for each other against possible aggression by Spain; the *Dual Alliance* 1879, opened for signature 7 October 1879, Parry, above n 251, Vol 155, 306 (entered into force 7 October 1879) in which Austria-Hungary and Germany agreed under Article 1 that either ‘are bound to come to the assistance of the other with the whole war strength of their Empires’ should either be attacked by Russia. In Article 2 each party bound itself in the case of aggression from a power other than Russia ‘not to support the aggressor against its high Ally, but to observe at least a benevolent neutral attitude towards its fellow Contracting Party’; the *Triple Alliance* 1882, opened for signature 20 May 1882, Parry, above n 251, Vol 160, 243 (entered into force 20 May 1882) in which Germany, Austria-Hungary and Italy under Article 2 promised military assistance to Italy should she be attacked by France and under Article 3 such assistance should any two other powers attack any of the parties to the treaty; the *Reinsurance Treaty* 1887, opened for signature 18 June 1887, Parry, above n 251, Vol 169, 317 (entered into force 18 June 1887) formed between Germany and Russia in which under Article 1 the parties agreed to ‘maintain a benevolent neutrality towards it, and would devote its efforts to the localization of the conflict’; the *Treaty of Bjorko* 1905, opened for signature 24 August 1905, Parry, above n 251, Vol 199, 123 (entered into force 24 August 1905) between Germany and Russia, a secret mutual defence accord which promised the use of each country’s army to defend the other in case of an attack from any other country, and the *Franco-Soviet Treaty of Mutual Assistance* 1935 (entered into force 15 March 1935) that was directed against Germany and whose Article 1 read ‘In the event that France or the U.S.S.R. are
‘aggression’ in the *Conventions for the Definition of Aggression 1933*. Article II defined this concept as:

1. Declaration of war upon another State;
2. Invasion by its armed forces, with or without a declaration of war, on the territory, vessels or aircraft of another State;
3. Attack by its land, naval or air forces, with or without a declaration of war, on the territory, vessels or aircraft of another State;
4. Naval blockade of the coasts or ports of another State;
5. Provision of support to armed bands formed on its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take, in its own territory, all the measures in its power to deprive those bands of all assistance or protection.’

The reason for expressing treaty obligations in this way is not clear from the treaties themselves. A possible explanation is that international law before 1928 restricted the exercise of the sovereign right to use war to certain circumstances, of which self-defence was one. In the absence of a general prohibition of war, from which self-defence needed to be distinguished, there was perhaps no need to express the legal basis for defensive war in a treaty.

In contrast, when war became prohibited in 1928, states began referring to the ‘legal right of self-defence’, the ‘inherent right of self-defence’, or equivalent terminology, as the legal basis for using defensive war in international law. Simultaneously, many treaties began demonstrating the increasing *opinio juris* of

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324 *Conventions for the Definition of Aggression 1933* 147 LNTS 67 (opened for signature 3 July 1933); 148 LNTS 79 (opened for signature 4 July 1933), and 148 LNTS 211 (opened for signature 5 July 1933).

325 Lauterpacht, above n 7, 184-190.
states to restrict the exercise of the sovereign right to use war. Brownlie believed that these instruments and pronouncements ‘were considered by the signatories to be an integral part of the existing legal structure relating to prohibition of resort to force.’

The Permanent Court of International Justice was not called upon to provide a judicial determination of the effects of the General Treaty. The tribunal in the Judgment of the Nuremberg International Tribunal, however, did advise that ‘the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law’ when determining aspects of international law in 1939.

Scholarly opinion since 1928 has varied in its interpretation of the legal effect of the prohibition of war in the General Treaty. Lauterpacht described the obligations accepted by the parties as operating on two distinct levels. First, he stated that the parties:

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327 Brownlie, above n 8 (1963), 103.

328 ‘Nuremburg International Military Tribunal’ (1947) 41 American Journal of International Law 205. See also Report of the 38th Conference of the International Law Association, Budapest (1934) 67 where it was observed in respect of the General Treaty, ‘A signatory state which threatens to resort to armed force for the solution of an international dispute or conflict is a violation of the Pact.’
‘... have renounced the right of war both as a legal instrument of self-help against an international wrong, and as an act of national sovereignty for the purpose of changing existing rights’. 329

Secondly, he believed that the treaty did not abolish the ‘institution’ of war. He based this conclusion on the fact that it preserved the inherent right of self-defence, the right to collective enforcement of international treaty obligations, the sovereign right to use war against non-signatories and the sovereign right to use war against another party who resorts to war against its obligations under the General Treaty. 330 He acknowledged that the question of whether the words ‘resort to war’ prohibited the use of force short of war was ‘a controversial one’ 331 and that the treaty was ‘open to the same serious objections as were the corresponding provisions of the Covenant of the League of Nations’. 332

Lauterpacht did not conclude whether the use of force short of war was prohibited by the operation of the treaty, even though he provided examples of a number of significant conflicts which he regarded as breaches of its provisions. However, in conclusion, he stated that the effect of the General Treaty in international law was as follows:

‘The Pact of Paris altered that state of the law (the admissibility of war as a regular legal institution). Henceforth war could not legally, as it could be prior to the conclusion of the Pact, be resorted to either as a legal remedy or as an instrument for changing the law. Resort to war ceased to be a discretionary prerogative right of States signatories of the Pact; it became a matter of legitimate concern for other signatories whose legal rights are violated by recourse to war in breach of the Pact; it became an act for which a justification must be sought in one of the exceptions permitted by the Pact of Paris.’ 333

Brownlie wrote of the effect of the General Treaty on international customary law:

329 Lauterpacht, above n 7, 182.
331 Ibid 184.
332 Ibid 185.
333 Ibid 196-197.
‘The right of war referred to so often in works on international law was not invoked. The condemnation of illegal resort to force either as a principle, a treaty obligation, or a reaction to an actual instance of resort to force was the general practice in these years. The Kellogg-Briand Pact was a legal instrument and the state practice shows a general awareness of the legal nature of limitations on use of force.’

He believed that the effect of the General Treaty was to prohibit any substantial use of armed force and that the most compelling evidence of this was to be found by recourse to the subsequent practice of its signatory states. In this regard, he wrote that:

‘The subsequent practice of parties to the Kellogg-Briand Pact leaves little room for doubt that it was understood to prohibit any substantial use of armed force’.

Brownlie examined conflicts after 1928 during which the Treaty was used as an instrument beholding the rights and obligations of states in respect to the use of force. He rejected the notion that the use of the term ‘war’ was meant to be restricted to its technical meaning, but rather encapsulated armed force short of war. He based his conclusions on a combination of the historic setting of the negotiations, the intentions of the international community and the articles of the treaty itself. However, he qualified his conclusion by writing that the role of the Treaty in state practice ‘did not assume significant proportions in every case’. Bowett was of the opinion that the General Treaty only prohibited behaviour between states which constituted war, and not the use of force short of war:

‘… for under accepted terminology of international law (and without defending that terminology) measures involving the use of force by falling short of war are characterised

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334 Brownlie, above n 8 (1963), 110.
335 Ibid 108 where he concluded that most states were stopped from ‘denying the illegality of resort to force except in self-defence’.
336 Ibid 76-80.
337 Ibid 87.
338 Ibid 74-80, 87-92, 107-111.
339 Ibid 85. See also McCormack, above n 6 (2005), 250-253.
340 Brownlie, above n 8 (1963), 85.
341 Ibid 76.
as ‘pacific’; in this case Article II cannot be invoked as a reason for departing from the plain meaning of the terms of Article I.\textsuperscript{342}

In contrast, Brierly took an unequivocal view. He was troubled by the outcome of applying the technical view of the meaning of ‘war’ as evolved during the 19\textsuperscript{th} and early 20\textsuperscript{th} Centuries and the apparent intentions expressed by the international community in the \textit{General Treaty}.\textsuperscript{343}

4.3 The corollary legal right created by the \textit{General Treaty}

It cannot be properly said that states before 1928 cannot be considered as having possessed under international law a general legal right to remain free from the use of war in their international relations. While ever international customary law permitted states to exercise the sovereign right to use war for reasons other than defensive war, a state could suffer war within the framework of international law.

This situation altered with the prohibition of war in the \textit{General Treaty}. This alteration was facilitated by the operation of a legal principle which has long been recognised in international and municipal law.\textsuperscript{344} It involves the creation of a legal right in one party which arises as a corollary to the imposition of an obligation on another party. The legal basis of this principle in international law was described by Fenwick, who wrote:

\begin{quote}
‘rights and duties are correlative, that is, the right of one state implies a corresponding duty on the part of other states to respect it’.
\end{quote}\textsuperscript{345}

\begin{itemize}
\item \textsuperscript{342} Bowett, above n 180, 451.
\item \textsuperscript{343} James Brierly, \textit{The Law of Nations} (3\textsuperscript{rd} ed, 1942) 263-264.
\item \textsuperscript{344} For example, see Wolff, above 13, 129 [252].
\item \textsuperscript{345} Charles Fenwick, \textit{International Law} (3\textsuperscript{rd} ed, 1948) 218-224.
\end{itemize}
The operation of this legal principle provided the basis for demands for reparations by an aggrieved state after illegal force was used by an aggressor. During the 19th century, such reparations were usually demanded in treaties which marked the cessation of hostilities. While this practice continued after the First World War, the right became one of international customary law during the 19th and 20th Centuries.

It was described by Brownlie as follows:

‘It is submitted that there is considerable evidence of a general recognition in the practice of states, as expressed not only in peace treaties but also in claims between states when no relationship of defeated and victor exists, that the victim of an unlawful resort to force, whether as a major military onslaught or as a minor frontier incident, has a claim for adequate compensation for damage to public and private property, loss of life and injuries among the civilian population, and the cost of reasonable measures of self-defence… the obligation to make reparation for loss consequent on commission of the delict arises as a general principle of law.’

Lauterpacht similarly wrote:

‘It may be a desire to enrich the victor, or to punish the vanquished, or to achieve both these ends; or it may be merely the recoupment of the victor for the expenses of the war.’

Other scholars have since referred to this legal principle in respect of the prohibition of war and the inherent right of self-defence. In applying this principle to the General Treaty in 1928, this treaty clearly imposed a legal

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346 Lauterpacht, above n 7, 592-595 and Brownlie, above n 8 (1963), 133-149. The general principle of a state bearing responsibility to make full reparations for injury caused by its internationally wrongful acts is well established in international law, for example, Factory at Chorzow [1927] P.C.I.J. Series A, No. 9, 21; Gabcikovo-Nagymaros Project (Hungary / Slovakia) [1997] I.C.J. Rep [152] and Avena and Other Mexican Nationals (Mexico v United States of America) [2004] I.C.J. Rep [119].

347 Brownlie, above n 8 (1963), 147.

348 Lauterpacht, above n 7, 594.

349 For instance, O’Connell, above n 22, 315 wrote, ‘A corollary of the right of to independence is the right of self-defence, a right fundamental in every legal system and circumscribed only to the extent to which formal law assumes the responsibility of defending the individual’. Bowett, above n 180, 3 wrote, ‘Moreover, it will be necessary to formulate these rights with reference to the correlative duties imposed by international law on other States, for without this correlation, there can be no substantive right stricto sensu, and therefore, no basis for the privilege of self-defence which presupposes delictual conduct violating those rights’. Dinstein, above n 7, 178 referred to this principle by suggesting that any act of lawful self-defence necessarily requires a corresponding violation of the duty to abstain from the resort to force. McCormack, above n 6 (2005), 263-265 examined the creation of corresponding legal rights by new legal rights, and Keith above n 208, 323-332 expressed the identical view of correlative rights in international law.
obligation on states not to use war in their international relations. Therefore, this obligation may be regarded as having produced, as a corollary, a new legal right in favour of states to remain free from war in their international relations. This seems a logical statement of the effect of the prohibition. If the General Treaty imposed upon its signatory states an obligation not to use war against all others, then this prohibition created the corollary opposite to this prohibition in those other states to remain free from the prohibited conduct. If this was so, how was this new legal right protected and preserved by international law in 1928 should it be threatened?

It would appear that the final legal means in international law by which a state could protect and preserve its right to remain free from war in 1928 was anticipatory self-defence. Whenever a state was threatened by an imminent threat of armed force, it would not always have been clear whether the force threatened would constitute ‘war’ if allowed to evolve into the use of armed force. Therefore, to protect the new legal right to remain free from war, acting against an imminent threat of armed force was necessary. By this logic, it may be concluded that anticipatory self-defence, in fulfilling its function of protecting and preserving the state from an imminent threat of armed force, also served to fulfil a new function of protecting the new legal right of states to remain free from war in their international relations.

4.4 The inherent right of self-defence

Although the materials which relate directly to the inherent right of self-defence in the period 1919 to 1939 are not abundant, it seems clear that this right continued to

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350 The General Treaty was signed and ratified by all states in the international community except Argentina, Bolivia, El Salvador and Uruguay.
be exercised against a threat, or use, of armed force and remained controlled by the international customary law principles of immediacy, necessity and proportionality.\textsuperscript{351} An exercise of this right of self-defence in international law was not dependent on conduct having gained a certain level of seriousness so as to be categorised as ‘aggression’, or ‘invasion’. What was required was an imminent threat of armed force.

Perhaps one of the most significant sources of evidence of the \textit{opinio juris} of states in respect of the inherent right of self-defence in the period examined is the negotiations surrounding the creation of the \textit{General Treaty for the Renunciation of War 1928}, as examined in sub-chapter 4.2.2.4. These negotiations acknowledged the existence of this right in international law. Indeed, the negotiating states sought an assurance from the United States that the treaty would not impair the operation of that right. The inviolability of the right, according to Mr Chamberlain and Secretary Kellogg, could not be diminished by any treaty provision. Nor did Mr Chamberlain consider that the right could be defined in a treaty.\textsuperscript{352}

The word ‘defined’ can be interpreted and applied in a number of ways. The first is that the content of the inherent right of self-defence was considered incapable of being articulated by a treaty. The second is that the right cannot be replicated in a treaty because its origin rests in the sovereignty of the state. Both interpretations are consistent with the context of the negotiations and with an understanding of the

\textsuperscript{351} Brownlie, above n 8 (1963), 241-242, 250 and 257.

process of recognition of the right by international customary law and its incorporation into international law centuries before, as seen in Chapters 2 and 3.

The second interpretation is also consistent with the observation that the content of international customary law in respect of self-defence was the principles of immediacy, necessity and proportionality. The research from Chapters 2 and 3 tends to show that a ‘customary law right of self-defence’ was probably not created by this process of recognition and incorporation. The opinio juris of states in respect of self-defence was the belief that the restriction imposed on the exercise of the inherent right of self-defence by the customary law principles was an obligation of law. As the negotiations for the General Treaty demonstrate, one right of self-defence in international law was attributed to the sovereign state and that was the inherent right of self-defence.

The customary law principles which governed the lawful exercise of the inherent right of self-defence were not expressly discussed in the negotiations for the General Treaty. However, the legal scope of the right described by Mr Chamberlain and Secretary Kellogg remained identical to the legal scope prior to 1919. This suggests that these principles still governed the right in 1928. Their continuing existence in international law after 1939, as will be seen in the next chapter, is consistent with this observation.

State practice in the exercise of the inherent right of self-defence during the period 1928 to 1939 was generally in accordance with the legal scope defined by the customary law principles of immediacy and necessity. In 1929, China responded with defensive force against the U.S.S.R.’s imminent threat to use military force in
its assertion of perceived economic rights during a dispute over the Manchurian Chinese Eastern Railway. In 1935, Ethiopia used defensive war against Italian troops when threatened by invasion and in 1939 Albania defended itself against Italy when the latter’s troops prepared to use armed force to make the state an Italian protectorate.

The inherent right of self-defence was lawfully exercised during this period when war was used in an attempt to conquer foreign land. China exercised this right in an attempt to repel an invasion and subsequent occupation of Manchuria by Japan from 1931 to 1945, as did Yemen in 1934 the moment Saudi Arabia seized a large part of its territory in an attempt to exercise sovereignty over it.

The inherent right of self-defence was also exercised against the use of armed force in confrontations over limited territorial disputes, such as the Chaco War between Bolivia and Paraguay from 1932 to 1935, the Columbia-Peru War from 1932 to 1933, in 1939 by Czechoslovakia against Hungarian troops over a border dispute involving two regions which resulted in an annexation of Czech territory by Hungarian troops and in the same year when Japan and the U.S.S.R. fought a
large battle over a disputed border area between the two states. In other instances, the use of armed force was so overwhelming that an exercise of the inherent right of self-defence by the self-defending state was useless, such as when the U.S.S.R. invaded Finland in 1939.

The use of war and armed force short of war in the period 1928 to 1939, despite the prohibition of war introduced by the General Treaty, in turn invites an examination of the inherent right of self-defence and its legal scope.

4.4.1 The legal scope of the inherent right of self-defence

There is little indication in the materials examined in this chapter to suggest that the legal scope of the inherent right of self-defence during the period 1919 to 1939 altered from its pre-existing parameters of an imminent threat, or use, of armed force. State practice was to exercise this right in response to this conduct. A self-defending state did wait for either form of conduct to fulfil any particular conceptual categorisation of force, such as ‘aggression’, ‘invasion’, or ‘war’ before exercising this right. This feature of state practice continued to reflect the human defensive instinct of defending one’s self in the face of imminent physical harm, as described earlier in Chapter 2. The legal scope of the right reflected this most basic human instinct, as Pufendorf pointed out:

‘And this holds good not merely if an enemy has undertaken to use every extremity against me, but also if he simply wishes to injure me within certain limits, for he has no greater right to do me a slight injury than a severe one’. 362

361 This battle is commonly referred to as the Battle of Khalkhin Gol and was part of the Soviet-Sino War of 1939 over their respective borders and economic influence. See Coox, above n 258.

362 Pufendorf, above n 15, Book II 269 [185], Book III 1298 [884] and 1302 [885].
My analysis of state practice in the examined period suggests that the legal scope of the inherent right of self-defence was determined by the operation of the international customary law principles of immediacy and necessity. The clearest documented evidence of the *opinio juris* of states which shows that the exercise of this right was considered to have been restricted by these principles were the negotiations surrounding the *General Treaty*, as examined in sub-chapter 4.2.1.4. Statements by the United States and Great Britain, with which Secretary Kellogg suggested to the United States Senate that other negotiating states concurred as reflecting customary law, establish that a threat, or use, of armed force formed the legal scope of the right.

In light of the historic operation of the customary law principles of immediacy and necessity and in the absence of the emergence of any other feature of international law which determined the legal scope of the inherent right of self-defence in the period examined, it seems logical to attribute the legal scope to the continuing operation of these two principles.

4.4.2 The legal commencement of an armed attack between sovereign states

It will be recalled that in Chapters 2 and 3 that I identified a possible basis for defining in international law the legal commencement of an armed attack between sovereign states. My definition was derived from the fulfilment of the international customary law principles of immediacy and necessity when a state was faced by an imminent threat of armed force. At this point in time, the inherent right of self-defence was triggered in the threatened state. I have in those chapters expressed the basis for my preference for identifying this point in time as defining my
examination over any earlier, or later, point in time. Can my definition continue to be applied to the period examined?

The inherent right of self-defence and the international customary law principles of immediacy and necessity remained the essential features of the international law of self-defence during this period. Further, state practice in this period demonstrated that the legal scope of this right remained the same as in the periods examined in Chapters 2 and 3. Thus, the inherent right continued to be first exercised at the same time as in the preceding periods, that is, with the manifestation of an imminent threat of armed force. Insofar as these considerations go, it would seem that my definition has relevant grounds for application in the period examined.

The new positive legal right in favour of states created by the General Treaty in 1928 to remain free from the use of war in their international relations appears to support this definition. This is because the final point in time at which this new legal right was either protected, or violated, by war was the identical point in time as that identified by my definition.

4.5 Conclusion

It can be seen from the period studied that increasing restrictions were placed on the sovereign right to use war when exercised for the purpose of settling legal disputes (which culminated in the prohibition of war in 1928 by the General Treaty). In contrast, the international customary law principles of immediacy, necessity and proportionality remained constant and uncontroversial in their restriction of the exercise of the inherent right of self-defence. These customary law principles and the functions they fulfilled can be regarded as having
recognised and preserved the natural practice (and instinct) of states to exercise this right against an imminent threat of armed force to avoid being physically attacked. The continuing recognition of this right by customary law can be regarded as balancing international law’s broader objective of restricting war *per se* with the recognition that the right to resort to defensive war must remain part of the international legal framework.

It appears from the material available in the period examined that the rationale for the inherent right of self-defence in international law remained consistent with that demonstrated in Chapters 2 and 3. As seen, an illustration of this rationale was particularly evident in the negotiations for the *General Treaty* in 1928 in which the right was treated as a manifestation of state sovereignty. The United States and Great Britain thought that this right was incapable of detraction by that, or any other, treaty. This rationale holds that the sovereign state, as the principal entity in international law – indeed, its creator – possessed an intrinsic right from the outset to use war to defend itself from an imminent threat, or use, of armed force.

Further, the inherent right of self-defence was considered in the negotiations for that treaty as immutable, meaning that an express mentioning of this right as an exception to the prohibition of war was not considered necessary. Therefore, the totality of evidence explored in this chapter tends to support the conclusion that the answer to my first supporting question of law, as provided in Chapters 2 and 3, are capable of remaining applicable to the period examined. Thus, the legal basis for concluding that the rationale for the inherent right of self-defence in international law in the period 1919 to 1939 was state sovereignty remained.
Similarly, the legal scope of the inherent right of self-defence appears to have been treated with the same consistency by states and international law in this period. The practice and *opinio juris* of states in self-defence was to exercise this right against an imminent threat, or use, of armed force, as illustrated in the negotiations for the *General Treaty* and demonstrated in state practice. The absence of emergence of any other substantive international law rules which influenced the governance of the exercise of this right suggests that the operation of the customary law principles of immediacy and necessity continued to naturally form this right’s legal scope.

For these reasons, I conclude that the answer to my second supporting question of law given in Chapters 2 and 3 remains applicable to the period examined, namely, that the rationale for anticipatory self-defence in international law to 1939 can be attributed to state sovereignty. Also for these reasons I conclude that the answer given in Chapters 2 and 3 to my third supporting question of law remains applicable to the period examined, that is, international customary law to 1939 maintained the principles of immediacy, necessity and proportionality to restrict the exercise of the inherent right of self-defence.

There appears to be no impediment in the practice and *opinio juris* of states in self-defence, or the substantive rules of international law, in the period examined which materially detracts from the basis upon which I previously proposed a definition of the legal commencement of an armed attack in international law. The hypothesis made in those chapters which explore the possibility that a time before, or after, the fulfilment of the international customary law principles of immediacy and necessity might offer a more appropriate time at which such a definition might
apply remain valid in the period examined. I therefore conclude that the answer previously given in response to my fourth supporting question of law may be applied to international law as it had developed to 1939. My definition suggests that an armed attack commenced as a matter of law in 1939 when the customary law principles of immediacy and necessity were fulfilled by an imminent threat of armed force directed against the state.

A new awareness of the relevance of anticipatory self-defence to the prohibition of war in the General Treaty has been suggested in this chapter. A closer observance of an exercise of the inherent right of self-defence against an imminent threat of armed force after the General Treaty demonstrates that this right not only fulfilled its historic function of protecting the state from the threat of war, but may also been seen as protecting a new legal right of states to remain free from the use of war after 1928. This right was derived as a corollary from the prohibition of war in that treaty.

It should, however, be understood that the protection afforded to this new legal right by anticipatory self-defence did not expand the legal scope of the inherent right of self-defence, or alter the circumstances in which anticipatory self-defence was considered lawful in international law. Rather, its protection arose naturally from the operation of anticipatory self-defence.

My observation of this new legal right and of the new function fulfilled by anticipatory self-defence in protecting it will be of particular relevance in Chapter 5, as the same reasoning will be applied to the prohibition of the threat, or use, of force created by Article 2(4) of the Charter. The relevance of this observation to
my thesis is that an implied extinguishment of anticipatory self-defence in 1945 by Article 51 would have eliminated its protection of the new legal right of states gained in that year to remain free from the threat, or use, of force which arose as a corollary from the prohibition in Article 2(4). As this observation is a new offering to the existing scholarly debate, the new consequence I have identified of an implied extinguishment of anticipatory self-defence in 1945 has not previously been raised. This consequence will be examined in Chapters 5 and 6.

The final issue identified in Chapters 2 and 3 are the two views which may be taken of the effect of international customary law’s recognition of the inherent right of self-defence and the consequent incorporation of this right into international law. One view identified was that this process restricted the substantive content of customary law to the principles of immediacy, necessity and proportionality. The other view was that this process formed these customary law principles, but also replicated the inherent right of self-defence in customary law to form a ‘customary law right of self-defence’.

As with Chapters 2 and 3, the materials examined in this chapter and the practice and opinio juris of states in self-defence appear to continue to be more consistent with the first view than the second, for the same reasons provided in those previous chapters. There is no reference in the materials examined in this chapter to a ‘customary law right of self-defence’, nor to states relying on such a right to repel an imminent threat, or use, of armed force in their practice. The evidence in this chapter of the substantive content of customary law favours a conclusion that it consisted of the three principles of immediacy, necessity and proportionality which
functioned to restrict an exercise of the inherent right of self-defence to an imminent threat, or use, of armed force.

The materials examined in Chapters 2, 3 and 4 provide an important preparatory step towards answering my central question of law at its first applicable time, being in 1945 with the creation of the *Charter*. The *Charter* will be examined in Chapter 5. However, as of 1939, my research provides a legal basis for favouring the conclusion that ‘anticipatory self-defence’ in international law can most appropriately be described as a manifestation of the inherent right of self-defence when this right was exercised against an imminent threat of armed force.
Chapter 5

The use of force between states – 1945 to the present

5.1 Introduction

The purpose of this chapter is to use the answers to my central and supporting questions of law as a new legal prism through which to view the international legal framework created in 1945, insofar as it pertains to the question posed by my thesis. To facilitate this purpose, I will consider the divisions in the existing scholarly debate in respect of the question posed by my thesis until Chapter 6. In that chapter, my new legal prism will be applied to this debate to see whether its divisions might be reconciled, or at least the distance between them reduced, by it.

The first part of sub-chapter 5.2 will examine Article 2(4) of the Charter to identify the nature of the prohibition of the threat, or use, of force created in 1945 and Chapter VII which created the enforcement authority of the Security Council of the United Nations. This part of sub-section 5.2 will complete my examination of that aspect of international law which relates to the use of force other than by exercising the inherent right of self-defence. The second part of sub-chapter 5.2 will examine Article 51 of the Charter and its travaux preparatoires to explore how and why the intention of the negotiating states to recognise the inherent right of self-defence and to protect it against impairment was formed. I will also explore how the answer to my fourth supporting question of law could apply to the words ‘if an armed attack occurs’ in this article.
In sub-chapter 5.3, I will integrate the answers to my central and supporting questions of law with my examination of Articles 2(4) and 51 of the Charter in sub-chapters 5.2 and 5.3 to offer a new legal basis in 1945 for the view that anticipatory self-defence coexisted with the Charter.

5.2 The Charter of the United Nations 1945

The Charter has been seen as the culmination of international law’s process of restraining the sovereign right to use war for purposes other than self-defence.363 The conduct finally prohibited by Article 2(4) of the Charter, being the threat, or use, of force, correlated with the conduct against which the inherent right of self-defence had been exercised throughout the history of international law.364 In the proceeding sub-chapters, the legal significance of this correlation will become apparent. A brief overview of the structure of those parts of the Charter relevant to my thesis is helpful.

Of the 19 chapters of the Charter, the most relevant to my thesis are Chapters I and VII. The Preamble of the Charter renounces war, requires armed force not to be used except in the common interest and commits the United Nations to the international rule of law by requiring it ‘to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained’. Chapter 1 specifies the purposes of the United Nations. It was constituted by two articles which expressed the commitment of the international community to the peaceful settlement of

364 Brownlie, above n 8 (1963), 112; Randelzhofer ‘Article 51’ in Simma (ed), above n 7, 789 [3]; McCormack, ‘The Use of Force’ in Blay, Piotrowicz and Tsamenyi (eds), above n 6, 226-228 and Cassese, above n 8, 354.
international disputes, collective security, the prevention and removal of threats to the peace, the suppression of acts of aggression and the prohibition of the threat, or use, of force. The interpretation and application of the articles of the Charter must be made with the objective of fulfilling these purposes.\textsuperscript{365}

Chapter VII exclusively reserves to the Security Council the authority to determine threats to, or breaches of, the peace and acts of aggression.\textsuperscript{366} The Security Council decides on measures to be taken to ‘restore international peace and security’.\textsuperscript{367} Members of the United Nations are required to provide military, or other, assistance to the Security Council if the use of force is authorised to restore international peace and security. These articles of the Charter, insofar as they are relevant to this thesis, will now be examined. Article 51, which appears in Chapter VII of the Charter, will be examined in sub-chapter 5.2.2.1.

5.2.1 The prohibition of the use, or threat, of force

5.2.1.1 Article 2(4)

Article 2(4) of the Charter states:

‘All Members shall 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.’\textsuperscript{368}

\textsuperscript{365} Article 18, 24(4), 26, 31(1),(2) and (3)(b) of the Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).


\textsuperscript{368} Article 2(4) of the Charter of the United Nations, opened for signature 26 June 1945, 59 Stat 1031 (entered into force 24 October 1945).
Article 2(4) prohibited the threat, or use, of armed force. Such force need not satisfy any particular conceptual categorisation of force, such as ‘armed attack’, ‘aggression’, ‘invasion’ or ‘war’ to constitute a violation of the article. This prohibition is absolute, insofar as it is used against the territorial integrity, or political independence, of a state. It appears to eliminate the uncertainty surrounding the scope of the prohibition of ‘war’ created by Article I of the General Treaty for the Renunciation of War 1928.

The prohibition against the threat, or use, of force is generally accepted as a rule of jus cogens. The significance of this status is that it is ‘accepted and recognised by the international community as a norm from which no derogation is permitted and which can only be altered by a subsequent norm of general international law having the same character’. Article 2(4) was reinforced by the 1987 U.N. Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations.

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369 For example, Nicaragua, above n 23, [187], [190], [228]-[229], [249], [292]; Legality of Nuclear Weapons, above n 23, [38]-[50]; Oil platforms, above n 23, [76] and Armed activities in the Congo, above n 23, [148]-[149].
370 Corfu Channel (Albania v United Kingdom) [1949] ICJ Rep 4, 34-35. See also Brownlie, above n 8 (1963), 113-114.
373 1987 U.N. Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, GA Res 42/22, UN GAOR, 42nd sess, 73rd plen mtg, UN Doc A/Res/42/22 supp 49 (1987). Additionally, as an indication of the view taken by the international community of Article 2(4), the General Assembly adopted on first reading a controversial text of the International Law Commission relating to Draft Articles on State Responsibility, in particular Clause 9, which considered serious breaches of the rules on international peace and security (such as Article 2(4)) as giving rise to the criminal responsibility of states in international law.
The prohibition in Article 2(4) has been consistently and strictly applied by the International Court of Justice. In all contentious cases, the Court found that a violation of the prohibition in the article simultaneously constituted a violation of the sovereignty of the affected state. This consequence demonstrates the connection between state sovereignty and the principles of non-use of force, equality of states and non-intervention reflected in Article 2 of the Charter.

374 Corfu Channel, above n 23; Nicaragua, above n 23; Legality of Nuclear Weapons, above n 23; Oil Platforms, above n 23; Legality of the Wall, above n 23 and Armed Activities in the Congo, above n 23.

375 For discussions on a state’s use of war to defend its sovereignty, see Fenwick, above n 192, 36; James Brierly, “International Law and Resort to Armed Force” (1932) 4 Cambridge Law Journal 308; Brownlie, above n 8 (1963), 40, 41, 49 and 50; Francis Hinsley, Sovereignty (2nd ed, 1986) 222-225; Akehurst, above n 21, 17-18; Antony Allott, Euromia: New World Order for a New World (1990) 329-330; Alan James, Sovereign Statehood (2nd ed 1986) ch 1; Luzius Wildhaber, Sovereignty and International Law (1983) 425-452; Randelzhofer ‘Article 51’ in Simma (ed), above n 7, 112-115; McCormack, above n 6 (2005), 225 and Malančuk, above n 8, 19, 151-154.

376 The principle of the equality of states has endured in international law. See Chapter 2 and Charter of the Organisation of American States 1948, opened for signature 30 April 1948, 119 UNTS 49 (entered into force 13 December 1951). Article 3 e) of the Charter states: ‘Every State has the right to choose, without external interference, its political, economic, and social system and to organise itself in the best way suited to it, and has the duty of abstaining from intervening in the affairs of another state. Subject to the foregoing, the American States shall cooperate fully among themselves, independently of the nature of their political, economic and social systems.’ The equality of states is specifically recognised and is derived by a state from the ‘mere fact of its existence as a person under international law’ (Article 10) and no state may use economic or political coercive means to force the political will of another (Article 20). The Organisation of African Unity 1963, which came into existence on 25 May 1963 and ceased existing in 2002, recognised in Article III 1 of its charter the ‘sovereign equality’ of its member states. See also General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States In Accordance With The Charter of the United Nations 1970, GA Res 2625 (XXV), UN GAOR 25th sess, 188/34 plen mtg, UN Doc A/Res/2625 (1970).

377 For example, Charter of the Organisation of American States 1948, above n 41, Articles 19 and 20; The Organisation of African Unity 1963, Article II 1(c) and Article III 2 and 3; Declaration on the Admissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, GA Res 2131(XX) UN GAOR, 20th sess, 1408th plen mtg, UN Doc A/Res/2131 Supp 14, 11 (1965), Article 1.

378 For examinations of the principle of state sovereignty by international judicial bodies, see Wimbledon (France, Italy, Japan and the United Kingdom v Germany) [1923] PCIJ (series A) no 1 25; Lotus (France v Turkey) [1927] ADPILC 98 153; Island of Palmas (Netherlands v United States) [1928] PCIJ 22 735; Clipperton Island (France v Mexico) (1931) 26 American Journal of International Law 390; Corfu Channel (U.K. v Albania)(Merits) [1947] ICJ Rep 35; Reparations (Advisory Opinion) [1949] ICJ Rep 174; Minquiers and Ecrehos (France v U.K.) [1953] ICJ Rep 47; Rights of Passage (Portugal v India) [1960] ICJ Rep 6; North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands) [1969] ICJ Rep 3; Western Sahara (Advisory Opinion) [1975] ICJ Rep 12 and Nicaragua, above n 23, [202]. For other scholarly views on the principle of state sovereignty and the freedom of states to act without the direction of another state, see Akehurst, above n 16, 78-79; Gerald Fitzmaurice, ‘Custom as a Source of International Law’ (1974-1975) 47 British Yearbook of International Law 53, 75; Friedmann, above n 6, 121-123; Hinsley, above n 375, 222-225; Allott, above n 375, 329-330; James, above n 375, ch 1; Wildhaber, above n 375, 425-452; Cassese, above n 371, 179; Schmitt, above n 68, 90 and Randelzhofer ‘Article 51’ in Simma (ed), above n 228, 112-115.
This connection and the legal consequences of violating Article 2(4) have continuously been highlighted by the Court. In *Corfu Channel*, the Court described the British Navy’s sweep of Albanian territorial waters as a:

‘manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law.”

The Court emphasised the connection between state sovereignty (as an ‘essential foundation of international relations’) and the prohibition of force which ultimately protects it. Thus, in *Nicaragua*, the principles of non-use of force and non-intervention were considered by the Court in the context of the provision of various means of support by the United States for military and paramilitary actions in and against Nicaragua. As part of this consideration, the Court examined the connection formed in 1945 between state sovereignty, these principles and Article 2(4). The Court emphasised that Article 2(4) emanated from a ‘common fundamental principle outlawing the use of force in international relations’ and a breach of it simultaneously constitutes a violation of the principle of state sovereignty.

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379 *Corfu Channel*, above n 23, 33-35. This conduct was described by Britain as one of ‘self-protection or self-help’. The Court did not examine what constituted ‘a threat to use force’ in *Nicaragua*, however, it did hold in *Legality of Nuclear Weapons and Oil Platforms* that a threat to use conduct which itself would, if it occurred, constitute ‘force’ within the meaning of Article 2(4) would equally be prohibited acts. See Sardurka, above n 371, 239 and Schmitt, above n 68, 91.

380 *Corfu Channel*, above n 23, 33-35.

381 *Nicaragua*, above n 23, [15] and [23]. The Court could not formally consider the legal question of whether Article 2(4) had been violated by the United States due to the multilateral treaty reservation made by the United States; [22]-[29], [185] and [228].

382 Ibid [188]-[192], [210]-[211], [227]-[228], [238] and [246]-[249] in respect to the international customary law rule of non-use of force and Article 2(4) of the *Charter* and [205], [212]-[214], [251]-[253] and [288]-[299] in respect of state sovereignty.

383 Ibid [181].

384 Ibid [195], [212]-[213], [251].
In *Nuclear Weapons*, the Court advised on the question, ‘Is the threat or use of nuclear weapons in any circumstances permitted under international law?’ The Court, as it did in *Nicaragua*, believed that this question necessarily involved a consideration of the connection between state sovereignty, the customary law prohibiting the threat, or use, of force and Article 2(4) of the *Charter*.

The Court said that a threat of force not authorised by the inherent right of self-defence and Article 51 was a violation of the prohibition in Article 2(4). It also rejected the argument that the possession of a nuclear weapon *per se* violates Article 2(4). It stated that the degree of force and the weapon employed to constitute such force were not ameliorating factors which change the legal fact of a violation of the article. The prohibition in Article 2(4) applied to ‘any use of force, regardless of the weapons employed’.

While the reference made is to ‘force’, it was the prohibition itself in Article 2(4) that was being discussed, so the observation of the Court in *Nuclear Weapons* can logically be extended to the use of any weapon used to threaten force. Further, an expressed conditional intention to use force may, or may not, amount to a threat of force of a nature capable of violating Article 2(4). This depends on the nature of the force if it was actually used. If such force would violate the article, the threat to use such force is equally a violation, regardless of whether the condition is

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385 *Legality of Nuclear Weapons*, above n 23, [20].
386 Ibid [47].
387 Ibid [48]. What was required was a credible threat to use the weapon and is directed ‘against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality’; [48].
388 Ibid [39] and [47].
389 Ibid [39].
390 Ibid [47].
fulfilled. A conclusion from these observations of the Court is that the only threat to use force which can be considered legal is that which conforms to the inherent right of self-defence and Article 51.

In *Oil platforms*, the considerations of the Court did not necessitate a specific examination of Article 2(4). Instead, the Court considered whether the use of force by the United States against Iranian oil platforms was an exercise of the inherent right of self-defence, or whether it constituted unlawful force in violation of Article 2(4). It confirmed that a provision in a treaty permitting the use of force which otherwise would have violated Article 2(4) of the *Charter* is subject to the substantive rules of international law.

The Court determined that the force used by the United States was not a measure necessary to protect its essential security interests under the treaty ‘in the light of the international law on the use of force’. As the body of the judgment focussed on the factual circumstances of the use of force, the justifications for it presented by the United States and the substantive rules governing self-defence, it was implicit that the use of force violated Article 2(4) by not according with those substantive rules.

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391 Ibid. The pre-requisite to these observations is the threat of force is against the territorial integrity or political independence of a sovereign state, or against the Purposes of the *United Nations*; [48].
393 *Oil Platforms*, above n 23, [43]-[45] and [125].
394 Ibid [125].
Similarly, in *Armed activities in the Congo*, the Court found the sovereignty and territorial integrity of the Democratic Republic of the Congo and Article 2(4) of the *Charter* were violated by the military activities conducted on its territory by Uganda. This violation occurred after permission for the presence of the Ugandan troops had been withdrawn. The Court held states cannot use force to protect perceived security interests which is not a lawful exercise of the inherent right of self-defence.

The prevailing scholarly opinion in respect of the prohibition in Article 2(4) is consistent with the interpretation of the Court. Few scholars have suggested that the article should be given a restricted interpretation. In contrast, other scholars have suggested that the legal rights of a state protected by the prohibition encompass the totality of the tangible and intangible rights possessed by states and should be interpreted consistent with the principles of state sovereignty and non-intervention. Most scholars agree that Article 2(4) prohibits the threat, or use, of armed force used for those reasons authorised by customary law before 1928 (other than for self-defence).

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395 *Armed Activities in the Congo*, above n 23.
396 Ibid [148]-[154], [165] and [259].
397 Ibid [148].
398 Ibid [148].
399 Lauterpacht, above n 7, 154; Brownlie, above n 8 (1963), 267-268; Bowett, above n 180, 152 and Eduardo Arechaga, ‘General Course in Public International Law’ (1978) 159 *Hague Recueil des Cours* 9 who holds the view that these words were designed to be an all-encompassing phrase to prohibit the threat or use of force employed for a reason not falling strictly within the phrase ‘against the territorial integrity or political independence of any state’. For a contemporary and thorough analysis of Article 2(4), see Sturchler, above n 371 generally, but especially 37-61 and Moir, above n 6, 5-9.
400 For instance, Bowett, above n 180, 185.
402 For instance, Brownlie, above n 8 (1963), 112-113; Lauterpacht, above n 7, 154; Randelzhofer in Simma (ed), above n 7, 789 [3]; E Roucounas, *Present Problems of the Use of Force in*
Randelzhofer, for instance, wrote that the effect of Article 2(4) was to prohibit the threat or use of force ‘in general’. He says that Security Council enforcement action under Chapter VII of the Charter and the inherent right to individual and collective security as ‘laid down in Article 51’ were the only exceptions to this prohibition in 1945.\textsuperscript{402} He writes that the:

‘prevailing view refers, above all, to the purpose of the UN Charter, i.e. to restrict as far as possible the use of force by the individual State, and considers Art. 51 to exclude any self-defence, other than that in response to an armed attack.’\textsuperscript{403}

There have been two significant issues touched upon by some scholars in respect of Article 2(4), as will be seen below. The first is the nature of conduct which may, or may not, constitute a ‘threat’ of force. The second is whether a threat of force \textit{per se} was sufficient in 1945 to trigger the inherent right of self-defence.

There was little material in 1945, other than in reference to the plain meaning of the words used in Article 2(4), which identified the conduct considered sufficient to constitute a ‘threat of force’.\textsuperscript{404} The \textit{travaux preparatoires} of the article refer generally to the ‘threat or use of force’ for the purpose of protecting the ‘territorial integrity and political independence’ of states.\textsuperscript{405} It seems there was no need to define the two types of conduct prohibited by the article. Rather, the plain meaning of the words ‘threat or use of force’ was regarded as sufficient. It must be remembered that this prohibition was created within the purposes of the \textit{United

\textsuperscript{402} Randelzhofer ‘Article 51’ in Simma (ed), above n 7, 789 [3].
\textsuperscript{403} Ibid 792 [10]. See also Brownlie, above n 8 (1963), 265.
\textsuperscript{404} Gray, above n 8, 592.
Nations as enunciated in Chapter 1 of the Charter.\textsuperscript{406} For instance, Lauterpacht, as did the drafters of Article 2(4), adopted a plain application of the article’s words when he concluded that it prohibited a threat, or use, of military force:

\begin{quote}
`The obligation extends not only to the use of force, but also to threats of force. The expression `force’ is used in its ordinary connotation as referring to armed force as distinguished from economic or political pressure.’\textsuperscript{407}
\end{quote}

Brierly\textsuperscript{408} and Jessup\textsuperscript{409} similarly excluded force other than military force from Article 2(4). Brownlie provided a practical example of a threat of force as ‘… when military aircraft violate the airspace of a state or warships stage a demonstration of strength or otherwise unlawfully penetrate territorial waters of a state.’\textsuperscript{410} He restricted his interpretation of a ‘threat of force’ under Article 2(4) to a ‘promise’:

\begin{quote}
`A threat of force consists in an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government. If the promise is to resort to force in conditions in which no justification for the use of force exists, the threat itself is illegal.’\textsuperscript{411}
\end{quote}

Brownlie’s description of a threat of force, such threat having been delivered expressly, or impliedly, encompassed a verbal threat as well as an actual gathering of troops, or armaments.\textsuperscript{412} Goodrich and Hambro interpreted Article 2(4) as requiring the actual threat of ‘physical force’, or ‘armed force’ and eliminated the use of ‘economic, or psychological, methods’.\textsuperscript{413} Their purpose in using the word ‘armed’ is clear. They considered that the actual physical threat of force by the


\textsuperscript{407} Lauterpacht, above n 7, 153-154.

\textsuperscript{408} James Brierly, The Basis of Obligation in International Law (1958) 233-236, 285. See also Shmitt, above n 68, 91.

\textsuperscript{409} Jessup, above n 6, 157-187.

\textsuperscript{410} Brownlie, above n 8 (1963), 148.

\textsuperscript{411} Ibid 364

\textsuperscript{412} Ibid 361-364.

\textsuperscript{413} Goodrich and Hambro, above n 8, 104.
gathering of troops, or deployment of armaments, in a hostile context was necessary to constitute a violation of the prohibition in Article 2(4).

Simma believed that the prohibition in 1945 extended to ‘the mere threat of force’ and that ‘force’ relates to armed force in the traditional sense. He acknowledged that the scope of the term ‘threat of force’ has received ‘far less consideration in legal writings’ than has the actual use of force. In contrast to Brownlie, Simma believed a physical threat of force is at least required to violate the prohibition in Article 2(4) in 1945. For instance, he wrote:

‘Another reason why it is difficult to qualify certain acts of a state as a prohibited threat of force is that the causal link between a threat and the behaviour of the target state is often indeterminable. It is not sufficient that another state reacts or believes it is reacting to a presumed threat of force. Only a threat directed towards a specific reaction on the part of the target state is unlawful under the terms of Art. 2(4)… After all, it has to be pointed out that the threat of force forbidden by Art. 2(4) requires a coercive intent directed towards specific behaviour on the part of another state.’

Simma’s observations are closer to the issue raised by McCormack, who expanded on the question of what constitutes a threat of force by stating that ‘the real issue is to decide the point at which a state’s violation of Article 2(4) justifies a forceful response in self-defence.’ His position is that the Charter in 1945 permitted the inherent right of self-defence to be triggered by a threat of force sufficiently serious and imminent to endanger the existence of a state. McCormack’s view can be seen as inferring that such a threat marks the legal commencement of an armed attack for the purpose of Article 51 of the Charter. If he did so infer, he would be

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414 Randelzhofer ‘Article 51’ in Simma (ed), above n 228, 110 [14] and 111-112.
415 Ibid 112 [15]. See also Fenwick, above n 192, 178-179; Malanczuk, above n 8, 309-311 and Sturchler, above n 398, 273-274.
416 Simma (ed), above n 371, 118 [36].
417 Ibid. He acknowledges that a context of hostility is often difficult, if not impossible, to determine as weapons can equally be used offensively as defensively.
418 Ibid.
inferring that the precondition of the occurrence of an armed attack in Article 51 was fulfilled at this point in time, rather than with the physical commencement of such an attack in the traditional sense.

The prohibition against a threat or use of force was not the only matter of significance arising from Article 2(4) in 1945. This prohibition may also be seen as having created in favour of states the positive legal right to remain free from the threat, or use, of force in their international relations. This is a matter not previously examined by legal scholars.

5.2.1.2 A new legal right derived from Article 2(4)

A new legal right in favour of states may be seen to have arisen in 1945 as a corollary to the prohibition created by Article 2(4) of the Charter. This new right was to remain free from the threat, or use, of force in their international relations. In support of this hypothesis, I recall the authorities cited in subchapter 4.3 in respect of the new legal right in favour of states derived in 1928 as a corollary to the prohibition of war created by the General Treaty.

The possible creation of this new legal right has not been a matter examined by scholars when examining the legal effect of Article 2(4). Consequently, they have not identified the possibility that anticipatory self-defence in 1945, assuming its coexistence with the Charter, fulfilled an additional function of preserving and protecting this legal right in cases where one state threatened the other with imminent armed force. This new function would have been in addition to its historic function of preserving and protecting the state from an imminent threat of armed force. The fulfilment of this function would have been preconditioned on
peaceful means failing to settle the dispute and where there was an absence of Security Council enforcement action in respect of that dispute.

The legal basis for the creation of this new legal right means – being a corollary to Article 2(4) itself – not only imposed on states a prohibition against the threat, or use, of force, but also provided them with the positive legal right to remain free from that conduct in their international relations. Thus, since 1945, a state requesting an order for reparations against another state in proceedings in the International Court of Justice for damage sustained from the use of unlawful force is based on a violation of this positive legal right.420

It can be seen that this new legal right, if created in 1945, was effective only if it was protected before its violation. Otherwise, it would have been of symbolic significance only. I suggest that, in circumstances where the machinery of the United Nations failed to prevent a dispute from manifesting as an imminent threat of armed force, the final legal basis for a state to unilaterally protect and preserve this right was anticipatory self-defence. This protection and preservation occurred simultaneously with and as a consequence of the protection and preservation provided to the self-defending state by an act of anticipatory self-defence. Therefore, the critical point in time at which this new legal right in 1945 was protected and preserved, or not, was when a threat of armed force became imminent.

420 For example, Corfu Channel, above n 23, 23-26; Nicaragua, above n 23, [15] and [292] in which Nicaragua alleged, inter alia, a violation of Article 2(4) of the Charter, Articles 18 and 20 of the Charter of the Organization of American States1948, Article 8 of the Convention on Rights and Duties of States 1933 and the international customary law against the threat or use of force by the United States and Oil Platforms, above n 23, [18]-[19] in which Iran alleged a violation of Articles I, IV(1) and X(1) of the Treaty of Amity, Economic Relations and Consular Rights 1955 (1955) UNTS 14 (entered into force 15 August 1955) and of ‘international law’ by the United States.
An important contrast is made between the new legal right derived as a corollary from Article 2(4) and that derived as a corollary from the General Treaty. In respect to the latter, the General Treaty prohibited war per se. In this case, a state faced with an imminent threat of force was able to respond with anticipatory self-defence before the right to remain free from war was violated. In contrast and in respect of the former, Article 2(4) also prohibited a threat of force, not just the use of force. With the manifestation of a threat of force, this new legal right would, prima facie, be violated. However, anticipatory self-defence, assuming its coexistence with the Charter, could only repel an imminent threat of force.

Therefore, this new legal right could initially be violated by a threat of armed force per se which had not fulfilled the international customary law principles of immediacy and necessity, but a state would not be authorised by international law to exercise its inherent right of self-defence to repel it. The contrast drawn between the operation of these two new legal rights can also perhaps be explained by the legal supremacy of the Security Council in 1945 and its authority to act under Chapter VII against a threat of force when such a threat was not sufficient to trigger a state’s inherent right of self-defence.

5.2.1.3 Chapter VII

Chapter VII of the Charter confers on the Security Council of the United Nations, inter alia, one of two exceptions under the Charter to the general prohibition against the threat, or use, of force created by Article 2(4). Article 39 grants the

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421 Brownlie, above n 8 (1963), 265-268, 270-275 and 435-436; Randlezhofer in Simma (ed), above n 7, 789 [3] and [41]; A Panyarachun, UN Secretary-General’s High-Level Panel on Threats, Challenges and Change, UN GAOR, 59th sess, 56th plen mtg, (2004) UN Doc A/59/565 [185]-[186]; E Roucounas, Present Problems of the Use of Force in International Law, 10th Commission,
Security Council jurisdiction to ‘determine the existence of any threat to the peace, breach of the peace, or act of aggression’ and to make recommendations to ‘maintain or restore international peace and security’, or to ‘decide what measures shall be taken in accordance with Article 41 and 42’. The scope of incidents over which the Security Council has exercised its jurisdiction under Article 39 includes armed conflicts between states, territorial disputes between states, the arrest of individuals suspected of having committed war crimes, the attempted overthrow of sovereign governments, internal political upheaval, the removal of colonial forces from conquered lands in disobedience of General Assembly Resolutions.

422 Randelzhofer ‘Article 51’ in Simma (ed), above n 7, 789 [4], [17]-[19] and [41].
424 For example SC Res 118, UN SCOR, 6th sess, 743rd mtg, UN Doc S/Res/118 (1956) over the Suez Canal.
426 For example SC Res 144, UN SCOR, 15th sess, 816th mtg, UN Doc S/Res/144 (1960) in respect to the United States and Cuba.
the hijacking of commercial aircraft, the self-determination of peoples, the taking of hostages, the break-up of former republics, the proliferation of weapons of mass destruction, the rights of children and civilians generally during armed conflict and terrorism.

Thus, the conduct in response to which the Security Council has authorised measures not involving the use of armed force under Article 41, or measures involving such force under Article 42, in order to maintain, or restore, international peace and security has been diverse and has included an ‘armed attack’ as preconditioned by Article 51. Article 44 authorises the Security Council to call upon a member state to provide the means to use force under Article 42, those means undertaken to have been made available to the Security Council by virtue of Article 43(1).

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430 For example SC Res 311, UN SCOR, 27th sess, 1639th mtg, UN Doc S/Res/311 (1972) in respect to the regime of apartheid in South Africa.
431 For example SC Res 384, UN SCOR, 30th sess, 1869th mtg, UN Doc S/Res/1869 (1975) in respect to East Timor.
434 For example SC Res 1172, UN SCOR, 53rd sess, 3890th mtg, UN Doc S/Res/1172 (1998) and others in respect to Pakistan and India.
436 For example SC Res 1377, UN SCOR, 56th sess, 4413rd mtg, UN Doc S/Res/4413 (2001) and the plethora of similar resolutions dealing with this subject.
437 A Panyarachun, UN Secretary-General’s High-Level Panel on Threats, Challenges and Change, UN GAOR, 59th sess, 56th plen mtg, UN Doc A/59/565 [193] (2004). The concept of an ‘armed attack’ is examined in Chapter 4.
438 Armed activities in the Congo v Uganda, above n 23, [151]-154.
The concept of ‘aggression’

Prior to 1945, ‘aggression’ was one term used by states to describe the use of armed force by one state against the territory, or vessels, of another.439 ‘Armed attack’ was another term used for this conduct. These categorisations of armed force shared common conduct. The term ‘aggression’ in 1945 appeared in Article 39 of the Charter amongst other conduct which may threaten, or breach, international peace and security.440 ‘Aggression’ is a different term to ‘force’ which appears in Article 2(4) and to ‘armed attack’ which appears in Article 51.441

The General Assembly of the United Nations requested the International Law Commission in 1950 to draft a proposed legal definition of ‘aggression’.442 Mr Jean Siropoulos, the Special Rapporteur of the Commission, soon reported that such a definition could not be achieved.443 The General Assembly of the United Nations in 1974 succeeded in categorising certain conduct considered to fall within this concept.444

In Article 1, ‘aggression’ was defined as the ‘use of armed force’ by a state in contravention of the prohibition already appearing in Article 2(4) of the Charter. In

439 Brownlie, above n 8 (1963), 247-250 and 351.
441 Randelzhofer ‘Article 51’ in Simma (ed), above n 7, 789 [17]-[19].
443 Jean Spiropoulos, ‘Second Report of the Special Rapporteur on the Draft Code of Offices Against the Peace and Security of Mankind’ (1951) Year Book International Law Commission vol 11, 43-69 [165] and [168] where he concluded that ‘Bearing in mind the preceding remarks, our conclusion is that the notion of aggression is a notion per se, a primary notion, which, by its very essence, is not susceptible of definition… even if the definition of aggression were theoretically possible, it would not be desirable, for practical reasons, to draw up such a definition.’
Article 2, a state that first used ‘armed force’ in contravention of the *Charter* was deemed to evince aggression, subject to an examination of ‘other relevant circumstances’. Terminology to categorise different forms of conduct deemed to constitute ‘aggression’ was used throughout Resolution 3314 (XXIX). It included ‘invasion’, ‘attack’, ‘military occupation’, ‘bombardment’, ‘blockade’, ‘aggression’, ‘war of aggression’ and the support of groups in other states participating in such conduct against the government of other states. The concept of ‘aggression’ has been relevant in the international criminal law and has recently been examined by an informal inter-sessional meeting of the Special Working Group of the International Criminal Court.

The efforts of states throughout history to define ‘aggression’ have been of limited relevance to the international law of self-defence. The exercise of the inherent right of self-defence has not been restricted by international law to any conceptual categorisation of force other than its imminent threat, or use. In 1963, Brownlie considered whether defining aggression was possible, or even desirable, for this, or any other, purpose. While he acknowledged the difficulty in attempting to define such a dynamic concept for all purposes, he believed that it was necessary to do so for the benefit of the international community and international relations. However, he suggested that defining aggression conceptually, so as not to burden...
the task with technicalities, would be the most effective approach. In this regard, he suggested in the case of armed aggression that:

‘discussion of the types of action which are unlawful tend to obscure the fact that it is the justifications for resort to force which are exceptional and not the norm of illegality.’

5.2.2 The recognition of the inherent right of self-defence and its protection against impairment in 1945

The remainder of this sub-chapter examines the legal effect of and the intent for recognising the inherent right of self-defence in Article 51 of the Charter and protecting this right against impairment by anything in that treaty. My examination is restricted to the point at which the Charter, so that the answers to my four supporting questions of law can be applied to Article 51 free of the divisions which have arisen in existing scholarly debate. The purpose of my examination is to answer my central question of law and the question posed by my thesis on the first occasion they arise, namely, with the commencement of the Charter in 1945.

5.2.2.1 Article 51

Article 51 of the Charter of the United Nations 1945 states:

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.

A number of immediate observations can be made of Article 51 in 1945 when plainly read. The first sentence created four legal effects. The first is that the article

448 Ibid 355-356. He states at 357 that such an approach could also be utilised in respect to the definition of an ‘armed attack’ for the purposes of Article 51.
449 Ibid 357.
recognised the inherent right of self-defence, whether that right was exercised individually, or collectively. Article 51 can be contrasted from the *General Treaty* in this regard on the basis that the latter did not expressly recognise, or exempt from its prohibition of war, the inherent right of self-defence. This was because the right was considered a manifestation of state sovereignty, inviolable and undefinable by any treaty. It will be seen in the following sub-chapter, in which the *travaux preparatoires* of Article 51 are examined, that the reason the negotiating states in 1945 saw fit to expressly recognise the inherent right of self-defence in the *Charter* was to expressly protect the concept of collective self-defence.

The second legal effect of the first sentence in Article 51 in 1945 is the explicit protection granted to the inherent right of self-defence against ‘impairment’ by the operation of the *Charter*. ‘Impairment’ could manifest in two respects. It could relate to the existence of the right in international law, or it could relate to its legal scope (that is, the conduct against and the time at which this right could lawfully be exercised at the time of the *Charter*), or both.

The third legal effect of the first sentence in Article 51 is to create the precondition of the occurrence of an armed attack for an exercise of the inherent right of self-defence. The word ‘occurs’ is in the present tense, meaning that the armed attack is required to have commenced before the right could be exercised. The question left unanswered by the article, of course, was: when did an armed attack ‘commence’ in 1945? This missing aspect of the equation goes to the heart of the question posed by my thesis. It shall be considered in more detail in the following sub-chapters.
The fourth legal effect of the first sentence in Article 51 is to establish the superiority of the Security Council over states upon taking effective enforcement action to maintain international peace and security. This meant that if the Security Council took such action after the inherent right of self-defence had been exercised, such exercise would cease.

This legal superiority of the Security Council did not impair the inherent right of self-defence. Rather, it subjugated the continuing exercise of the right to the power of the Security Council. Upon the council taking effective action to maintain international peace and security, the initial fulfilment of the international customary law principles of immediacy and necessity, and the existence of the occurrence of an armed attack under Article 51 would, in theory, have no longer existed. If the Security Council had taken such action before the inherent right of self-defence was exercised, then in theory the situation would not have progressed to the point of fulfilling these prerequisites.

The second sentence in Article 51 created two further legal effects. The first was the imposition of a legal obligation upon a self-defending state to immediately report to the Security Council measures it takes in the exercise of its inherent right of self-defence. This was to enable the Security Council to become aware of the conflict and to be appraised of the circumstances so that it may act under Chapter VII. The second legal effect of this sentence created the legal superiority (and responsibility) of the Security Council to act at any time to maintain, or restore,

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international peace and security. This included acting before circumstances arose which entitled a self-defending state to exercise its inherent right of self-defence.

This overview of the six legal effects of Article 51 is derived from the plain language used in 1945 to draft that article. Such a plain reading prima facie accommodates without contradiction, or for the need of inference, the answers to my four supporting questions of law as identified in my previous chapters. I suggest that a plain interpretation and application of the article may be assumed to have been the intention of its drafters, considering the simplicity of its language, the importance of its legal purpose and the plainness of the legal issues negotiated by states, as illustrated by the article’s travaux preparatoires.

It is now necessary to explore the travaux preparatoires to Article 51 of the Charter to determine the intention of the negotiating states.

5.2.2.2 The travaux preparatoires of Article 51

A preliminary question of law must be considered before referring to the travaux preparatoires of Article 51. For the travaux preparatoires to be referred to in order to assist with the interpretation of any treaty provision, some ambiguity, or obscurity, arising from the provision itself must be evident, or must lead to a manifestly absurd, or unreasonable, result if plainly applied.451

451 Article 32 Vienna Convention on the Law of Treaties 1969, opened for signature 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980) even though Article 4 states that the Convention applies prospectively. Article 5, however, states that the Convention applies to constituent treaties of international organisations and any treaty adopted by such an organisation. See Lotus (France v Turkey) [1927] PCIJ Rep Series A 10, 16; Competence of the General Assembly regarding Admission to the United Nations [1950] ICJ Rep 4, 8 where the Court held if it can give effect to a treaty by applying the natural and ordinary meaning of its words, it may not interpret the words by giving them a different meaning; Asylum (Columbia v Peru) [1950] ICJ Rep 266, 276-279 and Malanczuk, above n 8, 366.
It seems these preconditions were not fulfilled in 1945 at the time of the creation of the *Charter*. It was only in subsequent decades that some confusion arose as to whether Article 51 impliedly extinguished anticipatory self-defence, as will be seen in Chapter 6. Although the present sub-chapter is an examination of the legal effect of Article 51 in 1945, the confusion which has arisen in subsequent decades inevitably brings its *travaux preparatoires* into consideration. It is therefore convenient at this point to briefly revisit the nature of the division in the existing scholarly debate in order to justify invoking Article 32 of the *Vienna Convention*.

The division in the existing scholarly debate primarily between positivists and realists over the interpretation and application of Article 51 is relatively simple. Positivists assert that anticipatory self-defence was impliedly extinguished in 1945 by the precondition of the occurrence of an armed attack in that article. Realists reject the positivist philosophy because it results in states suffering the physical commencement of an armed attack before exercising the inherent right of self-defence. They therefore suggest that the words ‘if an armed attack occurs’ in Article 51 should not be literally interpreted and applied.

In my opinion, the seriousness of the absurdity and ambiguity identified above is sufficient to justify resort to the *travaux preparatoires* of Article 51 in accordance with Article 32 of the *Vienna Convention*.454

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452 For example, Kelsen, above n 7, 792, 915; Fenwick, above n 192, 239; Goodrich and Hambro, above n 8, 106-107; McCormack, ‘The Use of Force’ in Blay, Piotrowicz and Tsamenyi (eds), above n 6, 229 and Moir, above n 6, 10-12.

453 Randelzhofer ‘Article 51’ in Simma (ed), above n 7, 802 [37-38]; Bryde, above n 208, 212-215; Greig, above n 6, 366-402; Mrazek, above n 208, 81-111 and Moir, above n 6, 5-22.

454 Goodrich and Hambro, above n 8, 300 and Friedmann, above n 6, 260.
The first observation made of the *travaux preparatoires* of Article 51 is that the Committee used the term ‘inherent’ to describe the legal basis in international law for a state to defend itself against armed force.\(^{455}\) ‘Inherent’ was also the term used by states when negotiating the *General Treaty* in 1928. The use of this term by the negotiating states is consistent with the rationale for the inherent right of self-defence expressed in my previous chapters.\(^{456}\) This observation is supported by the *travaux preparatoires* treating this right as an encapsulation of the totality of a state’s legal right to defend itself, as no reference is made to a right of self-defence separate from the inherent right of self-defence.\(^{457}\)

It is evident from the *travaux preparatoires* of Article 51 that the focus of the Committee during its negotiations was to assure some states that existing and future regional arrangements for collective self-defence would not be affected by the *Charter*.\(^{458}\) Originally, some states, such as France, suggested that the inherent right of self-defence could only be invoked under Article 51 with the permission of the Security Council, except in the case of ‘ex-enemy states’ in World War II (the

\(^{455}\) *United Nations Conference on International Organisation, San Francisco 1945*, xii 702-703. The United States and Mexican delegates referred simply to ‘the right of self-defence’.

\(^{456}\) *United Nations Conference on International Organisation, San Francisco 1945*, vi in which this position is given commonly by states. The British Government Commentary on the *Charter* and the inherent right of self-defence reads: ‘It was considered at the Dumbarton Oaks Conference that the right of self-defence was inherent in the proposals and did not need explicit mention in the Charter. But self-defence may be undertaken by more than one state at a time, and the existence of regional organisations made this right of special importance to some states, while special treaties of defence made its explicit recognition important to others. Accordingly the right is given to individual states or to combination of states to act until the Security Council itself has taken necessary measures’ (emphasis added by author).

\(^{457}\) Brownlie, above n 8 (1963), 275.

\(^{458}\) *United Nations Conference on International Organisation, San Francisco 1945*, Committee III/4 23 May mtg 4 xxi and Committee III 13 June mtg 2 xxi in which states discussed the importance of explicitly referring to regional arrangements against aggression so that the principle of collective agreement was recognised in the *Charter*. Individual state contributions included Argentina 681; Australia 682; Bolivia, Brazil and Chile 681; Columbia 680, 687; Costa Rica, Cuba and Ecuador 681; Egypt 682; El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela 681. See Goodrich and Hambro, above n 14, 300-301; Simma (ed), above n 5, 792-794 [9]-[15]; Kelsen, above n 10, 915-916; Institut de Droit International, *Present Problems of the Use of Force in International Law*, Rapporteur Emmanuel Roucounas, (2008) Session de Santiago, 67-165 and 72 [2] and *Nicaragua*, above n 23, [195-199].
Axis Powers). This restriction was rejected as unreasonable because it was considered that individual states must retain the unilateral legal authority of determining when this right should be exercised.\footnote{United Nations Conference on International Organisation, San Francisco 1945, Amendments to Dumbarton Oaks Proposals, i 661, 693 and iii 635.} Turkey submitted that this right should be restricted to ‘cases of emergency’, or where a state was being ‘attacked’.\footnote{Ibid xxi i 781.} Other states suggested looser restrictions. For instance, Czechoslovakia suggested that the Security Council should authorise generally the exercise of this right in ‘cases of immediate danger’.\footnote{Ibid xxii 681.}

The Report of the Rapporteur of Committee 1 to Commission 1 stated that ‘the use of arms in legitimate self-defence remains admitted and unimpaired’, but subjugated the exercise of the inherent right of self-defence to the United Nations by reporting that ‘the use of force, therefore, remains legitimate only to back up the decisions of the Organisation at the start of the controversy or during its solution in the way that the Organisation itself ordains.’\footnote{United Nations Conference on International Organisation, San Francisco 1945, Report of Rapporteur of Committee 1 to Commission 1, vi 450.} As seen in the previous sub-chapter, the construction of Article 51 reflected the Rapporteur in this regard. If the inherent right of self-defence was exercised, it became subjugated to the enforcement action of the Security Council to restore, or maintain, international peace and security. However, the Security Council’s legal authority to act at any time to achieve this objective remained absolute.

In my opinion, the absence from the Committee’s considerations of any reference to anticipatory self-defence challenges the philosophy of positivists. Silence on this historic and fundamental dimension of the legal scope of the inherent right of self-
defence infers an intention to leave it unimpaired. This is particularly so when the primary purpose of the Committee’s negotiations were to leave the inherent right of self-defence unimpaired by the Charter so as to assure some states of their collective arrangements.\textsuperscript{463} This inference is preferable to that drawn by positivists, as the implied extinguishment they advocate, which could itself be seen as impairment to the legal scope of the right, had not been sought, or even contemplated, by the Committee.

The other absence in the travaux preparatoires of Article 51 which is relevant to my thesis is a reference to discussions by the Committee of defining the occurrence of an ‘armed attack’.\textsuperscript{464} Such absence implies that this question of law was considered uncontroversial and therefore did not require specific definition. In this respect, the context in which the Charter was drafted must be remembered. It was the closing stages of the Second World War. The occurrence of an armed attack by one state against another, although not expressly defined in international law at the time of the Charter, does not appear to have been a concept which generated controversy, or confusion.

Nevertheless, the legal effect of the precondition of an armed attack in Article 51 requires separate consideration to the article’s travaux preparatoires, due to the ensuing uncertainty which arose in respect of it in the existing scholarly debate and in state practice after the Charter.

\textsuperscript{463} The travaux preparatoires to Article 2(4) demonstrate that the international community in 1945 intended that the inherent right of self-defence would not be impaired, or diminished, by Article 2(4), or the Charter generally; United Nations Conference on International Organisation, San Francisco 1945 vi 717, 720. See also Dinstein, above n 7, 187; Stone, above n 6, 3 and McCormack, above n 6 (2005), 261, 263-276 who reject an interpretation of these words that results in a state first suffering injury from an armed attack before exercising its inherent right of self-defence.

\textsuperscript{464} Brownlie, above n 8 (1963), 275 and Alexandrov, above n 8, 96.
5.2.2.3 The precondition of the occurrence of an armed attack in Article 51

A plain interpretation of Article 51 of the Charter in 1945 was made in sub-chapter 5.2.2.1. As seen, the article includes a precondition of the occurrence of an armed attack before the inherent right of self-defence can lawfully be exercised. A plain interpretation of the words ‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs’ is that this right was not impaired by the Charter’s prohibition of the threat, or use, of force in Article 2(4).465 A plain interpretation also demonstrates an assumption by the negotiating states that the inherent right of self-defence was to be exercised upon the occurrence of an armed attack.

Is there a legal basis upon which these words in Article 51 can be interpreted so as not to place further restriction on the exercise of the inherent right of self-defence than that already imposed by the international customary law principles of immediacy, necessity and proportionality? This question necessitates a definition of the legal commencement of an armed attack for the purpose of Article 51.

My definition of the legal commencement of an ‘armed attack’ as being the point in time when the international customary law principles of immediacy and necessity are fulfilled for the two reasons given in Chapters 2, 3 and 4 may be applied to Article 51 of the Charter. The first reason is that my definition is derived from the functions fulfilled by the inherent right of self-defence and the customary law principles of immediacy and necessity, being the two historic elements of the international law of self-defence. In this respect, the elements of

465 Randelzhofer ‘Article 51’ in Simma (ed), above n 5, 803 [39] and Goodrich and Hambro, above n 8, 300.
my definition are provided by international law itself and these elements were present in the international legal framework created with the inception of the Charter. The second reason is that this definition is preferable to its two temporal alternatives, being a point in time before, or after, the principles of immediacy and necessity are fulfilled by an imminent threat of armed force.

The first effect of applying my definition of the legal commencement of an armed attack to Article 51 is to leave the inherent right of self-defence and its legal scope unimpaired. This effect appears to be the intention of negotiating states in 1945, as reflected by the travaux preparatoires of Article 51 and by the article itself. The second effect of applying my definition is that it reflects the functions fulfilled by and operation of the international customary law principles of immediacy and necessity. In this respect, my definition does not produce an inconsistency between the precondition of the commencement of an armed attack Article 51 and these two customary law principles. They may, in other words, coexist.

It can therefore be seen that the answer to my fourth supporting question of law addresses an apparent lacuna in Article 51 of the Charter. This lacuna is the tension formed between the protection afforded to the inherent right of self-defence against impairment (which includes the legal scope of this right) and the precondition of the occurrence of an armed attack for the exercise of that right.

5.3 A legal basis in 1945 for the coexistence of anticipatory self-defence and the Charter

That the inherent right of self-defence is a manifestation of state sovereignty is a rationale in international law which has remained consistent from about the 15th
century to the inception of the *Charter* in 1945. It seems equally consistent in international law from about the 15th century that the rationale for anticipatory self-defence is also state sovereignty, in that it was a manifestation of the inherent right of self-defence when that right was exercised against an imminent threat of armed force.

The temporal nature of my central question of law and the question posed by my thesis dictate that the first time either of them may be answered is when the *Charter* was created in 1945. When my central question of law is applied to the *Charter* at that time, its only reference to the inherent right of self-defence was the first sentence of Article 51:

> ‘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’.

This express recognition and protection of the inherent right of self-defence from impairment by anything in the *Charter* (including Article 51 itself) may be seen not only as a recognition and protection of the existence of the right itself in international law, but also as a manifestation of an intention of the negotiating states to leave the legal scope of this right unimpaired. This observation is consistent with the *travaux preparatoires* of Article 51, as there is no material evidence in the records of an intention on the part of the negotiating states to change, or otherwise impair, the legal scope of this right.

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466 That is, ‘Could anticipatory self-defence at the inception of the *Charter* have been a manifestation of the inherent right when that right was exercised against an imminent threat of armed force?’
The silence of negotiating states in this regard, coupled with Article 51’s express protection of the right against impairment, infers an intention on the part of states to maintain its legal scope when drafting the *Charter*. This legal scope in 1945, as it had been in international law since about the 15th century, was the imminent threat, or use, of armed force.

If this inference is accepted, then my definition of the legal commencement of an armed attack for the purpose of Article 51 of the *Charter* accords with a plain interpretation of the article and with the pre-existing legal scope of the inherent right of self-defence. My reasoning also highlights how the new legal right of states to remain free from the threat, or use, of force, derived as a corollary from the prohibition created by Article 2(4) of the *Charter*, was finally protected by anticipatory self-defence should attempts at a peaceful settlement of the dispute fail, or should effective Security Council enforcement action not be taken.

For these reasons, the answer to my central question of law which is supported by the materials and the practice and *opinio juris* of states in self-defence explored to 1945 is ‘yes’. Therefore, a new legal basis is offered which suggests how the inherent right of self-defence, the customary law principles of immediacy and necessity and Article 51 of the *Charter* functioned cooperatively in 1945 to permit anticipatory self-defence and the *Charter* to coexist in that year.

5.4 Conclusion

It seems certain that the legal effect of Article 2(4) of the *Charter* in 1945 was to prohibit the unilateral threat, or use, of force by states. The only exceptions to this prohibition were the inherent right of self-defence recognised by Article 51 and the
Security Council’s enforcement authority under Chapter VII to authorise, *inter alia*, the use of force against threats to the peace, breaches of the peace, or acts of aggression to restore such peace and security. The prohibition created by Article 2(4) was the culmination of international law’s centuries-long process of restricting the sovereign right to use war offensively in favour of peaceful means to settle legal disputes between states.

I have concluded that the answers to my central question of law and to my four supporting questions of law may provide a new legal prism through which to view the new international legal framework created in 1945 to explain how anticipatory self-defence coexisted with the *Charter* in that year. The reasoning for my conclusion is as follows.

In relation to the answer to my first question of law, the treatment in 1945 by negotiating states of the inherent right of self-defence, as illustrated by the *travaux preparatoires* of Article 51, is consistent with the rationale of this right in international law as described in Chapters 2 to 4. The use of the term ‘inherent’ to describe this right is conspicuous in this regard. Indeed, the starting point in these negotiations was that this right was considered so intrinsic to the state that there was perhaps no need to even recognise it in the *Charter*. It will be recalled that in 1928 a similar debate over the need to recognise this right in the *General Treaty* had arisen for the same reason. Therefore, the inference drawn from the *travaux preparatoires* and the use of the term ‘inherent’ in Article 51 is that there was no obvious impediment in the *Charter* in 1945 which prevented the answer to my first supporting question of law from continuing to apply in 1945.
The applicability of the answer to my second question of law is not as clear as the answer to my first question. However, this is due to the absence of reference to anticipatory self-defence in the travaux préparatoires of Article 51 and in the article itself. This absence is unsurprising, as anticipatory self-defence was not a term used in international law before the Charter to describe a state’s legal authority to defend itself against an imminent threat of armed force. Thus, the legal basis for anticipatory self-defence in international law in 1945 may be seen through my new legal prism as having fallen under the protection afforded to the inherent right of self-defence by Article 51. If this logic is accepted, a reasonable conclusion derived from it is that anticipatory self-defence can be seen as resting in the sovereignty of every state by virtue of manifesting as the inherent right when that right was exercised against an imminent threat of armed force.

My third question of law stands alone from the Charter, insofar that its subject-matter is the legal scope of the inherent right of self-defence as formed by the natural operation of the international customary law principles of immediacy and necessity. This legal scope, being the imminent threat, or use, of armed force directed against the state, became more closely associated with the answer to my fourth question of law upon the creation of the Charter in 1945. This is because the dimension of this legal scope encompassing an imminent threat of armed force would have been extinguished if the legal commencement of an armed attack was defined as the actual use of armed force.

The absence of a definition of the legal commencement of an armed attack in international law at the time of the Charter invites its formulation to be derived from the operation of the substantive legal rights and principles in international
law, as developed to 1945. To this end, the answers to my third and fourth supporting questions of law are conducive to producing such a definition consistent with the terms of Article 51 and with the intent behind this article, as illustrated by its *travaux preparatoires*.

In further support of this reasoning, my definition of the legal commencement of an armed attack respects the protection against impairment granted to the inherent right of self-defence by this article. Its application also preserves the pre-existing legal scope of this right, change to which is not evinced by the *travaux preparatoires* to Article 51 of the *Charter*. Thus, it can be observed that my new legal prism provides an alternative legal basis within the existing scholarly debate for suggesting that this right and the international customary law principles of immediacy and necessity were capable of functioning compatibly with Article 51 in 1945. It is perhaps for these reasons that no real controversy existed over the coexistence of anticipatory self-defence and the *Charter* in the existing scholarly debate, or in state practice in self-defence, for almost two decades after 1945, as will be seen in Chapter 7.

Therefore, the combined legal effect of my central question of law and my four supporting questions of law demonstrates how the question posed by my thesis may be answered ‘yes’ in 1945. However, aspects of the existing scholarly debate have since introduced a degree of uncertainty to this answer. The nature of that debate and the divisions which have arisen in it will now be critically examined.
Chapter 6

The existing scholarly debate and judicial developments in self-defence after 1945

6.1 Introduction

This chapter has two principal purposes. The first purpose is to analyse how the existing scholarly debate has answered my central question and four supporting questions of law. The second purpose is to analyse the legal bases offered by the positivist, realist and neutralist philosophies for their respective positions concerning the question posed by my thesis. This analysis may then assist an exploration of whether the new legal prism created by my answers to my central question and four supporting questions of law may reconcile the differences which divide the positivist and realist philosophies.

It will be seen in this chapter that there are two elements common to the three scholarly philosophies. The first element is the acknowledgement of international law’s objective of balancing the right of states to self-defence against unlawful force and the goal of restricting the use of armed force generally. The second element is that none of the three philosophies in the existing debate expressly advocate that a state must first suffer the consequences of the physical commencement of an armed attack before defending itself. In these two respects, it may be concluded that the existing scholarly debate does not philosophically differ from the views of early legal scholars.

This second element is of vital importance, for it assists in understanding that to answer the question of law actually being addressed by the existing scholarly debate, another question of law must instead be asked. This question is to determine the earliest point in time in 1945 at which the inherent right of self-defence could lawfully be exercised in accordance with Article 51 of the Charter. In other words, this question involves an assessment of the legal scope of the inherent right of self-defence at that time.

To place the existing scholarly debate in its full context, I will explore assumptions made in respect of the rationale in international law for the inherent right of self-defence and for anticipatory self-defence. I will also explore the focus of the debate on Article 51 of the Charter in its attempt to address the question it has asked and the possible consequences of neglecting the historic effect of the operation of the international customary law principles of immediacy and necessity.

Finally, I will explore how this historic effect may hold latent insights which fill a critical lacuna in the debate. This lacuna is a definition of the legal commencement of an armed attack for the purpose of Article 51. Although the International Court of Justice has not been requested to address the question posed by my thesis, its judgments in respect of self-defence provide valuable insights into my first, third and fourth supporting questions of law and to the construction and interpretation generally of Article 51 of the Charter.

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468 Corfu Channel, above n 23; Nicaragua, above n 23; Oil Platforms, above n 23; Legality of Nuclear Weapons, above n 23; Legal Consequences of the Wall, above n 23 and Armed activities in the Congo v Uganda, above n 23.
This chapter has four sub-chapters. The developments in the existing debate are examined in sub-chapter 6.2. This examination will be concluded by an application of the answers to my central question and supporting questions of law to this debate to explore whether those answers might assist in reconciling its divisions. The judgments of the International Court of Justice are examined in sub-chapter 6.3.

6.2 Scholarly developments

6.2.1 On the rationale for the inherent right of self-defence

Since 1945, scholarly views on the rationale in international law for the inherent right of self-defence can be conveniently categorised into three groups. The largest group follows the work of early legal scholars by attributing the rationale for this right to state sovereignty. Some scholars believe that this right formed the basis for the creation of all other subsequent substantive legal rights in international law, or that the nature of the right only ever permitted Article 51 of the Charter to recognise it. The latter view appears to reflect the approach adopted in the negotiations for the General Treaty in 1928, as seen in sub-chapter 4.2.1.4.

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469 For an excellent overview of the various rationales for the inherent right, see Institut de Droit International, Present Problems of the Use of Force in International Law, Rapporteur Emmanuel Roucounas, (2008) Session de Santiago, 67-165, 75 [9]-79 [16].
470 For example, Lauterpacht, above n 7, 153-155, 159 and 190-189 and 248; Keith, above n 208 and 149-154; Fenwick, above n 192, 46-49, 52, 55-61, 146, 176, and 228-250; Brownlie, above n 8 (2003), 5-6, 8-13, 24, 41-42 and 47-48; O’Connell, above n 22 and 315-317; Gray, above n 21, 98-99, 589 and 598; Arend and Beck, above n 231, 18 and 72; Goodrich and Hambro, above n 8, 106-107, 299; Alexandrov, above n 8, 19-27; Puttkamer, above n 262, 276-282; Jonathon Charney, ‘Universal International Law’ (1993) 87 American Journal of International Law 529, 532 and McCormack, ‘The Use of Force’ in Blay, Piotrowicz and Tsamenyi (eds), above n 6, 225; McCormack, above n 6 (2005), 262-276. However, he contradicts his earlier work in which he referred to the right of self-defence as the ‘customary international law right of self-defence’; McCormack, above n 6 (1991), 185; Franck, above n 6, 3, 48-51 and Williamson, above n 6, 82-97.
471 For example, Hall, above n 7, 303 [9.20]-[9.21].
472 Ibid and Lauterpacht, above n 7, 154-155.
A second group of scholars asserts that the rationale in international law for the inherent right of self-defence was both state sovereignty and international customary law,\textsuperscript{473} or even Article 51 of the Charter itself.\textsuperscript{474} The view that the rationale for this right is both sovereignty and customary law has been raised in my conclusions to Chapters 2, 3 and 4 and requires closer scrutiny. It seems that this view may be interpreted in two ways.

The first interpretation is that the origin of the inherent right of self-defence was state sovereignty, but that the process of recognition and incorporation of this right by international customary law also replicated it in customary law to form a ‘customary law right of self-defence’. This view suggests that the substantive content of customary law was a customary law right of self-defence and the three principles of immediacy, necessity and proportionality as previously discussed in my thesis. This view broadens the view of the substantive content of customary law in respect of self-defence provided by early legal scholars before 1945.

This view seems to suggest that two legal rights of self-defence existed in international law before and at the time of the Charter: the inherent right of self-defence and the customary law right of self-defence. Some light can be shed on this view by considering what occurs when an international customary law rule is formed, as demonstrated by some international judicial decisions.\textsuperscript{475}

\textsuperscript{473} For example, Dinstein, above n 7, 178-182; McDougal, above n 400, 599-601; Schachter, above n 22, 1633 and Jutta Brunee and Stephen Toope, ‘The Use of Force: International Law after Iraq’ (2004) 53 International Comparative Law Quarterly 756-806, 792.

\textsuperscript{474} For example, Kelsen, above n 7, 914.

\textsuperscript{475} For example, Wimbledon (France, Italy, Japan and the United Kingdom v Germany) [1923] PCIJ (ser A) no 1 25; Island of Palmas (Netherlands v United States) [1928] PCIJ 22 735; Asylum (Columbia v Peru) [1950] ICJ Rep 266, 276-277; (United Kingdom v Norway) [1951] ICJ Rep 116; United States Nationals in Morocco (France v United States of America) [1952] ICJ Rep 176, 200-201; Continental Shelf (Federal Republic of Germany v Denmark) (Federal Republic of Germany v
These cases show that a formation of an international customary law rule has historically been constituted by the presence of a general practice of states and the requisite _opinio juris_ that the states involved believed they were under a legal obligation to so act. If found to exist, a customary rule confers upon a state, or states, a legal right to act in a particular way, or imposes an obligation to refrain from acting in a particular way. This type of prohibitive rule was observed in _Corfu Channel_ and _Nicaragua_ in respect of the customary law rules which relate to the principles of non-interference in the internal affairs of a state.\(^{476}\)

However, in relation to the inherent right of self-defence, it manifested a state’s sovereignty and necessarily pre-existed international customary law (and international law itself, as seen in Chapter 2). This can be regarded as a unique situation, for it distinguishes an instance in which the practice and _opinio juris_ of states form a customary law right in favour of a state from an instance where the practice and _opinio juris_ of states form customary law rules to govern the exercise of a pre-existing legal right already vested in a state.

As previously observed, the work of early legal scholars and the materials explored in self-defence to 1945 suggest the inherent right of self-defence remained peculiar to sovereignty upon its recognition by international customary law and its consequent incorporation into international law.

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\(^{476}\)_Corfu Channel_, above n 23, 33-35 and _Nicaragua_, above n 23, [174], [176], [185]-[191], [202]-[207], [210]-[215], [227]-[228], [250]-[251] and [288]-[291].
The second interpretation of this view is that state sovereignty is the origin of the inherent right of self-defence and that its rationale in international law is that international customary law recognised it by forming the principles of immediacy, necessity and proportionality to restrict its exercise. If this was the intent of the scholars who expressed this view, it is consistent with the rationale expressed by early legal scholars before 1945. Unfortunately, their work does not identify which was intended.

In respect of the scholars in this second group who suggest that the rationale in international law for the inherent right of self-defence is Article 51 of the Charter, the two interpretations proposed above equally apply. One interpretation is that the view expressed is intended to mean that Article 51 recognised this right, thereby incorporating it into the Charter. The other interpretation is that the view expressed is intended to mean that the right exists in international law by virtue of Article 51.

A third group of scholars simply refer to the inherent right of self-defence in international law as a ‘right’ without exploring its rationale. Some do so by asserting that this right has historically been recognised by general international law, by international customary law, or by Article 51 of the Charter. These views, as far as they relate historically, are not inconsistent with the rationale...

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477 For example, Friedmann, above n 6, 259-260; Triggs, above n 8, 556 [10.9]; Gray, above n 8, 121; Dixon, above n 400, 295 who was of the view that the right of self-defence only became an ‘inherent’ right when the use of war generally became unlawful and Moir, above n 6, 10-12.

478 For example, Randelzhofer ‘Article 51’ in Simma (ed), above n 7, 789 [1]-[3] and 792 [10]-[12] which is at odds with his earlier references to the inherent right, for example, at 677 [37] and in Randelzhofer, ‘Article 51’ in Bruno Simma (ed), The Charter of the United Nations (4th ed, 1997) 737 [33] in which he describes the rationale for the right as being in ‘general international law.’ In the 2004 edition, Randelzhofer does not further analyse the origin of the inherent right of self-defence.

479 For example, Wallace, above n 8, 281-282 and Clarke, above n 6, 152.

480 For example, Maogoto, above n 7, 94.
expressed by early legal scholars, nor are they inconsistent with the *travaux preparatoires* of Article 51, as far as they relate to the *Charter*.

Thus, it can be observed that the views of scholars of the rationale in international law for the inherent right of self-defence, subject to clarifying the two possible interpretations which can be made of those scholars who form the second group, appear to vary. This variation can be contrasted from the relative uniformity of the views expressed on this question of law by early legal scholars before 1945. It may be seen as forming a less consistent starting point on a fundamental element of international law in the existing scholarly debate on the question posed by my thesis. One source of confusion which arises from this variation is identifying which legal right is actually exercised in any instance of self-defence.\footnote{For example, Westlake, above n 32, 16-17.}

6.2.2 On the rationale for anticipatory self-defence

In contrast to the inherent right of self-defence, scholars have not examined the rationale for anticipatory self-defence in international law. Some scholars simply describe anticipatory self-defence before and after the *Charter* as being a ‘right’ in international law.\footnote{For example, Shaw, above n 21, 789-790; Friedmann, above n 6, 260; Bowett, above n 180, 33; McCourbrey and White, above n 7, 92; Gray, above n 8, 130; Gray, above n 21, 601; Blay, Piotrowicz and Tsamenyi (ed), above n 6, 230; Hall, above n 7, 308 [9.28]; Arend and Beck, above n 231, 72; Fredrick Northedge, *The Use of Force in International Relations* (1974) 201; Wallace, above n 8, 284, Akehurst, above n 21, 315; Doyle, above n 6, 11-15; Edward McWhinney, *The September 11 Terrorist Attacks and the Invasion of Iraq in Contemporary International Law* (2004) 34-6 and 52-53; Franck, above n 6, 97-108; Waxman, above n 6, 6-7 who suggests that the inherent right also incorporates anticipatory self-defence. His position is closely aligned to mine, as demonstrated by the central question and first and second supporting questions of law. However, Waxman does not fully explain his position in this respect by making a detailed study of the rationale for the inherent right, or of anticipatory self-defence, beyond this statement and Moir, above n 6, 10-22.}

Other scholars simply describe it as ‘anticipatory self-defence’, ‘anticipatory action’ or ‘preventative action’ without elaborating on the
specific basis in international law for such defensive action.\footnote{O’Connell, above n 22, 317; Jessup, above n 6, 166; Henkin, above n 7, 142; MacChesney, above n 22, 592; Schachter, above n 22, 1634; McCormack, above n 6 (1991), 35-40; Dinstein, above n 7, 182-187; Alexandrov, above n 8, 149; Cassese, above n 8, 357-363 although he does also employ the term ‘doctrine of anticipatory self-defence’, for example, 358; Triggs, above n 8, 577 [10.16], 578 [10.16]; Maogoto, above n 7, 96; Dixon, above n 400, 297; Clarke, above n 6, 152-157; Williamson, above n 6, 117-124 who used ‘pre-emptive self-defence’ and ‘anticipatory self-defence’ interchangeably; Fawcett, above n 6, 128; Sturchler, above n 371, 55-56 and Green, above n 6, 28, examines the confusion caused by the use of multiple terms such as ‘interceptive’, ‘preventative’, ‘pre-emptive’ and ‘anticipatory self-defence’ in different contexts and often meaning different things. The author himself chose to use the term ‘anticipatory self-defence’ to refer to an exercise of the inherent right in response to an imminent threat of armed force, ‘pre-emptive self-defence’ to refer to a more temporally remote perceived threat of armed force and ‘preventative self-defence’ to refer to a use of force in self-defence against anything other than an armed attack.} One exception is Brownlie, who simultaneously attributes the rationale in international law for anticipatory self-defence to the inherent right of self-defence and international customary law.\footnote{Brownlie, above n 8 (1963), 42, 257-261, 366-368 and 429. He further confused his position at 366 by describing anticipatory self-defence as a distinct ‘right’. In his most recent work, Brownlie, above n 8 (2003), 701-702 did not expressly refer to anticipatory self-defence as a customary law right. However, the context of his discussion of the Caroline implied that his position has not altered.} Unfortunately, he did not explain what he meant by this.

The virtual dearth of scholarly inquiry into the rationale for anticipatory self-defence results in an inconsistent starting point on an element of international law critical to the debated issue. I suspect that this characteristic of the debate has contributed to detracting from the clarity and consistency of the views expressed by early legal scholars on the legal scope of the inherent right of self-defence. I will now explore this possibility.

\subsection{On the coexistence of anticipatory self-defence and the \textit{Charter}}

helpful to first provide a short overview of these philosophies before analysing their legal bases.

Positivists believe that a plain application of the words ‘if an armed attack occurs’ in Article 51 of the Charter impliedly extinguished anticipatory self-defence in international law in 1945. This is based on the assumption that the temporal effect of the word ‘occurs’ means that the inherent right of self-defence must only be exercised with, or after, the physical commencement of an armed attack.

Realists suggest that the positivist interpretation of Article 51 of the Charter should not be accepted because it condemns a state to suffer the consequences of the physical commencement of an armed attack before defending itself. They conclude that such an outcome is unprecedented, illogical and would be suicidal, given the powerful nature of contemporary weapons of war. Realists point to the absence of evidence in the travaux preparatories of Article 51 of an intention on the part of negotiating states to impair the inherent right of self-defence.

Neutralists acknowledge the respective legal bases of the positivist and realist philosophies, but do not unconditionally adopt either.

Positivists have a clear legal basis for their philosophy. The precondition of the commencement of an armed attack for the inherent right of self-defence to be exercised is clearly created by the temporal effect of the words ‘if an armed attack occurs’ in Article 51.\(^{486}\) The effect of this precondition cannot simply be dismissed

\(^{486}\) Brownlie, above n 8 (1963), 274-275 although on close examination of the entirety of his work, Brownlie is more neutralist than positivist. See also Lauterpacht, above n 7, 156.
on the basis that the practical consequences of its operation are thought by some to be undesirable. In order to constructively challenge the view of positivists, it must, in my opinion, be shown how their interpretation and application of Article 51 is not mutually exclusive with the natural instinct of states to defend themselves before being physically attacked.

In contrast, realists gain the primary strength of their view from a consideration of the historic practice of self-defence in international law and the impractical result which will result if the positivist philosophy is applied. Realists assert that the imposition of the legal requirement on a state to first suffer the physical consequences of an armed attack before exercising its inherent right of self-defence is a result which was not desired, contemplated, or debated by the negotiating states in 1945.

None of the three philosophies have provided a generally-accepted basis for reconciling the division between positivists and realists, or a clear definition of what constitutes anticipatory self-defence in international law. I suspect that the scholarly division may be largely attributed to an almost exclusive focus on the legal effect of the precondition for the occurrence of an armed attack in Article 51 of the Charter. This focus may have resulted in inadequate attention being paid to the remaining elements of the international law of self-defence to which my four supporting questions of law apply. The principal element is the legal effect of the operation of the international customary law principles of immediacy and

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487 For example Shaw, above n 21, 787; Brownlie, above n 8 (1963), 366-367; Harris, above n 151, 894-902; Cassese, above n 8, 361; Franck, above n 6, 107-108; McWhinney, above n 482, 34-36 and Doyle, above n 6, 7. See also Institut de Droit International, Present Problems of the Use of Force in International Law, Rapporteur Emmanuel Roucounas, (2008) Session de Santiago, 67-165, 71 [1] which observed that this confusion has provided states with ‘a rather boundless margin in the subjective appreciation of their actions when claiming self-defence.’
necessity. The validity of my suspicion will now be tested by examining, in greater
detail, the legal bases offered by members of each scholarly philosophy and their
respective legal consequences.

6.2.3.1 The positivist philosophy

Lauterpacht is one of the earliest scholars in the existing scholarly debate who
suggests that anticipatory self-defence was implicitly extinguished by Article 51 in
1945. His view is based on a literal and strict interpretation of the words ‘if an
armed attack occurs’ in that article:

‘On the other hand, the Charter confines the right of armed self-defence to the case of an
armed attack as distinguished from anticipated attack or from various forms of unfriendly
conduct falling short of armed attack. Moreover, the right to use force in self-defence is
permitted only for so long as the Security Council has not taken the necessary steps to
maintain or restore international peace and security.’

The relevant portion of his first sentence shows that Lauterpacht distinguishes ‘an
armed attack’ from an ‘anticipated attack’. His view suggests a belief that an
imminent threat of armed force does not constitute an armed attack for the purpose
of Article 51. He does not define his rationale in international law for the inherent
right of self-defence, or for anticipatory self-defence. Relevantly, nor does he
expressly advocate that a state must endure the physical commencement of an
armed attack before defending itself under this article.

Kelsen reaches the same conclusion as Lauterpacht on the same basis. He
concludes that ‘the right of self-defence exists only if, and that implies after an

488 Lauterpacht, above n 7, 156. At 159 he wrote ‘It does not follow from the character of the right
of self-defence – conceived as an inherent, a natural, right – that the States resorting to it possess
the legal faculty of remaining the judges of the justification of their action. They have the right to
decide in the first instance, when there is periculum in mora, whether they are in the presence of
armed attack calling for armed resistance.’
armed attack occurs.”\footnote{Kelsen, above n 7, 913-915.} Henkin writes that the power of modern weapons supports the implicit extinguishment of anticipatory self-defence.\footnote{Henkin, above n 7, 141-142. See also Bryde, above n 208, 212-215; David Linman, ‘Self-Defence, Necessity and UN Collective Security: United States and Other Views’ (1991) \textit{1 Duke Journal of Comparative and International Law} 51-122; Rostow, ‘Until What? Enforcement Action or Collective Self-Defence: Can Security Council Action suspend the Right of Self-Defence?’ (1991) \textit{85 American Journal of International Law} 506.} Dinstein believes that anticipatory self-defence was extinguished in 1945,\footnote{Dinstein, above n 7, 182.} but draws a distinction between anticipatory self-defence and ‘interceptive self-defence’, referring to a point in time when a threat of force became an armed attack ‘in the process of being mounted’.\footnote{Ibid 187.} He does not explain how this critical point is identified in law, but relied on the self-defending state determining it from ‘the basis of hard intelligence available at the time’.

McCoubrey and White believe that anticipatory self-defence would ‘seem to be in contradiction’ to Article 51, but conceded, for instance, in the case of missiles crossing a state’s border, that this conclusion would necessarily condemn that state to ‘destruction in whole or in part’.\footnote{McCoubrey and White, above n 7, 91.} They rely on a state’s possible abuse of anticipatory self-defence to support their view, due to its ‘inherent subjectivity and flexibility’.\footnote{Ibid 95.} They suggest the word ‘occurs’ in Article 51 equated in 1945 to an attack having been ‘launched’, or when the ‘aggressor state has clearly committed itself to the attack’ and in the case of missiles, perhaps as early as when the ‘launching sequence has been irrevocably started’.\footnote{Ibid 91.}

McCoubrey and White criticise as too wide the concept of ‘interceptive’ self-defence proposed by Dinstein. However, they include those circumstances as
conduct which, in their view, falls within the traditional concept of anticipatory self-defence. They categorised all defensive action before an actual armed attack as one legal type and unlawful, being ‘anticipatory self-defence’.496

‘The fact that anticipatory actions are successful in achieving their military objectives is not a reason for accepting the right to launch them. Anticipatory self-defence is a dangerous notion to imbue with legality.’497

The conflict within McCoubrey and White’s view between requiring an armed attack to have physically occurred and supporting the practical need of a state to protect itself from an imminent threat of force is patent. They reject the concept of anticipatory self-defence without precisely defining its rationale in international law, but simultaneously interpret the precondition of an armed attack in Article 51 to permit the exercise of the inherent right of self-defence against an imminent threat of force.

The tension underpinning McCoubrey and White’s attempt at literally applying the precondition in Article 51 without causing a state to first suffer the physical commencement of an armed attack is recognised by Randelzhofer. He acknowledges that:

‘There is no consensus in international legal doctrine over the point in time from which measures of self-defence against an armed attack may be taken.’498

He acknowledges the view that a distinct legal right of self-defence and of anticipatory self-defence exists in international customary law, but observes that

496 Ibid 94.
497 Ibid.
‘recourse to traditional customary law does not lead to a broadening of the narrow right of self-defence laid down in Art. 51.’

He believes the effect of the words ‘if an armed attack occurs’ in Article 51 necessarily disallows anticipatory self-defence as articulated in Caroline, but that the entire issue is confused by the absence of a definition of an armed attack for the purpose of that article:

‘Therefore, despite the exertion of considerable effort, a generally recognized definition of ‘armed attack’ is yet to be found. That does not mean, however, that any unilateral use of force may be declared to occur in response to an armed attack, and thus be justified as self-defence pursuant to Art. 51 of the Charter.’

Randelzhofer identifies practical considerations as to why anticipatory self-defence did not coexist with Article 51 in 1945. These included that ‘the imminence of an armed attack cannot usually be assessed by means of objective criteria’ and that the ‘manifest risk of an abuse’ by a self-defending state’s discretion would undermine the restriction. Interestingly he concluded,

‘Therefore Art. 51 has to be interpreted narrowly as containing a prohibition of anticipatory self-defence. Self-defence is thus permissible only after the armed attack has already been launched. Only in the implausible event that one state gives prior notice to another state of an armed attack would defensive measures involving the use of force be compatible with Art. 51.’

It is not clear whether the word ‘launched’ in his second sentence is intended to equate with the word ‘occurs’ in Article 51. If ‘launched’ is intended to refer to an imminent threat of armed force, rather than the physical commencement of an actual attack, then this may reconcile the paradox which appears in his final sentence. As with some other positivists, Randelzhofer appears to struggle with reconciling his view that anticipatory self-defence was impliedly extinguished by

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499 Ibid.
500 Ibid 792 [10-11].
501 Ibid 796 [19].
502 Ibid 803 [39].
503 Ibid.
Article 51 with the consequence that a state might suffer the physical commencement of an armed attack before defending itself. However, he does not go so far as to conclude that international law requires a state to suffer such a consequence before exercising its inherent right of self-defence.

This struggle also manifests in Maogoto’s work. His view is that the inherent right of self-defence is lawfully invoked in the ‘case of a clear and imminent danger of attack’. However, he concludes that ‘in keeping with the constrained time requirement, an anticipatory action is not self-defence because of the failure of the required ‘armed attack’ precondition [of Article 51].’

Hall exhibits the same conflict when he writes that an armed attack is the ‘prerequisite’ for exercising the inherent right of self-defence, but that anticipatory self-defence is ‘legitimate’ when the international customary law principles of immediacy and necessity are fulfilled. His intention in using of the word ‘legitimate’ is not clear. In light of his view on the precondition of an armed attack, ‘legitimate’ may not be intended to equate to ‘lawful’ because these two views may conflict. Rather, ‘legitimate’ may mean ‘necessary’, or ‘justified’, from the viewpoint of protecting the state from an imminent threat of armed force evolving into a use of such force.

What can be interpreted from the various legal bases provided members of the positivist school? The first observation is that the temporal effect of the words ‘if an armed attack occurs’ in Article 51 supports a prima facie view that anticipatory

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504 Maogoto, above n 7, 16-18 and 96.
505 Ibid 96.
506 Hall, above n 7, 308 [9.28]-[9.29].
self-defence was impliedly extinguished in 1945. The second observation is that positivists suggest the existence of a distinct ‘right’ of anticipatory self-defence in international law in 1945, but do not make it entirely clear where this ‘right’ existed before its implied extinguishment. Some positivists suggest international customary law, as they do with a general right of self-defence. Most, however, do not analyse this aspect of the issue. The fragmented nature of the existing scholarly debate on the rationale in international law for the inherent right of self-defence and of anticipatory self-defence, as explored in the preceding sub-chapters, does not clarify this.

The third observation is that a struggle appears in some positivists between their literal interpretation of Article 51 and the recognition that this interpretation condemns a state to suffering the physical commencement of an armed attack before the inherent right of self-defence can lawfully be exercised. Even though these scholars advocate the implied extinguishment of anticipatory self-defence by Article 51, none has expressly advocated that a state, as a question of law, is required to first suffer the physical commencement of such an attack before exercising its inherent right of self-defence. In most instances, positivists have provided some justification for anticipatory self-defence, but do not offer a clear legal basis for reconciling this justification with their primary view of implied extinguishment.

6.2.3.2 The realist philosophy

In contrast to the positivist philosophy, realists primarily identify the practical consequences which would arise if anticipatory self-defence was impliedly
extinguished in 1945. They assert that Article 51, despite the clarity of its precondition for the occurrence of an armed attack, should not be interpreted and applied in a way which results in states first suffering the physical commencement of an armed attack before the inherent right of self-defence is exercised. Realists frequently point to the power and swift delivery systems of modern weapons as one basis for justifying their view.

Jessup, for example, believed in 1948 that the state of weaponry made it:

“both important and appropriate under present conditions that the treaty [Charter of the United Nations 1945] define ‘armed attack’ in a manner appropriate to atomic weapons.”

While not offering such a definition, Jessup suggests that Article 51 should be interpreted liberally to enable the inherent right of self-defence to be exercised at some time before a self-defending state is physically attacked. This is also Dinstein’s and Akehurst’s view. Bowett believes that states in 1945 retained all their legal rights and principles granted by international law in respect of self-defence before that year and that those rights and principles remain unimpaired by the Charter, except where they were expressly surrendered under it:

507 Waldock, above n 6, 498 described anticipatory self-defence as operating ‘… where there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted, then an armed attack may be said to have begun to occur, though it has not passed the frontier.’ See also Anthony Arend and Robert Beck, above n 231, 186; Schmitt, above n 68, 93; Malanczuk, above n 8, 311-314 and Moir, above n 6, 10-22.


509 Jessup, above n 6, 166-167.

510 Dinstein, above n 7, 190 and Akehurst, above n 21, 311-313.
It was never the intention of the Charter to prohibit anticipatory self-defence and the traditional right certainly existed in relation to an ‘imminent’ attack. Moreover, the rejection of an anticipatory right is, in this day and age, totally unrealistic and inconsistent with general state practice.\(^5\) Bowett interprets the legal relationship formed between Article 2(4) and Article 51 in 1945 broadly, concluding that the inherent right of self-defence could have been exercised in circumstances other than those involving an armed attack.\(^5\) He writes that for a state to endure the physical commencement of such an attack ‘may well destroy the state’s capacity for further resistance and so jeopardise its very existence.’\(^5\) Brownlie expressly rejects Bowett’s broad range of conduct against which the inherent right of self-defence could lawfully be exercised in 1945. In doing so, however, he appears to recognise the possibility that anticipatory self-defence had not been impliedly extinguished in 1945 when he wrote of Article 51:

> ‘There is not the slightest hint that legitimate self-defence comprehended action otherwise than against the use or threat of force.’\(^5\)

Stone, like Bowett, rejects the positivist view as leading to ‘absurdities and injustices’.\(^5\) He considers that Article 2(4) and Article 51 should be read in close conjunction and that the former is not an absolute prohibition on the threat, or use, of force (discounting the exceptions under the *Charter*). Therefore, he reasons, anticipatory self-defence does not violate the qualifications contained in Article 2(4) in respect to the territorial integrity, or political independence, of another state.\(^5\) Fawcett writes,

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\(^5\) Bowett, above n 180, 185 and Bowett, above n 186, 1. See also Arechega, above n 398, 9.
\(^5\) Bowett, above n 180, 185-186.
\(^5\) Ibid. Bowett believed that defensive war generally was intended to protect certain legal rights possessed by all states. These rights were (a) territorial integrity; (b) political independence; (c) security on the high sea; (d) protection of nationals and (e) economic interests.
\(^5\) Brownlie, above n 8 (1963), 270.
\(^5\) Stone, above n 6, 96.
\(^5\) Ibid 95.
‘The inherent right of self-defence which every country has, and must have, cannot be effective if it can be exercised only after an attack has taken place.’\footnote{Fawcett, above n 6, 128.}

Greig reasons ‘that a state should not wait for the aggressor’s blow to fall before taking positive measures for its own protection.’\footnote{Greig, above n 6, 674-675.} He also believes that the scale and effect test was of little practicality in defining an armed attack, due to the ‘tortuous distinctions between different situations to decide whether each situation qualifies as an armed attack.’\footnote{Ibid 680.} He wrote that unless a:

‘rule of international law is based upon the practice of states or is sufficiently general to fit in with both that practice and the reasonable demands of states likely to be face with the need to act, it is probable that it will not be observed.’\footnote{Ibid. See also Miriam Sapiro, (2003) ‘Iraq: The Shifting Sands of Preemptive Self-Defence 97 American Journal of International Law 599, 604.}

Friedmann agrees with this logic,\footnote{Friedmann, above n 6, 259.} as does McCormack, who writes that anticipatory self-defence is the only legal means by which a state can effectively protect its most important thing: the fundamental right to exist.\footnote{McCormack, above n 6 (2005), 259-261. Anton, Mathew and Morgan (ed), above n 6, 525-527 [5.4.3] implicitly adopt the legal basis of the opinion of McCormack by including his work on the scope of self-defence in their book.} He believes that the international customary law principle of necessity applies equally to anticipatory self-defence.\footnote{Ibid 262 (in respect to the severity of the threat) and 269 (in respect to the proximity of the threat).} However, he qualified this by writing that anticipatory self-defence was only lawfully exercised if the national security of the self-defending state is threatened, such as when Israel attacked Iraq’s nuclear facility in 1981.\footnote{Ibid 295-302.} Schmitt believes that the power and swiftness in delivery of contemporary
weapons makes waiting for the commencement of an armed attack before
defensive action is taken ‘a form of suicide for a state.’

Clarke, as Randelzhofer does, also raises the possible existence in international law
in 1945 of a distinct international customary law ‘right’ of self-defence in addition
to the inherent right of self-defence recognised by Article 51 (he also alluded to
perhaps a third right of self-defence created by Article 51 itself, although he did
not sufficiently explain this view). He also writes that this customary law right was
‘broader’ than the inherent right of self-defence and believed that it was this right
that was exercisable in a ‘pre-emptive strike’ where there is an imminent threat of
an armed attack and in response to non-military forms of attack.

Clarke also proposes a model that advocates ‘a/ reactive self-defence, which
includes defence in cases of an actual armed attack and interceptive self-defence,
and b/ preventive self-defence, which includes anticipatory and pre-emptive self-
defence’ to define categories of the use of force in self-defence under Article 51.

McWhinney distinguishes anticipatory self-defence from a pre-emptive use of
force. He writes the former is exercised against an imminent threat of armed
force when the international customary law principles of immediacy and necessity
are fulfilled and the latter is exercised against a threat of force which does not fulfil
these principles. McWhinney does not make clear whether he considers
anticipatory self-defence is a manifestation of the inherent right of self-defence

525 Schmitt, above n 68, 93.
526 Clarke, above n 6, 155-157.
527 Institut de Droit International, Present Problems of the Use of Force in International Law,
528 McWhinney, above n 482, 52-53.
when exercised against an imminent threat of armed force, or whether it is a distinct legal right in itself. He believes that anticipatory self-defence is consistent with Article 51 of the *Charter*. This is an important point, as it infers that the occurrence of an armed attack under that article commences with the fulfilment of these two customary law principles.

Franck adopts a similar position, pointing out that:

‘The problem with recourse to anticipatory self-defence is its ambiguity. In the right circumstances, it can be a prescient measure that, at low cost, extinguishes the fuse of a powder-keg. In the wrong circumstances, it can cause the very calamity it anticipates.’

Other scholars treat the possession of weapons of mass destruction as presenting a special type of problem for which a new set of international law rules should be applied. For example, Waxman describes this view within the realist philosophy as the ‘reasonable necessity approach’ which:

‘holds that the use of force against another state believed to pose a WMD threat is justified when a reasonable state would conclude a WMD threat is sufficiently likely and severe that forceful measures are necessary.’

Waxman’s philosophy, which is directed to reconciling the polarised views of positivists and realists, favours the more extreme boundary of the realist philosophy, in that he thinks that a ‘reasonable’ state cannot await the possession by an [implicitly] unreasonable state of a nuclear, or biological, weapon before responding with force. This philosophy seemingly rests on the justification that an insufficient certainty held by state A (a ‘reasonable’ state) over the WMD

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529 Franck, above n 6, 107.
530 Waxman, above n 6, 3 and 26-30. ‘WMD’ refers to ‘weapons of mass destruction’.
capability held by state B (an unreasonable state) creates a burden on state B to prove this capability to the satisfaction of state A.\textsuperscript{531}

Should state B not satisfy this burden of proof, then the evidentiary threshold to authorise force on the part of state A is a ‘reasonable uncertainty’\textsuperscript{532} derived from forensic evidence and ‘propensity inferences’ to be drawn about state B.\textsuperscript{533} However, this philosophy would also apply to states which are ‘potentially hostile or aggressive’.\textsuperscript{534} Waxman makes it clear that the legal right which would be exercised under this philosophy is the inherent right of self-defence by virtue of its anticipatory dimension. He thereby infers that anticipatory self-defence coexists with the \textit{Charter}.\textsuperscript{535}

Doyle believes that anticipatory self-defence continued to exist in 1945 with the \textit{Charter}, but that the ‘formula’ articulated in \textit{Caroline} was too narrow.\textsuperscript{536} However, it must be pointed out that Doyle made his observations in the context that the international customary law principles in that case were applied to a ‘customary law right of anticipatory self-defence’ which exists separately from the inherent right of self-defence.

\textsuperscript{531} Ibid 70-75.
\textsuperscript{532} Ibid 14-15 and 58-62.
\textsuperscript{533} Ibid 62-70, although Waxman acknowledges the obvious dangers associated with decision to use force against a potential, as opposed to a manifestly imminent, threat; for example, 3.
\textsuperscript{534} Ibid 3-4.
\textsuperscript{535} Ibid 7.
\textsuperscript{536} Doyle, above n 6, 11-15.
The resolution adopted by the *Institut de Droit International* in 2008 defines the law thus:\(^{537}\)

1. Article 51 of the United Nations Charter as supplemented by customary international law adequately governs the exercise of the right of individual and collective self-defence.

2. Necessity and proportionality are essential components of the normative framework of self-defence.

3. The right of self-defence arises for the target State in case of an actual or manifestly imminent armed attack. It may be exercised only when there is no lawful alternative in practice in order to forestall, stop or repel the armed attack, until the Security Council takes effective measure necessary to maintain or restore international peace and security.

4. The target State is under the obligation immediately to report to the Security Council actions taken in self-defence.

5. An armed attack triggering the right of self-defence must be of a certain degree of gravity. Acts involving the use of force of lesser intensity may give rise to counter-measures in conformity with international law. In case of an attack of lesser intensity the target State may also take strictly necessary police measures to repel the attack. It is understood that the Security Council may take measures referred to in paragraph 3.

6. There is no basis in international law for the doctrines of ‘preventive’ self-defence (in the absence of an actual or manifestly imminent armed attack).

7. In case of threat of an armed attack against a State, only the Security Council is entitled to decide or authorise the use of force.

8. Collective self-defence may be exercised only at the request of the target State.

9. When the Security Council decides, within the framework of collective security, on measure required for the maintenance or restoration of international peace and security, it may determine the conditions under which the target State is entitled to continue to use armed force.

10. In the event of an armed attack against a State by non-State actors, Article 51 of the Charter as supplemented by customary international law applies as a matter of principle.

What can be made of the realist philosophy? It seems apparent that this philosophy suggests that the legal scope of the inherent right of self-defence remained the same in 1945 under the *Charter* as it had before. This position is maintained despite the express precondition of the occurrence of an armed attack in Article 51. However, this philosophy does not clearly reconcile itself with this precondition. Differences can be discerned within this philosophy concerning the rationale in

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international law for anticipatory self-defence in 1945, its legal bounds and the circumstances under which it may have been lawfully exercised.\textsuperscript{538}

6.2.3.3 The neutralist philosophy

The neutralist philosophy in respect of the co-existence of anticipatory self-defence and the \textit{Charter} in 1945 is constituted by an acknowledgement of the legal basis of the positivist philosophy and of the practicality of the realist philosophy, but does not accept either philosophy unconditionally. The neutralist school has the fewest members of the three philosophies and has not proposed a generally-accepted legal basis for reconciling the divisions which exist between the other two.

Brownlie believes that Article 2(4) and Article 51 of the \textit{Charter} were meaningless in 1945 unless their complete governance of the legal category of conduct to which they relate is assumed.\textsuperscript{539} He describes the prohibition in Article 2(4) as appearing in ‘absolute terms’ and that any use of force, including the inherent right of self-defence, was subject to the provisions of the \textit{Charter}.\textsuperscript{540} In his view, it is more justifiable to interpret Article 51 restrictively due to its exceptional nature, however, he acknowledged that international customary law in 1945 already reflected the restriction placed upon the exercise of the inherent right of self-defence by Article 51:

‘The use of force in riposte to force was the only generally accepted view as to the justified use of force in self-defence and the delegations at San Francisco naturally did not regard the phrasing of the Article as in any sense an innovation in its reference to self-defence… It is submitted that Article 51 is not subject to the customary law and that, even

\textsuperscript{538} Waxman, above n 6, 13-15.
\textsuperscript{539} Brownlie, above n 8 (1963), 273.
\textsuperscript{540} Ibid where he points out that even under Article 51 the inherent right of self-defence can only be exercised ‘until the Security Council has taken measures necessary to maintain international peace and security’.
if it were, this customary right must be regarded in the light of state practice up to 1945.\textsuperscript{541}

The nature of the ‘customary right’ to which Brownlie refers is uncertain. It is not clear if he was suggesting that the content of international customary law in 1945 included a distinct right of self-defence, or whether he intended to mean the inherent right of self-defence as recognised by customary law. Brownlie draws the general conclusion that Article 51 precluded ‘preventative’ defensive action, an apparent reference to anticipatory self-defence.\textsuperscript{542} However, he believes the launching of ballistic missiles, or an enemy fleet steaming towards the territorial waters of a self-defending state after a declaration of ‘hostilities’, are threats of armed force against which the inherent right of self-defence can lawfully be exercised under Article 51.\textsuperscript{543} He also writes:

‘Where state A launches an attack expressly and clearly aimed at state C, but which of necessity involves operations across the territory of state B, the State C may undertake defensive measures on the territory when the object of the operations has become reasonably clear and it is also obvious that state B has not only failed to repel the invader but has fallen substantially under his control’.\textsuperscript{544}

Brownlie’s view about the legal scope of the inherent right of self-defence under Article 51 seems inconsistent. He believes that Article 51 should be interpreted restrictively, thereby impliedly extinguishing anticipatory self-defence, but that exceptions exist which suggest that the inherent right of self-defence can lawfully be exercised before an armed attack physically commences. Further, his three exceptions do not appear to be exclusive, inferring the existence of other

\begin{itemize}
\item \textsuperscript{541} Ibid 274-275.
\item \textsuperscript{542} Ibid 275 and 367; Brownlie, above n 8 (2003), 701 where he wrote that ‘on the face of its text Article 51 is incompatible with anticipatory self-defence’.
\item \textsuperscript{543} Ibid 366-368.
\item \textsuperscript{544} Ibid 314.
\end{itemize}
circumstances in which this right may lawfully be exercised under Article 51 against an imminent threat of armed force.

Goodrich and Hambro consider that anticipatory self-defence is inconsistent with the Purposes of the Charter, but qualify this by suggesting that the inherent right of self-defence should be more liberally exercised than envisaged in 1945. Later in their work, Goodrich and Hambro acknowledge that ‘Article 51 applies only in the case of an ‘armed attack’ against a Member’, but alluded to the fact that the Charter was drafted prior to a successful use of atomic weapons. In their view, such weapons potentially rendered effective self-defence impossible after an initial attack. They write that the:

‘provisions of Article 51 do not necessarily exclude the right of self-defence in situations not covered by this Article. If the right of self-defence is inherent as has been claimed in the past, then each Member retains the right subject only to such limitations as are contained in the Charter.’

The friction in their attempt to reconcile the precondition of the occurrence of an armed attack in Article 51 and anticipatory self-defence in 1945 is evident. The basis of this friction is common to subsequent neutralists, one of whom bases his opinion on a number of factors, including making the distinction between Article 51 ‘excluding’ anticipatory self-defence rather than ‘prohibiting’ it, that the rationale in international law for the inherent right of self-defence and anticipatory self-defence in 1945 was international customary law. Triggs believes that

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545 Goodrich and Hambro, above n 8, 105-106.  
546 Ibid 107.  
547 Ibid 300.  
548 Ibid 301.  
549 For example, Akehurst, above n 21, 262; Malanczuk, above n 8, 313-314; Alexandrov, above n 8, 296; Dixon, above n 400, 279, 297 and Blay, Piotrowicz and Tsamenyi (ed), above n 6, 230, 233.  
550 Wallace, above n 8, 283-284. However, she appears to have contradicted her position at 281-282 where she suggested that the right of self-defence is indeed inherent to a state and that it is
Article 51 ‘seems to preclude any possibility of anticipatory action’. She also acknowledges that the suffering of an attack is ‘simply unworkable in this military and nuclear age.’ In conclusion, she writes that where there is:

’an overwhelming and imminent threat of force against a state, the Caroline principles, of venerable age though they may be, permit that state to use necessary and proportionate force to repel the attack and deter others.’

Cassese acknowledges the clarity of Article 51 and the repercussions its literal interpretation and application. As a consequence, he determines that it was:

‘more judicious to consider such action [anticipatory self-defence] as legally prohibited, while admittedly knowing that there may be cases where breaches of the prohibition may be justified on moral and political grounds and the community will eventually condone them or mete out lenient condemnation.’

Cassese writes that the international environment makes it unrealistic to conclude that states, if given the opportunity, would not use force in self-defence if imminently threatened. He envisages circumstances under which anticipatory self-defence could be considered lawful in the future if international law was to ‘legalise’ this concept. However, the proviso in point (ii) in his circumstances is that the attack be ‘massive, such as seriously to jeopardize the population or even imperil the life or the survival of the State’. This measurement appears to utilise the scope and effect test.

The neutralist philosophy can therefore be seen as acknowledging the respective legal bases of the positivist and realist philosophies, but does not unconditionally

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551 Triggs, above n 8, 578 [10.16].
552 Ibid 580 [10.17].
553 Ibid 581 [10.18].
554 Cassese, above n 8, 362.
555 Ibid 362-363.
556 The scale and effect test is examined further in sub-chapter 5.3.2.
adopt either. This philosophy has not offered a generally-accepted legal basis upon which the divisions of the other two philosophies can be reconciled.

6.2.4 On the definition of an armed attack

It seems evident from the preceding sub-chapters that the existing scholarly debate has primarily focussed on the legal effect of the precondition of the occurrence of an armed attack in Article 51 of *Charter*. As a consequence, insufficient attention may have been given to the historic legal effect of the operation of the international customary law principles of immediacy and necessity. In turn, this consequence may have obscured the legal scope of the inherent right of self-defence as it existed immediately before the creation of the *Charter*.

The effect of this characteristic of the debate has been compounded by the absence in the existing scholarly debate (and in international law) of a definition of the legal commencement of an armed attack for the purpose of Article 51. The precondition of the occurrence of an armed attack in this article makes such a definition central to determining the earliest point in time at which the inherent right of self-defence can lawfully be exercised under this article. Without such a definition, the legal commencement of the very conduct to which the precondition in the article relates remains uncertain. What does the existing scholarly debate say concerning the commencement of an armed attack for the purpose of Article 51?

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557 Green, above n 6, 31.
558 Doyle, above n 6, 17-18; Williamson, above n 6, 108-110 and and Moir, above n 6, 22.
Each scholarly philosophy has members who have identified the ramifications in international law which arise from the absence of a definition of the legal commencement of an armed attack.\textsuperscript{559} Randelzhofer writes:

‘Hence, it goes without saying that a far-reaching consensus on the meaning of this notion is of the utmost significance for the effectiveness of the rules of international law on war prevention. Only if ‘armed attack’ is defined in a clear-cut and unambiguous manner is it possible to oppose successfully attempts by States to ‘justify’ any use of force committed by them as self-defence. No matter how flimsy the excuses given… all those attempts would be thwarted \textit{ab initio} if an unambiguous definition of an armed attack existed to ward off arbitrary interpretations.’\textsuperscript{560}

Green has recently written on this point:

‘Without a clear definition of what an armed attack actually constitutes, the law on self-defence as conceived by the ICJ cannot be applied in any real sense; it becomes impossible to test the legal validity of invocations of the right [inherent right].’\textsuperscript{561}

Many scholars employ the ‘scope and effect test’ to define an armed attack \textit{per se} for the purpose of Article 51.\textsuperscript{562} I have suggested that this test has been of only limited practical assistance to a self-defending state in determining when an armed

\footnotesize{\textsuperscript{559} For example, Sir Robert Jennings QC and Sir Arthur Watts KCMG QC in Oppenheim, above n 26, [127]; Lauterpacht, above n 7, 153, 190-189; Dinstein, above n 7, 187-188; Brownlie, above n 8 (1963), 275; Randelzhofer in Simma (ed), above n 7, 794 [17]; Triggs, above n 8, 582-584 [10.20]; Alexandrov, above n 8, 96; Gray, above n 8, 130. 133; Gray, above n 21, 589; Doyle, above n 6, 17-18 and and Moir, above n 6, 30-31. See also A Panyarachun, \textit{UN Secretary-General’s High-Level Panel on Threats, Challenges and Change}, UN GAOR, 59\textsuperscript{th} sess, 56\textsuperscript{th} plen mtg, UN Doc A/59/565 (2004) [86] and Institut de Droit International, \textit{Present Problems of the Use of Force in International Law}, Rapporteur Emmanuel Roucounas, (2008) Session de Santiago, 67-165, 84 [26]-90 [35].

\textsuperscript{560} Randelzhofer in Simma (ed), above n 7, 794 [16]. At 790 [4], Randelzhofer, in comparing the concepts of ‘aggression’ and ‘armed attack’ under the \textit{Charter}, concluded that an armed attack has a narrower meaning of the two and represents the most serious form of aggression. At 794 [44]-[48] he makes the same conclusion about the comparison between the ‘use or threat of force’ in Article 2(4) and an armed attack under Article 51. Dixon, above n 7, 290 explained that deriving the elements of an armed attack for the purpose of Article 51 from international law immediately before and after 1945 is not a straight-forward matter: ‘The \textit{jus ad bellum} of today is not simply a product of the United Nations Charter. Prior to 1945 there was a web of customary and treaty law which regulated the unilateral use of force by states.’

\textsuperscript{561} Green, above n 6, 31 and 62. At 162-163 Green advocates that the definition of an armed attack should simply be ‘a use of force’.

attack has legally commenced. This is because the test is applied, at the earliest point in time, after an armed attack physically commences. Other scholars express dissatisfaction with the scope and effect test for this reason. For example, Greig described the test as unconstructive and that it created nothing but:

‘tortuous distinctions between different situations to decide whether each situation qualifies as an armed attack… Unless a rule of international law is based upon the practice of states or is sufficiently general to fit in with both the practical and reasonable demands of states likely to be faced with the need to act, it is probably that it will not be observed’.

Other scholars criticise the test as wholly inapplicable and impractical on the basis that an armed attack must be considered to have legally commenced at some point in time before armed force is used. Brownlie examines the legal and practical difficulties associated with defining an ‘armed attack’ in different contexts in separate parts of his classic text. His initial analysis is short and refers to circumstances since considered by the International Court of Justice.

Brownlie does not attempt an exclusive definition of an armed attack, but distinguishes its occurrence from an unlawful use of force in violation of Article 2(4) which does not amount to such an attack ‘in the tactical or military sense of the phrase.’ He examines the distinction in terminology which describes the

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563 Greig, above n 6, 680. See also Dinstein, above n 7, 188 and Green, above n 6, 31.
564 For example, McCormack, above n 6 (2005), 259-261 who examines various forms of conduct which, in his view, constitutes the commencement of an armed attack. These included the large-scale build-up of military forces by Egypt, Syria, Jordan and Lebanon in 1967. In a later work, McCormack, ‘The Use of Force’ in Blay, Piotrowicz and Tsamenyi (eds), above n 6, 229 his view on the relationship between anticipatory self-defence and Article 51 is founded on the protection of fundamental legal rights of a state. See also Dinstein, above n 7, 187-208.
565 Brownlie, above n 8 (1963), 278-279, 357 and 365-368. He encountered similar issues in defining ‘aggression’.
566 Ibid 278-279 in respect to Nicaragua, above n 23.
567 Brownlie, above n 8 (1963), 362 and 365. ‘Force’ does not include economic pressure as Brazil proposed in the drafting of Article 2(4) of the Charter, United Nations Conference on International Organisations, San Francisco vi 335. See also Goodrich and Hambro (eds), above n 8, 49 and Kelsen, above n 7, 783. See also the assessment by the Court of the attack by the United States
conduct in Article 2(4) and in Article 51 and writes that the inherent right of self-defence was intended to relate to conduct prohibited by Article 2(4):

‘In the discussion in Committee I of Commission I and the report of its Rapporteur it was stated that paragraph 4 left the use of force ‘in legitimate self-defence’ unimpaired. There is no indication that this right was to be equated with that referred to in Article 51. On the other hand, the general tendency was towards a restrictive interpretation of any permission in relation to the use of force. Delegations were concerned that the Organisation should have a near monopoly of the use of force and the wide terms of paragraph 4 reflect the emphasis on prohibition rather than permission. There is not the slightest hint that legitimate self-defence comprehended action otherwise than against the use or threat of force.’

Brownlie acknowledges that the term ‘armed attack’ in Article 51 refers to a trespass against, or direct invasion of, the victim state and that such conduct may be committed by the agents of the ‘aggressor state’. He acknowledges, but does not expressly endorse, the scope and effect test and its requirement that a use of force must ‘attain a certain gravity’ before it amounts to an armed attack. In describing the commencement of an armed attack, he writes that to ‘describe any act is to determine when it is committed and to enumerate its characteristics’. However, Brownlie did not proceed with an attempt to define the legal commencement of an armed attack.

against the Iranian oil platforms as an armed attack which was not challenged by the United States in Oil Platforms, above n 23, [45].


569 Brownlie, above n 8 (1963), 373. Such issues have since been dealt with by the International Court of Justice in Nicaragua.

570 Ibid 366. He eliminated ‘frontier incidents’ as too vague a category of incident to be constructive in defining an armed attack.

571 Ibid 366-367.

572 The United States recognises the essentiality of identifying the intent of the possessor of weapons of mass destruction to distinguish between an innocent and dangerous possessor. The Legal Adviser to the United States State Department, William Taft IV, wrote in a Memorandum in respect to the doctrine of pre-emption: ‘… while the definition of imminence must recognize the threat posed by weapons of mass destruction and the intentions of those who possess them, the decision to undertake any action must meet the test of necessity… in the face of overwhelming evidence of an imminent threat, a nation may take preemptive action to defend its nation from unimaginable harm’; William Taft IV, Memorandum: The Legal Basis for Preemption 18 November 2002 <http://www.cfr.org/publication> at 8 June (2008).
McWhinney infers that the legal commencement of an armed attack arises when a threat of force fulfils the international customary law principles of immediacy and necessity when he writes that anticipatory self-defence accords with the precondition of the occurrence of an armed attack in Article 51 of the Charter. Unfortunately, he did not fully develop this line of reasoning.

Franck who, like McWhinney, sees anticipatory self-defence as coexisting with Article 51, describes the requirement for an ‘actual armed attack’. This infers a belief that it is the point at which a state is physically attacked that marks the legal commencement of an armed attack. If this inference is correct, it does not rest comfortably with his simultaneously-held view that anticipatory self-defence coexists with the Charter, as anticipatory self-defence fulfils its function before a state is physically attacked.

Some assistance in understanding the concept of an armed attack per se is gained from the international community’s attempts to define ‘aggression’. In 1974, the General Assembly of the United Nations in its Resolution on the Definition of Aggression defined a range of conduct deemed to constitute ‘aggression’ inclusively. In Article 1, ‘aggression’ was defined as the ‘use of armed force’ by a state in contravention of the prohibition already appearing in Article 2(4) of the Charter. In Article 2, a state that first uses ‘armed force’ in contravention of the

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573 McWhinney, above n 482, 52-53.
574 Franck, above n 6, 3.
575 Resolution on the Definition of Aggression, GA Res 3314 (XXIX), UN GAOR, 29th sess, 2319th plen mtg, UN Doc A/Res/3314 supp 31 142 (1974). As a resolution of the General Assembly constitutes a recommendation only not a binding statement of law; ibid 794-795 [17]. The definition of ‘aggression’ was not intended by the parties to define ‘armed attack’ for the purpose of Article 51 of the Charter. In fact, Western states strongly opposed ‘armed attack’ being mentioned at all; Special Committee on the Question of Defining Aggression, UN GAOR, 29th sess, 2319th plen mtg, UN Doc A/Ac/134/112 (1979).
Charter shall be deemed evidence of an act of aggression, subject to an examination of ‘other relevant circumstances’.

Throughout the resolution, terminology similar to ‘armed force’ is used to categorise different forms of conduct deemed to constitute aggression. These include ‘invasion’, ‘attack’, ‘military occupation’, ‘bombardment’, ‘blockade’, ‘aggression’, ‘war of aggression’ and the support of groups in other states participating in such conduct against the government of other states.576

However, any of the categories of conduct identified in Resolution GA Res 3314 (XXIX) has never specifically been a precondition in international law for the lawful exercise of the inherent right of self-defence before, or after, 1945. This is not to say that the conduct against which this right was lawfully exercised could not have been described by one, or more, of these terms after the fact. This difference is simply explained.

The inherent right was exercised before 1945, at the earliest instance, against an imminent threat of armed force. At that point, the actual conduct could not properly have been described as ‘invasion’, ‘attack’, ‘military occupation’, ‘bombardment’, ‘blockade’, ‘aggression’, or any other category. This is because the extent to which the threat of armed force would have been carried out, had it been permitted to evolve into a use of such force, was not known until it had in fact evolved. It therefore could only properly be described as a threat of armed force. This may explain why the inherent right of self-defence has historically been

exercised against an imminent threat of a generalised type of conduct, being the use of armed force, and why the scope and effect test is only applicable after the fact of an ‘armed attack’.  

A reason offered by some scholars as to why an exclusive definition of an armed attack has been avoided is that it may face redundancy through the technological advancement of weapons, or that it may attract unnecessarily technical argument. In contrast, my definition of the legal commencement of an armed attack, as provided in the answer to my fourth supporting question of law, is based on the operation of the international customary law principles of immediacy and necessity whose joint function it is to measure a threat of armed force, regardless of how it might be categorised.

In this respect, my definition is based on law and is designed to assist a threatened state to better identify the earliest point in time at which it may exercise its inherent right of self-defence in accordance with the substantive rules of international law. It provides the flexibility required to be applied to any circumstance involving a threat of force, regardless of the identity of the aggressor, or the nature of the weapon with which the aggressor is armed. In contrast, the scope and effect test is applied after the fact of the physical commencement of an armed attack (thus after the earliest point in time at which the inherent right may be exercised) and is based on the gravity of that attack. My definition can therefore be preferred over the

578 For example, Brownlie, above n 8 (1963), 365-366 and Lauterpacht, above n 7, 190.
scope and effect test because it assists a state to determine the earliest point in time at which its inherent right of self-defence can be exercised.

6.2.5 Can the scholarly philosophies be reconciled?

It is observed that none of the scholarly philosophies expressly assert the view that a state must first suffer the consequences of the physical commencement of an armed attack before the inherent right of self-defence can be exercised in accordance with Article 51 of the Charter. The absence of such an assertion, especially on the part of positivists, suggests that all philosophies may believe that a state can, within the substantive rules of international law in 1945, lawfully use force in self-defence at least as early as immediately before the physical commencement of an armed attack.

With this common ground between the philosophies comes the probability that the underlying question of law actually being contended in the existing scholarly debate is the breadth of the legal scope of the inherent right of self-defence under the Charter.\(^{580}\) This probability attracts more weight when the framework of the debate is recalled. This framework is dependant upon a scholarly understanding of precisely what anticipatory self-defence was in international law in 1945. As observed, there is little expressed in the scholarly work about the rationale in international law for anticipatory self-defence. Therefore, the framework in which the debate is couched (whether anticipatory self-defence coexists with the Charter) is narrower than the alternative framework of debating the legal scope of the inherent right of self-defence in 1945.

\(^{580}\) Randelzhofer ‘Article 51’ in Simma (ed), above n 12, 789 [3].
While the scholarly focus on Article 51 of the *Charter* has resulted in the neglect of the operation of the international customary law principles of immediacy and necessity, the absence of a definition of the legal commencement of an armed attack for the purpose of that article has further hindered the existing debate. Without it, the focus on Article 51 itself has been handicapped because the legal commencement of the very conduct to which the article’s precondition relates remains uncertain. If the substantive rights and principles in international law are not used to define this point in time, the earliest point in time at which the inherent right of self-defence can be exercised in accordance with this article cannot be defined. If this point in time cannot be defined, the legal scope of this right remains illusory, as the existing debate demonstrates.

My proposed definition of the legal commencement of an armed attack is drawn from those substantive rights and principles and addresses the two points of contention in the existing scholarly debate identified immediately above. By exercising the inherent right of self-defence in 1945 against an imminent threat of armed force which had fulfilled the international customary law principles of immediacy and necessity, that right remained ‘unimpaired’ by the operation of the *Charter* (which includes the operation of Article 51 itself) in 1945 while simultaneously abiding by the precondition of the occurrence of an armed attack in that article.

Viewed through my new legal prism formed by the answers to my central question and supporting questions of law, it is concluded that the core difference between the positivist and realist philosophies is capable of being reconciled. This reconciliation is possible not by a continued focus on Article 51 of the *Charter*, but
by adopting a wider focus which views this article, the inherent right of self-defence and the international customary law principles of immediacy and necessity as essential components of the international legal framework created in 1945. This holistic view demonstrates how the new legal framework in 1945 reflected the human defensive instinct of striking first in the face of an immediate threat of harm, which was first identified in Chapter 2. Scholars in the disciplines of international law\(^{581}\) and others\(^{582}\) have written extensively on this instinct and how it underlies principles in law shared on a municipal and international level.\(^{583}\)

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\(^{581}\) See William Bishop, *International Law, Cases and Materials* (2nd ed, 1962) 898, who wrote ‘The standard of action under this principle [self-defence], as under other principles of law, is that it is to be applied in relation to what the reasonable man (or state) would do under the same or similar threatening circumstances’. Dinstein, above n 7, 176 wrote that the ‘legal notion of self-defence has its roots in inter-personal relations’. Randelzhofer ‘Article 51’ in Simma (ed), above n 7, 108-109 acknowledged the legitimacy of considering such fundamental human instincts in the interpretation and application of the international law of self-defence (and in fact other disciplines of scholarly study). Fawcett, above n 6, 128 wrote that ‘The inherent right of self-defence which every country has, and must have, cannot be effective if it can be exercised only after an attack has taken place’. O’Connell, above n 22, 315 wrote that ‘if the law is ineffective [the international law of self-defence] the primordial right of self-defence must reassert itself’. McCormack, above n 6 (2005), 124, 271-273 wrote about the necessity of the international law of self-defence ultimately serving the human defensive instinct by analogising the domestic criminal law of self-defence throughout the international community with it. He observes that domestic criminal law permits individuals to respond with proportionate force to repel unlawful force before the assault causes physical injury to the victim. He expresses the view that these laws would be of little use if they insisted on a person suffering the physical consequences of the assault before responding with defensive force. He notes a common element of these domestic laws is ‘a reasonable apprehension’, or its equivalent, on the part of the victim of unlawful force being applied for the right of self-defence to be lawfully invoked. Oppenheim did not believe that international law only ever concerned states, and that the interests of individuals are legitimate considerations in the formation of international law; Oppenheim, above n 26, 846-850. In this regard I highlight the domestic criminal law of self-defence in my state of Western Australia contained in s 248 of the *Criminal Code Compilation Act 1913 (WA)* to demonstrate this analogy. The offence of Assault is defined in s 222 and is committed, *inter alia*, by threatening to apply force to another. S 248 permits ‘such force to the assailant as is reasonably necessary to make effectual defence against the assault, provided that the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.’ The section extends the right of self-defence to the use of lethal force if there is a reasonable apprehension of grievous bodily harm of death arising from the assault. All other state jurisdictions in Australia have similar provisions prescribing the law on self-defence and these provisions are based on the identical criteria as s 248, i.e., that the self-defending person believes it is ‘reasonably necessary’ to use force in self-defence to repel the threat of unlawful force; *Crimes Act 1958* (Vic) s 9AC and s 9AE; *Crimes Act 1900* (NSW) s 418; *Criminal Law Consolidation Act 1935* (SA) s 15; *Criminal Code 1899* (Qld) s 272; *Criminal Code* (NT) s 28A and *Criminal Code Act 1924* (Tas) s 46. This is also the view of the High Court of Australia: (*Fadil Zecevic v The Director of Public Prosecutions*) (Vic) [1987] HC 87/027 and *Taikato v R* (High Court of Australia) [1996] 139 ALR 386, 398 (Dawson J). I cannot list in this thesis every domestic right of self-defence derived from all domestic criminal jurisdictions throughout the world. Instead I cite the conclusions drawn by McCormack that the general principle enunciated operates within ‘all the world’s legal systems’ and ‘religious legal systems’; McCormack, above n 6 (2005), 271. Brownlie, above n 8 (1963), 261 footnote 4, also makes reference to the proportionality rule that appears in the legal concept of self-
6.3 Judgments of the International Court of Justice

Since 1945, states in five cases have referred to the International Court of Justice\textsuperscript{584} international disputes,\textsuperscript{585} or requests for advising opinions,\textsuperscript{586} relating to the interpretation and application of Article 51 of the \textit{Charter}, or questions of law closely associated with self-defence.\textsuperscript{587} The aspects of these cases which are of most relevance to the question posed by my thesis are those parts of the judgments which relate to the inherent right of self-defence,\textsuperscript{588} international customary law and the interpretation and application of Article 51 itself. These aspects of the judgments will now be examined.

6.3.1 The inherent right

The Court describes a state’s right of self-defence in international law as an ‘inherent’ and ‘natural’ right\textsuperscript{589} and its primary purpose as protecting the defence in \textit{jus ad bellum} and domestic criminal law. The existence of the principles of necessity and proportionality in the international and domestic legal frameworks continued to be recognised, for example, Institut de Droit International, \textit{Present Problems of the Use of Force in International Law}, Rapporteur Emmanuel Roucounas, (2008) Session de Santiago, 67-165, 92 [41].

\textsuperscript{582} See Goleman, above n 139, 7, 60, 136, 205 and 227; Warran, above n 139, 225-227; Ratey, above n 139, 66, 88, 114, 161-162, 171, 228-229 and 232 and Winston, above n 139, 37-42, 49 and 61-62.

\textsuperscript{583} Abraham Sofaer, (2000) ‘International Law and Kosovo’ 36 \textit{Stanford Journal of International Law} 1, 16; Michael Bothe, (2003) ‘Terrorism and the Legality of Pre-Emptive Force’ 14 \textit{European Journal of International Law} 227, 239 and Reisman, above n 467, 82. However, some scholars have warned against perceived dangers in applying the same underlying principle of self-defence to both international and municipal law, for example, Institut de Droit International, \textit{Present Problems of the Use of Force in International Law}, Rapporteur Emmanuel Roucounas, (2008) Session de Santiago, 67-165, 75 [9]. An identification of and an explanation for these perceived dangers do not justify this warning other than recognising that both systems of law are ‘different legal environments’.

\textsuperscript{584} Articles 92 and 93(1) of the \textit{Statute of the International Court of Justice}, opened for signature 26 June 1945, 59 Stat 1031 (entered into force 24 October 1945).

\textsuperscript{585} Articles 34 and 36 of the \textit{Statute}.

\textsuperscript{586} Article 96 of the \textit{Charter}.

\textsuperscript{587} \textit{Corfu Channel}, above n 23; \textit{Nicaragua}, above n 23; \textit{Legality of Nuclear Weapons}, above n 23; \textit{Oil Platforms}, above n 23; \textit{Legality of the Wall}, above n 23 and \textit{Armed Activities in the Congo}, above n 23.

\textsuperscript{588} In respect to the inherent right of self-defence, \textit{Nicaragua}, above n 23, provides an overview of its position in international law at [193]-[195], [211], [230] and [232].

\textsuperscript{589} Ibid [175]-[177] and [193]. The United States in \textit{Oil Platforms}, above n 23, [48] also described it as the ‘inherent right’, however, the Court at [76] described it simply as the ‘right of self-defence’, as it did in \textit{Armed Activities in the Congo}, above n 23, [142]-[147]. See Gray, above n 8, 122-124.
sovereignty of each state.\textsuperscript{590} States have retained the unilateral right to exercise this right under the \textit{Charter}\textsuperscript{591} and the onus of proof in establishing that it was exercised lawfully remains with the self-defending state.\textsuperscript{592} This fundamental purpose of the right, in turn, is recognised by the Court as supporting the principles of non-intervention and the equality of states.\textsuperscript{593} The Court’s rationale for the inherent right of self-defence in international law is the same expressed by early legal scholars and as demonstrated by state practice in self-defence before 1945, as seen in Chapters 2-4.

The recognition of a state’s legal right of self-defence as ‘inherent’ and ‘natural’ to the state forms part of the basis for the Court’s view in \textit{Nicaragua} that the \textit{Charter} is not intended to cover ‘the whole area of the regulation of the use of force in international relations’.\textsuperscript{594} The other part of the basis for the Court’s view is that the principles of immediacy, necessity and proportionality previously formed by international customary law coexist with the \textit{Charter}, whether their respective rules overlap, or are identical.\textsuperscript{595} Thus, the right was incorporated into the \textit{Charter} by Article 51’s recognition of it.

\textsuperscript{590} For example, \textit{Nicaragua}, above n 23, [205], [212]-[214], [250]-252 and [288] and \textit{Armed Activities in the Congo}, above n 23, [165] and [259].
\textsuperscript{591} For example, \textit{Nicaragua}, above n 23, [176] and [195].
\textsuperscript{592} For example, \textit{Corfu Channel}, above n 23, 18; \textit{Nicaragua}, above n 23, [74], [195] and [229]-[230] and \textit{Oil Platforms}, above n 23, [51] and [57].
\textsuperscript{593} \textit{Corfu Channel}, above n 23, 33-35; \textit{Nicaragua}, above n 23, [174], [176], [185]-[191], [202]-[207], [210]-[215], [227]-[228], [250]-[251] and [288]-[291] and \textit{Armed Activities in the Congo}, above n 23, [153], [163]-[165] and [259].
\textsuperscript{594} \textit{Nicaragua}, above n 23, [176].
\textsuperscript{595} Ibid. The Court said that ‘The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content.’
However, the Court simultaneously attributes the inherent right of self-defence in international law to international customary law.\(^596\) This opinion is the first and only international judicial judgment which assumes, but not with clarity, that the substantive content of customary law in 1945 included a distinct right of self-defence.\(^597\) The Court’s view in this regard first appears at [176]:

‘On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the “inherent right” (in the French text the “droit naturel”) of individual or collective self-defence, which “nothing in the present Charter shall impair” and which applies in the event of an armed attack. The Court therefore finds that 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. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the “armed attack” which, if found to exist, authorizes the exercise of the “inherent right” of self-defence, is not provided in the Charter, and is not party of treaty law. It cannot therefore be held that Article 51 is a provision which “subsumes and supervenes” customary international law. It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed, customary international law continues to exist alongside treaty law. The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content.’

It is not perfectly clear from this aspect of the judgment whether the Court meant that the substantive content of the international customary law is constituted by a customary law right of self-defence (distinct to the inherent right of self-defence) and principles which functioned to restrict its exercise, or is constituted by those principles only.\(^598\) The balance of [176] and the following paragraphs to [179] of the Court’s judgment are more consistent with the latter proposition than the

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596 Ibid [176] and [193]-[194]. However, see Williamson, above n 6, 108 who writes ‘The ICJ did not suggest that there was an entirely different customary law right of self-defence…’

597 The Court’s previous decision in Corfu Channel did not specifically relate to the inherent right of self-defence, or its governing international customary law principles. It will be seen later in this sub-chapter that this assumption has not been repeated by the Court.

former. The same observation is made in respect of that part of the Court’s judgment at [194].

In contrast to Nicaragua, the Court in Nuclear Weapons does not attribute the rationale in international law for the inherent right of self-defence to international customary law. The Court maintained a clear distinction between the functions fulfilled in international law by the inherent right of self-defence, the international customary law principles of immediacy, necessity and proportionality and Article 51 of the Charter:

‘The entitlement to resort to self-defence under Article 51 is subject to certain constraints. Some of these constraints are inherent in the very concept of self-defence. Other requirements are specified in Article 51. The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law… there is a “specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.’

The Court relates the inherent right of self-defence to ‘the fundamental right of every State to survival’, a statement consistent with state sovereignty being the rationale for this right. The Court in Oil Platforms, Armed Activities in the Congo and the Legal Consequences of the Wall did not expressly adopt the view taken by the Court in Nicaragua in respect of the rationale for this right in international law. Rather, the Court in these cases maintained the distinction in Nuclear Weapons between the inherent right vested in the state and as recognised in Article 51 of the Charter and international customary law’s function of restricting the exercise of that right.

599 Legality of Nuclear Weapons, above n 23, [40]-[41].
600 Ibid [96].
601 Oil Platforms, above n 23.
602 Armed Activities in the Congo, above n 23.
603 Legal Consequences of the Wall, above n 23.
6.3.2 International customary law principles

The five judgments of the Court make consistent reference to the international customary law principles which have restricted the exercise of the inherent right of self-defence before and after 1945.\(^{604}\) The Court has not adopted the approach taken in *Caroline* of measuring the proximity of a threat of armed force as a distinct customary law principle.\(^{605}\) Rather, the Court refers only to the principles of necessity and immediacy,\(^{606}\) but places particular emphasis on the fulfilment of the former.\(^{607}\) For example, in *Oil Platforms*, the Court observed:

‘Therefore, in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as ‘armed attacks’ within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force… The United States must also show that its actions were necessary and proportional to the armed attack made on it, and that the platforms were a legitimate military target open to attack in the exercise of self-defence.’\(^{608}\)

What has been observed in previous chapters is that the international customary law principle of immediacy historically fulfilled the function of imposing a temporal restriction on the exercise of the inherent right of self-defence. This function was separate to the restriction imposed by the customary law principle of necessity. Both required fulfilment before the right could lawfully be exercised.

\(^{604}\) For example, *Nicaragua*, above n 23, [176], [194] and [237]; *Nuclear Weapons*, above n 23, [30] and [41]-[46]; *Oil Platforms*, above n 23, [44], [51], [73] and [76]; *Armed Activities in the Congo*, above n 23, [147] and *Legality of the Wall*, above n 23, [139]-[142].

\(^{605}\) However, in *Nicaragua*, above n 22, [123] the Court referred to the underlying principle of immediacy by saying the United States’ activities ‘continued long after the period in which any presumed armed attack by Nicaragua could reasonably be contemplated.’

\(^{606}\) See also *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Reports 15 [51] where the Court said ‘the state of necessity is a ground recognised by customary international law’ that ‘can only be accepted on an exceptional basis’; it ‘can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State is not the sole judge of whether those conditions have been met.’

\(^{607}\) For example, in *Oil Platforms*, above n 23, [73] where the Court stated ‘measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any measure of discretion.’

\(^{608}\) Ibid [51].
The Court in *Oil Platforms* does not expressly hold that the temporal consideration which underpins the customary law principle of immediacy does not exist in international law, or that the immediacy of a threat of armed force does not form an aspect of the test of necessity. A possible explanation is that the Court was not asked whether anticipatory self-defence coexists with the *Charter*, nor did the circumstances examined involve a threat of armed force. *Oil Platforms* involved circumstances of an actual use of armed force.

The judgments of the Court in *Armed activities in the Congo* and *Legality of the Wall* adopted the same approach as that in *Nicaragua* and *Oil Platforms*. The two former cases did not involve circumstances necessitating an examination of anticipatory self-defence, or of a threat of armed force. It is therefore concluded that the judgments of the Court are not particularly helpful to my third supporting question of law.

However, these judgments cannot necessarily be considered indicative of the Court’s view of the totality of the international customary law principles whose function is to restrict the exercise of the inherent right of self-defence. An historic effect of customary law, whether derived from a distinct principle, or from a consideration which forms part of the principle of necessity, is to measure the imminence of a threat of armed force directed at the state. Without the effect of this measurement, international law is less able to restrict the exercise of this right in a temporal sense. In support of this observation, it will be seen in Chapter 7 that it is the operation of the international customary law principle of immediacy which

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609 *Nicaragua*, above n 23, [194] and *Armed Activities in the Congo*, above n 23, [143].
610 *Oil Platforms*, above n 23, [49], [51] and [76].
largely defines the legal distinction between anticipatory self-defence and unlawful pre-emptive use of force in alleged self-defence.

6.3.3 Article 51

Article 51 of the Charter has been the object of examination throughout the relevant judgments of the Court.\textsuperscript{611} The Court consistently states that a lawful exercise of the inherent right of self-defence is dependent on the self-defending state acting in accordance with that article. Thus, the article is considered by the Court to have imposed a precondition on the exercise of that right by which states must abide.\textsuperscript{612} This precondition is imposed by the words ‘if an armed attack occurs’.\textsuperscript{613} An effect of this precondition in 1945 is that states were required, for the first time in the history of international law, to act in accordance with a treaty provision which partly regulated the inherent right of self-defence and in accordance with international customary law principles when exercising that right.\textsuperscript{614} How does the Court interpret and apply the words ‘if an armed attack occurs’ in Article 51? Does this interpretation and application assist in answering the question posed by my thesis?

\textsuperscript{611} For example, Nicaragua, above n 23, [176], [193], [200] and [235]; Nuclear Weapons, above n 23, [38]-[44] and [96]-[97]; Oil Platforms, above n 23, [37] and [48]-[51]; Armed Activities in the Congo, above n 23, [142]-[148] and Legality of the Wall, above n 23, [138]-[139]. The Court did not examine Article 51 in Corfu Channel because Great Britain did not plead self-defence.

\textsuperscript{612} For example, in Oil Platforms, above n 23, [49] the Court held the inherent right, to be lawfully exercised in accordance with Article 51, must be exercised against the conduct which triggered its exercise. Despite the justifications offered by the United States for the destruction of Iran’s oil platforms, a connection was not found by the Court between the conduct giving rise to the United States’ claim of self-defence and the use of force in respect of it; [76]-[78].

\textsuperscript{613} The obligation placed on states by Article 51 to immediately report an exercise of the inherent right arises after the fact, but ‘may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence’; Nicaragua, above n 23, [200] and [234]-[237] and Nuclear Weapons, above n 23, [45]. This reporting condition is not determinative of the lawful exercise of the inherent right.

\textsuperscript{614} Nuclear Weapons, above n 23, [30]-[41] and [96].
The Court describes conduct which it considers amounts to an armed attack for the purpose of Article 51 in an inclusive fashion\textsuperscript{615} and does not restrict the concept to the use of any particular type of weapon.\textsuperscript{616} The conduct described by the Court includes the sort of conduct against which the inherent right of self-defence has historically been exercised before 1945. However, the Court has not examined the earliest point at which a state may exercise this right. More precisely for the subject-matter of my thesis, the Court has not examined whether the threat of such conduct would trigger the inherent right.\textsuperscript{617}

In this respect, the Court consistently affirms that, in order to accord with Article 51, an exercise of the inherent right of self-defence has to be ‘in the event of an armed attack’, ‘in the case of an armed attack which has already occurred’, or is ‘subject to the State having been the victim of an armed attack.’\textsuperscript{618} The effect of these observations is to express the article’s precondition, that is, that the right is to be exercised contemporaneously with an armed attack. Unfortunately, these observations of Article 51 have not addressed the issue of when an armed attack legally commences for the purpose of Article 51.

As scholars do, a means employed by the Court to determine whether certain conduct amounts to an armed attack is the ‘scope and effect’ test. For example, the Court in \textit{Oil Platforms} repeats the principles given in \textit{Nicaragua} and \textit{Nuclear

\textsuperscript{615} Nicaragua, above n 23, [195] and \textit{Oil Platforms}, above n 23, [51] and [76].
\textsuperscript{616} Nuclear Weapons, above n 23, [38]-[39]. The Court advised if a use of force, if carried out, would violate Article 2(4) of the \textit{Charter}, a threat of such force is equally a violation of that article: ‘The notions of “threat” and “use” of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise be illegal’; [47].
\textsuperscript{617} However, the Court has said that a threat of force, if actually carried through to a use of force, would itself be unlawful; \textit{Nuclear Weapons}, above n 23, [47].
\textsuperscript{618} Nicaragua, above n 23, [193], [194] and [195] respectively. See also [229]-[233]; \textit{Nuclear Weapons}, above n 23, [38]-[41] and [96]; \textit{Oil Platforms}, above n 23, [37] and [43]; \textit{Armed Activities in the Congo}, above n 23, [142]-[145] and \textit{Legality of the Wall}, above n 23, [139].
Weapons in distinguishing ‘the most grave forms of the use of force (those constituting an armed attack) from other less grave forms’.\footnote{Oil Platforms, above n 23, [50]. The Court also applied the same test as referred to in Nuclear Weapons, above n 23, [76].} I have previously identified the limitations of this test in determining the earliest point in time at which the inherent right of self-defence can be exercised at the time a state faces a threat of armed force.\footnote{See sub-chapter 5.3.3.} Those limitations equally apply to the relevant judgments of the Court. However, the actual questions asked of the Court by protagonist states may not have been conducive to requiring the Court to define the legal commencement of an armed attack for the purpose of Article 51, as the use of armed force had already occurred in those cases.

6.4 Conclusion

A number of conclusions are drawn from the foregoing examination.

The first conclusion is that the existing scholarly debate consists of variations in the rationale in international law for the inherent right of self-defence and for anticipatory self-defence. These variations are contrasted from the uniformity of views expressed by early legal scholars before 1945. This uniformity, as seen in Chapter 2, produced consistency in their work in respect of the legal scope of the inherent right of self-defence. In respect of the existing debate, I consider it more likely that the variations which exist therein have heightened the possibility for wider differences of opinion over the legal scope of the inherent right of self-defence under the Charter.
In particular, the virtual absence of examination by the existing scholarly debate of the rationale for anticipatory self-defence in international law has contributed to the use of terminology to describe this feature of the law which asserts, or infers, that anticipatory self-defence may be a distinct legal right separate to the inherent right of self-defence. If such an assertion, or inference, has in fact been intended by the use of such terminology, then this interpretation of what constitutes anticipatory self-defence in international law is, as a question of law, fundamentally different to the views expressed by scholars before 1945. Those scholars did not regard anticipatory self-defence as a distinct legal right possessed by a state. Rather, they considered the act of using defensive armed force against an imminent threat of armed force as simply a manifestation of the inherent right of self-defence.

The second conclusion is that the existing debate almost exclusively focuses on the interpretation of Article 51 of the Charter (principally, the legal effect of the words ‘if an armed attack occurs’) in its consideration of whether anticipatory self-defence coexisted with that treaty in 1945. The effect of this focus is that the operation of the international customary law principles of immediacy and necessity, including the importance of how their operation formed the legal scope of the inherent right of self-defence to 1945, is neglected.

The third conclusion is that the existing debate does not offer a generally-accepted definition for the legal commencement of an armed attack for the purpose of Article 51. The absence of such a definition causes problems. First, it leaves uncertain the legal commencement of the very conduct to which the precondition in Article 51 relates. The consequence of this is that the scope and effect test has
remained the only test to ascertain the occurrence of an armed attack. This test has proven to be unhelpful to a threatened state in the period of time proximate to the physical commencement of an armed attack to understand when international law authorises it to exercise its inherent right of self-defence. Secondly, the absence of such a legal definition has not assisted in reconciling the positivist and realist theories at the narrow point where the two theories intersect, being immediately before a threat of armed force evolves into a use of such force.

The fourth conclusion, whose relevance attaches itself to the third conclusion, is that none of the three philosophies in the existing debate expressly asserts that a state should first suffer the consequences of the physical commencement of an armed attack before exercising its inherent right of self-defence. This infers that the true question of law which underlies the debate is not whether anticipatory self-defence coexisted with the Charter in 1945, but rather, what the legal scope of the inherent right of self-defence was at that time.

The debate, unfortunately, has not adopted this approach. It has, instead, focussed on Article 51. The fifth conclusion is that the judgments of the Court since 1945 have not materially progressed the subject-matter of my thesis, primarily because the Court has not been asked to determine the question posed by my thesis.

The existence of these characteristics of the existing scholarly debate appears to have eroded the clarity of the legal scope of the inherent right of self-defence which existed before the Charter. As a consequence (and along with uncertainties over what constitutes anticipatory self-defence) divisions have arisen in the existing debate over the coexistence of anticipatory self-defence and the Charter.
The almost exclusive focus on the legal effect of the precondition of the occurrence of an armed attack in Article 51 appears to have obfuscated the possibility that this precondition may have simply reflected in 1945 the historic effect of the operation of the international customary law principles of immediacy and necessity.

If the precondition for the occurrence of an armed attack in Article 51 is instead viewed through my legal prism, it demonstrates a legal basis upon it can be concluded that Article 51 did not impair the legal scope of the inherent right of self-defence in 1945.

Having explored in this chapter the nature of the divisions within the existing scholarly debate, I will now analyse controversial instances of state practice in self-defence since 1945 to identify how states have interpreted and applied Article 51 of the Charter and how they have viewed the legal scope of the inherent right of self-defence.
Chapter 7
State practice in self-defence since 1945

7.1 Introduction

The purpose of this chapter is to identify how states have interpreted the legal scope of the inherent right of self-defence under the Charter. To fulfil this purpose, a detailed analysis is conducted of controversial instances of state practice in self-defence which have occurred since the creation of this treaty. I will examine the event against which the inherent right of self-defence was purportedly exercised, the temporal proximity between that event and the action taken in response to it and the bases upon which other states objected to that action. I will then apply to each instance of state practice the answers to my central question of law and my four supporting questions of law, as described in sub-chapter 4.5, to offer a new legal basis for categorising the legal nature of the force used.

The period examined is divided into two. The first is the post-Charter period to 1962. The second is from 1962 to the present day. This division is deliberately placed at the approximate time when the practice and opinio juris of some states in self-defence demonstrably interpreted the legal scope of the inherent right of self-defence wider than the pre-1945 position.  

This chapter has four sub-chapters. Sub-chapter 7.2 examines aspects of state practice in self-defence in the post-Charter period to 1962 when the pre-1945 interpretation of the legal scope of the inherent right of self-defence was generally adhered to. Treaties of defence and two instances of state practice — the Arab-
Israeli War in 1948 and the Cuban Missile Crisis in 1962 – will be examined to demonstrate this adherence. Subchapter 7.3 examines controversial instances of state practice in self-defence under the Charter. Due to the number of instances to be studied, this subchapter is divided into two further sub-chapters. Subchapter 7.3.1 relates to controversial instances of state practice from 1962 to 1986 and subchapter 7.3.2 relates to such instances from 1986 to the present day. A short conclusion ends each of these two sub-chapters in which observations are made of the common factors shared by each instance. Subchapter 7.4 concludes the chapter.

7.2 The post-Charter period to 1962

The earliest evidence of state practice which touched upon my first supporting question of law, which concerns the rationale in international law for the inherent right of self-defence, arose during the negotiations of the Charter itself, as seen in subchapter 5.2.2. The rationale exhibited in these negotiations is consistent with that expressed by early legal scholars and the practice and opinio juris of states in self-defence to the time of the Charter. Treaties of defence concluded in the post-Charter period have also been consistent with this rationale.

For example, the Treaty of Brotherhood and Alliance 1947 and the Inter-American Treaty of Reciprocal Assistance of 1947 refer to the ‘inherent right’ of individual, or collective, ‘legitimate defence’ that could be used to ‘counter the

624 Inter-American Treaty of Reciprocal Assistance of 1947 (1949) 43 American Journal of International Law 7 (entered into force 2 September 1947), which is based on individual and collective self-defence in case of an armed attack.
unauthorised use of force by another State’. The North Atlantic Treaty 1950\(^{625}\) stipulates that each of its parties will exercise its ‘right’ of individual and collective self-defence to defend another party in the case of an ‘armed attack’.\(^{626}\) Similarly, the Southeast Asia Collective Defense Treaty 1954\(^{627}\) refers to the exercise of the ‘inherent’ right of self-defence and calls for each party to mutually resist any armed attack. The Security Treaty Between Australia, New Zealand and the United States of America 1952\(^{628}\) also calls upon the parties to ‘resist armed attack’ and reaffirms conduct in accordance with Article 51 of the Charter, as does the Mutual Defence Treaty Between The United States And The Republic of Korea 1954.\(^{629}\)

An example of the rationale in international law for the inherent right of self-defence occurred soon after the creation of the Charter. At the beginning of the Arab-Israeli War in 1948, Israel faced an imminent threat of armed force by its neighbouring Arab states almost immediately after its unilateral declaration of statehood on 14 May 1948.\(^{630}\) Upon exercising its inherent right of self-defence in

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\(^{626}\) Article 5 of the treaty states ‘The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.’ However Article 7 of the treaty reiterates the legal supremacy of the Charter and the Security Council for the overall maintenance of the international peace and security.


\(^{630}\) In 1947, the United Kingdom, after having administered Palestine since the Second World War as a mandatory territory, informed the United Nations that it intended to withdraw forthwith. On 29 November 1947, the General Assembly determined that Palestine should be partitioned into separate states of Arab and Jewish people; see Future Government of Palestine; GA Res 181(II) UN GAOR, special sess, 128\(^{20}\) plen mtg, UN Doc A/Res/181(II) (1947). Israel did not become a
the face of this threat, there was no protest to the Security Council by any state that
Israel, at the incipient point in its existence, did not possess such a right. Nor was there any sanction imposed upon Israel by the Security Council on this basis.

In the Arab-Israeli War in 1948, Israel exercised its inherent right of self-defence against an imminent threat of armed force posed by the mobilisation of the military forces of surrounding Arab states. The imminence of the threat and its nature almost certainly fulfilled the customary law principles of immediacy and necessity.

The response by the international community, as illustrated in the materials cited immediately above, to this defensive action before Israel was physically attacked infers that states considered an exercise of this right lawful in such circumstances in 1948. By implication, Israel was seen to have abided by the precondition of the occurrence of an armed attack in Article 51 of the Charter.

Similarly, in the Cuban Missile Crisis in 1962, which is examined in detail below in sub-chapter 7.3, the deliberations and decisions taken by the Kennedy member of the United Nations until 1949: SC Res 69, UN SCOR, 5th sess, 414th mtg, UN Doc S/Res/69 (1949). For accounts of the commencement of hostilities, see generally Ian Bickerton and Maria Hill, Contested Spaces: The Arab-Israeli Conflict (2003); Daniel Kurtzman, Genesis 1948: The First Arab-Israel War (1970) and Simha Flapan, The Birth of Israel: Myths and Realities (1987) Chapter 1.

631 The Security Council of the United Nations had called upon the governments of established sovereign states around Palestine and the Arab and Jewish authorities within Palestine to cease ‘military operations’ after the British withdrawal and before the commencement of the war: see SC Res 42, UN SCOR, 4th sess, 263rd mtg, UN Doc S/Res/42 (1948); SC Res 46, UN SCOR, 4th sess, 283rd mtg, UN Doc S/Res/46 (1948) and SC Res 49, UN SCOR, 4th sess, 302nd mtg, UN Doc S/Res/49 (1948). The Security Council called upon representatives of the Arab and Jewish authorities in Palestine to attend and called for an immediate truce to the ‘increasing violence and disorder’ in that region; see, for example, SC Res 43, UN SCOR, 4th sess, 277th mtg, UN Doc S/Res/43 (1948). After the unilateral declaration of statehood by Israel on 14 May 1948 and the commencement of the war, the Security Council again called for the cessation of hostilities and again invited state members of the Arab League and representatives of the Arab and Jewish authorities in Palestine to accept this resolution: SC Res 50, UN SCOR, 4th sess, 310th mtg, UN Doc S/Res/50 (1948), but did not refer to ‘Israel’ proper. However, in SC Res 54, UN SCOR, 4th sess, 338th mtg, UN Doc S/Res/54 (1948), the Security Council referred to the ‘Provisional Government of Israel’ in noting its acceptance of the council’s demand for a truce and the state members of the Arab League’s rejection of it before declaring the war a threat to the peace within the meaning of Article 39 of the Charter.

632 For an eyewitness account of the acts and considerations of the Kennedy Administration, see Abram Chayes, The Cuban Missile Crisis (1974).
Administration establish that it was the point at which Soviet ballistic missiles in Cuba were moved from their storage and placed on a launch pad that was considered the trigger for the United States to exercise its inherent right of self-defence.633 These deliberations and decisions also establish that the mere presence of these missiles in Cuba was a threat of force to the United States.634

The deliberations and decisions of the National Security Council and its Executive Committee were not conducted with express reference to Article 51 of the Charter,635 or the international customary law principles of immediacy and necessity. Rather, they were conducted through the perceptions of national security and the instinctive considerations which underpinned self-defence. For instance, President Kennedy said on 22 October 1962 in his broadcast:


635 However, the Soviet Embassy did voice its opinion to the State Department of the United States that for the United States to use force against Cuba on the basis of the presence of Soviet missiles that this would be contrary to the Charter: Foreign Relations of the United States, 1961-1963, vol XI, Department of State of the United States, Telegram from the Embassy in the Soviet Union to the State Department of the United States, 16 October 1962 <http://www.state.gov/www/about_state/history/frusXI/26_50.html> at 12 April 2010.
‘We no longer live in a world where the actual firing of weapons represents a sufficient challenge to a nation’s security to constitute a maximum peril. Nuclear weapons are so destructive, and ballistic missiles so swift, that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a threat to the peace.’

The intention of the United States to exercise its inherent right of self-defence in such circumstances can be interpreted as a belief that an armed attack had commenced at that point in time, that is, before suffering the physical commencement of an armed attack. In this regard, the underlying instinctive considerations of the United States about when to exercise this right were identical to those demonstrated in the Arab-Israeli War in 1948. The intentions of the United States demonstrate that it considered an exercise of this right against an imminent threat of armed force to be within the contemplation of Article 51 of the Charter, thus constituting the occurrence of an ‘armed attack’. Both instances of state practice in self-defence are consistent with the pre-1945 position in international law and do not evince doubt of the existence of anticipatory self-defence under the Charter.

A relative consistency in state practice in self-defence in the post-Charter period with the pre-1945 position is therefore observed from the travaux preparatoires of Article 51 of the Charter, treaties of defence and the two significant instances of practice in 1948 and 1962. Subsequently, however, the belief exhibited in these two instances of state practice in relation to the legal scope of the inherent right and the interpretation of the precondition of the occurrence of an armed attack in Article 51 can be observed.

637 An inference drawn by McWhinney, above n 482, 35-36 and 52-53.
7.3 Controversial instances of the use of force after 1962 sought to be justified by Article 51 and the inherent right

In contrast to the Arab-Israeli War in 1948 and the Cuban Missile Crisis in 1962, some subsequent instances of the use of force in purported self-defence have attracted strong disapproval from other states. Why was this? Are the differences in views of states in this respect restricted to the coexistence of anticipatory self-defence and the Charter, or is there a wider division over the legal scope of the inherent right of self-defence? To answer these questions, I will identify and examine the legal bases offered by states to justify, or disapprove of, the use of force in each instance since 1962.

The records of the Security Council are important in this regard. In many instances, unfortunately, such justifications and disapprovals are general in nature, either in the sense that they are restricted to an asserted compliance with Article 51 (or not), or an asserted compliance with the inherent right of self-defence (or not). How a particular use of force in alleged self-defence was exercised in circumstances which fulfilled the customary law principles of immediacy and necessity (or not), or the circumstances which constitute the commencement of an armed attack for the purpose of Article 51, were often not expressly articulated. Nevertheless, valuable evidence of the opinion juris of states concerning their view of the legal scope of the inherent right of self-defence can be gathered from these submissions, statements made by national leaders and government officials and state documents.

7.3.1 1962-1986

As seen in the previous sub-chapter, in October 1962 the Union of Soviet Socialist Republics constructed missiles sites in Cuba and supplied them with nuclear
missiles with the capacity of striking the United States.638 While my previous reference to this incident focussed on the natural defensive instinct of the United States and its reflection in the operation of the international customary law principles of immediacy and necessity,639 the broader issue of the lawfulness of the use of force on the part of the United States under Article 51 of the Charter arose with its earlier imposition of a naval blockade of Cuba.

On 22 October 1962, the United States began its naval blockade of Cuba, indicating that it would repel, or take into custody, any ship from any port found to be shipping offensive military equipment to Cuba.640 On 23 October 1962, the

638 John F Kennedy, Presidential Recordings, The White House, Washington D.C., 16 October 1962, Audio tape of a meeting of the National Security Council, Tape No. 28A.1 10/16/62 (p.m. meeting) <http://www.jfklibrary.org/Historical+Resources/JFK+in+History/Cuban+Missile+Crisis.htm> at 12 April 2010; Foreign Relations of the United States, 1961-1963, vol XI, Department of State of the United States, Minutes of the 505th Meeting of the National Security Council, 20 October 1962 <http://www.state.gov/www/about_state/history/frusXI/26_50.html> at 12 April 2010. See Meaney, above n 71, 216 and Sorensen, above n 632 667-719, who wrote that by 25 October 1962, approximately 16 Medium and Intermediate Range Ballistic Missiles with a range of 2,200 miles were located at three missile sites which had within their range the entire continental United States; 711.

Council of the Organisation of American States adopted a resolution under the

**Inter-American Treaty of Reciprocal Assistance 1947**⁶⁴¹ to:

‘… take all measures, individually and collectively, including the use of armed force, which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of the Continent and to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent.’⁶⁴²

The United States Deputy Legal Adviser justified the use of naval military force in the following terms:

‘It was considered not to contravene Article 2, paragraph 4, because it was a measure adopted by a regional organisation in conformity with the provisions of Chapter VIII of the Charter… the quarantine would no more violate Article 2, paragraph 4, than measures voted for by the Council under Chapter VII, by the General Assembly under Articles 10 and 11, or taken by the United Nations members in conformity with Article 51.’⁶⁴³

The United States Secretary of State for Foreign Affairs, while making reference to ‘the influence of accepted legal principles’ in international law, suggested that the use of force by the United States was ultimately not a legal consideration:

‘I must conclude that the propriety of the Cuban quarantine is not a legal issue. The power, position and prestige of the United States has been challenged by another state; and law simply does not deal with such questions of ultimate power – power that comes close to the source of sovereignty. I cannot believe that there are principles of law that say we must accept destruction of our way of life… The survival of states is not a matter of law.’⁶⁴⁴

The reaction of states in the Security Council to the naval blockade was not uniform. The U.S.S.R. condemned the blockade as a violation of the **Charter**

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because it threatened the use of force, increased the threat of war and interfered in the internal affairs of Cuba.\textsuperscript{645} Some states, such as Venezuela, reasserted the commitment to Article 2(4) of the Charter and generally implored the United States, Cuba and the U.S.S.R. to settle the dispute peacefully,\textsuperscript{646} as did the United Arab Republic.\textsuperscript{647}

The United Kingdom stated that the debate before the Council should not be about the inherent right of self-defence, but of addressing an unacceptable threat\textsuperscript{648} and did not debate the legality of the use of force by the United States.\textsuperscript{649} Ireland supported the action of the United States without explaining how the naval blockade did not violate Article 2(4), or how it abided by Article 51.\textsuperscript{650} France submitted that the use of force by the United States was within the purposes and principles of the Charter, but did not explain why,\textsuperscript{651} as did China.\textsuperscript{652} Some states, such as Chile, criticised the Soviet Union.\textsuperscript{653}

\textsuperscript{645} Union of Soviet Socialist Republic: Draft Resolution – Violation of the United Nations Charter and Threat to the Peace by the United States of America, UN SCOR, 17\textsuperscript{th} sess, 1022\textsuperscript{nd} mtg, UN Doc S/5187 (1962).

\textsuperscript{646} Sosa Rodriguez, Letter dated 23 October 1962 from the Permanent Representative of Cuba to the President of the Security Council, UN SCOR, 17\textsuperscript{th} sess, 1023\textsuperscript{rd} mtg, UN Doc S/PV.1023 (1962).

\textsuperscript{647} Seydoux, Letter dated 23 October 1962 from the Permanent Representative of Cuba to the President of the Security Council, UN SCOR, 17\textsuperscript{th} sess, 1024\textsuperscript{th} mtg, 10-14 UN Doc S/PV.1024 (1962).

\textsuperscript{648} Sosa Rodriguez, Letter dated 23 October 1962 from the Permanent Representative of Cuba to the President of the Security Council, UN SCOR, 17\textsuperscript{th} sess, 1023\textsuperscript{rd} mtg, 4 [16] UN Doc S/PV.1023 (1962).

\textsuperscript{649} Ibid 8 [38]-[39].

\textsuperscript{650} Ibid 15-20.

\textsuperscript{651} Seydoux, Letter dated 23 October 1962 from the Permanent Representative of Cuba to the President of the Security Council, UN SCOR, 17\textsuperscript{th} sess, 1024\textsuperscript{th} mtg, 17 UN Doc S/PV.1024 (1962).

\textsuperscript{652} Ibid 23.

\textsuperscript{653} Sosa Rodriguez, Letter dated 23 October 1962 from the Permanent Representative of Cuba to the President of the Security Council, UN SCOR, 17\textsuperscript{th} sess, 1023\textsuperscript{rd} mtg, 5-9 UN Doc S/PV.1023 (1962).
In contrast, Romania submitted that it was the action of the United States, not the Soviet Union, which created the threat to international peace and security.\(^{654}\) Ghana questioned whether the acceptance \textit{per se} by Cuba of ballistic missiles authorised the United States to threaten, or use, force under the \textit{Charter} in violation of Article 2(4).\(^{655}\) It noted that the United States stated that its action was enforcement action of the type envisage under Article 42 of the \textit{Charter} and that the United States conduct must therefore have been considered enforcement action under Article 53, but was ‘inadmissible’ because there was no Security Council resolution authorising it.\(^{656}\) Ghana said the use of force could not be considered lawful under the \textit{Charter} and that the placement of missiles on Cuba did not, \textit{per se}, fulfil the international customary law principles of necessity and immediacy.\(^{657}\)

The legal basis asserted by the United States to justify its use of force by way of naval blockade was its inherent right of self-defence and the endorsement of its action by the \textit{Organisation of American States}.\(^{658}\) The records of the administration show that the naval blockade was considered a first step in the use of force to prevent the threat posed by the Soviet missiles from increasing.\(^{659}\)

\(^{654}\) Ibid 9 [43]. It described the United States action as ‘a ruthless violation of the principles and fundamental provisions of the United Nations Charter, and is a direct negation of the general norms of international law’ (12 [57]), that the use of force to impose the naval blockade was in breach of Article 2(4) (12-13 [58], [63]) and that and that the United States was also in breach of Article 39 in causing a threat to the international peace and security (14 [69]).

\(^{655}\) Ibid 16.

\(^{656}\) Ibid 19 [109].

\(^{657}\) Ibid 19 [110].

\(^{658}\) But see Cassese, above n 8, 359; Gray, above n 8, 131 and Dinstein, above n 7, 186.

\(^{659}\) \textit{Foreign Relations of the United States, 1961-1963}, vol XI, Department of State of the United States, Memorandum from the Secretary of Defence McNamara to President Kennedy, 4 October 1962. Plans were made for widespread aerial bombings and naval bombardment, followed by an invasion force of 80,000 troops; \textit{Foreign Relations of the United States, 1961-1963}, vol XI, Department of State of the United States, Memorandum for the Secretary of Defence McNamara to the Chairman of the Joint Chiefs of Staff, 2 October 1962 <http://www.state.gov/www/about_state/history/frusXI/26_50.html> at 12 April 2010; \textit{Foreign Relations of the United States, 1961-1963}, vol XI, Department of State of the United States, Memorandum from the Secretary of Defence McNamara to President Kennedy, 4 October 1962
of foreign territory unauthorised by the Security Council under Chapter VII of the 
Charter appears to involve a threat, or use, of force envisaged by Article 2(4) and 
is considered a form of aggression by the General Assembly of the United 
Nations. The Kennedy Administration, from the viewpoint of one participant, 
did not see the use of force by way of naval blockade as violating the prohibition in 
Article 2(4).

There are two questions of law which must be considered to assess the legitimacy 
of the United States’ use of force. The first is whether the presence of the Soviet 
missiles on 22 October 1962 in all the circumstances fulfilled the international 
customary law principles of immediacy and necessity. The United States did not 
assert that this was the case. There is no evidence that the mere possession of a 
weapon was considered by international law before 1962 to have been sufficient to 
fulfil these principles.

As was seen in sub-chapter 5.2.1.1, such fulfilment required a placement of a 
weapon and some patent evidence of an intention to attack. If the situation had 
been otherwise, these two customary law principles may have been fulfilled as

660 Article 3(c) of the Resolution on the Definition of Aggression, GA Res 3314 (XXIX), UN 
661 Chayes, above n 643, 37-38.
662 Although, as will be seen as this sub-chapter unfolds, express references to the fulfilment of 
these two principles are not prevalent in the giving of such justifications.
early as 16 October 1962 when the missiles were first discovered. In addition, the nuclear missiles placed by the United States in Turkey, which adjoined the Soviet Union, before this crisis (and which were removed by the United States in its compromise with the Soviet Union to end the crisis) would, by this test, have also fulfilled these principles. Such a fulfilment was not asserted by any state at that time.

The second question is whether the presence of the Soviet missiles constituted the occurrence of an armed attack upon the United States on 22 October 1962 for the purpose of Article 51 of the Charter. The absence of a definition of the legal commencement of such an attack in international law in 1962 does not assist with answering this question.

An application of my definition suggests that such an attack against the United States had not commenced on 22 October 1962. This conclusion is drawn because the international customary law principles of immediacy and necessity were not fulfilled by the physical presence of the missiles in Cuba. Without the fulfilment of these principles, the legal commencement of an armed attack had not occurred. Therefore, the inherent right of self-defence was not triggered. This situation can be contrasted with that examined in the previous sub-chapter, where the evidence suggested that the United States considered that, if a missile had been placed on a

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launching pad, it would have been immediately necessary to respond with
defensive force.

Therefore, a legal basis exists upon which a conclusion can be made that the use of
force by the United States by way of naval blockade was pre-emptive in nature,
rather than an exercise of the inherent right of self-defence. By ‘pre-emptive’ I
mean that such force occurred before the fulfilment of the international customary
law principles of immediacy and necessity.

In 1963 and 1964 the United Kingdom complained to the Security Council about a
series of cross-border incursions by Yemen against the territory of South Arabia,
whose protection the United Kingdom was obliged to undertake. All incursions
were of a relatively minor nature. On 28 March 1964, after dropping leaflets to the
occupiers of the Harib Fort in Yemen and surrounding areas, the British Air Force
bombarded the fort, killing 25 people. The United Kingdom claimed in the
Security Council that its response was a lawful exercise of its inherent right of self-
defence. In justification, the United Kingdom referred to the on-going Yemeni
attacks, stating,

26. There is, in existing law, a clear distinction to be drawn between two forms of self-
help. One, which is of a retributive or punitive nature, is termed ‘retaliation’ or ‘reprisals’;
the other, which is expressly contemplated and authorised by the Charter, is self-defence
against armed attack… It is clear that the use of armed force to repel or prevent an attack –
that is, legitimate action of a defensive nature – may sometimes have to take the form of a
counter-attack…

31. It [self-defence against armed attack] has no parallel with acts of retaliation or
reprisals, which have as an essential element the purpose of vengeance or retribution. It is

665 There had been long-standing security and border issues in the region before the Harib Fort
incident and Security Council resolutions urging states in the area to ‘disengage… from any action
which would increase tension in the area’; SC Res 179, UN SCOR, 18th sess, 1039th mtg, UN Doc
this latter use of force which is condemned by the Charter, and not the use of force for defensive purposes such as warding off future attacks.\textsuperscript{666}

The Security Council\textsuperscript{667} rejected both limbs of the justification offered by Great Britain. In clause 1 the Council condemned ‘reprisals as incompatible with the purposes and principles of the United Nations’ generally and under clause 2 deplored the ‘British military action at Harib’.\textsuperscript{668} The Security Council therefore expressly rejected the pre-1945 international customary law right of reprisal, presumably because it violated the prohibition of the use of force in Article 2(4) of the Charter. It also expressly rejected the British claim of self-defence, however, it did not clearly articulate its reason for this rejection.

There are two possibilities in this respect. First, the Security Council may have considered that the customary law principles of immediacy and necessity were not fulfilled, as the last incursion before the British attack had occurred some weeks before. Secondly, it may have considered the British attack to be disproportionate to the nature of the threat (although a disproportionate response is a moot point if the principles of immediacy and necessity are not first fulfilled).

\textsuperscript{666} SC Res 188, UN SCOR, 18\textsuperscript{th} sess, 1111\textsuperscript{th} mtg, UN Doc S/Res/188 (1964). The resolution was adopted by nine votes to zero with the United Kingdom and the United States abstaining.

\textsuperscript{667} Gray, above n 8, 121-122.

\textsuperscript{668} However, the Security Council did deplore ‘all attacks and incidents which occurred in the area’, implying fault and responsibility to both sides for the general continuation of the use of force during the dispute; SC Res 188, UN SCOR, 18\textsuperscript{th} sess, 1111\textsuperscript{th} mtg, UN Doc S/Res/188 (1964). For a relatively modern judicial discussion concerning the unlawfulness of reprisal since 1945, see Oil Platforms, above n 23, including Judge Randelzhofer’s separate opinion at [15]; Judge Elaraby’s separate opinion at [1.2] and Judge Kooijmans’ separate opinion at [52], [55] and [62]. For scholarly views on reprisals, see Brownlie, above n 8 (1963), 223 and 365; Lauterpacht, above n 7, 767-797; Dinstein, above n 7, 222 and 226; Randelzhofer in Simma (ed), above n 7, 793-794 [13]-[14] and 798 [26]; Cassese, above n 8, 299 and 355-356 and 373; McCormack, ‘The Use of Force’ in Blay, Piotrowicz and Tsamenyi (eds), above n 6, 226-227; Gray, above n 8, 130 and 133; Gray, above n 21, 599; Wallace, above n 8, 278 and 293; Maogoto, above n 7, 36 and 96-97; Triggs, above n 8, 559 [10.4] and Williamson, above n 6, 145-148.
In 1965, members of the armed forces of The Dominican Republic and the Dominican Revolutionary Party overthrew the Cabral Government. Afterwards, a Military Junta took control, but after the situation deteriorated the Junta informed the United States Embassy that the safety of United States nationals could not be assured. After a response from the Junta, the United States on 28 April 1965 landed 400 marines in the asserted defence of its nationals. This figure was later increased to 20,000 troops until a new democratic government was installed. The United States submitted to the Security Council a Presidential statement as part of its notification under Article 51 of the Charter:

‘The United States Government has been informed by the military authorities in the Dominican Republic that American lives are in danger. These authorities are no longer able to guarantee their safety and have reported that the assistance of military personnel is now needed for that purpose. I’ve ordered the Secretary of Defence to put the necessary American troops ashore in order to give protection to hundreds of Americans who are still in the Dominican Republic and to escort them safely back to this country.’

On 2 May 1965, President Lyndon Johnson provided an additional reason for the use of force, being that ‘The American nation cannot permit the establishment of another Communist Government in the Western Hemisphere’. The President did not explain whether the prevention by force of the formation of a foreign government fell within the province of the inherent right of self-defence, or of Article 51 of the Charter. However, even before the President made his statement, the Security Council heard submissions from other states which strongly

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669 Adlai Stevenson, Letter dated 29 April 1965 from the Permanent Member of the United States of America Addressed to the President of the Security Council, UN SCOR, 20th sess, UN Doc S/6310 (1965).
670 The Organisation of American States informed the Security Council of the situation in the Dominican Republic by cable dated 30 April 1965; see Jose A. Mora, Cable dated 30 April 1965 from the Secretary-General of the Organisation of American States Addressed to the Secretary-General of the United Nations, UN SCOR, 20th sess, UN Doc S/6315 (1965). See also Norman Thomas and Anne Thomas, The Dominican Republic Crisis 1965 (1967) 75 and 94 for a view that the request from the Junta was in fact solicited by the United States.
671 Adlai Stevenson, Letter dated 29 April 1965 from the Permanent Member of the United States of America Addressed to the President of the Security Council, UN SCOR, 20th sess, UN Doc S/6310/Add.2 (1965).
672 United States Department of State Bulletin 52 (1965) 745-746.
disapproved of the United States’ use of force for the purpose of protecting its nationals. Cuba said the:

‘illegal action – action at variance with the principles of international law recognised by the United Nations – which has been carried out by the United States Government and which consists in an invasion of the territory of the Dominican Republic by military forces of that Government and by invading forces aimed at complete occupation of that country in flagrant violation of the Sovereignty of an independent State.’

Cuba, as did Cambodia and Albania, described the action as aggression, a violation of the sovereignty and internal affairs of the Republic and an act which endangered the principles of international law upon which the Charter was based. The Soviet Union described the action as ‘imperialism’, ‘armed intervention’ and ‘aggression’ and concluded that the United States action was a ‘violation of the elementary norms of international law and of the United Nations Charter.’ Mongolia and Poland made similar submissions. Yugoslavia described the use of force as ‘a new armed intervention by the United States’ that constituted ‘a threat with serious complications and dangers which cannot but

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673 Raul Roa, Letter dated 30 April 1965 from the Permanent Representative of Cuba to the Secretary-General of the United Nations, UN SCOR, 20th sess, 30 UN Doc S/6314 (1965).
674 Ibid 2.
675 Huot Sambath, Letter dated 5 May 1965 from the Representative of Cambodia to the Secretary-General, UN SCOR 20th sess, 113 UN Doc S/6347 (1965).
676 Halim Dudo, Letter dated 13 May 1965 from the Representative of Albania to the Secretary-General, UN SCOR, 20th sess, 122 UN Doc S/6354 (1965). On 2 May 1965, the Assistant Secretary-General of the Organization of American States informed the Security Council that the organisation had developed a Commission comprised of Brazil, Argentina, Panama, Columbia and Guatemala to ‘bring about peace and normalcy’, a ‘cease-fire’ and for the ‘evacuation of persons seeking refuge in embassies’; William Sanders, Cable dated 1 May 1965 from the Assistant Secretary-General of the Organization of American States Addressed to the Secretary-General of the United Nations, UN SCOR, 20th sess, 1-2 UN Doc S/6319 (1965).
677 Ibid 2-3.
679 Raul Roa, Letter dated 30 April 1965 from the Permanent Representative of Cuba to the Secretary-General of the United Nations, UN SCOR, 20th sess, 3 UN Doc S/6314 (1965).
680 M. Dugerseron, Telegram dated 5 May 1965 from the Minister of Foreign Affairs of Mongolia to the President of the Security Council, UN SCOR, 20th sess, 109 UN Doc S/6341 (1965).
681 Note Verbale from the Permanent Mission of Poland to the United Nations Addressed to the Secretary-General, UN SCOR, 20th sess, 106 UN Doc S/6339 (1965).
cause renunciation by the world public opinion’ and denied that the inherent right of self-defence could be exercised for the purpose of protecting citizens abroad.682

The lawfulness of exercising the inherent right of self-defence for the purpose of protecting nationals abroad has been a vexed question of law since 1945 because this asserted motivation may conceal broader objectives of national security.683

Prior to the prohibition of the use of force in Article 2(4) of the Charter, the use of force for the purpose of protecting nationals abroad rested in international customary law.684

On 28 December 1968, Israel attacked Beirut Airport after Lebanese gunmen attacked two El Al commercial aircraft at Athens Airport two days earlier. That attack had killed one Israeli citizen. Israeli commandos destroyed 13 civilian aircraft during its response and inflicted $40m damage. There was no loss of life.685 Israel submitted to the Security Council that it was a Lebanon-based terrorist group that carried out the attack in Athens686 and that international law authorised Israel to exercise its inherent right of self-defence against Lebanon:

682 Prasonovic, Note Verbale from the Permanent Representative of Yugoslavia to the Secretary-General, UN SCOR, 20th sess, 89 UN Doc S/6330 (1965).
683 The general view of scholars is that Article 2(4) of the Charter extinguished the pre-1945 legal basis for using force to rescue nationals in another state. See Brownlie, above n 8 (1963), 299-300; Akehurst, above n 21, 95; Harris, above n 151, 889-894; Malanczuk, above n 8, 315 and 323; Fernando Teson, Humanitarian Intervention (2nd ed, 1997) 179-185; Gray, above n 8, 30-31 and Cassese, above n 8, 368 and Randelzhofer ‘Article 51’ in Simma (ed), above n 7, 798 [26]. However, Dinstein, above n 7, 233-234 believed that the use of force in self-defence was in accordance with Article 51 because (a) the hijackers were apparently accommodated by the Ugandan Government; (b) the hijacking of Israeli (and other) nationals was meant to be an armed attack against Israel itself; (c) the Israelis were forced to Uganda in violation of international law, and (d) the use of force by Israel was not large but ‘surgical’ in nature. See also International Law Commission, First Report of the Special Rapporteur, Summary of the 2818th Meeting, 48 [18] UN Doc A/CN.4/SR/2618, (1976).
684 See sub-chapter 3.2.1.
685 SC Res 262, UN SCOR, 23rd sess, 1462nd mtg, UN Doc S/Res/262 (1968). See also Bowett, above n 180, 172 and Harris, above n 151, 915.
686 Ghorra, Address by the Permanent Representative of Lebanon to the President of the Security Council, UN SCOR, 23rd sess, 1460th mtg, 2 UN Doc S/PV.1460 (1968).
‘any attack against an Israeli civil aircraft, wherever it might be, is as much a violation of the ceasefire as any attack on Israeli territory and entitles the Israeli Government to exercise its right of self-defence.’

It then provided the additional justification:

‘This action was taken to uphold Israel’s basic right of free navigation in international skies. Its purpose was to show once again that Israel’s rights on land and sea and in the air cannot be jeopardised and trampled on with impunity.’

The Israeli action was heavily criticised in the Security Council. Lebanon described the attack as ‘a shameful exploit’ and stated that the attack ‘constitutes a threat to the peace and security of Lebanon, the Middle East and the entire world’. The United States representative called the Israeli action ‘unjustified’ and the United Kingdom described it as ‘dangerous and deplorable’. France described the Israeli action as ‘reprisal’ and as such ‘is inadmissible and deserving of condemnation.’

The Soviet Union described the action as ‘monstrous’ and India as ‘unprovoked, unnecessary and a fragrant breach of the Charter of the United Nations.’ Hungary blamed Israel for ‘particularly brutal’ behaviour and added ‘… for Israel, the Charter of the United Nations simply does not exist and the provisions of the Charter forbidding the use of force in international relations are systematically

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687 Ibid 5 [56]. At 5 [57] Mr Rosenne described the ability for Israel to defend itself against such acts as a ‘grave matter’ for Israel and for the whole world and that an inability to do so ‘threatens the very basis of international law and order.’
688 Ibid 5 [61].
689 Ghorra, Address by the Permanent Representative of Lebanon to the President of the Security Council, UN SCOR, 23rd sess, 1460th mtg, 2 UN Doc S/PV.1460 (1968). Lebanon requested a resolution under Chapter VII of the Charter.
690 Ibid 6 [73].
691 Ibid 7 [80].
692 Ibid 8 [89].
693 Ibid 8 [91]. At 8 [92] Mr Malik stated ‘This military action by Israel cannot be justified in any way.’
694 Ibid 9 [104].
rejected by Israel.\textsuperscript{695} Algeria stated that Israel has ‘a war-like attitude’ and ‘feeds on aggression’.\textsuperscript{696} Senegal described the action as ‘reprisal’\textsuperscript{697} and Brazil as an ‘unjustified and premeditated attack’.\textsuperscript{698} The Security Council unanimously condemned Israel for its ‘premeditated military action in violation of its obligations under the Charter and cease-fire resolutions’.\textsuperscript{699}

On 27 June 1976, an Air France airliner was hijacked after leaving Athens bound for Tel Aviv. On board were 100 Israeli passengers and 150 other passengers of different nationalities.\textsuperscript{700} The airliner was forced to fly to Entebbe Airport in Uganda where the Israeli passengers were separated from others. The hijackers demanded the release of 50 Palestinian prisoners held in various states. There was a suggestion by Israel that during the following week, Uganda not only failed to take steps against the hijackers, but instead assisted them. As a consequence, Israel flew commandos into Entebbe Airport and used armed force to rescue the hostages.

Israel submitted to the Security Council that, from its perspective of the demands of the hijackers and Israel’s alleged connivance of the Ugandan state, the hostages were soon to be killed. On these bases, Israel exercised its inherent right of self-defence to rescue its citizens.\textsuperscript{701} Israel recognised the operation of the customary law principles of immediacy, necessity and proportionality in such

\textsuperscript{695} Ibid 10 [110]-[112].
\textsuperscript{696} Ibid 11 [129].
\textsuperscript{697} Ibid 12 [137].
\textsuperscript{698} Ibid 13 [143].
\textsuperscript{699} SC Res 262, UN SCOR, 23\textsuperscript{rd} sess, 1462\textsuperscript{nd} mtg, 1 UN Doc S/Res/262 (1968). See also Dinstein, above n 180, 230; Cassese, above n 8, 371 and Gray, above n 8, 161-163.
\textsuperscript{700} Lieutenant-Colonel Juna Oris Abdalla, Letter dated 5 July 1976 from the Charge d’affaires of the Permanent Mission of Uganda to the United Nations Addressed to the President of the Security Council, UN SCOR, 31\textsuperscript{st} sess, 1939\textsuperscript{th} mtg, 3 [21] UN Doc S/PV.1939 (1976). The details of the hijacking were provided to the Security Council by, Minister of Foreign Affairs for Uganda.
\textsuperscript{701} Ibid 3 [80]-[86].
circumstances.\textsuperscript{702} Israel submitted that it ‘was entirely justified by every norm of natural and international law in taking the action which it took’\textsuperscript{703} and that:

‘This type of action, which in principle is not unprecedented, is dealt with at considerable length in international law, and there is no doubt whatsoever but that the weight of international law and precedent lies fully in Israel’s favour. However, the Israeli action at Entebbe came to remind us that the law we find in statute books is not the only law of mankind. There is also a moral law, and by all that is moral on this earth, Israel had the right to do what it did. Indeed, it had also the duty to do so.’\textsuperscript{704}

The United States was one of the few states which supported the Israeli action:

‘Israel’s actions in rescuing the hostages necessarily involved a temporary breach of the territorial integrity of Uganda. Normally, such a breach would be impermissible under the Charter of the United Nations. However there is a well established right to use limited force for the protection of one’s own nationals from an imminent threat of injury or death in a situation where the State in whose territory they are located are either unwilling or unable to protect them. The right, flowing from the right of self-defence, is limited to such a use of force as is necessary and appropriate to protect threatened nationals from injury.’\textsuperscript{705}

However, Uganda described Israel’s action as aggression and a violation of its sovereignty and territorial integrity,\textsuperscript{706} saying the Israeli commandos were ‘invaders’ due to an absence of consent from Uganda for the action.\textsuperscript{707} It asked the Security Council to condemn ‘Israel’s barbaric, unprovoked and unwarranted aggression against the sovereign state of Uganda.’\textsuperscript{708} Many states objected to the Israeli use of force, describing it as a violation of Article 2(4) of the Charter, of the sovereignty of Uganda and as unlawful aggression.\textsuperscript{709}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{702} Ibid 14 [115] – 15 [121].
\item \textsuperscript{703} Ibid 12 [98].
\item \textsuperscript{704} Ibid 12 [104]. The use of the term ‘moral law’ may have been a reference to Natural Law, inferring a belief in a source of international law in respect of self-defence in addition to the inherent right of self-defence and Article 51 of the Charter, but was not explained by the Israeli representative. For contemporary views of Natural Law, see footnote 34.
\item \textsuperscript{705} Ibid 8 [9.]
\item \textsuperscript{706} Ibid 3 [20].
\item \textsuperscript{707} Ibid 4 [31].
\item \textsuperscript{708} Ibid 5 [37].
\item \textsuperscript{709} Ibid. Mauritius said that Israel had clearly ‘taken the law into its own hands’ by invading Uganda with its armed forces 6 [45]. The Organisation of African Unity criticised Israel for violating the territorial integrity of Uganda and Article 2(4) of the Charter at 17 [141], as did Cameroon 24 [217]. Kenya described the action as ‘aggression’ 18 [152], as did Qatar 19 [168].
\end{itemize}
\end{footnotesize}
In 1979, a controversial instance of state practice occurred which did not clearly fall within the categories of a pre-emptive use of force, reprisal or the protection of nationals abroad. In that year, Tanzania expelled the Ugandan military forces of President Amin which had forcefully occupied Tanzanian territory since 30 October 1978. Tanzania exercised its inherent right of self-defence across the Kagera River against the initial Ugandan troop. However, her troops pressed on into Uganda supported by Ugandan rebels hostile to the Amin Military Junta. The Tanzanian troops defeated the Ugandan army, following which President Amin fled Uganda and another Government was installed. Tanzanian troops remained in Uganda and largely ravished the Ugandan infrastructure, crops and villages.

The Ugandan occupation of Tanzanian territory can properly be described as an armed attack for the purpose of Article 51 of the Charter. Therefore, as the international customary law principles of immediacy and necessity were fulfilled...

Cameroon 23 [209], China 24 [224], Tanzania, Ibid 11 [102] and Pakistan 16 [141]. The Soviet Union said that there was no international, or moral, law which justified the Israeli conduct 17 [150] – 18 [162]. See also Benin, Sir Harold Walter, Complaint by the Prime Minister of Mauritius, current Chairman of the Organisation of African Unity, of the ‘Act of Aggression’ by Israel against Uganda, UN SCOR. 31st sess, 1941st mtg. 2 [9] UN Doc S/PV.1941 (1976), in which Mauritius viewed the Israeli actions as prohibited by Article 2(4), as did Somalia 4 [30] and Yugoslavia 7 [65]. Germany condemned hostage taking, but did not comment on the lawfulness of the Israeli action 5 [50]-[61].


Harris, above n 151, 918.

The Tanzanian troops were supported by rebel forces within Uganda who had been trying to overthrow President Amin. Uganda was, in turn, assisted by the Libyan Air Force which attacked Tanzanian troops on Ugandan and Tanzanian territory: U.S. State Department Documents (2006) <http://www.state.gov/r/pa/ei/bgn/2963.htm> at 13 October 2006. The history of tension and conflict between Tanzania and Uganda is provided by Rita M. Burns ed, Library of Congress Country Studies (2006) <http://lcweb2.loc.gov/cgi-bin/query/r?fnd/cstdy:@field(DOCID+ug00000)> at 6 October 2006.
by the circumstances, the exercise of the inherent right of self-defence by Tanzania can be regarded as in accordance with international law. The question is whether Tanzania exceeded the customary law principle of proportionality in repelling the Ugandan armed attack and if it did, at what point?

It will be recalled from sub-chapter 3.2.3.3 that the legal function historically fulfilled by this principle was to restrict an exercise of the inherent right of self-defence to repelling an imminent threat, or use, of armed force until it no longer fulfilled the principles of immediacy and necessity. If Tanzania exceeded the principle of proportionality by its action after having repelled the Ugandan forces from its territory, as it most certainly did, it can be reasoned that the continuing use of force beyond that point was not attributable to the inherent right of self-defence, but instead constituted a violation of the prohibition of force in Article 2(4) of the Charter.

On 7 June 1981, Israeli military aircraft destroyed an Iraqi nuclear research facility under construction on the outskirts of Baghdad, Iraq. Prior to this use of force, Iraq had abided by the safeguard and inspection requirements of the International Atomic Energy Agency during the construction of its facility. In the Security Council debates held pursuant to the Iraqi complaint, Israel insisted that the

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714 Ibid.
nuclear reactor was close to completion and would be capable of producing weapons grade uranium no later than September 1981. Israel alleged that such a reactor constituted ‘a mortal danger’ to its people.\textsuperscript{717} Both the capacity of the nuclear research facility and the intentions of the Iraqi Government to create weapons grade uranium, or nuclear weapons, were vehemently denied by Iraq.\textsuperscript{718}

States in the Security Council condemned Israel’s action. Israel justified its use of force by relying on its inherent right of self-defence, Article 51 of the \textit{Charter} and morality:

‘In destroying Osirak, Israel performed an elementary act of self-preservation, both morally and legally. In so doing, Israel was exercising its inherent right of self-defence as understood in general international law and as preserved in Article 51 of the Charter of the United Nations… A threat of nuclear obliteration was being developed against Israel by Iraq, one of Israel’s most implacable enemies. Israel tried to have that threat halted by diplomatic means. Our efforts bore no fruit. Ultimately we were left with no choice. We were obliged to remove that mortal danger. We did it cleanly and effectively.’\textsuperscript{719}

Condemnation of the Israeli attack was uniform.\textsuperscript{720} Some states made submissions which highlighted the distinction between lawful anticipatory self-defence and an unlawful pre-emptive use of force. For instance, Algeria submitted:

\begin{flushright}
\textsuperscript{716}Doc S/PV.2284 (1981) and \textit{Letter dated 8 June 1981 from the Charge d’affaires of the Permanent Mission of Iraq to the United Nations addressed to the President of the Security Council}, UN SCOR, 36\textsuperscript{th} sess, 2286\textsuperscript{th} mtg, UN Doc S/PV.2286 (1981).
\textsuperscript{717}Saïb Bafi, \textit{Letter dated 8 June 1981 from the Charge d’affaires of the Permanent Mission of Iraq to the United Nations addressed to the President of the Security Council}, UN SCOR, 36\textsuperscript{th} sess, 2286\textsuperscript{th} mtg, 2 UN Doc S/14509 (1981).
\textsuperscript{718}Letter dated 8 June 1981 from the Charge d’affaires of the Permanent Mission of Iraq to the United Nations addressed to the President of the Security Council, UN SCOR, 36\textsuperscript{th} sess, 2280\textsuperscript{th} mtg, 63-92 UN Doc S/PV.2280 (1981) with the quotation at 92. Mr Blum delivered the address of Israel to the Security Council.
\textsuperscript{719}Ibid 20-53. The Iraqi facility was monitored and inspected by the International Atomic Energy Agency pursuant to its signing of the \textit{Treaty on Non-Proliferation of Nuclear Weapons}, open for signature on 1 July 1968, 7 ILM 7 (entered into force 5 March 1970). Mr Hammadi delivered the address of Iraq to the Security Council.
\textsuperscript{720}Letter dated 8 June 1981 from the Charge d’affaires of the Permanent Mission of Iraq to the United Nations addressed to the President of the Security Council, UN SCOR, 36\textsuperscript{th} sess, 2280\textsuperscript{th} mtg, 58-59, 95-97 UN Doc S/PV.2280 (emphasis added by the author).
\end{flushright}
‘The Israeli action has the monstrous characteristic of introducing into international relations new frightening forms of action based on aggression, baptized ‘preventive’ in order to make the unacceptable acceptable… The new theory of ‘preventative’ aggression is the very negation of law and of morality; it is diametrically opposed to peace and reason. Permeated by a suicidal subjectivism, it would in future authorise any State to attack another for whatever reason it considers valid – that is, in the final analysis, for no reason at all.’

Uganda highlighted Article 51 of the Charter, its precondition of the occurrence of an armed attack before the inherent right of self-defence can be exercised and the absence of such an attack by Iraq against Israel before the Israeli action:

‘I have heard many fantastic arguments from the representative of Israel but I have not heard him stretch our imagination by suggesting that the mere fact of having a nuclear research centre somehow constituted an armed attack by Iraq against Israel. But Article 51 is explicit in stating that the right of collective and individual self-defence is only permissible in response to an armed attack. Since there was no armed attack against Israel… how, then, can Israel take refuge under Article 51? Indeed, I recall no previous occasion when the Council has accepted the plea of self-defence in the absence of a prior armed attack.’

The views of Algeria and Uganda are representative of the legal bases upon which states invited to address the Security Council rejected Israel’s claim of self-defence.
defence. Scholars have provided views on the lawfulness of the Israeli attack largely along the positivist and realist philosophies examined in sub-chapter 6.2.\textsuperscript{723}

In October 1983, the pro-Soviet government of Grenada led by Maurice Bishop was ousted by members of his party and replaced by a government that was even more leftist. After Bishop and others were executed by the new government, a curfew was imposed upon the population. On the pretext of the defence of its citizens, of a request from the Organisation of Eastern Caribbean States and of a request from the Governor-General to intervene, the United States invaded Grenada. A democratic government was subsequently installed.\textsuperscript{724}

The Security Council debated the invasion on 26 October 1983.\textsuperscript{725} The Dominican Republic and Zaire viewed the United States’ action as a violation of normal principles of international law.\textsuperscript{726} Vietnam condemned the invasion as ‘an extremely serious violation of the independence and sovereignty of a Member State of the United Nations’ which violated the Charter.\textsuperscript{727} It rejected any legal basis in international law which justified the use of force in these circumstances.\textsuperscript{728}

\textsuperscript{723} See, for example, Dinstein, above n 7, 47-48 and 186; Maogoto, above n 7, 35; Gray, above n 8, 133; Cassese, above n 8, 360-361; Shai Feldman, (1982) ‘The Bombing of Osiraq – Revisited’ 7 Quarterly Journal of International Security 114, 114 and McCormack, above n 6 (2005), 259-261.

\textsuperscript{724} Davis Robinson, ‘The Use of Force in Protection of United States Nationals’ (1984) 78 American Journal of International Law 664. See Harris, above n 151, 893 and Malanczuk, above n 8, 315, and 323 who both questioned whether the Governor-General of Grenada, Sir Paul Scoon, had constitutional authority to request United States assistance and additionally whether that request in any case was made before, or after, the United States action. Harris at 893 rejects the capacity of the regional organisation to request assistance for matters of a purely domestic nature.

\textsuperscript{725} Letter dated 25 October 1983 from the Deputy Minister for External Relations Nicaragua Addressed to the President of the Security Council, UN SCOR, 38\textsuperscript{th} sess, 2489\textsuperscript{th} mtg, UN Doc S/PV.2489 (1983). Jamaica supported the United States action, citing the alleged execution of Mr Bishop as the reason 5 [14]. See Robinson, above n 724, 675.

\textsuperscript{726} Letter dated 25 October 1983 from the Deputy Minister for External Relations Nicaragua Addressed to the President of the Security Council, UN SCOR, 38\textsuperscript{th} sess, 2489\textsuperscript{th} mtg, 2 [11]-[15] UN Doc S/PV.2489 (1983).

\textsuperscript{727} Ibid 3 [21].

\textsuperscript{728} Ibid 3 [22] – 4 [28].
as did Nigeria, Bolivia, China, Algeria, Syria, Cuba, Laos and Pakistan.

Poland, France and Iran accused the United States of lying to the Security Council over its true motivation for the invasion, adding Grenada had not threatened armed force against any other state. Argentina and the Seychelles focussed on the violations of the principles of state sovereignty and the non-interference in the internal affairs of other states as much as Article 2(4) of the Charter. The submission by Ethiopia expressly rejected the United States’ view of the legal scope of the inherent right of self-defence:

“Once again the Marines have struck, this time in Grenada, to subdue a small, weak, developing country. This time again their declared objectives are the protection of the lives of American citizens and the restoration of democracy. History has not failed to record the many but similar crimes committed in the name of these seemingly lofty goals, while the peoples of the world, too, have never failed to recognize the true objectives of these destructive missions.”

Libya and Ethiopia described the invasion as ‘blatant aggression against small States’. Nicaragua protested to the Security Council about the invasion on 9

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729 Ibid 4 [32].
730 Ibid 6 [62].
731 Ibid 7 [66]-[67].
732 Ibid 9 [96]-[98].
733 Ibid 10 [104].
734 Ibid 12 [124].
735 Ibid 17 [168]-[173].
736 Ibid [175]-[176].
737 Ibid 4 [36]-[37].
738 Ibid 15 [145]-[146].
739 Ibid 16 [161].
740 Ibid 7 [72]-8 [80].
741 Ibid 8 [86].
743 Mohamed Hamid Ibrahim, Letter dated 28 October 1983 from the Ethiopian Permanent Representative Addressed to the President of the Security Council, UN SCOR, 38th sess, 2489th mtg, 2 UN Doc S/16099 (1983). Mr Ibrahim further described the use of force by the United States as ‘criminal aggression.’
November 1983. The draft resolution deploring the invasion of Grenada by the United States ‘as a flagrant violation of international law’ failed to be passed by the Security Council.

The General Assembly of the United Nations deplored the use of force by the United States against Grenada. In so doing, it had regard to the Security Council debate on the event. The Assembly recalled G.A. Resolution 2625 (XXV) on the Declaration on Principles on International Law concerning Friendly Relations and Co-operation among States, and referred to the Declaration of Inadmissibility of Intervention and Interference in the Internal Affairs of States and Article 2(4). It reaffirmed: ‘the sovereign and inalienable right of Grenada freely to determine its own political, economic and social system, and to develop its international relations without outside intervention, interference, subversion, coercion or threat in any form whatsoever.’

The General Assembly described the use of force by the United States as ‘an armed intervention in Grenada which constitutes a flagrant violation of international law and of the independence, sovereignty and territorial integrity of the State.’ The Assembly called ‘upon all States to show the strictest respect for the

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744 Letter dated 9 November 1984 from the Permanent Representative of Nicaragua to the United Nations Addressed to the President of the Security Council, UN SCOR, 39th sess, 2562nd mtg, UN Doc S/PV.2562 (1983). Mr Ibrahim listed a series of military flights and ship movements by the United States that violated Nicaraguan airspace and territorial waters prior and during the invasion. 745 11 states voted for the passing of the draft resolution, however the United States voted against it; Summary statement of matters of which the Security Council is seized and on the stage reached on their Consideration / by the Secretary-General, UN SCOR, 39th sess, 2562nd mtg, UN Doc S/15560/Add.43 4 (1983).

746 The Situation in Grenada, GA Res 38/7, GAOR, 38th sess, 43rd plen mtg, UN Doc A/Res/38/7 (1983).
sovereignty, independence and territorial integrity’ of Grenada. Scholars have generally criticised the United States’ action as not constituting an exercise of the inherent right of self-defence.

In 1985, the Israeli Air Force bombed the Headquarters of the Palestinian Liberation Organisation in Tunisia after Palestinian gunmen killed a number of Israeli tourists in Cyprus. States in the Security Council criticised the Israeli action as constituting aggression in violation of Article 2(4) of the Charter and which breached Tunisian territorial integrity, sovereignty and independence. Israel invoked its inherent right of self-defence as justification, but this was rejected by the Security Council.

747 The nature of the criticism directed at the United States in G.A. Resolution 38/7 for its use of force in Grenada reflected the criticism given in the Security Council debate over a draft resolution which condemned the United States for its action. The United States vetoed the draft resolution.

748 For example, Brownlie, above n 8 (1963), 299-300; Dinstein, above n 7, 232; Randlezhofer ‘Article 51’ in Simma (ed), above n 7, 798 [26]; Harris, above n 151, 189 and 889-894; Malanczuk, above n 8, 315, 323; Cassese, above n 8, 368-369 and Gray, above n 8, 127.

749 SC Res 573, UN SCOR, 40th sess, 2615th mtg, UN Doc S/Res/573 (1985). There were between 45-70 Tunisian citizens killed and widespread structural damage occasioned by the Israeli attack.


751 SC Res 573, UN SCOR, 40th sess, 2615th mtg, 1 UN Doc S/Res/573 (1985). The resolution was passed by 10 votes to one. The United States voted against the resolution, while Australia, the United Kingdom, Denmark and France abstained: Summary Statement on Matters of Which the Security Council is Seized and on the Stage Reached on Their Consideration / by the Secretary-General, UN SCOR, 40th sess, 2615th mtg, UN Doc S/16880 (1985). See Dinstein, above n 7, 230; Maogoto, above n 7, 90-91 and 111; Cassese, above n 8, 473 and Gray, above n 8, 161-163.
7.3.1.1 Conclusion

Except in the instance of the Tanzanian use of force in Uganda in 1979, which demonstrates a violation of the international customary law principle of proportionality after the inherent right of self-defence had initially been lawfully exercised, there are two principal observations which can be made of the remaining eight instances of state practice in the period 1962 to 1986. The first observation is that a perception of the legal scope of the inherent right of self-defence which is wider than the pre-1945 position has been taken by some states. In this respect, it will be recalled that the legal scope of this right before 1945 encompassed an imminent threat, or use, of armed force. This legal scope was determined by the combined operation of the international customary law principles of immediacy and necessity. The second observation relates to the perception of some states of the conduct which constitutes the occurrence of an armed attack for the purpose of Article 51 of the Charter.

In the instances of the United Kingdom’s use of force against Yemen in 1964, Israeli’s use of force against Lebanon in 1968 and against Tunisia in 1985, it can be observed that such force was not exercised to repel an imminent threat of armed force directed against the state. Rather, the force was used after the event about which the state complained. In this sense, the international customary law principles of immediacy and necessity cannot properly be described as being fulfilled by the event at the time force was used. As such, the force used in each instance is not best described as an exercise of the inherent right of self-defence, but as reprisal for a wrongful act committed, in the cases of Lebanon and Tunisia, against citizens and assets of Israel outside Israel’s territory and in the case of Yemen, for minor border incursions. Strong objections were made by a significant
The view of the United Kingdom and Israel in these instances that the force used was in accordance with the inherent right of self-defence infers a belief that the legal scope of the inherent right of self-defence was wider than the pre-1945 position. Their justification also infers a belief that the events against which they used force constituted the occurrence of an armed attack for the purpose of Article 51 of the Charter, for this is the precondition for the exercise of the inherent right of self-defence under that article. Objecting states did not appear to agree with this belief. My definition of the legal commencement of an armed attack for the purpose of that article excludes the events complained of because they did not fulfil the international customary law principles of immediacy and necessity at the time force was used in response to them.

In the instances of the United States’ use of force against the Dominican Republic in 1965, Israel’s use of force against Uganda in 1976 and the United States’ use of force against Grenada in 1983, the same reasoning employed above in respect of the legal scope of the inherent right of self-defence and the occurrence of an armed attack for the purpose of Article 51 of the Charter can be applied. These instances infer a belief on the part of the United States and Israel that the use of force to protect nationals abroad fell within this legal scope and that they constitute the occurrence of an armed attack in Article 51. As with the instances of reprisal above, significant objections were made against the justification of self-defence offered by the United States and Israel for their use of force.
In the instances of the threat of force made by the United States in its naval blockade of Cuba in 1962 and Israel’s use of force against Iraq in 1981, identical reasoning can be employed in respect of the legal scope of the inherent right of self-defence and the occurrence of an armed attack for the purpose of Article 51 of the Charter. Were the international customary law principles of immediacy and necessity fulfilled at the time force was threatened, or used, in each instance? There was virtually uniform international objection taken to the instance involving Israel. In contrast, the objections taken to the blockade imposed by the United States on Cuba were not uniform, but were nevertheless made. Along these lines, it is evident that the international community rejected the assertion made by Israel that the inherent right of self-defence could lawfully be exercised against infrastructure in another state which one day might be used to create a nuclear weapon that could, in turn, be used against the protagonist state. It is also evident that this same reasoning underpinned the blockade imposed by the United States, however, the circumstances in this instance did not attract the same degree of opposition as that directed against Israel. The nature of the threat of force and the circumstances of the crisis were undoubtedly relevant considerations in this regard.

In respect to the United States, the Kennedy Administration believed that an actual use of force in self-defence against Cuba would not occur until a missile had been moved onto a Cuban launch pad. This infers a belief that the international customary law principles of immediacy and necessity were not considered by the administration to be fulfilled until that point in time. An application of my definition of the occurrence of an armed attack to both instances of state practice does not support the implied assertion made by the United States and Israel that the event against which they used force constituted the commencement of such an
attack. It is therefore reasoned that these two instances are more appropriately categorised as a pre-emptive use of force rather than anticipatory self-defence, as force was used before the customary law principles of immediacy and necessity were fulfilled.

My analysis establishes that in the period 1962 to 1986, three of the eight controversial instances of state practice are more accurately categorised as reprisal, three as the protection of nationals abroad and two as a pre-emptive use of force. In all instances, the belief in the legal scope of the inherent right of self-defence by those states which used force was wider than the pre-1945 position and, in almost every instance, was objected to by a significant number of other states. Similarly, the inferred view of the states which used force that the event to which they responded amounted to the occurrence of an armed attack for the purpose of Article 51 of the Charter was also rejected by other states. The evidence of these eight controversial instances of state practice therefore tends to demonstrate that to 1986 the answers to my third and supporting fourth questions of law could still be considered valid.

In respect of my first supporting question of law and the issue touched upon in preceding chapters concerning the view expressed by some scholars that international customary law had formed a legal right of self-defence distinct from the inherent right of self-defence, it is noted that those states which used force only ever invoked the inherent right of self-defence as justification for their action. In addition, objecting states only made mention of this right in their addresses to the Security Council. No reference was made in these instances of state practice to a
‘customary law right of self-defence’, or any other right, in international law which permitted the use of force in self-defence.

The controversial instances of state practice in self-defence in this period do not demonstrate a specific disagreement between states over the co-existence of anticipatory self-defence and the Charter. As a consequence, there was little state debate about what constitutes anticipatory self-defence, whether it continued to exist with the Charter and, if it did, how international law restricted its use. In what is considered a clear instance of a pre-emptive use of force, the Israeli action against Iraq in 1981 is not helpful in this respect because it occurred in the absence of any threat of armed force posed by Iraq. The circumstances were different in 1962 when the United States blockaded Cuba, but the principles of international law which underpinned it were the same. The international objection against this threat of force was not as widespread as in the instance of Israel’s use of force in 1981.

This infers that an exercise of the inherent right of self-defence close to the time at which a threat of force becomes imminent was more likely to be regarded in 1962 as justified under Article 51 of the Charter. The Kennedy Administration’s own decision that exercising this right against Cuba would not occur until the threat posed by the presence of the missiles became imminent with a preparation for their launch tends to support inference. Although the international community’s reaction to such action can only be hypothesised, it may be concluded that the Kennedy Administration believed that anticipatory self-defence was a legitimate defensive action in 1962 and that it manifested as the inherent right of self-defence when exercised against an imminent threat of armed force.
On 15 April 1986, the United States bombed the Libyan cities of Tripoli and Benghazi, destroying an extensive number of military and civilian buildings and killed a large number of people. The United States informed the Security Council that it held Libya responsible for a series of terrorist attacks against it and the United Kingdom, including a bomb in a Berlin nightclub which killed two of its armed servicemen. The United States claimed that Libya had thereby violated Article 2(4) of the Charter. The United States justified its use of force as an exercise of its inherent right of self-defence, referring to the attack in Berlin as ‘criminal conduct that must be resisted and punished’. It asked the question of the Security Council:

‘If the inherent right of self-defence, specifically recognised in Article 51 of the Charter, does not include the right to protect one’s nationals and one’s ships, what does it protect?’

President Reagan said of the legal basis to use force in these circumstances:

‘The mission was fully consistent with Article 51 of the U.N. Charter; it was a pre-emptive action that would not only diminish Colonel Gaddaffi’s capacity to export terror but also provide him with incentives and reasons to change his criminal behaviour’.

Secretary of State of the United States Shultz stated:

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752 L Treiki, Letter dated 15 April 1986 from the Charge D’Affaires A.I. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, UN SCOR, 41st sess, 2682nd mtg, UN Doc S/PV.2682 (1986). See also Greenwood, ‘International Law and the United States Air Operation Against Libya’ (1987) 89 West Virginia Law Reports 933 and Harris, above n 151, 913 who wrote that some reports of the civilian casualties were 100 or more, including the daughter of Colonel Gadaffi.

753 L Treiki, Letter dated 15 April 1986 from the Charge D’Affaires A.I. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, UN SCOR, 41st sess, 2682nd mtg, 3-4 UN Doc S/PV.2682 (1986). Sir John Thomson, the United Kingdom Ambassador to the United Nations, held Libya and Colonel Gaddafi personally responsible for a history of international terrorist acts, stating that Libya had ‘… maintained over many years, of the use of terrorism – that is, common murder – as an instrument of State policy’; 2.


755 Ibid 31 [1].

756 President Ronald Reagan, United States Department of State Bulletin (1986) 188 1045.
‘The Charter’s restrictions on the threat or use of force in international relations include a specific exception for the right of self-defence. It is absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace; from attacking them on the soil of other states, even for the purpose of rescuing hostages, or from using force against other states that support, train and harbor terrorists and guerrillas.’

The United Kingdom, which permitted the United States bombers to launch their attack from its territory, defended the action taken by the United States in the Security Council:

‘The United States has, as any of us do, the inherent right of self-defence, as re-affirmed in Article 51 of the Charter… the right of self-defence is not an entirely passive right. It plainly includes the right to destroy or weaken the capacity of one’s assailant, to reduce his resources, and to weaken his will so as to discourage and prevent further violence.

At the same time, the right of self-defence should be used in a proportionate way. That is why when President Reagan told Mrs Thatcher last week that the United States intended to take action, she concentrated on the principle of self-defence and the consequent need to limit the action and to relate the selection of targets clearly to terrorism.’

Some states supported, or took a neutral position in respect of, the United States’ action. A central issue for the Security Council was whether the criminal act in Berlin constituted an armed attack against the United States within the meaning of Article 51 of the Charter. Uganda said in this respect:

‘The evidence presented thus far proffered does not persuade us that an armed attack within the meaning of Article 51 had taken place that warranted the resort to the use of force.’

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759 L Treiki, Letter dated 15 April 1986 from the Charge D’Affaires A.I. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, UN SCOR, 41st sess, 2682nd mtg, UN Doc S/PV.2682 (1986). Australia supported the United States, where it disagreed with the terms of the proposed resolution and deplored all forms of terrorism. The states that took a neutral view, or criticised both the United States and Libya were Denmark 34, Thailand 36; France 43, and Venezuela 43. See also UN Doc S/PV.2679 in the preceding footnote. The majority vote required to pass the resolution condemning the United States was achieved but was vetoed by the United States and the United Kingdom.

760 Ibid 16 [1].
Other states widely criticised the United States’ action in the Security Council debates on 15th April and 21st April 1986. The Soviet Union described the action as a ‘new criminal, evil deed, posing a serious threat to world peace and security’ and denied the United States acted within the Charter.\textsuperscript{761} Syria said that the use of force amounted to a ‘premeditated act of aggression’, a ‘brutal, barbaric act’ beyond the legal authority of self-defence provided by the Charter and therefore contrary to the purposes and principles of the organisation.\textsuperscript{762}

Oman communicated a message from the Secretariat of the Arab League describing the conduct of the United States as a ‘violation of international law’.\textsuperscript{763} Bulgaria described the conduct as ‘aggression’ and said that it was in violation of Article 2(4),\textsuperscript{764} as did the Soviet Union,\textsuperscript{765} Cuba,\textsuperscript{766} Yemen,\textsuperscript{767} India,\textsuperscript{768} Pakistan\textsuperscript{769} and Syria.\textsuperscript{770} The Chinese representative, Mr Li Luy, condemned the use of force as violating ‘the norms governing international relations’.\textsuperscript{771} Uganda’s submission particularly clarified the pertinent issue:

‘Article 51 of the Charter does not give unlimited freedom to strike at another state in self-defence. The purpose of the right of the Article is to grant the right of self-defence to any United Nations Member State which is actually being attacked, until the Security Council can take appropriate action. The evidence thus far proffered does not persuade us that an armed attack within the meaning of Article 51 had taken place that warranted the resort to the use of force… It is noteworthy that the act complained of – that is, the bombing of the discotheque in West Berlin – occurred in a third state which itself did not feel compelled to resort to force.’\textsuperscript{772}

\textsuperscript{762} Ibid 11-13, 18.
\textsuperscript{763} Ibid 24-25.
\textsuperscript{764} Ibid 31-33.
\textsuperscript{765} Ibid 46.
\textsuperscript{766} Ibid 38.
\textsuperscript{767} Ibid 42-45.
\textsuperscript{768} Ibid 47.
\textsuperscript{769} Ibid 51.
\textsuperscript{770} Ibid 59-60.
\textsuperscript{771} Ibid 53.
\textsuperscript{772} Ibid 16.
The legal bases upon which objecting states criticised the use of force were considered judicially a year later when the United States used force against Iranian oil platforms.\textsuperscript{773} The United States justified this action under Article 51 of the \textit{Charter} on the basis that it was responding to an alleged Iranian missile and mine attacks which occurred against United States and Kuwaiti shipping months before in the Persian Gulf.\textsuperscript{774} The Court held that the onus was on the United States to prove that Iran was responsible for the attacks as a first step in establishing whether the United States had acted lawfully in its response.\textsuperscript{775}

To determine whether the United States had breached the 1955 \textit{Iran-US Treaty of Amity, Economic Relations and Consular Rights} by using force,\textsuperscript{776} it was necessary for the International Court of Justice to interpret the relevant articles of the treaty in light of the substantive rules of international law governing self-defence. This was because the subject matter of those articles authorised the use of force in pursuit of the rights granted by the treaty.\textsuperscript{777} The Court maintained the correlation formed between these two issues throughout its judgment.\textsuperscript{778}

The Court rejected the assertion of the United States that the individual nature, or collective effect, of the missile and mines constituted an armed attack against the United States. It held that the nature of an armed attack contemplated by Article 51

\textsuperscript{773} \textit{Oil Platforms}, above n 23.
\textsuperscript{774} Ibid [24]. The United States, the United Kingdom and the Soviet Union were requested to re-flag a large number of its ships to ensure their protection from attacks within the Persian Gulf. In addition the United States and other powers provided military escorts to these re-flagged ships. The United States relied upon the mining of the United States-flagged \textit{Bridgetown} on 24 July 1987 and of the United States-owned \textit{Texaco Caribbean} on 10 August 1987, the firing on of Navy helicopters on 8 October 1987 and the missile attack upon the United States-owned \textit{Sea Isle City} on 19 October 1987; [64].
\textsuperscript{775} Ibid [51]-[57].
\textsuperscript{777} \textit{Oil Platforms}, above n 23, [37]-[38], [44].
\textsuperscript{778} Ibid [43]. See also Gray, above n 8, 122-124.
must be an attack in violation of Article 2(4) in the ‘most grave’ form in order to justify exercising the inherent right of self-defence. The ‘most grave form’ of a violation of Article 2(4) is the use of force that manifests as an armed attack for the purpose of Article 51. The Court reiterated that the nature of the armed attack must be of such seriousness that it is immediately necessary for the self-defending state to invoke this right to repel the physicality of the attack.

The claim by the United States that the international customary principle of necessity was fulfilled by the events complained of was determined by the Court by examining the subjective basis of the decision of the United States to use force and an objective assessment of the facts. The Court emphasised that:

‘measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any measure of discretion.’

The explanation by the Court of this principle was in response to a submission by the United States that a ‘measure of discretion’ should be afforded to its application. In rejecting this view, the Court also confirmed that Article 2(4) must be violated by a use of force and the nature of that force must be sufficiently serious as to amount to an armed attack for the purpose of Article 51:

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779 Ibid [51] and [74]-[78].

780 The reiteration of these fundamental principles are consistent with the considerations of the panel of the criteria for the authorisation of military force by the Security Council; see A Panyarachun, UN Secretary-General’s High-Level Panel on Threats, Challenges and Change, UN GAOR, 59th sess, 56th plen mtg, 56 UN Doc A/59/565 (2004).

781 Oil Platforms, above n 23, [43]; Legality of Nuclear Weapons, above n 23, [140] from which Gabčíkovo-Nagymaros Project (Hungary/Slovakia) [1997] ICJ Reports 15 [51] was quoted where the Court said ‘the state of necessity is a ground recognised by customary international law’ that ‘can only be accepted on an exceptional basis’; it ‘can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State is not the sole judge of whether those conditions have been met.’ See also O’Connell, above n 22, 9; Cassese, above n 8, 357 and Gray, above 8, 119.

782 Oil Platforms, above n 23, [73].

783 Ibid.
‘Therefore, in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as ‘armed attacks’ within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force… The United States must also show that its actions were necessary and proportional to the armed attack made on it, and that the platforms were a legitimate military target open to attack in the exercise of self-defence.”

The rejection by the Court of the claim of necessity by the United States was partly based on the failure by that state to prove that Iran was responsible for the armed attacks. The Court also placed a high evidentiary onus on the United States to accurately identify the state responsible for the attack before exercising its inherent right of self-defence. The Court held that a failure to cross this evidentiary threshold contributed to invalidating the claim of the United States that it had acted within Article 51 of the Charter.

Despite the military justifications offered by the United States for the destruction of the oil platforms, a causal link between the alleged source of the missile and mines and those platforms was not found by the Court. The Court found that the force used against the platforms would not have stopped future acts of the kind complained of by the United States, even if those acts had constituted an armed attack for the purpose of Article 51.

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784 Ibid [51].
785 I have combined the findings at law of the Court in respect to the missile attack upon the United States ship Sea Isle City sailing under Kuwaiti flag, the mine attack suffered by the USS Samuel B. Roberts and the other attacks relied upon by the United States, although the facts and circumstances relating to each attack differed.
786 Ibid [76].
787 Ibid [71]. The Court held that the evidence called by the United States was ‘highly suggestive’ that Iran had laid the mines, but failed to establish this fact to the satisfaction of the Court.
788 The Court ultimately rejected these bases; ibid [74].
789 Ibid [76]-[78].
790 Ibid [54]-[56], [63], [69]-[72] and [76]-[77].
On 20 December 1989, the United States invaded the state of Panama after a United States soldier was killed by Panamanian security forces. On 21 December 1989, United States President George H. Bush justified the invasion on the basis of self-defence of United States nationals in Panama, the restoration of democracy, the protection of the Panama Canal and to arrest General Noriega for the prosecution of drug-related crimes in the United States.791

Relations between the United States and Panama had been poor before the invasion. For instance, the permanent representative of Panama to the United Nations had complained to the President of the Security Council earlier that year about ‘the grave situation which my country is facing as a result of the flagrant intervention in its internal affairs by the United States, the policy of destabilisation and coercion pursued by the United States and the permanent threat of the use of force against my country.’792 On 20 December 1989, Nicaragua informed the


792 Leonardo A Kam, Letter dated 25 April from the Permanent Representative of Panama to the United Nations Addressed to the President of the Security Council, UN SCOR, 44th sess, 2858th mtg, UN Doc S/20606 (1989). Mr Kam also complained in the same letter that the United States had acted ‘overt and covert, direct and indirect, against the sovereignty, political independence, economic security and territorial integrity of the Republic of Panama, in open violation of the Charter of the United Nations.’ As a consequence, the Security Council met on 28 April 1989 and debated the complaint; Leonardo A Kam, Letter dated 25 April from the Permanent Representative of Panama to the United Nations Addressed to the President of the Security Council, UN SCOR, 44th sess, 2861st mtg, UN Doc S/PV.2861 (1989). On 8 August 1989 Mr Kam again complained to the Security Council concerning continued actions by the United States within Panamanian territory that he alleged were an infringement of the sovereignty of his state; Leonardo A Kam, Letter dated 7 August 1989 from the Permanent Representative of Panama to the United Nations Addressed to the President of the Security Council, UN SCOR, 44th sess, 2871st mtg, UN Doc S/20773 (1989). As a consequence the Security Council met on 11 August 1989 and debated the further complaint made by Mr Kam; Leonardo A Kam, Letter dated 25 April from the Permanent Representative of Panama to the United Nations Addressed to the President of the Security Council, UN SCOR, 44th sess, 2874th mtg, UN Doc S/PV.2874 (1989). At this meeting the Panamanian representative, Mr Ritter, stated ‘I have come to the Security in the sure expectation of an imminent catastrophe,
Security Council of the invasion of Panama by the United States. On the same day, the United States also informed the Security Council by letter of the invasion. In that letter, it provided the following justification for the use of armed force:

‘In accordance with Article 51 of the Charter of the United Nations… United States forces have exercised their inherent right of self-defence under international law by taking action in Panama in response to armed attacks by forces under the direction of Manuel Noriega… this United States action is designed to protect American lives and our obligations to defend the integrity of the Panama Canal treaties.’

The United States submitted to the Security Council that the desire for democratic government in Panama was a ‘historic necessity,’ that ‘democracy today is synonymous with legitimacy the world over’, that democracy ‘is, in short, the universal value of our time’ and that the use of force ‘was in conformity with Article 51 of the Charter of United Nations’. The United States said ‘the gratuitous killing of an American serviceman, the terrorizing of an American military couple and the general climate of intimidation’ had made self-defence necessary. It then submitted:

‘The use of force in self-defence under Article 51 is a right granted to all states under the Charter, and it cannot be read out of it. The use of force contrary to the Charter is impermissible and contrary to international law. There is no doubt about this point. But the Charter rightly provides, in those cases where all else fails, that States have the right to defend themselves where force is being used against them and their citizens in particular.’

knowing that a nation with such a small population and so little territory can succumb to a merciless decision by the world’s greatest military power, without having time to have recourse to corrective action by the Council and the condemnation of the international community’; ibid 11.


795 Ibid 8.

796 Ibid.

797 Ibid 11.

798 Ibid 13 (emphasis added by author).
States in the Security Council on 23 December 1989 were critical of the action by the United States. Senegal described the invasion as contrary to the Charter and that it jeopardised ‘the very foundations of present day relations.’ Colombia submitted that the use of force by the United States represented a ‘flagrant violation of international law and of the independence, sovereignty and territorial integrity of States.’

A draft Security Council Resolution criticised the United States for violating Article 2(4) of the Charter and strongly deplored its invasion, categorising it as ‘a flagrant violation of international law.’ After the draft resolution failed to pass, the General Assembly deplored the United States and its use of force for the reasons provided in the Security Council. The assembly recalled Article 2(4) of the Charter, reaffirmed the Panamanian right ‘to determine freely its economic, social and political system’ and the need to ‘restore conditions that will guarantee the full exercise of the human rights and fundamental freedoms of the Panamanian people.’ It expressed its ‘profound concern at the serious consequences of the armed intervention of the United States in Panama might have for peace and security in the Central American region.’ It finally categorised the invasion by the United States as ‘a flagrant violation of international law and of the independence,

800 Ibid 18.
802 The vote was 10 states for passing the draft resolution (Algeria, Brazil, China, Columbia, Ethiopia, Malaysia, Nepal, Senegal, the U.S.S.R. and Yugoslavia), and four states against passing (Canada, France, United Kingdom and the United States); Draft Resolution [On the Situation in Panama], UN SCOR, 44th sess, 2904th mtg, UN Doc S/21048 (1989).
sovereignty and territorial integrity of States’ and demanded an immediate withdrawal of the armed forces of the United States. 804

Four years later, the United States used force against Iraq after concluding that the Iraqi Government intelligence services planned the assassination of former United States President George Bush Snr in Kuwait City in April of 1993. 805 On 27 June 1993, the United States launched 23 Tomahawk cruise missiles at the Iraqi Military Intelligence Headquarters near Baghdad. 16 of the missiles struck their target, but the remainder missed and landed in nearby residential districts, killing civilians. 806 The United States justified its use of force in the Security Council under Article 51 of the Charter:

‘Our response has been proportionate and aimed at a target directly linked to the operation against President Bush. It was designed to damage the terrorist infrastructure of the Iraqi regime, reduce its ability to promote terrorism and deter further acts of aggression against the United States.’ 807

804 Dinstein, above n 7, 114 is skeptical of the reasons given by the United States for the invasion and believes that ‘all invitations of military assistance from abroad must be subjected to a thorough scrutiny’ and later in his work at 232 stated that these reasons appeared on all the evidence to be ‘contrived’. Gray, above n 8, 50-51 concludes that state practice does not support the action of the United States in Panama. However, Gray at 77 in contrast to Dinstein points out that the justification given by the United States for the use of force was not based on the invitation of Panama, but rather on ‘self-defence in protection of its nationals and defence of the Panama Canal under the 1977 Canal Treaty’. See also Cassese, above n 8, 370.

805 Madeleine Albright, Letter dated 26 June 1993 from the Permanent Representative of the United States of America Addressed to the President of the Security Council, UN SCOR, 48th sess, 3245th mtg, 6-7 UN Doc S/PV.3245 (1993).


Secretary of State Albright reported the missile attack to the Security Council in accordance with Article 51 of the Charter.\textsuperscript{808} The motivation for the United States’ action was ‘the Government of Iraq’s unlawful attempt to murder the former Chief Executive of the United States Government, President George Bush, and to its continuing threat to United States nationals.’\textsuperscript{809} On the following day in the Security Council, the Secretary referred to this reason as an ‘attempt against President Bush’s life’\textsuperscript{810} and classified the assassination plot as ‘… a direct attack on the United States, an attack that required a direct United States response.’\textsuperscript{811}

The Secretary referred to the role of the Iraqi intelligence apparatus in its domestic affairs to maintain the hold on power by Saddam Hussein and its history of defying Security Council resolutions.\textsuperscript{812} The United States concluded that there ‘is no reasonable prospect that new diplomatic initiatives or economic measures can influence the current Government of Iraq to cease planning future attacks against the United States’.\textsuperscript{813} As a ‘last resort’, the United States ‘decided that it was necessary’ to respond by resorting to the use of force against ‘an Iraq military and intelligence target that is involved in such attacks’.\textsuperscript{814}

\textsuperscript{808} Madeleine Albright, \textit{Letter dated 26 June 1993 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council}, UN SCOR, 48\textsuperscript{th} sess, 3245\textsuperscript{th} mtg, UN Doc S/26003 (1993).

\textsuperscript{809} Ibid 1 [1].

\textsuperscript{810} Madeleine Albright, \textit{United States Notification of 26 June 1993 Measures Against Iraq: Letter from the Permanent Representative of the United States of America Addressed to the President of the Security Council}, UN SCOR, 48\textsuperscript{th} sess, 3245\textsuperscript{th} mtg, 3 [1] UN Doc S/PV.3245 (1993).

\textsuperscript{811} Ibid 3 [4].


\textsuperscript{813} Madeleine Albright, \textit{United States Notification of 26 June 1993 Measures Against Iraq: Letter from the Permanent Representative of the United States of America Addressed to the President of the Security Council}, UN SCOR, 48\textsuperscript{th} sess, 3245\textsuperscript{th} mtg, 8 UN Doc S/PV.3245 (1993).

\textsuperscript{814} Madeleine Albright, \textit{Letter dated 26 June 1993 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council}, UN SCOR, 48\textsuperscript{th} sess, 3245\textsuperscript{th} mtg, 3 UN Doc S/26003 (1993).
In an address to the Security Council on 27 June 1993, the Secretary stated that the motivation of the United States in launching the attack was ‘… to damage the terrorist infrastructure of the Iraqi regime, reduce its ability to promote terrorism and deter further acts of aggression against the United States.’ The legal authority of the United States for the attack was said to be ‘…its right to self-defence’ and that the United States ‘responded directly, as we are entitled to do under Article 51 of the United Nations Charter, which provides for the exercise of self-defence in such cases.’ The Secretary demonstrated that part of the motivation for the use of force was to degrade Iraq’s future ability to plan, or execute, plans of the kind complained of, by saying that the:

‘proportionate action may frustrate future unlawful actions on the part of the Government of Iraq and discourage or preempt such activities.’

The Secretary equated the plot to assassinate Mr Bush with ‘… an attack on the United States of America’ and asserted that ‘every Member here today would regard an assassination attempt against its former Head of State as an attack against itself.’

States in the Security Council did not uniformly support the United States. Iraq was predictably critical. The Minister for Foreign Affairs, Mr Mohammed Said Al-

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819 Ibid 1 [1]; Kritsiotis, above n 806, 162-177, 173-174 in which the author examines the effect of an assassination of a Head of State or former Head of State as possibly constituting an attack against the state itself.
Sahaf, described the conduct of the United States as a ‘…cowardly act of military aggression’ and referred to a ‘large number of dead and wounded among the Iraqi civilian population, including women and children’. During the Security Council debate, he denied that Iraq was involved in the assassination plot and accused the United States of overlooking the principle of the rule of law in not providing the evidence of the plot to a third party for impartial assessment and of accusing, sentencing and punishing Iraq.

In contrast, France supported the United States action, as did Japan, New Zealand, Spain and the United Kingdom, which described the response of the United States as ‘proper and proportionate’. The United Kingdom relied heavily on the non-compliance by Iraq with existing Security Council resolutions. The Soviet Union said that the legal basis of the United States to act ‘arises from the right of States to individual and collective self-defence, in accordance with Article 51 of the Charter of the United Nations.’ Prime Minister John Major of the United Kingdom rejected the claim by his domestic opposition that the action was highly questionable, saying:

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821 Madeleine Albright, United States Notification of 26 June 1993 Measures Against Iraq: Letter from the Permanent Representative of the United States of America Addressed to the President of the Security Council, UN SCOR, 48th sess, 3245th mtg, 11-12 UN Doc S/PV.3245 (1993) respectively.
822 Ibid 13[5]
823 Ibid 16 [1]-[2].
824 Ibid 23. In his submission Mr Keating conceded that his state had not studied the evidence in detail, however expressed complete confidence in the ‘professionalism and the public accountability of the United States law-enforcement authorities’; 23 [3].
826 Ibid 23 [5].
827 Ibid 22 [1]-[4].
828 Ibid 22 [7].
‘It was entirely right of the United States to act in self-defence and they have my total support in doing so… If we just stand aside and accept that sort of behaviour, what is to stop that happening again, and again, and again?’

Other states, such as China, Brazil and Cape Verde, which spoke on behalf of the non-aligned states who were members of the Security Council, generally condemned terrorism, urged an avoidance of the use of force inconsistent with the purposes of the United Nations and expressed regret for the loss of life arising from the missile attack by the United States. Hungary was supportive of the United States, subject to the accuracy of the facts presented by it, but provided a general philosophical statement against terrorism rather than an opinion concerning the lawfulness of the action. The reaction of states outside the Security Council was less consistent. Egypt, Turkey, Saudi Arabia, Iran, Libya and the Arab League held the view that the resort to force by the United States would only have been lawful if authorised by the Security Council.

On 20 August 1998, the United States launched cruise missiles into a chemical plant in the Sudan and terrorist training camps in Afghanistan. This use of force occurred after the United States Embassies in Nairobi and Kenya had been

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829 Barbara Sherman, ‘Labour Questions Legality of US Attack’, The Times (London), 28 June 1993, 1. Dinstein, above n 7, 203 wrote that a characteristic of the principle of immediacy is ‘… that there must not be an undue time-lag between the armed attack and the invocation of self-defence.’ Cassese, above n 8, 356 believed that the use of force in this instance was ‘punitive’ in nature and was motivated by being a deterrent rather than lawful self-defence. Gray, above n 8, 162 acknowledged the varying views of states of the action by the United States, but came to no clear opinion of the legal basis offered for such action.


831 Cape Verde, Djibouti, Morocco, Pakistan and Venezuela.

832 Ibid 18 [1]-[3].

833 Ibid 18 [4] and [19]-[20].

destroyed in terrorist attacks on 7 August 1998. The United States said in the Security Council:

‘In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America has exercised its right of self-defence in responding to a series of armed attacks against United States Embassies and United States nationals.’

The United States added that its use of force was also ‘to prevent and deter’ the continuation of such terrorist acts. It added that it possessed:

‘convincing evidence that further such attacks were in preparation from these same terrorist facilities. The United States, therefore, had no choice but to use armed force to prevent these attacks from continuing.’

China neither supported nor condemned the United States, but encouraged it to act ‘in accordance with the Charter and international law’. Australia supported the United States, stating ‘The Americans have been subjected to a large number of indiscriminate attacks, and they have a perfect right to defend themselves.’ In contrast, the Arab League submitted that its Secretariat considered the behaviour of the United States an ‘unjustified act’ and a:
‘blatant violation of the sovereignty of a state member of the League of Arab States, and of its territorial integrity, as well as against all international laws and traditions, above all the Charter of the United Nations.’

Sudan described the United States attack as ‘aerial aggression’ and a ‘clear and blatant violation of the sovereignty and territorial integrity of a Member state of the United Nations, and is contrary to international law and practice, the Charter of the United Nations and civilised human behaviour.’ It submitted:

‘The conduct of the United States … drags modern society back to the laws of the jungle governed solely by the logic of force whereby each State is intent on taking the law into its own hands, a situation which will ultimately threaten international peace and security.

It is ironic that the United States administration has justified its aggression as an act of self-defence, in which connection it has cited Article 51 of the Charter. The Sudan considers that justification to be naïve, illogical and baseless since it has not committed any action that could be regarded as an attack or a threat against the United States of America.’

The Islamic Group of States condemned the United States action as ‘aggression’ and ‘contrary to the purposes of the Charter of the United Nations and international norms.’ Russia condemned the action. The Security Council described the terrorist attacks as ‘cowardly criminal acts’ and ‘terrorist attacks’, but were not described as armed attacks against the United States for the purpose of Article 51 of the Charter.

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843 Ibid 5.
846 SC Res 1189, UN SCOR, 3915th mtg, UN Doc S/Res/1189 (1998). See also Georg Kirgis, ‘Cruise Missile Strikes in Sudan and Afghanistan’ (1998) American Society of International Law <http://www.asil.org/insights/insigh24.htm> 29 August 1998 at 7 February 2006 who said that ‘International law recognises the limited right of reprisal (retaliation) in addition to the right of self-defence’ and that this right of reprisal is also governed by the customary principles of necessity and
From 7 October 2001, the United States, the United Kingdom and Australia, with support from other states, used force against and occupied some parts of Afghanistan. This action was in response to the attacks upon the United States on 11 September 2001 by members of al-Qaeda. The invasion followed an ultimatum by the President of the United States against the Taliban Government of Afghanistan to deliver all leaders of al-Qaeda to the United States, release all foreign prisoners held by it, immediately close all terrorist training camps, hand over every terrorist and their supporters to appropriate authorities and provide to the United States full access to all training camps throughout the state. The force proportionality. He concluded by stating that reprisal ‘permits the use of force if it meets the requirements of self-defense’, despite the prohibition against the use of force in Article 2(4). Gray, above n 8, 163 in contrast believed that the use of force by the United States ‘look more like reprisals’ than lawful self-defence authorised by Article 51 and the circumstances giving rise to this force did not fulfill the customary principles of necessity or immediacy. Cassese, above n 8, 356 and 371 described the use of force by the United States against Afghanistan and Sudan as ‘armed reprisals’ and were employed ‘under the cover of self-defence’. Maogoto, above n 7, 114 highlighted the inherent contradictions within the various reasons given by United States officials in an effort for legally justifying the use of force in alleged self-defence and categorised the action as unlawful; ‘the legitimacy of the strikes was doubtful at best and outrightly illegitimate at worst.’


which would be employed against Afghanistan pursuant to the ‘war on terror’ if this ultimatum was not consented to would be pursuant to the inherent right of self-defence.

On 7 October 2001, the United States informed the Security Council of its action against Afghanistan, describing its use of force as ‘actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried against the United States on 11 September 2001.’ It submitted:

‘In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, the United States armed forces have initiated actions designed to prevent and deter further attacks on the United States.’

The United Kingdom submitted by letter dated 8 October 2001 a lengthy conclusion that Osama bin Laden and al-Qaeda were responsible for the attack against the United States and other attacks in various parts of the world since 1998. The European Union voiced its ‘total solidarity’ with the United States and its efforts to ‘combat terrorism’. However, Russia rejected a request for

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851 US Criminal Code 18 USC 2331(4) restricts an ‘act of war’ to ‘any act occurring in the course of a. a declared war; b. armed conflict, whether or not war has been declared, between two or more nations; or c. armed conflict between military forces of any origin.’
854 Ibid 1.
855 Ibid.
857 Jean de Ruyt, Letter dated 17 October 2001 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council, UN SCOR, 56th sess, 4399th mtg, UN Doc S/2001/980 (2001) and Annex to this letter; Movses Abelian, Letter dated 29 October 2001 from the Permanent Representative of Armenia to the United Nations addressed to the President of the Security Council, UN SCOR, 56th sess, 5009th mtg, UN Doc S/2001/1020 (2001) and Annex to this letter which was a response to the attacks upon the United States from the Council of the Treaty on Collective Security and the Council of Ministers for Foreign Affairs of the
assistance in the use of force from the United States, describing it as an act of 'revenge' for the attacks on the United States.\textsuperscript{858} The Security Council had passed resolutions in respect of al-Qaeda and Afghanistan before 11 September 2001.\textsuperscript{859}

There has been disagreement among some scholars as to whether the nature of the attack could be described as an armed attack for the purpose of Article 51 of the \textit{Charter}\textsuperscript{860} and whether non-states are legally capable of committing an armed


\textsuperscript{859} SC Res 1267, UN SCOR, 54th sess, 4051\textsuperscript{st} mtg, UN Doc S/Res/1267 (1999) which was passed under Chapter VII of the \textit{Charter} strongly condemned the continued use of Afghanistan by the Taliban for training and sheltering of terrorists, for the planning of terrorist attacks, and for providing support and facilities to Osama bin Laden. It provided for a wide range of political and economic sanctions against Afghanistan, including the demand for bin Laden to be surrendered for trial. The resolution determined that such issues constituted a threat to the international peace and security. However, the resolution did not provide authority for the use of force against Afghanistan; SC Res 1333, UN SCOR, 55th sess, 4251\textsuperscript{st} mtg, UN Doc S/Res/1333 (2000) passed because Security Council Resolution 1267 was ignored by Afghanistan. This resolution was also passed under Chapter VII. It renewed the demands previously made against Afghanistan, and increased the scope of sanctions but it did not authorise the use of force against that state; SC Res 1363, UN SCOR, 56th sess, 4352\textsuperscript{nd} mtg, UN Doc S/Res/1363 (2001) which created a Monitoring Group of Experts and a Sanctions Enforcement Support Team in respect to Afghanistan, but did not authorise force against the state; SC Res 1368, UN SCOR, 56th sess, 4370\textsuperscript{th} mtg, UN Doc S/Res/1368 (2001) condemned the attack against the United States on the previous day. The resolution called on states to ‘work together urgently to bring to justice the perpetrators, organisers, and supporters of these terrorist attacks and \textit{stresses} that those responsible for aiding, supporting or harbouring the perpetrators, organisers and sponsors of these acts will be held accountable.’ The Security Council also expressed its ‘readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001 in accordance with its responsibilities under the \textit{Charter} of the United Nations.’ The resolution was not passed under Chapter VII and did not authorise force against Afghanistan. Nor did it identify any perpetrator of the attack on the previous day; SC Res 1373, UN SCOR, 56th sess, 4385\textsuperscript{th} mtg, UN Doc S/Res/1373 (2001) which was passed under Chapter VII and provided wide-ranging restrictions and prohibitions upon all states in respect to the funding and supporting of terrorist groups and activities, but did not authorise the use of force against Afghanistan or any other state and SC Res 1378, UN SCOR, 56th sess, 4415\textsuperscript{th} mtg, UN Doc S/Res/1378 (2001) which reaffirmed previous resolutions, and continued its condemnation of Afghanistan and the Taliban, but did not authorise the use of force against that state. No subsequent resolution authorised the use of force against Afghanistan under Chapter VII of the \textit{Charter}.

\textsuperscript{860} For example, Maogoto, above n 7, 121-122, 186-187; Jackson Nyamuya Maogoto, ‘Walking an International Law Tightrope: Use of Military Force to Counter Terrorism’ (2006) 31 \textit{Brooklyn}
attack under that article.\textsuperscript{861} While the means by which al-Qaeda attacked the United States on 11 September 2001 were novel and physically launched from within that state, there appears to be no legal objection to the nature of the attack being properly categorised simultaneously as an armed attack for the purpose of Article 51 of the \textit{Charter} and as domestic criminal acts within the United States (i.e., hijacking and murder). Article 51 of the \textit{Charter} does not stipulate that an armed attack must be committed by a state, or by groups backed by a state.\textsuperscript{862} Nor does the article stipulate that an attacker must be armed with a particular type of weapon.\textsuperscript{863} Article 51 recognises and protects the inherent right of self-defence and permits this right to be exercised ‘if an armed attack occurs’.\textsuperscript{864}

The invasion of Iraq in 2003, however, posed a different scenario to that involving Afghanistan in 2001. In March of 2003, the United States, the United Kingdom, Australia and Poland invaded Iraq.\textsuperscript{865} These states used the inherent right of self-defence, Article 51 of the \textit{Charter} and alleged breaches by Iraq of Security Council resolutions after the second Gulf War as justification for their use of force.\textsuperscript{866} The motivation for this action expressed at that time was that Iraq possessed weapons...
of mass destruction and posed an immediate threat to the United States and its allies.  

The United States submitted to the Security Council:

‘The actions that coalition forces are undertaking are an appropriate response. They are necessary steps to defend the United States and the international community from the threat posed by Iraq and to restore international peace and security in the area. Further delay would simply allow Iraq to continue its unlawful and threatening conduct.’  

In respect to the continuing breaches of Security Council resolutions, the opening paragraph of this letter states that the military operations ‘are necessary in view of Iraq’s continued material breaches of its disarmament obligations under the


relevant Security Council resolutions, including resolution 1441 (2002)… and will secure compliance with those obligations. In the second paragraph, the United States states ‘The actions being taken are authorized under existing Council resolutions, including its resolutions 678 (1990) and 687 (1991).’ Breaches of Security Council resolutions by Iraq since it invaded Kuwait in 1990 were relatively frequent and involved matters other than disarmament obligations. These matters included withdrawing its forces from Kuwait and the mistreatment of foreign nationals.

However, the United States relied exclusively (along with the inherent right of self-defence) on the breach of Security Council Resolution 1441 and other resolutions relating to disarmament obligations as a legal basis for invading Iraq. These other resolutions were not specified, however, an analysis of all resolutions since the Iraqi invasion shows that only a few imposed disarmament obligations. Most ‘breaches’ in respect to disarmament obligations were of resolutions repeating earlier Security Council demands for Iraq to fulfil its obligations.

869 Ibid.
870 Ibid. These words reveal three important insights into the reasoning of the United States for the invasion: that the ‘material breaches’ made it ‘necessary’ to invade (the reason for the invasion); the invasion would ‘secure’ Iraq’s compliance with Security Council resolutions (the objective for the invasion) and that the authority to so invade rested in pre-existing Security Council resolutions (the legal authority for the invasion).
875 See the resolutions identified above. The most significant disarmament obligations were imposed under SC Res 687, UN SCOR, 45th sess, 2963rd mtg, 7-13 UN Doc S/Res/687 (1990) and
Thus, the position of the United States can be described in the following way. Security Council Resolution 678 authorised the use of force to repel Iraq from Kuwait. Security Council Resolution 687 and others imposed disarmament obligations upon Iraq as a condition for the end of hostilities, and that breaching these disarmament obligations removed the basis of the ceasefire. This, in turn, ‘revived’ the authority to use force under Security Council Resolution 678.876

Firstly, did the Security Council resolutions provide authority for the coalition states to use force against Iraq in March 2003? Security Council Resolution 678 demanded that Iraq comply with Security Council Resolution 660, which itself demanded that ‘Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990.’877 Security Council Resolution 678 did not authorise the Coalition forces to continue to use force against Iraq indefinitely after Security Council Resolution 660 had been successfully implemented. Once the objective of Security Council Resolution 660 had been achieved by the execution of Security Council Resolution 678, it is suggested that the authority to use force against Iraq had ceased.

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876 John D Negroponte, Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations address to the President of the Security Council, UN SCOR, 58th sess, 1568th mtg, 3-5 UN Doc S/29070 (2003). The Letter reflects the position of the political leaders of the Coalition states in respect to the legal and operational effect of the relationship between the resolutions, and represents the legal justification for the invasion provided by the United Kingdom. See Lowe, above n 523, 865-866 and O’Connell, above n 17, 1-2. Even though some other resolutions referred to disarmament obligations imposed upon Iraq, they usually reiterated the obligations made under SC Res 678, UN SCOR, 45th sess, 2963rd mtg, 7-13 UN Doc S/Res/687 (1990).
Security Council Resolution 687 imposed an array of disarmament obligations upon Iraq.\textsuperscript{878} The most relevant obligation was for Iraq to account for and destroy its prohibited weapons and to accept international supervision when doing so. The practical difficulty in ultimately verifying the fulfilment of these obligations was therefore inherent in the resolution itself: non-compliance with Security Council Resolution 687 in failing to verify the destruction of its prohibited weapons would not necessarily prove that Iraq in fact possessed those weapons before or at the time of the invasion.\textsuperscript{879} Without proof that Iraq possessed prohibited weapons, the basis for the invasion can further be refined to the failure of Iraq to account for weapons of whose existence there was no clear evidence. As a consequence, the invasion of Iraq may be described as being over a matter of form (the objective breaches of Security Council resolutions) rather than substance (proof of the existence of prohibited weapons which proved the objective breach).

In this respect, the reason given by the United States that it was ‘necessary in view of Iraq’s continued material breaches of its disarmament obligations under relevant SC Res’, while objectively true in respect to the verification obligations, lends itself to the misleading implication that those material breaches were based on an

\textsuperscript{878} SC Res 687, UN SCOR, 45\textsuperscript{th} sess, 2963\textsuperscript{rd} mtg, 7-13 UN Doc S/Res/687 (1990).

\textsuperscript{879} A difficulty that crystallised during the following 12 years and ultimately under SC Res 1441, UN SCOR, 57\textsuperscript{th} sess, 4644\textsuperscript{th} mtg, UN Doc S/Res/1441 (2002); Letter dated 1 October 2004 from the Secretary-General addressed to the President of the Security Council, UN SCOR, 59\textsuperscript{th} sess, UN Doc S/2004/786 (2004); Twelfth quarterly report of the Executive Chairman of the United Nations Monitoring, Verification and Inspection Commission in accordance with [12] of SC Res 1284 (1999), UN SCOR, 58\textsuperscript{th} sess, UN Doc S/2003/232 (2003); Letter of IAEA Director General to Mr. Wang Guangya, President of the UN Security Council, Consolidated Progress Report to Security Council on IAEA Verification Activities in Iraq Pursuant to Resolution 687 (1991) and other Related Issues (2005) <http://www.iaea.org/NewsCenter/Focus/iaea/iaeafulq/unscreport-110405.shtml> at 12 April 2006; Hans Blix, Interview with Hans Blix: Blix insists there was no firm weapons evidence Guardian Unlimited Special Reports (2005) <http://www.guardian.co.uk/Iraq/Story/0,2763,1471932,00.html> at 12 April 2006.
actual possession of prohibited weapons. This possession was not proved before the invasion and remains unproved at the time of writing. 880

The purported causal connection advocated by the coalition states between Security Council Resolution 678 and Security Council Resolution 687 can be challenged. It is clear by paragraphs 1 and 2 of Security Council Resolution 678 that this resolution was a final warning to Iraq over its continued occupation of Kuwait in defiance of Security Resolution 660. 881 It is also clear that Security Council Resolution 687, passed after Security Council Resolution 678 had been successfully executed, imposed disarmament obligations upon Iraq. While Security Council Resolution 687 imposed disarmament obligations as punishment for the invasion of Kuwait and to assure the international community of ‘Iraq’s future peaceful intentions’, it also envisaged bringing the ‘military presence in Iraq to an end as soon as possible consistent with paragraph 8 of resolution 686 (1991).’

Other than recalling Security Council Resolution 678 in its opening paragraph, in paragraph 6 in respect to bringing the military presence of the Coalition forces in Iraq to an end, and in paragraph 33 in reference to a formal ceasefire between Iraq and Kuwait and Member States, there seems to be no connection formed between

880 The reason for the invasion is even further obfuscated by subsequent public statements made by the political leaders of the Coalition states about ‘regime change’ or ‘democratisation of Iraq’ after it became apparent that prohibited weapons were not likely to be found in Iraq. Such statements – if fact any statements other than the reason of material breaches of disarmament obligations – contradict the written reason of the United States communicated to the Security Council as to why it invaded Iraq; Kritsiotis, above n 867, 233; O’Connell, above n 22, 17-18; Gray, above n 8, 182-183; McWhinney, above n 482, 68-72; Schmitt, above n 68, 92 and Moir, above n 6, 83-85.

881 SC Res 660 required no further resolution from the Security Council before enforcement action under Chapter VII of the Charter was taken, as [2] stated: ‘Authorises Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, to use all necessary means to uphold and implement SC Res 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area’; SC Res 660, UN SCOR, 45th sess, 2932nd mtg, 2 UN Doc S/Res/660 (1990).
Security Council Resolution 687 and Security Council Resolution 678 which constituted a continuation of the right to use force against Iraq. Therefore, Security Council Resolution 687 did not appear to create any connection with Security Council Resolution 678 to form an open-ended authority for the use of force against Iraq triggered by material breaches of subsequent resolutions. The only connection that was created in respect to the use of force was between Security Council Resolution 678 and Security Council Resolution 660 by the explicit reference shown.

While Security Council Resolution 1441 declared Iraq in material breach of its obligations under relevant resolutions, including Security Council Resolution 687, it did not create a new authority to use force against Iraq. Nor did Security Council Resolution 1441 rely upon a pre-existing causal link between Security Council Resolution 687 and Security Council Resolution 678, to the effect that there existed an open-ended authority for the use of force against Iraq triggered by material breaches of subsequent resolutions. It would be reasonable to expect that such a causal link, if it existed, would have been explicitly recounted under Security Council Resolution 1441, especially when surrounded by international contention as to its legal effect.\textsuperscript{882}

Therefore, it seems relatively clear that the only Security Council resolution that authorised the use force against Iraq was Security Council Resolution 678, which was expressly linked to achieving the demands of Security Council Resolution 660. Once this objective was achieved, both resolutions were satisfied. In contrast, Security Council Resolution 687 arose as the basis of a ceasefire upon the

\textsuperscript{882} Brune and Toope, above n 473, 785-806 and 788 and O’Connell, above n 22, 6.
satisfaction of the other two resolutions. It dealt with a different subject-matter to those resolutions. Critically, Security Council Resolution 687 did not contain an open-ended, or residual, authority to use force against Iraq, should it, or subsequent resolutions, be ignored by Iraq.

The remaining legal basis used as justification for the use of force by the coalition states was the inherent right of self-defence and Article 51 of the Charter. In 2002, the United States adopted a strategy of using pre-emptive force to eliminate threats of force.\textsuperscript{883} The Strategy determined two principal things. First, it defined the scope of the doctrine of pre-emption. Secondly, it identified what were considered the perceived pragmatic reasons for this doctrine. Australia accepted the existence of this doctrine as part of international law.\textsuperscript{884} Other states disagreed with the doctrine and the position adopted by the United States and Australia.\textsuperscript{885} The Strategy


\textsuperscript{884} The then Minister for Defence of the Australian Government, Senator Robert Hill stated in a speech to the Australian Defence College ‘The need to act swiftly and firmly before threats become attacks is perhaps the clearest lesson of 11 September and is one that is clearly driving US policy and strategy. It is a position which we share, in principle’: Senator Robert Hill, Address to Defence and Strategic Studies Course, ‘Beyond the White Paper: Strategic Directions for Defence’, Australian Defence College, Canberra, 18 June 2002 <http://www.minister.defence.gov.au/2002/180602.doc> at 30 July 2007. Senator Hill on another occasion said ‘The issue now is how you define self-defence in an environment of unconventional conflict, non-state parties, weapons of mass destruction, global terrorism and while anticipatory self-defence has also been permissible, clearly this new environment requires a more liberal definition of self-defence to be meaningful’: Senator Robert Hill, Senator Hill makes case for pre-emptive strikes, ABC Lateline broadcast, 27 November 2002 <http://www.abc.net.au/lateline/stories/s736373.htm> at 4 August 2007. Then Prime Minister of Australia, John Howard, wished to accommodate pre-emptive strikes within the existing legal framework: Prime Minister John Howard, Prime Minister takes cautious line in face of terrorist threat, ABC Lateline broadcast, 29 November 2002 <http://www.abc.net.au/lateline/stories/s738064.htm> at 4 August 2007.

\textsuperscript{885} For example, Malaysia, Indonesia, the Philippines, New Zealand and Thailand: M. Gratten, ‘Words are Bullets, Mr Howard’ The Age Newspaper 4 December 2002, <http://www.theage.com.au/articles/2002/12/1038712935236.html> at 6 August 2007. Indonesia described Prime Minister Howard’s views as ‘unhelpful’ and Malaysia denied that Australia had any legal right in international law to operate in any capacity within its territory without its permission. The New Zealand Prime Minister, Helen Clark, stated that Charter does not permit pre-emptive force: G. Campbell, ‘A Rock and a Hard Place’ New Zealand Listener Newspaper, 1-7 March 2003 18-21.
requires closer examination. After advocating in the Preamble a global need for democracy, free economic markets and for all nations to fight terrorism, the Strategy reads:

‘The gravest danger our Nation faces lies at the crossroads of radicalism and technology. Our enemies have openly declared that they are seeking weapons of mass destruction, and evidence indicates that they are doing so with determination. The United States will not allow these efforts to succeed… And, as a matter of common sense and self-defence, America will act against such emerging threats before they are fully formed…. In the new world we have entered, the only path to peace and security is the path of action.’

The policy of the United States was not to distinguish between ‘terrorist organisations’ and those states harbouring them. The Strategy advocated that the United States possessed the legal right to invoke the doctrine before an actual threat emerged. Thus, the United States advocated the use of force *before* the means to carry out the threat have been obtained. In the absence of advocating a change to the international rules governing self-defence, the United States, by implication, believed that the Strategy conformed to existing international law.

888 14 [5] of the Preamble of the Strategy. The Legal Adviser to the United States State Department, William Taft IV, wrote in a Memorandum in respect to the doctrine of pre-emption: ‘… while the definition of imminence must recognize the threat posed by weapons of mass destruction and the intentions of those who possess them, the decision to undertake any action must meet the test of necessity… in the face of overwhelming evidence of an imminent threat, a nation may take preemptive action to defend its national from unimaginable harm’; William Taft IV, State Department Memorandum: The Legal Basis for Preemption (2002) <http://www.cfr.org/publication> at 18 November 2002. Schmitt, above n 68, 96 believes that the doctrine lawfully operates during the ‘last window of opportunity’ before an actual attack.
889 The Strategy does not advocate a change to the substantive rules of international law; it asserts that the existing rules accommodate the doctrine of pre-emption; [15] and [18] of ch V of the Strategy; Mary Ellen O’Connell, ‘The Myth of Preemptive Self-Defence’ (2002) 3 American Journal of International Law 17-18. Schmitt, above n 68, 96 concludes the ‘criticism should be levelled not at the strategy itself, but rather at applications of it that do not comport with existing international law.’
As the *Strategy* explicitly included an attempt to acquire the technology necessary to produce weapons of mass destruction as a legitimate target for the inherent right of self-defence, the definition of the United States as to when an armed attack commenced must be considered to be broad.\(^{890}\) An invocation of the doctrine of pre-emption before a perceived threat actually violated Article 2(4) had previously attracted either condemnation from the Security Council, or international controversy over its lawfulness.\(^{891}\)

How and when this doctrine was to be executed was identified in Chapter III of the *Strategy*. It includes a reference to using ‘all the elements of national and international power’ to deal with those ‘terrorist organisations of global reach and any terrorist or state sponsor of terrorism which attempts to gain or use weapons of mass destruction or their precursors’. The *Strategy* also confirms that the United States will act unilaterally and without the support of the international community in its execution of its policy.\(^{892}\) Chapter V\(^{893}\) provides the broad legal basis upon which the *Strategy* accords with international law. In part it states:

> ‘For centuries, international law recognised that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of an imminent threat – most often a visible mobilisation of armies, navies, and air forces preparing to attack.

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\(^{891}\) The military strike by Israel against an Iraqi nuclear power plant in 1981 and the United States, the United Kingdom, Poland and Australia’s invasion of Iraq in 2003 are rare examples of actual force being used pre-emptively to prevent another state from developing or possessing the technology to produce weapons of mass destruction. The *United Nations* has recently examined a multi-faceted approach in recommending a global response to the threats posed by conflicts between states [12]-[20], terrorism [38]-[44] and the use of force [53]-[57] in A Panyarachun, *UN Secretary-General’s High-Level Panel on Threats, Challenges and Change*, UN GAOR, 59th sess, 56th plen mtg, UN Doc A/59/565 (2004).

\(^{892}\) Ch III [9] of the *Strategy* titled ‘Strengthen Alliances to Defeat Global Terrorism and Work to Prevent Attacks Against Us and Our Friends’.

\(^{893}\) Titled ‘Prevent Our Enemies from Threatening Us, Our Allies, And Our Friends with Weapons of Mass Destruction’ of the *Strategy*. 
We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction – weapons that can be easily concealed, delivered covertly, and used without warning.

The United States has long maintained the option of pre-emptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.

The United States will not use force in all cases to pre-empt emerging threats, nor should nations use pre-emption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather.”

Another use of force in the period examined, the precise circumstances of which remain unclear due to silence by the states involved, occurred on 6 September 2007. The available information suggests that Israel detected certain infrastructure being built in a desert in Syria, was suspicious that North Korea was assisting Syria in building some form of nuclear capability and, due to the nuclear weapons capability of North Korea, used force to destroy this infrastructure. On this information, Israel’s use of force appears to have been pre-emptive and resembles those facts known of its strike against Iraq in 1981. Due to Israel’s silence, there is no offered justification to examine for the purpose of this sub-chapter.

The most recent instance of state practice in which the inherent right of self-defence was alluded to as justification for the use of force occurred when Israel

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894 [14], [15], [17] and [18] of ch V of the Strategy.
896 However, see AP, ‘Olmert ‘can’t deny’ Israelis hit Syrian reactor’ The Weekend Australian Newspaper 27-28 November 2010, 19 in which former Israeli Prime Minister Ehud Olmert said he cannot deny George W. Bush’s claim that Israel destroyed the Syrian reactor. The article quotes Syria has having announced at the time that its airspace had been ‘invaded’ by Israel, but said nothing about what had been attacked. Mr Bush claimed that Israel had asked the United States to bomb the site and when it refused, carried out the attack itself.
intercepted a predominantly Turkish flotilla bound for the Gaza Strip on 31 May 2010.\footnote{Israel Ministry of Foreign Affairs, ‘IDF forces met with pre-planned violence when attempting to board flotilla’ 31 May 2010 <http://www.mfa.gov.il/MFA/Government/Communiques/2010/Israel_Navy_warns_flootilla_31-May-2010.htm> at 23 June 2010; Press Release: Government Media Centre, Palestinian Government Statement on Israeli Interception of Freedom Flotilla 31 May 2010 <http://www.jmcc.org/Documentsandmaps.aspx?id=770> at 23 June 2010; Aljazeera.net, ‘Israel attacks Gaza aid fleet’ 31 May 2010 <http://english.aljazeera.net/news/middleeast/2010/05/201053133047995359.html> at 23 June 2010 and Jeffrey Heller, ‘Israel deports flotilla activists after world outcry’ Reuters 2 June 2010 <http://uk.reuters.com/article/idUKTRE64T21120100602> at 23 June 2010.} Israel at various times said its defence forces were exercising Israel’s inherent right of self-defence in preventing the flotilla from entering its naval blockade area off the Gaza strip, as it feared that weapons and other prohibited materials may have been on board and in defending themselves when physically attacked after boarding ships in the flotilla by force.\footnote{Prime Minister Netanjahu, ‘Statement by PM Netanyahu Regarding Flotilla to Gaza’ Prime Minister’s Office 1 June 2010 <http://www.pmo.gov.il/PMOEng/Communication/Spokesman/2010/06/spokehatshara010610.htm> at 23 June 2010; Elana Kieffer, ‘Interception of Gaza flotilla is legal under international law’ Israel Defence Forces – Statement of the IDF Military Advocate 3 June 2010 <http://dover.idf.il/IDF/English/News/today/10/06/0301.htm> at 23 June 2010 and James Reinf, ‘UN Chief seeks legal advice on flotilla interception’ The National 9 June 2010 <http://www.thenational.ae/apps/pbcs.dll/article?AID=/20100610/FOREIGN/706099854/1002> at 23 June 2010.} However, when Israeli Prime Minister Netanyahu gave evidence to the Turkel Committee, he did not expressly rely on this right as justification, or suggest that the flotilla constituted an immediate security threat.\footnote{Karl T Hudson-Phillips, Report on the international fact-finding mission to investigation violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance, UN GAOR, 15th sess, Human Rights Council, UN Doc A/HRC/15/21, 27 September 2010, 14.} Initial responses from states were critical of the Israeli action.\footnote{For example, Security Council Statement: Security Council Condemns Acts Resulting In Civilian Deaths During Israeli Operation Against Gaza-Bound Aid Convoy, Calls for Investigation in Presidential Statement 65th sess, 6325th and 6326th Meetings, 31 May 2010, SC 99/40; Australia: Minister for Foreign Affairs Stephen Smith, ‘Question without notice: Ministerial Statement on Israeli interception of flotilla’ Statement by the Minister for Foreign Affairs Mr Stephen Smith MP} On the facts known concerning this incident,\footnote{For example, Security Council Statement: Security Council Condemns Acts Resulting In Civilian Deaths During Israeli Operation Against Gaza-Bound Aid Convoy, Calls for Investigation in Presidential Statement 65th sess, 6325th and 6326th Meetings, 31 May 2010, SC 99/40; Australia: Minister for Foreign Affairs Stephen Smith, ‘Question without notice: Ministerial Statement on Israeli interception of flotilla’ Statement by the Minister for Foreign Affairs Mr Stephen Smith MP} it is clear Israel used force against the flotilla to
enforce another (continuing) use of force commenced earlier with the election of the Hamas Government in Gaza, namely, the naval blockade of the Gaza strip. The independent panel mandated by the United Nations described the history of and the Israeli reasons for imposing its naval blockade. After evaluating the evidence submitted to it, the panel concluded that the naval blockade was unlawful under international law because its effect upon the civilian population was disproportionate to the purpose represented by Israel and, as such, the inherent right of self-defence and Article 51 could not be used by Israel to justify the use of force to enforce it.

On a wider consideration of the international law of self-defence, it seems apparent that the flotilla did not fulfil the customary law principles of immediacy and necessity prior to the Israeli use of force, in that it did not pose an immediate threat of armed force against Israel itself which necessitated a use of defensive force to repel it. It seems equally apparent that the flotilla did not constitute the

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904 Ibid, 14. The panel stated that the inherent right could only be open to Israel where there as a reasonable suspicion of ‘an imminent and overwhelming threat to Israel and there was no alternative but to use force to prevent it.’ This observation is consistent with the principles of international law enunciated throughout my thesis in relation to self-defence.
occurrence of an armed attack against Israel for the purpose of Article 51 of the
Charter.

7.3.2.1 Conclusion

In the period 1986 to the present, there were eight controversial instances of state
practice in alleged self-defence. As with those instances examined in the period
1962 to 1986 in sub-chapter 7.3.1, two broad observations can be made. The first
relates to a different perception by some states of the legal scope of the inherent
right of self-defence and the second relates to the perception of some states of the
conduct which constitutes the occurrence of an armed attack for the purpose of
Article 51 of the Charter. Thus, the reasoning applied in sub-chapter 7.3.1.1 to
assess controversial instances of state practice in the period 1962 to 1986 can
similarly be applied to assess the nature of those in the period being examined.

The controversial instances of state practice in this period which involve the use of
force by the United States against Iran in 1987-88, against Iraq in 1993 and against
Sudan and Afghanistan in 1998 could more accurately be described as reprisal than
exercises of the inherent right of self-defence under Article 51 of the Charter. In
respect of the first instance, the Court in Oil Platforms provided its reasoning for
why the use of force by the United States did not accord with that article. This
reasoning was that insufficient proof was provided by the United States to establish
that Iran had attacked the United States and that the force used by the United States
in response was not, in any case, directed to a legitimate military target responsible
for the alleged attack.
To apply the Court’s reasoning under my third and fourth supporting questions of law, a more general observation could be that the international customary law principles of immediacy and necessity were not fulfilled by the events to which the United States was responding at the time it used force. This observation is based on the logic that a purported exercise of the inherent right of self-defence against a state which has not been properly identified as the perpetrator of the occurrence of an armed attack under Article 51 of the Charter is unlikely to effect the purpose served by those two customary law principles, which is to repel an imminent threat of armed force. The Court said that it is not enough for a state which alleges that it was the victim of an armed attack to respond with armed force after the fact and against another state which might have been responsible for the attack. In this sense, the legal scope of the inherent right of self-defence was exceeded by the United States in respect of the conduct against and time at which the right can lawfully be exercised.

The use of force by the United States in 1993 against Iraq and in 1998 against Sudan and Afghanistan infer a belief on the part of the United States that the legal scope of the inherent right of self-defence encompassed an alleged conspiracy to assassinate a former President and terrorist attacks upon embassies. This perception is wider than the pre-1945 position. Further, this absence of fulfilment of the international customary law principles of immediacy and necessity demonstrates that these events are not properly described as the occurrence of armed attacks for the purpose of Article 51 of the Charter.

The use of force by the United States (and others) against Afghanistan in 2001 can more properly be described as being within the legal scope of the inherent right of
self-defence. This is because when this right was exercised, the international customary law principles of immediacy and necessity continued to be fulfilled (having been fulfilled by the by the terrorist acts on 11 September 2001 which constituted an armed attack for the purpose of Article 51 of the Charter). However, as with the instance of Tanzania and Uganda in 1979, the proportionality of the exercise of the inherent right of self-defence by the United States and other states (invasion and continuous occupation) to the threat of force constituted by al-Qaeda and the Taliban in Afghanistan can and continues to be legitimately questioned.

The one instance of the use of force in the period examined which was allegedly motivated by the desire to protect nationals abroad, being the United States’ invasion of Panama in 1989, was objected to by a significant number of states as not constituting a legitimate exercise of the inherent right of self-defence. As were the three instances of using force to protect nationals abroad in the period 1962 to 1986, the event acted against cannot be properly described as fulfilling the international customary law principles of immediacy and necessity, nor as constituting an armed attack against the United States for the purpose of Article 51 of the Charter.

The use of force by the United States (and others) against Iraq in 2003, by Israel against Syria in 2007 and by Israel against the flotilla off Gaza in 2010 attract the same legal reasoning as applied to the two instances of pre-emptive force in the period 1962 to 1986. The perception by the United States and Israel of the legal scope of the inherent right of self-defence appears wider than the pre-1945 position, as in none of these instances can it be properly said that the international customary law principles of immediacy and necessity were fulfilled at the time
force was used by the United States, or by Israel. The same reasoning can be applied to challenge the perception of these states (and those states which invaded Iraq in 2003) of the conduct which properly constitutes the commencement of an armed attack for the purpose of Article 51 of the Charter.

The invasion of Iraq in 2003 and the use of force against the flotilla off Gaza in 2010, as were the two instances of pre-emptive force in the period 1962 to 1986, are two instances of state practice which relate to, but do not determine, the question posed by my thesis. The significant objections made by other states (and which continue to be made in respect of the invasion of Iraq) are evidence of the view that anticipatory self-defence, should it coexist with the Charter, was not constituted by these two instances of state practice. The unfulfilled international customary law principles of immediacy and necessity by the events reacted to erode claims that the inherent right of self-defence was lawfully exercised and erode claims that those events constituted the occurrence of an armed attack for the purpose of Article 51 of the Charter. In the objections against these instances of state practice, the nature of the criticism did not extend to the suggestion that a state should first endure the physical commencement of an armed attack before exercising its inherent right of self-defence. Rather, the essence of the criticism was that the circumstances did not provide evidence of the immediate necessity to exercise that right.

The final observation made of the period 1986 to the present is that it was the inherent right of self-defence and Article 51 of the Charter that were invoked by states as justification for the use of force in all controversial instances of state practice. These two elements of international law also formed the basis for most of
the objections made to these uses of force. There is an absence of reference by states in the records to a ‘customary law right of self-defence’, or to a ‘customary law right of anticipatory self-defence’ in international law the existence of which was asserted, or acknowledged, by states in international law as existing distinct to the inherent right of self-defence.

7.4 Conclusion

Three general conclusions are made of the period 1945 to the present. The first conclusion is the perceptions of states in respect of the legal scope of the inherent right of self-defence and of the conduct which constitutes the occurrence of an armed attack for the purpose of Article 51 of the Charter in the post-Charter period to 1962 remained consistent with the perceptions demonstrated in the pre-1945 position. The second conclusion is these perceptions varied in the period 1962 to the present, even though this right, the international customary law principles of immediacy and necessity and Article 51 remained the principle elements of international law in relation to self-defence. The third conclusion is this variation in perception has not manifested solely in the context of the coexistence of anticipatory self-defence and the Charter.

While it may be said that a pre-emptive use of force\textsuperscript{905} formed the basis for controversy in five of the 18 instances of state practice examined, reprisal\textsuperscript{906} may be said to have formed the basis for seven instances, the protection of nationals abroad\textsuperscript{907} in four instances and acting in excess of the international customary law

principle of proportionality\textsuperscript{908} in two instances. In the five instances involving the pre-emptive use of force, the circumstances involved in three instances (Iraq in 1981, in 2003 and Syria in 2010) can be described with some certainty as occurring before the customary law principles of immediacy and necessity were fulfilled by the nature of the events anticipated. The remaining two instances (Cuba in 1962 and Gaza 2010) respectively involved the threat of force and the use of force more proximate to the events responded to.

It is evident from these five instances of the use of pre-emptive force that the finer legal question of the coexistence of anticipatory self-defence and the *Charter* – including the characteristics which distinguish anticipatory self-defence from a pre-emptive use of force – was not debated between states. Similarly, the criticism directed to the protagonist states in these instances did not advocate that a state should endure the physical commencement of an armed attack before the inherent right of self-defence was exercised. In this regard, these instances are useful indicators of what may be considered uses of force beyond the legal scope of this right and of Article 51 of the *Charter*, but they do not as usefully contribute to answering the question posed by my thesis.

It is helpful to apply the answers to my central question of law and to my four supporting questions of law as provided in sub-chapter 4.5 to the controversial instances of state practice examined to assess whether these answers may be applicable to this period.

\textsuperscript{908} Uganda 1979 and Afghanistan 2001.
In respect of my first supporting question of law, the view of states of the rationale in international law for the inherent right of self-defence does not appear to have changed from the pre-1945 position. The *Charter*, defence treaties and statements made by states consistently refer to this right as being ‘inherent’ to the state, that is, manifesting the sovereignty of the state. States in their debates during the instances of state practice examined did not invoke, or refer to, any legal right of self-defence in international law other than the inherent right of self-defence in justifying, or objecting to, the use of force.

In respect of my second supporting question of law, the debates between states in instances of state practice did not involve express contentions over the rationale in international law for anticipatory self-defence. The two instances in the post-Charter period to 1962 – the Arab-Israeli War in 1948 and the Cuban Missile Crisis in 1962 – are seen as sound examples of how anticipatory self-defence manifested as the inherent right of self-defence when exercised against an imminent threat of armed force. Israel exercised its inherent right of self-defence to defend itself from an imminent threat of armed force and it was this right which was to be exercised by the United States should a missile have been placed on a launch pad.

The conclusion drawn from these examples is that Israel (and by virtue of the absence of objection, the international community generally in this instance) and the United States believed that the legal basis in international law for their respective use and planned use of armed force against an imminent threat of such force was the inherent right of self-defence. This infers a belief on their part that the rationale for anticipatory self-defence was also the inherent right of self-
defence. It is therefore reasoned that, as anticipatory self-defence continued to be a manifestation of the inherent right of self-defence when exercised against an imminent threat of armed force, the rationale in international law for anticipatory self-defence remained state sovereignty.

In respect of my third supporting question of law, it is observed that in each controversial instance of state practice examined, the international customary law principles of immediacy and necessity cannot properly be described as being fulfilled by the event to which the protagonist state responded, save for the two instances in which the customary law principle of proportionality might properly be described as being exceeded. The absence of such fulfilment manifests as a departure from the pre-1945 legal scope of the inherent right of self-defence (that is, the imminent threat, or use, of armed force directed against the state). Objections from a significant number of other states in each instance demonstrate a consistent rejection of the widening of the legal scope of this right.

In respect of my fourth supporting question of law, it is observed that in each instances of state practice (other than the two instances in which the international customary law principle of proportionality was exceeded) the state which used force has inferred – and in some instances asserted – that the event against which it responded constituted the occurrence of an armed attack for the purpose of Article 51 of the Charter. These inferences, or assertions, were usually objected to by other states on each occasion. A variation between states over their perception of the conduct required to constitute the occurrence of an armed attack can therefore be observed. The absence in international law of a definition of the legal
commencement of such an attack has, it appears, hindered state practice in self-defence in a similar way to the existing scholarly debate.

As the answers to my four supporting questions of law provided in sub-chapter 4.5 may validly be applied to the current period and in the absence of sufficient evidence in the instances of state practice examined which establishes a clear rejection of anticipatory self-defence, it is concluded that the answer provided to my central question of law when applied to this period is ‘yes’. In light of this answer, I also answer ‘yes’ to the question posed by my thesis when applied in 1945 and to the present. The qualification which accompanies this answer is that anticipatory self-defence manifests as a natural result of the operation of the international customary law principles of immediacy and necessity in restricting the exercise of the inherent right of self-defence.

As the answer to my central question of law and to the question posed by my thesis is ‘yes’, it is concluded that the new legal right created in favour of states as a corollary to the prohibition in Article 2(4) of the Charter to remain free from the threat, or use, of armed force in their international relations can be seen, in the final instance, to have been protected and preserved by the operation of anticipatory self-defence. As was the case with the new legal right created in favour of states to remain free from war in their international relations derived as a corollary to the General Treaty, the new legal right derived from Article 2(4) of the Charter symbolised how international law, in the form of anticipatory self-defence, functioned to protect a legal right created by it.

909 That is, if peaceful means to settle the dispute fails, or if the Security Council fails to take effective action under Chapter VII of the Charter to prevent the dispute from evolving into an imminent threat of armed force.
Chapter 8

Conclusion

To recall the purpose of my thesis, it is to:

‘offer a new, original and substantial contribution to the existing scholarly debate concerning the question: Does anticipatory self-defence coexist with the Charter of the United Nations 1945?’

The central question of law asked by my thesis to assist in fulfilling this purpose is:

‘Was anticipatory self-defence in international law in 1945 constituted by an exercise of the inherent right of self-defence against an imminent threat of armed force?’

To fulfil the purpose of my thesis, I have offered a new understanding of the functions fulfilled in international law by the inherent right of self-defence and the international customary law principles of immediacy and necessity. My methodology can be contrasted from that adopted by the existing scholarly debate. That debate’s focus is the precondition of the occurrence of an armed attack in Article 51 of the Charter and whether it impliedly extinguished anticipatory self-defence. In contrast, my holistic focus on that article, the inherent right of self-defence and the international customary law principles of immediacy and necessity offers a new legal basis for establishing how Article 51 did not impair the pre-Charter legal scope of the inherent right of self-defence, which was the imminent threat, or use, of armed force directed at the state.

It is my opinion that to understand the origin of the inherent right of self-defence and how its legal scope was determined by the operation of the international customary law principles of immediacy and necessity is to understand anticipatory self-defence. To form a legal basis for this understanding, I have returned to the
inception of international law and explored how the inherent right of self-defence and these international customary law principles first manifested. Even before the Law of Nations had developed into a recognised legal framework, the sovereign state possessed an inherent right to use war in its international relations to settle disputes and to defend itself from the threat, or use, of armed force. This right manifested a state’s sovereignty and was recognised and incorporated into the Law of Nations by its principal formal source, namely, international customary law. The collective legal effect of the customary law principles of immediacy and necessity restricted when and against which conduct the inherent right of self-defence was exercised, thereby determining its legal scope. This scope accommodated the essence of self-defence, which was the avoidance of the physical consequences of being unjustly attacked by repelling an imminent threat of armed force.

This relatively simple framework of law and its reflection of the underlying human defensive instinct of striking first in the face of imminent harm remained unchanged from the inception of the Law of Nations to the Charter in 1945. Why? It seems because it was the most effective way to balance the necessity of defensive war and the broader desire to restrict the use of war in a general sense. War was not considered by early legal scholars to be a good thing for humanity, but it was seen by states as a necessity, within the restrictions imposed by law, for the creation and protection of nations and to form their borders.

Of great importance in the work of early scholars is they did not categorise an exercise of the inherent right of self-defence against an imminent threat of armed force as ‘anticipatory self-defence’. Rather, before 1945, such defensive action was simply regarded as ‘self-defence’. Thus, the scholars did not consider anticipatory
self-defence as constituting a distinct legal right within the Law of Nations which existed separately from the inherent right of self-defence.

It has been seen that the international community did not change, or attempt to define, the inherent right of self-defence when it created the Charter in 1945. Indeed, the negotiating states seriously considered not mentioning this right in the treaty at all (as was the case with the General Treaty in 1928) because its existence in international law and its legal scope were uncontroversial. However, to allay fears expressed by some states that the Charter might affect their ability to exercise this right collectively, the decision was made to expressly mention it in Article 51. On this point, the Charter was different to the General Treaty. In 1945, however, the precondition of the occurrence of an armed attack for the exercise of this right in Article 51 was not a point of contention it would later become.

Thus, Article 51 in 1945 recognised the inherent right of self-defence, protected it from impairment by the Charter (including Article 51 itself), acknowledged that the right could be exercised ‘if an armed attack occurs’ and required an exercise of that right to be reported to the Security Council. An important addition to international law made by this article was that exercising the right became subordinate to effective enforcement action by the Security Council under Chapter VII of the Charter.

However, it has been seen that the relative simplicity with which the international legal framework of self-defence functioned before 1945 has been obscured in the existing scholarly debate over the coexistence of anticipatory self-defence and the Charter. This is because the debate almost exclusively focuses on the
interpretation of the words ‘if an armed attack occurs’ in Article 51 of the Charter.

By so focussing, the debate has neglected the historic operation of the international customary law principles of immediacy and necessity and its latent derivatives. These derivatives are the formation of the legal scope of the inherent right of self-defence and a definition for the legal commencement of an armed attack for the purpose of Article 51 of the Charter.

To reconcile the polarised positions of positivists and realists in their debate, I have observed three characteristics of that debate. The first was precisely where the two philosophies intersect in the continuum from peace to a use of armed force in violation of Article 2(4) of the Charter. The second was the fact that neither philosophy expressly asserts that a state should first suffer the physical consequences of an armed attack before exercising its inherent right under Article 51. The third was the hindering effect imposed upon the debate by the absence of a definition of the legal commencement of an armed attack for the purpose of that article.

The combination of the first two characteristics of the debate leads me to conclude that the narrow question of law debated – that is, whether anticipatory self-defence coexisted with the Charter in 1945 – is not the question which needs to be asked to determine the true legal issue underlying the debate. This narrow question of law is, in fact, the destination of the debate, but is not the means to arrive at it. The underlying question of law that needs to be answered in order to answer the question debated is defining the legal scope of the inherent right of self-defence in 1945 under the Charter.
If this question is instead debated and answered, the scholarly focus would shift from the precondition in Article 51 to encapsulating all the substantive elements of the law in 1945. By asking this broader question, the narrower question has a complete legal base. I have adopted this approach to introduce a new dimension to the existing debate. In so doing, I do not advocate the positivist or realist philosophy. Rather, I recognise the core legal position of each – respectively, abiding expressly by the precondition of the occurrence of an armed attack in Article 51 and exercising the inherent right of self-defence against an imminent threat of armed force – and provide a new legal basis for reconciling their differences.

I have also found it necessary to address other issues in the existing scholarly debate in order to fulfil the purpose of my thesis. Some scholars suggest that legal rights of self-defence other than the inherent right of self-defence were recognised by international law before and after 1945. These rights have principally been referred to as the ‘customary law right of self-defence’ and the ‘customary law right of anticipatory self-defence’. The logic underlying this view stems from an interpretation of the process of recognition and incorporation of the inherent right of self-defence by international customary law into the Law of Nations. The logic suggests that this process ‘replicated’ this right in customary law and also replicated, as a distinct legal right, the practice of exercising this right against an imminent threat of armed force.

The existence of such rights of self-defence other than the inherent right of self-defence in the Law of Nations was not identified by early legal scholars. Those scholars referred only to the general sovereign right to use war which was
exercised offensively, or defensively. Similarly, the inherent right of self-defence has been the legal right invoked to justify the use of force in state practice in self-defence after 1945. The weight of evidence seems to support the view that international law has only ever recognised one legal right of self-defence more than that view which asserts multiple rights of self-defence. If this is accepted, then the legal basis for the view that the precondition of the commencement of an armed attack in Article 51 impliedly extinguished a ‘customary law right of anticipatory self-defence’ in 1945, thereby leaving the inherent right of self-defence unimpaired, seems weaker than the view I propose. However, pursuing this view further is not determinative of the question of law being addressed, as the legal scope of the inherent right of self-defence and my definition of the legal commencement of an armed attack for the purpose of Article 51 are the key components of my thesis and which, in my opinion, prevail despite this view.

In contrast to the existing scholarly debate, the perception of states of the legal scope of the inherent right of self-defence in the period between the inception of the Charter and 1962 reflected the pre-1945 legal scope of this right. However, a divergence in this perception in the period 1962 to the present manifests, with the assertion made by some states that this legal scope has widened to include reprisal, the protection of nationals abroad and the pre-emptive use of force. These states also assert, or infer, that the events against which they have used force fulfilled the precondition of the occurrence of an armed attack for the purpose of Article 51. Much division between states exists over the validity of this assertion.

It has been seen that the protagonist states in each of these instances invoked the inherent right of self-defence, or Article 51 of the Charter, or both, as justification
for their use of force. Rarely were the international customary law principles of immediacy and necessity raised in support of these justifications. Objecting states usually opposed the use of such force on the same basis, whilst similarly neglecting the relevance of the application of these two customary law principles. It is unsurprising, then, that this neglect has coincided with the divergence in perception of some states of the very things which these two customary law principles have historically determined in international law.

Another latent effect of the operation of the international customary law principles of immediacy and necessity is how these principles offer a basis for defining the legal commencement of an armed attack for the purpose of Article 51 of the Charter. It is at this point in time in every armed attack that international law permits the inherent right of self-defence to be exercised as an exception to the prohibition of force in Article 2(4). Attributing this definition to a point in time prior to, or after, the fulfilment of these two principles does not accord with the substantive rules of international law, or with the practice and opinio juris of states in self-defence throughout history.

My definition permits the inherent right of self-defence to be exercised against an imminent threat of armed force in compliance with the international customary law principles of immediacy and necessity and in compliance the precondition of the occurrence of an armed attack in Article 51. It provides a new legal basis for a state to accord with the precondition in Article 51 (the core of the positivist philosophy) while preserving the state’s legal capacity to exercise this right before it is physically attacked (the core of the realist philosophy). My definition also leaves this right unimpaired in respect of both its continued recognition and legal scope.
which, as seen, is an express requirement of Article 51. Without the assistance of this definition, the inherent right of self-defence and the international customary law principles of immediacy and necessity coexist in international law with the precondition of the occurrence of an armed attack in Article 51 of the Charter, but without a common reference point. It is this reference point which allows them to relate to each other and produce legal certainty and clarity.

For these reasons, I conclude that anticipatory self-defence did coexist with the Charter in 1945 and continues to do so to the present. My conclusion means that anticipatory self-defence is, and has been since the inception of international law, a manifestation of the inherent right of self-defence when exercised against an imminent threat of armed force in accordance with the international customary law principles of immediacy and necessity. Thus, anticipatory self-defence is controlled by international law through the restriction exerted by those two customary law principles and Article 51 of the Charter over the inherent right of self-defence.

Anticipatory self-defence can now also be seen as providing the final legal authority within the international legal framework created in 1945 to enable states to protect their new legal right to remain free from the threat, or use, of force derived as a corollary to the prohibition in Article 2(4) of the Charter. The protection of this right occurs as a natural consequence of anticipatory self-defence, insofar as a state may lawfully protect itself from an imminent threat of armed force, as distinct from a threat of force.
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